

NORTH CAROLINA REGISTER

VOLUME 26 • ISSUE 17 • Pages 1284 - 1433

March 1, 2012

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Contact List for Rulemaking Questions or Concerns

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

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

Office of Administrative Hearings
Rules Division
1711 New Hope Church Road (919) 431-3000
Raleigh, North Carolina 27609 (919) 431-3104 FAX

contact: Molly Masich, Codifier of Rules molly.masich@oah.nc.gov (919) 431-3071
Dana Vojtko, Publications Coordinator dana.vojtko@oah.nc.gov (919) 431-3075
Julie Edwards, Editorial Assistant julie.edwards@oah.nc.gov (919) 431-3073
Tammara Chalmers, Editorial Assistant tammara.chalmers@oah.nc.gov (919) 431-3083

Rule Review and Legal Issues

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

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

Fiscal Notes & Economic Analysis and Governor's Review

Office of State Budget and Management
116 West Jones Street (919) 807-4700
Raleigh, North Carolina 27603-8005 (919) 733-0640 FAX
Contact: Anca Grozav, Economic Analyst osbmruleanalysis@osbm.nc.gov (919) 807-4740

NC Association of County Commissioners
215 North Dawson Street (919) 715-2893
Raleigh, North Carolina 27603
contact: Rebecca Troutman rebecca.troutman@ncacc.org

NC League of Municipalities (919) 715-4000
215 North Dawson Street
Raleigh, North Carolina 27603
contact: Erin L. Wynia ewynia@nclm.org

Legislative Process Concerning Rule-making

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

contact: Karen Cochrane-Brown, Staff Attorney Karen.cochrane-brown@ncleg.net
Jeff Hudson, Staff Attorney Jeffrey.hudson@ncleg.net

NORTH CAROLINA REGISTER
Publication Schedule for January 2012 – December 2012

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:	270 th day from publication in the Register
26:13	01/03/12	12/08/11	01/18/12	03/05/12	03/20/12	05/01/12	05/16/12	09/29/12
26:14	01/17/12	12/21/11	02/01/12	03/19/12	03/20/12	05/01/12	05/16/12	10/13/12
26:15	02/01/12	01/10/12	02/16/12	04/02/12	04/20/12	06/01/12	01/30/13	10/28/12
26:16	02/15/12	01/25/12	03/01/12	04/16/12	04/20/12	06/01/12	01/30/13	11/11/12
26:17	03/01/12	02/09/12	03/16/12	04/30/12	05/21/12	07/01/12	01/30/13	11/26/12
26:18	03/15/12	02/23/12	03/30/12	05/14/12	05/21/12	07/01/12	01/30/13	12/10/12
26:19	04/02/12	03/12/12	04/17/12	06/01/12	06/20/12	08/01/12	01/30/13	12/28/12
26:20	04/16/12	03/23/12	05/01/12	06/15/12	06/20/12	08/01/12	01/30/13	01/11/13
26:21	05/01/12	04/10/12	05/16/12	07/02/12	07/20/12	09/01/12	01/30/13	01/26/13
26:22	05/15/12	04/24/12	05/30/12	07/16/12	07/20/12	09/01/12	01/30/13	02/09/13
26:23	06/01/12	05/10/12	06/16/12	07/31/12	08/20/12	10/01/12	01/30/13	02/26/13
26:24	06/15/12	05/24/12	06/30/12	08/14/12	08/20/12	10/01/12	01/30/13	03/12/13
27:01	07/02/12	06/11/12	07/17/12	08/31/12	09/20/12	11/01/12	01/30/13	03/29/13
27:02	07/16/12	06/22/12	07/31/12	09/14/12	09/20/12	11/01/12	01/30/13	04/12/13
27:03	08/01/12	07/11/12	08/16/12	10/01/12	10/22/12	12/01/12	01/30/13	04/28/13
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27:05	09/04/12	08/13/12	09/19/12	11/05/12	11/20/12	01/01/13	01/30/13	06/01/13
27:06	09/17/12	08/24/12	10/02/12	11/16/12	11/20/12	01/01/13	01/30/13	06/14/13
27:07	10/01/12	09/10/12	10/16/12	11/30/12	12/20/12	02/01/13	05/2014	06/28/13
27:08	10/15/12	09/24/12	10/30/12	12/14/12	12/20/12	02/01/13	05/2014	07/12/13
27:09	11/01/12	10/11/12	11/16/12	12/31/12	01/22/13	03/01/13	05/2014	07/29/13
27:10	11/15/12	10/24/12	11/30/12	01/14/13	01/22/13	03/01/13	05/2014	08/12/13
27:11	12/03/12	11/07/12	12/18/12	02/01/13	02/20/13	04/01/13	05/2014	08/30/13
27:12	12/17/12	11/26/12	01/01/13	02/15/13	02/20/13	04/01/13	05/2014	09/13/13

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.



U.S. Department of Justice
Civil Rights Division

TCH:RSB:RPL:RAK:maf
DJ 166-012-3
2011-4859
2011-4860

Voting Section - NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

January 17, 2012

Jonathan S. Care, Esq.
109 West Montgomery Street
Henderson, North Carolina 27536

Dear Mr. Care:

This refers to Chapter 95 (H.B. 884) (1989), which changes the number of board members from five to seven and enacts the 1989 districting plan for the Vance County School District; and the 2011 redistricting plans for the Vance County School District and Vance County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your submissions on November 16, 2011; supplemental information was received through January 13, 2012.

With respect to the 1989 districting plan for the school district, you have advised us that this change was superseded by the redistricting plan adopted by the board of education on November 7, 2011. Accordingly, no determination by the Attorney General is required or appropriate concerning the 1989 districting plan. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.25 and 51.35.

The Attorney General does not interpose any objection to the remaining specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. 28 C.F.R. 51.41.

Sincerely,

A handwritten signature in black ink, appearing to read "T. Christian Herren, Jr.", is written over the typed name.

T. Christian Herren, Jr.
Chief, Voting Section

North Carolina Department of Health and Human Services
North Carolina Medical Care Commission
Notice of Receipt of Periodic Report

In accordance with GS131E-192.9 Certificate of Public Advantage, Periodic Reports the Department of Health and Human Services does hereby give notice of receipt of the Periodic Report dated September 30, 2011 (the "Report"). The Report relates to the Third Amended Certificate of Public Advantage dated August 31, 2011, as issued to Mission Health System.

In accordance with GS131E-192.9 the public has 30 days from the date of this notice March 1, 2012 to file written comments on the Report and on the benefits and disadvantages of continuing the Certificate of Public Advantage.

A copy of the Report is available via electronic means upon request. Requests for a copy of the Report and comments thereon should be addressed to the following:

Christopher B. Taylor, CPA, Assistant Secretary
North Carolina Medical Care Commission
2701 Mail Service Center
Raleigh, North Carolina 27699-2701
Chris.Taylor@dhhs.nc.gov

With a copy to:

KD Sturgis, Assistant Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001
ksturgis@ncdoj.gov

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 NC Commission for the Blind intends to amend the rule cited as 10A NCAC 63F .0402.

Link to agency website pursuant to G.S. 150B-19.1(c):
<http://www.ncdhhs.gov/dsb>

Proposed Effective Date: July 1, 2012

Public Hearing:

Date: March 16, 2012

Time: 1:00 p.m.

Location: 309 Ashe Avenue, Fisher Building, Raleigh, NC 27606

Reason for Proposed Action: The Division of Services for the Blind, in conjunction with the Commission for the Blind, is initiating a change to the Economic Needs Schedule (10A NCAC 63F .0402 Economic Needs Policies). This rule change will allow eligible individuals who are visually impaired to obtain assistive technology, as well as books and cost for fees related to post-secondary education regardless of economic income. The assistive technology and training must be identified as necessary services on their Individualized Plan for Employment in order to attain their employment goal.

Procedure by which a person can object to the agency on a proposed rule: Submit written objections to Eddie Weaver, Director, Division of Services for the Blind at 309 Ashe Avenue, Raleigh, NC 27606 or 2601 Mail Service Center, Raleigh, NC 27699-2601.

Comments may be submitted to: Mary Flanagan, 309 Ashe Avenue, Raleigh, NC 27606 or 2601 Mail Service Center, Raleigh, NC 27699-2601; phone (919) 733-9822; fax (919) 733-9769; email mary.flanagan@dhhs.nc.gov

Comment period ends: April 30, 2012

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 (check all that apply).

- ☒ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Date submitted to OSBM:
- ☐ Substantial economic impact (≥\$500,000)
- ☒ Approved by OSBM
- ☐ No fiscal note required

CHAPTER 63 - SERVICES FOR THE BLIND

SUBCHAPTER 63F - VOCATIONAL REHABILITATION

SECTION .0400 - ECONOMIC NEED

10A NCAC 63F .0402 ECONOMIC NEEDS POLICIES

(a) The Division of Services for the Blind shall establish economic need for each eligible consumer either simultaneously with or prior to the provision of those services for which the Division requires a needs test. The financial need of a consumer shall be determined by the financial needs test specified in Rule .0403 of this Section. If the consumer has been determined eligible for Social Security benefits under Title II or XVI of the Social Security Act, the Division of Services for the Blind shall not apply a financial needs tests or require the financial participation of the consumer. A financial needs test shall be applied for all consumers determined eligible to receive services through the Independent Living Rehabilitation Program regardless of SSA Title II or Title XVI eligibility.

(b) The Division of Services for the Blind shall furnish the following services not conditioned on economic need:

- (1) an assessment for determining eligibility and priority for services except those non-assessed services that are provided during an exploration of the applicant's abilities, capabilities, and capacity to perform in work situations through the use of trial work experiences or an extended evaluation and an assessment by personnel skilled in rehabilitation technology;

- (2) assessment for determining rehabilitation needs by a qualified vocational rehabilitation counselor;
- (3) vocational rehabilitation counseling and guidance, including information and support services to assist an applicant or consumer in exercising informed choice;
- (4) tuition and supplies for Community Rehabilitation Program training;
- (5) tuition and fees for:
 - (A) community college/college parallel and vocational programs up to the catalog rate; and
 - (B) post-secondary education up to the maximum rate charged for the North Carolina public university system.

The Division shall require eligible consumers applying for training programs listed in Parts (b)(5)(A) and (B) of this Rule to first apply for all available grants and financial aid. The Division may grant an exception to the rate for tuition and required fees for post-secondary education specified in Part (b)(5)(B) of this Rule when necessary to accommodate the special training needs of severely disabled individuals who must be enrolled in special programs designed for severely physically disabled students;

- (6) interpreter services including sign language and oral interpreter services for applicants or consumers who are deaf or hard of hearing and tactile interpreting services for applicants or consumers who are deaf-blind;
- (7) reader services, rehabilitation teaching services, and orientation and mobility services;
- (8) job-related services, including job search, job placement employment assistance and job retention services;
- (9) DSB Rehabilitation Center or fundamental independent living rehabilitation adjustment services including transportation and training supplies contingent on a consumer's participation in the program;
- (10) diagnostic transportation;
- (11) on-the-job training;
- (12) training and associated maintenance and transportation costs for Business Enterprises Program trainees;
- (13) upward mobility training and associated maintenance and transportation costs for Business Enterprises Program trainees;
- (14) equipment and initial stocks and supplies for state-owned (Randolph-Sheppard) vending stands;
- (15) Supported Employment Services;
- (16) personal assistance services provided while a consumer with a disability is receiving vocational rehabilitation services;
- (17) referral and other services designed to assist applicants or consumers with disabilities in securing needed services from other agencies

- through agreements developed under Section 101(a)(11) of the Act (P.L. 102-569), if such services are not available under this Act and to advise those individuals about client assistance programs established under the Act;
- (18) transition services for students with disabilities that facilitate the achievement of the employment outcome identified in the student's individualized plan for employment except for those services based on economic need; and
- (19) technical assistance and other consultation services to consumers who are pursuing self-employment or telecommuting or establishing a business operation as an employment outcome.

(c) The following services shall be provided by the Division of Services for the Blind and conditioned on economic need:

- (1) physical and mental restoration services (medical services other than diagnostic);
- (2) maintenance for additional costs incurred while participating in rehabilitation;
- (3) transportation in connection with the rendering of any vocational rehabilitation service except where necessary in connection with determination of eligibility or nature and scope of services;
- (4) services to members of a disabled consumer's family necessary to the adjustment or rehabilitation of the consumer with a disability;
- ~~(5) rehabilitation technology including telecommunications, sensory, and other technological aids and devices;~~
- ~~(6)(5)~~ post-employment services necessary to assist consumers with visual disabilities to maintain, regain or advance in employment except for those services not conditioned on economic need listed in Paragraph (b) of this Rule;
- ~~(7)(6)~~ fees necessary to obtain occupational licenses;
- ~~(8)(7)~~ tools, equipment, and initial stocks and supplies for items listed in Subparagraphs (1) through (7) of this Paragraph;
- ~~(9)(8)~~ expenditures for short periods not to exceed 30 days of medical care for acute conditions arising during the course of vocational rehabilitation, which if not cared for, will constitute a hazard to the achievement of the vocational rehabilitation objective; and
- ~~(10) books and other training materials; and~~
- ~~(11)(9)~~ other goods and services not prohibited by the Act (P.L. 102-569), which can reasonably be expected to benefit an individual with a disability in terms of his employability or independent living skill development.

(d) Notwithstanding Paragraph (c) of this Rule, the following services are not subject to economic need for individuals being served through the Vocational Rehabilitation Program:

- (1) books and other training materials required for post secondary training; and
- (2) rehabilitation technology including telecommunications, sensory aids, and other technological aids and devices for consumers who have an Individualized Plan for Employment (IPE), who are working toward an employment goal that requires specified technology to attain, regain, or maintain employment and who have the capability to use the equipment.

~~(d)(e)~~ The Division of Services for the Blind shall publish the standard as determined by the Legislature for measuring the financial need of consumers with respect to normal living requirements and for determining their financial ability to meet the cost of necessary rehabilitation services, and for determining the amount of agency supplementation required to procure the necessary services.

Authority G.S. 111-28; 34 C.F.R. 361.48; 34 C.F.R. 361.5; 34 C.F.R. 361.52; 34 C.F.R. 361.54; P.L. 102-569, Section 103; S.L. 2009-475.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Social Services Commission intends to repeal the rules cited as 10A NCAC 67A .0109; 68 .0201, .0207; 71E .0101-.0109; 71U .0202, .0301, .0304; 71V .0101; 71W .0102, .0201, .0301, .0401-.0402, .0406, .0409, .0411, .0501, .0701-.0703, .0705-.0711, .0801-.0803, .0901-.0904; and 71X .0101-.0108, .0201-.0210, .0301-.0304, .0401-.0413.

Link to agency website pursuant to G.S. 150B-19.1(c):
<http://www.ncdhs.gov/dss/sscommission/pubnot.htm>

Proposed Effective Date: July 1, 2012

Public Hearing:

Date: April 30, 2012

Time: 10:00 a.m.

Location: Division of Social Services, Albermarle Building, Suite 832, 325 North Salisbury Street, Raleigh, NC 27603

Reason for Proposed Action:

10A NCAC 67A .0109 – This Rule refers to a formula used to determine disbursements of equalizing funds to county department of social services. In 1997, this formula was discontinued. Our agency identified during Internal Review of Rules (EO70) as needed to be repealed because it is outdated/unnecessary.

10A NCAC 68 .0201 – This Rule refers to any person wishing to request the adoption, amendment, or repeal of a rule by the Director of the Division of Social Services. This Rule is no longer valid. The authority of the rule making process is governed by the Social Services Commission. Our agency identified during Internal Review of Rules (EO70) as needing to repeal this Rule because it is outdated/unnecessary.

10A NCAC 68 .0207 – This Rule refers to fees charged by the Director to persons requesting information from the Director's Office. This Rule is outdated due to the Director's Office does not charge for information requests. Our agency identified during Internal Review of Rules (EO70) as needed to be repealed because it is outdated/unnecessary.

10A NCAC 71E .0101-.0109 – The Resident Evaluation (RES) was never implemented statewide. The pilot phase for implementation of RES, including use of the automated Resident Assessment Instrument-Assisted Living-North Carolina (RAI-AL-NC), was scheduled to begin July 2002. The RES pilot includes county DSSs, area mental health programs, and adult care home providers. During development of the software application for the RAI-AL-NC, the State's budget outlook significantly worsened. The budget shortfall projected for the next two years had significant implications for the implementation of RES. RES was to be a Medicaid funded program with a \$1.2 million state appropriation to support it. To become operational statewide, the RES program would have needed additional state funds totaling at least \$3,500,000. Our agency identified during Internal Review of Rules (EO70) as needed to be repealed because they were outdated/unnecessary.

10A NCAC 71U .0202 – This Rule refers to Coupon Issuance which are no longer used for the program. The Food, Conservation, and Energy Act of 2008 directed that no state shall issue any coupon, stamp, certification, or authorization card to a household that receives supplemental nutrition assistance under this Act. Effective beginning on the date one year after the date of the enactment, only an EBT card issued shall be eligible for exchange at any retail food store. Our agency identified during Internal Review of Rules (EO70) as needed to be repealed because they were outdated/unnecessary.

10A NCAC 71U .0301 – This Rule requires a specific form be used as verification of income for Farmers or Day Laborers. Federal Regulations, CFR 273.2(f)(4), state that although documentary evidence shall be the primary source of verification, acceptable verification shall not be limited to any single type of document and may be obtained through the household or other source. Our agency identified during Internal Review of Rules (EO70) as needed to be repealed because they were outdated/unnecessary.

10A NCAC 71U .0304 – This Rule refers to transmittal of ATP cards which are no longer used for the program. The Food, Conservation, and Energy Act of 2008 directed that no State shall issue any coupon, stamp, certification, or authorization card to a household that receives supplemental nutrition assistance under this Act. Effective beginning on the date one year after the date of the enactment, only an EBT card issued shall be eligible for exchange at any retail food store. Our agency identified during Internal Review of Rules (EO70) as needed to be repealed because they were outdated/unnecessary.

10A NCAC 71V .0101 – This Rule refers to a process that is no longer used. Currently, administrative dollars are allocated based on the percentage of estimated Low Income Energy Assistance Program dollars that will go to a county. The number of applications each county takes is also taken into consideration. This process allows for a more accurate and consistent allocation of administrative dollars based on each county's actual LIEAP dollars and applicants. Our agency

identified during Internal Review of Rules (EO70) as needed to be repealed because they were outdated/unnecessary.

10A NCAC 71W .0102, .0201, .0301, .0401-.0402, .0406, .0409, .0411, .0501, .0701-.0703, .0705-.0711, .0801-.0803, .0901-.0904 – These Rules applied to the AFDC program, which was abolished by the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, which established the Temporary Assistance for Needy Families (TANF) program. Under the TANF program, these Rules are either obsolete or the criteria have been addressed in the TANF State Plan. Our agency identified during Internal Review of Rules (EO70) as needed to be repealed because they were outdated/unnecessary.

10A NCAC 71X .0101-.0108, .0201-.0210, .0301-.0304, .0401-.0413 – These Rules applied to the AFDC program, which was abolished by the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, which established the Temporary Assistance for Needy Families (TANF) program. Under the TANF program, these Rules are either obsolete or the criteria have been addressed in the TANF State Plan. Our agency identified during Internal Review of Rules (EO70) as needed to be repealed because they were outdated/unnecessary.

Procedure by which a person can object to the agency on a proposed rule: Please submit your objection(s) in writing to Glenda Pearce, Division of Social Services, 2401 Mail Service Center, Raleigh, NC 27699-2401 or email Glenda.pearce@dhhs.nc.gov; or by telephone at (919) 334-1134.

Comments may be submitted to: Glenda Pearce, Division of Social Services, 2401 Mail Service Center, Raleigh, NC 27699-2401; phone (919) 334-1134; fax (919) 334-1018; email glenda.pearce@dhhs.nc.gov

Comment period ends: April 30, 2012

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 (check all that apply).

- ☐ State funds affected
☐ Environmental permitting of DOT affected
☐ Analysis submitted to Board of Transportation
☐ Local funds affected
Date submitted to OSBM:

- ☐ Substantial economic impact (≥\$500,000)
☐ Approved by OSBM
☒ No fiscal note required

Note: The Codifier of Rules has determined that publication of the complete text of these rules proposed to be repealed is impractical (G.S. 150B-17(b)).

CHAPTER 67 – SOCIAL SERVICES - PROCEDURES

SUBCHAPTER 67A – GENERAL ADMINISTRATION

SECTION .0100 - ADMINISTRATION

10A NCAC 67A .0109 STATE PUBLIC ASSISTANCE EQUALIZING FUND

Authority G.S. 108A-92; 143B-153.

CHAPTER 68 - SOCIAL SERVICES: RULEMAKING

SECTION .0200 - RULEMAKING: DIVISION DIRECTOR

10A NCAC 68 .0201 PETITIONS

Authority G.S. 143B-10; 150B-16.

10A NCAC 68 .0207 FEES

Authority G.S. 143B-10; 150B-11.

CHAPTER 71 – ADULT AND FAMILY SUPPORT

SUBCHAPTER 71E - RESIDENT EVALUATION SERVICES FOR ADULTS

SECTION .0100 - GENERAL POLICIES

- 10A NCAC 71E .0101 DEFINITIONS**
10A NCAC 71E .0102 AVAILABILITY OF THE SERVICE
10A NCAC 71E .0103 DEFINITION OF THE SERVICES
10A NCAC 71E .0104 TARGET POPULATION
10A NCAC 71E .0105 RESIDENT EVALUATION INSTRUMENT
10A NCAC 71E .0106 EVALUATION AND REFERRAL
10A NCAC 71E .0107 TRAINING REQUIREMENTS FOR RESIDENT EVALUATORS
10A NCAC 71E .0108 METHODS OF SERVICE PROVISION
10A NCAC 71E .0109 CASE RECORD

Authority G.S. 143B-153; S.L. 1999-237.

SUBCHAPTER 71U - FOOD ASSISTANCE

SECTION .0200 - MANUAL

10A NCAC 71U .0202 COUPON ISSUANCE

Authority G.S. 108A-51; 143B-153; P.L. 104-193; 7 C.F.R. 274.2; 7 C.F.R. 274.3; U.S.C. 2011-2027.

SECTION .0300 - FORMS

10A NCAC 71U .0301 FARMER OR DAY LABORER INCOME VERIFICATION

Authority G.S. 143B-138(b)(5); 7 U.S.C. 2011 to 2026.

10A NCAC 71U .0304 TRANSMITTAL OF ATP CARDS

Authority G.S. 143B-138, 143B-153; 7 U.S.C. 2011 to 2026.

SUBCHAPTER 71V - LOW INCOME ENERGY ASSISTANCE PROGRAM

10A NCAC 71V .0101 FUNDING

Authority G.S. 143B-153.

SUBCHAPTER 71W - GENERAL PROGRAM ADMINISTRATION

SECTION .0100 - GENERAL PROGRAM ADMINISTRATION

10A NCAC 71W .0102 GENERAL AFDC PROGRAM PROCEDURES

Authority G.S. 143B-153.

SECTION .0200 - COVERAGE

10A NCAC 71W .0201 OPTIONAL

Authority G.S. 108A-25; 143B-153; 45 C.F.R. 233.10.

SECTION .0300 - APPLICATION PROCESS

10A NCAC 71W .0301 ACCEPTANCE OF APPLICATION

Authority G.S. 108A-43; 143B-153; 45 C.F.R. 206.10.

SECTION .0400 - ELIGIBILITY FACTORS

10A NCAC 71W .0401 AGE

10A NCAC 71W .0402 SCHOOL ATTENDANCE

Authority G.S. 108A-25; 143B-153; 45 C.F.R. 233.39.

10A NCAC 71W .0406 DEPRIVATION

Authority G.S. 108A-25; 143B-153; 45 C.F.R. 233.90.

10A NCAC 71W .0409 NEED

Authority G.S. 108A-25; 108A-33; 143B-153; 45 C.F.R. 233; c. 738, 1987 Session Laws.

10A NCAC 71W .0411 STATE WORK REQUIREMENT

Authority G.S. 108A-29; 143B-153; 45 C.F.R. 233.10; 45 C.F.R. 233.20; 45 C.F.R. 250.30; 45 C.F.R. 250.34.

SECTION .0500 - REDETERMINATION OF ELIGIBILITY

10A NCAC 71W .0501 CHANGES IN SITUATION

Authority G.S. 143B-153; 45 C.F.R. 206.10.

SECTION .0700 - EMERGENCY ASSISTANCE COVERAGE

10A NCAC 71W .0701 ELIGIBILITY FOR COVERAGE

10A NCAC 71W .0702 EMERGENCIES COVERED

10A NCAC 71W .0703 EMERGENCY NOT COVERED

Authority G.S. 108A-39.1; 143B-153; 45 C.F.R. 233.120.

10A NCAC 71W .0705 TYPES OF ASSISTANCE PROVIDED

10A NCAC 71W .0706 METHODS OF PAYMENT

10A NCAC 71W .0707 APPLICATION AND

DISPOSITION

10A NCAC 71W .0708 RESERVE

10A NCAC 71W .0709 INCOME

10A NCAC 71W .0710 RESERVE AND INCOME FOR SERVICES

10A NCAC 71W .0711 PROCEDURES

Authority G.S. 108A-39.1; 143B-153; 45 C.F.R. 233.120.

SECTION .0800 - UNEMPLOYED PARENT PROGRAM

10A NCAC 71W .0801 GENERAL PROCEDURES

10A NCAC 71W .0802 COVERAGE AND

PARTICIPATION

10A NCAC 71W .0803 ELIGIBILITY VERIFICATIONS

Authority G.S. 108A-28; 143B-153; Chapter 738, 1987 Session Laws.

