NORTH CAROLINA REGISTER

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June 15, 2011

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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.

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300 North Salisbury Street (919) 733-2578
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NORTH CAROLINA REGISTER

Publication Schedule for January 2011 – December 2011

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

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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. 92

EXTENDING EXECUTIVE ORDER NO. 88 AND TERMINATION OF EXECUTIVE ORDER 87

WHEREAS, I issued Executive Order No. 87 on April 16, 2011, declaring a state of emergency as a result of severe weather impacting the State including tornadoes, flooding and severe winds; and

WHEREAS, I also issued Executive Order No. 88 also issued on April 16 2011, which waived the rules and regulations that limit the hours of service for operators of certain commercial vehicles and lifted weight restrictions on certain vehicles; and

WHEREAS, both Executive Orders contained a provision that they would be effective for thirty (30) days or the duration of the emergency, whichever is less; and

WHEREAS, the emergency that necessitated Executive Order 87 has now ended; and

WHEREAS, the ongoing recovery efforts related to the tornadoes, flooding and severe winds, including debris removal from those impacted areas, requires that the State continue to waive the maximum hours of service for drivers prescribed by N.C.G.S. § 20-381 for persons transporting essential fuels, food, water, medical supplies, restoration of utility services, and debris removal.

By the power vested in me as Governor by the Constitution and laws of the State of North Carolina, **IT IS ORDERED**:

Executive Order No. 87 issued April 16, 2011, is hereby terminated, effective as of 12:00 p.m. on the date signed below.

Executive Order No. 88 is hereby extended until midnight June 30, 2011.

This order is effective immediately.

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 Thirteenth day of May in the year of our Lord two thousand and eleven, and of the Independence of the United States of America the two hundred and thirty-fifth.

Beverly Eaves Perdue
Governor

ATTEST:

Elaine F. Marshall
Secretary of State

2

OFFICE OF STATE PERSONNEL

NOTICE OF PUBLIC HEARING

RE: 25 NCAC 01H .0904-.0905, .1003-.1004 and 01N.0602

The above-referenced rules were noticed in the North Carolina Register, Volume 25:18 dated March 15, 2011. The public hearing that was scheduled for May 18, 2011 was not held. The rescheduled public hearing will be on June 30, 2011 at 10:00 a.m. The location of the public hearing will be at the Office of State Personnel, Administration Building, Third Floor Conference Room, 116 West Jones Street, Raleigh, North Carolina. The end of the required comment period is August 15, 2011. The proposed effective date of the rules is October 1, 2011. All other information in the March 15, 2011 North Carolina Register remains the same.

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 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice *is hereby given in accordance with G.S. 150B-21.2 that the Division of Services for the Deaf and the Hard of Hearing intends to repeal the rule cited as 10A NCAC 17D .0217.*

Proposed Effective Date: *October 1, 2011*

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice)*: *A written request for a hearing can be submitted via mail to the Division of Services for the Deaf and the Hard of Hearing, 2301 Mail Service Center, Raleigh, NC 27699-2301; fax to (919) 855-6872; or email carolyn.edmonds@dhhs.nc.gov.*

Reason for Proposed Action: *This rule is not required by law and is no longer being used.*

Procedure by which a person can object to the agency on a proposed rule: *Objections to this repealed rule can be made by contacting the Rule Coordinator: Carolyn Edmonds, 2301 Mail Service Center, Raleigh, NC 27699-2301; phone (919) 874-2257; or email carolyn.edmonds@dhhs.nc.gov.*

Comments may be submitted to: *Carolyn Edmonds, 2301 Mail Service Center, Raleigh, NC 27699-2301; phone (919) 874-2257; fax (919) 855-6872; email carolyn.edmonds@dhhs.nc.gov*

Comment period ends: *August 15, 2011*

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 17 – DIVISION OF SERVICES FOR THE DEAF AND HARD OF HEARING

SUBCHAPTER 17D - ASSISTIVE EQUIPMENT DISTRIBUTION

SECTION .0200 - TELECOMMUNICATIONS EQUIPMENT DISTRIBUTION PROGRAM

10A NCAC 17D .0217 REPORTS FROM LOCAL AGENCIES

~~(a) Each county manager shall inform the Division of the name, address and telephone number of the hospital, or hospitals if more than one, in the county which has a TDD installed and in operation as required under G.S. 143B-216.34.~~
~~(b) Each county sheriff's department, city police department, and firefighting agency shall inform the Division of the telephone number with which a TDD is available as required under G.S. 143B-216.34.~~
~~(c) Each 911 emergency number system and each agency receiving automatically routed calls through a 911 emergency number system shall inform the Division of the availability and operation of a TDD unit.~~

Authority G.S. 143B-216.34.

* *

Notice *is hereby given in accordance with G.S. 150B-21.2 that the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services intends to amend the rule cited as 10A NCAC 26E .0603.*

Proposed Effective Date: *November 1, 2011*

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice)*: *A person may demand a public hearing on the proposed rules by submitting a request in writing to Amanda J. Reeder, 3018 Mail Service Center, Raleigh, NC 27699-3018.*

Reason for Proposed Action: *It is proposed that the rule be amended by the Commission to comply with a legislative*

mandate contained in Session Law 2009-438 (Senate Bill 628), that changes the reporting requirements of pharmacies dispensing controlled substances. Prior to Session Law 2009-438, pharmacies reported dispensing of any prescription twice per month; the law now requires pharmacies to report such distributions within seven days of dispensing the prescription.

Procedure by which a person can object to the agency on a proposed rule: *The objection, reasons for the objection and the clearly identified portion of the rule to which the objection pertains, may be submitted in writing to Amanda J. Reeder, 3018 Mail Service Center, Raleigh, NC 27699-3018.*

Comments may be submitted to: *Amanda J. Reeder, 3018 Mail Service Center, Raleigh, NC 27699-3018; phone (919) 715-2780; fax (919) 508-0973; email Amanda.Reeder@dhhs.nc.gov*

Comment period ends: *August 15, 2011*

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: A copy of the fiscal note can be obtained from the agency.

☒ **State**
☐ **Local**
☐ **Substantial Economic Impact (**≥$3,000,000**)**
☐ **None**

Fiscal Note posted at
http://www.osbm.state.nc.us/files/pdf_files/DHHS03092011.pdf

CHAPTER 26 - MENTAL HEALTH: GENERAL

SUBCHAPTER 26E - MANUFACTURERS: DISTRIBUTORS: DISPENSERS AND RESEARCHERS OF CONTROLLED SUBSTANCES

SECTION .0600 - CONTROLLED SUBSTANCES REPORTING SYSTEM

10A NCAC 26E .0603 REQUIREMENTS FOR TRANSMISSION OF DATA

(a) Each dispenser shall transmit to the Department the data as set forth in G.S. 90-113.73. The data shall be transmitted in the ASAP Telecommunication Format for Controlled Substances, published by the American Society for Automation in Pharmacy that is in use in the majority of states operating a controlled substance reporting system.

(b) The dispenser shall transmit the data electronically unless the Department approves a request for submission on paper as set forth in Paragraphs (e) and (f) of this Rule.

(c) The dispenser's electronic transfer data equipment including hardware, software and internet connections shall be in compliance with the Health Insurance Portability and Accountability Act as set forth in 45 CFR, Part 164.

(d) Each electronic transmission shall meet data protection requirements as follows:

(1) Data shall be at least 128B encryption in transmission and at rest; or

(2) Data shall be transmitted via secure file transfer protocol. Once received, data at rest shall be encrypted.

(e) The data may be submitted on paper, if the dispenser submits a written request to the Department and receives prior approval.

(f) The Department shall consider the following in granting approval of the request:

(1) The dispenser does not have a computerized record keeping system.

(2) The dispenser is unable to conform to the submission format required by the database administrator without incurring undue financial hardship.

(g) The dispenser shall report the data ~~on the 30th day of each month for the first 12 months of the system's operation, and on the 15th day and 30th day of each month thereafter. If the 15th or the 30th day does not fall on a business day the dispenser shall report the data on the next following business day.~~ pursuant to the requirements of G.S. 90-113.73(a).

(h) The Department shall provide reports to the Commission concerning the outcomes of the implementation of the controlled substances reporting system. The reports shall be made to the Commission six and 12 months after the reporting system is implemented.

Authority G.S. 90-113.70; 90-113.73; 90-113.76.

* *

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services intends to repeal the rules cited as 10A NCAC 27B .0601-.0603; and 27G .2401-.2404, .2501-.2504.*

Proposed Effective Date: *November 1, 2011*

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice)*: *A person may demand a public hearing on the proposed rules by submitting a request in writing to Amanda J. Reeder, 3018 Mail Service Center, Raleigh, NC 27699-3018.*

Reason for Proposed Action:
10A NCAC 27B .0601, .0602, .0603 – *It is proposed that the rules be repealed as the Commission no longer has rulemaking authority for these facilities. The facilities are now governed by rules promulgated by the Division of Public Health.*
10A NCAC 27G .2401, .2402, .2403, .2404 – *It is proposed that the rules be repealed as the Commission no longer has rulemaking authority for these facilities. The facilities are now governed by rules promulgated by the Child Care Commission.*
10A NCAC 27G .2501, .2502, .2503, .2504 – *It is proposed that the rules be repealed as the Commission no longer has rulemaking authority for these facilities. The facilities are now governed by rules promulgated by the Division of Public Health.*

Procedure by which a person can object to the agency on a proposed rule: *The objection, reasons for the objection and the clearly identified portion of the rule to which the objection pertains, may be submitted in writing to Amanda J. Reeder, 3018 Mail Service Center, Raleigh, NC 27699-3018.*

Comments may be submitted to: *Amanda J. Reeder, 3018 Mail Service Center, Raleigh, NC 27699-3018; phone (919) 715-2780; fax (919) 508-0973; email Amanda.Reeder@dhhs.nc.gov*

Comment period ends: *August 15, 2011*

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 27 - MENTAL HEALTH: COMMUNITY FACILITIES AND SERVICES

SUBCHAPTER 27B - RULES GOVERNING AREA PROGRAMS AND CONTRACTED PROGRAMS UTILIZING SOCIAL SERVICES BLOCK GRANT (TITLE XX) FUNDS

SECTION .0600 - EARLY CHILDHOOD INTERVENTION SERVICES (ECIS) FOR CHILDREN WITH OR AT RISK FOR DEVELOPMENTAL DELAYS, DEVELOPMENTAL DISABILITIES OR ATYPICAL DEVELOPMENT AND THEIR FAMILIES

10A NCAC 27B .0601 DEFINITION AND GOALS

~~(a) Definition.~~

~~(1) Primary Service. Early childhood intervention services (ECIS) are periodic services which include interdisciplinary services, designed to provide prescriptive developmental programming for young children, who are primarily under the age of three, and who are mentally retarded or who are at high risk for mental retardation. In addition, the services provide families with information on child rearing skills and management, parent support, services and resources available to the child and family, and assistance in promoting the child's developmental growth. The primary methodology of service delivery is periodic (usually weekly) home visits which may be supplemented by group or individual activities at sites other than the child's home;~~

~~(2) Components. None;~~

~~(3) Resource Items. None;~~

~~(4) Target Population.~~

~~(A) Infants who are at high risk for mental retardation.~~

~~(B) Children who are under three years of age and are moderately, severely or profoundly retarded.~~

~~(C) Within funding guidelines established in 10A NCAC 27A .0203 (division publication APSM 75-1), preschool children who are at least three years of age and who are moderately, severely or profoundly retarded.~~

~~(D) Within funding guidelines established in 10A NCAC 27A .0203 (division publication APSM 75-1), preschool children with developmental disabilities other than mental retardation.~~

~~(b) This service may be directed toward the goals of:~~

~~(1) personal self-sufficiency;~~

~~(2) preventing or remedying abuse, neglect, or exploitation of children or adults unable to protect their own interests;~~

~~(3) preventing or reducing inappropriate institutional care.~~

Authority G.S. 143B-10; 143B-147.

10A NCAC 27B .0602 ELIGIBILITY REQUIREMENTS

~~Individuals must be determined eligible in accordance with the same criteria as for ECIS state funds.~~

Authority G.S. 143B-10; 143B-147.

10A NCAC 27B .0603 CRITERIA

~~Programs providing this service shall meet standards for Early Childhood Intervention Services (ECIS) for Children with or at Risk for Developmental Delays, Developmental Disabilities or Atypical Development and Their Families as codified in 10A NCAC 27G .0100.~~

Authority G.S. 143B-10; 143B-147.

SUBCHAPTER 27G - RULES FOR MENTAL HEALTH, DEVELOPMENTAL DISABILITIES, AND SUBSTANCE ABUSE FACILITIES AND SERVICES

SECTION .2400 - DEVELOPMENTAL DAY SERVICES FOR CHILDREN WITH OR AT RISK FOR DEVELOPMENTAL DELAYS, DEVELOPMENTAL DISABILITIES OR ATYPICAL DEVELOPMENT

10A NCAC 27G .2401 SCOPE

~~A developmental day service is a day/night service which provides individual habilitative programming for children with, or at risk for developmental delay, developmental disabilities or atypical development in specialized licensed child care centers. The service:~~

~~(1) is designed to meet developmental needs of the children such as self help, physical, language and speech, and cognitive and psychosocial skills in order to facilitate their functioning in a less restrictive environment, as well as to meet child care needs of families; and~~

~~(2) offers family training and support.~~

Authority G.S. 143B-147.

10A NCAC 27G .2402 STAFF

~~(a) Each developmental day center shall have a designated director who holds a bachelor level degree with specialization in administration, education, social work, nursing, psychology or a related field or have comparable experience and education.~~

~~(b) Each staff member except student trainees and supervised volunteers shall be at least 18 years of age.~~

~~(c) Staff shall provide continuous supervision of each child.~~

~~(d) A minimum of two staff members shall provide direct child care at all times.~~

~~(e) A minimum of one direct child care staff member shall be on duty for every five children.~~

~~(f) If school or preschool aged children are served under contract with the Department of Public Instruction, a preschool handicapped, B-K, or special education certified teacher shall be employed for each 20 children or less. The type of certification shall be based on the ages of the children served. When infants and toddlers are served, a professional privileged in accordance with the requirements of Part H of Individuals with Disabilities Education Act shall be employed for each 20 children or less. This material is incorporated by reference and includes subsequent editions and amendments.~~

~~(g) If infants are served, a minimum of one direct care staff member shall be on duty for every three infants.~~

~~(h) Centers with at least 40% of their enrollment being children without disabilities, and having an inclusion plan approved by DMH/DD/SAS for area-operated programs and by the area program director for contract agency centers, may utilize the following staff/child ratio:~~

~~(1) Infants - 1:4;~~

~~(2) Toddlers and older children - 1:6.~~

~~(i) The disciplines of social work, physical therapy, occupational therapy and speech and language therapy shall be available through center employees, consultants, or agreements with other providers.~~

Authority G.S. 143B-147.

10A NCAC 27G .2403 OPERATIONS

~~(a) Hours. Developmental day services for preschool children shall be available for a minimum of eight hours per day (exclusive of transportation time), five days per week, twelve months a year.~~

~~(b) Daily Training Activities. Activities shall be planned around the following principles:~~

~~(1) Group and individual activities, related to individual outcome plans, shall be scheduled daily.~~

~~(2) Both free play and organized recreational activities shall be provided. No more than one-third of the daily schedule shall be designated for both of these activities combined.~~

~~(c) Grouping of children. Grouping shall allow for attending to the individual needs of each child and reflect developmentally appropriate practices.~~

~~(d) Family Services:~~

~~(1) Parents shall be provided the opportunity to observe their child in the program.~~

~~(2) The center shall provide or secure opportunities for parents to attend parent training seminars.~~

~~(e) Environmental Rating. Each center shall complete a professionally recognized environmental rating scale that evaluates the appropriateness of the learning environment design and the teaching materials and equipment used.~~

Authority G.S. 122C-51; 143B-147.

10A NCAC 27G .2404 PHYSICAL PLANT

~~(a) Classroom And Activity Space:~~

~~(1) A ratio of 50 square feet per child shall be available for indoor classroom and activity~~

space, exclusive of space occupied by sinks, lockers, storage cabinets, and other fixed equipment.

(2) Space shall be available for small groups and individualized training.

(3) Special interest areas shall be provided to enhance the development of individual children.

(4) Space for indoor physical activities shall be available for the provision of those activities enhancing gross motor development.

(5) Centers with at least 40% of their enrollment being children without disabilities and having an inclusion plan approved by DMH/DD/SAS for area-operated programs and by the area program director for contract agency centers may have a total of 35 square feet available per child for indoor classroom and activity space.

(b) Outdoor Activity Space:

(1) Outdoor activity space shall be available in the ratio of 200 square feet per child scheduled to use the area at any one time.

(2) Centers with at least 40% of their enrollment being children without disabilities and having an inclusion plan approved by DMH/DD/SAS for area-operated programs and by the area program director for contract agency centers may have a total of 100 square feet available per child.

Authority G.S. 122C-51; 143B-147.

SECTION .2500 - EARLY CHILDHOOD INTERVENTION SERVICES (ECIS) FOR CHILDREN WITH OR AT RISK FOR DEVELOPMENTAL DELAYS, DEVELOPMENTAL DISABILITIES, OR ATYPICAL DEVELOPMENT AND THEIR FAMILIES

10A NCAC 27G .2501 SCOPE

(a) An early childhood intervention service (ECIS) is a periodic service designed to promote the developmental growth of children with or at risk for developmental delay, disabilities or atypical development, and their families. In addition, it provides families with support and information on child-rearing skills and management, and services and resources available to the child and family. The service provides, on a regularly scheduled basis, comprehensive assessment and prescriptive developmental programming in such areas as cognitive, language and communication, physical, self-help, and psychosocial skill development in the client's home which may be supplemented by individual or group services at other sites. This service provides case specific and general follow-up and consultation to other preschool programs. Case management is also a component of this service.

(b) The primary methodology of service delivery is periodic (usually weekly) home visits which may be supplemented by group or individual activities at sites other than the child's home.

(c) This Section applies to those early intervention services that are available through the area programs and contract agencies.

Authority G.S. 143B-147; 20 USC 1471.

10A NCAC 27G .2502 DEFINITIONS

(a) As used in this Section, the term "Early Intervention Services" shall have the meaning specified in Section 303.12 of Subpart A of Part 303 of Title 34 of the Code of Federal Regulations.

(b) As used in this Section, an eligible child is an infant or toddler who meets the definition of "high risk children," "developmentally delayed children," or children with "atypical development" as defined in 10A NCAC 26C .0302, or "developmentally disabled" children as defined in G.S. 122C-3.

Authority G.S. 143B-147; 20 U.S.C. Sections 1401 et. seq., 1471 et.seq..

10A NCAC 27G .2503 STAFF REQUIREMENTS

(a) Each Early Childhood Intervention Services (ECIS) shall have a designated program director who holds at least a baccalaureate degree in a field related to developmental disabilities, or is registered to practice as a registered nurse in the State of North Carolina, and who has at least one year's experience in services for infants or toddlers with or at risk for developmental delays or atypical development. This includes, but is not limited to early childhood education, child development, or special education.

(b) At least one member of the ECIS staff shall be an individual who holds a degree in education or early childhood development.

(c) Staff shall be privileged in accordance with the requirements of Part H of the Individuals with Disabilities Education Act.

(d) The disciplines of social work, physical therapy, occupational therapy and speech therapy shall be represented on the staff in response to the documented needs of the children and families served. These disciplines may be represented by staff members, consultant staff, or through agreements with staff of other agencies.

Authority G.S. 122C-51; 143B-147; 20 USC 1471.

10A NCAC 27G .2504 FOLLOW-ALONG

Follow-along, a continuing relationship with the client for the purpose of assuring that the client's changing needs are recognized and appropriately met, shall be provided semi-annually for one year on behalf of children who have been discharged from the ECIS.

Authority G.S. 143B-147; 20 USC 1471.

TITLE 11 – DEPARTMENT OF INSURANCE

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Commissioner of Insurance intends to amend the rule cited as 11 NCAC 13 .0308.*

Proposed Effective Date: *October 1, 2011*

Public Hearing:
Date: *July 29, 2011*
Time: *10:00 a.m.*
Location: *4th Floor, Suite 4140, Room 4126A, 430 N. Salisbury Street, Raleigh, NC 27603*

Reason for Proposed Action: *The rule revision removes a burden both from ASD and the licensees as the annual report is due at a different time than the renewal application and causes both parties problems as a result. This rule revision was suggested by the NC Premium Finance Association.*

Procedure by which a person can object to the agency on a proposed rule: *The North Carolina Department of Insurance will accept written objections to this rule until the expiration of the comment period on August 16, 2011.*

Comments may be submitted to: *Karen E. Waddell, 1201 Mail Service Center, Raleigh, NC 27699-1201; phone (919) 733-4529; fax (919) 733-6495; email karen.waddell@ncdoi.gov*

Comment period ends: *August 16, 2011*

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 13 - AGENT SERVICES DIVISION – NON-INSURANCE ENTITIES

SECTION .0300 - INSURANCE PREMIUM FINANCE COMPANIES

11 NCAC 13 .0308 ANNUAL STATEMENT

Each licensee shall file a special report entitled "Annual Statement" with the Commissioner ~~on or before March 1 of each year.~~ along with the annual renewal application required by G.S. 58-35-15(c). The annual statement shall be a record of the premium finance company's business for the calendar year (January-December) immediately preceding the filing date. The annual statement form will be supplied by the commissioner and shall include the name and address of the licensee, a list of the officers and directors of the licensee, instructions for filing the report, a statement of income, expenses, assets, and liabilities, a reconciliation of the licensee's net worth, schedules of ~~pertinent~~ relevant balance sheet items, ~~general~~ interrogatories concerning the licensee's operation in North ~~Carolina,~~ Carolina and an analysis of premium finance contracts written in North Carolina. ~~Carolina and all other pertinent information.~~

Authority G.S. 58-2-40; 58-35-15(c); 58-35-30(a).

This Section contains information for the meeting of the Rules Review Commission on Thursday May 19, 2011 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 919-431-3000. Anyone wishing to address the Commission should notify the RRC staff and the agency no later than 5:00 p.m. of the 2nd business day before the meeting. Please refer to RRC rules codified in 26 NCAC 05.

RULES REVIEW COMMISSION MEMBERS

Appointed by Senate
Jim R. Funderburk - 1st Vice Chair
David Twiddy - 2nd Vice Chair
Ralph A. Walker
Jerry R. Crisp
Jeffrey P. Gray

Appointed by House
Jennie J. Hayman - Chairman
Daniel F. McLawhorn
Curtis Venable
Ann Reed
George Lucier

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

RULES REVIEW COMMISSION MEETING DATES
June 16, 2011 July 21, 2011
August 18, 2011 September 15, 2011

RULES REVIEW COMMISSION
May 19, 2011
MINUTES

The Rules Review Commission met on Thursday, May 19, 2011, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Jerry Crisp, Jim Funderburk, Jeff Gray, Jennie Hayman, George Lucier, Dan McLawhorn, Ann Reed, David Twiddy, and Ralph Walker. Commissioner Curtis Venable joined via Skype.

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

The following people were among those attending the meeting:

Doug Shackelford	NC State Highway Patrol
Barry Gupton	NC Department of Insurance/NC Building Code Council
Penny De Pas	NC Board of Podiatry Examiners
Rebecca Shigley	NC Department of Insurance
Lynda Elliot	Board of Cosmetic Art Examiners
Elizabeth Turgeon	Office of Administrative Hearings

The meeting was called to order at 9:02 a.m. with Ms. Hayman presiding. She reminded the Commission members that they have a duty to avoid conflicts of interest and the appearances of conflicts as required by NCGS 138A-15(e).

The Chairman introduced Elizabeth Turgeon, an extern from the University of North Carolina School of Law.

APPROVAL OF MINUTES

Chairman Hayman asked for any discussion, comments, or corrections concerning the minutes of the April 21, 2011 meeting. There were none and the minutes were approved as distributed.

FOLLOW-UP MATTERS

21 NCAC 14N .0113 – Board of Cosmetic Art Examiners. The Commission approved the rewritten rule submitted by the agency.

21 NCAC 57D .0402 – Appraisal Board. The agency indicated that they would not make any changes in the rule. The agency understands that this terminates the rulemaking proceeding on this rule.

LOG OF FILINGS
Chairman Hayman presided over the review of the log of permanent rules.

Department of Insurance
Prior to the review of the rule from the Department of Insurance, Commissioner Twiddy recused himself and did not participate in any discussion or vote concerning this rule because he is the former owner of an insurance agency and in negotiations to purchase another one.

11 NCAC 06A .0802 was approved unanimously.

Department of Crime Control and Public Safety
14A NCAC 09J .0101 was approved unanimously.

Board of Examiners for Electrical Contractors
All permanent rules were withdrawn by the agency and refiled for the June meeting.

Medical Board/Perfusion Advisory Committee
21 NCAC 32V .0103 was withdrawn by the agency.

Board of Podiatry Examiners
All permanent rules were approved unanimously with the following exception:

21 NCAC 52 .0206 – The Commission objected to this rule based on lack of necessity. This rule is unnecessary and reflects internal action. G.S. 143b-10(j)(3)specifies that such policies are internal matters and "shall not be adopted or filed" as rules under G.S. 150B. This "rule" neither requires the applicant to take any action nor forbids the applicant from taking any action. To the extent that it binds the board or the agency it seems to bind them to act with common sense and take the steps an occupational licensing agency would be expected to take in issuing any license to practice that occupation. That is unnecessary and does not help the applicant. Ms. De Pas indicated the agency intends to repeal the rule next month.

Respiratory Care Board
21 NCAC 61 .0302 was approved unanimously.

Substance Abuse Professional Practice Board
All permanent rules were approved unanimously.

Office of Administrative Hearings
Commissioner Gray served as staff for review of the rules from the Office of Administrative Hearings; therefore he did not participate in any discussion or vote concerning these rules.

All permanent rules were approved unanimously.

Building Code Council
All permanent rules were approved unanimously.

TEMPORARY RULES
There were no temporary rules filed for review.

COMMISSION PROCEDURES AND OTHER BUSINESS

The Commission discussed Session Law 2011-13 and the staff's opinion that the provisions apply on an individual rule basis.

The meeting adjourned at 9:40 a.m.

The next scheduled meeting of the Commission is Thursday, June 16 at 9:00 a.m.

Respectfully Submitted,

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Julie Edwards
Editorial Assistant

LIST OF APPROVED PERMANENT RULES
May 19, 2011 Meeting

INSURANCE, DEPARTMENT OF			
Licensee Requirements	11	NCAC 06A	.0802
CRIME CONTROL AND PUBLIC SAFETY, DEPARTMENT OF			
Safety of Operation and Equipment	14A	NCAC 09J	.0101
COSMETIC ART EXAMINERS, BOARD OF			
Re-examination	21	NCAC 14N	.0113
PODIATRY EXAMINERS, BOARD OF			
Name and Purpose	21	NCAC 52	.0101
Membership	21	NCAC 52	.0102
Application	21	NCAC 52	.0201
Examination	21	NCAC 52	.0202
Re-Examination	21	NCAC 52	.0204
Continuing Education	21	NCAC 52	.0208
Specialty Credentialing Privileges	21	NCAC 52	.0212
Registration	21	NCAC 52	.0301
Annual Renewal	21	NCAC 52	.0302
Penalties	21	NCAC 52	.0303
Application for Examination	21	NCAC 52	.0601
Certificate of Licensure	21	NCAC 52	.0602
Application for Renewal	21	NCAC 52	.0603
Certificate of Continuing Education	21	NCAC 52	.0604
Certificate for Establishing a Professional Corporation	21	NCAC 52	.0605
Certificate of Registration of Professional Corporation	21	NCAC 52	.0606
Appl/Exam/Podiatrist Licensed/Other States (Reciprocity)	21	NCAC 52	.0610
Forms and Applications	21	NCAC 52	.0611
Petition for Rulemaking Hearings	21	NCAC 52	.0701
Contents of Petition	21	NCAC 52	.0702
Dispositions of Petitions	21	NCAC 52	.0703
Notice Mailing List	21	NCAC 52	.0804
RESPIRATORY CARE BOARD			

License Renewal	21	NCAC 61	.0302

SUBSTANCE ABUSE PROFESSIONAL PRACTICE BOARD

Definitions	21	NCAC 68	.0101
Supervised Practicum for Certified Substance Abuse Counse...	21	NCAC 68	.0204
Continuing Education Required for Counselor, Criminal Jus...	21	NCAC 68	.0208
Supervised Practicum for Criminal Justice Addictions Prof...	21	NCAC 68	.0217
Armed Services Credential	21	NCAC 68	.0226

ADMINISTRATIVE HEARINGS, OFFICE OF

Definitions	26	NCAC 02C	.0102
Original and Duplicate Copy	26	NCAC 02C	.0103
Return Copy	26	NCAC 02C	.0104
Electronic Version	26	NCAC 02C	.0105
General Format Instructions	26	NCAC 02C	.0108
Illustrations/Notes	26	NCAC 02C	.0110
Publication of Notice of Text	26	NCAC 02C	.0306
Electronic Filing	26	NCAC 02C	.0308
Publication of a Permanent Rule	26	NCAC 02C	.0402
Body of the Rule	26	NCAC 02C	.0405
History Note	26	NCAC 02C	.0406
Publication of a Temporary Rule	26	NCAC 02C	.0502
Publication of an Emergency Rule	26	NCAC 02C	.0602
Publication of a Rule on the OAH Website	26	NCAC 02C	.0702

BUILDING CODE COUNCIL

2009 NC Residential Code - Soffit	R703.11.2
2009 NC Residential Code - Flame Spread	R703.11.3
2012 NC Residential Code - Soffit	R703.11.3
2012 NC Residential Code - Flame Spread	R703.11.4

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	DATE	PUBLISHED DECISION REGISTER CITATION
ALCOHOLIC BEVERAGE CONTROL COMMISSION			
ABC Commission v. Fusion Foods, Inc., T/A Coastal Blue	09 ABC 4672	11/08/10	
ABC Commission v. Quickstops of Guilford County, Inc., T/A Road Runner Express (Regional Road)	09 ABC 5421	04/19/10	
ABC Commission v. Ghulam Khan v. T/A West Green Market	09 ABC 4303	04/19/10	
ABC Commission v. Sarabjit Kaur v. T/A G&S Food Market	09 ABC 5257	04/19/10	
ABC Commission v. Quickstops of Guildford County, Inc., T/A Road Runner Express (Lee Street)	09 ABC 5422	06/09/10	
ABC Commission v. Boulos 2, Inc., T/A Akron Texaco	10 ABC 0027	04/21/10	
ABC Commission v. Startown Lounge, Inc. T/A 5 O'clock Somewhere	10 ABC 0153	06/25/10	
ABC Commission v. Diversified Investments and Growth, LLC, T/A Petro Mart 6	10 ABC 0576	07/09/10	
ABC Commission v. Talmar Inc. D/B/A E-City Restaurant and Lounge, Mary Ann Davidson and Ratanya Walker			
ABC Commission v. Scooby's Bar & Restaurant, Sherri Lynn Bridgeman	10 ABC 2512	08/02/10	
Melvin Lewis, JA's Inc. T/A PAPA Ja's Fine Family Dining v. ABC Commission	10 ABC 2603	12/08/10	
ABC Commission v. Alpha 3 Enterprises LLC, T/A Liquid Room	10 ABC 2659	07/14/10	
ABC Commission v. Taqueria Guadalajara II, Inc, Jaime Fuentes Vice President	10 ABC 3107	07/15/10	
ABC Commission v. AMR Bowling Centers, Inc. T/A AMF Winston-Salem Lanes 123	10 ABC 3716	04/13/11	
ABC Commission v. Ab3 LLC T/A On the Roxx	10 ABC 4120	10/08/10	
ABC Commission v. El Corona Mexican Restaurant Inc., T/A Corona II	10 ABC 4122	09/24/10	
ABC Commission v. Partnership T/A La Poblanita	10 ABC 4235	02/09/11	
ABC Commission v. Speed Dee Superette, Tonya Marchisella	10 ABC 4583	11/04/10	
ABC Commission v. Ben Long Wang, T/A Sapporo Bistro	10 ABC 4843	10/15/10	
Bobby Larry Avery Jr. Larry's v. State of North Carolina ABC Commission	10 ABC 5360	12/14/10	
ABC Commission v. Clifton Ballard T/A Club Phoenix 1	10 ABC 5543	03/11/11	
ABC Commission v. Abdullbaset Ahmed Alnajdi	10 ABC 5869	05/05/11	
ABC Commission v. Lourdes, Inc, T/A, El Gavilan	10 ABC 6372	01/13/11	
ABC Commission v. Centro Celvesera La Zaona, LLC, T/A Centro Celvesera LA Saona	10 ABC 9704	03/31/11	
ABC Commission v. El Azteca Mexican Grill Inc, T/A Taqueria El Azteca	11 ABC 0358	04/19/11	
ABC Commission v. Michael and Michelle Inc, T/A Misundries	11 ABC 1454	04/20/11	
ABC Commission v. Pit Stop 301 Express LLC, T/A Pit Stop 301 Express	11 ABC 1780	05/13/11	
ABC Commission v. Kyle Thuy Nguyen	11 ABC 1784	04/19/11	
BOARD OF COSMETIC ARTS EXAMINERS			
Douglas Van Essen v. Board of Cosmetic Arts Examiners	10 BCA 5944	05/02/11	
BOARD OF SOCIAL WORK CERTIFICATION AND LICENSURE			
Miriam Deborah Kahn Sichel v. Social Work Certification and Licensure Board	10 BSW 2454	06/25/10	
DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY			
Toni Goins Joyce v. Department of Crime Control and Public Safety, Victim Compensation	07 CPS 2252	02/01/11	