SECTION .0900 - TRANSITIONAL CHILD CARE

10A NCAC 71W .0901 GENERAL REQUIREMENTS

10A NCAC 71W .0902 METHODS OF PROVIDING

CHILD CARE

10A NCAC 71W .0903 SLIDING FEE SCALE

10A NCAC 71W .0904 CHILD CARE RATES AND MAXIMUM PAYMENT

Authority G.S. 108A-25; 143B-153; 45 C.F.R. Part 256.

SUBCHAPTER 71X - JOB OPPORTUNITIES AND BASIC SKILLS TRAINING (JOBS) PROGRAM

SECTION .0100 - ADMINISTRATION

10A NCAC 71X .0101	IMPLEMENTATION SCHEDULE
10A NCAC 71X .0102	COUNTY PLAN
10A NCAC 71X .0103	OPTIONAL COMPONENTS
10A NCAC 71X .0104	POST-SECONDARY EDUCATION
10A NCAC 71X .0105	PARTICIPATION RATE
10A NCAC 71X .0106	EXPENDITURE RATE
10A NCAC 71X .0107	APPLICANTS
10A NCAC 71X .0108	JOBS CASE MANAGEMENT

Authority G.S. 108A-29; 143B-153; 42 U.S.C. 682(a)(2); 45 C.F.R. 250.11.

SECTION .0200 - JOBS PARTICIPATION

10A NCAC 71X .0201	PARTICIPATION OF UNEMPLOYED PARENT IN EDUCATION
10A NCAC 71X .0202	CONCILIATION PROCEDURE
10A NCAC 71X .0203	ASSIGNMENT OF 16 AND 17 YEAR OLD CUSTODIAL PARENTS
10A NCAC 71X .0204	ASSIGNMENT OF 18 AND 19 YEAR OLD CUSTODIAL PARENTS
10A NCAC 71X .0205	ASSIGNMENT OF PARTICIPANTS 20 YEARS OF AGE OR OLDER
10A NCAC 71X .0206	SATISFACTORY PROGRESS IN AN EDUCATIONAL COMPONENT
10A NCAC 71X .0207	CONTINUATION IN PROGRAM COMPONENTS AFTER AFDC TERMINATION
10A NCAC 71X .0208	PROVISION OF CASE MANAGEMENT AND SUPPORTIVE SERVICES
10A NCAC 71X .0209	CRITERIA FOR SELF-INITIATED EDUCATION OR TRAINING
10A NCAC 71X .0210	SERVICES DURING GAPS IN PARTICIPATION

Authority G.S. 108A-29; 143B-153; 42 U.S.C. 682(a)(2); 45 C.F.R. 255.2(d).

SECTION .0300 - JOBS PROGRAM COMPONENTS AND ACTIVITIES

10A NCAC 71X .0301	JOBS COMPONENT EXPENSES
10A NCAC 71X .0302	WORK EXPERIENCE
10A NCAC 71X .0303	POST-SECONDARY EDUCATION
10A NCAC 71X .0304	ALTERNATIVE WORK EXPERIENCE

Authority G.S. 143B-153; 45 C.F.R. 250.63(k); 42 U.S.C. 682(a)(2).

SECTION .0400 - SUPPORTIVE SERVICES

10A NCAC 71X .0401	SUPPORTIVE SERVICES TO BE AVAILABLE IN JOBS COUNTIES
10A NCAC 71X .0402	HEALTH SUPPORT SERVICES
10A NCAC 71X .0403	IN-HOME AIDE SERVICES
10A NCAC 71X .0404	TRANSPORTATION SERVICES
10A NCAC 71X .0405	CHILD CARE
10A NCAC 71X .0406	PERSONAL AND FAMILY COUNSELING
10A NCAC 71X .0407	INDIVIDUAL AND FAMILY ADJUSTMENT SERVICES
10A NCAC 71X .0408	PARTICIPATION EXPENSES
10A NCAC 71X .0409	ONE-TIME WORK RELATED EXPENSES
10A NCAC 71X .0410	DAY CARE SERVICES FOR ADULTS
10A NCAC 71X .0411	SUPPORTIVE SERVICES TO BE AVAILABLE IN NON-JOBS COUNTIES
10A NCAC 71X .0412	SUPPORTIVE SERVICES LIMITS
10A NCAC 71X .0413	DEFINITION OF FAMILY MEMBER

Authority G.S. 108A-29; 143B-153; 42 U.S.C. 602(g); 42 U.S.C. 682(a)(2); 45 C.F.R. 250.10; 45 C.F.R. 255.1(c); 45 C.F.R. 255.2(c)(2).

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 03 – NORTH CAROLINA BOARD OF ATHLETIC TRAINER EXAMINERS

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Athletic Trainer Examiners intends to adopt the rules cited as 21 NCAC 03 .0202, .0310; and amend the rule cited as 21 NCAC 03 .0201.

Link to agency website pursuant to G.S. 150B-19.1(c):
<http://www.ncbate.org>

Proposed Effective Date: July 1, 2012

Public Hearing:

Date: March 21, 2012

Time: 10:00 a.m.

Location: NC Board of Athletic Trainer Examiners, 11A Glenwood Avenue, Raleigh, NC 27603

Reason for Proposed Action:

21 NCAC 03 .0201 – Increased costs for Board services and clarification of fees

21 NCAC 03 .0202, .0310 – Meeting statutory requirements

Procedure by which a person can object to the agency on a proposed rule: Contact Paola Learoyd, Executive Director, in writing at NCBATE, P.O. Box 10769, Raleigh, NC 27605.

Comments may be submitted to: Paola Learoyd, Executive Director, P.O. Box 10769, Raleigh, NC 27605; phone (919) 821-4980; email paola@recanc.com

Comment period ends: April 30, 2012

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 (check all that apply).

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Date submitted to OSBM:
- ☐ Substantial economic impact (≥\$500,000)
- ☒ Approved by OSBM
- ☒ No fiscal note required

SECTION .0200 - FEES

21 NCAC 03 .0201 FEES

The following fees are payable to the Board by cash, check or money order:

License Issuance Fee	\$100.00 \$200.00
License Renewal Fee	\$ 50.00 \$ 75.00
Reinstatement of Lapsed License Fee	\$ 75.00 \$100.00
Duplicate License Fee	\$ 10.00
Reasonable Charges for Duplication Services and Materials.	

Authority G.S. 90-525; 90-534.

21 NCAC 03 .0202 SUSPENSION OF AUTHORITY AND ESCROW OF FUNDS

The Board shall file the annual reports set forth in G.S. 93B-2 no later than October 31 of each year. In the event the Board fails to file the reports as required by G.S. 93B-2 and the Board's authority to expend any funds is suspended until such time as the Board files the required reports, the Board shall deposit any fees or funds received during the period of suspension into an escrow account established by the Board solely for this purpose.

Authority G.S. 90-525.

SECTION .0300 - RENEWAL OF LICENSE

21 NCAC 03 .0310 ARMED SERVICES EXTENSION FOR CREDENTIAL

Upon receipt of a written request by or on behalf of a licensed athletic trainer who is currently in good standing with the Board, is serving in the armed forces of the United States, and to whom G.S. 105-249 authorizes an extension of time to file a tax return, the Board shall postpone renewal fees, renewal application deadlines, continuing education requirements and any other requirements or conditions related to the maintenance of the credential issued by the Board or to the renewal thereof for the same period of time as the extended period of time to file a tax return that is granted pursuant to G.S. 93B-15.

Authority G.S. 90-525.

CHAPTER 36 - BOARD OF NURSING

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Nursing intends to amend the rules cited as 21 NCAC 36 .0120, .0702-.0703, .0801, .0803-.0804, and .0808.

Link to agency website pursuant to G.S. 150B-19.1(c):
<http://www.ncbon.com>

Proposed Effective Date: July 1, 2012

Public Hearing:

Date: May 17, 2012

Time: 1:00 p.m.

Location: NC Board of Nursing Office, 4516 Lake Boone Trail, Raleigh, NC 27607

Reason for Proposed Action:

21 NCAC 36 .0120 – To clarify definition of APRN, expressly listing the four distinct roles; this is also consistent with national nomenclature for advanced practice registered nurses.

21 NCAC 36 .0702, .0703 – To bring the licensure compact rules in compliance with the Nurse Licensure Compact Administration Model Rules for the Nurse Licensure Compact, consistent with Article 9G of Chapter 90.

21 NCAC 36 .0801, .0803, .0804, .0808 – The NC Board of Nursing and the NC Medical Board recently reviewed the Nurse Practitioner rules to improve clarity and to be more in sync with the physician assistant process; correct references in rule and to change the years of inactive for the refresher course.

Procedure by which a person can object to the agency on a proposed rule: Persons may submit objections to this rule by contacting Jean H. Stanley, APA Coordinator, NC Board of Nursing, P.O. Box 2129, Raleigh, NC 27602; fax (919) 781-9461; email jeans@ncbon.com.

Comments may be submitted to: Jean H. Stanley, NC Board of Nursing, P.O. Box 2129, Raleigh, NC 27602; fax (919) 781-9461; email jeans@ncbon.com

Comment period ends: May 17, 2012

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 (check all that apply).

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Date submitted to OSBM:
- ☐ Substantial economic impact (≥\$500,000)
- ☐ Approved by OSBM
- ☒ No fiscal note required

SECTION .0100 - GENERAL PROVISIONS

21 NCAC 36 .0120 DEFINITIONS

The following definitions shall apply throughout this chapter unless the context indicates otherwise:

- (1) "Academic term" means one semester of a school year.
- (2) "Accountability/Responsibility" means being answerable for action or inaction of self, and of others in the context of delegation or assignment.
- (3) "Accredited institution" means an institution accredited by a United States Department of Education approved institutional accrediting body.
- (4) "Active Practice" means activities that are performed, either for compensation or without compensation, consistent with the scope of practice for each level of licensee as defined in G.S. 90-171.20(4), (7) and (8).
- (5) "Advanced Practice Registered Nurse (APRN)" means nurse practitioner, nurse anesthetist, nurse-midwife or clinical nurse specialist, ~~for the purposes of Board qualification a nurse who meets the criteria specified in G.S. 90-171.21(d)(4).~~

- (6) "Assigning" means designating responsibility for implementation of a specific activity or set of activities to a person licensed and competent to perform such activities.
- (7) "Clinical experience" means application of nursing knowledge in demonstrating clinical judgment.
- (8) "Clinical judgment" means the application of the nursing student's knowledge, skills, abilities and experience in making decisions about client care.
- (9) "Competent" means having the knowledge, skills and ability to safely perform an activity or role.
- (10) "Continuing Competence" means the on-going acquisition and application of knowledge and the decision-making, psychomotor, and interpersonal skills expected of the licensed nurse resulting in nursing care that contributes to the health and welfare of clients served.
- (11) "Contact Hour" means 60 minutes of an organized learning experience.
- (12) "Continuing Education Activity" means a planned, organized learning experience that is related to the practice of nursing or contributes to the competency of the nurse as defined in 21 NCAC 36 .0223 Subparagraph (a)(2).
- (13) "Controlling institution" means the degree-granting organization or hospital under which the nursing education program is operating.
- (14) "Curriculum" means an organized system of teaching and learning activities directed toward the achievement of specified learning objectives/outcomes.
- (15) "Delegation" means transferring to a competent individual the authority to perform a selected nursing activity in a selected situation. The nurse retains accountability for the delegation.
- (16) "Dimensions of Practice" means those aspects of nursing practice that include professional responsibility, knowledge-based practice, legal/ethical practice and collaborating with others, consistent with G.S. 90-171.20(4), (7) and (8).
- (17) "Distance education" means the teaching/learning strategies used to meet the learning needs of students, when the students and faculty are separate from each other.
- (18) "Faculty directed clinical practice" means the responsibility of nursing program faculty in overseeing student clinical learning including the utilization of preceptors.
- (19) "Focused client care experience" means a clinical experience that simulates an entry-level work experience. The intent is to assist the student to transition to an entry-level practice. There is no specific setting requirement. Supervision may be by

- faculty/preceptor dyad or direct faculty supervision.
- (20) "Interdisciplinary faculty" means faculty from professions other than nursing.
- (21) "Interdisciplinary team" means all individuals involved in providing a client's care, who cooperate, collaborate, communicate and integrate care to ensure that care is continuous and reliable.
- (22) "Level of Licensure" means practice of nursing by either a Licensed Practice Nurse or a Registered Nurse as defined in G.S. 90-171.20(7) and (8).
- (23) "Level of student" means the point in the program to which the student has progressed.
- (24) "Maximum enrollment" means the total number of pre-licensure students that can be enrolled in the nursing program at any one time. The number reflects the capacity of the nursing program based on demonstrated resources sufficient to implement the curriculum.
- (25) "Methods of Instruction" means the planned process through which teacher and student interact with selected environment and content so that the response of the student gives evidence that learning has taken place. It is based upon stated course objectives/outcomes for learning experiences in classroom, laboratory and clinical settings.
- (26) "National Credentialing Body" means a credentialing body that offers certification or re-certification in the licensed nurse's or Advanced Practice Registered Nurse's specialty area of practice.
- (27) "NCLEX-PN™" means the National Council Licensure Examinations for Practical Nurses.
- (28) "NCLEX-RN™" means the National Council Licensure Examinations for Registered Nurses.
- (29) "Nursing Accreditation body" means a national nursing accrediting body, recognized by the United States Department of Education.
- (30) "Nursing program faculty" means individuals employed full or part time by academic institution responsible for developing, implementing, evaluation and updating nursing curricula.
- (31) "Nursing project" means a project or research study of a topic related to nursing practice that includes a problem statement, objectives, methodology and summary of findings.
- (32) "Participating in" means to have a part in or contribute to the elements of the nursing process.
- (33) "Pattern of noncompliance" means episodes of recurring non-compliance with one or more Rules in Section .0300.
- (34) "Preceptor" means a registered nurse at or above the level of licensure that an assigned student is seeking, who may serve as a teacher, mentor, role model and supervisor for a faculty directed clinical experience.
- (35) "Prescribing Authority" means the legal permission granted by the Board of Nursing and Medical Board for the nurse practitioner and nurse midwife to procure and prescribe legend and controlled pharmacological agents and devices to a client in compliance with Board of Nursing rules and other applicable federal and state law and regulations.
- (36) "Program Closure" means to cease operation of a nursing program.
- (37) "Program Type" means a course of study that prepares an individual to function as an entry-level practitioner of nursing. The three program types are:
- (a) BSN - Curriculum components for Bachelor of Science in Nursing provides for the attainment of knowledge and skill sets in the current practice in nursing, nursing theory, nursing research, community and public health, health care policy, health care delivery and finance, communications, therapeutic interventions and current trends in health care. For this program type, the client is the individual, family, group, and community.
- (b) Associate Degree in Nursing (ADN)/Diploma in Registered Nursing - Curriculum components for the ADN/Diploma in Registered Nursing provides for the attainment of knowledge and skill sets in the current practice in nursing, community concepts, health care delivery, communications, therapeutic interventions and current trends in health care. For this program type, client is the individual, group of individuals, and family.
- (c) Practical Nurse Diploma - Curriculum prepares for functioning in a dependent role in providing direct nursing care under the direction of a registered nurse or other health care provider as defined by the Nursing Practice Act. Curriculum components provide for the attainment of knowledge and skill sets in the current practice of practical nursing, communications, therapeutic interventions, including pharmacology, growth and development and current trends in

- health care. For this program type client is the individual, or group of individuals.
- (38) "Review" means collecting and analyzing information to assess compliance with Section .0300 of this Chapter. Information may be collected by multiple methods including review of written reports and materials, on-site observations and review of documents or in person or telephone interview(s) and conference(s)
- (39) "Rescind Approval" means a Board action that removes the approval status previously granted.
- (40) "Self Assessment" means the process whereby the individual reviews her/his own nursing practice and identifies the knowledge and skills possessed, as well as those skills to be strengthened.
- (41) "Specialty" means a broad, population-based focus of study encompassing the common health-related problems of that group of patients and the likely co-morbidities, interventions and responses to those problems.
- (42) "Supervision" means the provision of guidance or direction, evaluation and follow-up by the licensed nurse for accomplishment of an assigned or delegated nursing activity or set of activities.
- (43) "Survey" means an on-site visit for the purpose of gathering data in relation to reviewing nursing programs compliance with Section .0300 of this Chapter.

Authority G.S. 90-171.23; 90-171.38.

SECTION .0700 - NURSE LICENSURE COMPACT

21 NCAC 36 .0702 ISSUANCE OF A LICENSE BY A COMPACT PARTY STATE

For the purpose of the Compact:

- (1) A nurse applying for a license in a home state shall produce evidence of the nurses' primary state of residence. Such evidence shall include a declaration signed by the licensee attesting to the licensee's primary state of residence. Further evidence that may be requested includes, but is not limited to:
- (a) Driver's license with a home address;
 - (b) Voter registration card displaying a home address; ~~or~~
 - (c) Federal income tax return declaring the primary state of residence; ~~residence.~~
 - (d) Military Form No. 2058 – state of legal residence certificate; or
 - (e) W2 from US Government or any bureau, division or agency thereof

- indicating the declared state of residence.
- (2) A nurse changing primary state of residence, from one party state to another party state, may continue to practice under the former home state license and multistate licensure privilege during the processing of the nurse's licensure application in the new home state for a period not to exceed 30 days.
- (3) The licensure application in the new home state of a nurse under pending investigation by the former home state shall be held in abeyance. The 30-day period in Item (2) of this Rule shall be stayed until resolution of the pending investigation.
- (4) The former home state license shall no longer be valid upon the issuance of a new home state license.
- (5) If a decision is made by the new home state denying licensure, the new home state shall notify the former home state within 10 business days and the former home state may take action in accordance with that state's laws and rules.
- (6) As of July 1, 2005, no individual shall be issued a multistate licensure privilege unless the applicant provides evidence of successful completion of the licensing examination developed by the National Council of State Boards of Nursing, Inc.
- (7) A nurse on a visa from another country applying for licensure in a party state may declare either the country of origin or the party state as the primary state of residence. If the foreign country is declared the primary state of residence, a single state license will be issued by the party state.
- (8) A license issued by a party state is valid for practice in all other party states unless clearly designated as valid only in the state which issued the license.

Authority G.S. 90-171.82(6); 90-171.83(a)(b); 90-171.85(b); 90-171.87(4).

21 NCAC 36 .0703 LIMITATIONS ON MULTISTATE LICENSURE PRIVILEGE

- (a) Home state Boards shall include in all licensure disciplinary orders or agreements that limit practice or require monitoring the requirement that the licensee subject to said order or agreement will agree to limit the licensee's practice to the home state during the pendency of the disciplinary order or agreement. This requirement may, in the alternative, allow the nurse to practice in other party states with prior written authorization from both the home state and such other party state Boards.
- (b) An individual who had a license which was surrendered, revoked, suspended, or an application denied for cause in a prior state of primary residence, may be issued a single state license in a new primary state of residence until such time as the individual

would be eligible for an unrestricted license by the prior state(s) or adverse action. Once eligible for licensure in the prior state(s); a multistate license may be issued.

Authority G.S. 90-171.37; 90-171.85(f); 90-171.87(4).

SECTION .0800 - APPROVAL AND PRACTICE PARAMETERS FOR NURSE PRACTITIONERS

21 NCAC 36 .0801 DEFINITIONS

The following definitions apply to this Section:

- (1) "Medical Board" means the North Carolina Medical Board.
- (2) "Board of Nursing" means the North Carolina Board of Nursing.
- (3) "Joint Subcommittee" means the subcommittee composed of members of the Board of Nursing and members of the Medical Board to whom responsibility is given by G.S. 90-8.2 and G.S. 90-171.23(b)(14) to develop rules to govern the performance of medical acts by nurse practitioners in North Carolina.
- (4) "Nurse Practitioner" or "NP" means a currently licensed registered nurse approved to perform medical acts consistent with the nurse's area of nurse practitioner academic educational preparation and national certification under an agreement with a licensed physician for ongoing supervision, consultation, collaboration and evaluation of the medical acts performed. Such medical acts are in addition to those nursing acts performed by virtue of registered nurse (RN) licensure. The NP is held accountable under the RN license for those nursing acts that he or she may perform.
- (5) "Registration" means authorization by the Medical Board and the Board of Nursing for a registered nurse to use the title nurse practitioner in accordance with this Section.
- (6) "Approval to Practice" means authorization by the Medical Board and the Board of Nursing for a nurse practitioner to perform medical acts within her or his area of educational preparation and certification under a collaborative practice agreement (CPA) with a licensed physician in accordance with this Section.
- (7) "Supervision" means the physician's function of overseeing medical acts performed by the nurse practitioner.
- (8) "Collaborative practice agreement" means the arrangement for nurse practitioner-physician continuous availability to each other for ongoing supervision, consultation, collaboration, referral and evaluation of care provided by the nurse practitioner.
- (9) "Primary Supervising Physician" means the licensed physician ~~who, by signing the nurse~~

~~practitioner application, who~~ shall provide ongoing supervision, collaboration, consultation and evaluation of the medical acts performed by the nurse practitioner as defined in the collaborative practice agreement. Supervision shall be in compliance with the following:

- (a) The primary supervising physician shall assure both Boards that the nurse practitioner is qualified to perform those medical acts described in the collaborative practice agreement.
 - (b) A physician in a graduate medical education program, whether fully licensed or holding only a resident's training license, shall not be named as a primary supervising physician.
 - (c) A fully licensed physician in a graduate medical education program who is also practicing in a non-training situation may supervise a nurse practitioner in the non-training situation.
- (10) "Back-up Supervising Physician" means the licensed physician who, by signing an agreement with the nurse practitioner and the primary supervising physician(s) shall provide supervision, collaboration, consultation and evaluation of medical acts by the nurse practitioner in accordance with the collaborative practice agreement when the Primary Supervising Physician is not available. Back-up supervision shall be in compliance with the following:
- (a) The signed and dated agreements for each back-up supervising physician(s) shall be maintained at each practice site.
 - (b) A physician in a graduate medical education program, whether fully licensed or holding only a resident's training license, shall not be named as a back-up supervising physician.
 - (c) A fully licensed physician in a graduate medical education program who is also practicing in a non-training situation and has a signed collaborative practice agreement with the nurse practitioner and the primary supervising physician may be a back-up supervising physician for a nurse practitioner in the non-training situation.
- (11) "Volunteer Approval" means approval to practice consistent with this rule except without expectation of direct or indirect compensation or payment (monetary, in kind or otherwise) to the nurse practitioner.

- (12) Disaster" means a state of disaster as defined in G.S. 166A-4(1a) and proclaimed by the Governor, or by the General Assembly pursuant to G.S. 166A-6.
- (13) "National Credentialing Body" means one of the following credentialing bodies that offers certification and re-certification in the nurse practitioner's specialty area of practice: American Nurses Credentialing Center (ANCC); American Academy of Nurse Practitioners (AANP); American Association of Critical Care Nurses Certification Corporation (AACN); National Certification Corporation of the Obstetric Gynecologic and Neonatal Nursing Specialties (NCC); and the Pediatric Nursing Certification Board (PNCB).

Authority G.S. 90-8.1; 90-8.2; 90-18(14); 90-18.2; 90-171.20(4); 90-171.20(7); 90-171.23(b); 90-171.83.

21 NCAC 36 .0803 NURSE PRACTITIONER REGISTRATION

- (a) The Board of Nursing shall register an applicant who:
- (1) has an unrestricted license to practice as a registered nurse in North Carolina and, when applicable, an unrestricted approval, registration or license as a nurse practitioner in another state, territory, or possession of the United States;
 - (2) has successfully completed a nurse practitioner education program as outlined in Rule .0805 of this Section;
 - (3) is certified as a nurse practitioner by a national credentialing body consistent with ~~21 NCAC 36 .0120(7) and (9);~~ 21 NCAC 36 .0801(13); and
 - (4) has supplied additional information necessary to evaluate the application as requested.
- (b) Beginning January 1, 2005, new graduates of a nurse practitioner program, who are seeking first-time nurse practitioner registration in North Carolina shall:
- (1) hold a Master's or higher degree in Nursing or related field with primary focus on Nursing;
 - (2) have successfully completed a graduate level nurse practitioner education program accredited by a national accrediting body; and
 - (3) provide documentation of certification by a national credentialing body.

Authority G.S. 90-18(c)(13); 90-18.2; 90-171.20(7); 90-171.23(b); 90-171.83.

21 NCAC 36 .0804 PROCESS FOR APPROVAL TO PRACTICE

- (a) Prior to the performance of any medical acts, a nurse practitioner shall:
- (1) meet registration requirements as specified in 21 NCAC 36 .0803 of this Section;
 - (2) submit an application for approval to practice;

- (3) submit any additional information necessary to evaluate the application as requested; and
- (4) have a collaborative practice agreement with a primary supervising physician.

(b) A nurse practitioner seeking approval to practice who has not practiced as a nurse practitioner in more than ~~five~~ two years shall complete a nurse practitioner refresher course approved by the Board of Nursing in accordance with Paragraphs (o) and (p) of 21 NCAC 36 .0220 and consisting of common conditions and their management directly related to the nurse practitioner's area of education and certification.

(c) The nurse practitioner shall not practice until notification of approval to practice is received from the Board of Nursing after both Boards have approved the application.

(d) The nurse practitioner's approval to practice is terminated when the nurse practitioner discontinues working within the approved nurse practitioner collaborative practice agreement, or experiences an interruption in her/his registered nurse licensure status, and the nurse practitioner shall notify the Board of Nursing in writing. The Boards may extend the nurse practitioner's approval to practice in cases of emergency such as injury, sudden illness or death of the primary supervising physician.

(e) Applications for approval to practice in North Carolina shall be submitted to the Board of Nursing and then approved by both Boards as follows:

- (1) the Board of Nursing shall verify compliance with Rule .0803 and Paragraph (a) of this Rule; and
- (2) the Medical Board shall verify that the designated primary supervising physician holds a valid license to practice medicine in North Carolina and compliance with Paragraph (a) of this Rule.