Division			
Tammy S. Barbone v. Crime Victims Compensation Comm.	08 CPS 2667	07/16/10	
Christine G. Mroskey v. Crime Victims Compensation	09 CPS 0451	06/24/10	
Ace Wrecker Service Inc, Secretary of Crime Control and Public Safety	09 CPS 2292	03/31/10	
William G. Fisher v. Victims and Justice Services	09 CPS 4024	11/15/10	
Terry L. SChermerhorn v. North Carolina State Highway Patrol	09 CPS 4547	10/21/10	
William Pickard Trucking, Inc., William Pickard v. Dept. of Crime Control and Public Safety, State Highway Patrol	09 CPS 4692	06/09/10	
California Overland Ltd., NC State Highway Patrol, Motor Carrier Enforcement Section	09 CPS 5225	05/12/10	
Earl Stanley Peters III v. Victims Compensation Service Division	09 CPS 5444	08/30/10	
John Rose (Fliptastic, Inc) v. Department of Crime Control and Public Safety	09 CPS 5985	08/25/10	25:11 NCR 1345
Lynch's Auto Sales Salvage & Wrecker Service, inc v. Crime Control and Public Safety, Division of State Highway Patrol	09 CPS 6158	09/10/10	
Alice Conrad v. Crime Victims Compensation Commission	09 CPS 6168	04/01/10	
Marius A. Christian v. State Highway Patrol	09 CPS 6368	08/13/10	
Jose H. Geronimo Ramirez v. Victims and Justice Services	09 CPS 6454	06/23/10	
Neill Grading and Construction Co., Inc., v. North Carolina State Highway Patrol Motor Carrier Enforcement Section	09 CPS 6516	11/24/10	
David Leon Darby v. Division of Crime Control and Public Safety	09 CPS 6703	08/17/10	
Selective Clearing and Grading, Inc., Danny Creech, Lynn Creech v. Crime Control and Public Safety	09 CPS 6726	07/29/10	
Harry L. Foy Jr., Department of Crime Control and Public Safety, Div. of State Highway Patrol Motor Carrier Enforcement Section	09 CPS 6728	08/17/10	
James M. Abdella v. Department of Crime Control and Public Safety v. Motor Carrier Enforcement Div	09 CPS 6740	08/18/10	
John Pascahll, Pilot Intermodal Inc v. Department of Crime Control and Public Safety	09 CPS 6780	02/02/11	
AD Gustafson Inc., Andrew Gustafson v. State Highway Patrol	10 CPS 0071	07/30/10	
Covenant Trucking Company, Inc v. Crime Control and Public Safety, Division of State Highway Patrol, Motor Carrier Enforcement Section	10 CPS 0212	10/21/10	
Benjamin C. Simmons III, Precision Custom Farming, LLC v. DMV	10 CPS 0419	06/29/10	25:04 NCR 515
Keon J. Jones v. Victims Compensation Commission	10 CPS 0848	07/26/10	
X&M Trucking, Xavier Artis v. Dept State Highway Patrol, DMV	10 CPS 0855	07/20/10	
Preferred Materials Inc v. Department of Crime Control & Public Safety, DMV	10 CPS 0931	08/30/10	
AD Gustafson, Inc., Andrew Gustafson v. Secretary of Crime Control	10 CPS 2072	06/15/10	
Tracy James Drake, SR v. Victims and Justice Services	10 CPS 2073	08/30/10	
Victim: Tyler A. Wright/Guardian Claire S. Casale v. Crime Victims Compensation Commission	10 CPS 2178	12/20/10	
Michael A. Rossi Sr., v. Dept. of Crime Control and Public Safety, Div. of Victims Compensation Services	10 CPS 2478	08/30/10	
McLain, LLC, Phillip McLain v. NC State Highway Patrol	10 CPS 2515	07/02/10	
Vincent John Hall v. Crime Victims Compensation Commission, Maxton Police Department, Officer Duron Burney	10 CPS 2811	10/04/10	
Anne F. Palmer v. Victim and Justice Services	10 CPS 3604	09/08/10	
Nivia Velandra v. Crime Victims Compensation Commission	10 CPS 4061	11/15/10	
Tinita Vick v. Crime Victims Compensation Commission	10 CPS 7825	01/14/11	
Odell Gene Golden v. Crime Victims Compensation Commission	10 CPS 9348	05/18/11	

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Stevie Lawrence v. DHHS, Division of Health Service Regulation	09 DHR 1462	04/20/11	
Peterkin & Associates Inc v. DHHS	09 DHR 1883	10/15/10	
Vance County Home Health, Nwa Kpuda v. DHHS	09 DHR 2815	10/27/10	
C&W Alternative Family Living Facility, Inc., v. CenterPoint Human Services and DHHS	09 DHR 3377	06/16/10	
Kevin Summers v. DHHS, Div. of Health Service Regulation, Health Care Personnel Registry	09 DHR 3766	08/12/10	
Ward Drug Co. of Nashville Gary Glisson v. DHHS	09 DHR 3830	04/29/10	
Mekre Francis v. DHHS, Div. of Health Service Regulation	09 DHR 3935	05/27/10	
Mattie Lowe/Angela Lowe, Lowe Family Care Home #3 v. DHHS, Division of Health Service Regulation	09 DHR 4148	08/27/10	
Kid Ventures Inc., d/b/a Health Park Child Development Center v. Div. of Child Development DHHS	09 DHR 4887	06/22/10	
Nicol Smith v. DHHS	09 DHR 4932	09/01/10	25:11 NCR 4932
Kimberly N. Carter (Davis) v. DHHS, Div. of Health Service Regulation	09 DHR 5133	08/03/10	
Theresa Renee Moore v. DHHS	09 DHR 5163	12/17/10	
A+ Child Development Center LLC, v. DHHS, Division of Child Development	09 DHR 5443	04/27/10	
Gail N. Highsmith v. DHHS	09 DHR 5513	05/13/10	
Sarah J. Bridges v. DHHS	09 DHR 5583	05/27/10	
Onslow MRI, LLC v. DHHS, Div. of Health Service Regulation, Certificate of Need Section and Jacksonville Diagnostic Imaging, LLC d/b/a Coastal Diagnostic Imaging	09 DHR 5617	06/24/10	
Jacksonville Diagnostic Imaging, LLC d/b/a Coastal Diagnostic Imaging v. DHHS, Division of Health Service Regulation, CON Section and Onslow MRI, LLC	09 DHR 5638	06/24/10	
Kimberly Denise Harrison v. DHHS, Division of Health Service Regulation	09 DHR 5702	11/09/10	
Rex Hospital, Inc, d/b/a Rex Hospital and UNC and Wake Radiology Oncology Services v. DHHS, Division of Health Service Regulation, Certificate of Need Section and Parkway Urology,	09 DHR 5769	07/20/10	

P.A.			
University of North Carolina Hospitals at Chapel Hill, and Rex Hospital, Inc. d/b/a Rex Healthcare and Wake Radiology Oncology Services, PLLC v. DHHS	09 DHR 5770	07/20/10	
Wake Radiology Oncology Services, PLLC and University of North Carolina Hospitals at Chapel Hill and Rex Hospital, Inc. d/b/a Rex Healthcare v. DHHS, Division of Health Service Regulation, CON Section and Parkway Urology, P.A. d/b/a Cary Urology, P.A.	09 DHR 5785	07/20/10	
The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Rehabilitation-Mount Holly and d/b/a Carolinas Health Care System v. DHHS, Div of Health Service Regulation CON Section and Caromont Health, Inc. and Gaston Memorial Hospital, Inc	09 DHR 6116	07/26/10	25:08 NCR 1010
June Rae Crittenden v. Health Care Registry Section, DHHS	09 DHR 6166	03/29/10	
Kelvin Donelle Lewis v. Health Care Personnel Registry, Nurse Aide Registry	09 DHR 6196	04/05/10	
Elizabeth Ann Holt v. DHHS, Division of Health Service Regulation	09 DHR 6347	03/31/10	
Gloria Manley v. DHHS-DCD	09 DHR 6816	06/24/10	
Estate of Nora L. Edwards, Wanda Harrington v. DHHS, Div. of Medical Assistance	09 DHR 6836	03/16/10	
Jerry Flood, Forever Young Group Care v. DHHS, Div. of Health Service Regulation	09 DHR 6839	10/01/10	
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STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
ALAMANCE COUNTY	06 OSP 1059, 09 OSP 0097

Juliana W. Smith, Petitioner,	)	
vs.	)	**DECISION**
Alamance-Caswell Area Mental Health, Developmental Disabilities, And Substance Abuse Authority Respondent.	)	

On December 8 and 9, 2009 and March 26, 2010, Administrative Law Judge Melissa Owens Lassiter heard this contested case at the Office of Administrative Hearings, Raleigh, North Carolina. Pursuant to a parties' request, on June 21, 2010, August 13, 2010, and September 16, 2010, the undersigned issued Orders extending the time for the parties to file proposed Decisions. On October 8, 2010, the parties filed their respective proposed Decisions. On October 8, 2010, Respondent also filed a Motion to Dismiss. On October 22, 2010, Petitioner filed an Objection and Response to Respondent's Motion to Dismiss. Chief Administrative Law Judge Julian Mann III extended the deadline for filing the decision in this case until February 4, 2011.

APPEARANCES

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ISSUES

1. Whether Respondent retaliated against Petitioner, for reporting issues related to the time sheets of Respondent's Director in September 2004, by terminating Petitioner's employment as part of a reduction in force in February 2006?

2. Whether Respondent discriminated against Petitioner, based on her age, when it terminated Petitioner from employment as part of a reduction in force in February 2006?

GOVERNING LAW, RULE, AND POLICY

N.C. Gen. Stat. § 126-34.1(a)(2)b & 7
N.C. Gen. Stat. § 126-84 and -85

WITNESSES

For Petitioner: Juliana W. Smith (Petitioner), Daniel Hahn, Debra Welch, Richard Stegenga.

For Respondent: Drake Maynard

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 1, 3A, 3B, 4, 5, 6, 7, 8, 9, 10D, 14, 15, 16, 17, 19, 20, 21, 22, 23, 27, & 28

For Respondent: 1, 9, 15, 16, 17, 40, 40A

FINDINGS OF FACT

Based upon the sworn testimony of the witnesses, exhibits entered into evidence and the other competent evidence admitted at the hearing, the undersigned finds the following facts:

A. Background

1. Respondent is a multi-county area mental health, developmental disabilities and substance abuse authority organized by the Board of Commissioners of Alamance, Caswell, and Rockingham Counties pursuant to the requirements of G.S. Chapter §122C-115. Pursuant to N.C. Gen. Stat. §122C-115.1, Respondent operates

as a local management entity focusing on initiating, managing and overseeing public mental health, developmental disabilities, and substance abuse services.

2. Historically, Respondent operated as a local area authority, or public mental health agency, that provided public behavioral health services directly to individuals in Alamance, Caswell, and Rockingham counties. The individual recipients either had Medicaid or did not have insurance at all (T pp. 32-33). Respondent employed about two hundred and sixty (260) employees (T p 32).

3. From 2003 going forward, Respondent was involved with the process of the mental health system reform. Respondent divested itself of the services it directly provided to individuals, and transferred the services to private entities, which then provided such services directly to the recipients. (T pp. 42; 474) Respondent requested the private service providers give Respondent's employees the opportunity to work for the private entities that would be providing the services formerly provided by Respondent. Each of the private agencies afforded and offered the current employees the opportunity to do so. Respondent's work force was significantly reduced because of this divestiture process. (T pp. 43-44)

4. During the transition period from January 2004 and continuing to the time of trial, Respondent's work force dropped from approximately two hundred and sixty (260) to approximately fifty-seven (57) employees (T p 43).

5. At the time of this hearing, Respondent operated in only Alamance and Caswell counties. (T p. 40) At all times relevant to this hearing, Respondent's workforce exceeded fifteen (15) employees.

B. Procedural History

6. On February 24, 2006, Respondent involuntarily separated Petitioner from employment as part of a Reduction-In-Force (RIF) in which fifteen (15) employees were separated from employment. (T pp. 119-121)

7. At the time of her termination from employment, Petitioner was employed in the position of Quality Assurance Specialist II, with a working title of Corporate Compliance Officer. Petitioner's Quality Assurance Specialist II position was subject to the provisions of the State Personnel Act, Chapter 126 of the North Carolina General Statutes. (Pet. Ex. 14; T pp. 104-105; 367)

8. At the time of Respondent's Reduction in Force, Petitioner was forty-seven years old, had twenty-six years and eight months of service with Respondent, and earned an annual salary of $55,608 (T. 40, Resp Exh 3A, p 6).

9. On June 9, 2006, Petitioner filed a contested case petition with the Office of Administrative Hearings ("OAH"), appealing Respondent's February 24, 2006

decision to terminate Petitioner's employment through a RIF. That petition was assigned case number 06 OSP 1059.

10. On August 22, 2006, Petitioner filed a charge with the Equal Employment Opportunity Commission ("EEOC"). That charge was deferred to the Office of Administrative Hearings – Civil Rights Division ("OAH") for investigation.

11. On August 30, 2006, the undersigned issued an order staying contested case 06 OSP 1059 pending the investigation by the OAH Civil Rights Division.

12. On December 1, 2008, after completing its investigating of Petitioner's EEOC claims, OAH Civil Rights Division issued a finding in favor of Petitioner

13. On January 14, 2009, Petitioner filed a second petition for a contested case with the Office of Administrative Hearings against Respondent for discrimination based upon the same facts asserted in her first petition. That petition was assigned case number 09 OSP 0097.

14. On February 27, 2009, the undersigned lifted the stay of 06 OSP 1059, after OAH's Civil Rights Division notified the undersigned that the Civil Rights Division had completed its investigation into Petitioner's EEOC claim.

15. On February 27, 2009, Chief Administrative Law Judge Julian Mann III ordered that contested cases 06 OSP 1059 and 09 OSP 0097 (retaliation and discrimination) be consolidated for hearing.

16. After presentation of all the evidence at the contested case hearing, Respondent renewed its Motion to Dismiss. Upon consideration of the parties' arguments on such Motion, the undersigned hereby Denies Respondent's Motion.

C. Retaliation Claim for Reporting Director's Falsification of Timesheets

17. Petitioner's first claim is that Director Daniel Hahn retaliated against her, by involuntarily separating her from employment, after Petitioner reported that Director Hahn was allegedly falsifying his timesheets.

18. In September 2004, Petitioner's position was classified as a Personnel Technician II. However, Petitioner was working as Respondent's Human Resources Director. (T p. 32)

19. In September 2004, Petitioner filed a complaint with Respondent's Personnel Committee, noting some discrepancies in Director Hahn's timesheets. Petitioner specifically alleged that Hahn had falsified his timesheets by reporting he had worked 8 hours a day, when in fact, Hahn had been away on vacation. Hahn's timesheets for March 2003 through September 2004 showed only one entry for sick or annual leave taken. (T pp. 440-441)

20. Members of Respondent's Personnel Committee reviewed these allegations. The Personnel Committee determined that Hahn was not required to keep timesheets, as he was an exempt employee, and took no action on Petitioner's complaint. Because Hahn was an at-will employee, the Personnel Committee offered a five-year contract to Hahn, thus, guaranteeing his employment with Respondent. (T pp. 127-128)

21. The Personnel Committee informed Petitioner that Director Hahn was keeping two separate sets of timesheets, and that the matter had been resolved. After their review, the Personnel Committee advised Mr. Hahn that Petitioner had filed the complaint regarding his timesheets, and directed Hahn not to retaliate against Petitioner for filing the complaint.

22. In December 2005, Director Hahn signed a good evaluation for Petitioner.

23. In February 2005, Respondent promoted Petitioner to Corporate Compliance Officer over other applicants, and gave Petitioner a pay raise. Director Hahn was the ultimate decision maker who approved Petitioner's promotion and raise, which was a two-step increase in pay. (T p. 436)

24. At the hearing, Petitioner acknowledged that Director Hahn never made any derogatory comments about Petitioner. Petitioner admitted that before the RIF, she was not treated adversely because she reported the timesheet issue to Respondent's board. (T pp. 292-293; 440) Additionally, Petitioner admitted that she did not think that Hahn would implement a fifteen person RIF to get rid of her. (T p. 389)

25. Petitioner failed to present any testimony or evidence to substantiate that Director Hahn retaliated against her, by including her in the February 2006 RIF, after Petitioner reported Hahn's timesheet issue. The evidence showed that seventeen months elapsed between the time Petitioner reported Hahn's timesheet issue to Respondent's Board in September 2004, until Petitioner's employment ended by Respondent's February 2006 RIF.

D. Respondent's Revised RIF Policy

26. Before February 2006, Respondent had a RIF policy in place since February 2000. That policy mirrored the OSP RIF policy, and listed the following factors to be considered in determining which employee(s) would be separated from employment:

- applicable laws and regulations,
- impact on overall program objectives,
- departmental organization structure,
- funding sources,
- possible re-distribution of staff and other resources,
- appointment type,

- seniority, and
- employee job performance.

27. In January 2006, per Director Hahn's request, Ms. Welch scheduled a meeting with Mr. Drake Maynard, HR Managing Partner of the Office of State Personnel. The purpose of that meeting was to discuss the Area Director's authority in deciding which employees to include in a reduction in force, and what should be included in Respondent's personnel policy manual relating to reductions in force. (Resp Exh 1)

28. On January 23, 2006, Hahn, Richard Stegenga, and Debra Welch, ("the management team") met with Drake Maynard to discuss Respondent's RIF procedures as they were written under Respondent's Personnel Manuel, Section 36, "Reduction In Force."

29. Debra Welch was Respondent's Human Resources Director, was fifty-three (53) years old, and had been employed with Respondent for five years. (T pp. 235) Richard Stegenga was Respondent's Deputy Director, a.k.a. Chief Financial Officer.

30. At the January 23, 2006 meeting, Maynard advised the management team that Section 36 of Respondent's Personnel Manual was "unnecessarily wordy and that it brought in irrelevant factors." (Resp Exh 1) He further advised that:

> [T]hey would be well served to make job performance the primary consideration. Upon their asking me, I said that they did not have to retain seniority as a factor to be considered in determining who would be included in a reduction in force. I also told them that the 30 days notice to employees of the reduction in force was not a statutory obligation of area mental health authorities such as A-C [Respondent].

(Resp Exh 1)

31. Respondent's personnel, not Maynard himself, initiated the idea of removing seniority from the RIF policy. (T pp 609-10) Maynard advised Hahn, Stegenga, and Welch that they could consider "seniority" when developing their RIF policy if they wanted, but they were not required to include "seniority" as a factor in their RIF policy. (T pp 609-10)

32. Based solely on Maynard's advice, Director Hahn believed that Respondent could have a RIF policy different from that required by the Office of State Personnel (OSP) policy. (T pp 51-52) Based on Maynard's advice, Director Hahn requested Respondent's RIF policy be revised to be consistent with Maynard's advice, and to allow Hahn more authority to make RIF decisions. Hahn did not seek advice from any other professionals, in terms of "other state people." (T p 52)

33. Director Hahn also asked HR Director Debra Welch to compile an employee matrix listing all employees, the employees' current job responsibilities and functions, as well as cross-training of those employees based on prior experience.

34. On February 3, 2006, Welch presented the employee matrix to Director Hahn. Ms. Welch, on her own initiative, added additional information to the matrix, including employees' prior job evaluations, and Welch's commentary on certain employees. (Pet Exh 4) Welch did not add any commentary on Petitioner, because Petitioner had been Welch's predecessor as HR Manager.

35. On that date, Welch also provided Hahn with a Memorandum compiled by Amy Stevens, entitled, "Staffing Responsibilities, and Cross-training." (Pet Exh 5) In Stevens' memorandum, she described job responsibilities and cross-training of staff in both Medical Records, and Quality Improvement Departments, including herself, Bonnie Hill, Tammy King, and Jane Peters.

36. Debra Welch drafted and submitted the new RIF policy for Mr. Hahn, based on the management team's conversation with Drake Maynard. (Pet Exh 23)

37. At Respondent's February 7, 2006 board meeting, Respondent's board approved the RIF policy, that was drafted by Ms. Welch, as Respondent's new RIF policy. The Board's revised RIF policy contained two primary changes.

a. First, the Board approved reducing the required minimum employee notification period from thirty days (30) to fourteen (14) days. That is, Respondent would provide employees with a minimum of 14-calendar days notice that they were being separated from employment, due to a RIF, before the effective date of the reduction in force.

b. Second, Respondent's Board eliminated the following factors from Respondent's consideration in determining which employees should be RIF'd:

- seniority,
- applicable laws and regulations, and
- appointment type.

Instead, Respondent listed the following factors to be considered in determining which employee(s) will be separated from employment due to a RIF:

- employee job performance,
- relative efficiency,
- impact on overall program objectives, and
- budgetary guidelines.

38. As of early 2006, Respondent employed five (5) Quality Assurance Specialists. Tammy King (age 47), Jane Peters (age 53), and Bonnie Hill (age 54) were

employed as Quality Assurance Specialist I. Petitioner was the only Quality Assurance Specialist II, while Amy Stevens (age 36) was the only Quality Assurance Specialist III employed by Respondent. As of February 2006, Ms. Peters was employed with Respondent for twenty-six (26) years, King was employed with Respondent for twenty-five (25) years, Hill was employed with Respondent for ten (10) years, and Stevens was employed with Respondent for one (1) year. Petitioner, Tammy King and Jane Peters, lost their jobs because of the RIF. Amy Stevens and Bonnie Hill were retained.

39. On February 10, 2006, Respondent gave letters to Petitioner, Tammy King, and Jane Peters, notifying them that Respondent was involuntarily separating them from employment as part of a Reduction in Force. Respondent retained Amy Stevens and Bonnie Hill in their positions. Petitioner's separation letter stated:

> This letter shall serve as official written notification that your position as QA Specialist III will be eliminated on or about February 24, 2006. This **reduction in force is necessary due to the economic situation of the Alamance-Caswell-Rockingham Local Management Entity.**

(Emphasis added, Pet Exh 28)

E. Age Discrimination Claim

40. Petitioner alleged that Respondent intentionally discriminated against her, because of her age (47), and violated N.C. Gen. Stat. § 126-34.1(a)(2)b, when it involuntarily separated Petitioner from employment as part of Respondent's February 2006 Reduction in Force.

41. In this case, Petitioner established a prima facie case of age discrimination by preponderance of the evidence.

a. Petitioner was in a protected class as she was forty-seven years old when she was separated from employment.

b. Petitioner had been employed with Respondent since June 7, 1979, and was performing at a satisfactory level. Petitioner's annual evaluation on December 8, 2005 showed that Petitioner received eight (8) above standard ratings and seventeen (17) standard ratings out of 30 possible ratings. Five (5) ratings criteria were "Not Applicable" to Petitioner. Petitioner, Petitioner's supervisor (Artie Light), and Director Hahn signed Petitioner's evaluation. On this evaluation, Mr. Light commented that, "Juliana has done an above average job in her position as Compliance Officer." (Pet Exh 16) Director Hahn noted that at the time of her separation, Petitioner was performing her job duties not only in accordance with expectations, but also at a very consistently high level, and had done so throughout her employment with Respondent. (T p 84).

c. Petitioner was discharged despite the adequacy of her performance.

d. Petitioner was treated less favorably than younger employees during the RIF. Respondent retained Amy Stevens, who was 11 years younger than Petitioner, and reassigned the majority of Petitioner's job duties to Stevens. (T p 99; pp 575-576). Even if one considers Ms. Stevens' 11 years of total work experience and six (6) years of education, Amy Stevens' overall job experience was still considerably less than Petitioner's almost 26 years of related experience, and 4 years of education.

F. Legitimate Nondiscriminatory Reasons and Pretext

42. At hearing, Respondent offered evidence showing that Respondent's financial or economic condition was the legitimate, nondiscriminatory reason Respondent implemented its February 2006 Reduction in Force, and terminated Petitioner's employment. In Petitioner's termination letter, Respondent wrote that "the economic situation of the Alamance-Caswell-Rockingham Local Management Entity" was why Respondent involuntarily separated Petitioner from employment through a Reduction in Force. (Pet Exh 28)

a. Respondent first presented evidence that in September 2005, Respondent learned that it was facing an anticipated annualized budgetary deficit of one million two hundred thousand dollars ($1.2 million) due to its merger and consolidation with Rockingham County mental health, developmental disabilities, and substance abuse services. (T pp 46; 465-466) Specifically, Respondent learned that, effective back to July 2005, the State Division of Mental Health was reducing the administrative funding for LMEs by reducing the rate of funding from two dollars and three cents ($2.03) "per member per month" to one dollar and seventy-two cents ($1.72). Due to this retroactive reduction "per member per month," Respondent actually lost approximately $900,000 to $1 million in funding from its annual budget. (T pp. 59; 465-466)

b. Respondent then presented evidence that in January 2006, Respondent learned that the North Carolina Department of Health and Human Services ("DHHS") was launching a deficiency proposal due to a State budget shortfall that would allegedly cause Respondent to lose $1.5 million from its budgeted funds. Due to these financial concerns, Respondent's Chief Financial Officer, Richard Stegenga, informed Director Hahn that Respondent needed to reduce expenditures immediately. Stegenga advised Director Hahn that a reduction in nonpersonnel costs, and personnel costs were two ways to reduce expenditures. (T pp. 47; 60-61; 474-476)

c. At hearing, Director Hahn explained that this anticipated $1.5 million reduction in budgeted funds created the "financial crisis" that required Respondent to implement the February 2006 Reduction in Force of several employees, including Petitioner.

43. However, Petitioner proved by a preponderance of the evidence that Respondent's "financial crisis" reason for Respondent's Reduction in Force was, in fact,

a pretext for Respondent's unlawful and discriminatory reason for separating Petitioner's employment because of Petitioner's age.

a. This pretext was initially shown through inconsistent testimony by Director Hahn and Mr. Stegenga regarding whether Respondent actually lost the anticipated $1.5 million from Respondent's budgeted funds. In Director Hahn's April 2006 statement, Hahn did not cite the anticipated $1.5 million deficit as the primary reason Respondent implemented the February 2006 Reduction in Force. (Resp Exh 16) In contrast, in Hahn's September 28, 2006 affidavit, Hahn did cite the alleged $1.5 million deficit as a primary reason for the RIF, and thus for Petitioner's separation. (Pet Exh 3A, Affidavit of Daniel Hahn).

b. At hearing, Hahn confirmed that all statements in his affidavit were true, and that he stood by his affidavit, which was a collaborative effort between himself and Respondent's counsel. (T p 53-54) Director Hahn responded, "Yes" to Petitioner's question, "So you [Respondent] actually lost 1.5 million in funding?" (T p 45)

c. However, when Petitioner's counsel pressed Hahn about his affidavit, Hahn admitted that the anticipated $1.5 million deficit in budget funds from the NC DHHS, in fact, did not occur. (T p 56). During the next question, Hahn did not recall how much of the $1.5 million actually was lost. (T p 56-57). The following exchange took place between the undersigned and Mr. Hahn:

THE COURT: Of the 1.5 [million] anticipated that you would lose, how much of that did you actually lose?

THE WITNESS: I don't believe any was lost.

THE COURT: So the answer would be zero?

THE WITNESS Yes.

(T p 56)

44. Similarly at hearing, Richard Stegenga failed to support Respondent's "legitimate, nondiscriminatory reason" that Respondent's anticipated $1.5 million budget shortfall was the reason Respondent terminated Petitioner's employment by a RIF. In fact, Stegenga's testimony was erratic at best.

a. In 2006, Stegenga represented affirmatively to the OAH Office of Civil Rights, that the [$1.5 million] "cut" had actually taken place. (T p 495). At the contested case hearing, Stegenga likewise, stated that Respondent lost $1.5 million in funding. (T. 464-465).

b. Yet in later testimony, Stegenga did not recall whether Respondent lost that sum or not. (T p 472-473). Then, Stegenga acknowledged that he did not know

whether the $1.2 million cut caused by the merger with Rockingham County services, and the alleged DHHS $1.5 million cuts were "separate and distinct." (T p 496-497).

c. Finally, on redirect examination, Stegenga conceded that Respondent had not, in fact, lost the $1.5 million at the time Petitioner was terminated, or RIF'd from her job. (T p 550)

45. Hahn and Stegenga were the only current or former upper managers of Respondent who testified in favor of Respondent at hearing. Their above-noted inconsistencies rebutted their earlier allegations that Respondent had legitimate, non-discriminatory reasons for Petitioner's involuntary separation, by proving that Respondent did not actually suffer a $1.5 million deficit in its budgeted funds. As a result, Petitioner proved that Respondent's reliance on that reason, for terminating Petitioner's employment, was a pretext for illegally discriminating against Petitioner based on her age.

46. Respondent contended that its second legitimate nondiscriminatory reason for terminating Petitioner's employment was that the February 2006 RIF was implemented in accordance with its revised personnel policy under Section 36 of Respondent's Personnel Manual. At hearing, Respondent's evidence demonstrated that its RIF was conducted in accordance with its revised RIF policy.

47. However, Petitioner proved by a preponderance of the evidence that Respondent was required to comply with 25 NCAC .01I .2005 when it implemented its revised RIF policy in February 2006.

a. 25 NCAC .01I .2005 "Separation" provided that:

> Employees who have acquired permanent status are not subject to involuntary separation or suspension except for cause or reduction-in-force. The following are types of separation:
>
> (3) Reduction-in-Force. For reasons of curtailment of work, reorganization, or lack of funds the appointing authority may separate employees. **Retention of employees in classes affected shall be based on systematic consideration of type of appointment, length of service, and relative efficiency.** No permanent employee shall be separated while there are emergency, intermittent, temporary, probationary, or trainee employees in their first six months of the trainee progression serving in the same or related class, unless the permanent employee is not willing to transfer to the position held by the non-permanent employee, or the permanent employee does not have the knowledge and skills required to perform the work of the alternate position within a reasonable period of orientation and training given any new employee. . . .

(Pet Exh 22)

b. Petitioner proved that Respondent failed to comply with 25 NCAC 1I .2005 when it revised its RIF policy, Section 36 of Respondent's Personnel Manual, by (1) eliminating "seniority" or "length of service" as a factor Respondent would consider in making RIF decisions, and by (2) changing the required minimum written notification for a RIF'd employee from 30 to 14 days.

c. Petitioner proved that she was adversely affected and disadvantaged by Respondent's omission of the seniority factor from its RIF policy, as Petitioner had 26 years of service with Respondent, compared to Amy Stevens' one of year of service with Respondent.

d. The timeframe within which Respondent had its revised RIF policy approved by its Board on February 7, 2006, and Respondent terminated its employees by a Reduction in Force on February 10, 2006, further proved that Respondent's second nondiscriminatory reason for Petitioner's termination was unworthy of belief, and was a mere pretext for its age discrimination against Petitioner.

48. Respondent further argued that it did not include "seniority" as a factor for selecting employees to be RIF'd, because it relied upon Drake Maynard's advice that Respondent did not have to consider "seniority" as a factor. The evidence at hearing showed that Mr. Maynard incorrectly advised Respondent that it did not have to consider "seniority" as a factor in deciding which employees to separate from employment in its February 2006 Reduction in Force. At hearing, Director Hahn agreed that Mr. Maynard gave him some advice that Hahn subsequently believed to be wrong. (T pp 52-53; 553-554; 615)

49. Conversely, a preponderance of the evidence established that Respondent was looking for a way to remove "seniority" or "length of service" as a consideration in making its RIF decisions.

a. First, Respondent already had an established RIF policy in place. Respondent failed to show there was anything wrong with its current RIF policy, and provided no reason why it needed to change its existing RIF policy, other than to find a way to cut personnel expenses.

b. Second, when Hahn, Stegenga, and Welch met with Mr. Maynard, someone from Respondent, not Maynard, raised the issue of excluding the seniority criteria from the RIF policy. (T pp 629-630)

c. Third, Maynard's incorrect and inaccurate advice regarding the "length of service" or "seniority" factor did not relieve Respondent of its responsibility to act in compliance with state law, including compliance with 25 NCAC 1I .2005. Furthermore, at hearing, Mr. Maynard could not cite any policy that excused Respondent from its responsibility to act in accordance with state law (T p 630), including 25 NCAC 1I .2005.

50. Respondent contended that Hahn and Stegenga sought input from the managers of the areas where employees might be or were subject to the RIF. (T pp 529-531) However, Respondent did not consult either Petitioner as the Compliance Officer, or Petitioner's supervisor, Artie Light, before Respondent either revised or implemented Respondent's RIF. (T pp 57-58) Petitioner only learned of the details of Respondent's revised RIF policy just hours before opening her letter that informed Petitioner that she was being involuntarily separated from employment due to a RIF.

51. The fourth reason Respondent asserted as a nondiscriminatory reason for terminating Petitioner was that Respondent was unable to afford a full-time compliance officer, and had to eliminate Petitioner's position. (T p 81) Director Hahn could point to no documentation, at hearing, substantiating this claim. (T p 81-82) Hahn also conceded that Respondent still needed Petitioner's compliance duties within Respondent's organization after the February 2006 RIF. (T p 82) Similarly, Mr. Stegenga agreed that the need to ensure [Respondent's] compliance [with applicable laws and regulation including public personnel law] did not end with Petitioner's departure. (T p 486) Nonetheless, Respondent presented a legitimate nondiscriminatory reason unrelated to Petitioner's age on this issue.

52. Respondent's fifth asserted nondiscriminatory reason for terminating Petitioner was that Respondent "split up and reassigned" Petitioner's job duties to Mr. Stegenga, Clay McClain, and Amy Stevens.

a. Yet, on further questioning, Hahn acknowledged that Amy Stevens actually received the majority of Petitioner's job responsibilities. (T pp 83, 87) In contrast to Hahn's assertion, Mr. Stegenga admitted that he did not take over any of Petitioner's compliance officer duties after the RIF. (T p 554) Debra Welch also admitted at hearing she received the majority of Petitioner's duties.

b. Mr. Hahn also acknowledged that Respondent still had compliance duties, which had been Petitioner's duties, associated with its [new] functions, and there was still a need for that job function [after Petitioner was fired.] (T pp 82-83)

c. Given Hahn and Stegenga's earlier-noted inconsistencies, Hahn and Stegenga's evidence on this issue makes Respondent's fifth stated reason for terminating Petitioner's employment unbelievable, not worthy of credence, and more likely to be a pretext for its age discrimination against Petitioner.

53. The sixth legitimate nondiscriminatory reason Respondent asserted was that Petitioner's background, experience, and cross-training were irrelevant to Respondent's new agency needs. Respondent claimed that it first determined what functions to eliminate. Second, Respondent determined which employees to eliminate, based on his managers' input. Hahn noted that he relied heavily on his managers' input and feedback where there was more than one employee in the same position. (T p 230) In his affidavit, and at trial, Hahn claimed that it would have been "totally

inappropriate" to replace Stevens with Petitioner. In support of this contention, Hahn indicated that:

> QA Specialist III Amy Stevens had more education and training and a broader range of relevant experience and cross-training to meet AC's staffing needs than [Petitioner].

(Pet Exh 3A) Respondent argued that Stevens supervised five to ten employees, while Petitioner supervised none, (T pp 90-91), and that Petitioner did not have any experience in the areas of Medical Records and Quality Assurance/Quality Improvement.

54. Conversely, a preponderance of the evidence rebutted this assertion. Petitioner had approximately 26 years of related experience, all with Respondent, and 6 years of education. Stevens had 11 years of related experience with various employers, including private employers, and one year of experience with Respondent. Stevens had 6 years of education.

a. Petitioner's prior relevant job experience demonstrated that from June 1981 to August 1987, Petitioner worked as Respondent's ADAP Coordinator. From September 1987 to March 1994, Petitioner worked as Respondent's Director of Program Services. From November 1992 to January 1994, and from February 1994 to October 2001, Petitioner worked as Respondent's Community Employment Program Director II. Through these positions, Petitioner's job duties involved Medical Records experience, Quality Assurance/Quality Improvement experience State and Federal regulatory experience, and supervisory experience.

b. Petitioner's relevant experience in these positions consisted of approximately 21 years, 9 months experience in Medical Records, 25 years and 9 months in Quality Assurance/Quality Improvement and in state and federal regulations. In addition, Petitioner had compliance experience. Petitioner had 15 years and 7 months of supervisory experience as Program Services Director, and Community Employment Program Director III.

c. In comparison, Amy Stevens' experience included 3 years of Medical Records experience, 9 years of Quality Assurance/Quality Improvement experience, 9 years of State and Federal regulatory experience. Stevens had one year of supervisory experience while employed with Respondent. Stevens' prior experience was primarily in the private sector.