(f) Applications for approval of changes in practice arrangements for a nurse practitioner currently approved to practice in North Carolina:

- (1) addition or change of primary supervising physician shall be submitted to the Board of Nursing and processed pursuant to protocols developed by both Boards; and
- (2) request for change(s) in the scope of practice shall be submitted to the Joint Subcommittee.

(g) A registered nurse who was previously approved to practice as a nurse practitioner in this state who reapplies for approval to practice shall:

- (1) meet the nurse practitioner approval requirements as stipulated in Rule .0808(c) of this Section; and
- (2) complete the appropriate application.

(h) Volunteer Approval to Practice. The North Carolina Board of Nursing shall grant approval to practice in a volunteer capacity to a nurse practitioner who has met the qualifications to practice as a nurse practitioner in North Carolina.

(i) The nurse practitioner shall pay the appropriate fee as outlined in Rule .0813 of this Section.

(j) A Nurse Practitioner approved under this Section shall keep proof of current licensure, registration and approval available for

inspection at each practice site upon request by agents of either Board.

Authority G.S. 90-18(13), (14); 90-18.2; 90-171.20(7); 90-171.23(b).

21 NCAC 36 .0808 INACTIVE STATUS

(a) Any nurse practitioner who wishes to place her or his approval to practice on an inactive status shall notify the Board of Nursing.

(b) A nurse practitioner with an inactive approval to practice status shall not practice as a nurse practitioner.

(c) A nurse practitioner with an inactive approval to practice status who reapplies for approval to practice shall meet the qualifications for approval to practice in Rules .0803(a)(1), .0804(a) and (b), ~~.0804(a), .0806(b)~~, .0807, and .0810 of this

Section and receive notification from the Board of Nursing of approval prior to beginning practice after the application is approved by both Boards.

(d) A nurse practitioner ~~with an inactive approval to practice status of greater than~~ who has not practiced as a nurse practitioner in more than two five years shall complete a nurse practitioner refresher course approved by the Board of Nursing in accordance with Paragraphs (o) and (p) of 21 NCAC 36 .0220 and consisting of common conditions and their management directly related to the nurse practitioner's area of education and certification in order to be eligible to apply for approval to practice. ~~certification.~~

Authority G.S. 90-18(13); 90-18.2; 90-171.36; 90-171.83.

APPROVED RULES

*This Section includes a listing of rules approved by the Rules Review Commission followed by the full text of those rules. The rules that have been approved by the RRC in a form different from that originally noticed in the Register or when no notice was required to be published in the Register are identified by an * in the listing of approved rules. Statutory Reference: G.S. 150B-21.17.*

Rules approved by the Rules Review Commission at its meeting on January 19, 2012.

**REGISTER CITATION TO THE
NOTICE OF TEXT****ALCOHOLIC BEVERAGE CONTROL COMMISSION**

<u>Notice of Alleged Violation</u>	04	NCAC	02R	.0802*	26:06 NCR
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CHILD CARE COMMISSION

<u>General Safety Requirements</u>	10A	NCAC	09	.0604*	26:05 NCR
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SHERIFFS EDUCATION AND TRAINING STANDARDS COMMISSION

<u>Limited Lecturer Certification</u>	12	NCAC	10B	.0908*	26:07 NCR
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<u>Instructors</u>	12	NCAC	10B	.2004*	26:07 NCR
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<u>Minimum Training Requirements</u>	12	NCAC	10B	.2005*	26:07 NCR
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ALARM SYSTEMS LICENSING BOARD

<u>Application for License</u>	12	NCAC	11	.0201*	26:02 NCR
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<u>Renewal or Re-issue of License</u>	12	NCAC	11	.0204*	26:02 NCR
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<u>Application for Registration</u>	12	NCAC	11	.0301*	26:02 NCR
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<u>Renewal or Reregistration of Registration</u>	12	NCAC	11	.0306*	26:02 NCR
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MARINE FISHERIES COMMISSION

<u>Trout</u>	15A	NCAC	03M	.0504	26:03 NCR
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<u>Shad</u>	15A	NCAC	03M	.0519	26:03 NCR
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<u>Surrender of Licenses</u>	15A	NCAC	03O	.0111	26:03 NCR
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<u>Suspension, Revocation and Reissuance of Licenses</u>	15A	NCAC	03O	.0114*	26:03 NCR
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SEDIMENTATION CONTROL COMMISSION

<u>Design Standards for the Upper Neuse River Basin</u>	15A	NCAC	04B	.0132*	26:06 NCR
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WILDLIFE RESOURCES COMMISSION

<u>Wild Boar (Both Sexes)</u>	15A	NCAC	10B	.0204*	n/a G.S. 150B-21.5(b)
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<u>Feral Swine</u>	15A	NCAC	10B	.0223	26:05 NCR
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WATER TREATMENT FACILITY OPERATORS CERTIFICATION BOARD

<u>Grades of Certification</u>	15A	NCAC	18D	.0201*	26:08 NCR
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<u>Fee Schedule</u>	15A	NCAC	18D	.0304*	26:08 NCR
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CERTIFIED PUBLIC ACCOUNTANT EXAMINERS, BOARD OF

<u>Computation of CPE Credits</u>	21	NCAC	08G	.0409	26:08 NCR
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APPROVED RULES

<u>Professional Ethics and Conduct CPE</u>	21	NCAC	08G	.0410	26:08 NCR
<u>Retired and Inactive Status: Change of Status</u>	21	NCAC	08J	.0105	26:08 NCR

COSMETIC ART EXAMINERS, BOARD OF

<u>Internships</u>	21	NCAC	14T	.0614*	26:04 NCR
<u>School Operations/Licensure Maintenance</u>	21	NCAC	14T	.0701*	26:04 NCR

MEDICAL BOARD

<u>Initiation of Formal Hearings</u>	21	NCAC	32N	.0101	26:02 NCR
<u>Continuances</u>	21	NCAC	32N	.0102	26:02 NCR
<u>Disqualification for Personal Bias</u>	21	NCAC	32N	.0103	26:02 NCR
<u>Discovery</u>	21	NCAC	32N	.0104	26:02 NCR
<u>Informal Proceedings</u>	21	NCAC	32N	.0105	26:02 NCR
<u>Definitions</u>	21	NCAC	32N	.0106*	26:02 NCR
<u>Investigations and Complaints</u>	21	NCAC	32N	.0107*	26:02 NCR
<u>Investigative Interviews by Board Members</u>	21	NCAC	32N	.0108	26:02 NCR
<u>Pre-Charge Conference</u>	21	NCAC	32N	.0109	26:02 NCR
<u>Initiation of Disciplinary Hearings</u>	21	NCAC	32N	.0110	26:02 NCR
<u>Conducting Disciplinary Hearings</u>	21	NCAC	32N	.0111	26:02 NCR
<u>Post Hearing Motions</u>	21	NCAC	32N	.0112	26:02 NCR
<u>Correction of Clerical Mistakes</u>	21	NCAC	32N	.0113	26:02 NCR

PODIATRY EXAMINERS, BOARD OF

<u>Continuing Education</u>	21	NCAC	52	.0208*	26:07 NCR
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REAL ESTATE COMMISSION

<u>Active and Inactive License Status</u>	21	NCAC	58A	.0504*	n/a G.S. 150B-21.5(a)(5)
<u>Licensing of Persons Licensed in Another Jurisdiction</u>	21	NCAC	58A	.0511*	n/a G.S. 150B-21.5(a)(5)

These rules are subject to the next Legislative Session. (See G.S. 150B-21.3)

CHILD CARE COMMISSION

<u>Definitions</u>	10A	NCAC	09	.0102*	25:14 NCR
<u>Education Standards for a Two Component Rated...</u>	10A	NCAC	09	.2819*	25:14 NCR
<u>Education Standards for Lead Teachers for a Rated...</u>	10A	NCAC	09	.2820*	25:14 NCR
<u>Education Standards for Teachers for Rated License...</u>	10A	NCAC	09	.2821*	25:14 NCR
<u>Education Standards for Program Coordinators for a...</u>	10A	NCAC	09	.2822*	25:14 NCR
<u>Education Standards for Group Leaders and Assist...</u>	10A	NCAC	09	.2823*	25:14 NCR
<u>Education Standards for a Rated License for Admi...</u>	10A	NCAC	09	.2824*	25:14 NCR
<u>Education Standards for Program Coordinators for...</u>	10A	NCAC	09	.2825*	25:14 NCR
<u>Education Standards for Group Leaders and Assistan...</u>	10A	NCAC	09	.2826*	25:14 NCR
<u>Education Standards for Operators for a Rated Licen...</u>	10A	NCAC	09	.2827*	25:14 NCR

TITLE 04 – DEPARTMENT OF COMMERCE

04 NCAC 02R .0802 NOTICE OF ALLEGED VIOLATION

If facts reported by a law enforcement officer indicate a violation of the ABC laws, the Commission shall send a Notice of Alleged Violation to the permittee. The permittee is deemed notified if the notice is delivered to the permittee's address as stated on the permit.

History Note: Authority G.S. 1A-1, Rule 4(j); 18B-100; 18B-104; 18B-203(a)(12); 18B-207; 150B-22; 150B-23; Eff. January 1, 1982; Amended Eff. February 1, 2012; July 1, 1992; May 1, 1984.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

10A NCAC 09 .0102 DEFINITIONS

The terms and phrases used in this Chapter are defined as follows except when the context of the rule requires a different meaning. The definitions prescribed in G.S. 110-86 also apply to these Rules.

- (1) "Agency" as used in Section .2200 of this Chapter, means Division of Child Development and Early Education, Department of Health and Human Services located at 319 Chapanoke Road, Suite 120, Raleigh, North Carolina 27603.
- (2) Appellant" means the person or persons who request a contested case hearing.
- (3) Basic School-Age Care" training (BSAC training) means the training on the elements of quality afterschool care for school-age children, developed by the North Carolina State University Department of 4-H Youth Development and subsequently revised by the North Carolina School-age Quality Improvement Project. Other training shall be approved as equivalent if the Division determines that the content of the training offered is substantially equivalent to the BSAC training.
- (4) "Child Care Program" means a single center or home, or a group of centers or homes or both, which are operated by one owner or supervised by a common entity.
- (5) "Child care provider" as defined by G.S. 110-90.2 (a) (2) a. and used in Section .2700 of this Chapter, includes the following employees who have contact with the children in a child care program: facility directors, administrative staff, teachers, teachers' aides, cooks, maintenance personnel, and drivers.
- (6) "Child Development Associate Credential" means the national early childhood credential

- (7) "Developmentally appropriate" means suitable to the chronological age range and developmental characteristics of a specific group of children.
- (8) "Division" means the Division of Child Development and Early Education within the Department of Health and Human Services.
- (9) "Drop-in care" means a child care arrangement where children attend on an intermittent, unscheduled basis.
- (10) "Early Childhood Environment Rating Scale - Revised Edition" (Harms, Clifford, and Cryer, 2005, published by Teachers College Press, New York, NY) is the instrument used to evaluate the quality of care received by a group of children in a child care center, when the majority of children in the group are two and a half years old through five years old, to achieve three or more points for the program standards of a rated license. This instrument is incorporated by reference and includes subsequent editions. Individuals wishing to purchase a copy may call Teachers College Press at 1-800-575-6566. The cost of this scale in May 2010 is nineteen dollars and ninety-five cents (\$19.95). A copy of this instrument is on file at the Division at the address given in Item (1) of this Rule and is available for public inspection during regular business hours.
- (11) "Experience working with school-aged children" means working with school-age children as an administrator, program coordinator, group leader, assistant group leader, lead teacher, teacher or aide.
- (12) "Family Child Care Environment Rating Scale – Revised Edition" (Harms, Cryer and Clifford, 2007, published by Teachers College Press, New York, NY) is the instrument used to evaluate the quality of care received by children in family child care homes to achieve three or more points for the program standards of a rated license. This instrument is incorporated by reference and includes subsequent editions. Individuals wishing to purchase a copy may call Teachers College Press at 1-800-575-6566. The cost of this scale in May 2010 is nineteen dollars and ninety-five cents (\$19.95). A copy of this instrument is on file at the Division at the address given in Item (1) of this Rule and is available for public inspection during regular business hours.
- (13) "First aid kit" is a collection of first aid supplies (such as bandages, tweezers, disposable nonporous gloves, micro shield or face mask, liquid soap, cold pack) for

- treatment of minor injuries or stabilization of major injuries.
- (14) "Group" means the children assigned to a specific caregiver or caregivers, to meet the staff/child ratios set forth in G.S. 110-91(7) and this Chapter, using space which is identifiable for each group.
- (15) "Health care professional" means:
- (a) a physician licensed in North Carolina;
 - (b) a nurse practitioner approved to practice in North Carolina;
 - (c) a licensed physician assistant.
- (16) "Household member" means a person who resides in a family home as evidenced by factors including maintaining clothing and personal effects at the household address, receiving mail at the household address, using identification with the household address, or eating and sleeping at the household address on a regular basis.
- (17) "If weather conditions permit" means:
- (a) temperatures that fall within the guidelines developed by the Iowa Department of Public Health and specified on the Child Care Weather Watch chart. These guidelines shall be used when determining appropriate weather conditions for taking children outside for outdoor learning activities and playtime. This chart may be downloaded free of charge from <http://www.idph.state.ia.us/hcci/common/pdf/weatherwatch.pdf>, and is incorporated by reference and includes subsequent editions and amendments;
 - (b) following the air quality standards as set out in 15A NCAC 18A .2832(d). The Air Quality Color Guide can be found on the Division's web site at <http://xapps.enr.state.nc.us/aq/ForecastCenter> or call 1-888-RU4NCAIR (1-888-784-6224); and
 - (c) no active precipitation. Caregivers may choose to go outdoors when there is active precipitation if children have appropriate clothing such as rain boots and rain coats, or if they are under a covered area.
- (18) "Infant/Toddler Environment Rating Scale - Revised Edition" (Harms, Cryer, and Clifford, 2003, published by Teachers College Press, New York, NY) is the instrument used to evaluate the quality of care received by a group of children in a child care center, when the majority of children in the group are younger than thirty months old, to achieve three or more points for the program standards of a rated license. This instrument is incorporated by reference and includes subsequent editions. Individuals wishing to purchase a copy may call Teachers College Press at 1-800-575-6566. The cost of this scale in May 2010 is nineteen dollars and ninety-five cents (\$19.95). A copy of this instrument is on file at the Division at the address given in Item (1) of this Rule and is available for public inspection during regular business hours.
- (19) "ITS-SIDS Training" means the Infant/Toddler Safe Sleep and SIDS Risk Reduction Training developed by the NC Healthy Start Foundation for the Division of Child Development and Early Education for caregivers of children ages 12 months and younger.
- (20) "Licensee" means the person or entity that is granted permission by the State of North Carolina to operate a child care facility. The owner of a facility is the licensee.
- (21) "North Carolina Early Educator Certification (certification)" is an acknowledgement of an individual's verified level of educational achievement based on a standardized scale. The North Carolina Institute for Child Development Professionals certifies individuals and assigns a certification level on two scales: the Early Care and Education Professional Scale (ECE Scale) in effect as of July 1, 2010 or the School Age Professional Scale (SA Scale) in effect as of May 19, 2010. Each scale reflects the amount of education earned in the content area pertinent to the ages of children served. The ECE Scale is designed for individuals working with or on behalf of children ages birth to five. The SA Scale is designed for individuals working with or on behalf of children ages 5 to 12 who are served in school age care settings.
- (22) "North Carolina Early Childhood Credential" means the state early childhood credential that is based on completion of required early childhood coursework taken at any NC Community College. Other post secondary curriculum coursework shall be approved as equivalent if the division determines that the content of the other post secondary curriculum coursework offered is substantially equivalent to the NC Early Childhood Credential Coursework. A copy of the North Carolina Early Childhood Credential requirements is on file at the Division at the address given in Item (1) of this Rule and is available for public inspection or copying at no charge during regular business hours.
- (23) "Owner" means any person with a five percent or greater equity interest in a child care

facility, however stockholders of corporations who own child care facilities are not subject to mandatory criminal history checks pursuant to G.S. 110-90.2 and G.S. 110-91(8) unless they are a child care provider.

- (24) "Parent" means a child's parent, legal guardian, or full-time custodian.
- (25) "Part-time care" means a child care arrangement where children attend on a regular schedule but less than a full-time basis.
- (26) "Passageway" means a hall or corridor.
- (27) "Person" means any individual, trust, estate, partnership, corporation, joint stock company, consortium, or any other group, entity, organization, or association.
- (28) "Preschooler" or "preschool-age child" means any child who does not fit the definition of school-age child in this Rule.
- (29) "School-Age Care Environment Rating Scale" (Harms, Jacobs, and White, 1996, published by Teachers College Press) is the instrument used to evaluate the quality of care received by a group of children in a child care center, when the majority of the children in the group are older than five years, to achieve three or more points for the program standards of a rated license. This instrument is incorporated by reference and includes subsequent editions. Individuals wishing to purchase a copy may call Teachers College Press at 1-800-575-6566. The cost of this scale in May 2010 is nineteen dollars and ninety-five cents (\$19.95). A copy of this instrument is on file at the Division at the address given in Item (1) of this Rule and is available for public inspection during regular business hours.
- (30) "School-age child" means any child who is attending or who has attended, a public or private grade school or kindergarten and meets age requirements as specified in G.S. 115C-364.
- (31) "Seasonal Program" means a recreational program as set forth in G.S. 110-86(2)(b).
- (32) "Section" means Division of Child Development and Early Education.
- (33) "Substitute" means any person who assumes the duties of a staff person for a time period not to exceed two consecutive months.
- (34) "Temporary care" means any child care arrangement which provides either drop-in care or care on a seasonal or other part-time basis and is required to be regulated pursuant to G.S. 110-86.
- (35) "Track-Out Program" means any child care provided to school-age children when they are out of school on a year-round school calendar.
- (36) "Volunteer" means a person who works in a child care facility and is not monetarily compensated by the facility.

History Note: Authority G.S. 110-85; 110-88; 143B-168.3; Eff. January 1, 1986;
 Amended Eff. April 1, 1992; October 1, 1991; October 1, 1990; November 1, 1989;
 Temporary Amendment Eff. January 1, 1996;
 Amended Eff. August 1, 2010; November 1, 2007; May 1, 2006; May 1, 2004; April 1, 2003; July 1, 2000; April 1, 1999; July 1, 1998; April 1, 1997;
 Amended Eff. Pending Legislative Review.

10A NCAC 09 .0604 GENERAL SAFETY REQUIREMENTS

- (a) In child care centers, potentially hazardous items, such as archery equipment, hand and power tools, nails, chemicals, propane stoves, lawn mowers, and gasoline or kerosene, whether or not intended for use by children, shall be stored in locked areas or with other safeguards, or shall be removed from the premises.
- (b) Firearms and ammunition are prohibited in a licensed child care program unless carried by a law enforcement officer.
- (c) Electrical outlets not in use which are located in space used by the children shall be covered with safety plugs unless located behind furniture or equipment that cannot be moved by a child.
- (d) Electric fans shall be mounted out of the reach of children or shall be fitted with a mesh guard to prevent access by children.
- (e) All electrical appliances shall be used only in accordance with the manufacturer's instructions. For appliances with heating elements, such as bottle warmers, crock pots, irons, coffee pots, or curling irons, neither the appliance nor the cord, if applicable, shall be accessible to preschool-age children.
- (f) Electrical cords shall not be accessible to infants and toddlers. Extension cords, except as approved by the local fire inspector, shall not be used. Frayed or cracked electrical cords shall be replaced.
- (g) All materials used for starting fires, such as matches and lighters, shall be kept in locked storage or shall be stored out of the reach of children.
- (h) Smoking is not permitted in space used by children when children are present. All smoking materials shall be kept in locked storage or out of the reach of children.
- (i) Fuel burning heaters, fireplaces and floor furnaces shall be provided with a protective screen attached securely to supports to prevent access by children and to prevent objects from being thrown into them.
- (j) Plants that are toxic shall not be in indoor or outdoor space that is used by or is accessible to children.
- (k) Air conditioning units shall be located so that they are not accessible to children or shall be fitted with a mesh guard to prevent objects from being thrown into them.
- (l) Gas tanks shall be located so they are not accessible to the children or shall be in a protective enclosure or surrounded by a protective guard.
- (m) Cribs and playpens shall be placed so that the children occupying them shall not have access to cords or ropes, such as venetian blind cords.
- (n) Once a day, prior to initial use, the indoor and outdoor premises shall be checked for debris, vandalism, and broken equipment. Debris shall be removed and disposed.

(o) Plastic bags, toys, and toy parts small enough to be swallowed, and materials that can be easily torn apart such as foam rubber and styrofoam, shall not be accessible to children under three years of age, except that styrofoam plates and larger pieces of foam rubber may be used for supervised art activities and styrofoam plates may be used for food service. Latex and rubber balloons shall not be accessible to children under five years of age.

(p) When non-ambulatory children are in care, a crib or other device shall be available for evacuation in case of fire or other emergency. The crib or other device shall be fitted with wheels in order to be easily moveable, have a reinforced bottom, and shall be able to fit through the designated fire exit. For centers that do not meet institutional building code, and the exit is more than eight inches above grade, the center shall develop a plan to ensure a safe and timely evacuation of the crib or other device. This plan shall be demonstrated to a Division representative for review and approval. During the monthly fire drills required by Rule 10A NCAC 09 .0302(d)(4), the evacuation crib or other device shall be used in the manner described in the evacuation plan.

(q) A first aid kit must always be available on site.

History Note: Authority G.S. 110-85; 110-91(3),(6); 143B-168.3;

Eff. January 1, 1991;

Amended Eff. January 1, 1996; November 1, 1991;

Temporary Amendment Eff. October 1, 1997;

Amended Eff. February 1, 2012; July 1, 2010; December 1, 2007; April 1, 2001; July 1, 1998.

10A NCAC 09 .2819 EDUCATION STANDARDS FOR ON-SITE ADMINISTRATORS FOR A RATED LICENSE FOR CHILD CARE CENTERS

(a) This Rule applies to evaluating the education standards for an on-site administrator for child care centers. The points for education standards are determined by applying this Rule along with Rules .2820, .2821, .2822 and .2823 of this Section. To determine the points attained for meeting the education standards, the lowest number of points attained under each Rule shall be the point used to meet Rule .2802 of this Section.

(b) To achieve two points, the on-site administrator shall have:

- (1) A Level I North Carolina Early Childhood Administration Credential or its equivalent; and
- (2) Two years of full-time verifiable early childhood work experience, or one year experience in child care administration; and
- (3) If providing school-age care, 150 hours of verifiable experience working with school-aged children in a licensed child care program; or 300 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; or shall complete the BSAC Training or its equivalent. Completion of these requirements shall count toward meeting experience requirements in Subparagraph (2) of this Paragraph.

(c) To achieve three points, the on-site administrator shall have:

- (1) A Level I North Carolina Early Childhood Administration Credential or its equivalent; and
- (2) Six semester hours in early childhood education or child development (not including North Carolina Early Childhood Administration Credential coursework); and either
 - (A) Two years of full-time verifiable early childhood work experience; or
 - (B) One year of experience in child care administration; and
- (3) If providing school-age care, 300 hours of verifiable experience working with school-aged children in a licensed child care program; or 450 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; or shall have completed the BSAC Training or its equivalent. Completion of these requirements may count toward meeting experience requirements in Subparagraphs (2)(A) and (B) of this Paragraph.

(d) To achieve four points, the on-site administrator shall have:

- (1) A Level I North Carolina Early Childhood Administration Credential or its equivalent; and either
 - (A) 18 semester hours in early childhood education or child development (not including North Carolina Early Childhood Administration Credential coursework) and one year of experience in child care administration; or
 - (B) Six semester hours in early childhood education or child development (not including North Carolina Early Childhood Administration Credential coursework), and 10 years of experience in child care administration; and
- (2) If providing school-age care, 450 hours of verifiable experience working with school-aged children in licensed child care program; or 600 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; or shall have completed the BSAC Training or its equivalent. Completion of these requirements may count toward meeting experience requirements in Subparagraphs (1)(A) and (B) of this Paragraph.

(e) To achieve five points, the on-site administrator shall have:

- (1) A Level II North Carolina Early Childhood Administration Credential or its equivalent; and
- (2) Two years of full-time verifiable early childhood work experience; and

- (3) If providing school-age care, 600 hours of verifiable experience working with school-aged children in a licensed child care program; or 900 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting, or shall have completed the BSAC training or its equivalent. Completion of these requirements may count toward meeting experience requirements in Subparagraph (2) of this Paragraph.
- (f) To achieve six points, the on-site administrator shall have:
 - (1) A Level II North Carolina Early Childhood Administration Credential or its equivalent; and
 - (2) 18 semester hours in early childhood education or child development (not including the North Carolina Early Childhood Administration Credential coursework or hours earned during the completion of the A.A.S degree); and either
 - (A) Three years of full-time verifiable work experience in an early childhood center teaching young children; or
 - (B) Three years of administrative experience; or
 - (C) Three years of a combination of both; and
 - (3) If providing school-age care, 750 hours of verifiable experience working with school-aged children in a licensed child care program; or 1150 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; or shall have completed the BSAC training or its equivalent. Completion of these requirements may count toward meeting experience requirements in Subparagraphs (2)(A) and (B) of this Paragraph.
- (g) To achieve seven points, the on-site administrator shall:
 - (1) Have a Level III North Carolina Early Childhood Administration Credential or its equivalent; and
 - (2) Either:
 - (A) Four years of full-time verifiable work experience in an early childhood center teaching young children; or
 - (B) Four years of administrative experience; or
 - (C) Four years of a combination of both; and
 - (3) If providing school-age care, 900 hours of verifiable experience performing administrative duties in a licensed child care program serving school-aged children; or 1350 hours of verifiable experience performing administrative duties in an unlicensed school-age care or camp setting; or shall have

completed the BSAC Training or its equivalent. Completion of these requirements may count toward meeting experience requirements in Subparagraphs (2)(A), (B) and (C) of this Paragraph.

(h) For centers with a licensed capacity of 3 to 12 children located in a residence, when an individual has responsibility both for administering the child care program and for planning and implementing the daily activities of a group of children, the educational requirements for lead teacher in Rule .2820 of this Section shall apply. All other teachers shall follow the educational requirements for teachers in this Section.

(i) For centers with a licensed capacity of 200 or more, there shall be a second administrator on-site for a minimum of 20 hours per week who shall have the Level I North Carolina Early Childhood Administration Credential or its equivalent.

History Note: Authority G.S. 110-85; 110-88(7); 110-90(4); 143B-168.3;

Eff. May 1, 2006;

Amended Eff. Pending Legislative Review.

10A NCAC 09 .2820 EDUCATION STANDARDS FOR LEAD TEACHERS FOR A RATED LICENSE FOR CHILD CARE CENTERS

(a) This Rule applies to evaluating child care centers with regards to all lead teachers. The points for education standards are determined by applying this Rule along with Rules .2819, .2821, .2822 and .2823 of this Section. To determine the points attained for meeting the education standards, the lowest number of points attained under each Rule shall be the point used to meet Rule .2802 of this Section.

(b) To achieve two points, 75 percent of the lead teachers shall:

- (1) Have the North Carolina Early Childhood Credential, its equivalent or a Level I or higher Early Educator Certification on the Early Care and Education Professional Scale (ECE scale); and
- (2) Have completed or enrolled in three semester hours in early childhood education or child development (not including North Carolina Early Childhood Credential coursework).

(c) To achieve three points, all lead teachers shall have the North Carolina Early Childhood Credential, its equivalent or a Level I or higher certification on the ECE scale; and either

- (1) 75 percent of the lead teachers shall have:
 - (A) Completed three semester hours in early childhood education and completed or are enrolled in three additional semester hours in early childhood education or child development (not including North Carolina Early Childhood Credential coursework); or
 - (B) Completed one year full time verifiable early childhood work experience; or
 - (C) A level II or higher certification on the ECE scale; or

- (D) Any combination of Parts (A) through (C) of this Subparagraph; or
- (2) 50 percent of the lead teachers shall have a Level II or higher certification on the ECE scale.
- (d) To achieve four points, all lead teachers shall have the North Carolina Early Childhood Credential, its equivalent, or Level I or higher certification on the ECE scale; and
 - (1) Either 75 percent of the lead teachers shall have:
 - (A) Completed six semester hours in early childhood education or child development (not including the North Carolina Early Childhood Credential coursework), and have completed or are enrolled in three additional semester hours in early childhood education; or
 - (B) Completed three semester hours of early childhood education and have three years of full-time verifiable early childhood work experience; or
 - (C) Five years of full-time verifiable early childhood work experience; or
 - (D) Any combination of Parts (A) through (C) of this Subparagraph; or
 - (2) 50 percent of the lead teachers shall have a Level III or higher certification on the ECE scale.
- (e) To achieve five points, all lead teachers shall have the North Carolina Early Childhood Credential, its equivalent, or have a Level I or higher certification on the ECE scale and 75 percent of the lead teachers shall have:
 - (1) Completed nine semester hours in early childhood education or child development (not including the North Carolina Early Childhood Credential coursework), and have completed or are enrolled in three additional semester hours in early childhood education, and have one year of full-time verifiable early childhood work experience; or
 - (2) A Level IV or higher certification on the ECE scale and have one year of full-time verifiable early childhood work experience; or
 - (3) Any combination of Subparagraphs (1) and (2) of this Paragraph.
- (f) To achieve six points, all lead teachers shall have the North Carolina Early Childhood Credential, its equivalent, or a Level I or higher certification on the ECE scale and 50 percent of the lead teachers shall have either:
 - (1) An A.A.S degree in early childhood education or child development or an A.A.S degree in any major with 12 semester hours in early childhood education or child development and one year of full-time verifiable early childhood work experience; or
 - (2) Completed 60 semester hours towards a BA/BS degree program with 12 semester hours in early childhood education and one

- year of full-time verifiable early childhood work experience; or
- (3) A Level VI certification on the ECE scale and one year of full-time verifiable early childhood work experience; or
- (4) Any combination of Subparagraphs (1) through (3) of this Paragraph.
- (g) To achieve seven points, all lead teachers shall have the North Carolina Early Childhood Credential, its equivalent, or a Level I or higher certification on the ECE scale and 75 percent of the lead teachers shall have either:
 - (1) An A.A.S. degree in early childhood education or child development or an A.A.S. degree in any major with 12 semester hours in early childhood education or child development and two years of full-time verifiable early childhood work experience; or
 - (2) A Level VI certification on the ECE scale and two years of full-time verifiable early childhood work experience; or
 - (3) Any combination of Subparagraphs (1) and (2) of this Paragraph.

History Note: Authority G.S. 110-85; 110-88(7); 110-90(4); 143B-168.3;
Eff. Pending Legislative Review.

10A NCAC 09 .2821 EDUCATION STANDARDS FOR TEACHERS FOR A RATED LICENSE FOR CHILD CARE CENTERS

- (a) This Rule applies to evaluating child care centers with regards to all teachers. The points for education standards are determined by applying this Rule along with Rules .2819, .2820, .2822, and .2823 of this Section. To determine the points attained for meeting the education standards, the lowest number of points attained under each Rule shall be the point used to meet Rule .2802 of this Section.
- (b) To achieve two points, 50 percent of the teachers counted in staff/child ratios shall:
 - (1) Have one year of full time verifiable early childhood work experience; or
 - (2) Be enrolled in three semester hours in early childhood education, or child development; or
 - (3) Have any combination of Subparagraphs (1) and (2) of this Paragraph.
- (c) To achieve three points, 50 percent of the teachers counted in staff/child ratios shall have:
 - (1) Three semester hours in early childhood education or child development; or
 - (2) Two years of full time verifiable early childhood work experience; or
 - (3) Any combination of Subparagraphs (1) and (2) of this Paragraph.
- (d) To achieve four points, 50 percent of the teachers counted in staff/child ratios shall have the North Carolina Early Childhood Credential, its equivalent or have a Level I or higher certification on the ECE scale.
- (e) To achieve five points, 50 percent of the teachers counted in staff/child ratios shall have either:

- (1) The North Carolina Early Childhood Credential, its equivalent or have a Level I or higher certification on the ECE scale and three semester hours in early childhood education or child development (not including North Carolina Early Childhood Credential coursework); or
- (2) A Level II or higher certification on the ECE scale; or
- (3) Any combination of Subparagraphs (1) and (2) of this Paragraph.

(f) To achieve six points, 50 percent of the teachers counted in staff/child ratios shall have the North Carolina Early Childhood Credential, its equivalent or a Level I or higher certification on the ECE scale and either:

- (1) Three semester hours in early childhood education or child development (not including North Carolina Early Childhood Credential; and one year of full-time verifiable early childhood work experience; or
- (2) A Level II or higher certification on the ECE scale and one year of full-time early childhood work experience; or
- (3) Any combination of Subparagraphs (1) and (2) of this Paragraph.

(g) To achieve seven points, 50 percent of the teachers counted in staff/child ratios shall have the North Carolina Early Childhood Credential, its equivalent or have a Level I or higher certification on the ECE scale and either:

- (1) Six semester hours in early childhood education or child development (not including North Carolina Early Childhood Credential coursework); and two years of full-time verifiable early childhood work experience; or
- (2) A Level III or higher certification on the ECE scale and two years of full-time verifiable early childhood work experience; or
- (3) Any combination of Subparagraphs (1) and (2) of this Paragraph.

History Note: Authority G.S. 110-85; 110-88(7); 110-90(4); 143B-168.3; Eff. Pending Legislative Review.

10A NCAC 09 .2822 EDUCATION STANDARDS FOR PROGRAM COORDINATORS FOR A RATED LICENSE FOR CHILD CARE CENTERS

(a) This Rule applies to evaluating child care centers with regards to program coordinators. The points for education standards are determined by applying this Rule along with Rules .2819, .2820, .2821, and .2823 of this Section. To determine the points attained for meeting the education standards, the lowest number of points attained under each Rule shall be the point used to meet Rule .2802 of this Section.

(b) To achieve two points, the program coordinator shall have completed all the applicable requirements in Rule .2510(b) of this Chapter and shall:

- (1) Be enrolled in three additional semester hours of school-age care related coursework; or

- (2) Have 200 hours of verifiable experience working with school-aged children in a licensed child care program; or
- (3) Have 300 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting.

(c) To achieve three points, the program coordinator shall have completed all the applicable requirements in Rule .2510(b) of this Chapter and shall have:

- (1) Completed three additional semester hours of school-age care related coursework; or
- (2) 300 hours of verifiable experience working with school-aged children in a licensed child care program; or
- (3) 450 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; or
- (4) At least a Level I or higher certification on the SA scale.

(d) To achieve four points, the program coordinator shall have completed all the applicable requirements in Rule .2510(b) of this Chapter and shall have:

- (1) Completed three additional semester hours of school-age care related coursework and have either 200 hours of verifiable experience working with school-aged children in a licensed child care program, or 300 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; or
- (2) A Level I or higher certification on the SA scale and have either 200 hours of verifiable experience working with school-aged children in a licensed child care program, or 300 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; or
- (3) 450 hours of verifiable experience working with school-aged children in a licensed child care program; or
- (4) 600 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting.

(e) To achieve five points, the program coordinator shall have completed all the applicable requirements in Rule .2510(b) of this Chapter and shall have:

- (1) Completed three additional semester hours of school-age care related coursework; and be enrolled in three additional semester hours of school-age care related coursework; or
- (2) 600 hours of verifiable experience working with school-age children in a licensed child care program; or
- (3) 750 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; or
- (4) A Level II or higher certification on the SA scale.

(f) To achieve six points, the program coordinator shall have completed all the applicable requirements in Rule .2510(b) of this Chapter and shall have:

- (1) Completed six additional semester hours of school-age care related coursework and either 750 hours of verifiable experience working with school-aged children in a licensed child care program or 900 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; or
- (2) A BA/BS degree with three additional semester hours of school-age care related coursework; or
- (3) A Level IV or higher certification on the SA scale.

(g) To achieve seven points, the program coordinator shall have completed all the applicable requirements in Rule .2510(b) of this Chapter and shall have:

- (1) Completed six additional semester hours of school-age care related coursework and either 900 hours of verifiable experience working with school-aged children in a licensed child care program or 1350 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; or
- (2) Nine additional semester hours of school-age related coursework and either 600 hours of verifiable experience working with school-aged children in a licensed child care program or 900 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; or
- (3) A BA/BS degree or higher with six additional semester hours of school-age related coursework and either 300 hours of verifiable experience working with school-aged children in a licensed school-age care program; or 450 hours of working with school-aged children in an unlicensed school-age care or camp setting; or
- (4) A Level IV or higher certification on the SA scale and either 300 hours of verifiable experience working with school-aged children in a licensed school-age care program or 450 hours of working with school-aged children in an unlicensed school-age care or camp setting.

(h) For centers providing school-age care with 200 or more school-aged children enrolled, there shall be two program coordinators on site, one of whom shall not have concurrent group leader responsibilities. The additional program coordinator shall have completed all the applicable staff requirements in Rule .2510(b) of this Chapter.

History Note: Authority G.S. 110-85; 110-88(7); 110-90(4); 143B-168.3;
Eff. Pending Legislative Review.

10A NCAC 09 .2823 EDUCATION STANDARDS FOR GROUP LEADERS AND ASSISTANT GROUP LEADERS FOR A RATED LICENSE FOR CHILD CARE CENTERS

(a) This Rule applies to evaluating child care centers with regards to group leaders and assistant group leaders. The points for education standards are determined by applying this Rule along with Rules .2819, .2820, 2821, and .2822 of this Section. To determine the points attained for meeting the education standards, the lowest number of points attained under each Rule shall be the point used to meet Rule .2802 of this Section.

(b) To achieve two points, all group leaders shall have completed the BSAC training or its equivalent.

(c) To achieve three points, all group leaders shall have completed the BSAC training or its equivalent, and 25 percent of the group leaders shall be enrolled in or have completed two semester hours of school-age care related coursework.

(d) To achieve four points, all assistant group leaders shall be at least 16 years of age and all group leaders shall have completed the BSAC training or its equivalent, and 25 percent of the group leaders shall have either:

- (1) Completed two semester hours of school-age care related coursework; or
- (2) 100 hours of verifiable experience working with school-aged children in a licensed child care program; or
- (3) 150 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; or
- (4) Any combination of Subparagraphs (1) through (3) of this Paragraph.

(e) To achieve five points, all group leaders shall have completed the BSAC training or its equivalent, and

- (1) 50 percent of the group leaders shall have either:
 - (A) Completed two semester hours of school-age care related coursework; or
 - (B) 300 hours of verifiable experience working with school-aged children in a licensed child care program; or
 - (C) 450 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; or
 - (D) Any combination of Subparagraphs (A) through (C) of this Paragraph; and
- (2) All assistant group leaders shall be at least 16 years of age and shall have either:
 - (A) Completed the BSAC training or its equivalent; or
 - (B) 250 hours of verifiable experience working with school-aged children in a licensed child care program; or
 - (C) 400 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; or

- (D) Any combination of Subparagraphs (A) through (C) of this Paragraph.
- (f) To achieve six points, all group leaders shall have completed the BSAC training or its equivalent, and
 - (1) 50 percent of group leaders shall have:
 - (A) Completed two semester hours of school-age care related coursework and have completed or be enrolled in two additional semester hours of school-age related coursework; or
 - (B) 600 hours of verifiable experience working with school-aged children in a licensed child care program; or
 - (C) 900 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; or
 - (D) Any combination of Subparagraphs (A) through (C) of this Paragraph; and
 - (2) All assistant group leaders shall be 17 years of age and shall have either:
 - (A) Completed the BSAC training or its equivalent; or
 - (B) 250 hours of verifiable experience working with school-aged children in a licensed child care program; or
 - (C) 400 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; or
 - (D) Any combination of Subparagraphs (A) through (C) of this Paragraph.
- (g) To achieve seven points, all assistant group leaders shall be 18 years of age and shall have completed the BSAC training or its equivalent and all group leaders shall have completed the BSAC training or its equivalent, and 75 percent of the group leaders shall have:
 - (1) Completed two semester hours of school-age care related coursework and have completed, or are enrolled in two additional semester hours of school-age related coursework; or
 - (2) 600 hours of verifiable experience working with school-aged children in a licensed child care program; or
 - (3) 900 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; or
 - (4) Any combination of Subparagraphs (1) through (3) of this Paragraph.

*History Note: Authority G.S. 110-85; 110-88(7); 110-90(4); 143B-168.3;
Eff. Pending Legislative Review.*

10A NCAC 09 .2824 EDUCATION STANDARDS FOR A RATED LICENSE FOR ADMINISTRATORS FOR CENTERS THAT PROVIDE CARE ONLY TO SCHOOL-AGED CHILDREN

- (a) This Rule applies to evaluating the education standards for administrators for centers that provide care only to school-aged children. The points for education standards are determined by applying this Rule along with Rules .2825 and .2826 of this Section. To determine the points attained for meeting the education standards, the lowest number of points attained under each rule shall be the point used to meet Rule .2802 of this Section.
- (b) To achieve two points, the administrator shall have:
 - (1) A Level I North Carolina Early Childhood Administration Credential or its equivalent or have enrolled in coursework as required in G.S. 110-91(8); and
 - (2) 1600 hours of verifiable experience performing administrative duties in a licensed school-aged program.
- (c) To achieve three points, the administrator shall have:
 - (1) A Level I North Carolina Early Childhood Administration Credential or its equivalent; and
 - (2) Either:
 - (A) 300 additional hours of verifiable experience performing administrative duties in a licensed child care program; or
 - (B) 450 additional hours of verifiable experience performing administrative duties in an unlicensed school-aged care or camp setting.
- (d) To achieve four points, the administrator shall have:
 - (1) A Level I North Carolina Early Childhood Administration Credential or its equivalent; and
 - (2) Either:
 - (A) 450 additional hours of verifiable experience performing administrative duties in a licensed child care program; or
 - (B) 600 additional hours of verifiable experience performing administrative duties in an unlicensed school-age care or camp setting.
- (e) To achieve five points, the administrator shall have:
 - (1) A Level II North Carolina Early Childhood Administration Credential or its equivalent; and
 - (2) Either:
 - (A) 600 additional hours of verifiable experience performing administrative duties in a licensed child care program serving school-aged children; or
 - (B) 750 additional hours of verifiable experience performing administrative

duties in an unlicensed school-aged care or camp setting.

(f) To achieve six points, the administrator shall have:

- (1) A Level II North Carolina Early Childhood Administration Credential or its equivalent; and
- (2) Either:
 - (A) 750 additional hours of verifiable experience performing administrative duties in a licensed child care program serving school-aged children; or
 - (B) 1150 additional hours of verifiable experience performing administrative duties in an unlicensed school-aged care or camp setting.

(g) To achieve seven points, the administrator shall have:

- (1) A Level III North Carolina Early Childhood Administration Credential or its equivalent; and
- (2) Either:
 - (A) 900 additional hours of verifiable experience performing administrative duties in a licensed child care program serving school-aged children; or
 - (B) 1350 additional hours of verifiable experience performing administrative duties in an unlicensed school-aged care or camp setting.

(h) As used in this Rule, the definition of the term "experience working with school-aged children" in Rule .2510(h) of this Chapter shall apply.

History Note: Authority G.S. 110-85; 110-88(7); 110-90(4); 143B-168.3;

Eff. Pending Legislative Review.

10A NCAC 09 .2825 EDUCATION STANDARDS FOR PROGRAM COORDINATORS FOR A RATED LICENSE FOR CENTERS THAT PROVIDE CARE ONLY TO SCHOOL-AGED CHILDREN

(a) This Rule applies to evaluating the education standards for program coordinators for centers that provide care only to school-aged children. The points for education standards are determined by applying this Rule along with Rules .2824 and .2826 of this Section. To determine the points attained for meeting the education standards, the lowest number of points attained under each Rule shall be the point used to meet Rule .2802 of this Section.

(b) To achieve two points, the program coordinator shall have completed all the applicable requirements in Rule .2510(b) of this Chapter and shall:

- (1) Be enrolled in three additional semester hours of school-age care related coursework; or
- (2) Have 200 hours of verifiable experience working with school-aged children in a licensed child care program; or

- (3) Have 300 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting.

(c) To achieve three points, the program coordinator shall have completed all the applicable requirements in Rule .2510(b) of this Chapter and shall have:

- (1) Completed three additional semester hours of school-age care related coursework; or
- (2) 300 hours of verifiable experience working with school-aged children in a licensed child care program; or
- (3) 450 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; or
- (4) A Level I certification or higher on the SA scale.

(d) To achieve four points, the program coordinator shall have completed all the applicable requirements in Rule .2510(b) of this Chapter and shall have:

- (1) Completed three additional semester hours of school-age care related coursework and 200 hours of verifiable experience working with school-aged children in a licensed child care program; or
- (2) 450 hours of verifiable experience working with school-aged children in a licensed child care program; or
- (3) 600 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; or
- (4) A Level I certification or higher on the SA scale, and either:
 - (A) 200 hours of verifiable experience working with school-aged children in a licensed child care program; or
 - (B) 300 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting.

(e) To achieve five points, the program coordinator shall have completed all the applicable requirements in Rule .2510(b) of this Chapter and shall have:

- (1) Completed three additional semester hours of school-age care related coursework and is enrolled in three additional semester hours of school-age care related coursework; or
- (2) 600 hours of verifiable experience working with school-aged children in a licensed child care program; or
- (3) 750 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; or
- (4) A Level II certification or higher on the SA scale.

(f) To achieve six points, the program coordinator shall have completed all the applicable requirements in Rule .2510(b) of this Chapter and shall have:

- (1) 750 hours of verifiable experience working with school-aged children in a licensed child

care program; or 900 hours of verifiable experience working with school-aged children in an unlicensed school-aged care or camp setting; and

(2) Either:

- (A) Completed six additional semester hours of school-aged care related coursework; or
- (B) Shall have a BA/BS degree with three additional semester hours of school-aged care related coursework; or
- (C) Level III certification or higher on the SA scale.

(g) To achieve seven points, the program coordinator shall have completed all the applicable requirements in Rule .2510(b) of this Chapter and shall have:

(1) Completed six additional semester hours of school-aged care related coursework and either:

- (A) 900 hours of verifiable experience working with school-aged children in a licensed child care program; or
- (B) 1350 hours of verifiable experience working with school-aged children in an unlicensed school-aged care or camp setting; or

(2) Completed nine additional semester hours of school-aged care related coursework and either:

- (A) 600 hours of verifiable experience working with school-aged children in a licensed child care program; or
- (B) 900 hours of verifiable experience working with school-aged children in an unlicensed school-aged care or camp setting; or

(3) A BA/BS degree or higher with six additional semester hours of school-aged related coursework and either:

- (A) 300 hours of verifiable experience working with school-aged children in a licensed school-aged care program; or
- (B) 450 hours of working with school-aged children in an unlicensed school-aged care or camp setting; or

(4) A Level IV certification or higher on the SA scale and either:

- (A) 300 hours of verifiable experience working with school-aged children in a licensed school-aged care program; or
- (B) 450 hours of working with school-aged children in an unlicensed school-aged care or camp setting.

(h) As used in this Rule, the definition of the term "experience working with school-aged children" in Rule .2510(h) of this Chapter shall apply.

(i) For programs with a licensed capacity of 200 or more school-aged children, there shall be two program coordinators on site, one of whom shall not have concurrent group leader responsibilities. The additional program coordinator shall have completed the applicable staff requirements in Rule .2510(b) of this Chapter.

History Note: Authority G.S. 110-85; 110-88(7); 110-90(4); 143B-168.3;

Eff. Pending Legislative Review.

10A NCAC 09 .2826 EDUCATION STANDARDS FOR GROUP LEADERS AND ASSISTANT GROUP LEADERS FOR A RATED LICENSE FOR CENTERS THAT PROVIDE CARE ONLY TO SCHOOL-AGED CHILDREN

(a) This Rule applies to evaluating the education standards for group leaders and assistant group leaders that work in programs that provide care only to school-aged children. The points for education standards are determined by applying this Rule along with Rules .2824, and .2825 of this Section. To determine the points attained for meeting the education standards, the lowest number of points attained under each Rule shall be the point used to meet Rule .2802 of this Section.

(b) To achieve two points, all group leaders shall have completed the BSAC training or its equivalent.

(c) To achieve three points, all group leaders shall have completed the BSAC training or its equivalent, and 25 percent of the individuals designated as group leaders as set out in Rule .2510 of this Chapter shall be enrolled in two semester hours of school-age care related coursework.

(d) To achieve four points:

(1) All group leaders shall have completed the BSAC training or its equivalent, and 25 percent of the individuals designated as group leaders as set out in Rule .2510 of this Chapter shall have:

- (A) Completed two semester hours of school-age care related coursework; or
- (B) 100 hours of verifiable experience working with school-aged children in a licensed child care program; or
- (C) 150 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; and

(2) All assistant group leaders shall be at least 16 years of age.

(e) To achieve five points:

(1) All group leaders shall complete the BSAC training or its equivalent, and 50 percent of the individuals designated as group leaders as set out in Rule .2510 of this Chapter shall have:

- (A) 300 hours of verifiable experience working with school-aged children in a licensed child care program; or
- (B) 450 hours of verifiable experience working with school-aged children in

- an unlicensed school-age care or camp setting; or
 - (C) Completed two semester hours of school-age care related coursework; and
 - (2) All assistant group leaders shall be at least 16 years of age and shall have;
 - (A) 400 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; or
 - (B) Completed the BSAC training or its equivalent; or
 - (C) 250 hours of verifiable experience working with school-aged children in a licensed child care program.
- (f) To achieve six points:
 - (1) All group leaders shall have completed the BSAC training or its equivalent, and 50 percent of the individuals designated as group leaders as set out in Rule .2510 of this Chapter shall have:
 - (A) Completed two semester hours of school-aged care related coursework and have completed or are enrolled in two additional semester hours of school-aged related coursework; or
 - (B) 600 hours of verifiable experience working with school-aged children in a licensed child care program; or
 - (C) 900 hours of verifiable experience working with school-aged children in an unlicensed school-age care or camp setting; and
 - (2) All assistant group leaders shall be at least 17 years of age and shall have;
 - (A) Completed the BSAC training or its equivalent; or
 - (B) 250 hours of verifiable experience working with school-aged children in a licensed child care program; or
 - (C) 400 hours of verifiable experience working with school-aged children in an unlicensed school-aged care or camp setting.
- (h) To achieve seven points:
 - (1) All group leaders shall have completed the BSAC training or its equivalent, and 75 percent of the individuals designated as group leaders as set out in Rule .2510 of this Chapter shall have:
 - (A) Completed two semester hours of school-aged care related coursework and have completed or are enrolled in two additional semester hours of school-aged related coursework; or
 - (B) 600 hours of verifiable experience working with school-aged children in a licensed child care program; or

- (C) 900 hours of verifiable experience working with school-aged children in an unlicensed school-aged care or camp setting; and
 - (2) All assistant group leaders shall be at least 18 years of age and shall have completed the BSAC training or its equivalent.
 - (j) As used in this Rule, the definition of the term "experience working with school-aged children" in Rule .2510(h) of this Chapter shall apply.

History Note: Authority G.S. 110-85; 110-88(7); 110-90(4); 143B-168.3; Eff. Pending Legislative Review.