55. At hearing, Director Hahn admitted that Petitioner supervised employees far longer than Stevens, (T p 91), and supervised as many as 47 employees at one time while working for Respondent. (T p 106-107) Director Hahn used a matrix, prepared by Debra Welch, in deciding which employees to terminate. Hahn admitted that the matrix was inaccurate as it reflected that Petitioner's job performance rating was "good." (Pet Exh 4) In Petitioner's last performance review, signed by Hahn, Petitioner actually

received a rating of "Very Good," the next highest rating on the rating scale (T p 114-115). Respondent offered no explanation for this discrepancy. Furthermore, Hahn conceded at hearing that Petitioner could have handled Stevens' job duties, was doing a good job, and was an excellent personnel supervisor. (T pp 91-93)

56. Based on the foregoing evidence, Petitioner proved by a preponderance of the evidence that Respondent abandoned 2000 RIF policy in favor of a revised policy that was age-biased as that policy eliminated the length of service factor and violated N.C. Gen. Stat. § 126-34.1(a)(2)b, 25 NCAC 1I .2005, and the Age Discrimination In Employment Act at 29 U.S.C. 623(a)(1).

57. Petitioner established by a preponderance of the evidence that Respondent's legitimate nondiscriminatory reasons, as cited above, were a pretext for its age discrimination against Petitioner, and that Respondent terminated Petitioner's employment based on Petitioner's age.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this action pursuant to N.C. Gen. Stat. §150B-23 et seq. The parties received proper notice of the hearing. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be considered without regard to the labels given.

2. Pursuant to N.C. Gen. Stat. § 126-5(2)(c), Petitioner was covered by, and subject to the State Personnel Act, as an employee of an Area Mental Health agency.

A. Retaliation Claim for Reporting Director's Falsification of Timesheets

3. N.C. Gen. Stat. § 126-34.1(a) provides:

> A State employee or former State employee may file in the Office of Administrative Hearings a contested case under Article 3 of Chapter 150B of the General Statutes only as to the following personnel actions or issues:
>
> (7) Any retaliatory personnel action that violates G.S. 126-85.

4. N.C. Gen. Stat. § 126-85 states:

> (a) No head of any State department, agency or institution or other State employee exercising supervisory authority shall discharge, threaten or otherwise discriminate against a State employee regarding the State employee's compensation, terms, conditions, location, or privileges of employment because the State employee,

> or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, any activity described in G.S. 126-84, unless the State employee knows or has reason to believe that the report is inaccurate.
> (a1) No State employee shall retaliate against another State employee because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, any activity described in G.S. 126-84.

5. A prima facie case of retaliation is established when an employee shows: (1) the employee engaged in protected activity; (2) she suffered an adverse employment action; and (3) a causal connection exists between the protected activity and the adverse action. Bryant v. Aiken Reg'l Med. Ctrs., Inc., 333 F.3d 536, 543 (4th Cir. 2003); King v. Rumsfeld, 328 F.3d 145, 150-51 (4th Cir. 2003).

6. In this case, Petitioner proved that she engaged in protected activity when she reported concerns to Respondent's personnel committee that Director Hahn had not completed his timesheets correctly when he recorded that he had worked, when in fact he had taken vacation. Petitioner suffered an adverse action as she was terminated from employment. However, seventeen months elapsed between the time Petitioner reported the timesheet issue involving Director Hahn, and Respondent terminated Petitioner's employment. Petitioner also failed to establish there was a casual connection between her protected activity, of reporting Hahn's timesheet issue, and her termination from employment. For those reasons, Petitioner failed to establish a prima facie case of retaliation against Petitioner involving her termination from employment in February 2006.

B. Age Discrimination Claim

7. Under the Age Discrimination In Employment Act, it is "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a) (1).

8. N.C. Gen. Stat. § 126-34.1 provides:

> (a) A State employee or former State employee may file in the Office of Administrative Hearings a contested case under Article 3 of Chapter 150B of the General Statutes only as to the following personnel actions or issues:
>
> (2) An alleged unlawful State employment practice constituting discrimination, as proscribed by G.S. 126-36, including:
>
> b. Demotion, reduction in force, or termination of an employee in retaliation for the employee's opposition to alleged

discrimination on account of the employee's age, sex, race, color, national origin, religion, creed, political affiliation, or handicapping condition as defined by Chapter 168A of the General Statutes.

9. In this case, because Petitioner did not present direct evidence of age discrimination, her discrimination claim is analyzed under the analysis in McDonnell-Douglas v. Green [5 EPD 8607] 411 U.S. 792, 802-805, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973).

10. Pursuant to McDonnell Douglas v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973) and N.C. Dept. Of Correction v. Gibson, 308 N.C. 131 (1983), the US Supreme Court and the NC Supreme Court respectively have adopted the standards to be applied when unlawful discrimination is alleged. Pursuant thereto, "we look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases." Gibson, 308 N.C. at 136, 301 S.E.2d at 82. Furthermore, the Court in Gibson stated that in properly applying the burden-shifting scheme the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains *at all times* with the plaintiff." *Id.* at 138, 301 S.E.2d at 83 (1983) (emphasis added) (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 67 L. Ed. 2d 207, 215 (1981)).

11. Our Supreme Court has adopted the United States Supreme Court's "burden-shifting" scheme set out in the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668 (1973).

To establish a prima facie case of age discrimination in the RIF context, an employee must show:

(a) She was in the protected class,

(b) She was selected for the RIF,

(c) She was performing her job at a level that met the employer's expectations, and

(d) The employer either did not treat her protected status neutrally OR there were other circumstances giving rise to an inference of discrimination, such as replacement by someone substantially younger or outside the protected class.

(Dugan v. Albemarle County School Board, 293 F.3rd 716, 720-21 (2002)).

12. If a prima facie case of discrimination is established, the burden shifts to the employer to articulate some legitimate non-discriminatory reason for the alleged discriminatory act. If a legitimate non-discriminatory reason for the alleged discriminatory act has been articulated, the Petitioner has the opportunity to show that

the stated reason for the act was, in fact, a pretext for discrimination. McDonnell Douglas v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973)

13. Petitioner does not have to show that discrimination was "THE," as opposed to "A," motivating factor. Hartley v. Dillard's, Inc., 310 F.3rd. 1054, 1060 (8th Cir. 2002).

14. In this case, Petitioner proved a prima facie case of age discrimination, under the standards of McDonnell. supra, and Gibson, supra, when Respondent terminated Petitioner, based on her age, as part of a February 2006 Reduction in Force.

a. There is no dispute about that Petitioner sufficiently established (a), (b), or (c) under the evidence.

b. The last prong of the prima facie case, prong (d), is often demonstrated by showing that the employer treated a similarly-situated younger employee more favorably. (*See* holdings in Byrnie v. Town of Cromwell Board of Education, 243 F.3rd. 93, 102-04 (2nd. Cir. 2005) and Anderson v. Consolidated Rail Corp., 297 F3rd. 242, 249-50 (3rd. Cir. 2002)) "The fourth element can be satisfied by showing that the employer could have retained plaintiff but instead chose to keep someone of a different race." Juarez v. ACS Government Solutions Group, 314 F.3rd. 1243, 1245-46 (10th Cir. 2003).

c. In this case, both Petitioner and Amy Stevens were Quality Assurance Specialists with similar job descriptions. Petitioner was 47 years old compared to Stevens' age was 36 at the time of the RIF. Respondent stressed the comparison between Stevens and Petitioner when Hahn explained that it was "inappropriate to replace Amy Stevens with [Petitioner]." Yet, the preponderance of the evidence showed that Petitioner had substantially more experience than Stevens, 26 years compared to 11 years, Petitioner had several years of supervisory experience versus Stevens' one year of supervisory experience, and Respondent gave the great majority of Petitioner's job duties to Stevens after the RIF. Petitioner's last performance evaluation was superior to Stevens' evaluation. Lastly, Director Hahn admitted that Petitioner could have done Stevens' job in addition to her own. Through this evidence, Petitioner proved the last prong of her prima facie case of discrimination.

Respondent's Articulated Legitimate Non-Discriminatory Reason

15. Respondent then articulated several legitimate non-discriminatory reasons for its demotion of Petitioner. At trial and before, Respondent's primary advanced reason for its action was an alleged $1.5 million budget shortfall that made keeping Petitioner's position impossible. And if this had actually occurred, it would certainly be a legitimate reason for elimination of positions.

16. However, despite Respondent's years of insistence that this shortfall did occur, including during the hearing itself, evidence at hearing established, for the first

time, that the alleged $1.5 million shortfall did not occur. (See Garrett v. Hewlett-Packard Co., 305 F.3rd 1210, 1217-1218 (10th Cir. 2002) for holding that employer's reason must be supported by evidence. Here, the evidence, including evidence from Respondent's own director and former finance director, refuted it.

Violation of RIF Procedures

17. Further, the Court notes that Respondent revised its RIF policies a few days before it implements such policy, and terminated employees, including Petitioner, based on that revised policy. While violations of RIF policies are not jurisdictionally proper appeals in the OAH, violations of policies and procedures serve as circumstantial evidence of discriminatory motive. Gu v. Boston Police Department, 312 F.3rd 6 (1st Cir. 2002).

18. Specifically, in Tyler v. Union Oil Co. of California, 304 F.3rd. 379, 395-97 (5th Cir. 2002) the Fifth Circuit affirmed, in major part, the judgment for the ADEA RIF plaintiffs, and held that there was sufficient evidence to support an inference of pretext and age discrimination, in part because of two departures from defendant's RIF procedures. That Court held:

> An employer's conscious, unexplained departure from its usual policies and procedures when conducting a RIF may in appropriate circumstances support an inference of age discrimination if the plaintiff establishes some nexus between employment actions and the plaintiff's age."

19. Here, Respondent not only specifically changed its RIF procedures shortly before conducting the RIF that resulted in Petitioner's separation, but also did so in such a manner as to (a) violate North Carolina law, and (b) remove from consideration the very policy – length of service – that would have protected Petitioner and other older, long-service employees from being separated in favor of substantially younger, new employees such as Stevens. (See also Cotter vs. Boeing Co., 101 FEP Cases 92 (E.D. Pa. 2007))

Respondent's Inconsistent or Changing Explanations as Pretext Proof

20. The case law is rife with examples of how pretext may be shown by inconsistent or changing explanations for the employer's adverse employment action. In Cummings v. Standard Register, 265 F.2d, 56 (1st Cir. 2004), the Court held that inconsistent or changing reasons for dismissal provided an independent basis for jury to conclude pretext and that the real motivation was age animus. Here, Respondent consistently claimed a crippling budget shortfall that, in fact, never existed.

21. In Abramson v. William Paterson College of New Jersey, 260 F.3rd 265 (3rd Cir. 2005), the Court ruled that a defendant's initially stated reasons for dismissal were subsequently disavowed by decision-maker under oath. Here, both Hahn and

Stegenga disavowed at hearing the claimed budget shortfall that they initially claimed made Petitioner's separation mandatory. Hahn likewise admitted that other bases for dismissing Petitioner, such as her experience and abilities set forth in his September 2005 affidavit, were false, and inaccurate.

22. In Dennis v. Columbia Colleton Medical Center, Inc. 290 F.3rd 639 (4th Cir. 2002, the Plaintiff showed that defendant's proffered nondiscriminatory reason for adverse employment action was false. Here, Petitioner showed that Respondent's primary stated reason for taking its action, the $1.5 million dollar budget shortfall, was false, as that budget shortfall never actually occurred.

23. In EEOC v. Sears Roebuck & Co., 243 F.3rd. 846 (4th Cir. 2002), the 4th Circuit Court reversed summary judgment for Title VII defendant, reasoning that, "Indeed, the fact that Sears has offered different justifications at different times ... is itself probative of pretext." That Court held that an official's failure to provide the now-offered rationale for the action during an earlier internal investigation led to legitimate inference that the defendant's current story was implausible. In this case, Hahn did not cite the alleged $1.5 million shortfall in April 2006 as a reason for terminating Petitioner and the other RIF'd employees. Yet, in his September 2006 affidavit, Hahn contended. that the existence of that $1.5 million shortfall was the primary reason for the RIF and for terminating Petitioner. Subsequently, substantial testimony at hearing revealed, for the first time, that Respondent never suffered a $1.5 million shortfall.

24. Petitioner proved her prima facie case of age discrimination by Respondent. To the extent that Respondent showed a legitimate non-discriminatory reason for its actions in response to that prima facie case, Petitioner has sufficiently demonstrated the pretextual nature of that explanation.

25. A preponderance of the evidence established that Respondent discriminated against Petitioner, based on her age, when it terminated Petitioner from employment in February 2006 as part of a Reduction in Force. As such, Respondent's action violated N.C. Gen. Stat. § 126-34.1(a)(2)b.

26. Accordingly, because Respondent discriminated against Petitioner because of age, Respondent should reinstate Petitioner to the same or similar position, pay back pay from the date of termination until the date of reinstatement, and pay Petitioner's costs and reasonable attorney's fees. (See N.C. Gen. Stat. 150B-33).

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Respondent's decision to terminate Petitioner's employment should be **REVERSED.** Based on Petitioner is entitled to back pay. Pursuant to 25 N.C.A.C. 1B.0414, Petitioner should be awarded reasonable attorney fees, based upon Petitioner's attorney's submission of an itemized statement of the fees

and costs incurred in representing the Petitioner, in a Petition to the North Carolina State Personnel Commission for Attorney Fees.

ORDER AND NOTICE

The North Carolina State Personnel Commission will make the Final Decision in this contested case. N.C. Gen. Stat. § 150B-36(b), (b1), (b2), and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it is required to give each party an opportunity to file exceptions to this decision, and to present written arguments to those in the agency who will make the Final Decision. N.C. Gen. Stat. 150B-36(b)(3) requires the agency to serve a copy of its Final Decision on each party, and furnish a copy of its Final Decision to each party's attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

This 4th day of February, 2011.

Melissa Owens Lassiter
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **DECISION** was served upon the following persons by depositing same in the U.S. Mail, prepaid postage and addressed as follows:

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This the 4th day of February, 2011.

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4-5-2011 9:00:00 AM

STATE OF NORTH CAROLINA COUNTY OF FORSYTH	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 10 DHR 3788
Novant Health Inc. Forsyth Memorial Hospital Inc. d/b/a Forsyth Medial Center and Medical Park Hospital Inc. Petitioner vs. N. C. Department of Health and Human Services, Division of Health Service Regulation Certificate of Need Section Respondent and North Carolina Baptist Hospital Respondent Intervenor	**DECISION ALLOWING SUMMARY JUDGMENT**

THIS MATTER comes before the Honorable Donald W. Overby, Administrative Law Judge presiding, on Respondent-Intervenor North Carolina Baptist Hospital's (hereinafter "NCBH"), Motion for Summary Judgment filed with the Office of Administrative Hearings on December 23, 2010, and Petitioner Novant Health's Response and Motion for Summary Judgment filed with the OAH on January 7, 2011, pursuant to N.C. Gen. Stat. § 1A-1, Rule 56 of the North Carolina Rules of Civil Procedure, and which were argued to the Court on January10, 2011. All parties have stipulated and agreed that summary judgment is appropriate on (1) Criterion 1 and Policy AC-3; (2) Criterion 6; and (3) the Agency Special Rules, therefore, acknowledge that there are no genuine issues of fact regarding those provisions of the application at issue herein.

Based upon the matters contained in the Respondent-Intervenor's Motion and accompanying documents as well as submissions by Petitioner Novant Health, Inc.(hereinafter "Novant"), Respondent N. C. Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section (hereinafter the "Agency" or "CON Section") and the Amicus Curiae University of North Carolina Hospital's at Chapel Hill, including the supplemental memoranda filed on or before February 7, 2011; and after reviewing matters of record properly considered for summary judgment; and the following

PROCEDURAL HISTORY

1. On January 15, 2010, NCBH filed a Certificate of Need ("CON") application with the CON Section seeking a CON to construct a new building to house eight operating rooms, two procedure rooms, one robotic surgery training room, and one simulation operating room in Winston-Salem, Forsyth County, North Carolina (hereinafter the "NCBH Application"). The eight operating rooms would consist of seven new operating rooms and one existing operating room relocated from the existing surgical suite. Upon completion, the new facility would be located across the street from NCBH and was to be known as the "West Campus Surgery Center" (hereinafter the "WCSC"). See generally Ex. 1, NCBH App.; Ex. 2, Agency File. NCBH already has an outpatient surgery center located on its campus. (Tr. Vol. 4, p. 714)

2. The annual State Medical Facilities Plan ("SMFP") strictly limits the addition of new operating rooms. If there is no need in the SMFP for additional operating rooms in a county, a provider cannot propose to add new operating rooms in that county. *See* N.C. Gen. Stat. § 131E-183(a)(1).

3. According to the 2010 SMFP, there is a surplus of 5.52 operating rooms in Forsyth County. (Jt. Ex. 133, p. 78) Therefore, the 2010 SMFP did not contain a need for any additional operating rooms in Forsyth County.

4. Academic Medical Center Teaching Hospitals ("AMCs"), granted such status prior to January 1, 1990, are exempt from the need determinations in the SMFP if they file a CON application pursuant to SMFP Policy AC-3 and if they meet the requirements of SMFP Policy AC-3. (Jt. Ex. 133, pp. 23-24) The NCBH Application was submitted pursuant to Policy AC-3.

5. Based upon Policy AC-3, NCBH was permitted to file the CON application, despite the fact that the 2010 SMFP did not show a need for additional operating rooms in Forsyth County. Ex. 133, 2010 SMFP, p. 69.

6. On December 23, 2010, NCBH filed a Motion for Summary Judgment, along with its Memorandum and various documents and exhibits in support of the motion, arguing that the NCBH Application should be approved as a matter of law.

7 On January 7, 2011, Novant filed a response and moved pursuant to Rule 56(c) of the North Carolina Rules of Civil Procedure that summary judgment be entered against NCBH, on the grounds that the NCBH Application was non-conforming with Criteria 1 and 6, and the administrative rules as a matter of law. NCBH subsequently filed a Reply to the Novant Response along with additional documentary exhibits on 10 January 2011.

8. The Court heard oral arguments on Motions for Summary Judgment on January 10, 2011. During this hearing, the parties stipulated that genuine issues of material fact existed with regard to the following issues in this contested case:

a. Issues pertaining to the Agency's Findings regarding the NCBH Application under N.C. Gen. Stat. § 131E-183(a)(3) (hereinafter "Criterion 3");

b. Issues pertaining to whether the Agency's approval of the NCBH Application substantially prejudiced the rights of Novant; and

c. Such other and further issues as were necessary for the Court to render its decision in this cause;

9. These three issues about which remained genuine issues of material fact were heard on the merits and are disposed in a separate Recommended Decision.

10. After hearing oral argument on January 10, 2011, all parties agreed that no genuine issue of material fact existed and the following issues were ripe for disposition by summary judgment: Criterion 1 (and Policy AC-3), Criterion 6, and the administrative rules.

11. In light of the foregoing, the Court instructed the parties to submit limited supplemental memoranda related to the issues stipulated as being ripe for summary judgment. These supplemental memoranda were filed by the parties on 7 February 2010.

Based upon the foregoing, this Tribunal makes the following Conclusions of Law and Summary judgment is granted as set forth below.

CONCLUSIONS OF LAW

A. CRITERION 1 AND POLICY AC-3

1. N.C. Gen. Stat. § 131E-183(a)(1), Criterion 1, requires the applicant to demonstrate conformity with all applicable rules and policies.

2. The relevant policy at issue in this contested case is Policy AC-3 of the 2010 State Medical Facilities Plan (hereinafter "Policy AC-3"). That policy provides an exemption from the requirement of complying with the need determinations of the State Medical Facilities Plan based upon certain conditions.

3. Specifically, Policy AC-3 states:

Exemption from the provisions of need determinations of the North Carolina State Medical Facilities Plan shall be granted to projects submitted by Academic Medical Center Teaching Hospitals designated prior to 1 January 1990 provided the projects comply with one of the following conditions:

1. Necessary to complement a specified and approved expansion of the number or types of students, residents or faculty, as certified by the head of the relevant associated professional school; or

2. Necessary to accommodate patients, staff or equipment for a specified and approved expansion of research activities, as certified by the head of the entity sponsoring the research; or

3. Necessary to accommodate changes in requirements of specialty education accrediting bodies, as evidenced by copies of documents issued by such bodies.

A project submitted by an Academic Medical Center Teaching Hospital under this Policy that meets one of the above conditions shall also demonstrate that the Academic Medical Center Teaching Hospital's teaching or research need for the proposed project

cannot be achieved effectively at any non-Academic Medical Center Teaching Hospital provider which currently offers the service for which the exemption is requested and which is within 20 miles of the Academic Center Teaching Hospital.

Ex. 133, 2010 SMFP, pp. 23-24.

4. The two components to Policy AC-3 are: (1) comply with one of the three specified enumerated conditions in Policy AC-3; and (2) compliance with the so-called 20-Mile Rule.

5. In order to comply with the first of the two components under Policy AC-3, NCBH provided a certification letter from Dr. Applegate, the Dean of the Wake Forest University School of Medicine. As "head of the relevant associated professional school," Dr. Applegate certifies to the necessity of the project to "complement a specified and approved expansion of the number or types of students, residents, or faculty" as required in the first numbered paragraph of Policy AC-3. Dr. Applegate's letter satisfies the requirements of the first component as delineated above. In as much as NCBH complies with the first prong of Policy AC-3, it is exempted form the need determination of the SMFP.

6. There is not a requirement that the applicant is to provide a specific recruitment plan or specific budget projections for the proposed recruitment, nor require approval by the appropriate Board of Directors for the Dean's proposal.

7. The second part of Policy AC-3 is compliance with the so called 20-Mile Rule. The plain language of the 20-Mile Rule states that the applicant "shall also demonstrate that the [AMC's] teaching or research need for the proposed project cannot be achieved effectively at any [non-AMC] provider which currently offers the service for which the exemption is requested and which is within 20 miles" of the AMC. (Emphasis added)

8. The language of the 20-Mile Rule is clear and unambiguous. The use of the word "also" in the phrase "shall also demonstrate" refers to the language within the same sentence that requires that the applicant must also meet one of the three enumerated conditions.

9. The phrase "shall also demonstrate" is clear and unambiguous. It is a mandatory demand for an affirmative showing. The plain language of the policy calls for a comparison of the AMC's with non-AMC's. The applicant is specifically required to talk about the non-AMC facilities that are within 20 miles of it and to explain why these facilities cannot meet the teaching or research need.

10. An AMC applicant's preference is, while perhaps relevant to the 20-Mile Rule, is not determinative. The 20-Mile Rule demands that the applicant specifically explain why other facilities are not able to meet the teaching or research need for the project effectively.

11. Use of the phrase "achieved effectively" in the policy also should be accorded its ordinary and customary interpretation in that it is clear and unambiguous language. It clearly does not articulate a standard of "most" effective, or even "most efficient." It sets a standard of whether or not the proposal can be met at another facility effectively—a very simple and straight forward standard.

12. There is a contention that NCBH was the only facility that could provide the services efficiently. In as much as the Agency merely and blindly accepts the word of the applicant without any comparison or without any consideration of any other facility, how can such determination be made? The test is not the most efficient.

13. There is indeed evidence that was before the Agency demonstrating and documenting that NCBH could effectively meet the teaching needs identified in the NCBH Application. The Agency accepted NCBH's contention that because of the training for these

surgeons and why they needed to be where they needed to be and why that would be the most effective way was a reasonable demonstration for the purposes of the application. The Agency reached this conclusion based on the information in the NCBH Application, the Agency's experience and its consistent application of the 20-mile rule in the past.

14. Consistency is important, but the effect of the Agency's position is that it in essence blindly accepted the applicant's contentions, a sense of "who knows better than the applicant what is best for them." The Agency's position is that NCBH was in the best position to make the decision that it could "achieve effectively" what was being proposed, and once NCBH made that decision, then the Agency need not look any further. It is inconceivable that any applicant would ever do anything to the contrary; .i.e., aver that some place other than its own campus is the best place for whatever is being sought by the AMC.

15. It is completely counter-intuitive to allow the applicant to make its own determination of any issue without testing based solely on the applicant's own self-serving averments, but that has been the consistent path the Agency has followed in assessing the 20-mile rule. It is contrary to the entire CON application process and effectively takes the CON Section out of the decision making process. Such is not to be found anywhere else in the application process.

16. In preparing its application, NCBH followed this consistently applied path as established by the Agency and was not significantly in variance with precedence established by the Agency for interpreting Policy AC-3.

17. The very purpose of the CON Law is set forth in N.C. Gen. Stat. § 131E-175 wherein the General Assembly makes Findings of Fact to justify the existence of the Certificates of Need. Among those provisions in N.C. Gen. Stat. § 131E-175 are:

> (4) That the proliferation of unnecessary health service facilities results in costly duplication and underuse of facilities, with the availability of excess capacity leading to unnecessary use of expensive resources and overutilization of health care facilities.
>
> (6) That excess capacity of health service facilities places an enormous economic burden on the public who pay for the construction and operation of these facilities as patients, health insurance subscribers, health plan contributors, and taxpayers.

N.C. Gen. Stat. § 131E-175

18. It is recognized that AMC's are indeed given a preferred status, but it is not without limitation. The very tenor of Policy AC-3 points to a consideration in keeping with the provisions of N.C. Gen. Stat. § 131E-175 cited above.

19. The very tenor of Policy AC-3 also is such that non-AMC providers must be at the very least given some consideration before relying solely on self-serving statements by the applicant and blindly approving any AMC application based upon those self-serving statements. If there are other facilities in the applicant's service area that do what the applicant proposes to do, then the burden is on the applicant to explain why these other facilities cannot meet the need the applicant says it has, and to demonstrate why the Agency should allow the applicant to duplicate existing resources.

20. It is well settled that the provisions of a statute would govern as opposed to those of either a rule or of a policy.

21. The Agency has consistently and correctly interpreted N.C. Gen. Stat. § 131E-183(b) to mean that the Agency may not require an AMC to demonstrate that any health service facility or service at another hospital is being appropriately utilized in order to demonstrate conformity with any of the Statutory Review Criteria enumerated in N.C. Gen. Stat. § 131E-183(a).

22. The Agency has the authority to adopt rules respecting the applications it reviews. That authority also comes from the language of N.C. Gen. Stat. § 131E-183(b), which specifically authorizes the Agency to "adopt rules for the review of particular types of applications" to be used "in addition to" the Statutory Review Criteria outlined under N.C. Gen. Stat. § 131E-183(a). Because the statutory criteria themselves do not provide the specific parameters by which the Agency can determine whether a particular service is conforming, the Agency rules assist the Agency in determining conformity with the statutory criteria.

23. N.C. Gen. Stat. § 131E-183(b) speaks specifically to AMC's and prohibits the Agency from adopting a rule which would "require an academic medical center teaching hospital, as defined by the State Medical Facilities Plan, to demonstrate that any facility or service at another hospital is being appropriately utilized in order for that academic medical center teaching hospital to be approved for the issuance of a certificate of need to develop any similar facility or service."

24. The Agency has properly adopted performance standard rules based upon the Agency's interpretation of N.C. Gen. Stat. § 131E-183(b), and in particular 10A N.C.A.C. 14C .2103. The Agency has consistently found that 10A N.C.A.C. 14C .2103 does not apply to

AMC applicants seeking to develop new operating rooms but is applicable to non-AC-3 proposals to develop new operating rooms.

25. If it is the Agency's position that the prohibitions against considering utilization in other facilities within the provisions of N.C. Gen. Stat. § 131E-183(b) act as a prohibition from considering other providers pursuant to the 20-Mile rule, then one of two conclusions must be drawn: (1) either the prohibitions against considering utilization act as a complete and total bar to considering other facilities; or (2) the prohibitions do not act as a total bar to considering other facilities.

26. To adopt the first of these conclusions would mean that the 20-mile rule is based completely upon utilization and, therefore, the provisions of N.C. Gen. Stat. § 131E-183(b) would completely negate the second requirement of Policy AC-3, the 20-Mile rule. That is not a position that the Agency has ever articulated.

27. To adopt the second of these conclusions would mean that the 20-mile rule is not based completely upon utilization, and, therefore, the statute does not prohibit the consideration of other facilities pursuant to Policy AC-3.

28. Similarly, the performance standards rules are applicable to the provisions of Policy AC-3 only if the policy is one of utilization.

29. It must be presumed that SMFP Policy AC-3 was adopted with full and complete knowledge of all applicable statutes and rules including but not limited to N.C. Gen. Stat. § 131E-183(b) and10A N.C.A.C. 14C .2103.

30. It is therefore concluded that Policy AC-3 is not a policy that is limited by application of utilization of other facilities, and if the Agency wants to apply that standard, then it should articulate such in its Findings.

31. The Agency's complete reliance on the submissions of the applicant's without any comparison to any other facility makes the 20-mile rule surplusage. If the Agency is relying on the performance standard rule and contends that the 20-mile rule requires consideration of the other facilities utilization contrary to the provisions of N.C. Gen. Stat. § 131E-183(b) and10A N.C.A.C. 14C .2103, then it clearly makes the 20-mile rule surplusage.

32. The Agency's precedent in reviewing the 20 mile rule of Policy AC-3 has been to effectively ignore the requirements of the 20-mile rule, rendering the second portion of the Policy meaningless surplusage.

33. The Conclusions contained herein concerning Criterion 1 and Policy AC-3 are not inapposite or contradictory of the Conclusion concerning the applicability of the special rules below and, in fact, are consistent with those Conclusions.

34. The Agency's interpretation of the applicable statutes, rules and policy has not been reasonable and is not based on permissible construction of the statutes, rules and policy as applicable to Criterion 1 and Policy AC-3. The Agency's review has been based upon an error of law in its interpretation of applicable law, rules and policy, and therefore, Novant is entitled to summary judgment on this issue.

B. CRITERION 6

35. As stated in regards to Criterion 1 above, each criterion contained in N.C. Gen. Stat. § 131E-183(a) must be separately analyzed by the Agency during the review.

36. N.C. Gen. Stat. § 131E-183(a) requires that the Department "shall review" all applications using the criteria set forth in that section and "shall determine" that the application is consistent with or at least not in conflict with those criteria. The language is mandatory.

37. Criterion 6 of N.C. Gen. Stat. § 131E-183(a) mandatorily requires the applicant to demonstrate that the project "will not result in unnecessary duplication of existing or approved health service capabilities or facilities." Thus, it requires an affirmative consideration of other facilities.

38. The agency tacitly acknowledges that Criterion 6 must be reviewed and answered independently by finding the applicant conforming ("C") to that criterion. There was not a finding that the requirements of Criterion 6 were not applicable ("NA") to NCBH's application.

39. A determination of unnecessary duplication of services or facilities is not the equivalent of or tantamount to a finding of "need." The agency's finding that NCBH had adequately demonstrated the need for the project and then referred to the findings related to Criterion 3 is not adequate to meet the mandatory requirements of Criterion 6 of § 183(a).

40. Obviously, Criterion 3 and Criterion 6 are separate and distinct criteria requiring their own independent consideration. Otherwise, the statute would contain surplusage, and we must assume that it does not contain surplusage, that each section is intended and that each section is given its plain meaning. It is acknowledged that oftentimes the answer to one or more criteria may be derivative of another but that does not obviate the necessity to at least address the mandates of the criteria at issue. Looking to the whole application is a long-standing and accepted practice and likewise furnishes the answer to some questions, although the necessity to have to look for an answer seems illogical.

41. The plain language of Criterion 6 requires a showing that there will not be a duplication of "existing or approved" services or facilities. The plain language requires at the very least some discussion or acknowledgment of the existing or approved services in some fashion. Criterion 6 is not strictly a "utilization" question, as well, that may or may not be influenced by the second part of § 183(b).

42. As stated above concerning Criterion 1, the Agency has consistently and correctly interpreted N.C. Gen. Stat. § 131E-183(b) to mean that the Agency may not require an AMC to demonstrate that any health service facility or service at another hospital is being appropriately utilized in order to demonstrate conformity with any of the Statutory Review Criteria enumerated in N.C. Gen. Stat. § 131E-183(a).

43. N.C. Gen. Stat. § 131E-183(b) authorizes the Department to adopt rules that are "in addition to" the criteria of N.C. Gen. Stat. § 131E- 183(a). The language is clear that such rules are not in the stead of the mandatory considerations of the various criteria but are in addition to and perhaps explanatory of the criteria and assist in understanding and application of the criteria.

44. N.C. Gen. Stat. § 131E-183(b) speaks specifically to AMC's and prohibits the Agency from adopting a rule which would require an academic medical center to have to demonstrate another facility is being appropriately utilized.

45. The argument here is analogous to the argument concerning Criterion 1 and Policy AC-3. As is discussed with Criterion 1 above, unless Criterion 6 is deemed to be relying upon "utilization," then the concept of "utilization" from N.C. Gen. Stat. § 131E-183(b), and the rules enacted pursuant thereto, have no application to Criterion 6. If, indeed, Criterion 6 is

dependent upon "utilization" then the Agency is required to state that as a reason. The consideration of Criterion 6 is not otherwise limited.

46. The answer to Criterion 3 does not adequately answer the question posed by Criterion 6. The agency's very cursory answer to Criterion 6 in the Findings is seriously deficient.

47. The Agency did review Criterion 6 of the NCBH application in the same fashion as many other prior applications and has been relatively consistent it so doing. However, the Agency's review has been based upon an error of law in its interpretation of applicable law, rules and policy.

48. The Conclusions contained herein concerning Criterion 6 are not inapposite or contradictory of the Conclusion concerning the applicability of the special rules below and, in fact, are consistent with those Conclusions.

49. There is not a satisfactory showing by the agency that it conducted a full and proper analysis of Criterion 6, and, therefore, Novant is entitled to summary judgment on this issue.

C. AGENCY SPECIAL RULES

50. Petitioner Novant has not challenged the Agency's determination respecting any of the Agency rules other than 10A N.C.A.C. 14C.2103.

51. A fundamental inquiry is the impact of N.C. Gen. Stat. § 131E-183(b) on the requirements set forth in the Agency's utilization-based performance standards.

52. N.C. Gen. Stat. § 131E-183(b) provides for the Department to adopt rules to be used in addition to the criteria established in § 131E-183(a). It further states that no rule adopted in accord with this statute "shall require an academic medical center teaching hospital, . . , to

demonstrate that any facility or service at another hospital is being appropriately utilized" for that AMC to be approved for a CON.

53. The language of the statute is clear in its exemption of AMC's from being required to demonstrate that "any facility or service at another hospital is being appropriately utilized." N.C. Gen. Stat. § 131E-183(b) (emphasis added). It is likewise clear that the exemption does not apply only to the utilization at other hospitals and other facilities within hospitals, but other separate and distinct "facilities" as well. Further, a "health service facility" is defined in N.C. Gen. Stat. § 131E-176(9b) to include both hospitals and ambulatory surgical facilities.