10A NCAC 09 .2827 EDUCATION STANDARDS FOR OPERATORS FOR A RATED LICENSE FOR FAMILY CHILD CARE HOMES

- (a) This Rule applies to evaluating family child care homes with regards to the operator.
- (b) To achieve two points, the operator shall have completed:
 - (1) Four semester credit hours in early childhood education or child development (not including the North Carolina Family Child Care Credential coursework); or
 - (2) Five years of verifiable early childhood work experience and eight additional clock hours annually of in-service training.
- (c) To achieve three points, the operator shall have completed the North Carolina Family Child Care Credential, its equivalent or a Level I or higher certification on the ECE scale.
- (d) To achieve four points, the operator shall have completed a Level II or higher certification on the ECE scale; or
 - (1) Have six semester credit hours in early childhood education or child development (not including the North Carolina Family Child Care Credential coursework); and
 - (2) Have the North Carolina Family Child Care Credential, its equivalent, or a Level I or higher certification on the ECE scale.
- (e) To achieve five points, the operator shall have completed a Level IV certification on the ECE scale and have one year verifiable early childhood work experience; or have
 - (1) The North Carolina Family Child Care Credential, its equivalent, or a Level I or higher certification on the ECE scale; and
 - (2) 12 semester credit hours in early childhood education or child development (not including the North Carolina Family Child Care Credential coursework); and
 - (3) Either:
 - (A) Two of 12 semester hours in early childhood education in child care administration; or
 - (B) One year of verifiable early childhood work experience.
- (f) To achieve six points, the operator shall have completed a Level VI certification on the ECE scale and have one year verifiable childhood work experience; or have

- (1) The North Carolina Family Child Care Credential, its equivalent, or a Level I or higher certification on the ECE scale; and
- (2) 18 semester credit hours in early childhood education or child development (not including the North Carolina Family Child Care Credential coursework; and
- (3) Either:
 - (A) Five of the 18 semester hours in early childhood education are in child care administration; or
 - (B) Two years of verifiable early childhood work experience.

- (g) To achieve seven points, the operator shall have completed:
- (1) An A.A.S. degree in any major with a minimum of 12 semester credit hours in early childhood education/child development coursework and two years of full-time verifiable early childhood work experience; or
 - (2) An A.A.S. in early childhood education/child development and 18 months of full-time verifiable early childhood work experience; or
 - (3) A Level VI certification on the ECE scale and two years of experience.

History Note: Authority G.S. 110-85; 110-88(7); 110-90(4); 143B-168.3;
Eff. May 1, 2006;
Amended Eff. Pending Legislative Review.

TITLE 12 – DEPARTMENT OF JUSTICE

12 NCAC 10B .0908 LIMITED LECTURER CERTIFICATION

(a) The Commission shall issue a Limited Lecturer Certification to an applicant who has developed specific or special skills by virtue of specific or special training. Limited Lecturer Certification shall be issued in the following topical areas:

- (1) First Aid and CPR;
- (2) Subject Control Techniques;
- (3) Fire Emergencies in the Jail;
- (4) Medical Care in the Jail; and
- (5) Physical Fitness for Detention Officers.

(b) To be eligible for a Limited Lecturer Certificate for topic areas set forth in Paragraph (a) of this Rule, the applicant must meet the qualifications as follows:

- (1) First Aid and CPR: first aid and CPR instructor with the American Red Cross, American Heart Association (AHA), American Safety and Health Institute (ASHI), or National Safety Council (NSC); or a licensed physician, Nurse Practitioner, Licensed Practical Nurse (LPN), Registered Nurse (RN), Physician's Assistant, or Emergency Medical Technician (EMT);
- (2) Subject Control Techniques: certified by N.C. Criminal Justice Education and Training

Standards Commission as Defensive Tactics Instructor and compliance with Rule .0903(c) of this Section;

- (3) Fire Emergencies in the Jail: Certified Fire Instructor (Level II or higher) through the North Carolina Department of Insurance Office of State Fire Marshall, or a Specialized Instructor in the Explosive and Hazardous Material Emergencies topical area through the NC Criminal Justice Commission;
- (4) Medical Care in a Jail: A Licensed Physician, Nurse Practitioner, LPN, RN, or EMT, or Physician's Assistant; and
- (5) Physical Fitness for Detention Officer: certified as a Physical Fitness Instructor by the North Carolina Criminal Justice Education and Training Standards Commission.

(c) In addition to the requirements set out in Paragraph (b) of this Rule, applicants for Limited Lecturer Certification must possess current certification to perform CPR which was obtained through the applicant having shown proficiency both cognitively and through skills testing.

History Note: Authority G.S. 17E-4;
Eff. January 1, 1989;

Amended Eff. February 1, 2012; January 1, 2006; August 1, 2002; August 1, 2000; August 1, 1998; January 1, 1996; January 1, 1992; January 1, 1991; January 1, 1990.

12 NCAC 10B .2004 INSTRUCTORS

The following requirements and responsibilities are hereby established for instructors who conduct a Commission-mandated In-Service Training Program:

- (1) The instructors shall:
 - (a) hold General Instructor Certification as issued by the North Carolina Criminal Justice Education and Training Standards Commission as set out in 12 NCAC 09B .0302, .0304, and .0306;
 - (b) hold Professional Lecturer Instructor certification issued by either the Commission as set out in either 12 NCAC 10B .0906 or .0916, or the Criminal Justice Education and Training Standards Commission as set out in 12 NCAC 09B .0306, or General Instructor Certification as issued by the North Carolina Criminal Justice Education and Training Standards Commission as set out in 12 NCAC 09B .0302, .0304, and .0306, when teaching a legal block of instruction;
 - (c) hold Professional Lecturer Instructor certification issued by the Criminal Justice Education and Training Standards Commission as set out in 12 NCAC 09B .0306, when teaching

- a medical or psychological block of instruction; or
- (d) hold Specific Instructor Certification issued by the Criminal Justice Education and Training Standards Commission when teaching the lesson plans published by the NC Justice Academy as follows:
- (i) Firearms must be taught by a Firearms Instructor certified in accordance with 12 NCAC 09B .0304(e);
 - (ii) Weapons Retention and Disarming Techniques must be taught by Subject Control Arrest Techniques Instructor certified in accordance with 12 NCAC 09B .0304(e);
 - (iii) Spontaneous Attack Defense and Subject Control/Arrest Techniques must be taught by a Subject Control Arrest Techniques Instructor certified in accordance with 12 NCAC 09B .0304(b);
 - (iv) Handcuffing and Impact Weapons Refresher and Subject Control Arrest Techniques: Equipment Retention must be taught by a Subject Control Arrest Techniques Instructor certified in accordance with 12 NCAC 09B .0304(e);
 - (v) Wellness and Stress Awareness and Health and Fitness for Detention Officers must be taught by a Physical Fitness Instructor certified in accordance with 12 NCAC 09B .0304(g);
 - (vi) Law Enforcement Driver Training (classroom and practical) must be taught by a Specialized Law Enforcement Driver Training Instructor certified in accordance with 12 NCAC 09B .0304(f); and
 - (vii) Active Shooter: Practical Refresher must be taught by a Firearms Instructor certified in accordance with 12 NCAC 09B .0304(e).

In addition, each instructor certified by the Criminal Justice Commission to teach in a Commission-certified course shall remain competent in his/her specific or specialty areas. Competent includes remaining current

in the instructor's area of expertise, which may be demonstrated by attending and successfully completing all instructor updates issued by the Commission.

- (2) The use of guest participants is permitted provided they are subject to the direct on-site supervision of a commission-certified instructor.
- (3) The instructor shall deliver the training consistent with the specifications as established in the rules in this Section.
- (4) The instructor shall document the successful or unsuccessful completion of training for each person attending a training program and forward a record of their completion to each person's Sheriff or Department Head.

History Note: Authority G.S. 17E-4; 17E-7; Eff. January 1, 2007; Amended Eff. February 1, 2012; January 1, 2011; March 1, 2010; January 1, 2009.

12 NCAC 10B .2005 MINIMUM TRAINING REQUIREMENTS

(a) A Sheriff or Department Head may use a lesson plan developed by the North Carolina Justice Academy, or may use a lesson plan for any of the topical areas developed by another entity. The Sheriff or Department Head may also use a lesson plan developed by a certified instructor, provided that the instructor develops the lesson plan in accordance with the Instructional Systems Development model as taught in Criminal Justice Instructor Training in 12 NCAC 09B .0209.

(b) The 2011 Law Enforcement In-Service Training Program requires 24 hours of training in the following topical areas:

- (1) Legal Update;
- (2) Juvenile Minority Sensitivity Training: Interactions, Communications, and Understanding;
- (3) Career Survival: Leadership and Mentoring;
- (4) Firearms Training and Requalification for deputy sheriffs as set out in Section .2100 of this Subchapter;
- (5) Domestic Violence: Lesbian, Gay, Bi-Sexual and Transgender (LGBT) Relationships; and
- (6) Any topic areas of the Sheriff's choosing.

(c) The 2011 Detention Officer In-Service Training Program requires 16 hours of training in the following topical areas:

- (1) Legal Update for Detention Officers;
- (2) Career Survival for Detention Officers; Interpersonal Communications;
- (3) Communicable Diseases and Pandemics; and
- (4) Any topic areas of the Sheriff's or Department Head's choosing.

(d) The 2011 Telecommunicator In-Service Training Program requires 16 hours of training in the following topical areas:

- (1) Elder Abuse Awareness and the Telecommunicator;
- (2) Tactical Dispatch;
- (3) Handling Difficult Callers; and

- (4) Any topic areas of the Sheriff's or Department Head's choosing.
- (e) The 2012 Law Enforcement In-Service Training Program requires 24 hours of training in the following topical areas:
 - (1) Legal Update;
 - (2) Juvenile Minority Sensitivity Training: Interactions Skills in Building Rapport;
 - (3) Career Survival: Social Networking and Digital Communications;
 - (4) Firearms Training and Requalification for deputy sheriffs as set out in Section .2100 of this Subchapter;
 - (5) Awareness of Issues Surrounding Returning Military Personnel; and
 - (6) Any topic areas of the Sheriff's choosing.
- (f) The 2012 Detention Officer In-Service Training Program requires 16 hours of training in the following topical areas:
 - (1) Inmate Movement;
 - (2) Career Survival for Detention Officers; Social Networking and Digital Communications; and
 - (3) Any topic areas of the Sheriff's or Department Head's choosing.
- (g) The 2012 Telecommunicator In-Service Training Program requires 16 hours of training in the following topical areas:
 - (1) Legal Update for Telecommunicators;
 - (2) Career Survival for Telecommunicators; Social Networking and Digital Communications; and
 - (3) Any topic areas of the Sheriff's or Department Head's choosing.

History Note: Authority G.S. 17E-4; 17E-7; Eff. January 1, 2007; Amended Eff. February 1, 2012; January 1, 2011; January 1, 2010; January 1, 2009; January 1, 2008.

12 NCAC 11 .0201 APPLICATION FOR LICENSE

- (a) Each applicant for a license shall complete an application form provided by the Board. This form and one additional copy shall be submitted to the administrator and shall be accompanied by:
 - (1) one set of classifiable fingerprints on an applicant card provided by the Board;
 - (2) two head and shoulders color photographs of the applicant of acceptable quality for identification one inch by one inch in size;
 - (3) statements of the results of a local criminal history records search by the city-county identification bureau or clerk of superior court in each county where the applicant has resided within the immediately preceding 48 months or a statewide criminal history records search for the past five years conducted by an Administrative Offices of the Courts' approved firm that conducts criminal history searches and bases its search on the criminal history

- database maintained by the North Carolina Administrative Offices of the Courts;
- (4) the applicant's application fee; and
- (5) an Equifax credit check run within 30 days of the license application submission date.
- (b) Each applicant must provide evidence of high school graduation either by diploma, G.E.D. certificate, or other equivalent documentation.
- (c) Each applicant for a license shall meet personally with either a Board investigator, the Screening Committee, the Director, or a Board representative designated by the Director prior to being issued a license. The applicant shall discuss the provisions of G.S. 74D and the administrative rules during the personal meeting. The applicant shall sign a form provided by the Board indicating that the applicant has reviewed the information with the Board's representative and that the applicant has an understanding of G.S. 74D and the administrative rules.
- (d) Each applicant for a branch office license shall complete an application form provided by the Board. This form and one additional copy shall be submitted to the administrator and shall be accompanied by the branch office application fee.

History Note: Authority G.S. 74D-2; 74D-3; 74D-5; 74D-7; Temporary Rule Eff. January 9, 1984, for a period of 120 days to expire on May 7, 1984; Eff. May 1, 1984; Amended Eff. February 1, 2012; January 1, 2007; September 1, 2006; March 1, 1993; July 1, 1987; January 1, 1986.

12 NCAC 11 .0204 RENEWAL OR RE-ISSUE OF LICENSE

- (a) Each applicant for a license renewal shall complete a renewal form provided by the Board. This form shall be submitted to the administrator not less than 30 days prior to expiration of the applicant's current license and shall be accompanied by:
 - (1) two head and shoulders color photographs of the applicant of acceptable quality for identification and made within 90 days of the application one inch by one inch in size;
 - (2) statements of the result of a local criminal history records search by the City/County Identification Bureau or Clerk of Superior Court in each county where the applicant has resided within the immediately preceding 24 months;
 - (3) the applicant's renewal fee; and
 - (4) proof of liability insurance pursuant to G.S. Sec. 74D-9.
- (b) Applications for renewal shall be submitted not less than 30 days before the expiration date of the license. In no event shall renewal be granted more than 90 days after the date of expiration of a license. Renewals shall be dated on the next day following expiration of the prior license.
- (c) Applications for renewal submitted after the expiration date of the license shall be accompanied by the late renewal fee established by 12 NCAC 11 .0203 and must be submitted not later than 90 days after the expiration date of the license.

(d) The administrator shall approve or deny all applications for renewal. Any denials shall be submitted to the Board for a final board decision.

(e) Members of the armed forces whose licenses are in good standing and to whom G.S. 105-249.2 grants an extension of time to file a tax return are granted the same extension of time to pay the license renewal fee and to complete the continuing education requirements prescribed by 12 NCAC 11 .0500. A copy of the military order or the extension approval by the Internal Revenue Service or by the North Carolina Department of Revenue must be furnished to the Board.

History Note: Authority G.S. 74D-2(a); 74D-5; 93B-15; Eff. January 1, 1995; Temporary Adoption Eff. May 18, 1995; Amended Eff. February 1, 2012; July 1, 2010; May 1, 1999; October 1, 1995.

12 NCAC 11 .0301 APPLICATION FOR REGISTRATION

(a) Each licensee or qualifying agent shall submit and sign an application form for the registration of his employee on a form provided by the Board. This form, when sent to the board, shall be accompanied by:

- (1) a set of classifiable fingerprints on a standard F.B.I. applicant card,
- (2) two photographs of acceptable quality for identification and made within 90 days of the application one inch by one inch in size,
- (3) statements of the results of a local criminal history records search by the city-county identification bureau or clerk of superior court in each county where the applicant has resided within the immediately preceding 48 months or a statewide criminal history records search for the preceding 48 months conducted by an Administrative Offices of the Courts' approved firm that conducts criminal history searches and bases its search on the criminal history database maintained by the North Carolina Administrative Offices of the Courts, and
- (4) the registration fee required by 12 NCAC Chapter 11 .0302.

(b) The employer of an applicant who is currently registered with another alarm business shall complete an application form provided by the Board. This form shall be accompanied by the applicant's multiple registration fee.

(c) The employer of each applicant for registration shall retain a copy of the applicant's application in the individual applicant's personnel file in the employer's office.

(d) The employer of each applicant for registration shall complete and submit to the Board a certification of the background and criminal record check of every applicant signed by the licensee or qualifying agent. A copy of this certification shall be retained in the individual applicant's personnel file in the employer's office.

History Note: Authority G.S. 74D-5; 74D-8;

Temporary Rule Eff. January 9, 1984 for a Period of 120 Days to Expire on May 7, 1984;

Eff. May 1, 1984;

Amended Eff. February 1, 2012; January 1, 2007; July 1, 1993; March 1, 1993; September 1, 1990; November 1, 1988.

12 NCAC 11 .0306 RENEWAL OR REREGISTRATION OF REGISTRATION

(a) Each applicant for renewal of a registration identification card or his employer, shall complete a form provided by the Board. This form shall be submitted not less than 30 days prior to expiration of the applicant's current card and shall be accompanied by:

- (1) two head and shoulders color photographs of the applicant of acceptable quality for identification and made within 90 days of the application one inch by one inch in size;
- (2) statements of the result of a local criminal history records search by the City/County Bureau or Clerk of Superior Court in each county where the applicant has resided within the immediately preceding 24 months; and
- (3) the applicant's renewal fee.

(b) Each licensee shall provide each applicant for registration or re-registration an application form provided by the Board. This form shall be submitted to the Board and accompanied by:

- (1) two head and shoulders photographs of the applicant of acceptable quality for identification and made within 90 days of the application one inch by one inch in size; and
- (2) the applicant's reregistration fee.

(c) The employer of each applicant for a registration renewal or reregistration shall give the applicant a copy of the application which will serve as a record of application for renewal and shall retain a copy of the applicant's renewal application in the individual's personnel file in the employer's office.

(d) Members of the armed forces whose registrations are in good standing and to whom G.S. 105-249.2 grants an extension of time to file a tax return are granted that same extension of time to pay the registration renewal fee and to complete the continuing education requirements prescribed by 12 NCAC 11 .0500. A copy of the military order or the extension approval by the Internal Revenue Service or by the North Carolina Department of Revenue must be furnished to the Board.

History Note: Authority G.S. 74D-7; 74D-8; 93B-15; Temporary Rule Eff. January 9, 1984, for a Period of 120 Days to Expire on May 7, 1984;

Eff. May 1, 1984;

Amended Eff. February 1, 2012; July 1, 2010; March 1, 1993; December 1, 1988; July 1, 1987.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

15A NCAC 03M .0504 TROUT

History Note: Authority G.S. 113-134; 113-182; 113-221; 143B-289.52;
Eff. January 1, 1991;
Amended Eff. March 1, 1996; March 1, 1995; February 1, 1992;
Temporary Amendment Eff. September 9, 1996;
Temporary Amendment Eff. October 1, 1996;
Amended Eff. April 1, 1997;
Temporary Amendment Eff. July 1, 1999;
Amended Eff. October 1, 2008; August 1, 2000;
Repealed Eff. April 1, 2012.

15A NCAC 03M .0519 SHAD

- (a) It is unlawful to take American shad and hickory shad by any method except hook-and-line from April 15 through December 31.
- (b) It is unlawful to possess more than 10 American shad or hickory shad, in the aggregate, per person per day taken by hook-and-line or for recreational purposes.
- (c) It is unlawful to take or possess American shad from the Atlantic Ocean.

History Note: Authority G.S. 113-134; 113-182; 113-221.1; 143B-289.52;
Eff. October 1, 2008;
Amended Eff. April 1, 2012.

15A NCAC 03O .0111 SURRENDER OF LICENSES

- (a) It is unlawful for any licensee to refuse to surrender to an agent of the Secretary all licenses, license receipts, endorsements, commercial fishing vessel registration or decals, and other forms and records relating to the license following service of notice of suspension or revocation of licenses in accordance with G.S. 113-171.
- (b) It is unlawful for any person in custody or possession of any licenses, license receipt, endorsements, commercial fishing vessel registration or decals, and other documentation required to be surrendered to refuse to surrender same to an agent of the Secretary making such demand.

History Note: Authority G.S. 113-134; 113-171; 143B-289.52; S.L. 2010-145;
Temporary Adoption Eff. July 1, 1999;
Eff. August 1, 2000;
Amended Eff. October 1, 2012.

15A NCAC 03O .0114 SUSPENSION, REVOCATION AND REISSUANCE OF LICENSES

- (a) All commercial and recreational licenses issued under Article 14A, Article 14B, and Article 25A of Chapter 113 are subject to suspension and revocation.
- (b) A conviction resulting from being charged by an inspector under G.S. 14-32, 14-33 or 14-399 shall be deemed a conviction for license suspension or revocation purposes.
- (c) Upon receipt of notice of a licensee's conviction as specified in G.S. 113-171 or a conviction as specified in Paragraph (b) of this Rule, the Fisheries Director shall determine whether it is a first, a second, a third or a fourth or subsequent conviction.

Where several convictions result from a single transaction or occurrence, the convictions shall be treated as a single conviction so far as suspension or revocation of the licenses of a licensee is concerned. For a second conviction, the Fisheries Director shall suspend all licenses issued to the licensee for a period of 30 days; for a third conviction, the Fisheries Director shall suspend all licenses issued to the licensee for a period of 90 days; for a fourth or subsequent conviction, the Fisheries Director shall revoke all licenses issued to the licensee, except:

- (1) For a felony conviction under G.S. 14-399, the Fisheries Director shall suspend all licenses issued to the licensee for a period of one year;
- (2) For a first conviction under G.S. 113-187(d)(1), the Fisheries Director shall suspend all licenses issued to the licensee for a period of one year; for a second or subsequent conviction under G.S. 113-187(d)(1), the Fisheries Director shall revoke all licenses issued to the licensee;
- (3) For a conviction under G.S. 113-209, the Fisheries Director shall revoke all licenses issued to the licensee; and
- (4) For a conviction under G.S. 14-32 or 14-33, when the offense was committed against a marine fisheries inspector the Fisheries Director shall revoke all licenses issued to the licensee; the former licensee shall not be eligible to apply for reinstatement of a revoked license or for any additional license authorized in Article 14A, Article 14B and Article 25A of Chapter 113 for a period of two years.

(d) After the Fisheries Director determines a conviction requires a suspension or revocation of the licenses of a licensee, the Fisheries Director shall cause the licensee to be served with written notice of suspension or revocation. The written notice may be served upon any responsible individual affiliated with the corporation, partnership, or association where the licensee is not an individual. The notice of suspension or revocation shall be served by an inspector or other agent of the Department or by certified mail, must state the ground upon which it is based, and takes effect immediately upon service. The agent of the Fisheries Director making service shall then or subsequently, as may be feasible under the circumstances, collect all license certificates and plates and other forms or records relating to the license as directed by the Fisheries Director.

(e) Where a license has been suspended, the former licensee shall not be eligible to apply for reissuance of license or for any additional license authorized in Article 14A, Article 14B and Article 25A of Chapter 113 during the suspension period. Licenses shall be returned to the licensee by the Fisheries Director or the Director's agents at the end of a period of suspension.

(f) Where a license has been revoked, the former licensee shall not be eligible to apply for reinstatement of a revoked license or for any additional license authorized in Article 14A, Article 14B and Article 25A of Chapter 113 for a period of one year, except as provided in Subparagraph (c)(4) of this Rule. For a request for reinstatement following revocation, the eligible former licensee shall satisfy the Fisheries Director that the licensee will

strive in the future to conduct the operations for which the license is sought in accord with all applicable laws and rules by sending a request for reinstatement in writing to the Fisheries Director, Division of Marine Fisheries, P.O. Box 769, Morehead City, North Carolina 28557. Upon the application of an eligible former licensee after revocation, the Fisheries Director may issue one license sought but not another, as deemed necessary to prevent the hazard of recurring violations of the law.

(g) A licensee shall not willfully evade the service prescribed in this Rule.

History Note: Authority G.S. 113-168.1; 113-171; S.L. 2010-145;
Eff. October 1, 2012.

15A NCAC 04B .0132 DESIGN STANDARDS FOR THE UPPER NEUSE RIVER BASIN (FALLS LAKE WATERSHED)

In addition to any other requirements of State, federal, and local law, land-disturbing activity in the watershed of the drinking water supply reservoir that meets the applicability requirements of Session Law 2009-486, Section 3.(a), shall meet all of the following design standards for sedimentation and erosion control:

- (1) Erosion and sedimentation control measures, structures, and devices shall be planned, designed, and constructed to provide protection from the runoff of the 25-year storm that produces the maximum peak rate of runoff as calculated according to procedures set out in the United States Department of Agriculture Soil Conservation Service's "National Engineering Field Manual for Conservation Practices" or according to procedures adopted by any other agency of the State or the United States.
- (2) Sediment basins shall be planned, designed, and constructed so that the basin will have a settling efficiency of at least 70 percent for the 40-micron size soil particle transported into the basin by the runoff of the two-year storm that produces the maximum peak rate of runoff as calculated according to procedures in the United States Department of Agriculture Soil Conservation Service's "National Engineering Field Manual for Conservation Practices" or according to procedures adopted by any other agency of the State or the United States.
- (3) Newly constructed open channels shall be planned, designed, and constructed with side slopes no steeper than two horizontal to one vertical if a vegetative cover is used for stabilization unless soil conditions permit steeper side slopes or where the side slopes are stabilized by using mechanical devices, structural devices, or other ditch liners sufficient to restrain accelerated erosion. The

angle for side slopes shall be sufficient to restrain accelerated erosion.

- (4) For an area of land-disturbing activity where grading activities have been completed, temporary or permanent ground cover sufficient to restrain erosion shall be provided as soon as practicable, but in no case later than seven days after completion of grading. For an area of land-disturbing activity where grading activities have not been completed, temporary ground cover shall be provided as follows:

- (a) For an area with no slope, temporary ground cover shall be provided for the area if it has not been disturbed for a period of 14 days.
- (b) For an area of moderate slope, temporary ground cover shall be provided for the area if it has not been disturbed for a period of 10 days. For purposes of this Item, "moderate slope" means an inclined area, the inclination of which is less than or equal to three units of horizontal distance to one unit of vertical distance.
- (c) For an area of steep slope, temporary ground cover shall be provided for the area if it has not been disturbed for a period of seven days. For purposes of this Item, "steep slope" means an inclined area, the inclination of which is greater than three units of horizontal distance to one unit of vertical distance.

History Note: Authority S.L. 2009-486;
Eff. February 1, 2012.

15A NCAC 10B .0204 WILD BOAR (BOTH SEXES)

History Note: Authority G.S. 113-134; 113-270.3; 113-276.1; 113-291.2;
Eff. February 1, 1976;
Amended Eff. May 1, 2009; May 1, 2007; July 1, 1999; July 1, 1995; July 1, 1993; July 1, 1987; July 1, 1986;
Repealed Eff. February 1, 2012.

15A NCAC 10B .0223 FERAL SWINE

- (a) Open season. There is no closed season for taking feral swine by hunting.
- (b) Bag limits. There are no bag limit restrictions.

History Note: Authority G.S. 113-129; 113-134; 113-291; 113-291.2;
Temporary Adoption Eff. October 1, 2011;
Eff. February 1, 2012.

15A NCAC 18D .0201 GRADES OF CERTIFICATION

(a) Applicants for the various grades of certification shall be at least 18 years' old and meet the following educational and experience requirements:

- (1) **GRADE A-SURFACE** shall have one year of acceptable experience at a surface water facility while holding a Grade B-Surface certificate and have satisfactorily completed an A-Surface school conducted by the Board.
- (2) **GRADE B-SURFACE** shall:
 - (A) Be a college graduate with a bachelor's degree in the physical or natural sciences or be a graduate of a two year technical program with a diploma in water and wastewater technology, have six months of acceptable experience at a surface water facility, and have satisfactorily completed a B-Surface school conducted by the Board; or
 - (B) Have one year of acceptable experience at a surface water facility while holding a Grade C-Surface certificate and have satisfactorily completed a B-Surface school conducted by the Board.
- (3) **GRADE C-SURFACE** shall:
 - (A) Be a college graduate with a bachelor's degree in the physical or natural sciences or be a graduate of a two year technical program with a diploma in water and wastewater technology, have six months of acceptable experience at a surface water facility, and have satisfactorily completed a C-Surface school conducted by the Board; or
 - (B) Be a high school graduate or equivalent, have six months acceptable experience at a surface water facility and have satisfactorily completed a C-Surface school conducted by the Board.
- (4) **GRADE A-WELL** shall have one year of acceptable experience at a well water facility while holding a Grade B-Well certificate and have satisfactorily completed an A-Well school conducted by the Board.
- (5) **GRADE B-WELL** shall:
 - (A) Be a college graduate with a bachelor's degree in the physical or natural sciences or be a graduate of a two year technical program with a diploma in water and wastewater technology, have six months of acceptable experience at a well water facility, and have satisfactorily

completed a B-Well school conducted by the Board; or

- (B) Have one year of acceptable experience at a well water facility while holding a Grade C-Well certificate and have satisfactorily completed a B-Well school conducted by the Board.
- (6) **GRADE C-WELL** shall:
 - (A) Be a college graduate with a bachelor's degree in the physical or natural sciences or be a graduate of a two year technical program with a diploma in water and wastewater technology, have three months of acceptable experience at a well water facility, and have satisfactorily completed a C-Well school conducted by the Board; or
 - (B) Be a high school graduate or equivalent, have six months of acceptable experience at a well water facility, and have satisfactorily completed a C-Well school conducted by the Board; or
 - (C) Hold a Grade A-Surface certification and have satisfactorily completed a C-Well school conducted by the Board.
- (7) **GRADE D-WELL** shall be a high school graduate or equivalent, have three months of acceptable experience at a well water facility, and have satisfactorily completed a C-Well or D-Well school conducted by the Board.
- (8) **GRADE A-DISTRIBUTION** shall have one year of acceptable experience at Class B or higher distribution system while holding a Grade B-Distribution certificate and have satisfactorily completed an A-Distribution school conducted by the Board.
- (9) **GRADE B-DISTRIBUTION** shall:
 - (A) Be a college graduate with a bachelor's degree in the physical or natural sciences or be a graduate of a two year technical program with a diploma in water and wastewater technology, have six months of acceptable experience at a Class B or higher distribution system, have satisfactorily completed a B-Distribution school conducted by the Board, and shall hold a certificate of completion of trench shoring training conducted by the Board; or
 - (B) Have one year of acceptable experience at a Class C or higher distribution system while holding a Grade C-Distribution certificate and have satisfactorily completed a

- B-Distribution school conducted by the Board.
- (10) **GRADE C-DISTRIBUTION** shall hold a certificate of completion of trench shoring training conducted by the Board and shall:
- (A) Be a college graduate with a bachelor's degree in the physical or natural sciences, or be a graduate of a two year technical program with a diploma in water and wastewater technology, have three months of acceptable experience at a Class C or higher distribution system, and have satisfactorily completed a C-Distribution school conducted by the Board; or
- (B) Be a high school graduate or equivalent, have six months of acceptable experience at a Class D or higher distribution system and have satisfactorily completed a C-Distribution school conducted by the Board.
- (11) **GRADE D-DISTRIBUTION** shall be a high school graduate or equivalent, have three months of acceptable experience at a distribution system, and have satisfactorily completed a D-Distribution school conducted by the Board.
- (12) **GRADE CROSS-CONNECTION-CONTROL** shall:
- (A) Be a college graduate with a bachelor's degree in the physical or natural sciences or be a graduate of a two-year technical program with a degree in water and wastewater or civil engineering technology, and have satisfactorily completed a cross connection control school conducted by the Board; or
- (B) Be a high school graduate or equivalent, have six months of acceptable experience at Class D - Distribution or higher system or have one year experience in the operations of cross connection control devices, and have satisfactorily completed a cross connection control school conducted by the Board; or
- (C) Be a plumbing contractor licensed by the State of North Carolina and have satisfactorily completed a cross connection control school conducted by the Board.
- (13) **APPRENTICE** shall be a high school graduate or equivalent. The apprentice shall have satisfactorily completed a Grade C, Grade D, or CC school conducted by the Board and shall have successfully passed an examination

designed for the class of certification for which the applicant is applying. The apprentice certification may be renewed annually for a maximum of five years, pursuant to the continuing education and renewal requirements of this Subchapter. An apprentice shall not act as a certified operator or an ORC for a facility. An apprentice is eligible for Grade C, D, or CC certification after meeting the applicable experience requirements as set forth in this Rule and making application to the Board.

- (b) Applications for certification of an operator certified in a state other than North Carolina shall be submitted on the Board's form. The application shall supply information to assist the Board in determining whether or not the requirements under which the out-of-state certification was obtained are equivalent to those required by the rules of the Water Treatment Facility Operators Board of Certification

History Note: Authority G.S. 90A-21(c); 90A-22; 90A-23; 90A-24;

Eff. February 1, 1976;

Amended Eff. September 1, 1977;

Readopted Eff. March 1, 1979;

Amended Eff. February 1, 2012; May 1, 2006; September 1, 2004; August 1, 2000; August 1, 1998; May 3, 1993; August 3, 1992; July 1, 1991; December 31, 1980.

15A NCAC 18D .0304 FEE SCHEDULE

(a) The cost of examination and certification shall be fifty dollars (\$50.00). The cost of upgrading an apprentice to Grade C, D, or CC certification shall be fifty dollars (\$50.00).

(b) The cost of a temporary certificate shall be fifty dollars (\$50.00).

(c) The examination and certification fee must be paid to the Board when the application is submitted.

(d) The cost of the annual certification renewal shall be thirty dollars (\$30.00). Renewal fees shall be due December 31 of each calendar year and shall be delinquent on the first day of February. Delinquent certifications shall be charged an additional fee of thirty dollars (\$30.00).

(e) The operator shall notify the Board, in writing, within 30 days of any change in his or her address.

History Note: Authority G.S. 90A-27;

Eff. February 1, 1976;

Amended Eff. July 1, 1977;

Readopted Eff. March 1, 1979;

Amended Eff. February 1, 2012; September 22, 2004; August 1, 2000; August 3, 1992; December 1, 1990; December 1, 1989; June 30, 1981.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 08 - BOARD OF CERTIFIED PUBLIC ACCOUNTANT EXAMINERS

21 NCAC 08G .0409 COMPUTATION OF CPE CREDITS

(a) Group Courses: Non-College. CPE credit for a group course that is not part of a college curriculum shall be given based on contact hours. A contact hour shall be 50 minutes of instruction. One-half credits shall be equal to 25 minutes after the first credit hour has been earned in a formal learning activity. For example, a group course lasting 100 minutes shall be two contact hours and thus two CPE credits. A group course lasting 75 minutes shall be only one and one-half contact hours and thus one and one-half CPE credits. When individual segments of a group course shall be less than 50 minutes, the sum of the individual segments shall be added to determine the number of contact hours. For example, five 30-minute presentations shall be 150 minutes, which shall be three contact hours and three CPE credits. No credit shall be allowed for a segment unless the participant completes the entire segment.

(b) Completing a College Course. CPE credit for completing a college course in the college curriculum shall be granted based on the number of credit hours the college gives the CPA for completing the course. One semester hour of college credit shall be 15 CPE credits; one quarter hour of college credit shall be 10 CPE credits; and one continuing education unit (CEU) shall be 10 CPE credits. However, under no circumstances shall CPE credit be given to a CPA who audits a college course.

(c) Self Study. CPE credit for a self-study course shall be given based on the average number of contact hours needed to complete the course. The average completion time shall be allowed for CPE credit. A sponsor must determine, on the basis of pre-tests, the average number of contact hours it takes to complete a course.

(d) Instructing a CPE Course. CPE credit for teaching or presenting a CPE course for CPAs shall be given based on the number of contact hours spent in preparing and presenting the course. No more than 50 percent of the CPE credits required for a year shall be credits for preparing for and presenting CPE courses. CPE credit for preparing for and presenting a course shall be allowed only once a year for a course presented more than once in the same year by the same CPA.

(e) Authoring a Publication. CPE credit for published articles and books shall be given based on the number of contact hours the CPA spent writing the article or book. No more than 25 percent of a CPA's required CPE credits for a year shall be credits for published articles or books. An article written for a CPA's client or business newsletter is not applicable for this CPE credit.

(f) Instructing a College Course. CPE credit for instructing a graduate level college course shall be given based on the number of credit hours the college gives a student for successfully completing the course, using the calculation set forth in Paragraph (b) of this Rule. Credit shall not be given for instructing an undergraduate level course. In addition, no more than 50 percent of the CPE credits required for a year shall be credits for instructing a college course and, if CPE credit shall also be claimed under Paragraph (d) of this Rule, no more than 50 percent of the CPE credits required for a year shall be credits

claimed under Paragraph (d) and this Paragraph. CPE credit for instructing a college course shall be allowed only once for a course presented more than once in the same year by the same CPA.

History Note: Authority G.S. 93-12(8b); Eff. May 1, 1989;

Amended Eff. February 1, 2012; January 1, 2007; January 1, 2004; February 1, 1996; April 1, 1994; March 1, 1990.

21 NCAC 08G .0410 PROFESSIONAL ETHICS AND CONDUCT CPE

(a) As part of the annual CPE requirement, all active CPAs shall complete CPE on professional ethics and conduct. They shall complete either two hours in a group study format or in a self-study format of a course on regulatory or behavioral professional ethics and conduct. This CPE shall be offered by a CPE sponsor registered with the Board, or with NASBA pursuant to 21 NCAC 08G .0403(a) or (b).

(b) A non-resident licensee whose primary office is in North Carolina must comply with Paragraph (a) of this Rule. All other non-resident licensees may satisfy Paragraph (a) of this Rule by completing the ethics requirements in the jurisdiction in which he or she is licensed as a CPA and works or resides. If there is no ethics CPE requirement in the jurisdiction where he or she is licensed and currently works or resides, he or she must comply with Paragraph (a) of this Rule.

History Note: Authority G.S. 93-12(8b); Eff. January 1, 2005;

Amended Eff. February 1, 2012; January 1, 2007; January 1, 2006.

21 NCAC 08J .0105 RETIRED AND INACTIVE STATUS: CHANGE OF STATUS

(a) A CPA may apply to the Board for change of status to retired status or inactive status provided the CPA meets the description of the appropriate status as defined in 21 NCAC 08A .0301. Application for any status change may be made on the annual certificate renewal form or another form provided by the Board.

(b) A CPA who does not meet the description of inactive or retired as defined in 21 NCAC 08A .0301 may not be or remain on inactive or retired status.

(c) A CPA on retired status may change to active status by:

- (1) paying the certificate renewal fee for the license year in which the application for change of status is received;
- (2) furnishing the Board with evidence of satisfactory completion of 40 hours of acceptable CPE courses during the 12-month period immediately preceding the application for change of status. Eight of the required hours must be credits derived from a course or examination in North Carolina accountancy statutes and rules (including the Code of Professional Ethics and Conduct contained therein) as set forth in 21 NCAC 08G .0401(a); and

- (3) three certificates of moral character and endorsements as to the eligibility signed by CPAs holding valid certificates granted by any state or territory of the United States or the District of Columbia.

(d) A CPA on retired status may request change to inactive status by application to the Board.

(e) Any individual on inactive status may change to active status by complying with the requirements of 21 NCAC 08J .0106(c).

History Note: Authority G.S. 93-12(8); 93-12(8b); Eff. December 1, 1982; Curative Adopted Eff. January 25, 1983; Legislative Objection Lodged Eff. January 31, 1983; Amended Eff. February 1, 2012; February 1, 2011; August 1, 1998; August 1, 1995; April 1, 1994; March 1, 1990; May 1, 1989.

CHAPTER 14 – BOARD OF COSMETIC ART EXAMINERS

21 NCAC 14T .0614 INTERNSHIPS

Schools and cosmetic art shops desiring to implement an internship program shall follow these requirements:

- (1) Schools wishing to participate in an internship program must notify the Board of intent to implement a program before credit for an internship may be granted. Cosmetic art shops and student selection criteria must be submitted along with the notification.
- (2) Schools shall report to the Board all cosmetic art shops contracted and students selected to participate in the program.
- (3) Internships may be arranged in various time frames but shall never exceed five percent of a student's training period.
- (4) Credit for an internship shall be granted upon submission of student hours verification based on a daily attendance record. Hours must be recorded on a form approved by the school.
- (5) Students may be assigned a variety of duties, but client services are restricted. Cosmetology and natural hair care students may provide only shampoo services, manicurist students may only remove nail polish and esthetician students may only drape and prep clients
- (6) Students must follow all Board rules and regulations.
- (7) A licensed teacher need not be in attendance during this internship.
- (8) Students participating in the program shall not receive compensation for duties performed in the cosmetic art shop.

History Note: Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17; Eff. February 1, 2012.

21 NCAC 14T .0701 SCHOOL OPERATIONS/LICENSURE MAINTENANCE

(a) No individual shall be given credit for any hours earned in a cosmetic art school before the date the school is granted a license, before the student is enrolled or after graduation or withdrawal without a new enrollment.

(b) All Cosmetic Art schools must submit hours of operation per cosmetic art discipline to the Board. Any changes to the hours of operation must be submitted to the Board. A school will be considered open by the Board when cosmetic art instruction, services or performances are provided.

(c) Students can be required to clean and disinfect work areas, reception areas, implements and the dispensary. Students cannot be required to perform regular maintenance.

(d) All cosmetic art schools must adhere to all Board sanitation regulations.

(e) Cosmetic art schools may permit students to leave the cosmetic art school to visit on campus libraries and other educational resource rooms such as computer labs for research and study under the supervision of a cosmetic art instructor.

(f) Cosmetic art schools must use the following grading scale as a minimum for passing grades:

Grade A	100-90
Grade B	80-89
Grade C	70-79
Grade F (Fail)	0-69

(g) Cosmetic art schools shall not graduate any student that has not met the minimum school and Board requirements for graduation.

(h) Examinations shall be administered in all subjects of the cosmetic art curriculum. Students must pass examinations in all curriculum subjects.

(i) Students present at school must be supervised by a cosmetic art teacher at all times. If a guest lecturer is leading a class, at least one cosmetic art teacher must be present in the lecture.

(j) All cosmetic art schools shall provide:

- (1) One teacher for every 25 students enrolled in the beginner department.
- (2) During student practical work on live models, on the clinic floor a ratio of one teacher for every 20 students.
- (3) Cosmetic art teachers at a ratio of 1:25 teacher to teacher trainees; or
 - (A) one teacher and up to 25 beginner cosmetic art students and 5 teacher trainees; or
 - (B) one teacher and up to 20 cosmetic art students in practice on the clinic floor and 5 teacher trainees.

(k) In theory classes the teacher student ratio may exceed the ratios established in this Rule.

(l) The teacher student ratios established in this Rule shall be adhered to when schools are in operation.

(m) A teacher shall not administer instruction to students enrolled in beginner and advanced departments at the same time.

(n) At no time can any one teacher be responsible for students in a theory class and students in practice on the clinic floor.

(o) The Board must be notified of changes in teaching staff by written correspondence prior to instruction by the new teacher.

- (1) A change in teaching staff includes any substitution for the regularly scheduled teacher and any change, scheduled or otherwise, in the list of teachers last given to the Board.
- (2) All courses in a cosmetic art school must be taught by a licensed cosmetology teacher, except that manicuring courses may be taught by either a licensed cosmetology teacher or a licensed manicurist teacher, natural hair care courses may be taught by either a licensed cosmetology teacher or a licensed natural hair care teacher, and esthetics courses may be taught by either a licensed cosmetology teacher or a licensed esthetician teacher. A licensed cosmetologist not licensed as a cosmetology teacher may substitute for a cosmetology, esthetician, natural hair care or manicurist teacher; a licensed manicurist not licensed as a manicurist teacher may substitute for a manicurist teacher; a licensed natural hair care specialist not licensed as a natural hair care teacher may substitute for a natural hair care teacher; and a licensed esthetician not licensed as an esthetician teacher may substitute for an esthetician teacher.

(p) In no event may any cosmetic art licensee substitution last for more than 15 consecutive working days per year per teacher. If any teacher substitution is 16 consecutive days or longer, the school must provide a new cosmetic art teacher.

(q) Enrolled students may earn a maximum of 8 hours per day per discipline of cosmetic art and a maximum of 48 hours per week per discipline. A student enrolled in more than one cosmetic art discipline may not earn hours or performances concurrently.

(r) A cosmetic art student must complete at least 1/3 of the minimum required hours in the cosmetic art school certifying his or her application for the state board examination.

(s) Upon written petition by the student and the school, the Board shall make an exception to the requirements set forth in Paragraph (r) of this Rule if the student shows that circumstances beyond the student's control prohibited him or her from completing a minimum of 1/3 hours at the school that certifies his or her application.

(t) The Board shall certify student hours for any North Carolina cosmetic art school that is closed. The Board shall not certify student hours between any North Carolina open cosmetic art schools. The Board shall certify student hours earned at North Carolina cosmetic art schools to other state boards and schools open outside of the state of North Carolina.

History Note: Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17; Eff. February 1, 2012

CHAPTER 32 – MEDICAL BOARD

21 NCAC 32N .0101 HEARINGS

21 NCAC 32N .0102

21 NCAC 32N .0103 PERSONAL BIAS

21 NCAC 32N .0104

21 NCAC 32N .0105

INITIATION OF FORMAL

CONTINUANCES

DISQUALIFICATION FOR

DISCOVERY

INFORMAL PROCEEDINGS

History Note: Authority G.S. 90-14.1; 90-14.2; 90-14.3; 90-14.4; 90-14.5; 90-14.6; 90-14.7; 150B-11(1); 150B-38(h); 150B-39;

Eff. March 1, 1991;

Amended Eff. September 1, 1995;

Repealed Eff. February 1, 2012.

21 NCAC 32N .0106

DEFINITIONS

As used in this Section:

- (1) "Disciplinary Proceedings" means hearings conducted pursuant to G.S. 90-14.2 through 90-14.7, and Article 3A of Chapter 150B.
- (2) "Good cause" related to motions or requests to continue or for additional time for responding includes:
 - (a) death or incapacitating illness of a party, or attorney of a party;
 - (b) a court order requiring a continuance;
 - (c) lack of proper notice of the hearing;
 - (d) a substitution of the attorney of a party if the substitution is shown to be required;
 - (e) agreement for a continuance by all parties if either more time is demonstrated to be necessary to complete mandatory preparation for the case, such as authorized discovery, and the parties and the Board have agreed to a new hearing date or the parties have agreed to a settlement of the case that has been or is likely to be approved by the Board; and
 - (f) where, for any other reason, either party has shown that the interests of justice require a continuance or additional time.
- (3) "Good cause" related to motions or requests to continue or for additional time for responding shall not include:
 - (a) intentional delay;
 - (b) unavailability of a witness if the witness testimony can be taken by deposition; and
 - (c) failure of the attorney or respondent to use effectively the statutory notice period provided in G.S. 90-14.2(a) to prepare for the hearing.
- (4) "Licensee" means all persons to whom the Board has issued a license as defined in G.S. 90-1.1.

- (5) "Respondent" means the person licensed or approved by the Board who is named in the Notice of Charges and Allegations.

History Note: Authority G.S. 90-5.1(a)(3); 90-14.2; 150B-38(h); 150B-40(c)(4);
Eff. February 1, 2012.

21 NCAC 32N .0107 INVESTIGATIONS AND COMPLAINTS

(a) At the time of first oral or written communication from the Board or staff or agent of the Board to a licensee regarding a complaint or investigation, the Board shall provide the notices set forth in G.S. 90-14(i), except as provided in Paragraph (e) of this Rule.

(b) A licensee shall submit a written response to a complaint received by the Board within 45 days from the date of a written request by Board staff. The Board shall grant up to an additional 30 days for the response where the licensee demonstrates good cause for the extension of time. The response shall contain accurate and complete information. Where a licensee fails to respond in the time and manner provided herein, the Board may treat that as a failure to respond to a Board inquiry in a reasonable time and manner as required by G.S. 90-14(a)(14).

(c) The licensee's written response to a complaint submitted to the Board in accordance with Paragraph (b) of this Rule shall be provided to the complainant upon written request as permitted in G.S. 90-16(e1), except that the response shall not be provided where the Board determines that the complainant has misused the Board's complaint process or that the release of the response would be harmful to the physical or mental health of the complainant who was a patient of the responding licensee.

(d) A licensee shall submit to an interview within 30 days from the date of an oral or written request from Board staff. The Board may grant up to an additional 15 days for the interview where the licensee demonstrates good cause for the extension of time. The responses to the questions and requests for information, including documents, during the interview shall be complete and accurate. Where respondent fails to respond in the time and manner provided herein, the Board may treat that as a failure to respond to a Board inquiry in a reasonable time and manner as required by G.S. 90-14(a)(14).

(e) The licensee who is the subject of a Board inquiry may retain and consult with legal counsel of his or her choosing in responding to the inquiries as set out in G.S. 90-14(i).

History Note: Authority G.S. 90-5.1(a)(3); 90-14(a)(14); 90-14(i); 90-16(e1);
Eff. February 1, 2012.

21 NCAC 32N .0108 INVESTIGATIVE INTERVIEWS BY BOARD MEMBERS

(a) In addition to formal hearings pursuant to G.S. 90-14 and G.S. 90-14.2, the Board may ask a licensee to attend a non-public interview with members of the Board and staff to discuss a pending complaint or investigation. The invitation letter shall describe the matters of dispute or concern and shall enclose the notices required by G.S. 90-14(i), if not previously issued. No individual shall be placed under oath to give testimony.

Statements made or information provided by a licensee during this interview may, however, be used against such licensee in any subsequent formal hearing.

(b) As a result of the interview, the Board may ask that the licensee take actions as referred to in G.S. 90-14(k), may offer the licensee the opportunity to enter into a consent order or other public agreement that will be a matter of public record, may institute a formal public hearing concerning the licensee, or may take other action as the Board deems appropriate in each case.

(c) Unless ordered by the Board pursuant to G.S. 90-8, attendance at such an interview is not required. A licensee may retain legal counsel and have such counsel present during such interview.

(d) If ordered to appear for an interview, requests for continuances from interviews shall be filed with the President as soon as practicable and shall be granted only upon good cause shown.

History Note: Authority G.S. 90-5.1(a)(3); 90-8; 90-14(a)(14);
Eff. February 1, 2012.

21 NCAC 32N .0109 PRE-CHARGE CONFERENCE

(a) Prior to issuing public Notice of Charges and Allegations against a licensee, the Board shall inform the licensee in writing of the right to request a pre-charge conference as set forth in G.S. 90-14(j). The written notice regarding the pre-charge conference shall be sent by certified mail, return receipt requested to the last mailing address registered with the Board.

(b) A request for a pre-charge conference must be:

- (1) in writing via delivery of a letter or by facsimile or electronic mail;
- (2) addressed to the coordinator identified in the written notice provided as set forth in Paragraph (a) of this Rule; and
- (3) received by the Board no later than 30 days from the date appearing on the written notice provided as set forth in Paragraph (a) of this Rule.

(c) Upon receipt of a request for a pre-charge conference, the coordinator shall schedule the conference to occur within 45 days and serve notice of the date and time of the conference on the licensee or on counsel for licensee, if the Board is aware licensee is represented by counsel.

(d) The pre-charge conference shall be conducted as provided in G.S. 90-14(j). The pre-charge conference will be conducted by telephone conference unless the interests of justice require otherwise or both parties agree to conduct the conference in person. No continuances of the pre-charge conference shall be allowed except when granted by the Board for good cause shown.

(e) The licensee may provide to the Board written documents not previously submitted by delivering those documents in electronic form to the coordinator identified in the written notice up to five days prior to the pre-charge conference.

(f) The Board shall provide information to the licensee during the pre-charge conference regarding the possibility of settlement of the pending matter prior to the issuance of a public notice of charges and allegations.

History Note: Authority G.S. 90-5.1(a)(3); 90-14(j); Eff. February 1, 2012.