54. It is apparent that the statute contemplates an exemption from all utilization-based performance standards by rule.

55. 10A N.C.A.C. 14C.2103 is a utilization-based performance standard. Based upon the clear language of N.C. Gen. Stat. § 131E-183(b), as well as the provisions of the 2010 SMFP, the Agency is statutorily barred from requiring that NCBH—or any other AMC—comply with the Agency's utilization-based performance standards set forth at 10A N.C.A.C. 14C.2103.

56. Also at issue is the relationship between NCBH and WFUHS. Petitioner Novant contends that NCBH and WFUHS are "related entities" and therefore the Agency should have considered under these rules the utilization of operating rooms owned by WFUHS, specifically the Plastic Surgery Center of North Carolina (PSCNC).

57. "Related entity" is defined in 10A N.C.A.C. 14C .2101(9) as "the parent company of the applicant, a subsidiary company of the applicant (i.e., the applicant owns 50 percent or more of another company), a joint venture in which the applicant is a member, or a company that

shares common ownership with the applicant (i.e., the applicant and another company are owned by some of the same persons)."

58. This Tribunal specifically reserves ruling on whether NCBH and WFUHS were a joint venture at the time of the application and therefore a "related entity" since it is relevant only if the performance standards set forth at 10A N.C.A.C. 14C .2103 apply. As set forth above, 10A N.C.A.C. 14C .2103 does not apply.

59. The conclusions concerning the special rules are consistent with the application of the statutes and rules as found in the discussion above concerning Criteria 1 (and Policy AC-3) and 6.

60. Summary judgment against Novant is appropriate as applicable to all of the agency's special rules.

DECISION

NOW, THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Administrative Law Judge finds and so holds that there is no genuine issue as to any material fact; and Petitioner Novant is entitled to judgment as a matter of law and therefore entitled to Summary Judgment on the issue of compliance with Criterion 1 (Policy AC-3), Petitioner Novant is entitled to judgment as a matter of law and therefore entitled to Summary Judgment on the issue of compliance with Criterion 6, and Respondent-Intervernor NCBH is entitled to judgment as a matter of law and therefore entitled to Summary Judgment on the issue concerning the special rules. Summary Judgment should be and is **GRANTED** accordingly.

ORDER AND NOTICE

The N.C. Department of Health and Human Services will make the Final Decision in this contested case. It is required to give each party an opportunity to file exceptions to this decision

and present written arguments to those in the agency who will make the final decision. N.C.Gen. Stat. § 150B-36(a). Pursuant to N.C.G.S. § 150B-36(b), this agency shall serve a copy of the final decision on all parties, and the parties' attorneys of record, and the Office of Administrative Hearings.

This the 5th day of April, 2011.

Donald W. Overby
Administrative Law Judge

A copy of the foregoing was mailed to:

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This the 5th day of April, 2011.

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STATE OF NORTH CAROLINA

COUNTY OF FORSYTH

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
10 DHR 3788

NOVANT HEALTH, INC., FORSYTH MEMORIAL HOSPITAL, INC. D/B/A FORSYTH MEDICAL CENTER AND MEDICAL PARK HOSPITAL, INC.,

Petitioners,

v.

N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION,

Respondent.

and

NORTH CAROLINA BAPTIST HOSPITAL,

Respondent-Intervenors.

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Office of
Administrative Hearings

RECOMMENDED DECISION

This matter came for hearing before the undersigned Administrative Law Judge on January 10, 12-14, and 17-21 in Raleigh, North Carolina. The Court, having heard all the evidence in the case, considered the arguments of counsel, examined all the exhibits, and reviewed the relevant law, makes the following findings of fact, by a preponderance of the evidence, enters his conclusions of law thereon, and makes the following recommended decision.

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APPLICABLE LAW

1. The procedural statutory law applicable to this contested case is the North Carolina Administrative Procedure Act, N. C. Gen. Stat. §150B-1, *et seq.*

2. The substantive statutory law applicable to this contested case hearing 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 hearing are the North Carolina Certificate of Need administrative rules, 10A N.C.A.C. 14C .2100 *et seq.*, the policies set forth in 2010 State Medical Facilities Plan (hereinafter the "SMFP"), and the Office of Administrative Hearings rules, 26 N.C.A.C. 3 .0100 *et seq.*

ISSUES

Whether the Respondent Agency 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 its 10 June 2010 decision approving NCBH's Certificate of Need Application (Project ID. #G-8460-10) to construct a new building to house eight operating rooms, two procedure rooms, one simulation operating room, and one robotic surgery training room pursuant to Policy AC-3 in the 2010 State Medical Facilities Plan (the "NCBH Application").

Whether the Respondent Agency substantially prejudiced the rights and interests of any of the Petitioners as a result of its 10 June 2010 decision approving the NCBH Application.

BURDEN OF PROOF

Novant bears the burden of showing by the greater weight of the evidence that the Agency substantially prejudiced their rights, and that the Agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as

required by law or rule in finding the NCBH Application conforming or conditionally conforming with all the applicable Statutory Review Criteria, Policies and Agency Rules; and in approving the NCBH Application as set forth in the Agency's decision letter and Required State Agency Findings dated 10 June 2010 (hereinafter the "Findings"). See N.C. Gen. Stat. §150B-23(a); Britthaven, Inc. v. N.C. Dept. of Human Resources, et al., 118 N.C. App. 379, 455 S.E.2d 455, 459, disc. rev. denied, 341 N.C. 418, 461 S.E.2d 754 (1995).

WITNESSES

Witnesses for Novant:

1. Gebrette Miles. Ms. Miles is employed as a Project Analyst by the Agency. (Tr. Vol. 1, p. 13) She is the Project Analyst who reviewed the Baptist Application and is the only employee of the Agency who reviewed the entire Baptist Application. (Tr. Vol. 1, p. 14)

2. Nancy Bres Martin. Ms. Bres Martin is a consultant and is the owner of NBM Health Planning Associates. (Jt. Ex. 181, pp. 883-886) Ms. Bres Martin was qualified as an expert in the areas of CON analysis and preparation and health care planning. (Tr. Vol. 1, pp. 175-76) Ms. Bres Martin assisted in the preparation of Novant's comments in opposition to the NCBH Application. (Tr. Vol. 2, p. 201)

3. Teresa Carter. Ms. Carter is Vice President and the Chief Operating Officer of Surgical Services at Medical Park Hospital, Inc. (Jt. Ex. 181, pp. 887-888; Tr. Vol. 3, p. 449) Ms. Carter was qualified as an expert in the field of planning, provision and coordination of surgical services, economic aspects of surgical services and trends in utilization of surgical services. (Tr. Vol. 3, pp. 462-63) Ms. Carter prepared a financial impact analysis as to how Medical Park Hospital would be impacted if the Baptist project were to be developed. (Jt. Ex. 181, pp. 1-4; Tr. Vol. 3, pp. 514-15)

4. Sallye Liner. Ms. Liner is Executive Vice President and Chief Clinical Officer at Novant. (Jt. Ex. 181, pp. 2455-2457; Tr. Vol. 3, p. 586)

Witnesses for the Agency:

1. Martha Frisone. Ms. Frisone is employed as the Assistant Chief of the Agency, a position she has held since March 1, 2010. (Tr. Vol. 5, pp. 1040-41) During the review of the Baptist Application, she was the co-signer on the Agency Findings. (Jt. Ex. 2, pp. 505-552) Ms. Frisone was called as a witness in the Agency's case-in-chief.

2. Craig R. Smith. Mr. Smith is employed as the Chief of the Agency. (Tr. Vol. 7, p. 1415) Mr. Smith was called as a sur-rebuttal witness by the Agency.

Witnesses for Baptist:

1. Betty Petree. Ms. Petree is Director of Nurse Anesthesia and PACU and Interim Director of Surgical Services at Wake Forest University Baptist Medical Center. (NCBH Ex. 404; Tr. Vol. 4, p. 630)

2. J. Wayne Meredith, M.D., FACS. Dr. Meredith is Chief of Surgical Services and Director of the Division of Surgical Services at Wake Forest University Baptist Medical Center. (Jt. Ex. 8; Tr. Vol. 4, pp. 747; 752) Dr. Meredith was qualified as an expert witness in the clinical field of medicine and specialties in trauma surgery, thoracic surgery, burns, complex trauma care, and in the operation and function and administration of an academic medical center surgical service and the general administration and operation of an academic medical center. (Tr. Vol. 4, p. 757) Dr. Meredith started the process of the development of the NCBH Application. (Tr. Vol. 4, p. 758)

3. Jennifer A. Houlihan. Ms. Houlihan is Manager, Government Relations & Regulatory Affairs at Wake Forest University Baptist Medical Center. (NCBH Ex. 402; Tr. Vol. 5, p. 866)

Ms. Houlihan was qualified as an expert witness in the field of health planning and CON review and analysis. (Tr. Vol. 5, p. 877) Ms. Houlihan was responsible for the preparation of the Baptist Application. (Tr. Vol. 5, p. 878)

EXHIBITS [1]

A. JOINT EXHIBITS [2]

1. CON Application of NCBH, Project I.D. No. G-8460-10
2. Agency File
8. C.V. of Jay Wayne Meredith, M.D., FACS
28. Letter dated 5/22/09 to Lee Hoffman from S. Todd Hemphill regarding Plastic Surgery Center of North Carolina, Inc. Ambulatory Surgical Facility/Acquisition by Wake Forest University Health Sciences/Winston-Salem, Forsyth County, North Carolina
29. Letter dated 6/15/09 to S. Todd Hemphill from Gebrette Miles and Lee Hoffman regarding Exempt from Review/Acquisition of Plastic Surgery Center of North Carolina, Inc. by Wake Forest University Health Sciences (WFUHS)/Forsyth County
34. Required State Agency Findings dated 05/04/07 issued to Brunswick Community Hospital, LLC and Novant Health, Inc., Project I.D. No. O-7767-06
38. North Carolina Baptist Hospital 2010 Bond Documents
63. Excerpt from 1999 SMFP
64. Excerpt from 2000 SMFP
65. Excerpt from 2001 SMFP
66. Excerpt from 2002 SMFP
67. Excerpt from 2003 SMFP
68. Excerpt from 2004 SMFP
69. Excerpt from 2005 SMFP

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[1] Unless otherwise noted, all page references in exhibits refer to the Bates numbers or exhibit page numbers added for the purposes of this litigation.

All citations marked with a cross symbol ("†") are citations to materials that have been designated as confidential and are subject to the Consent Protective Order entered by the Court and/or were marked as confidential during the contested case hearing in this cause.

All citations marked with a superscript letter "I" ("^{I}") are citations to materials that were admitted for illustrative purposes only.

[2] Exhibits denominated as "Joint" Exhibits reflect the parties' stipulation as to authenticity and numbering, but do not reflect the consent of the parties as to the relevance or admissibility of same. See Prehearing Order.

70. Excerpt from 2006 SMFP

71. Excerpt from 2007 SMFP

77. Functional Integration Agreement dated 08/06/09 between Wake Forest University Health Sciences, North Carolina Baptist Hospital and Wake Forest University Baptist Medical Center †

91. Affiliation Agreement among North Carolina Baptist Hospital, Wake Forest University Health Sciences and Wake Forest University Baptist Medical Center 2004 †

107. 2010 Hospital License Renewal Application of Forsyth Medical Center

114. Nancy Bres Martin Opinions (reformed)

115. Nancy Bres Martin Opinion Tables

117. Required State Agency Findings dated 09/04/08 issued to Davie County Emergency Health Corporation d/b/a Davie County Hospital and North Carolina Baptist Hospital, Project I.D. No. G-8078-08

119. Required State Agency Findings dated 10/09/09 issued to The Charlotte-Mecklenburg Hospital Authority d/b/a Carolina Rehabilitation-Mount Holly and d/b/a Carolinas HealthCare system, Project I.D. No. F-8339-09; and CaroMont Health, Inc. and Gaston Memorial Hospital, Inc., Project I.D. No. F-8340-09

124. Compass Advisory Board Company – Overall OR Analysis Scorecard

129. 2010 Hospital License Renewal Application of Medical Park Hospital

133. Excerpts from 2010 SMFP

134. Dartmouth Atlas Article – An Agenda For Change – Improving Quality and Curbing Health Care Spending: Opportunities for the Congress and the Obama Administration

135. Tracking Medicine Excerpt by John E. Wennberg

138. Tracking Medicine Summary by John E. Wennberg

180. Documents Produced by NCBH (pp. 20-29†; 53-54†; 89-92†; 820†; 853†; 857†; 896†; 898-99†;)

181. Documents Produced by Novant (pp. 1-4; 565; 883-886; 887-888; 2387[3]; 2388; 2428-29[3]; 2430; 2455-2457; 2565-2690†)

219. Excerpts from Deposition Transcript of Gebrette Miles (p. 85, ln. 7 – p. 87, ln. 1; p. 87, lns. 14-21; p. 93, ln. 11 – p. 94, ln. 11; p. 96, lns. 3-16)

220. Excerpts from Deposition Transcript of Martha Frisone, Vol. 1 (p.156, lns. 3-9, 16-24; p. 167 lns. 6 – 14; p. 189, lns. 9-11; p. 193 ln. 19 – p. 194, ln. 2; p. 195, lns. 2-4)

[3] The admission of Exhibit 181, pp. 2387 and 2428-29, was limited by the Court as to weight.

231. Excerpts from Deposition Transcript of Martha Frisone, Vol. 2 (p. 73, lns. 2-9; p. 74, lns. 1-7)

239. Testimony Admitted via Stipulation: Greg Beier, Ed Chadwick, Lyndsey Gamble and Karen Huey

B. NOVANT EXHIBITS

312. Letter dated 02/15/08 to Gregory J. Beier from Martha J. Frisone regarding Project I.D. #G-7980-07/Medical Park Hospital-Clemmons

313. Letter to Martha J. Frisone from Gregory J. Beier regarding Project I.D. #G-7980-07/Medical Park Hospital-Clemmons

314. Letter dated 01/09/08 to Michael Freeman from Martha J. Frisone regarding Request for Additional Information/Project I.D. #G-7984-07/Davie County Hospital

315. Letter dated 01/31/08 to Martha J. Frisone from S. Todd Hemphill regarding Request for Additional Information/Project I.D. #G-7984-07

333. Required State Agency Findings dated 02/26/09 issued to Mecklenburg Diagnostic Imaging, LLC, Project I.D. No. F-8237-08

334. Required State Agency Findings dated 05/06/09 issued to Durham Diagnostic Imaging, LLC, Project I.D. No. J-8255-08

337. Charts prepared by Nancy Bres Martin [i] (illustrative purposes only)

338. Map of Location of Facilities in Winston-Salem [i] (illustrative purposes only)

C. NCBH EXHIBITS

402. C.V. of Jennifer Houlihan

404. C.V. of Betty Petree

407a. Article entitled "*What Does Health Reform Mean for North Carolina?*," North Carolina Medical Journal, May/June 2010 (EX pp. 17-35)

410. Chart: WCSC Global Procedure List [†]

421. Final Agency Decision: Parkway Urology v. NCDHHS, DHSR, CON Section, et al., (08 DHR 1834 & 1835) (via Judicial Notice)

424. Recommended Decision: Rex Hospital, et al. v. NCDHHS, DHSR, CON Section and UNC Hospitals, et al., (09 DHR 5769, 5770 & 5785) (via Judicial Notice)

425. Final Agency Decision: Rex Hospital, et al. v. NCDHHS, DHSR, CON Section and UNC Hospitals, et al., (09 DHR 5769, 5770 & 5785) (via Judicial Notice)

426. Final Agency Decision: Park Ridge Hosp. v. NCDHHS, DHSR, CON Section and Mission Hospitals, et al., (08 DHR 0053) (via Judicial Notice)

431. Accreditation Council for Graduate Medical Education: Program Requirements for Medical Residency Programs

439. Excerpts from Deposition Transcript of Craig Smith, Alamance Regional Medical Center v. NCDHHS, DHSR, CON Section and UNC Hospitals (09 DHR 5771) (pp. 120-121)

D. AGENCY EXHIBITS

501. Required State Agency Findings dated 6/28/01 issued to North Carolina Baptist Hospital, Project I.D. No. G-6376-01

502. Required State Agency Findings dated 4/26/05 issued to UNC Hospitals, Project I.D. No. J-7481-04

503. Excerpt: Exhibit 10 to the Brunswick Community Hospital Replacement Application, Project I.D. No. O-7767-06

I. ISSUES ADDRESSED BY MOTION FOR SUMMARY JUDGMENT

1. On December 23, 2010, NCBH filed a Motion for Summary Judgment, along with its Memorandum and various documents and exhibits in support of the motion, arguing that the NCBH Application should be approved as a matter of law.

2. On January 7, 2011, Novant filed a response and moved pursuant to Rule 56(c) of the North Carolina Rules of Civil Procedure that summary judgment must be entered against NCBH, on the grounds that the NCBH Application was non-conforming with Criteria 1 and 6, and the administrative rules as a matter of law. NCBH subsequently filed a Reply to the Novant Response along with additional documentary exhibits on 10 January 2011.

3. The Court heard oral arguments on Motions for Summary Judgment on January 10, 2011. During this hearing, the parties stipulated that genuine issues of material fact existed with regard to the following issues in this contested case:

a. Issues pertaining to the Agency's Findings regarding the NCBH Application under N.C. Gen. Stat. § 131E-183(a)(3) (hereinafter "Criterion 3");

b. Issues pertaining to whether the Agency's approval of the NCBH Application substantially prejudiced the rights of Novant; and

c. Such other and further issues as were necessary for the Court to render its decision in this cause;

4. After hearing oral argument on January 10, 2011, all parties agreed that no genuine issue of material fact existed and the following issues were ripe for disposition by summary judgment: Criterion 1 (and Policy AC-3), Criterion 6, and the administrative rules.

5. In light of the foregoing, the Court instructed the parties to submit limited supplemental memoranda related to the issues stipulated as being ripe for summary judgment. These supplemental memoranda were filed by the parties on 7 February 2010.

6. This Recommended Decision addresses only the Findings of Fact and Conclusions of Law bearing upon matters and issues presented to the Court during the evidentiary hearing in this contested case. All findings, conclusions, judgments, and/or orders related to any and all remaining issues raised in this contested case are addressed and dispensed with separately as part of the Order of this Court on NCBH's Motion for Summary Judgment.

A. CRITERION 1

7. Except as otherwise stated herein, all issues pertaining to the Agency's Findings regarding the NCBH Application under N.C. Gen. Stat. § 131E-183(a)(1) (hereinafter "Criterion 1") and SMFP Policy AC-3 are addressed and dispensed with separately as part of the Order of this Court on NCBH's Motion for Summary Judgment. Ex. 2, Agency File, pp. 505-08.

B. CRITERION 6

8. Except as otherwise stated herein, all issues pertaining to the Agency's Findings regarding the NCBH Application under N.C. Gen. Stat. § 131E-183(a)(6) (hereinafter "Criterion

6") are addressed and dispensed with separately as part of the Order of this Court on NCBH's Motion for Summary Judgment. Ex. 2, Agency File, p. 530.

C. AGENCY RULES

9. Except as otherwise stated herein under Criterion 3, supra, all issues pertaining to the Agency's Findings regarding the NCBH Application under N.C. Gen. Stat. § 131E-183(b) and the performance standards adopted by the Agency in 10A N.C.A.C. 14C .2103 pursuant thereto, are addressed and dispensed with separately as part of the Order of this Court on NCBH's Motion for Summary Judgment. Ex. 2, Agency File, pp. 536-52.

10. Novant did not raise any issues regarding the Agency's determination under the remaining rules in 10A N.C.A.C. 14C .2100, *et seq*. Thus, as a matter of fact and law the Agency's determinations under these criteria are deemed appropriate and free of error.

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 Decision, which is tendered to the North Carolina Department of Health and Human Services for a final decision.

FINDINGS OF FACT

1. The development of new operating rooms, and the relocation of existing operating rooms over more than a public right-of-way, is a new institutional health service that requires a certificate of need ("CON"). N.C. Gen. Stat. §§ 131E-176(u)(16) and -178.

2. On January 15, 2010, NCBH filed a CON application with the CON Section (CON Project ID No. G-8460-10) seeking a CON to construct a new building to house eight operating rooms, two procedure rooms, one robotic surgery training room, and one simulation operating room in Winston-Salem, Forsyth County, North Carolina (hereinafter the "NCBH Application"). The eight operating rooms would consist of seven new operating rooms and one existing operating room relocated from the existing surgical suite. Upon completion, the new facility would be located across the street from NCBH and was to be known as the "West Campus Surgery Center" (hereinafter the "WCSC"). See generally Ex. 1, NCBH App.; Ex. 2, Agency File. NCBH already has an outpatient surgery center located on its campus. (Tr. Vol. 4, p. 714)

3. The annual State Medical Facilities Plan ("SMFP") strictly limits the addition of new operating rooms. If there is no need in the SMFP for additional operating rooms in a county, a provider cannot propose to add new operating rooms in that county. *See* N.C. Gen. Stat. § 131E-183(a)(1).

4. According to the 2010 SMFP, there is a surplus of 5.52 operating rooms in Forsyth County. (Jt. Ex. 133, p. 78) Therefore, the 2010 SMFP did not contain a need for any additional operating rooms in Forsyth County.

5. Academic Medical Center Teaching Hospitals ("AMCs"), granted such status prior to January 1, 1990, are exempt from the need determinations in the SMFP if they file a

CON application pursuant to SMFP Policy AC-3 and if they meet the requirements of SMFP Policy AC-3. (Jt. Ex. 133, pp. 23-24)

6. The NCBH Application was submitted pursuant to pursuant to Policy AC-3 of the 2010 State Medical Facilities Plan (hereinafter the "Policy AC-3") which states:

> *Exemption from the provisions of need determinations of the North Carolina State Medical Facilities Plan shall be granted to projects submitted by Academic Medical Center Teaching Hospitals designated prior to 1 January 1990 provided the projects comply with one of the following conditions:*
>
> *1. Necessary to complement a specified and approved expansion of the number or types of students, residents or faculty, as certified by the head of the relevant associated professional school; or*
>
> *2. Necessary to accommodate patients, staff or equipment for a specified and approved expansion of research activities, as certified by the head of the entity sponsoring the research; or*
>
> *3. Necessary to accommodate changes in requirements of specialty education accrediting bodies, as evidenced by copies of documents issued by such bodies.*
>
> *A project submitted by an Academic Medical Center Teaching Hospital under this Policy that meets one of the above conditions shall also demonstrate that the Academic Medical Center Teaching Hospital's teaching or research need for the proposed project cannot be achieved effectively at any non-Academic Medical Center Teaching Hospital provider which currently offers the service for which the exemption is requested and which is within 20 miles of the Academic Center Teaching Hospital.*

Ex. 133, 2010 SMFP, pp. 23-24.

7. Based upon Policy AC-3, NCBH was permitted to file the CON application, despite the fact that the 2010 SMFP did not show a need for additional operating rooms in Forsyth County. Ex. 133, 2010 SMFP, p. 69.

8. The Agency determined that the NCBH Application was complete for review, and reviewed the application in the review cycle which began on 1 February 2010. Ex. 2, Agency File, p. 5.

The Agency's Review Process

9. Ms. Jennifer Houlihan prepared the NCBH Application. (Tr. Vol. 5, p. 878) Although no pre-application conference took place, Ms. Houlihan spoke with Ms. Martha Frisone, Assistant Chief of the Agency before submission of the application. (Tr. Vol. 5, p. 882) The NCBH Application was the first application pursuant to Policy AC-3 that Ms. Houlihan had prepared. (Tr. Vol. 5, p. 877)

10. Ms. Lyndsey Gamble helped Ms. Houlihan prepare the NCBH Application. (Tr. Vol. 5, p. 886) Ms. Gamble did the actual projections of surgical volume contained in the NCBH Application. (Tr. Vol. 5, p. 936) This was the first CON application in which Ms. Gamble was involved. (*Id.;* Jt. Ex. 239, pp. 30-32)

11. Ms. Gebrette Miles was the Project Analyst who reviewed the NCBH Application. (Tr. Vol. 1, p. 14) Ms. Miles was the only person who reviewed the NCBH Application in its entirety. Ms. Miles' review of this application was the first time she had reviewed an application filed pursuant to Policy AC-3. (Tr. Vol. 1, p. 109)

12. Ms. Martha Frisone, co-signed the Agency's Findings on the NCBH Application. (Jt. Ex. 2, p. 505) She did not review the entire application. (Tr. Vol. 5, p. 1058) As a co-signer, she served as a resource to the project analyst, and responded to any questions or concerns she might have. (Tr. Vol. 5, p. 1045)

13. After reviewing the NCBH Application, Ms. Miles prepared a draft of the Agency Findings, and submitted them to Ms. Frisone for her comments. (Tr. Vol. 1, p. 110-11)

14. Ms. Miles, as the project analyst, also conducted a public hearing on the NCBH Application in accordance with N.C. Gen. Stat. § 131E-185(a1). Ms. Miles had the ability ask NCBH questions about its application at the public hearing, but she did not do so. (Tr. Vol. 1, p. 18)

15. The public hearing was held regarding the NCBH Application on March 8, 2010. No representative from Novant was present at the public hearing. (Jt. Ex. 2, p. 62) Novant was not required to attend the public hearing. Novant's failure to attend in no way affects the comments in opposition to the NCBH Application that were properly filed during the review period in accordance with N.C. Gen. Stat. § 131E-185. (Jt. Ex. 2, pp. 12-36) (Tr. Vol. 1, pp. 149-150)

16. Ms. Miles and Ms. Frisone reviewed the comments submitted by Novant. (Tr. Vol. 1, pp. 15-16; Tr. Vol. 5, pp. 1050-51)

17. Ms. Miles conducted a site visit during the course of the review period. She did not ask any questions, because she had not yet begun her review of the NCBH Application. (Tr. Vol. 1, pp. 100-101)

18. The Agency is required to apply all of the statutory review criteria in N.C. Gen. Stat. § 131E-183(a) to every CON application, regardless of whether comments are filed on an application. *See* N.C. Gen. Stat. § 131E-183(a). (Tr. Vol. 7, p. 1309)

19. Comments filed by a third party are not a substitute for the Agency's analysis of CON applications. While comments may be helpful to the Agency, the comments do not take the place of the Agency analyzing applications against the statutory review criteria. (Tr. Vol. 2, pp. 312-13; Tr. Vol. 3, p. 447; Tr. Vol. 7, p. 1309)

20. By letter dated June 10, 2010, Ms. Miles and Ms. Frisone informed NCBH that the NCBH Application had been approved, subject to conditions. That same day, the Agency issued its Required State Agency Findings setting forth the reasons supporting its decision. Ex. 2, Agency File, pp. 8-11, 505-552.

21. On July 9, 2010, Novant timely filed a Petition for Contested Case with the Office of Administrative Hearings contesting the approval of the NCBH Application.

22. By Order dated July 20, 2010, the Court granted NCBH's unopposed Motion to Intervene in this cause.

23. By Order dated August 30, 2010, the Court denied the UNC Hospitals' Motion to Intervene, but granted UNC Hospitals the right to participate in this cause as *amicus curiae*.

II. AGENCY FINDINGS REGARDING THE NCBH APPLICATION'S CONFORMITY WITH THE STATUTORY REVIEW CRITERIA AND AGENCY RULES

24. The Agency found the NCBH Application conforming with all applicable Statutory Review Criteria codified at N.C. Gen. Stat. § 131E-183(a), with the applicable agency rules codified at 10A N.C.A.C. 14C .2100, *et seq*., and with SMFP Policy AC-3. See generally Ex. 2, Agency File, pp. 505-552.

A. CRITERION 3

25. N.C. Gen. Stat. § 131E-183(a)(3) (hereinafter "Criterion 3") provides as follows:

> *The applicant shall identify the population to be served by the proposed project, and shall 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.*

Ex. 2, Agency File, p. 508.

26. Criterion 3 addresses the need for a project from a health planning perspective. Id.; also see Frisone, Tr., pp. 1061, 1065-66; Miles, Tr., p. 19; Houlihan, Tr., pp. 885-86.

27. Criterion 3 has two primary components at issue herein:

a. The identification of the population proposed to be served by the service proposed by the applicant;

and

b. The need that the identified population has for the proposed service.

Miles, Tr. p. 44, Frisone, Tr., p. 1061.

28. The further requirement of Criterion 3 is to explain "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." This requirement has not been raised as an issue in this contested case and it is acknowledged that it is adequately addressed in other places within the application, including Criterion 13.

29. The demonstration of need as required by Criterion 3 is different from the showing that an AMC must make under Policy AC-3. (Tr. Vol. 1, pp. 20-21) According to Ms. Miles Policy AC-3 and Criterion 3 "are two different things." *Id.*

30. Nothing in the language of Criterion 3 suggests that it does not apply to AMC's, or that it applies differently to AMC's than to other CON applicants. Criterion 3 was applicable to the Baptist Application. (Tr. Vol. 1, p. 23; Tr. Vol. 6, p. 1207)

31. If Criterion 3 had been "not applicable" to the Baptist Application, the Agency Findings would reflect such a determination with the letters "NA" in the Agency Findings. (Tr. Vol. 1, p. 22) The findings do not state that Criterion 3 is "NA" to the Baptist application. (Tr. Vol. 1, pp. 22-23; Tr. Vol. 6, p. 1207; Jt. Ex. 2, p. 508)

32. Despite agreeing that Criterion 3 applies to an AMC's application, Ms. Frisone admitted that the Agency applies Criterion 3 differently to AMC applications than to non-AMC applications. (Tr. Vol. 6, pp. 1096-98, 1174)

1. CRITERION 3: POPULATION PROPOSED TO BE SERVED BY NCBH

33. Critical to this review is to identify and define who or what constitutes the "population." The more traditional definition of "population" refers to a group of people who inhabit a specified area. An alternate definition would apply to a specific demographic.

34. The primary focus of the Agency's Finding relate to the alternate definition in that the focus is more on NCBH and Wake Forest School of Medicine and their needs than those of the more general population of the inhabitants of the area to be served. Ex. 2, Agency File, pp. 526.

35. The language of Criterion 3 would seem to imply the more general definition and that the focus should be on the inhabitants of the area, but the alternate definition is acceptable and reasonable.

36. In the instant review, the Agency found the NCBH Application conforming with the first prong of Criterion 3, concluding that NCBH adequately identified the population it proposed to serve. Ex. 2, Agency File, pp. 508-11, accord Ex. 1, NCBH App. pp. 68-77.

37. With regard to the patients to be served, NCBH proposed to serve patients that it was already drawing from its 19-county service area. Frisone, Tr., pp. 1061-65; 1201-06; Ex. 1, NCBH App. p. 267; also see Bres Martin, Tr., p. 352; Houlihan, Tr. p. 926.

38. Ms. Frisone testified at hearing that in an AC-3 project such as the NCBH Application, the population proposed to be served includes not only patients but also the academic faculty which will teach in the space developed by NCBH. Frisone, Tr., pp. 1061-65;

1201-06. Ms. Frisone reasoned that since the purpose of an AC-3 project is to meet a teaching and/or research need, the medical staff of the AMC is likewise part of the population that the project proposes to serve under Criterion 3. Id.

39. Ms. Frisone had not previously articulated that the population to be served by the Baptist Application included doctors and faculty. (Tr. Vol. 5, pp. 1061-62)

40. There is no specific reference to doctors or faculty being part of the "population to be served" by the project in the Baptist Application or the Agency Findings. (Jt. Ex. 1; Jt. Ex. 2, pp. 508-27) However, this conclusion is consistent with the discussion in the NCBH Application indicating that one of the qualitative factors demonstrating the need for the project was meeting the needs of additional faculty to be added by WFUHS. Ex. 1, NCBH App. pp. 46-47, 264-66.

41. The preponderance of the evidence demonstrates that NCBH properly identified the population proposed to be served, and demonstrated conformity with this first component of Criterion 3.

2. CRITERION 3: NEED THAT THE IDENTIFIED POPULATION HAS FOR THE SERVICE PROPOSED BY NCBH

42. The Agency concluded that the NCBH Application adequately demonstrated the need that the population it proposed to serve had for the services it proposed to develop as part of the WCSC. Ex. 2, Agency File, pp. 511-27.

43. During the Agency's review of a CON application, the applicant bears the burden of demonstrating to the Agency the need that the population to be served has for the proposed project. Miles, Tr., pp. 149; Frisone, Tr., pp. 1047.

44. According to the 2010 SMFP, there is a surplus of 5.52 operating rooms in Forsyth County. (Jt. Ex. 133, p. 78) Therefore, the 2010 SMFP did not contain a need for any additional operating rooms in Forsyth County.

45. The only surgical providers in Forsyth County are NCBH, Novant facilities, and Plastic Surgery Center of North Carolina. (Tr. Vol. 2, p. 238, Tr. Vol. 3, p. 512)

46. If operating rooms are chronically underutilized for three years, they are removed from the inventory for purposes of the state's need methodology; i.e., those rooms are subtracted out of the inventory before the standard methodology is applied to determine how many rooms are needed. (Jt. Ex. 133, p. 74; Tr. Vol. 1, p. 181-82)

47. Plastic Surgery Center of North Carolina ("PSCNC") in Winston-Salem has three severely underutilized operating rooms. (Tr. Vol. 1, p. 63; Jt. Ex. 2, pp. 35-36)

48. The surplus of 5.52 operating rooms in Forsyth County does not take into account the three underutilized rooms at PSCNC. If those three rooms are also considered for purposes of determining the surplus, there would be a surplus of 8.52 operating rooms in Forsyth County. (Tr. Vol. 1, p. 183)

49. Ms. Miles and Ms. Frisone did not consider the surplus of operating rooms in Forsyth County when evaluating the need for the project proposed in the Baptist Application. (Tr. Vol. 1, pp. 157-58; Tr. Vol. 6, p. 1219) Ms. Miles stated that because of Policy AC-3, Baptist did not need to rely on the SMFP to justify the need for more operating rooms. (Tr. Vol. 1, p. 158)

50. For purposes of a CON application, need may be demonstrated via a systematic methodology included in the application. Miles, Tr., pp. 121-33; Frisone, Tr., pp. 1075; Houlihan, Tr., pp. 876, 880-83; Bres Martin, Tr., pp. 341-44; and accord Ex. 1, NCBH App. pp. 44-81. There is no one specific methodology that an applicant must use and many different types of methodologies have been accepted by the Agency in the past. Frisone, Tr., pp. 1065-66; Houlihan, Tr., pp. 939; Bres Martin, Tr., pp. 309-10, 341-44.