21 NCAC 32N .0110 INITIATION OF DISCIPLINARY HEARINGS

(a) The Board shall issue a Notice of Charges and Allegations only upon completion of an investigation, a finding by the Board or a committee of the Board that there exists a factual and legal basis for an action pursuant to any subsection of G.S. 90-14(a), and a pre-charge conference, if one was requested by the licensee.

(b) Disciplinary proceedings shall be initiated and conducted pursuant to G.S. 90-14 through G.S. 90-14.7 and G.S. 150B-38 through G.S. 150B-42.

(c) A pre-hearing conference shall be held not less than seven days before the hearing date unless waived by the Board President or designated presiding officer upon written request by either party. The purpose of the conference will be to simplify the issues to be determined, obtain stipulations in regards to testimony or exhibits, obtain stipulations of agreement on undisputed facts or the application of particular laws, consider the proposed witnesses for each party, identify and exchange documentary evidence intended to be introduced at the hearing, and consider such other matters that may be necessary or advisable for the efficient and expeditious conduct of the hearing.

(d) The pre-hearing conference shall be conducted in the offices of the Medical Board, unless another site is designated by mutual agreement of all parties; however, when a face-to-face conference is impractical, the Board President or designated presiding officer may order the pre-hearing conference be conducted by telephone conference.

(e) The pre-hearing conference shall be an informal proceeding and shall be conducted by the Board President or designated presiding officer.

(f) All agreements, stipulations, amendments, or other matters resulting from the pre-hearing conference shall be in writing, signed by the presiding officer, respondent or respondent's counsel and Board counsel, and introduced into the record at the beginning of the disciplinary hearing.

(g) Motions for a continuance of a hearing shall be granted upon a showing of good cause. In determining whether to grant such motions, the Board shall consider the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina. Motions for a continuance must be in writing and received in the office of the Medical Board no less than 14 calendar days before the hearing date. A motion for a continuance filed less than 14 calendar days from the date of the hearing shall be denied unless the reason for the motion could not have been ascertained earlier. Motions for continuance shall be ruled on by the President of the Board or designated presiding officer.

(h) The Respondent may challenge on the basis of personal bias or other reason for disqualification the fitness and competency of any Board member to hear and weigh evidence concerning the Respondent. Challenges must be in writing accompanied by affidavit setting forth with specificity the grounds for such challenge and must be filed with the President of the Board or designated presiding officer at least 14 days before the hearing

except for good cause shown. Nothing contained in this Rule shall prevent a Respondent appearing before the Board at a formal hearing from making inquiry of Board members as to their knowledge of and personal bias concerning that person's case and making a motion based upon the responses to those inquiries that a Board member recuse himself or herself of be removed by the Board President or presiding officer.

(i) In any formal proceeding pursuant to G.S. 90-14.1 and G.S. 90-14.2, discovery may be obtained as provided in G.S. 90-8 and 150B-39 by either the Board or the Respondent. Any discovery request by a Respondent to the Board shall be filed with the Executive Director of the Board. Nothing herein is intended to prohibit a Respondent or counsel for Respondent from issuing subpoenas to the extent that such subpoenas are otherwise permitted by law or rule. The Medical Board may issue subpoenas for the Board or a Respondent in preparation for or in the conduct of a contested case as follows:

- (1) Subpoenas may be issued for the appearance of witnesses or the production of documents or information, either at the hearing or for the purposes of discovery;
- (2) Requests by a Respondent for subpoenas shall be made in writing to the Executive Director and shall include the following:
 - (A) the full name and home or business address of all persons to be subpoenaed; and
 - (B) the identification, with specificity, of any documents or information being sought;
- (3) Where Respondent makes a request for subpoenas and complies with the requirements in Subparagraph (2) of this Paragraph, the Board shall provide subpoenas promptly;
- (4) Subpoenas shall include the date, time, and place of the hearing and the name and address of the party requesting the subpoena. In the case of subpoenas for the purpose of discovery, the subpoena shall include the date, time, and place for responding to the subpoena; and
- (5) Subpoenas shall be served as provided by the Rules of Civil Procedure, G.S. 1A-1. The cost of service, fees, and expenses of any witnesses or documents subpoenaed shall be paid by the party requesting the witnesses.

(j) All motions related to a contested case shall be in writing and submitted to the Medical Board at least 14 calendar days before the hearing. Pre-hearing motions shall be heard at the pre-hearing conference described in Paragraph (c) of this Rule. Motions filed fewer than 14 days before the hearing shall be considered untimely and shall not be considered unless the reason for the motion could not have been ascertained earlier. In such case, the motion shall be considered at the hearing prior to the commencement of testimony. The Board President or designated presiding officer shall hear the motions and any response from the non-moving party and rule on such motions. If the pre-hearing motions are heard by an Administrative Law

Judge from Office of Administrative Hearings the provisions of G.S. 150B-40(e) shall govern the proceedings.

History Note: Authority G.S. 90-5.1(a)(3); 90-8; 90-14.1; 90-14.2; 90-14.3; 150B-38; 150B-39(c);
Eff. February 1, 2012.

21 NCAC 32N .0111 CONDUCTING DISCIPLINARY HEARINGS

(a) Disciplinary hearings conducted before a majority of Board members shall be held at the Board's office or, by mutual consent, in another location where a majority of the Board has convened for the purpose of conducting business. For proceedings conducted by an administrative law judge, the venue shall be determined in accordance with G.S. 150B-38(e). All hearings conducted by the Medical Board are open to the public; however, portions are closed to protect the identity of patients pursuant to G.S. 90-16(b).

(b) All hearings by the Medical Board shall be conducted by a quorum of the Medical Board, except as provided in Subparagraph (1) and (2) of this Paragraph. The Medical Board President or his or her designee shall preside at the hearing. The Medical Board shall retain independent legal counsel to provide advice to the Board as set forth in G.S. 90-14.2. The quorum of the Medical Board shall hear all evidence, make findings of fact and conclusions of law, and issue an order reflecting the decision of the majority of the quorum of the Board. The final form of the order shall be determined by the presiding officer, who shall sign the order. When a majority of the members of the Medical Board is unable or elects not to hear a contested case:

(1) The Medical Board may request the designation of an administrative law judge from the Office of Administrative Hearings to preside at the hearing so long as the Board has not alleged the licensee failed to meet an applicable standard of medical care. The provisions of G.S. 150B, Article 3A shall govern a contested case in which an administrative law judge is designated as the Hearing Officer; or

(2) The Medical Board President may designate in writing three or more hearing officers to conduct hearings as a hearing committee to take evidence. The provisions of G.S. 90-14.5(a) through (d) shall govern a contested case in which a hearing committee is designated.

(c) If any party or attorney of a party or any other person in or near the hearing room engages in conduct which obstructs the proceedings or would constitute contempt if done in the General Court of Justice, the Board may apply to the applicable superior court for an order to show cause why the person(s) should not be held in contempt of the Board and its processes.

(d) During a hearing, if it appears in the interest of justice that further testimony should be received and sufficient time does not remain to conclude the testimony, the Medical Board may continue the hearing to a future date to allow for the additional testimony to be taken by deposition or to be presented orally. In such situations and to such extent as possible, the seated

members of the Medical Board shall receive the additional testimony. If new members of the Board or a different independent counsel must participate, a copy of the transcript of the hearing shall be provided to them prior to the receipt of the additional testimony.

(e) All parties have the right to present evidence, rebuttal testimony, and argument with respect to the issues of law, and to cross-examine witnesses. The North Carolina Rules of Evidence in G.S. 8C apply to contested case proceedings, except as provided otherwise in this Rule, G.S. 90-14.6 and G.S. 150B-41.

History Note: Authority G.S. 90-5.1(a)(3); 90-14.2; 90-14.5; 90-14.6; 90-14.7; 90-16(b); 150B-38(e)(h); 150B-40; 150B-41; 150B-42;
Eff. February 1, 2012.

21 NCAC 32N .0112 POST HEARING MOTIONS

(a) Following a disciplinary hearing either party may request a new hearing or to reopen the hearing for good cause as provided in G.S. 90-14.7. For the purposes of this Rule, good cause is defined as any of the grounds set out in Rule 59 of the North Carolina Rules of Civil Procedure and complying with the following requirements:

(1) Following hearings conducted by a quorum of the Board, a motion for a new hearing or to reopen the hearing to take new evidence shall be served, in writing, on the presiding officer of the disciplinary hearing no later than 20 days after service of the final order upon the respondent. Supporting affidavits, if any, and a memorandum setting forth the basis of the motion together with supporting authorities, shall be filed with the motion. The opposing party has 20 days from service of the motion to file a written response, any reply affidavits, and a memorandum with supporting authorities. A quorum of the Board shall rule on the motion based on the parties' written submissions and oral arguments, if the Board permitted any; and

(2) Following hearings conducted by a hearing panel pursuant to G.S. 90-14.5, a motion for a new hearing or to reopen the hearing to take new evidence shall be served, in writing, on the presiding officer of the hearing panel no later than 20 days after service of the recommended decision upon the respondent or respondent's counsel. Supporting affidavits, if any, and a memorandum setting forth the basis of the motion together with supporting authorities, shall be filed with the motion. The opposing party has 20 days from service of the motion to file a written response, any reply affidavits, and a memorandum with supporting authorities. The hearing panel shall rule on the motion based on the parties' written submission and oral arguments, if the Board permitted any.

(b) Either party may file a motion for relief from the final order of the Board based on any of the grounds set out in Rule 60 of the North Carolina Rules of Civil Procedure. Relief from the final order of the Board shall not be permitted later than one year after the effective date of the final order from which relief is sought. Motions pursuant to this section will be heard and decided in the same manner as motions submitted pursuant to Subparagraph (a)(1) of this Rule.

(c) The filing of a motion under Subparagraph (a)(1) or Paragraph (b) of this Rule does not automatically stay or otherwise affect the effective date of the final order.

History Note: Authority G.S. 90-5.1(a)(3); 90-14.7; Eff. February 1, 2012.

21 NCAC 32N .0113 CORRECTION OF CLERICAL MISTAKES

Clerical mistakes in orders or other parts of the record from a formal hearing and errors therein arising from oversight or omission may be corrected by the Board President or designated presiding officer at any time on his or her own initiative or on the motion of any party and after such notice, if any, as the Board President or designated presiding officer orders. After the filing by a respondent of an appeal to the Superior Court of the Board's imposition of public disciplinary action as set forth in G.S. 90-14.8, such mistakes may be so corrected before the record of the case is filed by the Board with the clerk of the Superior Court as required by G.S. 90-14.8.

History Note: Authority G.S. 90-5.1(a)(3); 150B-40; Eff. February 1, 2012.

CHAPTER 52 - BOARD OF PODIATRY EXAMINERS

21 NCAC 52 .0208 CONTINUING EDUCATION

(a) An additional requirement for issuance of the annual renewal certificate shall be certification to the board of proof of having complied with the continuing education provisions of the General Statutes. The board shall notify all podiatrists that 25 hours are required annually.

(b) General CME policy – Minimum of 25 hours / year

- (1) Completion of 25 hours of Continuing Medical Education (CME) is required per year (July 1- June 30) for renewal of licensure. CME credits cannot be carried over from the previous licensure year.
- (2) It shall be the responsibility of the individual podiatrist to ascertain in advance that the courses which he or she attends have received proper approval of the certifying organizations. The Board shall respond in writing or by email with approval or denial to individuals requesting approval of CME courses and credit hours. Decisions by the Board are the final agency decision and may be appealed as set out in G.S. 150B-23.

(3) Certificates of completion of courses other than that sponsored by the NC Foot and Ankle Society (NCF&AS) must be submitted to the Board along with the podiatrist's annual license renewal documents. Completion certificates must contain the following information:

- (A) Podiatrist's name;
- (B) Course name, location, and date;
- (C) Number of hours CME completed;
- (D) Signature of seminar chairperson; and
- (E) Name of certifying or sponsoring agency.

Handwritten certificates are not acceptable. It is the podiatrist's responsibility to contact the seminar organizer to secure a printed certificate before submitting to the Board for approval along with a renewal.

(4) In the case of a licensed podiatrist participating in the second or third year of a medical residency, a letter signed by the podiatric residency director indicating podiatrist's name and the dates the podiatrist has been in residency will substitute for the 25-credit hour requirement and a CME certificate.

(5) A podiatrist may submit his CME certificate(s) to the Board in facsimile, electronic, or hard copy format at any time during the renewal year.

(6) The Board shall retain CME documentation along with the individual podiatrist's license renewal information.

(c) Category 1: Minimum requirement 20 hours per year, as follows:

- (1) Continuing medical education (CME) credit shall be allowed for attendance at educational seminars offered by the North Carolina Foot and Ankle Society (NCF&AS). The number of qualifying hours of continuing education shall be determined and approved by the Board in advance based on the standards in 90-202.11. NCF&AS shall provide the Board directly with a listing of individuals attending its CME events and credits earned.
- (2) Continuing medical education credit shall be recognized for attendance at educational seminars offered by other national, state and podiatric education providers, as certified by the Council on Podiatric Medical Education (CPME) of the American Podiatric Medical Association (APMA). The number of qualifying hours of continuing education shall be determined and approved by the Council on Podiatric Medical Education.
- (3) Lecturers may receive one hour of credit for each hour of CPME- or APMA- approved lectures given, but such credit shall be limited to one hour for each discrete topic. A brief

summary of the content of each lecture must be submitted for approval.

- (4) Category 1 is limited to educational seminars either offered by NCF&AS or by sponsors pre-approved by CPME:

<http://www.apma.org/Members/Education/CPMEAccreditation/ContinuingEducation/CPME700.aspx?FT=.pdf>

(N.B.: APMA- or CPME- approved online or journal courses are considered Category 2.)

(d) Category 2: A maximum of only 5 of the total 25 CME hours per year will be allowed as follows:

- (1) Continuing medical education (CME) credit shall be allowed for educational programs approved for Category 1 credit by the American Medical Association (AMA) and the American Osteopathic Association (AOA) or their affiliated organizations.
- (2) Continuing medical education (CME) credit shall be allowed for courses approved by North Carolina Area Health Education Center (AHEC).
- (3) Online or medical journal courses approved by CPME are permitted.
- (4) For courses not pre-approved by AHEC, AOA, or AMA, all requests for CME approval must contain a timeline and course description.

(e) Waiver for Certified Illness, Medical Condition, Natural Disaster, or Undue Hardship

Since continuing education is one of the methods whereby a podiatrist keeps his medical knowledge and skills up-to-date, in the case of an unexpected, certified illness or medical condition of the licensee or immediate family member (as certified by a letter from a licensed physician) or undue hardship (e.g., active military service or natural disaster) which precludes a licensed podiatrist from completing his continuing education requirement within the 18-month timeframe from July 1 of the year of last license or renewal issuance through December 31 of the following year, the Board may waive the continuing education requirement for license renewal by issuing the podiatrist a conditional license predicated on the licensee acquiring all of the required continuing education credits in a mutually-agreeable timeframe, but no later than 24 months after December 31 of the year following the year of license or renewal issuance. The Board reserves the right to require additional information to support the licensee's claim. The Board will notify the licensee of its decision in writing.

History Note: Authority G.S. 90-202.4(g); 90-202.11;

Eff. February 1, 1976;

Amended Eff. February 1, 2012; November 1, 2011; June 1, 2011; December 1, 1988.

CHAPTER 58 – REAL ESTATE COMMISSION

21 NCAC 58A .0504 ACTIVE AND INACTIVE LICENSE STATUS

(a) Except for licenses that have expired or that have been revoked, suspended or surrendered, all licenses issued by the Commission shall be designated as being either on active status or inactive status. The holder of a license on active status may engage in any activity requiring a real estate license and may be compensated for the provision of any lawful real estate brokerage service. The holder of a license on inactive status may not engage in any activity requiring a real estate license, including the referral for compensation of a prospective seller, buyer, landlord or tenant to another real estate licensee or any other party. A licensee holding a license on inactive status must renew the license and pay the prescribed license renewal fee in order to continue to hold the license. The Commission may take disciplinary action against a licensee holding a license on inactive status for any violation of G.S. 93A or any rule adopted by the Commission, including the offense of engaging in an activity for which a license is required while a license is on inactive status.

(b) A license issued to a provisional broker shall, upon initial licensure, be assigned to inactive status. A license issued to a firm or a broker other than a provisional broker shall be assigned to active status. Except for persons licensed under the provisions of Section .1800 of this Subchapter, a broker may change the status of his or her license from active to inactive status by submitting a written request to the Commission. A provisional broker's license shall be assigned by the Commission to inactive status when the provisional broker is not under the active, direct supervision of a broker-in-charge. A firm's license shall be assigned by the Commission to inactive status when the firm does not have a qualifying broker with an active license. Except for persons licensed under the provisions of Section .1800 of this Subchapter, a broker shall also be assigned to inactive status if, upon the second renewal of his or her license following initial licensure, or upon any subsequent renewal, he or she has not satisfied the continuing education requirement described in Rule .1702 of this Subchapter.

(c) A provisional broker with an inactive license who desires to have the license placed on active status must comply with the procedures prescribed in Rule .0506 of this Section.

(d) A broker, other than a provisional broker, with an inactive license who desires to have the license placed on active status shall file with the Commission a request for license activation on a form provided by the Commission containing identifying information about the broker, a statement that the broker has satisfied the continuing education requirements prescribed by Rule .1703 of this Subchapter, the date of the request, and the signature of the broker. Upon the mailing or delivery of this form, the broker may engage in real estate brokerage activities requiring a license; however, if the broker does not receive from the Commission a written acknowledgment of the license activation within 30 days of the date shown on the form, the broker shall immediately terminate his or her real estate brokerage activities pending receipt of the written acknowledgment from the Commission. If the broker is notified that he or she is not eligible for license activation due to a continuing education deficiency, the broker must terminate all real estate brokerage activities until such time as the continuing

education deficiency is satisfied and a new request for license activation is submitted to the Commission.

(e) A firm with an inactive license which desires to have its license placed on active status shall file with the Commission a request for license activation containing identifying information about the firm and its qualifying broker and satisfy the requirements of Rule .0110 of this Subchapter. If the qualifying broker has an inactive license, he or she must satisfy the requirements of Paragraph (d) of this Rule. Upon the mailing or delivery of the completed form by the qualifying broker, the firm may engage in real estate brokerage activities requiring a license; however, if the firm's qualifying broker does not receive from the Commission a written acknowledgment of the license activation within 30 days of the date shown on the form, the firm shall immediately terminate its real estate brokerage activities pending receipt of the written acknowledgment from the Commission. If the qualifying broker is notified that the firm is not eligible for license activation due to a continuing education deficiency on the part of the qualifying broker, the firm must terminate all real estate brokerage activities until such time as the continuing education deficiency is satisfied and a new request for license activation is submitted to the Commission.

(f) A person licensed as a broker under Section .1800 of this Subchapter shall maintain his or her license on active status at all times as required by Rule .1804 of this Subchapter.

History Note: Authority G.S. 93A-3(c); 93A-4(d); 93A-4.1; 93A-6; 93A-9;

Eff. February 1, 1976;

Readopted Eff. September 30, 1977;

Amended Eff. February 1, 2012; January 1, 2012; July 1, 2009; April 1, 2006; July 1, 2005; July 1, 2004; October 1, 2000; April 1, 1997; July 1, 1996; July 1, 1995; July 1, 1994; February 1, 1989; December 1, 1985.

21 NCAC 58A .0511 LICENSING OF PERSONS LICENSED IN ANOTHER JURISDICTION

(a) The Commission shall fully exempt from its license examination requirement and issue broker licenses by reciprocity to applicants who have otherwise satisfied the requirements of

G.S. 93A-4 and who are residents of and hold active licenses in the following jurisdictions:

- (1) Arkansas,
- (2) Connecticut,
- (3) Georgia,
- (4) Iowa,
- (5) Louisiana,
- (6) Mississippi,
- (7) Nebraska,
- (8) South Carolina,
- (9) Tennessee, and
- (10) West Virginia.

The Commission shall discontinue broker licensing by reciprocity effective February 29, 2012. On and after March 1, 2012, licensees who were licensed in North Carolina by reciprocity shall be entitled to retain such license indefinitely, unless suspended, revoked or surrendered pursuant to G.S. 93A-6, so long as the license is continuously renewed or is reinstated within six months of expiration. A person who was previously licensed in North Carolina by reciprocity and who seeks reinstatement of that license after the license has been expired for more than six months, suspended, revoked or surrendered shall satisfy the requirements described in Rule .0505 of this Subchapter.

(b) Effective March 1, 2012, persons applying for a North Carolina broker license who hold a current real estate license that has been on active status within the previous three years in another state of the United States, a United States territory or possession of a Canadian jurisdiction shall meet the licensing requirements prescribed in G.S. 93A-4 except that such persons shall be exempt from the "national" section of the North Carolina real estate license examination, but shall pass the "state" section of that examination.

History Note: Authority G.S. 93A-3(c); 93A-4(b),(c),(d); 93A-4.1; 93A-9(a);

Eff. January 1, 2012;

Amended Eff. February 1, 2012.

This Section contains information for the meeting of the Rules Review Commission on Thursday February 16, 2012 and March 15, 2012 10:00 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**

Addison Bell
Margaret Currin
Pete Osborne
Bob Rippy
Faylene Whitaker

Appointed by House

Ralph A. Walker
Curtis Venable
George Lucier
Garth K. Dunklin
Stephanie Simpson

COMMISSION COUNSEL

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

RULES REVIEW COMMISSION MEETING DATES

March 15, 2012 April 19, 2012
May 17, 2012 June 21, 2012

RULES REVIEW COMMISSION**February 16, 2012****MINUTES**

The Rules Review Commission met on Thursday, February 16, 2012, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Margaret Currin, George Lucier, Pete Osborne, Bob Rippy, Stephanie Simpson and Ralph Walker. Commissioners Garth Dunklin, Curtis Venable joined via skype.

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

The meeting was called to order at 10:01 a.m. with Judge Walker presiding. He reminded the Commission members that they have a duty to avoid conflicts of interest and the appearances of conflicts as required by NCGS 138A-15(e).

APPROVAL OF MINUTES

Chairman Walker asked for any discussion, comments, or corrections concerning the minutes of the January 19, 2012 meeting. There were none and the minutes were approved as distributed.

FOLLOW-UP MATTERS

04 NCAC 02S .1008 – Alcoholic Beverage Control Commission. The Commission approved the rewritten rule submitted by the agency.

10A NCAC 10 .0203 – Social Services Commission. The Commission approved the rewritten rule submitted by the agency.

21 NCAC 32C .0102, .0105, .0106, .0109 – Medical Board. No action was taken.

LOG OF FILINGS

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

Department of Insurance

11 NCAC 13 .0308 was approved unanimously.

Environmental Management Commission

Elizabeth Kountis from the Agency and Max Justice, Attorney representing the Town of Boone addressed the Commission.

All rules were approved unanimously.

The Commission received more than 10 written letters of objection to 15A NCAC 02B .0307. This rule is now subject to legislative review and a delayed effective date.

15A NCAC 02D .1903 and .1904 were approved by the Commission because they contained changes to the name of the Forestry Service. Changes to the rules made pursuant to S.L. 2011-394 were not subject to review by the Commission and are subject to legislative review and a delayed effective date pursuant to that Session Law.

Medical Board

21 NCAC 32U .0101 was approved unanimously.

Board of Pharmacy

21 NCAC 46 .2507 was approved unanimously.

TEMPORARY RULES

There were no temporary rules filed for review.

COMMISSION PROCEDURES AND OTHER BUSINESS

The Commission discussed the possibility of legislation being introduced to include a sunset provision for rules in the Administrative Procedure Act. There was a brief discussion of a draft prepared by staff at Commissioner Bell's request. Chairman Walker appointed Commissioners Bell, Currin and Lucier to a committee to work on the issue.

The meeting adjourned at 10:40 p.m.

The next scheduled meeting of the Commission is Thursday, March 15 at 10:00 a.m.

Respectfully Submitted,

Julie Edwards
Editorial Assistant

Rules Review Commission

Meeting

Please Print Legibly

FEBRUARY 16, 2012

Name	Agency
Don Johnson	DD NH/DO/SAS
Max Justice	Boone
Sam Furgurle	Town of Boone
Alexi Gruber	DOJ
Dedra Alse	DCDEE
Kim Miller	DCDEE
David Rose	Boone
Steve Metcalf	Boone
Greg Young	Town of Boone
Jack Miller	Town of Boone
Rebecca Shingley	NC DOT
Elizabeth Kovatis	NC DENR
Eric David	BA of Pharm.
Anca GROZAV	OSBM
Patrick Krawson	DENR - DAQ
Bob Ham. Hon	ABC Commission
Karen Waddell	NCDEE
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Please Print Legibly	Please Print Legibly

LIST OF APPROVED PERMANENT RULES
February 16, 2012 Meeting

ALCOHOLIC BEVERAGE CONTROL COMMISSION

Advertising of Malt Beverages, Wine and Beverages by Reta... 04 NCAC 02S .1008

SOCIAL SERVICES COMMISSION

Rates for Subsidized Child Care 10A NCAC 10 .0203

INSURANCE, DEPARTMENT OF

Analysis of Contracts 11 NCAC 13 .0308

ENVIRONMENTAL MANAGEMENT COMMISSION

New River Basin 15A NCAC 02B .0307

Cape Fear River Basin 15A NCAC 02B .0311

Open Burning Without an Air Quality Permit 15A NCAC 02D .1903

Air Curtain Burners 15A NCAC 02D .1904

MEDICAL BOARD

Administration of Vaccines by Pharmacists 21 NCAC 32U .0101

PHARMACY, BOARD OF

Administration of Vaccines by Pharmacists 21 NCAC 46 .2507

AGENDA

RULES REVIEW COMMISSION

Thursday, March 15, 2012 10:00 A.M.