51. Witnesses for all parties agreed that it is common for applicants to break their need methodology into separate parts, one relating to the qualitative need for the proposed project, and the other discussing the quantitative need. Miles, Tr., pp. 85-91; Bres Martin, Tr., pp. 197-200; Houlihan, Tr., pp. 887-88, 993-94; Frisone, Tr., pp. 1065-68. This was the manner in which the NCBH Application demonstrated the need for its proposal.

a. Qualitative Demonstration of Need

52. The Agency noted that the NCBH Application represented that the need for the proposed operating rooms was based upon seven specific factors:

- Need in the State Medical Facilities Plan (SMFP);
- Need to Accommodate Current and Planned Faculty Growth in Surgical Sciences;
- Need to Support the Innovations and Research of NCBH as an Academic, Tertiary/Quaternary Hospital;
- Increase in the Amount of Minimally Invasive Surgical Procedures;
- Need to Accommodate Increasing Patient Demand;
- NCBH Campus-Ardmore Tower-Growth in Demand Exhausts Capacity; and
- Need to Address Capacity Enhancement.

Id. at 512-13, quoting, Ex. 1, NCBH App. pp. 44-52.

53. Jennifer Houlihan, the individual who was primarily responsible for the preparation of the NCBH Application, was accepted by the Court as an expert in the fields of health planning and CON review and analysis. Houlihan, Tr., pp. 877-79; Ex. 402, CV of Jennifer Houlihan.

54. Ms. Houlihan explained at length the particulars of each of these factors described above, explaining why each factor bore on the need for the proposed project, and she discussed how these factors related to the issues relevant to the Agency's review of the NCBH Application. Id. at 885-89, 896-905; also see Ex. 1, NCBH App. pp. 44-52.

55. The Agency noted each of these factors, determined them to be adequate and affirmatively accepted them as providing support for the proposed WCSC project. Miles, Tr., pp. 108-11, 120-32; Ex. 2, Agency File, pp. 511-27; also see Frisone, Tr., p. 1068.

56. Ms. Miles also noted that several of the factors touched upon the specific needs of the population the NCBH Application proposed to serve. Miles, Tr., pp. 86-91. Among other things, the NCBH Application explained how patient wait times, growth in the number of patients over the ages of 45 and 65, and patient acuity helped drive the qualitative need for the project. Id.; Ex. 2, Agency File, pp. 511-27.

57. Ms. Houlihan included the qualitative factors identified in the NCBH Application based upon her past experience in preparing CON applications in both North Carolina and Florida. Id. at 865-79, 887-88, 993-94. Ms. Houlihan stated that the specific factors used in the NCBH Application included both factors she typically used as part of the health planning process as well as ones which were developed specifically for the WCSC Application. Id. at 886-88; also see Ex. 1, NCBH App. pp. 44-52.

58. It has been the experience of Ms. Houlihan that the Agency both allowed and expected applicants to specifically discuss qualitative factors which bore upon the methodology for the proposed application. Houlihan, Tr., pp. 886-88, 993-94.

59. NCBH has used similar qualitative factors as a projector of future growth in prior CON applications which were approved by the Agency. Ex. 1, NCBH App., p. 465; Bres Martin, Tr. pp. 404-405; Houlihan, Tr. pp. 907-908; Frisone, Tr. pp. 1066-1068.

60. In preparing the NCBH Application, Ms. Houlihan relied upon the Agency's past decisions, in particular focusing upon the Agency's past findings addressing AMC applications under Policy AC-3. Houlihan, Tr., pp. 886-87.

61. The applications and findings relied upon by Ms. Houlihan were also relied upon by Ms. Frisone and Ms. Miles in preparing the findings issued in this case, and were included in the Agency's working papers in the official Agency File. Miles, Tr., pp. 78, 109; 119-20; Frisone, Tr., pp. 1147-51; Ex. 2, Agency File, pp. 147-217, 486-506.

62. Ms. Miles and Ms. Frisone reviewed and consulted a total of eight prior sets of findings addressing applications submitted by AMCs pursuant to Policy AC-3, which were included in the Agency's working papers. Miles, Tr., pp. 78, 109, 119-20; Frisone, Tr., pp. 1147-51; Ex. 2, Agency File, pp. 124-506.

i. Need in the SMFP

63. On the factor of "Need in the State Medical Facilities Plan," Ms. Houlihan explained that the prescribed average case times set forth in the SMFP need methodology for operating rooms, of 3.0 hours per inpatient procedure and 1.5 hours per outpatient procedure, were lower than NCBH's historical average case times of 3.12 hours and 1.79 hours respectively. Houlihan, Tr., pp. 888-89, 909-10, 943; Ex. 1, NCBH App. pp. 44-45; Ex. 133, 2010 SMFP Excerpts; also see Miles, Tr., pp. 122-25

64. As a result, the 2010 SMFP need methodology showed no need for additional operating rooms in Forsyth County. Ex. 133, 2010 SMFP Excerpts.

65. As Ms. Frisone testified, the Agency Findings noted that if the historical average case times actually experienced by NCBH of 3.12 and 1.79 hours were used in place of the SMFP-dictated case times, then under the SMFP-defined methodology there was a need for four additional operating rooms. Ex. 2, Agency File, pp. 513-14; Frisone, Tr., pp. 1184-85.

66. Thus the absence of a need determination for new operating rooms in Forsyth County in the 2010 SMFP, was not necessarily reflective of the actual need for additional operating rooms at NCBH.

ii. Physician Recruitment by WFUHS

67. NCBH relied at least in part on "physician recruitment" to qualify for Policy AC-3. Baptist included in its application a letter from Dr. William B. Applegate, Dean of the Wake Forest University School of Medicine, Baptist's "associated professional school," regarding the recruitment plans of WFUHS. (Jt. Ex. 1, p. 264)

68. The letter from Dr. Applegate stated that WFUHS had begun the expansion of the clinical and research faculty. It further stated that WFUHS projected to add a total of 51 faculty members in the Division of Surgical Sciences by 2020. (Jt. Ex. 1, p. 264)

69. One of the primary factors creating the need for the project was the recent hiring of clinical surgical faculty, and the projected addition of 39 new clinical surgical faculty by WFUHS who will be training residents at NCBH. Ex. 1, NCBH App. pp. 46-47, 264-66; Houlihan, Tr., pp. 887-88, 896-98; Meredith, Tr., pp. 748-58.

70. J. Wayne Meredith, M.D., Chief of Surgery at Wake Forest University Baptist Medical Center—who was accepted by the Court as an expert in (1) the clinical field of medicine with specialties in trauma surgery, thoracic surgery, burns, and complex trauma care; (2) in the operation and function and administration of an AMC surgical service; and (3) the general administration and operation of an AMC—explained the reasoning underlying the proposed increases in the surgical faculty and how that impacted the need for additional operating room space. Meredith, Tr., pp. 748-58, 786-88; Ex. 8, CV of Wayne Meredith.

71. Dr. Meredith, who is charged with the administration of all WFUHS surgical services faculty, explained that there are many reasons why WFUHS needs to add additional faculty, including: the need to serve the volumes of patients currently coming to NCBH; the need to provide additional robotic surgery training capabilities; the need for additional research capabilities; the need to continue the education of medical students and advance developments in academic medicine; and the need to train residents within the limitations of and in conformity with the requirements set by the Accreditation Council for Graduate Medical Education (hereinafter "ACGME"). Meredith, Tr., pp. 761-63, 788-96, 843; also see generally Ex. 431, ACGME Requirements.

72. Dr. Meredith, Ms. Petree, and Ms. Houlihan explained how this expansion of the clinical surgical faculty will result in growth in utilization of the operating rooms.

73. Dr. Meredith also pointed out that, without residents, many types of procedures could not be performed effectively by either the current or future WFUHS faculty. Meredith, Tr., pp. 792-93. In particular, longer, more complex cases such as surgeries on burn patients are simply not possible within the context of a community hospital and can only be performed at AMCs where residents and attending (teaching) surgeons work together. Id.

74. Dr. Meredith testified at length about the rules and requirements governing graduate medical education and residency programs under rules prescribed by the ACGME—the ultimate accrediting and certifying body for such programs. Meredith, Tr., pp. 788-96, 843; also see generally Ex. 431, ACGME Requirements. Integral to the principles set forth by the ACGME are specialized educational and faculty requirements which necessitate that medical schools maintain educationally sound academic environments, foster a vibrant educational experience for students and residents, and provide students specific practical educational

exposure to a myriad of medical procedures and situations. Id. All of this must be done within the bounds of the ACGME's faculty requirements—which requires a commitment to academic scholarship on the part of teaching surgeons. Ex. 431, ACGME Requirements, pp. 962-63, 993-94, 1011-14, 1031-32, 1042, 1053-54, 1068-69, 1084-85, 1104-05, 1124-25, 1143-44, 1163-64, 1182-84, 1205-06, 1225-27, 1251-52, 1271. It also must be done while observing the strict duty-hour requirements imposed upon medical schools' teaching residents, limiting each resident to 80 hours of duty per week. Ex. 431, ACGME Requirements, pp. 969-70; Meredith, Tr., pp. 762-63; Petree, Tr., pp. 679-82. This means that more physicians are needed to teach residents within their allotted duty time.

75. Based upon his bi-annual review of the various departments within the surgical services division, Dr. Meredith found that there was a continuing need for additional surgeons to train residents, treat patients, and teach medical students. Meredith, Tr., pp. 759-62; 772-75, 777-80. As a result of these needs, in conjunction with his review of the surgical departments under his administration, Dr. Meredith, approved the addition of an estimated 39 new clinical faculty over the next ten years. Meredith, Tr., pp. 769-75, 777-80. This addition ultimately was approved by William Applegate, M.D., President of WFUHS and Dean of the Wake Forest University School of Medicine. Ex. 1, NCBH App. pp. 264-66.

76. The process for adding new members to the surgical faculty is a fluid process which necessarily is more specific in the near term than it is in the long term. Meredith, Tr., pp. 772-75. The timing of specific additions to the faculty is also controlled, to some extent, by the availability of qualified physicians in the desired specialty or sub-specialty. Meredith, Tr., pp. 822-24.

77. Dr. Meredith, nonetheless, explained in great detail his expectations of when and how the projected surgical faculty would be hired. Dr. Meredith pointed to numerous specific faculty appointments that he currently anticipates hiring as faculty by WFUHS over the next three to seven years. See generally Meredith, Tr., pp. 777-80, 814-34.

78. According to Dr. Meredith, the addition of the new faculty identified in the NCBH Application is budgeted based on the assumption that the newly added physicians will be able to produce revenue sufficient to support their recruitment and salary requirements. Meredith, Tr., pp. 777-80, 819-25. Since these surgeons essentially will "pay for" themselves, no additional funding would be necessary above and beyond that which the surgical services division would normally have in its budget. Id.

79. The development of long-range faculty hiring plans is based upon Dr. Meredith's direct review of the needs of the physicians within the surgical services division, which includes the review of both volume data and direct conversations with the department heads for each surgical sub-specialty. Meredith, Tr., pp. 759-62; 772-75, 777-80.

iii. Strains on Existing Capacity at NCBH

80. The fundamental purpose of the project was to decompress the existing strains on the current NCBH complement of 40 operating rooms, while developing new training spaces for the growing WFUHS faculty.

81. Dr. Meredith summed up the proposal as one which would:

> *offload some of the lower acuity operations into an outpatient surgery center, which would allow us to grow our cases in the inpatient operating room and revise those operating rooms, and in conjunction with that, create next to that space a training environment for us to better train our residents in a simulated environment and a robotic environment.*

Meredith, Tr., pp. 759

82. NCBH contends that the current surgical facilities at NCBH are landlocked and unable to be expanded to meet the current demand for services. Meredith, Tr., pp. 758-59; Petree, Tr., pp. 648-50, 656-57; Ex. 239, pp. 61-62 (Huey Depo., pp. 12-13). In order for additional needed clinical faculty to be added, new surgical space is also needed at NCBH to better and more fully accommodate the capacity that NCBH already serves as well as the capacity it projects to serve in the future. Meredith, Tr., pp. 737-38, 777-80, 842; Petree, Tr., pp. 647-50, 656-57, 730; Houlihan, Tr., pp. 884-85, 896-98, 901-02, 1016; Ex. 1, NCBH App. pp. 46-47, 51-53.

83. Dr. Meredith pointed out that the surgical service at AMCs such as NCBH function differently and generally treat different types of patients than regional and community medical centers. Meredith, Tr., pp. 765-67; 786-89. AMCs typically treat patients whose acuity levels are higher than those seen in other hospitals. Id. AMCs also routinely treat patients who suffer from conditions requiring extremely specialized care which is not generally available at local hospitals. Id. AMCs are typically trauma centers, performing involved and lengthy procedures which usually results in longer operating room times while diminishing the availability of capacity for other procedures. Id.; Petree, Tr., pp. 666-67.

84. Ms. Betty Petree, CRNA, Director of Nurse Anesthesia and PACU, and Interim Director of Surgical Services for NCBH was accepted by the Court as an expert in the clinical field of surgical nursing and anesthesia nursing and also in the planning, provision, and coordination of surgical services within an AMC. Ms. Petree agreed with these perspectives. Petree, Tr., pp. 630-46; 685-97, 730; Ex. 404, CV of Betty Petree; Ex. 410.

85. Nancy Bres Martin, a health planning consultant for Novant Health, who was identified as an expert in CON preparation and analysis and health planning, also agreed that as

an AMC, NCBH served higher acuity surgical patients than other service area hospitals, including FMC and MPH. Bres Martin, Tr., pp. 337-40.

86. NCBH has attempted to improve efficiency within the surgical services departments. Meredith, Tr., pp. 767-68; Petree, Tr., pp. 666-67, 677-79. Some of the steps NCBH has taken to improve efficiency and maximize capacity include:

- Restructuring the process for block scheduling (the scheduling of blocks of time for specific physicians and/or procedures) in the operating rooms (Meredith, Tr., pp. 742; Petree, Tr., pp. 649-67, 677-79, 717-21);
- Extending the availability of operating rooms to include weekends and holidays (Meredith, Tr., pp. 767-68; Petree, Tr., pp. 649-67; Ex. 1, NCBH App. pp. 51-53);
- Replacing equipment with newer, more efficient units (Petree, Tr., pp. 666-67, 677-79, 717-21);
- Streamlining the scheduling and medical records functions of the surgical service at NCBH (Petree, Tr., pp. 677-79, 717-21);
- Reducing operating room turnover times between procedures (Petree, Tr., pp. 674-77); and
- Extending the operating hours of the surgical service into the evening (see Meredith, Tr., p. 812; Petree, Tr., pp. 649-67).

87. Despite these efforts to maximize efficiency, the demand for surgical space and operating room time currently fills or exceeds the capacity of the existing operating rooms at NCBH. Meredith, Tr., pp. 767-68; Petree, Tr., pp. 678-79, 730, 736; Houlihan, Tr. pp. 880-82.

88. Teresa Carter, Vice President of Surgical Services for Novant, however, opined that with specific improvement in the area of operating room turnover times, NCBH might be able to increase its capacity to treat patients in its existing operating rooms. Carter, Tr., pp. 481-95, 533-50; Ex. 180, Chart of NCBH OR Turnover Times, p. 54[†]; Ex. 124, Compass Advisory Board OR Turnover Data.

89. During the Agency's review of the NCBH Application, Novant submitted written comments to the Agency setting forth reasons why Novant contended the NCBH Application should be disapproved. Ex. 2, Agency File, pp. 12-36. Ms. Carter's opinion that the NCBH operating rooms were not fully utilized was not included in those written comments. The Agency had no reason to consider this issue or question the historical operating room data in NCBH's application.

90. Ms. Carter conceded that the materials produced by the Compass Review Board were only available to paying members of the Review Board, and would not have been available to the Agency at the time of its review of the NCBH Application. Carter, Tr., pp. 536-37.

91. Ms. Carter pointed to data published by the Compass Advisory Board analyzing average operating room turnover times for between 15 and 17 unidentified facilities across the country meeting the Compass Advisory Board definition of an "Academic Facility," as a standard for OR turnover times. Carter, Tr., pp. 483-95; 540-50; Ex. 124, Compass Advisory Board OR Turnover Data.

92. Ultimately, Ms. Carter opined that she believed a reduction of the average NCBH operating room turnover times of approximately 3 minutes—thereby meeting the 50th percentile of the Compass Advisory Board cohorts—would permit NCBH to perform one or two additional procedures per day. Carter, Tr., pp. 541-42.

93. Ms. Carter had no personal experience with the dynamics or administration of surgical services provided in any AMC, including NCBH. In reaching her conclusions, Ms. Carter did not review any other benchmarking data sets such as those produced by the American Association of Medical Colleges or University Health Consortium, which are both composed of more than 100 AMCs (as contrasted with only 17 AMCs in the Compass Advisory Board report)

and reports data on matters such as turnover times. Carter, Tr., pp. 537-38; Petree, Tr., pp. 673-75. Ms. Carter agreed that when creating "best practice" standards, larger sets of data from a larger number of facilities is preferable. Carter, Tr., p. 540. Ms. Carter also conceded that surgical procedures typically take longer when teaching is involved. Carter, Tr., pp. 541.

94. Ms. Carter admitted that, even if NCBH were able to add one additional case per day as a result of improved turnover times, in the end that would only result in the ability to perform at most 250 additional cases per year. Carter, Tr., pp. 242-42.

95. Ms. Petree testified that, in her experience, the data provided by the Compass Advisory Board was of marginal use and often was unreliable. Petree, Tr., pp. 673.

96. According to Ms. Petree the surgical services departments at NCBH typically rely upon benchmarks produced by the University Health Consortium which includes all AMCs in the United States. Petree, Tr., pp. 674-75. Ms. Petree further testified that the current University Health Consortium, benchmark for turnover times is approximately 36 minutes, or four minutes higher than the average Ms. Carter calculated for NCBH. Id.; Carter, Tr., pp. 491, 541. Ms. Petree also noted that NCBH's "on-time start" percentage was 93%, a point which, in her opinion, was a better overall benchmark of efficiency. Petree, Tr., pp. 735-37.

97. Ms. Petree also disputed Ms. Carter's conclusion that additional capacity could be freed up as a result of a 3 minute reduction in average turnover times at NCBH. Ms. Petree pointed out that, given an average volume of four cases per operating room per day, a net total of only 15 minutes per operating room would be gained. Petree, Tr., pp. 675-677. A gain of only 15 minutes would not be enough to perform any procedure of any type. Id.

98. The testimony of Ms. Petree is found to be more credible and more reliable than that of Ms. Carter. Ms. Carter's testimony is not a reliable basis to support her contentions that

the existing surgical services at NCBH are being operated inefficiently or that the turnover time could be improved to the point where the existing capacity at NCBH could be used more fully.

iv. Consistency with Prior Agency Findings

99. Based upon the representations in the NCBH Application relating to the qualitative need for the project and the prior Agency findings from Policy AC-3 projects consulted by Ms. Miles during her review, Ms. Miles concluded that her determinations with respect to the NCBH Application were consistent with past Agency practice. Miles, Tr., pp. 78, 109, 119-32; Ex. 2, Agency File, pp. 511-27.

100. In particular, Ms. Miles found that the information provided by NCBH in its application regarding the recruitment of physicians and the identified teaching need for the project was substantially similar to the information provided by other AC-3 applicants in recently approved AC-3 applications. Miles, Tr., pp. 78, 109, 119-20; Ex. 2, Agency File, pp. 147-217, 218-310.

101. Ms. Frisone concluded as well that the information provided by NCBH was sufficient to demonstrate the qualitative need for the project based upon the Agency's past findings dealing with AC-3 applications. Frisone, Tr., pp. 1068, 1111, 1142; also see Ex. 2, Agency File, pp. 124-506.

102. Ms. Frisone further distinguished the Agency's prior decision denying an application submitted by NCBH in 2003 pursuant to Policy AC-3, proposing to acquire an additional MRI and a PET scanner (Project ID No. G-6816-03) (hereinafter "2003 NCBH Findings"). She testified that the review of the 2003 NCBH application was different in several key aspects. Frisone, Tr., pp. 1313-16, 1391-1403; Ex. 2, Agency File, pp. 346-98; accord, Miles, Tr., pp. 78-81.

103. In particular Ms. Frisone pointed to several key differences between the disapproval of the 2003 NCBH application and the approval of the instant NCBH Application pertaining to Criterion 3. Frisone, Tr., pp. 1313-16, 1391-1403; accord, Miles, Tr., pp. 78-81. No such issue relative to Criterion 3 is present regarding the 2010 NCBH Application.

104. The 2003 NCBH Findings are looked upon by the Agency as being an anomaly amongst the other AC-3 Findings; however, Ms. Frisone stated that even those findings are consistent with all others regarding Criterion 3.

105. In the 2003 NCBH Findings and in all the other prior and subsequent findings that are in the Agency File and therefore considered in this application that are related to other Policy AC-3 applicants, the utilization of other health care facilities (including those operated by Novant) was not a factor in determining conformity with Criterion 3. Ms. Frisone stated that this is based on the Agency's interpretation and application of N. C. Gen. Stat. § 131E-183(b). Ex. 2, Agency File, pp. 124-504; Frisone, Tr., pp. 1391-1403; and accord Ex. 501, and Ex. 502.

106. NCBH's application is consistent with the prior Findings by the Agency for AC-3 applications.

b. Quantitative Demonstration of Need

107. Ms. Houlihan testified that the discussion of quantitative need for the proposed project began with the responses in the NCBH Application under Question III.1(b). Houlihan, Tr., pp. 906; Ex. 1, NCBH App. pp. 53-65. Ms. Miles and Ms. Frisone both testified that they understood the empirical demonstration of quantitative need to appear in response to this question along with responses found in Section IV of the NCBH Application, which addressed issues relating to projected utilization. Miles, Tr., pp. 120-32; Frisone, Tr., pp. 1068, 1111, 1142; Ex. 1, NCBH App. pp. 82-85.

108. The NCBH Application documented the historical and projected OR utilization for all NCBH ORs through the third year of operation for the WCSC. Ex. 2, Agency File, pp. 520, quoting, Ex. 1, NCBH App. pp. 82-84.

109. Ms. Houlihan testified that the data provided by NCBH regarding its historical and projected OR utilization was based in the first instance upon the actual historical experience of NCBH as a provider of surgical services. Houlihan, Tr., pp. 881-88, 898-99, 908-14, 918-20. The Agency accepted these representations and found these projections reasonable. Ex. 2, Agency File, pp. 519-27; Miles, Tr., pp. 120-32; Frisone, Tr., pp. 1068, 1111, 1142.

i. Procedures to Be Performed at the WCSC

110. It is important to remember that the fundamental purpose of the project was to decompress the existing strains on the current NCBH complement of 40 operating rooms, while developing new training spaces for the growing WFUHS faculty. The project was not solely about establishing an ambulatory surgery center.

111. As Ms. Houlihan explained, the NCBH Application proposed to shift a percentage of the existing ambulatory surgery volumes from the existing ORs on the NCBH campus to the proposed WCSC. Houlihan, Tr., pp. 908-14; Ex. 1, NCBH App. pp. 57-58. The surgical volumes that were to be shifted to the WCSC were those that were deemed clinically appropriate for treatment in a freestanding ambulatory surgery center. Id.; Petree, Tr., pp. 685-97; Meredith, Tr., pp. 799-803. In total, the NCBH Application proposed to shift 40% of the existing ambulatory surgery volumes from the NCBH main-campus operating rooms to the WCSC. Houlihan, Tr., pp. 908-14; Ex. 1, NCBH App. pp. 57-58.

112. The procedures which were identified as being clinically appropriate were lower acuity procedures which were already being done in the main-campus ORs at NCBH. Houlihan,

Tr., pp. 884-85, 905, 909-10; Petree, Tr., pp. 685-97; Meredith, Tr., pp. 799-803; Ex. 1, NCBH App. pp. 30, 57-58, 61; and accord, Carter, Tr. pp. 562-63. These procedures were selected based upon an analysis performed by members of the NCBH clinical staff to determine which types of procedures could be performed at the WCSC. Houlihan, Tr., pp. 884-85, 905, 909-10; Petree, Tr., pp. 685-97; Ex. 1, NCBH App. pp. 30, 57-58, 61.

113. Betty Petree was primarily responsible for the determination as to which procedures were to be proposed for the WCSC. Petree, Tr., pp. 685-97; Ex. 410, NCBH Procedures Analysis.

114. The primary criteria for determining whether a specific type of surgical procedure was appropriate for the WCSC were (1) whether the patient could be sent home after the completion of the procedure, and (2) the average length of time needed to complete the procedure. Petree, Tr., pp. 685-86. Ms. Petree reviewed data regarding the historical ambulatory surgery procedures performed at NCBH, and based upon her education, expertise, and more than 30 years of clinical experience in operating rooms, she selected a group of procedures which were appropriate for the WCSC. Petree, Tr., pp. 685-97; Ex. 404, CV of Betty Petree; Ex. 410.

115. This list of procedures was reviewed by other members of the NCBH steering committee for the WCSC project, which included surgeons and physicians such as Dr. Meredith, and was then provided to Ms. Houlihan for inclusion in the NCBH Application. Petree, Tr., pp. 683-84; Meredith, Tr., pp. 764, 807; Houlihan, Tr., p. 884-85, 905, 909-10; Ex. 410. This list of procedures ultimately was used by Ms. Houlihan to develop the list of top 20 projected procedures for the WCSC. Houlihan, Tr., pp. 884-85, 905, 909-10; Ex. 1, NCBH App. pp. 30, 57-58, 61.

116. With the fundamental purpose of the project being to decompress the strain on the existing 40 operating rooms, Dr. Meredith, Ms. Petree, and Ms. Houlihan all pointed out that the goal of the WCSC was not to gain new outpatient surgical volumes for NCBH, but rather to better serve the patients that NCBH was already serving. Meredith, Tr., pp. 758-59, 800-803; Petree, Tr., pp. 647, 691-93, 730; Houlihan, Tr., pp. 915-19, 922; and accord, Ex. 1, NCBH App. pp. 46-47, 51-53; Carter, Tr. pp. 562-63.

117. In reviewing the NCBH Application, the Agency Findings noted that the NCBH Application proposal to shift procedures to the WCSC, as well as the list of procedures that were proposed to be shifted, were both reasonable and well documented. Ex. 2, Agency File, pp. 519-21; Miles, Tr., pp. 26-28, 120-32; Frisone, Tr., pp. 1074-76, 1137. No testimony offered by the witnesses offered by the parties at the contested case hearing in this matter called this conclusion by the Agency into question. Petree, Tr., pp. 647, 691-93, ; Meredith, Tr., pp. 758-59, 800-803; Houlihan, Tr., pp. 908-14; Ex. 410; and accord, Ex. 1, NCBH App. pp. 30, 57-58, 61; Ex. 2, Agency File, pp. 519-21.

ii. Projected Growth Rate

118. The NCBH Application provided documentation of the Compound Annual Growth Rate (hereinafter "CAGR") for both inpatient and outpatient surgical procedures for NCBH's fiscal years 2005-2009. Ex. 2, Agency File, pp. 521-22; Ex. 1, NCBH App. pp. 54-55. The CAGR for inpatient surgeries was 2.10%, the CAGR for outpatient surgeries was 4.55%, and the combined CAGR for all surgical services provided at NCBH was 3.49% during that time period. Id. This reflected a 14.7% increase in total surgical case volumes during this time frame. Id.

119. The NCBH Application cited several factors which had resulted in abnormally low growth rates in 2006, most notably a billing dispute between NCBH and Blue Cross / Blue Shield of North Carolina. Ex. 1, NCBH App. p. 55; Houlihan, Tr., pp. 995-97. As a result, the growth rates are not necessarily linear and can be affected by isolated factors—thereby skewing the overall CAGR. Houlihan, Tr., pp. 995-97.

120. Based upon the historical growth rates and considering the proposed addition of 39 new clinical faculty, the NCBH Application assumed that inpatient and outpatient surgical cases would increase 4.5% and 5.0% per year, respectively, in the interim years prior to the project's completion and 5.0% and 5.5% during the first three years of operation. Ex. 2, Agency File, pp. 522-23; Ex. 1, NCBH App. pp. 55-56. NCBH's application charted the projected growth of both inpatient and outpatient surgical procedures at NCBH for 2010 – 2012. Id. at 55-56, 82-84.

121. Based upon these growth rate projections, NCBH utilized the OR need methodology set forth in the 2010 SMFP to determine the total number of operating rooms that would be needed by NCBH in the third project year (FY 2015). Ex. 2, Agency File, p. 523; Ex. 1, NCBH App. p. 57; and accord, Ex. 133, 2010 SMFP.

122. Based upon the OR need methodology, NCBH demonstrated that it would need a total of 47.1 operating rooms by 2015—7.1 more operating rooms than it currently has in service at the NCBH main-campus surgical facility. Id.; Petree, Tr., pp. 648; Frisone, Tr., pp. 1076-81, 1083; Ex. 133, 2010 SMFP. In other words, this calculation leads to the conclusion that NCBH would have a deficit of 7.1 operating rooms by the end of the third project year (2015). Frisone, Tr., pp. 1081-83; Ex. 2, Agency File, p. 523.

123. The 2010 SMFP did not include a need determination for new operating rooms for Forsyth County, and in fact showed a surplus of operating rooms in the county. However, since the NCBH application was relying on Policy AC-3, the need determinations in the SMFP were irrelevant to the determination of conformity under Criterion 3 so long as NCBH complied with the requirements of Policy AC-3. Frisone, Tr., pp. 1094-99, 1105-10, 1231-35; Ex. 133, 2010 SMFP.

124. Ms. Frisone testified that the Agency adopted performance standard rules based upon the Agency's interpretation of N.C. Gen. Stat. § 131E-183(b), and that those rules—in particular 10A N.C.A.C. 14C .2103—are applicable to non-AC-3 proposals to develop new operating rooms and do not apply to AMC applicants seeking to develop new operating rooms. Frisone, Tr., pp. 1081-83; 1103-1110, 1231-35, 1329, 1336-38, 1391-95. Thus, Ms. Frisone and Ms. Miles concluded that the NCBH Application demonstrated the need for an additional seven operating rooms. Id.; Miles, Tr., pp. 120-32; Ex. 2, Agency File, pp. 524, 526-27.

125. N.C. Gen. Stat. § 131E-183(b) establishes that the AMC's do not have to demonstrate utilization at other facilities and therefore the performance standard rules do not compel NCBH to look at the utilization of other facilities in order justify its quantitative analysis.

126. Ultimately, the Agency Findings concluded that:

> *Based on projected faculty recruitment to expand teaching, research, and training within the Division of Surgical Sciences at the Wake Forest School of Medicine and the current utilization of NCBH's existing ORs, NCBH does not have the capacity to accommodate the projected increase in surgeons without additional OR capacity.*

Ex. 2, Agency File, pp. 526.

127. Novant contends that NCBH should have used historical data based upon the federal fiscal year ("FFY") used in hospital License Renewal Applications, which is calculated

from October 1 through September 30, rather than data from NCBH's actual fiscal year ("FY"), which is calculated from July 1 through June 30, because the FFY data would have been more recent. Bres Martin, Tr. pp. 208-11.

128. This contention was raised in Novant's written comments submitted and available to the Agency for consideration during the review. Ex. 2, Agency File, pp. 19-23.

129. Ms. Bres Martin did not believe that NCBH used FY data in order to misrepresent its historical experience. In her experience, NCBH always uses its historical FY in projecting for the future, and the Agency has approved previous NCBH applications based upon that data. Bres Martin, Tr. pp. 209, 322.

130. NCBH pointed out that the 2005-09 CAGR of NCBH's operating rooms using FFY data was actually ***higher*** for inpatient cases than the 2005-09 CAGR using NCBH FY data, and the outpatient data was very similar. Ex. 2, Agency File, pp. 21, 40.

131. Thus, whether the NCBH Application used FY historical data or FFY historical data would not have materially changed its need analysis.

132. In its submitted written comments, Novant also calculated NCBH's need for additional operating rooms based upon the SMFP methodology if it had used NCBH's historical five-year FFY growth rates of 3% for inpatients and 4.5% for outpatients, rather than the projected rates used in the CON application. Based upon its calculation, Novant determined that NCBH would have a need for only 4.4 operating rooms by FFY 2015. Ex. 2, Agency File, p. 22.

133. Novant's projection assumed that NCBH should have included the three Plastic Surgery Center of North Carolina (hereinafter "PSCNC") operating rooms owned by WFUHS in NCBH's inventory of operating rooms, in determining need. Id. As discussed in Finding of Fact Nos. 136-158, infra, based upon N.C. Gen Stat. §131E-183(b), the Agency does not and

could not consider the utilization of other health service facilities, including Plastic Surgery Center of North Carolina, in determining the need for a service proposed by an AMC.

134. If the PSCNC ORs are not included as suggested, then Novant's written comments show NCBH would have a need for seven additional operating rooms by FFY 2015, basically the same number as projected in the NCBH Application. Ex. 2, Agency File, p. 22; Frisone, Tr. pp. 1194-95.

135. Ms. Frisone testified that, if the actual NCBH average case lengths were applied to the analysis contained in Novant's written comments, then NCBH would demonstrate a need for more than seven additional operating rooms. Frisone, Tr., pp. 1192-95, 1338-39, 1341-43, 1345-48 Ex. 2, Agency File, pp. 22, 30, 96, 527; Ex. 409, and compare, Ex. 2, Agency File, pp. 30, 22; Ex. 115.

iii. Applicability of Agency-adopted Utilization-Based Performance Standards to Analysis Under Criterion 3

136. Ms. Houlihan testified that other facilities were not addressed in the NCBH Application because NCBH had concluded that it would be the most effective to develop the WCSC on its campus. Having come to the conclusion that it believed its proposal was the most effective, NCBH did not believe it was necessary to explicitly address why other facilities could not meet the need of the population for the services proposed in the Baptist Application. (Tr. Vol. 5, pp. 894-96). Whether or not this is correct goes to the issue of interpretation of Policy AC-3.

137. Ms. Houlihan also testified that she did not discuss the inability of other facilities to meet the purported need for the NCBH Application because of N.C. Gen. Stat. § 131E-183(b). (Tr. Vol. 5, pp. 894-96) N.C. Gen. Stat. § 131E-183(b) provides:

> The Department is authorized to adopt rules for the review of particular types of applications that will be used in addition to those criteria outlined in subsection (a) of this section and may vary according to the purpose for which a particular review is being conducted or the type of health service reviewed. No such rule adopted by the Department shall require an academic medical center teaching hospital, as defined by the State Medical Facilities Plan, to demonstrate that any facility or service at another hospital is being appropriately utilized in order for that academic medical center teaching hospital to be approved for the issuance of a certificate of need to develop any similar facility or service.
> (Emphasis added)

138. According to Ms. Houlihan, she started using the reference to N.C. Gen. Stat. § 131E-183(b) in all AC-3 CON applications filed by NCBH upon learning that Duke and UNC had been successfully including this reference as a response in the CON applications they had previously submitted to the Agency. (Tr. Vol. 5, pp. 894-96, 989)

139. Ms. Frisone testified that the administrative rules promulgated by the Agency give applicants guidance about the information they need to provide in their applications. (Tr. Vol. 6, pp. 1095-97) She also testified that the rules guide the Agency's review of an application under Criterion 3. *Id.*

140. Ms. Frisone testified that the Agency looks at the administrative rules to determine what an applicant needs to show in its application to demonstrate need for its project in conformance with Criterion 3. (Tr. Vol. 6, pp. 1096-97) If there are performance standards that require an applicant to show certain utilization at other facilities, those standards cannot be applied to an academic medical center, based on N.C. Gen. Stat. § 131E-183(b). (Tr. Vol. 6, pp. 1096-97)

141. Even if there are no performance standards applicable to a particular application, the Agency must still evaluate whether the application conforms to Criterion 3. Frisone. (Tr. Vol. 6, p. 1210)

142. N.C. Gen. Stat. § 131E-183(b) addresses the adoption and applicability of administrative rules. While Criterion 3 is a statute and not an administrative rule, it must be read in conjunction with other applicable statutes, rules and policy, which may affect its applicability, in particular in this instance N.C. Gen. Stat. § 131E-183(b), Rule 10A NCAC 14C .2103, and SMFP Policy AC-3.

143. During the Agency's review of the Baptist Application, Ms. Miles did not make any inquiry of Baptist whether other facilities could meet the needs of the patients proposed to be served by the new WCSC. (Tr. Vol. 1, pp. 45-49) Ms. Miles did not consider whether any other existing facilities perform the procedures proposed to be performed at the WCSC. (Tr. Vol. 1, pp. 27-28)

144. There is no reference to N.C. Gen. Stat. § 131E-183(b) in the Agency's Findings with respect to Criterion 3. (Jt. Ex. 2, pp. 508-27) Ms. Frisone admitted that the Agency Findings do not expressly reference N.C. Gen. Stat. § 131E-183(b). (Tr. Vol. 6, p. 1214)

145. Ms. Frisone testified at length as to her understanding of the applicability of the Agency-adopted utilization-based performance standards set forth in 10A N.C.A.C. 14C .2103. In particular Ms. Frisone testified that the performance standard in 10A N.C.A.C. 14C .2103(b)(1), requiring the applicant to demonstrate that its own facility will be performing a certain number of cases by the third year of the project, was not applicable to the NCBH Application because 10A N.C.A.C. 14C .2103(b)(1) specifically provides that those standards are not applicable to a Policy AC-3 application. The language of the rule is clear that so long as the applicant demonstrates conformance with Policy AC-3, it does not have to otherwise demonstrate the requirements of that section of the rule. Frisone, Tr., pp. 1081-83; 1103-1110, 1231-35, 1329, 1336-38, 1391-95; Ex. 2, Agency File, pp. 545-46

146. Ms. Frisone testified that it was her understanding and prior Agency practice that, pursuant to the language of N.C. Gen. Stat. § 131E-183(b), no AMC applicant could be required to demonstrate that any other health service facility would meet the utilization-based performance standards in 10A N.C.A.C. 14C .2103(c), *including those operated by related entities*,. Frisone, Tr., pp. 1081-83; 1103-1110, 1231-35, 1329, 1336-38, 1391-1403; N.C. Gen. Stat. § 131E-183(b); 10A N.C.A.C. 14C .2103.

147. Thus, since NCBH, an AMC, proposed to develop its service pursuant to Policy AC-3, the utilization requirements in 10A N.C.A.C. 14C .2103(b)(1) and (c) were not applicable to the NCBH Application so long as the application is otherwise conforming to Policy AC-3. Id.

148. Novant did not otherwise challenge the NCBH Application's conformity with the performance standards in 10A N.C.A.C. 14C .2103.

149. Ms. Frisone testified that the purpose underlying the Agency performance standards is to assist it in determining the conformity of applicants with the provisions of the more general Statutory Review Criteria, in particular Criteria 3 and 6. Their purpose is to supplement and assist the review of the underlying Statutory Review Criteria in terms of the requirements they impose on applicants. Frisone, Tr., pp. 1327-30, 1335-36.

150. Ms. Frisone testified that the Agency understands that Policy AC-3 and § 131E-183(b) further prevent the application of those performance standards to Policy AC-3 applications under the Statutory Review Criteria found in N.C. Gen. Stat. § 131E-183(a). Frisone, Tr., pp. 1081-83; 1103-1110, 1231-35, 1329, 1336-38, 1391-95.

151. Based upon the above, Ms. Frisone concluded that the Agency was prohibited from applying any of the Agency-adopted performance standards to the NCBH Application for

any purpose in this review. Frisone, Tr., pp. 1081-83; 1103-1110, 1231-35, 1329, 1336-38, 1391-1403.

152. Ms. Frisone concluded that the NCBH Application was not required to demonstrate the utilization of other area surgical services providers—including Novant owned facilities and others—under 10A N.C.A.C. 14C .2103, in order to demonstrate that the application conformed with Criterion 3. Frisone, Tr., pp. 1081-83; 1103-1110, 1231-35, 1329, 1336-38, 1391-1403.

153. This conclusion is consistent with the Agency's review and analysis of other AC-3 applications. See Finding of Fact Nos. 79-85, supra. It is also consistent with the Agency findings in reviews of other applications filed by AMCs which were *not* filed pursuant to Policy AC-3. Frisone, Tr., pp. 1100-05; Ex. 501; Ex. 502.

154. Craig Smith, Chief of the CON Section, confirmed that Ms. Frisone's testimony regarding the applicability of N.C. Gen. Stat. § 131E-183(b) to the Statutory Review Criteria was consistent with the Agency's interpretation of the CON Law. Smith, Tr., pp. 1419-22.

155. During the contested case hearing, Novant offered no evidence, either in the form of opinion testimony or prior Agency findings, indicating that the Agency's interpretation that N.C. Gen. Stat. § 131E-183(b) prohibits the application of utilization-based performance standards to Criterion 3 was unreasonable or inconsistent with prior Agency practice. Bres Martin, Tr., pp. 174-75.

156. Novant contends that the Agency erred in, among other things, failing to find the NCBH Application non-conforming with Criterion 3 based upon the under-utilization of the PSCNC ORs which were purchased by WFUHS in 2009. Novant further contends that

WFUHS's ownership of the PSCNC ORs constitutes a joint venture with NCBH and that the under-utilization of these operating rooms should have been taken into account by the Agency.

157. However, the failure of the Agency to account for the under-utilization of the PSCNC ORs—or the utilization of any other service area surgical services provider—could only be an error on the part of the Agency if the provisions of 10A N.C.A.C. 14C .2103 are applicable to the review of the NCBH Application under Criterion 3.

158. For the reasons set forth below, the evidence presented by Novant fails to meet its burden of demonstrating that the Agency's determination regarding the applicability of the Agency-adopted utilization-based performance standards to Criterion 3 was not supported by substantial evidence in the record before the Agency.

3. *CRITERION 3: ISSUES PERTAINING TO UTILIZATION OF OTHER AREA PROVIDERS AND MARKET SHARE*

159. None of the Agency's findings in this review found that the NCBH Application was required to demonstrate that other area facilities are or would be appropriately utilized. At hearing, Novant contends that the Agency's failure to either require a market share analysis by NCBH or perform its own market share analysis, i.e., determining what impact the NCBH Application would have on other area providers, was erroneous, arbitrary, and capricious. This contention was raised for the first time at the contested case hearing, and was not included in Novant's written comments submitted to the Agency during the review. Bres Martin, Tr., pp. 311-12; Ex. 2, Agency File, pp. 12-36.

160. Ms. Bres Martin testified at length about the reasons why the lack of a market share analysis was error on the part of the Agency. See generally Bres Martin, Tr., pp. 216-41.

161. Ms. Bres Martin developed six different methodologies, comparing NCBH's projected inpatient and outpatient surgery annual growth rates of 5% and 5.5%, respectively,

with population growth and surgical growth in Davidson, Davie, Forsyth, Surry, Stokes and Yadkin Counties, and with all North Carolina counties combined. Specifically, she compared NCBH's projected annual growth rates with (a) the projected CAGR of the above population between FFY 2009-2014 and/or (b) the historical surgical use CAGR for the above population, from FFY 2007-2009. Ex. 2, Agency File, p. 95; Bres Martin, Tr., pp. 216-41.

162. Based upon her conclusion that NCBH's projected growth rates were higher than both (a) the projected CAGR of the population of these six counties and (b) the historical surgical use CAGR of the population in these six counties, Ms. Bres Martin concluded that NCBH's projected growth in surgical cases would result in an increase in its market share of patients from these six counties. Bres Martin, Tr., pp. 227-41; Ex. 114; Ex. 115.

163. Ms. Bres Martin's calculated change in NCBH's surgical services market share varied from a 1.1% reduction in market share from Davidson County to a 6.4% increase in market share from Stokes County. Ex. 115, Tables 8, 24.

164. Ms. Bres Martin's opinions regarding a projected increase in NCBH's surgical services market share were not discussed in Novant's written comments submitted during the Agency review, and Novant's written comments did not otherwise contend that NCBH's proposal would result in an increase in market share. Bres Martin, Tr., pp. 311-14; and compare, Ex. 2, Agency File, pp. 12-36.

165. The NCBH Application did not project an increase in market share. See generally, Ex. 1, NCBH App.; Bres Martin, Tr., p. 255; Frisone, Tr. pp. 1138-40; Houlihan, Tr., p. 1029; and accord, Carter, Tr. pp. 562-63.

166. The Agency in its review of the NCBH Application did not conduct a market share analysis, because the Application did not project a market share shift of any kind. See generally, Ex. 2, Agency File, pp. 505-52; Bres Martin, Tr., p. 256; Frisone, Tr. pp. 1138-40.

167. As Ms. Frisone explained, when a market share shift is proposed, the Agency will always analyze those shifts to determine whether they are reasonable. Frisone, Tr., pp. 1118-40; Ex. 34, Brunswick Community Hospital Findings, pp. 11, 16; Ex. 119, CMHA Findings pp. 21, 43.

168. The Agency will also analyze market share where an applicant projects "aggressive" growth. Id. The NCBH Application, however, projected growth that Ms. Frisone described as "no more than what other applicants have proposed in terms of growth based on a number of factors, not just population growth." Frisone, Tr., p. 1139. Thus, Ms. Frisone concluded that no market share analysis was needed. Frisone, Tr., pp. 1138-40, 1237-38.

169. By way of example, Ms. Frisone pointed to Novant's approved CON application to relocate Brunswick Community Hospital, where the Agency found Novant's projected 12.8% market share increase to be reasonable. The market share increase projected in the Brunswick Community Hospital application was higher than any of those Ms. Bres Martin projected for the NCBH Application. Frisone, Tr., pp. 1122-32; Ex. 503; Ex. 34; and compare, Ex. 115; Bres Martin, Tr., pp. 216-41.

170. Ultimately, Ms. Frisone testified that the utilization of other area providers is irrelevant to the analysis of an application submitted by an AMC applicant. Citing prior agency findings addressing applications submitted by both NCBH and UNC Hospitals—both AMCs—but *not* pursuant to Policy AC-3, Ms. Frisone discussed that the utilization of other area providers are not applicable to such applications in any circumstance. Frisone, Tr., pp. 1100-54;

Ex. 501, NCBH Cancer Center Findings, pp. 16, 38-39; Ex. 502, UNC Hospitals Cancer Hospital Findings, pp. 32, 40-41.

171. Ms. Bres Martin did not attempt to determine the hospitals from which surgical patients from these six counties would shift to NCBH. She agreed that they could come from any hospital that treated patients from these counties, including other Academic Medical Center Teaching Hospitals. Thus, there is no way to tell from her analysis whether an increase in NCBH's market share of surgery patients would have any specific impact on Novant's operating rooms. Bres Martin, Tr., p. 352; Houlihan, Tr. pp. 927-930.

172. NCBH's actual service area is not comprised solely of the six counties identified by Ms. Bres Martin in Exhibit 115. Rather, it is comprised of 19 counties in central and western North Carolina. Ex. 1, NCBH Application, p. 267; Bres Martin, Tr., p. 352; Houlihan, Tr. p. 926; Meredith, Tr., p. 842.

173. Ms. Bres Martin did not calculate market share shifts from 13 of the 19 counties in NCBH's service area, but combined those counties with all of North Carolina. Bres Martin, Tr., p. 352. Because the six counties in Ms. Bres Martin's analysis form just a fraction of the market NCBH serves, they are not representative of the impact the additional proposed operating rooms may have. Houlihan, Tr. pp. 927-28; Meredith, Tr., pp. 842.

174. As noted earlier, methodologies in CON applications for projecting service growth can vary. Ms. Bres Martin agreed that no methodology is 100% correct. She also agreed that health planning methodologies can vary, and that she tends to be a conservative planner. Bres Martin, Tr. pp. 351, 360.

175. There were several factors that Ms. Bres Martin did not take into account in her methodology which could actually show an increase future surgical growth in her six-county

service area beyond historical population growth or historical surgical use rate. Some are set forth below.

176. One such factor is that circumstances can exist which cause growth to be lower one year and higher another. For that reason, in calculating CAGR, health planners prefer to use five-year time frames, rather than the three-year time frame used by Ms. Bres Martin, as they tend to smooth out short-term anomalies. Bres Martin, Tr. p. 422; Houlihan, Tr. pp. 995-96.

177. Another factor is that the FY 2007-2009 time frame used in Ms. Bres Martin's analysis occurred during the most recent recession. During economic downturns, people often postpone elective surgery. Ms. Bres Martin agreed that during that time frame, there were a number of providers who were experiencing downturns in utilization. Bres Martin, Tr., pp. 356, 358.

178. In addition, Ms. Bres Martin's analysis did not take into account the expected increase in patients having access to insurance or Medicaid, under the federal health care reform law enacted in the spring of 2010. Bres Martin, Tr., pp. 359-360; Houlihan, Tr. p. 928.

179. In this regard, Ms. Bres Martin reviewed the May/June 2010 issue of the North Carolina Medical Journal, which she considers a reliable scholarly source in determining health planning issues. That Journal is published by the North Carolina Institute of Medicine, which Ms. Bres Martin would consider a leader in public health research in North Carolina and nationally. She also would consider its authors, Dr. Pam Silberman and Dr. Thomas Ricketts, both of whom she knows personally, to be experts in health policy. That article predicted that as a result of the law, in 2014 there will be approximately 340,000 new people eligible for Medicaid in North Carolina of which approximately 257,000 will enroll. In addition, there are already approximately 320,000 people who are currently eligible for but not enrolled in Medicaid, of

which approximately 167,000 will enroll by 2014. Thus, the article estimates that by 2014, approximately 424,000 additional people in North Carolina will have health care coverage. Ms. Bres Martin testified that she would have no reason to doubt these projections. Bres Martin, Tr., pp. 375-82; Ex. 407[A].

180. Ms. Bres Martin's analysis also did not take into account the projected growth in the population or the utilization of surgical services by the 45-64 and 65+ age population. These factors were included as part of the reason for NCBH's projected increase in surgical growth. Bres Martin, Tr. pp. 307-09; Ex. 1, NCBH Application, p. 48-49.

181. More than half of NCBH's surgical patients are 45+, and many of those are actually 65+. The NCBH Application showed the growth rate for the 65+ population for its 19 county service area was 3.3%, much higher than the growth rate of the population overall. Houlihan, Tr. pp. 926, 931.

182. Ms. Bres Martin's market share analysis also did not account for the variation of surgical utilization based on different age cohorts. Different age cohorts have surgeries at different rates. The 65+ age group has two to four times the number of surgeries that would be seen in a younger age cohort. Because the 65+ age cohort is the largest growing and the fastest growing, that growth, coupled with higher surgical use rate, is a contributing factor to the growth in surgical cases greater than the population growth rate. Houlihan, Tr. pp. 926-27, 931.

183. Finally, Ms. Bres Martin's analysis did not take into account the acuity levels of the surgery patients served at NCBH, as opposed to the other facilities in her six-county service area. Houlihan, Tr. pp. 929-930.

184. Various witnesses affirmed that both inpatient and outpatient surgeries performed at NCBH generally take longer than inpatient and outpatient surgeries performed in Novant

operating rooms. Bres Martin, Tr. pp. 337-40; Carter, Tr. pp. 541, 552; Petree, Tr. p. 671-72, 676, 696-97; Meredith, Tr. pp. 791-92, 807-08. The NCBH Application provides data for FY 2005 to FY 2009, which shows that the average case time at NCBH was 3.12 hours for inpatient cases and 1.79 hours for outpatient cases. Ex. 2, Agency File, p. 513.

185. As discussed above, one reason NCBH's case times are longer than FMC's or MPH's is because it serves patients with higher acuity levels than the other operating rooms in Forsyth County. Bres Martin, Tr. pp. 337-40; Petree, Tr. p. 671-72, 676, 694-97; Meredith, Tr. pp. 791-92, 807-08. This is true for both inpatients and outpatients. FMC, a Novant facility, actually sends certain high acuity patients to NCBH for surgery. Petree, Tr. p. 694-97.

186. NCBH's patients also have a higher case mix index than patients at FMC or MPH. "Case mix index" is an index that reports the severity of the classification of illnesses of the patients, along with the types of surgical cases that are done on these patients. Petree, Tr. pp. 695-696.

187. Case times are longer on higher case mix index patients. They often are larger, bigger cases, which take more preoperative preparation because of the gravity of their illness and because of the gravity of their general state of health and welfare. It often takes more people to take care of surgical patients and it increases the patient's length of stay in days. Id.

188. Case times also are longer because residents and medical students are being taught during most surgical cases performed at NCBH. Meredith, Tr., pp. 807-08; Petree, Tr., pp. 696-97; Carter, Tr., p. 541.

189. Because of the higher acuity of its patients, NCBH serves a different patient population from the other providers in Ms. Bres Martin's six-county service area.

190. Ms. Bres Martin's analysis focused on the surgical use rates for FY 2007-09. To the extent that this time frame is appropriate to consider for purposes of NCBH's projected utilization, during the same time frame, the historical CAGR at NCBH for inpatient and outpatient cases was 4.6% and 5.75%, respectively. This growth occurred despite the fact that NCBH had no additional operating rooms during that time frame. Compare Ex. 115, Ex. 1, NCBH App., pp. 55-56, and Ex. 2, Agency File, pp. 522-23.

191. The historical FFY 2007-2009 CAGR for surgical services at NCBH is similar to the NCBH Application's projected FY 2014-2016 annual growth rates of 5% and 5.5% for inpatient and outpatient cases.

192. In addition, the NCBH Application's historical growth rate for FY 2008-2009 was 5.52% and 5.83%, respectively. Ex. 1, NCBH App., p. 55; Ex. 2, Agency File, p. 527.

193. Ms. Bres Martin's opinions regarding a market share shift do not support a finding that the NCBH Application should have been found non-conforming with Criterion 3.

194. The preponderance of the evidence demonstrates that the Agency properly found the NCBH Application conforming with Criterion 3.

B. OTHER STATUTORY REVIEW CRITERIA

195. Except as addressed and dispensed with herein or separately as part of the Order of this Court on NCBH's Motion for Summary Judgment, Novant did not raise any issues regarding the Agency's determinations under the remaining Statutory Review Criteria found in N.C. Gen. Stat. § 131E-183(a). Thus, as a matter of law and fact the Agency's determinations under these criteria are deemed appropriate and free of error.

III. IMPACT OF AGENCY DETERMINATION ON THE RIGHTS OF NOVANT

A. SUBSTANTIAL PREJUDICE

196. Central to Novant's claim of substantial prejudice is its contention that the NCBH Application provided an unfair advantage that was not the result of ordinary competition. (Tr. Vol. 3, p. 600) Because there is no need for operating rooms in Forsyth County in the 2010 SMFP, Novant was precluded from applying for additional operating rooms. (Tr. Vol. 7, pp. 1388-89) Because the NCBH Application was submitted pursuant to Policy AC-3, which is only available to AMC's, Novant could not submit a similar application for operating rooms. (Tr. Vol. 3, p. 593) Novant is not an AMC, and, therefore, it was not able to file an application for operating rooms to compete with NCBH.

197. Also primary to Novant's claim of substantial prejudice is what if any market shift does NCBH project.

198. Novant's claim that the approval of the NCBH Application would substantially prejudice Novant was based primarily on the testimony of Ms. Bres Martin, Ms. Carter, and Ms. Liner.

1. MS. BRES MARTIN'S TESTIMONY

199. As is discussed above, Ms. Bres Martin attempted to analyze the market share impact of the NCBH Application on existing surgical services providers operated by Novant. For the reasons stated above, Ms. Bres Martin's analysis is not persuasive in that it fails to consider numerous factors that were specifically included in the NCBH methodology. See Section II.A.3, supra.

200. In addition to the issues discussed above, Ms. Bres Martin's analysis is equally not persuasive for the purpose of demonstrating substantial prejudice on the part of Novant to the extent that it attempted to analyze the surgical use rates for the NCBH service area.

201. Despite the historical growth in the ***number*** of surgical cases at NCBH, no evidence was offered during the contested case hearing indicating that its historical ***market share*** of inpatient and outpatient surgical cases has been increasing. Ms. Bres Martin specifically testified that she had done no such historical market share analysis. Bres Martin, Tr., p. 401.

202. Ms. Bres Martin agreed that no provider is entitled to a particular market share of surgical patients. She also agreed that competition is a good thing. Bres Martin, Tr. pp. 401-02

203. For the reasons set forth in this section, as well as those set forth above, Ms. Bres Martin's assumption that the growth in surgical cases would substantially prejudice Novant is speculative, because (1) Ms. Bres Martin's projection of future growth in surgery based upon historical population and surgical utilization data is very conservative, and does not take into account any factors which could cause it to be higher in the future; and (2) even assuming NCBH's market share will grow, Ms. Bres Martin's analysis does not demonstrate that such growth will cause a decrease in the Novant's surgical services market share. Further, as discussed in the Conclusions of Law below, under North Carolina law, a general loss of market share is not sufficient to support or define any legal right that is substantially prejudiced by the Agency's decision.

2. Ms. Carter's Testimony

204. Ms. Carter conducted a financial analysis of the WCSC on outpatient surgical cases in the operating rooms at Medical Park Hospital. She estimated that the growth in outpatient surgery at NCBH would have a $7-11.9 million annual negative impact on Medical

Park Hospital. Carter, Tr. pp. 514-28; Ex. 181, pp. 1-4. Indeed, if supported, loss of such a large amount of revenue could constitute a substantial prejudice.

205. Ms. Carter assumed that NCBH had projected a market share shift in Forsyth County outpatient surgical patients to NCBH. Carter, Tr. p. 555. Her calculation was based on the assumption that the NCBH's percentage of outpatient surgery patients from Forsyth County would increase from 32% to 42% as a result of the WCSC. However, Ms. Carter could not point to anything in the NCBH Application which projected this market share shift.

206. Ms. Carter ultimately conceded that, if a 10% market share shift was not proposed, then her assumptions would be incorrect. Carter, Tr. p. 558.

207. Ms. Carter's assumption of projected market share shift was in fact, incorrect. The NCBH Application did not project an increase in the percentage of inpatient or outpatient surgery patients from Forsyth County. The NCBH Application's projected percentage of patients from each county was based solely upon its historical percentage of patients from the same counties. Ex. 1, NCBH App., p. 74; Houlihan, Tr. pp. 913-15, 1029-30; Miles, Tr., pp. 83-85; Ex. 181, pp. 1-4; Ex. 239, pp. 46-51 and 52-53 also see Ex. 239, pp. 46-53 [Gamble Dep., pp. 80-95, 101-103].

208. The Application explained that 32% of its historical total outpatient surgery patients were from Forsyth County. The NCBH Application projected that the total outpatient surgical patient percentage would be the same. Id.

209. The Application's projection was the same as NCBH's *historical* percentage of the lower acuity patients from Forsyth County. The projection was that 42% of its lower acuity outpatient surgery patients who could be served in a setting like the WCSC would come from Forsyth County, and that projected percentage would be the same as NCBH's *historical*

percentage. This was based upon an analysis of the acuity of historical surgical cases by Dr. Meredith and Ms. Petree, which they provided to Ms. Houlihan as part of her preparation of the NCBH Application. Houlihan, Tr. p. 910; Petree, Tr. pp. 685-97; and accord, Ex. 1, NCBH App., pp. 30, 57-58, 61.

210. In making her assumption that the NCBH Application projected an increase in the percentage of outpatient surgical patients from Forsyth County, Ms. Carter seemingly confused the percentage of historical *total* outpatient surgical patients with the percentage of historical *lower acuity* outpatient surgery patients who could have been served in a setting like the WCSC. Ms. Carter's assumptions, thus, were incorrect.

211. Ms. Carter also seemingly confused NCBH's *percentage* of patients from Forsyth County with its *market share* of patients from Forsyth County. Ms. Houlihan explained that patient origin is a reflection of a facility's total cases by county. It seeks to identify your internal cases by the different counties listed. In order to use patient origin data to determine market share, you also would have to know the total number of surgical cases done in each of the counties in the service area. Ms. Carter did not conduct this sort of analysis. Houlihan, Tr. pp. 915-17.

212. Thus, the NCBH Application did not project that its percentage *or* market share of either low acuity or total outpatient surgical patients from Forsyth County would increase.

213. As a result of Ms. Carter's erroneous assumption, there is no statistical or otherwise reliable support for her projection that the growth in outpatient surgery at NCBH would have a $7-11.9 million annual negative impact on Medical Park Hospital. Carter, Tr. p. 559; Houlihan, Tr. pp. 918-19.

214. Ms. Carter performed no other analysis of the financial impact of the WCSC on the operating rooms owned by Novant.

3. MS. LINER'S TESTIMONY

215. Ms. Liner testified that she generally agreed with Ms. Carter's opinion of the impact of the WCSC on Medical Park Hospital, but believed they were understated. However, this was just a general belief, and she did not perform any market share analysis of her own. Liner, Tr. p. 597.

216. In addition, Ms. Liner's opinions were based upon the assumptions contained in Ms. Carter's analysis contained in Exhibit 180, pp. 1-4. Ms. Liner was not offered or accepted as an expert witness. Because Ms. Carter incorrectly assumed that NCBH intended to increase its percentage of Forsyth County surgical patients, Ms. Liner's reliance on Ms. Carter's opinion was flawed.

4. DEPOSITION TESTIMONY OF GREGORY J. BEIER

217. In addition to live testimony, Novant offered the deposition testimony of Mr. Beier on the substantial prejudice issue. Mr. Beier testified that he believed that as part of this project, WFUHS may try to recruit local community physicians to the WFUHS faculty. Ex. 239, pp. 12-14 [Beier Dep., pp. 119-123].

218. However, Mr. Beier could only identify one type of community physician, gynecologists, who had been recruited to the WFUHS faculty in the past. Mr. Beier did not actually know how many gynecologists had actually been recruited, or whether any actually joined the WFUHS faculty. Id.

219. None of the 39 projected additional surgical faculty that WFUHS expects to hire in conjunction with the NCBH Application are gynecologists, and gynecologists are not part of

the WFUHS Department of Surgical Services. Ex. 1, NCBH App., pp. 46-47; Meredith, Tr., p. 755.

220. The NCBH Application does not propose to allow non-faculty community physicians to perform surgical cases in the WCSC. Ex. 1, NCBH App., pp. 103-105; Carter, Tr., pp. 561-624.

221. Mr. Beier also testified that he agreed with Ms. Carter's analysis that the approval of the NCBH Application could result in a loss to Novant of approximately $8 to $12 million. Ex. 239, pp. 20, 22-23 [Beier Dep., pp. 213-214, 248-249].

222. However, as with Ms. Liner, Mr. Beier's assumption of this lost income was based upon Ms. Carter's assumption that the NCBH Application projected a 10% increase in the percentage of outpatient surgical patients from Forsyth County. Mr. Beier did not perform a market share analysis of his own.

223. Because Ms. Carter's assumption was incorrect, Mr. Beier's opinion that Novant will lose income as a result of the NCBH project is not supported.

B. ANY MARKET SHARE SHIFT WILL BE CAUSED BY WFUHS HIRING OF ADDITIONAL SURGEONS

224. As noted, the basis for the NCBH Application was to accommodate the growth of existing and projected faculty in the Surgical Sciences Department at WFUHS.

225. No CON is required for WFUHS to hire additional surgical faculty. Bres Martin, Tr. p. 563; Carter, Tr. p. 563; accord, N.C. Gen. Stat. §§ 131E-176 and -178.

226. With the exception of emergency situations, patients choose a surgeon who will perform their surgery, either directly or through referral by another physician. Patients do not generally choose the operating room where the surgery will be performed. Bres Martin, Tr. pp. 397-98; Carter, Tr. p. 562; Petree, Tr., pp. 665.

227. With the exception of OB surgeries performed as part of the joint OB/GYN program between NCBH and FMC, WFUHS surgeons rarely perform surgeries at FMC or the other hospitals owned by Novant. Similarly, community physicians who are not on the faculty of WFUHS do not perform surgeries at NCBH. The NCBH Application proposes to serve the same group of physicians (the faculty of the WFUHS) that it already serves, and if a patient chooses to be seen by a WFUHS surgeon, any surgery they receive will be performed at NCBH. Ex. 1, NCBH App., pp. 103-105; Carter, Tr. pp. 562-63.

228. Because the preponderance of the evidence demonstrates that patients first choose their surgeon and the NCBH Application proposes to serve the same group of physicians (the faculty of the WFUHS) that it already serves, the Agency's approval of the NCBH Application should not, in and of itself, negatively impact Novant's market share of inpatient and outpatient surgical patients. Rather, if such market share change occurs, it will be due to patients choosing to be operated on by WFUHS surgeons. Since the hiring of additional surgeons does not require a CON, Novant has not demonstrated that the Agency's approval of the NCBH Application to add seven operating rooms will be the cause of any shift in market share.

Based upon the foregoing Findings of Fact the undersigned makes the following

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.

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. The parties received proper notice of the hearing in this matter.

5. As the Petitioner in this case, Novant has the burden of proof as to all issues presented to the Court regarding the Agency's approval of the NCBH Application. See Southland Amusements and Vending, Inc. v. Rourk, 143 N.C. App. 88, 94, 545 S.E.2d 254, 257 (2001); Britthaven, Inc. v. North Carolina Dept. of Human Resources, Div. of Facility Svcs., supra.

6. 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 one of these criteria, then the applicant is not entitled to a CON for the proposed project as a matter of law. See Presbyterian-Orthopedic Hospital v. N.C. Dept. 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 criteria supports entry of summary judgment against the applicant) (emphasis in original).

7. Under N.C. Gen. Stat. § 131E-183(a), the Agency "shall determine that an application is either consistent with or not in conflict with these criteria before a certificate of need for the proposed project shall be issued."

8. Novant asserted that the Agency erred in its application of N.C. Gen. Stat. § 131E-183(a), the statutory review criteria, to the NCBH Application. In particular, Novant

asserted that the Agency acted erroneously in its interpretation of the requirements of N.C. Gen. Stat. § 131E-183(a)(3), Criterion 3.

9. With the exception of what may be contained in the separate Order on the Motions for Summary Judgment, in concluding that the NCBH Application was conforming with the Statutory Review Criteria contained in N.C. Gen. Stat. § 131E-183(a), the Agency did not did not exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; or fail to act as required by rule or law. Ex. 2, Agency File, pp. 505-36.

10. With the exception of what may be contained in the separate Order on the Motions for Summary Judgment, in concluding that the NCBH Application was conforming with the applicable Agency Rules found at 10A N.C.A.C. 14C .2100 *et seq.*, the Agency did not did not exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; or fail to act as required by rule or law. Ex. 2, Agency File, pp. 536-52.

I. CONCLUSIONS OF LAW ON CRITERION 3

11. The NCBH Application complies 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. . . ."

12. The NCBH Application is conforming with Criterion 3 because it adequately identified the population to be served by the proposed project and because the applicant adequately demonstrated the need the identified population has for the services proposed.

13. The evidence presented to the Court demonstrates that the Agency properly applied Criterion 3 as part of its review of the NCBH Application.

14. The Agency properly determined that N.C. Gen. Stat. § 131E-183(b) prohibited the Agency from considering the utilization of other health service facilities, including the facilities owned by Novant and the PSCNC OR's, in determining NCBH's conformity with Criterion 3.

15. The authority of the Agency to adopt rules respecting the applications it reviews devolves from the language of N.C. Gen. Stat. § 131E-183(b), which specifically authorizes the Agency to "adopt rules for the review of particular types of applications" to be used "in addition to" the Statutory Review Criteria outlined under N.C. Gen. Stat. § 131E-183(a). Because the statutory criteria themselves do not provide the specific parameters by which the Agency can determine whether a particular service is conforming, the Agency rules assist the Agency in determining conformity with the statutory criteria.

16. N.C. Gen. Stat. § 131E-183(b) prohibits the Agency from adopting a rule which would "require an academic medical center teaching hospital, as defined by the State Medical Facilities Plan, to demonstrate that any facility or service at another hospital is being appropriately utilized in order for that academic medical center teaching hospital to be approved for the issuance of a certificate of need to develop any similar facility or service."

17. The Agency adopted performance standard rules based upon the Agency's interpretation of N.C. Gen. Stat. § 131E-183(b), and in particular 10A N.C.A.C. 14C .2103 is applicable to non-AC-3 proposals to develop new operating rooms and does not apply to AMC applicants seeking to develop new operating rooms. 10A N.C.A.C. 14C.2103 provides in pertinent part:

> (b) A proposal to establish a new ambulatory surgical facility, to establish a new campus of an existing facility, to establish a new hospital, to increase the number of operating rooms in an existing facility (excluding dedicated C-section operating rooms), to convert a specialty ambulatory surgical program to a multispecialty ambulatory surgical program or to add a specialty to a specialty ambulatory surgical program shall:
>
> > (1) demonstrate the need for the number of proposed operating rooms in the facility which is proposed to be developed or expanded in the third operating year of the project . . . or demonstrate conformance of the proposed project to Policy AC-3 in the State Medical Facilities Plan titled "Exemption From Plan Provisions for Certain Academic Medical Center Teaching Hospital Projects;"
>
> 10A N.C.A.C. 14C.2103(b)(1)

18. 10A N.C.A.C. 14C.2103(c) addresses a proposal to increase the number of operating rooms in a service area and does not specifically include the language concerning conformance with Policy AC-3.

19. In prior reviews of AMC applications, the Agency has consistently interpreted N.C. Gen. Stat. § 131E-183(b) to mean that the Agency may not require an AMC to demonstrate that any health service facility or service at another hospital is being appropriately utilized in order to demonstrate conformity with any of the Statutory Review Criteria enumerated in N.C. Gen. Stat. § 131E-183(a).

20. In as much as N.C. Gen. Stat. § 131E-183(b) establishes that the AMC's do not have to demonstrate utilization at other facilities, the performance standard rules do not compel NCBH to look at the utilization of other facilities in order to justify its analysis for Criterion 3.

21. Since the PSCNC OR's are an existing ambulatory surgical facility, the utilization of those OR's would not be considered in determining the NCBH Application's conformity with Criterion 3. Id.

22. The Agency's interpretation and application of the statutes and rules it is empowered to enforce are entitled to deference, as long as the agency's interpretation is reasonable and based on a permissible construction of the statute. Craven Regional Medical Authority v. N.C. Dept. of Health and Human Services, 176 N.C. App. 46, 58, 625 S.E.2d 837, 844 (2006); Good Hope Health Sys., L.L.C. v. N.C. Dept. of Health & Human Services, Div. of Facility Services, Certificate of Need Section, 189 N.C. App. 534, 544, 659 S.E.2d 456, 463 (N.C. Ct. App. 2008), aff'd sub nom. Good Hope Health Sys., L.L.C. v. N.C. Dept. of Health & Human Services, Div. of Facility Services, 362 N.C. 504, 666 S.E.2d 749 (2008).

23. Subpart (a) and Subpart (b) of N.C. Gen. Stat. § 131E-183 must be read together and in harmony. See In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co., 161 N.C. App. 558, 560, 589 S.E.2d 179, 181 (2003) ("Statutory provisions must be read in context: 'Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole.'") (quoting, Comr. of Insurance v. Automobile Rate Office, 294 N.C. 60, 66, 241 S.E.2d 324, 328 (1978)). It would be inconsistent to render the utilization of other facilities irrelevant under the rules but then make it relevant under the Statutory Criteria. If that interpretation were to govern, there would be no need for the General Assembly to except AMC's in Subpart (b) because AMC's would have to address the utilization of other facilities in Subpart (a). In re Hayes, ___ N.C. App. ___, 681 S.E.2d 395, 401 (2009) (stating "a statute must be construed, if possible, so as to give effect to every part of it, it being presumed that the Legislature did not intend any of its provisions to be surplusage.").

24. N.C. Gen. Stat. § 131E-183(b) is specific in its language relating to the utilization of others, as compared to the more general language in Criterion 3. See Krauss v. Wayne County Dep't of Soc. Servs., 347 N.C. 371, 378, 493 S.E.2d 428, 433 (1997) (specific provision

and general provision should be read together and harmonized, but, if not possible, specific provision controls over general provision). Indeed, Subpart (b) is the only provision in N.C. Gen. Stat. § 131E-183 that specifically mentions the utilization of others.

25. Finally, because an agency may not enact any rule which is contrary to the law, N.C. Gen. Stat. § 131E-183(b) trumps the rule at 10A N.C.A.C. 14C.2103(c). See Thomas v. N.C. Dept. of Human Res., 124 N.C. App. 698, 710, 478 S.E.2d 816, 823 (N.C. Ct. App. 1996) aff'd, 346 N.C. 268, 485 S.E.2d 295 (1997) ("a regulation that conflicts with its enabling legislation can … have no effect.")

26. Novant argued during the contested case hearing that the AMC exemption in N.C. Gen. Stat. § 131E-183(b) should be applied only to services provided by other hospitals. The language in § 131E-183(b) is clear and Novant's proposed interpretation of the law is inconsistent with the generally-accepted rules of construction and the doctrine of the last antecedent. Therefore, the interpretation of N.C. Gen. Stat. § 131E-183(b) as requested by Novant is not accepted. HCA Crossroads Residential Center, Inc. v. N. C. Dept. of Health and Human Res., 327 N.C. 573, 578, 398 S.E.2d 466, 469 (1990); Wilkins v. N. C. State Univ., 178 N.C App. 377, 381, 631 S.E.2d 221, 224 (2006).

27. As the evidence presented makes clear, the NCBH Application proposed to serve patients drawn from its existing 19 county service area for surgical procedures performed by members of the WFUHS faculty. This population is the same population that NCBH currently serves and any increases in that population are a function of incremental growth which NCBH would have otherwise experienced. Carter, Tr., pp. 562-63; Meredith, Tr., pp. 801-03.

28. The population proposed to be served by NCBH is not isolated to merely the patients it proposes to treat, but also the medical staff that will use the proposed facility to teach

surgical residents and medical students. Since the need for this project is based upon an articulated teaching need—pursuant to Policy AC-3—it is reasonable that the physicians teaching at the new facility can and should be considered by the Agency in its determination as to whether the applicant adequately identified the population it proposed to serve.

29. While a more traditional and broad definition of "population" refers to a group of people who inhabit a specified area, an alternate definition such as applied in this contested case to a specific demographic of the medical staff at NCBH and Wake Forest School of Medicine is acceptable to define the population to be served in Criterion 3 of this application.

30. The primary focus of the Agency's Finding related to the population to be served is more on NCBH and Wake Forest School of Medicine and their needs than those of the more general population of the inhabitants of the area to be served.

31. The Agency did not err by finding the NCBH Application conforming with Criterion 3 by finding the growth rates used by NCBH were reasonable.

32. The Agency did not err by not determining when the 51 physicians NCBH planned to recruit would begin employment in the time period from 2010-20.

33. The Agency likewise did not err by failing to determine what surgical volume for the WCSC these recruited physicians would generate.

34. The Agency did not err by failing to consider whether there are other existing facilities or services in the service area that could meet the needs of the population; however, the specific provisions of Policy as it applies to other facilities with in twenty miles is discussed in the separate Summary Judgments Decision.

35. The Agency did not err by failing to consider whether the Novant facilities in Forsyth County could be used to meet the purported need for the WCSC proposed in the Baptist Application.

36. Based upon these considerations, the preponderance of the evidence demonstrates that the Agency's finding that the NCBH Application demonstrated the need for the population it proposed to serve was both reasonable and consistent with the provisions of N.C. Gen. Stat. § 150B-23 and the CON Law and was neither erroneous, arbitrary, nor capricious.

II. SUBSTANTIAL PREJUDICE

37. The Administrative Procedure Act and the decisions of the North Carolina appellate courts interpreting the APA require that a petitioner demonstrate by a preponderance of the evidence that "the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights." N.C. Gen. Stat. § 150B-23; Parkway Urology, P.A. v. NCDHHS, __ N.C. App. __, 696 S.E.2d 187 (2010); Presbyterian Hosp. v. NCDHHS, 177 N.C. App. 780, 785, 630 S.E.2d 213, 216 (2006); Bio-Medical Applications v. NCDHHS, 173 N.C. App. 641, 619 S.E.2d 593(2005).

38. Novant failed to demonstrate substantial prejudice to its legal rights, as required by the APA. Novant did not allege that it had been deprived of property or ordered to pay a fine or civil penalty as a result of the Agency's decision approving the NCBH Application. Id.; see Finding of Fact Nos. 172-201, supra.

39. The evidence demonstrated that one of Novant's primary concerns is the effect of competition on its existing market share. However, these allegations regarding potential market share shift were speculative and unsupported by the preponderance of the evidence.

40. The fact that some patients have chosen or may choose to receive services at NCBH instead of one of Novant's facilities does not support or define any legal right that is substantially prejudiced by the Agency's decision. "Everyone has [the] right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition." Coleman v. Whisnant, 225 N.C. 494, 506, 35 S.E.2d 647, 655 (1945). Novant "is not being prevented from benefiting from 'the fruits and advantages of [its] own enterprise, industry, skill and credit,' but is merely being required to compete for such benefit." Bio-Medical Applications v. N.C. Dept. of Health and Human Svcs., 179 N.C. App. 483, 491-92, 634 S.E.2d 572, 578 (2006), quoting, Coleman, at 506, 35 S.E.2d at 655.

41. One of the purposes of the CON Law is to foster competition, which is favored because it helps to lower prices and improve quality. N.C. Gen. Stat. § 131E-183(a)(18a). An AC-3 application is in derogation of the concept to foster competition in that AMC's are exempted from the need determination of the SMFP, and the AMC's are allowed to file applications when there is no need found for such in the SMFP. That is to say that AMC's are given a preferred status in CON law.

42. While recognizing that AMC's are given preferred status in CON law, it is not axiomatic that such status automatically translates into substantial prejudice within the service area.

43. Essential to Novant's position is that the increase in competition resulting from the award of a CON to an AMC based upon AC-3 as inherently and substantially prejudicial to any existing competing health service provider in the same geographic area. This argument does not meet the substantial prejudice requirement contained in N.C. Gen. Stat. § 150B-23(a) and the

case law interpreting it. Novant has failed to carry it's burden and demonstrate that this application has or will cause Novant substantial prejudice.

44. While Novant is an "affected person" under N.C. Gen. Stat. §131E-188 because it provided similar services to individuals residing within the service area of NCBH's proposed operating rooms, the affected person status alone does not satisfy the independent *prima facie* requirement of a showing of substantial prejudice under N.C. Gen. Stat. §150B-23(a). Novant was required to provide specific evidence of harm resulting from the award of the CON to NCBH that went beyond any harm that necessarily resulted from additional competition. Parkway Urology, __ N.C. App. at __, 696 S.E.2d at 194.

45. Novant's failure to establish substantial prejudice, standing alone, warrants a decision against Novant and upholding the CON Section's decision to approve NCBH's Application.

RECOMMENDED DECISION

Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, it is hereby recommended that the decision of the CON Section approving the NCBH Application be **AFFIRMED** to the extent that is discussed in this RECOMMENDED DECISION, but not in derogation of the terms ORDER FOR SUMMARY JUDGMENT entered this same date, and to the extent there is any variance or disagreement between this Recommended Decision and the Order for Summary Judgment, then the Summary Judgment Order shall prevail. .

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

Before the Agency makes the Final Decision, it is required by N.C. Gen. Stat. § 150B-36(a) 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.

The Agency is further 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.

IT IS SO ORDERED, this the 5th day of April, 2011.

By: _____
HON. DONALD W. OVERBY
Administrative Law Judge

CERTIFICATE OF SERVICE

On this date the foregoing Recommended Decision was mailed to:

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This the 5th day of April, 2011.

NORTH CAROLINA OFFICE OF ADMINISTRATIVE HEARINGS

By: Vicky Bullock
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STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF TYRRELL	**10 DOJ 4407**
MICHAEL WILEY ARMSTRONG, **Petitioner,**	
v.	**PROPOSAL FOR DECISION**
NORTH CAROLINA SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION, **Respondent.**	

THE ABOVE-ENTITLED MATTER was heard before the undersigned Augustus B. Elkins II, Administrative Law Judge, on November 15, 2010, in the Pasquotank County Courthouse, Elizabeth City, North Carolina. This case was heard after Respondent requested, pursuant to N.C.G.S. § 150B-40(e), designation of an Administrative Law Judge to preside at the hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

APPEARANCES

FOR PETITIONER: Windy H. Rose, Attorney at Law
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FOR RESPONDENT: John J. Aldridge III, Attorney at Law
Special Deputy Attorney General
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EXHIBITS

FOR PETITIONER: Petitioner's Exhibits #1 through #8.

FOR RESPONDENT: Respondent's Exhibits #1 through #9

ISSUES

1. Did the Petitioner knowingly make a material misrepresentation of information required for certification or accreditation as a justice officer to the North Carolina Sheriffs' Education and Training Standards Commission?

2. Did the Petitioner knowingly and designedly by any means of false pretense, deception, fraud, misrepresentation or cheating whatsoever obtain or attempt to obtain credit, training or certification from the North Carolina Sheriffs' Education and Training Standards Commission?

RULES AT ISSUE

12 NCAC 10B .0204(c) (1) and (2)

OFFICIAL NOTICE TAKEN

Pursuant to 12 NCAC 10B .0205(2) the full Commission may:

"either reduce or suspend the periods of sanction...or substitute a period of probation in lieu of revocation, suspension or denial following an administrative hearing. This authority to reduce or suspend the period of sanction may be utilized by the Commission when extenuating circumstances brought out at the administrative hearing warrant such a reduction or suspension."

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following Findings of Fact by a preponderance of the evidence. In making these Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received notice of hearing, and the Petitioner received by certified mail, the "proposed revocation" of justice officer certification letter, mailed by Respondent Sheriffs' Commission on June 23, 2010.

2. The North Carolina Sheriffs' Education and Training Standards Commission has the authority granted under Chapter 17E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 10B, to certify justice officers and to deny, revoke, or suspend such certification.

3. The Petitioner was appointed as a jailor through the Dare County Sheriff's Office on June 21, 1992. The Petitioner signed a report of Appointment form for this appointment below an attestation which reads, in pertinent part, "...that the information provided above and all other information submitted by me, both oral and written throughout the employment and certification process is thorough, complete and accurate to the best of my knowledge. I further understand and agree that any omission, falsification, or misrepresentation of any factor or portion of such information can be the sole basis for termination of my employment and/or denial or revocation of my certification at any time; now or later." The Petitioner completed a Personal History Statement (Form F-3), on or about March 30, 1992, as part of his original employment application with the Dare County Sheriff's Office and in order to obtain certification as a justice officer from the North Carolina Sheriffs' Education and Training Standards Commission (Sheriffs' Commission).

4. Question No. 44 of the Sheriffs' Commission Form F-3 asked the applicant to disclose whether or not he had ever used marijuana, and if so, to describe the circumstances. This question asking about the Petitioner's prior use of marijuana is under the section of "prior criminal conduct". Directly above Question No. 44 is a note which reads as follows, "answer all of the following questions completely and accurately. Any falsifications or misstatements of fact may be sufficient to disqualify you from certification." Applicants for the position of justice officer must disclose all prior criminal conduct. When the Petitioner answered Question No. 44 on this Personal History Statement, Petitioner indicated that he had previously used marijuana. The Petitioner went on to explain, "I have experimented once in high school. Only on a dare. That was the first and last time attempted."

5. It appears the Petitioner disclosed to the Dare County Sheriff's Office in 1992 the fact that he had previously used marijuana. Petitioner was hired as a jailor with the Dare County Sheriff's Office and subsequently received certification as a jailor through the Respondent.

6. The Petitioner resigned from the Dare County Sheriff's Office on October 22, 2009. The Petitioner was appointed as a detention officer through the Chowan County Sheriff's Office on November 1, 2009. Petitioner signed a second Report of Appointment form for the Chowan County Sheriff's Office on November 20, 2009. The Petitioner signed this form underneath a similar attestation referenced above for the 1992 Dare County Report of Appointment form.

7. As part of the Petitioner's application process with the Chowan County Sheriff's Office, Petitioner completed a new Personal History Statement (Form F-3).

Petitioner signed this Personal History Statement under oath on August 4, 2009, certifying that each and every statement on the Personal History Statement was true and complete. He further acknowledged that any misstatements or omissions of information could subject him to disqualification or dismissal.

8. On his Chowan County Personal History Statement, the Petitioner had to describe his prior criminal conduct as he had on the 1992 Dare County Personal History Statement. Question No. 39 of the 2009 Personal History Statement asked the Petitioner, "Have you ever used any illegal drugs including but not limited to marijuana, steroids, opiates, pills, heroin, cocaine, crack, LSD, etc., to include even one time use or experimentation?" The Petitioner indicated that he had previously used marijuana. In response to this question, the Petitioner stated that he, "used marijuana when I was a teenager, around age 16 through 18. Used drug approximately six to ten times. Last use was a laced joint with an unknown drug in it. Which cured me of ever doing such again."

9. When the staff for the Respondent reviewed and compared the Petitioner's 1992 Personal History Statement through the Dare County Sheriff's Office with his 2009 Chowan County Personal History Statement, it was determined that there were several discrepancies in the Petitioner's responses. Specifically, it was noted that the Petitioner did not have consistent responses as to a fine he had previously paid on a speeding citation. Additionally, the discrepancy between the manner in which the Petitioner explained his prior involvement with marijuana was noted when staff for the Respondent conducted this review. Staff for Respondent discussed these discrepancies with the Director of the Sheriffs' Standards Division, who in turn consulted with legal counsel for the Respondent. The decision was made to submit the discrepancy in the Petitioner's responses as to his prior marijuana use to the Probable Cause Committee of the Respondent.

10. Staff solicited the input of the Petitioner as to why he answered differently on his two Personal History Statements concerning his prior involvement with marijuana. Petitioner responded in a letter, dated February 2, 2010, explaining that he had experimented once in high school with marijuana only on a dare. Petitioner stated he did not completely list his prior involvement with marijuana because his last incident "cured" him of doing anything of that nature again. Petitioner stated that he failed to remember the other incidents where he had used marijuana, "because that incident (the last incident) was what caused me to correct my behavior in such things." Petitioner went on to state that when he submitted his Personal History Statement through the Chowan County Sheriff's Office, he was then much older and through years reflecting on his past mistakes remembered the approximate times with which he had experimented with marijuana. Petitioner confirms the use of marijuana approximately six to ten times as a teenager. Petitioner reiterated that he did not remember the full extent of his use in 1992.

11. In a letter dated June 23, 2010, the Petitioner was informed that "the Commission has found probable cause exists to believe that your justice officer certification should be revoked." The authority of the revocation was/is "found in Rule .0204(c)(1) and (2)" and the probable cause for revocation was based on Petitioner's

August 4, 2009 Personal History Statement response to use of any illegal drugs which "reveals a much more extensive use of marijuana than you disclosed on your 1992 Personal History Statement."

12. Petitioner requested an administrative hearing in the matter of the findings of the Probable Cause Committee. In his request for an administrative hearing, dated July 6, 2010, Petitioner explained why he did not believe his certification should be revoked. Petitioner stated, "I, being immature and ignorant of youth, failed to see the depth at which the question required answering on my first Personal History Statement (F-3)."

13. In response to the Respondent's first set of Interrogatories and Requests for Admissions, the Petitioner stated in response to Interrogatory No. 4 that he had used marijuana approximately six to ten times between the ages of 16 to 18. He indicated that he had used these drugs at separate occasions around his peers at social gatherings. He indicated that the last time he had used this drug was on a dare at a party. He believed that after smoking this particular marijuana joint he thought the joint was laced with another drug. Petitioner indicated that it frightened him so badly that he had not smoked marijuana since. In response to Interrogatory No. 5, Petitioner stated that the last incident where he smoked marijuana was very scary for him and that stuck out in his mind. He believed that this episode was relevant and important to disclose on his application.

14. The Petitioner testified on his own behalf at this administrative hearing. The Petitioner was born on July 1, 1968 and was approximately 24 years of age at the time he completed the Personal History Statement for the Dare County Sheriff's Office.

15. Petitioner testified at this hearing that the last time he used marijuana was on a dare from a group of friends who were gathered on a beach. Petitioner accepted this dare and took several puffs from a marijuana cigarette which was being passed around. Petitioner stated that he felt as if he was going to die after smoking from this marijuana (which he believes was laced with another drug) and recalls running into the ocean after smoking it. At the time of this use, the Petitioner had gathered on the beach with a number of friends. All had graduated high school. Petitioner recalls they may have been 17 or 18 years of age. Petitioner testified that he did not provide the marijuana and that it was provided by another member of the group. Petitioner was worried about the effects of this particular marijuana episode because he had previously used marijuana and the effects were entirely different on this last occasion.

16. Petitioner testified that he had previously used marijuana approximately six to ten times the previous three to four years. On each occasion the marijuana was provided by another source and it was consumed by way of smoking the marijuana in a cigarette form. On each occasion of the use the Petitioner, who was a teenager, was with a group of other people.

17. Petitioner acknowledges that honesty and integrity are essential attributes to be a detention officer in North Carolina. Petitioner stated that the reason he did not

disclose the previous six to ten times of use on his 1992 Personal History Statement is because in filling out that application, he did not remember the episodes. He believed he was not mature enough at the time to make an informed decision as to what to disclose but did not seek any guidance or assistance on how to answer the question from anyone at the Dare County Sheriff's Office.

18. Petitioner explained that when he completed the 2009 Chowan County Personal History Statement some seventeen years (17) later, his life had changed and allowed him to become more mature. Upon a more thoughtful reflection Petitioner remembered the prior episodes and wrote them in his 2009 Personal History Statement. Petitioner testified that he cannot remember exactly what he may have recalled in 1992.

19. Petitioner acknowledges that each separate use of marijuana would constitute a separate criminal offense. Petitioner acknowledged that the Dare County Sheriff's Office and the Respondent would have wanted to have known about all of his prior uses of marijuana.

20. Petitioner told Captain Dozier with the Dare County Sheriff's Office in 1992 of the single episode where he believed he smoked a laced marijuana cigarette. He stated they talked about that use because Captain Dozier questioned him about it. He did not recall Captain Dozier asking him if he had any other episodes of marijuana use but did not himself speak of any other instances of use.

21. Albert L. (Bert) Austin was the Sheriff of Dare County in 1992 when the Petitioner first applied for employment as a jailor. Sheriff Austin retired in 2002. Sheriff Austin stated that had he known about the Petitioner's six to ten times use of marijuana, he would not have hired him. Nonetheless over the next ten years, Sheriff Austin testified that Petitioner was a person of very good character. During his time working with Petitioner, Sheriff Austin had no complaints on Petitioner, and had no reason to question his trustworthiness or work performance. Further Sheriff Austin had no reason to believe that Petitioner ever used drugs during his employment at the Dare County Sheriff's Department.

22. Dare County Jail Administrator, Norman Johnson, testified that he had no knowledge of the Petitioner's prior involvement with marijuana. Johnson testified that he would take into account in any hiring decision the applicant's honesty as to their past criminal behavior, such as their use of marijuana. He would further take into account the number of times a person experimented with drugs and how long ago was the last usage. Johnson testified that Petitioner was a very good worker and that he never questioned his honesty. Administrator Johnson never questioned Petitioner's trustworthiness and that he never suspected Petitioner used any type of drugs either on duty or off duty during his time at Dare County Sheriff's Office.

23. In a February 18, 2010 letter from Deputy Sheriff Linda N. Terry of the Office of the Sheriff in Chowan County to the Sheriffs' Commission, she writes that Petitioner had explained his usage of marijuana during high school and had submitted a

letter explaining the discrepancies. She goes on to write that "Chief Deputy Andy Bunch and I discussed this issue with Mr. Armstrong, and the department is satisfied with his explanations. We feel Mr. Armstrong was not trying to mislead or hide any of his actions during his high school years."

24. In 1992, the Petitioner was twenty-four years of age and his son was born 15 days after he completed the Personal History Statement. At the time of the Petitioner's application for employment through the Dare County Sheriff's Office, the Petitioner was working at a retail chain and wanted to get the job with Dare County. Petitioner testified that being a law enforcement officer was his passion. He stated he has never been written up. He stated that honesty is not an issue in his life and that he would never intentionally mislead others.

25. Chief Deputy William Bunch of the Chowan County Sheriff's Office testified that he has known the Petitioner for approximately one year. Chief Bunch participated in the interview panel who hired the Petitioner as Chowan County's Chief Jailor. The Petitioner had a very good work ethic and a good reputation. The panel did not know about the Petitioner's prior six to ten time use of marijuana as a teenager. It is unknown what effect, if any, the knowledge of this information would have had on the panel's decision to recommend the Petitioner for that position. Chief Deputy Bunch testified that it would depend on the type of drug used, how long ago the use had been and the frequency of the use. He testified that Petitioner was an honest employee, that he had no concerns on Petitioner's trustworthiness or honesty, and has never suspected Petitioner of using any type of drugs or had any concerns regarding that.

26. Sheriff Dwayne Goodwin of the Chowan County Sheriff's Office testified that he supports the Petitioner and is satisfied with the Petitioner's explanation as to this discrepancy on his prior uses of marijuana and would have still hired him. He would like to retain the Petitioner as an employee. Sheriff Goodwin testified that Petitioner was an honest employee with a great deal of integrity. He has no cause to question Petitioner's trustworthiness. Sheriff Goodwin did not believe that Petitioner knowingly made a misrepresentation to the Commission.

27. The Petitioner's certification case file shows that he received Intermediate and Advanced Professional certificates from the Commission. Petitioner's prior omissions of his six to ten times use of marijuana were unknown to the Commission at that time.

28. Since the Commission began reviewing Petitioner's Personal History Statement completed for Chowan County, Petitioner has consistently admitted to the drug usage set forth in the 2009 Statement. Petitioner did not try to hide the fact that he had used marijuana in the past, in that he admitted such on Statements in both 1992 and 2009.

29. Petitioner has taken many hours of training in various law enforcement areas and been steadily promoted through the years. He further has received numerous acclamations in his career as a detention officer over the last 18 years. Some of those

include Certificate of Appreciation "for your faithfulness to your fellow officers during Hurricanes Dennis and Floyd," the awarding of the Certificate of Merit bar, with letter citing his "professional conduct and devotion to duty has enhanced the standards upheld by this Office," and the Dare County Sheriff's Commendation Award citing his actions along with others "kept drugs out of the building" and sent the culprit "back to the Department of Corrections."

30. The Petitioner testified that given the circumstances at the time, including the impending birth of a child, he probably did not put a lot of thought into his 1992 Personal History Statement. He testified that on completing his 2009 Personal History Statement, he took his time and reflected on past mistakes. He took his time to think of all of those things, good and bad, that caused him to be who he now was. Petitioner testified that his son is now a teenager and he does not want him to do or make the mistakes that he had made.

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. To the extent that the findings of fact contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels.

2. 12 NCAC 10B .0204 (c)(1) and (2) states that the Sheriffs' Commission may deny or revoke the certification of a justice officer when the Commission finds the applicant has:

(1) knowingly made a material misrepresentation of any information required for certification or accreditation from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission; or

(2) knowingly and designed by any means of false pretense, deception, defraud, misrepresentation, or cheating whatsoever, obtained or attempted to obtain credit, training or certification from the Commission or the North Carolina Justice Education and Training Standards Commission.

3. Whether a Petitioner has engaged in knowingly making a misrepresentation or knowingly and designedly by fraud or misrepresentation attempted to obtain certification may be gathered from the facts of the case as applied to the

standards of law that speak to the specific issues. Knowingly means with knowledge; consciously; intelligently; willfully; intentionally and is equivalent to an averment that one knew what he was about to do, and, with such knowledge, proceeded to do the act alleged. Black's Law Dictionary 784 (5th ed. 1979). Misrepresentation is an incorrect or false representation. (See also deceit, fraud, material fact and reliance.) Black's Law Dictionary 903 (5th ed. 1979). Case law in various areas clarifies these concepts and though drawn upon various types of cases such as an application for insurance are nonetheless relevant and binding for other applications as well.

4. The essential elements of fraud are: (1) false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party. See *C.F.R. Foods, Inc. v. Randolph Development Co.*, 107 N.C.App. 584, 421 S.E.2d 386 (1992) *Bolton Corp. v. T.A. Loving Co.*, 94 N.C.App. 392, 380 S.E.2d 796 (1989), citing *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988) and Terry v. Terry, 302 N.C. 77, 273 S.E.2d 674 (1981) citing *Ragsdale v. Kennedy*, 286 N.C.130, 209 S.E.2d 494 (1974); accord *Cofield v. Griffin*, 238 N.C. 377, 78 S.E.2d 131 (1953). As distinguished from negligence, it is always a positive, intentional perversion of truth.

5. As the court in *Meyers & Chapman* pointed out a traditional formulation of the elements of fraud were: (a) a representation made relating to some material past or existing fact, (b) that the representation was false, (c) that when made, the individual knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion, (d) that the individual made the false representation with the intention that it should be acted on by another, (e) that the other party reasonably relied upon the representation and acted upon it, and (f) that the other party suffered injury. Id. 323 N.C. at 568, 374 S.E.2d at 391, citing *Odom v. Little Rock & I-85 Corp.*, 299 N.C. 86, 261 S.E.2d 99 (1980). The court in *Meyers & Chapman* (and as cited in *Bolton Corp.*) disapproved this formulation of the elements of fraud to the extent it suggests that the essential element of the intent to deceive need not be shown. Id. 323 N.C. at 569, 374 S.E.2d at 392. Specifically, the court rejected the idea that "it is unnecessary to prove intent to deceive because intent may be inferred by reckless indifference to the truth." Id at 567, 374 S.E.2d at 391.

6. The North Carolina Courts have held that, in fraud claims, subsequent acts and conduct are competent on the issue of original intent and purpose. *Rowan County Bd. Of Educ. v. U.S. Gypsum Co.*, 103 N.C.App. 288, 407 S.E.2d 860 (1991) quoting *Rush (Cross) v. Beckwith* 293 N.C. 224, 238 S.E.2d 130 (1977) quoting *Early v. Eley*, 243 N.C. 695, 91 S.E.2d 919 (1956).

7. The preponderance of the evidence supports the conclusion that Petitioner did not knowingly make a material misrepresentation of information required for certification or accreditation from the North Carolina Sheriffs' Education and Training Standards Commission. The Petitioner did not knowingly and designedly by means of false pretense, deception, fraud, misrepresentation, or cheating attempt to obtain credit,

training or certification from the North Carolina Sheriffs' Education and Training Standards Commission. The essential requirement of knowingly is absent. Having admitted marijuana use in the 1992 Personal Statement History, the greater weight of the evidence does not support that Petitioner consciously and intelligently intended to deceive or pervert, and as such, Petitioner did not knowingly and willfully with calculation subvert the certification process by stating the incorrect number of times he used marijuana as a teenager. Moreover, the preponderance of the evidence does not support an intentional design or plan to commit fraud. Some 17 years later, the evidence supports the conclusion that the information on Petitioner's 2009 Personal History Statement is correct.

8. Pursuant to 12 NCAC 10B .0205(2): "The Commission may either reduce or suspend the periods of sanction under this Item or substitute a period of probation in lieu of revocation, suspension or denial following an administrative hearing. This authority to reduce or suspend the period of sanction may be utilized by the Commission when extenuating circumstances brought out at the administrative hearing warrant such a reduction or suspension."

9. The circumstances of this hearing lead to the conclusion that the Petitioner is that type of individual suited for and a credit to the law enforcement community, and where the Commission, if applicable, should suspend or in the alternative substitute a period of probation in lieu of revocation, suspension or denial. The Undersigned makes this conclusion as a result of an analysis of the nature of Petitioner's offenses, the years of service and advancement of rank by Petitioner in the field of law enforcement, the Petitioner's present maturity as reflected in the positions held in the Dare County Sheriff's Office and now the Chowan County Sheriff's Office, and the testimony of Captain Dozier, Jail Administrator Norman Johnson and retired Sheriff Albert L. (Bert) Austin of the Dare County Sheriff's Office, and Sheriff Dwayne Goodwin and Chief Deputy William Bunch of the Chowan County Sheriff's Office.

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

PROPOSAL FOR DECISION

The following proposal for decision is fact specific to this case and to this Petitioner.

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. The weight of the evidence in this case sustains a finding that the Petitioner did not knowingly make a material misrepresentation or knowingly or intentionally seek to obtain certification by false pretenses or fraud. In the alternative, extenuating circumstances, including but not

limited to some 19 years as a law enforcement officer in good standing, as set forth in the record, were brought out at the administrative hearing that warrants a reduction or suspension. The preponderance of the evidence in any regard therefore supports a decision that Petitioner, Michael Wiley Armstrong, retain his justice officer certification.

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.

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addresses to the party at the latest address given by the party to the agency and a copy shall be furnished to his attorney of record. N.C.G.S. § 150B-42(a). It is requested that the agency furnish a copy to the Office of Administrative Hearings.

IT IS SO ORDERED.

This is the 18th day of March, 2011.

Augustus B. Elkins II
Administrative Law Judge

A copy of the foregoing was mailed to:

Windy Rose
Attorney at Law
P.O. Box 54
Columbia, NC 27925
ATTORNEY FOR PETITIONER

John J. Aldridge III
Special Deputy Attorney General
NC Department of Justice
Law Enforcement Liaison Section
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ATTORNEY FOR RESPONDENT

This the 21st day of March, 2011.

Anita M. Wright

Office of Administrative Hearings
6714 Mail Service Center
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(919) 431 3000
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STATE OF NORTH CAROLINA		IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF MADISON		FILE NO. 10 OSP 1249
STEWART COATES, Petitioner, v. NORTH CAROLINA DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY (DIVISION OF EMERGENCY MANAGEMENT) Respondent.	)	**DECISION**

THIS MATTER came on to be heard before the Honorable Donald Overby, Administrative Law Judge, on 11 October 2010 at 9:00 a.m. in the Buncombe County Courthouse, 60 Court Plaza , Asheville, North Carolina.

APPEARANCES

For Petitioner: Larry Leake, Esq.
Jamie Stokes, Esq.
Leake and Scott
501 BB&T Building
1 West Park Square
Asheville, North Carolina 28801

For Respondent: Hal F. Askins
Cheryl A. Perry
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

WITNESSES CALLED BY PETITIONER

1. Stewart Coates.
2. Ben Levitan.
3. Susan Spake.
4. Gregory Atchley.
5. Deborah Frisbee Coates.

WITNESSES CALLED BY RESPONDENT

1. Matthew Stemple.
2. James Blanks.
3. William Dancy.
4. Darla Hall.
5. Steven Sloan.
6. Fred Patton.

EXHIBITS

The following exhibits were admitted into evidence on behalf of Petitioner:

Exhibit C, J, 1, 2, 3

The following exhibits were admitted into evidence on behalf of Respondent:

1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 13, 15,

The Court took official notice of Ex. 4.

Ex. 8 with the exception of testimony of Alan Page, Agent Matt Davis, Jennifer Fox, Agent Dave Miller, Mike Cook, Agent Mark Senter, Tiawana Ramsey, and Jimmie Ramsey redacted.

ISSUE

1. Did the Respondent have "just cause" to dismiss the Petitioner from employment with the N.C. Division of Emergency Management pursuant to N.C.G.S. § 126-35, 25 NCAC 1J.0604, 25 NCAC 1J.0608, and 25 NCAC 1J.0614 for unacceptable personal conduct?

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following Findings of Fact. In making the Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

BASED UPON the foregoing and upon the preponderance or greater weight of the evidence, the Undersigned makes the following:

FINDINGS OF FACT

1. All parties have been correctly designated and jurisdiction and venue are proper.

2. The Respondent North Carolina Department of Crime Control and Public Safety, Division of Emergency Management (hereinafter "DEM") is an agency of the State of North Carolina that is subject to the provisions of Chapter 126 of the North Carolina General Statutes.

3. On October 16, 2009, the Petitioner was employed with the Department of Crime Control and Public Safety, North Carolina Division of Emergency Management as a Multi-Hazard Field Planner, and he had been so employed from February 4, 2008 until he was terminated from employment on January 15, 2010.

4. On October 16, 2009, the Petitioner was a "career State employee" as that term is defined in N.C.G.S. § 126-1.1. Prior to October 16, 2009, the Petitioner had been a satisfactory employee of the Respondent, and had never been subject to any disciplinary action.

5. Petitioner completed Basic Law Enforcement Training (BLET) certification in 1991 and has been BLET certified for 19 years. (Resp. Ex. 8, T. pp. 90, lines 15-25, pp. 218, line 25, pp. 219, lines 1-25). Petitioner currently maintains his law enforcement certification, and Petitioner is a reserve officer with the Buncombe County Sheriff's Department and the Madison County Sheriff's Department.

6. Petitioner previously worked as a police officer for the Mars Hill Police Department, as a public safety officer for the Asheville Regional Airport, and as a probation and parole officer for the Division of Probation and Parole. (Resp. Ex. 8, T. pp. 192, lines 19-25), pp. 220, lines 19-25).

7. Petitioner previously served for five years as the Madison County Director of Emergency Management including 911 and the Fire Marshall's Office. (T. pp. 193, lines 15-20).

8. On Friday, October 16, 2009 at approximately 10:18 a.m., a person called the District VII N.C. Alcohol Law Enforcement (ALE) office in Hickory, North Carolina. The call was answered at the Hickory ALE Office by assistant Jennifer Fox, who subsequently transferred the call to ALE Agent Matthew Stemple.

9. The caller, who identified himself as Earl Lunsford, told Agent Matthew Stemple that he was a Tennessee State Bureau of Investigation agent and stated that a white female approximately 50 years old with the last name Ramsey would transport non-tax paid liquor to Hickory, N.C. The caller provided Agent Stemple with a license plate number that belonged to a state emergency management vehicle, a description of the vehicle and the approximate time that the non-tax paid liquor would be

transported on Sunday, October 18, 2009. The caller stated that he received this information from an informant who provided the information to Texas law enforcement. (Resp. Ex. 1, T. pp. 9-12, 13, Lines 1 through 8).

10. According to Agent Stemple, the call lasted less than five minutes. Agent Stemple did not obtain contact information from the caller, nor did he attempt to verify the identity or employment of "Earl Lunsford" at that time.

11. Agent Stemple confirmed that the vehicle plate was an emergency management vehicle. Tiawana Ramsey was identified as a white female of the approximate age with the Division of Emergency Management. (Resp. Ex. 1, T. pp. 12). Agent Stemple spoke with Emergency Management (EM) personnel and determined that there would be an EM conference in Hickory, N.C. (Resp. Ex. 1, T. pp. 23, Lines 19-25 and pp. 24, Lines 1-5).

12. Agent Stemple provided the information he had to his supervisors, and ALE decided to conduct surveillance of the Ramsey residence. During the surveillance of the Ramsey home on Sunday, October 18, 2009, ALE confirmed that Ms. Ramsey drove an emergency management vehicle with that license plate. (Resp. Ex. 1, T. pp. 15, Lines 17-18).

13. On Sunday, October 18, 2009, Mrs. Ramsey departed her home at the time the caller who identified himself as Earl Lunsford indicated she would depart her home. (Resp. Ex. 1, T. pp. 15, Lines 20-25 and pp. 16, 1-2).

14. On Sunday, October 18, 2009, ALE conducted an investigative traffic stop to determine if there was non-tax paid spirituous liquor in Mrs. Ramsey's vehicle. (Resp. Ex. 1, T. pp. 13, Lines 1-8 and pp. 15, lines 21-23).

15. Mrs. Ramsey refused to stop for the blue lights immediately, and when one of the Agents pulled beside her vehicle and motioned for her to stop, Mrs. Ramsey shook her head "no." Mrs. Ramsey drove for approximately one mile before stopping. Mr. Jimmie Ramsey, her husband, was in a separate vehicle following Mrs. Ramsey.

16. After the stop, ALE requested and received consent to search Mrs. Ramsey's vehicle. (Resp. Ex. 1, T. pp. 16, Lines 2-6). Although no non-tax paid liquor was found in the Ramsey vehicles, the Agents did find one bottle of broken-sealed tax-paid liquor in the trunk and one bottle of broken-sealed tax-paid liquor in the passenger compartment of Mrs. Ramsey's vehicle, a violation of North Carolina law.

17. The agents poured the liquor out and Ms. Ramsey was not charged with possession of an open container in a motor vehicle or any other criminal or traffic offense related to the vehicle stop.

18. After the failed investigative traffic stop, Agent Stemple contacted the Tennessee State Bureau of Investigation and asked if they had an employee named Earl Lunsford. The Tennessee State Bureau of Investigation stated that it did not have an employee named Earl Lunsford. Agent Stemple also contacted the Tennessee ABC and Tennessee Highway Patrol who likewise stated that they did not have an employee named Earl Lunsford. (Resp. Ex. 1, T. pp. 16, Lines 10-19).

19. Agent Stemple then began conducting an investigation for a violation of N.C.G.S 14-277 "Impersonation of a Law Enforcement Officer" since the Tennessee State Bureau of Investigation, Tennessee ABC and Tennessee Highway Patrol did not have an employee named Earl Lunsford. As part of this investigation, Agent Stemple obtained a subpoena for the ALE District VII incoming AT&T phone records for Friday, October 16, 2009 and received the results of the subpoena. (Resp. Ex. 1, Resp. Ex. 2, T. pp. 19, Line 1-25).

20. The results of the AT&T subpoena identified an incoming call to the ALE District VII office at 828-466-5550 at 10:18 a.m. on Friday, October 16, 2009, from telephone number 828-777-7911. (Resp. Ex. 2, T. pp. 144, lines 1-3, pp. 145, lines 1-14).

21. On Tuesday, October 20, 2009, Agent Stemple called 828-777-7911 and the person who answered identified himself as Stewart Coates. (Resp. Ex. 1, T. pp. 22, lines 10-25 and pp. 25, lines 1-3).

22. During the October 20, 2009, telephone conversation with Agent Stemple, Mr. Coates cooperated fully with Agent Stemple, answering all questions presented and providing his contact information for future communication. He denied making the call at issue. Petitioner admitted that 828-777-7911 is his personal cell phone number. (Resp. Ex. 8, T. pp. 143, lines 16-23). Petitioner did not deny that his telephone number showed up on the ALE District VII phone records. (Resp. Ex. 1, T. pp. 23, lines 1-16). Petitioner did not dispute the accuracy of the results of the AT&T subpoena. (Resp. Ex. 8, T. pp. 80, lines 5-17).

23. Although Agent Stemple was initially certain that he recognized the voice as the same voice and person he spoke with four days earlier on Friday, October 16, 2009, his subsequent equivocation negates that identification.

24. On November 30, 2009, Agent Stemple caused a search warrant to be issued to Verizon Wireless for all telephone records, cellular tower activity, and text/SMS logs for 828-777-7911 on Friday, October 16, 2009, between 8:30 a.m. and 1:30 p.m. Eastern Standard Time.

25. Agent Stemple did not subpoena or obtain a search warrant for cell tower or telephone records for any other provider of cellular service in Raleigh, North Carolina other than Verizon Wireless to determine what tower the call at issue may

have roamed on. There are at least four other cellular communication carriers in the Raleigh area.

26. The telephone records produced by Verizon Wireless pursuant to the search warrant indicate that a telephone call was made from (828) 777-7911 to the ALE District VII Office at (1828) 466-5550 on October 16, 2009, at 10:18:12 a.m. with an "Orig C/G" of 128 and a "Term C/G" of 6911, with a call duration of 522 seconds. (Resp. Ex. 3). The results of the Verizon search warrant show that the call from 828-777-7911 to 828-466-5550 at 10:18 a.m. on October 16, 2009 connected to a cell phone tower located at 1707 Hillsborough Street, Raleigh, N.C.

27. "Orig C/G" refers to originating cell gateway or tower and "term C/G" refers to termination cell gateway or tower.

28. It would not be unusual for a cellular call which is being made by someone in motion, such as traveling in a car to make use of multiple cell towers from the beginning to the end of their call.

29. When multiple cell towers are used in a cell call, only the first and last would be listed on the call detail record, intermediary towers, if any, would not be listed.

30. During the Respondent's investigation leading to the termination of the Petitioner's employment, no law enforcement officer or other individual involved in this investigation contacted a Verizon Wireless technician to determine the significance of the terms "Orig C/G" and "Term C/G", or to otherwise request assistance in determining whether they were correctly interpreting the Verizon records.

31. Michael Sprayberry, Deputy Director of the North Carolina Department of Crime Control and Public Safety requested the assistance of the North Carolina State Highway Patrol (hereinafter "SHP") to conduct an internal affairs personnel investigation. Agent Stemple was conducting a criminal investigation whereas the SHP was conducting a personnel investigation.

32. At the request of the Highway Patrol, on December 2, 2009, Agent Stemple issued a subpoena to U.S. Cellular, the Petitioner's cellular service provider, for all outgoing telephone records, cellular tower activity, and text/SMS logs for 828-777-7911 on Friday, October 16, 2009, between 8:30 a.m. and 1:30 p.m. Eastern Standard Time.

33. The telephone records produced by U.S. Cellular pursuant to the subpoena did not show any call placed from 828-777-7911 to the Hickory ALE office on October 16, 2009.

34. The Petitioner has never denied that the number 828-777-7911 is his personal cell phone number. (T. pp. 79, lines 6-14, pp. 114, lines 1-5, pp. 221, lines 23-25, and pp. 222, lines 1-2). He has had the number for thirteen (13) years since 1993 and continues to use that number.

35. Petitioner worked at the Division of Emergency Management Western Branch office in Hickory, North Carolina with Mrs. Tiawana Ramsey and her husband, Mr. Jimmie Ramsey. (T. pp. 89, lines 24-25 and pp. 90, lines 1-5).

36. Prior to and on October 16, 2009, Stewart Coates had a very friendly relationship with Mr. and Mrs. Ramsey and often socialized with them outside of the workplace and in their home. He had known Jimmie Ramsey for much longer than Mrs. Ramsey and considered Mr. Ramsey to be one of his very best friends.

37. Respondent's witness Darla Hall said she has never heard Petitioner say anything disparaging about either Mr. or Mrs. Ramsey. She was not interviewed by the SHP at all and not by anyone at all until July 2010.

38. The Petitioner learned of the job opening for the position he held at the time of his termination, Multi-Hazard Field Planner, from the Ramseys. Petitioner, Mr. Ramsey and Mrs. Ramsey previously discussed that Petitioner should apply for Mrs. Ramsey's job when she retired. Mrs. Ramsey only had approximately one and half more years before she would have been eligible to retire. (Resp. Ex. 8, T. pp. 200, lines 15-25, pp. 201, lines 1-2). Mrs. Ramsey's job would have been a promotion for Petitioner. (T. pp. 235, lines 1-3).

39. Petitioner rode with Mr. Ramsey and another Division of Emergency Management employee, Darla Hall, from Buncombe County to Raleigh, N.C. on Thursday, October 15, 2009 to attend a State Emergency Response Commission (SERC) meeting the next day on Friday, October 16, 2009. While riding in the car with Mr. Ramsey and Mrs. Hall on Thursday, October 15, 2009, Petitioner asked Mr. Ramsey what time he would leave his home on Sunday, October 18, 2009. (T. pp. 90, lines 1-5, pp. 151, lines 15-25, pp. 152, lines 1-25, and pp. 153, lines 1-22).

40. Petitioner attended the SERC meeting as scheduled on Friday, October 16, 2009. The Petitioner arrived at the Archdale Building shortly prior to the scheduled meeting at 9:00 a.m. and never left the immediate vicinity of the Archdale Building until the meeting concluded, at approximately noon.

41. The SERC meeting was held in the Archdale Building located at 512 N. Salisbury Street, Raleigh, N.C. (Resp. Ex. 7, T. pp. 81, lines 1-10 and pp. 94, lines 1-25). The Archdale Building is located approximately one mile to 1.7 miles from the Verizon cell phone tower located at 1707 Hillsborough Street, Raleigh, N.C. (Resp. Ex. 15, T. pp. 94, lines 1-25, pp. 142, lines 13-25, and pp. 143, lines 1-15).

42. There was a break during the SERC meeting between approximately 10:00 a.m. and 10:30 a.m. (Resp. Ex. 7, T. pp. 81, lines 10-18, and pp. 154, lines 1-23).

43. Petitioner met with investigators from the North Carolina State Highway Patrol, Internal Affairs Division, who are also employed by Respondent. He met with Lt.

James Blanks and First Sgt. William Dancy, on November 3 and 12, 2009. Petitioner met with investigators, First Sgt. William Dancy and First Sgt. B.L. Craft, on January 4, 2010. (Resp. Ex. 8, T. pp. 140).

44. In the November 3, 2009 interview, Petitioner was informed that he was the subject of an investigation, that he should read a copy of a memorandum dated October 21, 2009 from Deputy Director Michael Sprayberry, and that he should read Section 7 of the State Personnel Manual.

45. Petitioner signed the form entitled "Interview of Subject of Investigation" acknowledging that he received the documents, had an opportunity to review the documents, understood the documents, and initialed and dated them. Petitioner acknowledged that he had not ingested any substances that would prevent him from answering questions during the interviews. (Resp. Ex. 5, T. pp. 77).

46. When the investigators interviewed Petitioner, he asked whether the phone call was recorded and whether there was video surveillance of the Archdale Building on Friday, October 16, 2009 at the time of the phone call. (Resp. Ex. 8, T pp. 81). A recording of the phone call could have clarified whether or not it was the defendant who had called. A video of the Archdale Building could have confirmed whether or not he left the premises during the conference.

47. During the November 3, 2009 interview, the Petitioner requested more than once to take a polygraph examination. Likewise, he has subsequently requested more than once to submit to a polygraph examination. The SHP routinely utilizes polygraph examinations during applicant investigations in its employment process, and the SHP would have had qualified polygraphers available to it should it have granted the Petitioner's request for a polygraph examination. The requests for polygraph examination were never granted.

48. In cooperating with the investigation during the November 3, 2009 interview, the Petitioner attempted to access his U.S. Cellular telephone records via computer in the presence of Lieutenant Blanks, but was advised that he could only access those records via mail or in-person pickup.

49. Continuing to cooperate during the November 3, 2009 interview, in the presence of Lieutenant Blanks, the Petitioner contacted U.S. Cellular via speakerphone, requested that his telephone records for the date at issue be mailed to his address, and agreed to contact his supervisor and deliver the records to him sealed upon receipt.

50. Following the November 3, 2009 interview, the Petitioner did as instructed and provided the sealed U.S. Cellular telephone records to Mike Cook, Western Branch Manager of DEM.

51. The U. S. Cellular telephone records produced at Petitioner's request did not show any call placed from 828-777-7911 to the Hickory ALE office on October 16, 2009. The U.S. Cellular telephone records produced at Respondent's request likewise did not show any call placed from 828-777-7911 to the Hickory ALE office on October 16, 2009.

52. During the third interview on January 4, 2010, the Petitioner again requested to take a polygraph examination, but that request likewise was never granted.

53. The Petitioner's version of events has been consistent every time he has been interviewed.

54. When questioned by investigators, Petitioner stated "I look guilty as sin". Petitioner acknowledged that "it did look bad against me". (Resp. Ex. 8, T. pp. 145, lines 22-25, pp. 146, lines 1-4, pp. 240, lines 3-7). Indeed it does "look bad" at first blush and without any technical insight as to how any of this may have taken place. In spite of those statements, Petitioner has consistently denied that he made the call at issue. Those statements out of context were not admissions or any manner of confession by Petitioner, but an acknowledgment of how things may have been perceived.

55. During all interviews and communications with law enforcement and others conducting this investigation, the Petitioner has consistently acknowledged that telephone number 828-777-7911 belonged to him, but that he did not make the call at issue, and he had no explanation as to why his telephone number appeared on the AT&T and Verizon records. Petitioner has consistently admitted that his personal cell phone was never out of his possession on Friday, October 16, 2009 during the 10:00 a.m. to 11:00 a.m. time period. (Resp. Ex. 8, T. pp. 45, lines 4-14, pp. 102, lines 19-25, page 103, lines 1-110, and pp. 114, lines 6-10).

56. Petitioner informed the investigators that he went outside of the Archdale Building to make two phone calls during the SERC meeting break between 10:00 a.m. and 10:30 a.m. (Resp. Ex. 7, T. pp. 82, lines 3-25, pp. 96, lines 16-25, pp. 97, lines 1-9, pp. 143, lines 24-25, and pp. 144, lines 1-10). The two phone calls that Petitioner admitted making during the SERC meeting break do not appear on Petitioner's personal U.S. Cellular phone bill, the Verizon records or the AT&T records. (Resp. Ex. 2, Resp. Ex. 3, T. pp. 97, lines 15-25, pp. 98, lines 1-4, pp. 144, lines 1-13, pp. 145, lines 15-21, pp. 147, lines 21-25, and pp. 148, lines 1-5).

57. As the Petitioner's cellular phone is an Asheville phone number, when in Raleigh, he would have been roaming; i.e., he and his phone were outside of their home area. Cellular telephone policy provides that telephone providers will not charge customers for roaming calls under one minute in duration, and as such, these two calls would not appear on the Petitioner's cell phone bill if under one minute in duration as Petitioner contends.

58. Lt. James Blanks, First Sgt. William Dancy and First Sgt. B.L. Craft completed their investigation and submitted a Report of Investigation to Deputy Director Michael Sprayberry. (Resp. Ex. 8, T. pp. 71).

59. Petitioner received a memorandum from Doug Hoell, Director, Division of Emergency Management dated January 7, 2010 notifying him that a pre-disciplinary conference would be conducted on January 12, 2010. Petitioner was informed that he would be afforded an opportunity to respond to the disciplinary recommendation and to offer information or arguments to support his position. (Resp. Ex. 9, T. pp. 187).

60. The Pre-Disciplinary Conference was held on January 12, 2010. (Resp. Ex. 10).

61. Petitioner received the Notification of Dismissal dated January 14, 2010, along with his appeal rights. The dismissal became effective the next day, January 15, 2010. (Resp. Ex. 10). The Notification of Dismissal stated that the Petitioner was being terminated on the grounds of unacceptable personal conduct, in that the Petitioner contacted the District 7 ALE office on October 16, 2009, and falsely identified himself as Agent Earl Lunsford, a law enforcement officer with the Tennessee Bureau of Investigation, and that during said contact the Petitioner filed a false allegation against a co-worker indicating that said co-worker would be transporting non-tax paid liquor in a state vehicle on October 18, 2009.

62. Mr. Ben Levitan was tendered by Petitioner and accepted by the Court as an expert in the field of cellular communication. Mr. Levitan is a nationally and internationally recognized expert in the field of cellular communication:

a. Mr. Levitan has been employed in the communication industry from 1986 to the present.

b. Mr. Levitan was employed by COMSAT as a Digital Engineer from 1986-1990, with Aeronautical Radio as Principle Engineer from 1990-1995, with ALCATEL as a Senior System Engineer from 1995-1998, with GTE as Manager in Standards and Technology from March 1998-March 2003, with Nextel/Sprint as Senior Manager of Global Technology Standards from August 2003-Deceber 2005 and from January 2006 to the present as a consultant in Wireless and Broadband Telephony.

c. Mr. Levitan has represented the United States Airline Association and the United States State Department on technical telecom issues and was a member of the Commission established by the United States Congress to determine the effect of the use of cellular communication devices by passengers on commercial aircraft.

d. He was a consultant to the Federal Bureau of Investigation with regard to the Communication Assistance for Law Enforcement Act wiretap provisions and developed the "Train the Trainers" coursework for law enforcement agencies.

e. Mr. Levitan has had 27 patents approved in all areas of telecommunication, including GPS.

f. Mr. Levitan was one of the key developers of the wiretap system used by the Federal Government in its investigation of former Illinois Governor Rod Blagojevich, and he currently owns the patent on the next generation of that system.

g. He has authored eight technical books on tele-communications, and is currently under contract with McGraw-Hill to write a handbook on the European cell phone system.

h. For twelve years, he was a delegate for the United States to the United Nations Committee to develop international standards for cell phone system design.

i. He has previously been qualified as an expert in the area of cellular technology by the Federal Courts in California, the Federal Courts in Tennessee and the Ohio State Courts.

63. A phone call such as allegedly made to the ALE Regional Office in Hickory would have appeared on the Petitioner's bill, if he had made the call.

64. If the Verizon tower had been "pinged" in transmitting a call from Raleigh as contended by the Respondent, it is extremely unlikely that that the call would not have appeared on the Petitioner's bill since the cellular communication industry is dependent on proper reporting of calls for revenue; or stated in the positive, the call would have appeared on Petitioner's bill.

65. The Verizon record admitted as Respondent's Exhibit 13 in this cause are AMA records that only show the portions of the call serviced by Verizon Wireless, such that the "First Serving Cell Site" is the first Verizon tower serving the call, and the "Last Serving Cell Site" is the last Verizon tower serving the call. This record shows the only Verizon tower the call was ever on was cell tower 128.

66. The Verizon records admitted as Respondent's Exhibit 3 in this cause are call detail records that show the originating tower and the termination tower, regardless of the carrier who owns the tower of termination.

67. As shown on Respondent's Exhibit 3 shows Verizon's call detail records the Verizon records, the call at issue began on Verizon Wireless cell tower 128 and ended on cell tower 6911, which is not a Verizon Wireless cell tower.

68. Tower 6911 does not appear next to the call at issue on the Verizon AMA record admitted as Respondent's Exhibit 13 in this cause because Tower 6911 is not a Verizon Wireless cell tower.

69. The typical cell tower coverage area is one mile in radius and covers an area of 3.14 miles, or 2,010 acres.

70. Verizon Wireless cell tower 128 is located 1.7 miles from the Archdale Building by street, and if, cell tower 128 had been hit by a cellular call originating from outside the Archdale Building, and the cellular caller had not left the Archdale Building, the call would not have switched to another tower.

71. The call at issue was made by a caller who was in motion and traveling at the time of making that call.

72. As the Petitioner never left the area of the Archdale building during the critical time period, it is impossible for him to have made the alleged call to the Hickory ALE Office.

73. As testified to and demonstrated by Mr. Levitan in a live demonstration during the hearing, "Spoofing" is when a telephone caller utilizes a website, card service, application, or the like to place a telephone call that appears on the recipient's caller ID to be from a telephone number of the caller's choosing, rather than from the caller's actual telephone number.

74. Mr. Levitan successfully demonstrated "spoofing" during the hearing in this cause in the open courtroom by using a Spoof Card he purchased to call attorney Jamie Stokes' cellular telephone from his own personal cellular telephone and making it appear to be a call placed with a woman's voice from the Petitioner's telephone number 828-777-7911, rather than his own.

75. During the call at issue, Agent Stemple noticed an echo that was not present when he made the initial call to Petitioner's phone on October 20, 2009. According to Mr. Levitan such an echo often occurs in a "spoofed" call.

76. Telephone calls that are spoofed will appear on the cellular records of the actual caller who perpetrated the spoof if the spoof was made from a cell phone, but it will not appear on the cell records of the number being spoofed.

77. The Verizon records admitted as Respondent's Exhibit 13 contain evidence of attempts to spoof or wiretap the Petitioner's phone by a smart phone or computer in the Charlotte, North Carolina, calling area in the days prior to October 16, 2009.

78. By letter dated January 8, 2010, prior to the Pre-Disciplinary Conference and the Petitioner's termination, the Petitioner submitted substantial evidence to the Secretary regarding the mechanics and prevalence of spoofing.

79. The call at issue was made by an unknown individual who was spoofing the Petitioner Stewart Coates' telephone number 828-777-7911.

80. The Petitioner Stewart Coates did not place the call at issue.

81. The Petitioner has never been charged with any criminal offense relating to the call at issue.

82. ALE and the SHP only subpoenaed the records of Verizon Wireless in the Raleigh area, and not the records of other cellular communication companies, even thought there are at least four other carriers in the Raleigh area on whose towers the call at issue could have roamed.

83. The Verizon record admitted as Respondent's Exhibit 3 in this cause was the only cellular phone record obtained by Respondent prior to the termination of the Petitioner's employment and was the only record relied upon by the Respondent in its decision to terminate the Petitioner's employment. No other records were sought or reviewed.

84. The Respondent did not consult an expert in the field of cellular communications or request assistance from any cellular communication company in interpreting the records of the call at issue prior to terminating the Petitioner's employment.

85. In the summer of 2010, the Respondent secured the services of Fred Patton, a former SBI agent, who is currently employed as an investigator for the North Carolina State Bar, who had never worked for any cellular communications company, and had never previously qualified as an expert witness in the field of cellular communications.

86. Fred Patton's only training in the field of cellular communications was one forty-hour course taught by a vendor and two and one half days each year of continuing education coursework in cellular communications.

87. Fred Patton did not contact any individuals working for Verizon for assistance in interpreting the Verizon telephone records in this cause until the evening of October 11, 2010, in the course of this hearing, when he contacted a Subpoena Compliance Specialist in the Verizon legal department rather than a technical engineer.

88. A subpoena compliance specialist is not an engineer or expert in cellular technology but rather simply a clerical employee, the records custodian.

89. The Court finds the expert testimony of Ben Levitan considerably more credible than the expert testimony of Fred Patton.

90. There were widespread rumors and belief amongst the employees of the DEM that there was home-made or non-tax paid alcoholic beverage being brought to Emergency Management conferences which is commonly referred to as moonshine, white lightning and/or home brew. There is some credible evidence that Mrs. Ramsey was responsible for bringing the alcohol to the conferences.

91. Petitioner expressed concern to his wife, Deborah Frisbee Coates, from whom he is separated, that Mrs. Ramsey was going to get into trouble if she kept on carrying moonshine. (T. pp. 237, lines 3-20). (T. pp. 390, lines 11-15).

92. Petitioner expressed concern to Mr. Ramsey that Mrs. Ramsey was going to get into trouble if she kept on carrying moonshine. (T. pp. 246, lines 1-4).

93. Numerous State and local emergency management employees, other than the Petitioner, had access to the same information disclosed by the caller who made the call at issue, but none of those individuals were interviewed or questioned about their knowledge of moonshine use or transportation by State employees during the course of this investigation.

94. During his November 3, 2009 interview, the Petitioner informed law enforcement that Neil Tilley had driven by the Petitioner's residence on numerous occasions and that Mr. Tilley indicated that he was monitoring both the Petitioner's and Petitioner's girlfriend's, Loretta Shelton, locations through their cellular phones. Neil Tilley may have had reason to implicate Petitioner in improper conduct.

95. Law enforcement never interviewed Neil Tilley or otherwise investigated his potential involvement in the call at issue prior to the Petitioner's termination.

CONCLUSIONS OF LAW

1. All parties are properly before this Administrative Law Judge and jurisdiction and venue are proper. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

2. As Petitioner was continuously employed as a Division of Emergency Management employee for over eight (8) years at the time of his dismissal, he was a Career State Employee entitled to the protections of the North Carolina State Personnel Act (N.C. Gen. Stat. § 126-1 *et seq.*), and specifically the just cause provision of N.C. Gen. Stat. §126-35.

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

4. While just cause is not susceptible of precise definition, our courts have held that it is "a flexible concept, embodying notions of equity and fairness that can only be

determined upon an examination of the facts and circumstances of each individual case." *NC DENR v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004)

5. The North Carolina Supreme Court has held that; "Determining whether a public employer had just cause to discipline its employee requires two separate inquires: First, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for the disciplinary action taken." *NC DENR v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004).

6. Because Petitioner has alleged that Respondent lacked just cause for his termination, the Office of Administrative Hearings has jurisdiction to hear his appeal and issue a recommendation to the State Personnel Commission, which will make the final decision in this matter.

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

8. 25 NCAC 1J .0614(i) defines "unacceptable personal conduct" as including:

(1) conduct for which no reasonable person should expect to receive a written warning; or

(2) job-related conduct which constitutes a violation of state or federal law; or

. . .

(4) the willful violation of known or written work rules; or

(5) conduct unbecoming a state employee that is detrimental to state service; or

. . . .

9. There were no procedural defects by the Respondent in the disciplinary action against the Petitioner, and the procedural requirements for terminating Petitioner were followed pursuant to the North Carolina General Statutes, North Carolina State Personnel Manual, and the rules and policies of the North Carolina Department of Crime Control and Public Safety.

10. Petitioner's Due Process rights were not violated by Respondent.

11. Petitioner has been certified as a law enforcement officer for nineteen years, having served with several law enforcement agencies.

12. On Thursday, October 15, 2009, Petitioner rode to Raleigh, N.C. with two other Division of Emergency Management employees, Ms. Darla Hall and Mr. Jimmie Ramsey.

13. On Friday, October 16, 2009, Petitioner attended a State Emergency Response Commission (SERC) meeting at the Archdale Building located at 512 N. Salisbury Street, Raleigh, N.C.

14. There was a break during the SERC meeting between 10:00 a.m. and 10:30 a.m. on Friday, October 16, 2009. During the break, Petitioner went outside the Archdale Building located at 512 N. Salisbury Street, Raleigh, N.C.

15. A phone call was made to the District VII ALE Office in Hickory, N.C. at 828-466-5550 on Friday, October 16, 2009 at 10:18 a.m. The call was directed by the receptionist to ALE Agent Matthew Stemple and lasted approximately five minutes. The caller identified himself as Earl Lunsford of the Tennessee State Bureau of Investigation and stated that a white female approximately 50 years old with the last name Ramsey would transport non-tax paid liquor to Hickory, N.C. on Sunday, October 18, 2009. The caller provided Agent Stemple with a license plate number that belonged to a state emergency management vehicle, a description of the vehicle and the approximate time that the non-tax paid liquor would be transported on Sunday, October 18, 2009.

16. There were widespread rumors and belief amongst the employees of the DEM that there was home-made or non-tax paid alcoholic beverage being brought to Emergency Management conferences which is commonly referred to as moonshine, white lightning and/or home brew. There is some credible evidence that Mrs. Ramsey was responsible for bringing some of the non-taxed alcohol to the conferences.

17. Numerous State and local emergency management employees, other than the Petitioner, had access to the same information disclosed by the caller who made the call at issue. None of those individuals were interviewed or questioned about the issues in the criminal and/or personnel investigations that lead to this contested case.

18. As a result of this information given to Agent Stemple on October 16, 2009, ALE conducted an investigation, culminating in an investigatory stop of Mrs. Tiawana Ramsey. The stop produced no non-tax paid alcohol, and other violations of North Carolina law were not charged.

19. At this point Agent Stemple's criminal investigation switched from a non-tax paid whiskey case to an investigation of impersonating a law enforcement officer. Agent Stemple obtained a subpoena for the ALE District VII incoming phone records from AT&T, the telephone carrier for the agency, for Friday, October 16, 2009. The results of the AT&T subpoena identified an incoming call to 828-466-5550 at the ALE District VII office at 10:18 a.m. on Friday, October 16, 2009 from Petitioner's personal cell phone number at 828-777-7911.

20. On Tuesday, October 20, 2009, ALE Agent Matthew Stemple called 828-777-7911. Petitioner answered, identified himself and identified the number as his personal cell

phone number. Agent Stemple's recognition of Petitioner's voice as the same person with whom he spoke four days earlier on Friday, October 16, 2009 was not credible.

21. Agent Stemple issued a search warrant to Verizon Wireless (Verizon) for the telephone records for 828-777-7911. The results of the Verizon search warrant show that the number 828-777-7911 called 828-466-5550 at 10:18 a.m. on October 16, 2009 and connected to a cell phone tower located at 1707 Hillsborough Street, Raleigh, N.C.

22. The Respondent initiated a personnel investigation aside from any criminal investigation being conducted by Agent Stemple. The personnel investigation was conducted by the Internal Affairs Division of the Highway Patrol.

23. At the request of the Highway Patrol, on December 2, 2009, Agent Stemple issued a subpoena to U.S. Cellular, the Petitioner's cellular service provider, for all outgoing telephone records, cellular tower activity, and text/SMS logs for 828-777-7911 on Friday, October 16, 2009, between 8:30 a.m. and 1:30 p.m. Eastern Standard Time.

24. The telephone records produced by U.S. Cellular pursuant to the Respondent's subpoena did not show any call placed from 828-777-7911 to the Hickory ALE office on October 16, 2009. U.S. Cellular, the Petitioner's cellular service provider, has never billed the Petitioner for any such call placed to the ALE office in Hickory.

25. The Archdale Building located at 512 N. Salisbury Street, Raleigh, N.C. is located approximately one mile to 1.7 miles from the Verizon cell phone tower located at 1707 Hillsborough Street, Raleigh, N.C.

26. Verizon's call detail records show that the call at issue began on Verizon Wireless cell tower 128 and ended on cell tower 6911, which is not a Verizon Wireless cell tower. Tower 6911 is not a Verizon Wireless cell tower.

27. The call at issue was made by a caller who was in motion and traveling at the time of making that call. As the Petitioner never left the area of the Archdale building during the critical time period, it is impossible for him to have made the alleged call to the Hickory ALE Office

28. "Spoofing" is when a telephone caller utilizes a website, card service, application, or the like to place a telephone call that appears on the recipient's caller ID to be from a telephone number of the caller's choosing, rather than from the caller's actual telephone number.

29. The Petitioner Stewart Coates did not place the call at issue. The call at issue was made by an unknown individual who was spoofing the Petitioner Stewart Coates' telephone number 828-777-7911.

30. The Petitioner has never been charged with any criminal offense relating to the call at issue.

31. From the very first contact with Agent Stemple, Petitioner has fully cooperated with both the criminal and personnel investigations, has been fully and completely forth-coming with information and has repeatedly offered to submit to polygraph examination. He has always admitted that the phone number at issue is his personal cellular phone, that he never lost possession of his phone on Friday, October 16, 2009, and that he still has the same personal cell phone and phone number. Petitioner has consistently denied making the call at issue, and he understandably had no explanation as to why his telephone number appeared on the AT&T and Verizon records.

32. The string of coincidences are lengthy and indeed make the Petitioner "look guilty as sin" as he acknowledged, but the evidence of "spoofing" is overwhelming and convincing.

33. Petitioner discussed with Mr. and Mrs. Ramsey when Mrs. Ramsey would retire. It was the Ramseys who suggested to Petitioner that he might seek her position when she retired in approximately one and a half years. Mr. Ramsey was Petitioner's best friend. There was no indication of any animosity toward the Ramseys. Based on the evidence in this case, it is completely counter-intuitive that Petitioner, an excellent employee with an unblemished record or any kind, would attempt to get his best friend and/or his best friend's wife into criminal trouble so that he could potentially apply for the wife's job which he could do by merely waiting a year and a half.

34. Based on the totality of the credible evidence presented, the findings of fact as set forth above, and the preceding conclusions of law there from, the undersigned concludes that the Petitioner did not make the telephone call to Agent Stemple, in which he misrepresented himself to be a law enforcement officer in violation of North Carolina law.

35. Respondent has failed to show that Petitioner engaged in the conduct as alleged. Respondent has not met its burden of proof in this matter.

36. Respondent did not have just cause to terminate Petitioner from employment based on the unacceptable personal conduct.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby recommended that Respondent's determination to terminate Petitioner's employment should be **REVERSED**.

The Petitioner should be reinstated to his previous position as Multi-Hazard Field Planner with the Respondent North Carolina Department of Crime Control and Public Safety, Division of

Emergency Management, effective immediately. The Petitioner should receive back pay in full for his employment with DEM from January 15, 2010, through the present date.

The Petitioner should be awarded attorneys fees and costs, to be paid by the Respondent in an amount in accordance with Affidavit to be filed by Petitioner's attorney within 30 days of the entry of this Order.

ORDER

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

NOTICE

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

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

The agency is required by N.C.G.S. 150B-36(b3) to serve a copy of the Final Decision to all parties and to furnish a copy to the Parties' attorney of record.

This the 16th day of March, 2011.

Donald Overby
Administrative Law Judge

A copy of the foregoing was mailed to:

Larry B. Leake
Leake Scott & Stokes
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ATTORNEY FOR PETITIONER

Cheryl A. Perry
NC Department of Justice
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ATTORNEY FOR RESPONDENT

This the 16th day of March, 2011.

Vicky Bullock

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