1711 New Hope Church Rd., Raleigh, NC 27609

- I. Ethics reminder by the chair as set out in G.S. 138A-15(e)
 - II. Approval of the minutes from the last meeting
 - III. Follow-Up Matters:
 - A. Medical Board – 21 NCAC 32C .0102, .0105, .0106, .0109 (Bryan)
 - IV. Review of Log of Filings (Permanent Rules) for rules filed between January 23, 2012 and February 20, 2012
 - V. Review of Log of Filings (Temporary Rules) for any rule filed within 15 business days of the RRC Meeting
 - VI. Commission Business
 - Next meeting: April 19, 2012
-

Commission Review

Log of Permanent Rule Filings

January 23, 2012 through February 20, 2012

HHS - HEALTH SERVICE REGULATION, DIVISION OF

The rules in Chapter 14 are from the Director of the Division of Health Service Regulation.

The rules in Subchapter 14B concern the State Medical Facilities Plan including planning policies and need

determination for 1999 and 2000 (.0100); planning policies and need determination for 2001 and 2002 (.0200); and planning policies and need determination for 2003 (.0300).

<u>Applicability of Rules Related to the 1999 State Medical ...</u> Repeal/*	10A	NCAC	14B	.0101
<u>Certificate of Need Review</u> Repeal/*	10A	NCAC	14B	.0102
<u>Certificate of Need Review Schedule</u> Repeal/*	10A	NCAC	14B	.0103
<u>Multi-County Groupings</u> Repeal/*	10A	NCAC	14B	.0104
<u>Service Areas and Planning Areas</u> Repeal/*	10A	NCAC	14B	.0105
<u>Reallocations and Adjustments</u> Repeal/*	10A	NCAC	14B	.0106
<u>Acute Care Bed Need Determination (Review Category A)</u> Repeal/*	10A	NCAC	14B	.0107
<u>Rehabilitation Bed Need Determination (Review Category E)</u> Repeal/*	10A	NCAC	14B	.0108
<u>Ambulatory Surgical Facilities Need Determination (Review...</u> Repeal/*	10A	NCAC	14B	.0109
<u>Open Heart Surgery Services Need Determinations (Review C...</u> Repeal/*	10A	NCAC	14B	.0110
<u>Heart-Lung Bypass Machines Need Determination (Review Cat...</u> Repeal/*	10A	NCAC	14B	.0111
<u>Fixed Cardiac Catheterization Equipment and Fixed Cardiac...</u> Repeal/*	10A	NCAC	14B	.0112
<u>Mobile Cardiac Catheterization Equipment and Mobile Cardi...</u> Repeal/*	10A	NCAC	14B	.0113
<u>Burn Intensive Care Services Need Determination (Review C...</u> Repeal/*	10A	NCAC	14B	.0114
<u>Positron Emission Tomography Scanners Need Determination ...</u> Repeal/*	10A	NCAC	14B	.0115
<u>Bone Marrow Transplantation Services Need Determination (...)</u> Repeal/*	10A	NCAC	14B	.0116
<u>Solid Organ Transplantation Services Need Determination (...)</u> Repeal/*	10A	NCAC	14B	.0117
<u>Gamma Knife Need Determination (Review Category H)</u> Repeal/*	10A	NCAC	14B	.0118
<u>Lithotripter Need Determination (Review Category H)</u> Repeal/*	10A	NCAC	14B	.0119
<u>Radiation Oncology Treatment Centers Need Determination (...)</u> Repeal/*	10A	NCAC	14B	.0120
<u>Magnetic Resonance Imaging Scanners Need Determination (R...</u> Repeal/*	10A	NCAC	14B	.0121
<u>Nursing Care Bed Need Determination (Review Category B)</u> Repeal/*	10A	NCAC	14B	.0122
<u>Home Health Agency Office Need Determination (Review Cate...</u> Repeal/*	10A	NCAC	14B	.0123
<u>Dialysis Station Need Determination</u> Repeal/*	10A	NCAC	14B	.0124
<u>Hospice Need Determination (Review Category F)</u>	10A	NCAC	14B	.0125

Repeal/*				
<u>Hospice Inpatient Facility Bed Need Determination (Review...</u>	10A	NCAC	14B	.0126
Repeal/*				
<u>Psychiatric Bed Need Determination (Review Category C)</u>	10A	NCAC	14B	.0127
Repeal/*				
<u>Chemical Dependency (Substance Abuse) Treatment Bed Need...</u>	10A	NCAC	14B	.0128
Repeal/*				
<u>Intermediate Care Beds for the Mentally Retarded Need Det...</u>	10A	NCAC	14B	.0129
Repeal/*				
<u>Policies for General Acute Care Hospitals</u>	10A	NCAC	14B	.0130
Repeal/*				
<u>Policies for Inpatient Rehabilitation Services</u>	10A	NCAC	14B	.0131
Repeal/*				
<u>Policy for Ambulatory Surgical Facilities</u>	10A	NCAC	14B	.0132
Repeal/*				
<u>Policy for Provision of Hospital-Based Long-Term Nursing ...</u>	10A	NCAC	14B	.0133
Repeal/*				
<u>Policy for Nursing Care Beds in Continuing Care Facilities</u>	10A	NCAC	14B	.0134
Repeal/*				
<u>Policy for Determination of Need for Additional Nursing B...</u>	10A	NCAC	14B	.0135
Repeal/*				
<u>Policy for Relocation of Certain Nursing Facility Beds</u>	10A	NCAC	14B	.0136
Repeal/*				
<u>Policy for Home Health Services</u>	10A	NCAC	14B	.0137
Repeal/*				
<u>Policy for End-Stage Renal Disease Dialysis Services</u>	10A	NCAC	14B	.0138
Repeal/*				
<u>Policies for Psychiatric Inpatient Facilities</u>	10A	NCAC	14B	.0139
Repeal/*				
<u>Policy for Chemical Dependency Treatment Facilities</u>	10A	NCAC	14B	.0140
Repeal/*				
<u>Policies for Intermediate Care Facilities for Mentally Re...</u>	10A	NCAC	14B	.0141
Repeal/*				
<u>Applicability of Rules Related to the 2000 State Medical ...</u>	10A	NCAC	14B	.0150
Repeal/*				
<u>Certificate of Need Review Schedule</u>	10A	NCAC	14B	.0152
Repeal/*				
<u>Multi-County Groupings</u>	10A	NCAC	14B	.0153
Repeal/*				
<u>Service Areas and Planning Areas</u>	10A	NCAC	14B	.0154
Repeal/*				
<u>Reallocations and Adjustments</u>	10A	NCAC	14B	.0155
Repeal/*				
<u>Acute Care Bed Need Determination (Review Category E)</u>	10A	NCAC	14B	.0156
Repeal/*				
<u>Rehabilitation Bed Need Determination (Review Category E)</u>	10A	NCAC	14B	.0157
Repeal/*				
<u>Ambulatory Surgical Facilities Need Determination (Review...</u>	10A	NCAC	14B	.0158
Repeal/*				
<u>Open Heart Surgery Services Need Determinations (Review C...</u>	10A	NCAC	14B	.0159
Repeal/*				
<u>Heart-Lung Bypass Machines Need Determination (Review Cat...</u>	10A	NCAC	14B	.0160

Repeal/*				
<u>Fixed Cardiac Catheterization Equipment and Fixed Cardiac...</u>	10A	NCAC	14B	.0161
Repeal/*				
<u>Burn Intensive Care Services Need Determination (Review C...</u>	10A	NCAC	14B	.0163
Repeal/*				
<u>Positron Emission Tomography Scanners Need Determination ...</u>	10A	NCAC	14B	.0164
Repeal/*				
<u>Bone Marrow Transplantation Services Need Determination (...)</u>	10A	NCAC	14B	.0165
Repeal/*				
<u>Solid Organ Transplantation Services Need Determination (...)</u>	10A	NCAC	14B	.0166
Repeal/*				
<u>Gamma Knife Need Determination (Review Category H)</u>	10A	NCAC	14B	.0167
Repeal/*				
<u>Lithotripter Need Determination (Review Category H)</u>	10A	NCAC	14B	.0168
Repeal/*				
<u>Radiation Oncology Treatment Centers Need Determination (...)</u>	10A	NCAC	14B	.0169
Repeal/*				
<u>Magnetic Resonance Imaging Scanners Need Determination (R...</u>	10A	NCAC	14B	.0170
Repeal/*				
<u>Magnetic Resonance Imaging Scanners Need Determination fo...</u>	10A	NCAC	14B	.0171
Repeal/*				
<u>Nursing Care Bed Need Determination (Review Category B)</u>	10A	NCAC	14B	.0172
Repeal/*				
<u>Demonstration Project for Continuing Care of Adults with ...</u>	10A	NCAC	14B	.0173
Repeal/*				
<u>Home Health Agency Office Need Determination (Review Cate...</u>	10A	NCAC	14B	.0174
Repeal/*				
<u>Dialysis Station Need Determination Methodology</u>	10A	NCAC	14B	.0175
Repeal/*				
<u>Dialysis Station Adjusted Need Determination (Review Cate...</u>	10A	NCAC	14B	.0176
Repeal/*				
<u>Hospice Need Determination (Review Category F)</u>	10A	NCAC	14B	.0177
Repeal/*				
<u>Hospice Inpatient Facility Bed Need Determination (Review ...)</u>	10A	NCAC	14B	.0178
Repeal/*				
<u>Psychiatric Bed Need Determination (Review Category C)</u>	10A	NCAC	14B	.0179
Repeal/*				
<u>Chemical Dependency (Substance Abuse) Treatment Bed need...</u>	10A	NCAC	14B	.0180
Repeal/*				
<u>Intermediate Care Beds for the Mentally Retarded Need Det...</u>	10A	NCAC	14B	.0181
Repeal/*				
<u>Policies for General Acute Care Hospitals</u>	10A	NCAC	14B	.0182
Repeal/*				
<u>Policies for Inpatient Rehabilitation Services</u>	10A	NCAC	14B	.0183
Repeal/*				
<u>Policy for Ambulatory Surgical Facilities</u>	10A	NCAC	14B	.0184
Repeal/*				
<u>Policy for Provision of Hospital-Based Long-Term Nursing ...</u>	10A	NCAC	14B	.0185
Repeal/*				
<u>Policy for Plan Exemption for Continuing Care Retirement ...</u>	10A	NCAC	14B	.0186
Repeal/*				
<u>Policy for Determination of Need for Additional Nursing Be...</u>	10A	NCAC	14B	.0187

Repeal/*				
<u>Policy for Relocation of Certain Nursing Facility Beds</u>	10A	NCAC	14B	.0188
Repeal/*				
<u>Policies for Home Health Services</u>	10A	NCAC	14B	.0189
Repeal/*				
<u>Policy for Relocation of Dialysis Stations</u>	10A	NCAC	14B	.0190
Repeal/*				
<u>Policies for Psychiatric Inpatient Facilities</u>	10A	NCAC	14B	.0191
Repeal/*				
<u>Policy for Chemical Dependency Treatment Facilities</u>	10A	NCAC	14B	.0192
Repeal/*				
<u>Policies for Intermediate Care Facilities for Mentally Re...</u>	10A	NCAC	14B	.0193
Repeal/*				
<u>Equipment Need Determinations for 1996 SMFP (Review Categ...</u>	10A	NCAC	14B	.0194
Repeal/*				
<u>Open Heart Surgery Services Need Determinations for 1996 ...</u>	10A	NCAC	14B	.0195
Repeal/*				
<u>Applicability of Rules Related to the 2001 State medical ...</u>	10A	NCAC	14B	.0201
Repeal/*				
<u>Certificate of Need Review Schedule</u>	10A	NCAC	14B	.0202
Repeal/*				
<u>Multi-County Groupings</u>	10A	NCAC	14B	.0203
Repeal/*				
<u>Service Areas and Planning Areas</u>	10A	NCAC	14B	.0204
Repeal/*				
<u>Reallocations and Adjustments</u>	10A	NCAC	14B	.0205
Repeal/*				
<u>Acute Care Bed Need Determination (Review Category A)</u>	10A	NCAC	14B	.0206
Repeal/*				
<u>Rehabilitation Bed Need Determination (Review Category E)</u>	10A	NCAC	14B	.0207
Repeal/*				
<u>Open Heart Surgery Services Need Determinations (Review C...</u>	10A	NCAC	14B	.0209
Repeal/*				
<u>Heart-Lung Bypass Machines Need Determination (Review Cat...</u>	10A	NCAC	14B	.0210
Repeal/*				
<u>Fixed Cardiac Catheterization Equipment and Fixed Cardiac...</u>	10A	NCAC	14B	.0211
Repeal/*				
<u>Shared Fixed Cardiac Catheterization Equipment Need Deter...</u>	10A	NCAC	14B	.0212
Repeal/*				
<u>Burn Intensive Care Services Need Determination (Review C...</u>	10A	NCAC	14B	.0213
Repeal/*				
<u>Positron Emission Tomography Scanners Need Determination ...</u>	10A	NCAC	14B	.0214
Repeal/*				
<u>Bone Marrow Transplantation Services Need Determination (...</u>	10A	NCAC	14B	.0215
Repeal/*				
<u>Solid Organ Transplantation Services Need Determination (...</u>	10A	NCAC	14B	.0216
Repeal/*				
<u>Gamma Knife Unit Need Determination (Review Category H)</u>	10A	NCAC	14B	.0217
Repeal/*				
<u>Lithotripter Need Determination (Review Category H)</u>	10A	NCAC	14B	.0218
Repeal/*				
<u>Radiation Oncology Treatment Centers Need Determination (...</u>	10A	NCAC	14B	.0219

Repeal/*				
<u>Magnetic Resonance Imaging Scanners Need Determination</u>	10A	NCAC	14B	.0220
Repeal/*				
<u>Magnetic Resonance Imaging Scanners Need Determination Ba...</u>	10A	NCAC	14B	.0221
Repeal/*				
<u>Nursing Care Bed Need Determination (Review Category B)</u>	10A	NCAC	14B	.0222
Repeal/*				
<u>Medicare-Certified Home Health Agency Office Need Determi...</u>	10A	NCAC	14B	.0223
Repeal/*				
<u>Dialysis Need Determination Methodology for Reviews Begin...</u>	10A	NCAC	14B	.0224
Repeal/*				
<u>Dialysis Station Need Determination Methodology for Revie...</u>	10A	NCAC	14B	.0225
Repeal/*				
<u>Hospice Care Need Determination (Review Category F)</u>	10A	NCAC	14B	.0226
Repeal/*				
<u>Hospice Inpatient Facility Bed Need Determination (Review...</u>	10A	NCAC	14B	.0227
Repeal/*				
<u>Psychiatric Bed Need Determination (Review Category C)</u>	10A	NCAC	14B	.0228
Repeal/*				
<u>Chemical Dependency (Substance Abuse) Treatment Bed Need ...</u>	10A	NCAC	14B	.0229
Repeal/*				
<u>Chemical Dependency (Substance Abuse) Adult Detox-Only Be...</u>	10A	NCAC	14B	.0230
Repeal/*				
<u>Intermediate Care Beds for the Mentally Retarded Need Dee...</u>	10A	NCAC	14B	.0231
Repeal/*				
<u>Policies for General Acute Care Hospitals</u>	10A	NCAC	14B	.0232
Repeal/*				
<u>Policies for Cardiac Catheterization Equipment and Services</u>	10A	NCAC	14B	.0233
Repeal/*				
<u>Policies for Transplantation Services</u>	10A	NCAC	14B	.0234
Repeal/*				
<u>Policy for MRI Scanners</u>	10A	NCAC	14B	.0235
Repeal/*				
<u>Policy for Provision of Hospital-Based Long-Term Care Nur...</u>	10A	NCAC	14B	.0236
Repeal/*				
<u>Policy for Plan Exemption for Continuing Care Retirement ...</u>	10A	NCAC	14B	.0237
Repeal/*				
<u>Policy for Determination of Need for Additional Nursing B...</u>	10A	NCAC	14B	.0238
Repeal/*				
<u>Policy for Relocation of Certain Nursing Facility Beds</u>	10A	NCAC	14B	.0239
Repeal/*				
<u>Policy for Transfer of Beds from State Psychiatric Hospital...</u>	10A	NCAC	14B	.0240
Repeal/*				
<u>Policies for Relocation of Nursing Facility Beds</u>	10A	NCAC	14B	.0241
Repeal/*				
<u>Policies for Medicare-Certified Home Health Services</u>	10A	NCAC	14B	.0242
Repeal/*				
<u>Policy for Relocation of Dialysis Stations</u>	10A	NCAC	14B	.0243
Repeal/*				
<u>Policies for Psychiatric Inpatient Facilities</u>	10A	NCAC	14B	.0244
Repeal/*				
<u>Policy for Chemical Dependency Treatment Facilities</u>	10A	NCAC	14B	.0245

Repeal/*				
<u>Policies for Intermediate Care Facilities for Mentally Re...</u>	10A	NCAC	14B	.0246
Repeal/*				
<u>Applicability of Rules Related to the 2002 State Medical ...</u>	10A	NCAC	14B	.0251
Repeal/*				
<u>Certificate of Need Review Schedule</u>	10A	NCAC	14B	.0252
Repeal/*				
<u>Multi-County Groupings</u>	10A	NCAC	14B	.0253
Repeal/*				
<u>Service Areas and Planning Areas</u>	10A	NCAC	14B	.0254
Repeal/*				
<u>Reallocations and Adjustments</u>	10A	NCAC	14B	.0255
Repeal/*				
<u>Acute Care Bed Need Determination (Review Category A)</u>	10A	NCAC	14B	.0256
Repeal/*				
<u>Inpatient Rehabilitation Bed Need Determination (Review C...</u>	10A	NCAC	14B	.0257
Repeal/*				
<u>Operating Room Need Determinations (Review Category E)</u>	10A	NCAC	14B	.0258
Repeal/*				
<u>Open Heart Surgery Services Need Determination (Review Ca...</u>	10A	NCAC	14B	.0259
Repeal/*				
<u>Heart-Lung Bypass Machines Need Determination (Review Cat...</u>	10A	NCAC	14B	.0260
Repeal/*				
<u>Fixed Cardiac Catheterization/Angioplasty Equipment Need ...</u>	10A	NCAC	14B	.0261
Repeal/*				
<u>Shared Fixed Cardiac Catheterization/Angioplasty Equipment...</u>	10A	NCAC	14B	.0262
Repeal/*				
<u>Burn Intensive Care Services Need Determination (Review C...</u>	10A	NCAC	14B	.0263
Repeal/*				
<u>Bone Marrow Transplantation Services Need Determination (...)</u>	10A	NCAC	14B	.0264
Repeal/*				
<u>Solid Organ Transplantation Services Need Determination (...)</u>	10A	NCAC	14B	.0265
Repeal/*				
<u>Gamma Knife Need Determination (Review Category H)</u>	10A	NCAC	14B	.0266
Repeal/*				
<u>Lithotripter Need Determination (Review Category H)</u>	10A	NCAC	14B	.0267
Repeal/*				
<u>Radiation Oncology Treatment Centers Need Determination (...)</u>	10A	NCAC	14B	.0268
Repeal/*				
<u>Positron Emission Tomography Scanners Need Determination ...</u>	10A	NCAC	14B	.0269
Repeal/*				
<u>Fixed Magnetic Resonance Imaging Scanners Need Determination...</u>	10A	NCAC	14B	.0270
Repeal/*				
<u>Magnetic Resonance Imaging Scanners Need Determination for...</u>	10A	NCAC	14B	.0271
Repeal/*				
<u>Fixed Magnetic Resonance Imaging Scanners Need Determination...</u>	10A	NCAC	14B	.0272
Repeal/*				
<u>Nursing Care Bed Need Determination (Review Category B)</u>	10A	NCAC	14B	.0273
Repeal/*				
<u>Adult Care Home Bed Need Determination (Review Category B)</u>	10A	NCAC	14B	.0274
Repeal/*				
<u>Medicare-Certified Home Health Agency Office Need Determination...</u>	10A	NCAC	14B	.0275

Repeal/*				
<u>Dialysis Station Need Determination Methodology for Review...</u>	10A	NCAC	14B	.0276
Repeal/*				
<u>Dialysis Station Need Determination Methodology for Review...</u>	10A	NCAC	14B	.0277
Repeal/*				
<u>Hospice Home Care Need Determination (Review Category F)</u>	10A	NCAC	14B	.0278
Repeal/*				
<u>Single County Hospice Inpatient Bed Need Determination (R...</u>	10A	NCAC	14B	.0279
Repeal/*				
<u>Contiguous County Hospice Inpatient Bed Need Determination</u>	10A	NCAC	14B	.0280
Repeal/*				
<u>Psychiatric Bed Need Determination (Review Category C)</u>	10A	NCAC	14B	.0281
Repeal/*				
<u>Chemical Dependency (Substance Abuse) Treatment Bed Need ...</u>	10A	NCAC	14B	.0282
Repeal/*				
<u>Chemical Dependency (Substance Abuse) Adult Detox-Only Be...</u>	10A	NCAC	14B	.0283
Repeal/*				
<u>Intermediate Care Beds for the Mentally Retarded Need Detox...</u>	10A	NCAC	14B	.0284
Repeal/*				
<u>Policies for General Acute Care Hospitals</u>	10A	NCAC	14B	.0285
Repeal/*				
<u>Policies for Nursing Care Facilities</u>	10A	NCAC	14B	.0289
Repeal/*				
<u>Policies for Medicare-Certified Home Health Services</u>	10A	NCAC	14B	.0291
Repeal/*				
<u>Policy for Relocation of Dialysis Stations</u>	10A	NCAC	14B	.0292
Repeal/*				
<u>Policies for Psychiatric Inpatient Facilities</u>	10A	NCAC	14B	.0293
Repeal/*				
<u>Policy for Chemical Dependency Treatment Facilities</u>	10A	NCAC	14B	.0294
Repeal/*				
<u>Policies for Intermediate Care Facilities for Mentally Re...</u>	10A	NCAC	14B	.0295
Repeal/*				

PUBLIC HEALTH, COMMISSION FOR

The rules in Chapter 41 concern epidemiology health.

The rules in Subchapter 41A deal with communicable disease control and include reporting of communicable diseases (.0100); control measures for communicable diseases including special control measures (.0200-.0300); immunization (.0400); purchase and distribution of vaccine (.0500); special program/project funding (.0600); licensed nursing home services (.0700); communicable disease grants and contracts (.0800); and biological agent registry (.0900).

<u>Control Measures - Hepatitis C</u>	10A	NCAC	41A	.0214
Adopt/*				

COSMETIC ART EXAMINERS, BOARD OF

The rules in Subchapter 14B concern rule-making procedures including petitions for rule-making (.0100); notice (.0200); hearings (.0300); declaratory rulings (.0500); and fees (.0600).

<u>Control of Hearings</u>	21	NCAC	14B	.0307
Amend/*				
<u>Waivers</u>	21	NCAC	14B	.0607

Adopt/*

The rules in Subchapter 14H are sanitation rules for both operators and facilities including shop licensing and physical dimension (.0200); cosmetic art shop and equipment (.0300); sanitation procedures and practices (.0400); and enforcement, maintenance of licensure (.0500).

<u>Application for Shop License</u> Adopt/*	21	NCAC	14H	.0201
<u>Separation of Cosmetic Art Shops</u> Adopt/*	21	NCAC	14H	.0202
<u>Newly Established Shops</u> Adopt/*	21	NCAC	14H	.0203
<u>Dimensions of Cosmetic Art Shops</u> Adopt/*	21	NCAC	14H	.0204
<u>Water Supply</u> Adopt/*	21	NCAC	14H	.0301
<u>Ventilation and Light</u> Adopt/*	21	NCAC	14H	.0302
<u>Bathroom Facilities</u> Adopt/*	21	NCAC	14H	.0303
<u>Equipment</u> Adopt/*	21	NCAC	14H	.0304
<u>Licensees and Students</u> Adopt/*	21	NCAC	14H	.0401
<u>Cosmetic Art Shops and Schools</u> Adopt/*	21	NCAC	14H	.0402
<u>Disinfections Procedures</u> Adopt/*	21	NCAC	14H	.0403
<u>First Aid</u> Adopt/*	21	NCAC	14H	.0404
<u>Inspection of Cosmetic Art Shops</u> Adopt/*	21	NCAC	14H	.0501
<u>Failure to Permit Inspection</u> Adopt/*	21	NCAC	14H	.0502
<u>Sanitary Ratings and Posting of Ratings</u> Adopt/*	21	NCAC	14H	.0503
<u>Systems of Grading Beauty Establishments</u> Adopt/*	21	NCAC	14H	.0504
<u>Rule Compliance and Enforcement Measures</u> Adopt/*	21	NCAC	14H	.0505

The rules in Subchapter 14R are continuing education rules.

<u>Continuing Education</u> Adopt/*	21	NCAC	14R	.0105
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LOCKSMITH LICENSING BOARD

The rules in Chapter 29 include general rules (.0100); rules about examinations (.0200); licensing requirements (.0400); code of ethics (.0500); administrative law procedures (.0600); license renewal requirements (.0700); and continuing education (.0800).

<u>Exemption from Examination</u> Repeal/*	21	NCAC	29	.0405
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RULES REVIEW COMMISSION

<u>Protection of the Public Interest</u>	21	NCAC	29	.0503
<u>Amend/*</u>				
<u>Requirements</u>	21	NCAC	29	.0802
<u>Amend/*</u>				

CONTESTED CASE DECISIONS

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

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>DATE</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
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ABC Commission v. TruVisions Enterprises, LLC, T/A Touch	10 ABC 7025	06/29/11	26:06 NCR 509
Elm Street Connection LLC, DBA Bella Mea Coal Fired Pizza v. ABC Commission	10 ABC 06298	11/07/11	
ABC Commission v. Universal Entertainment, LLC T/A Zoo City Saloon	11 ABC 2294	07/05/11	
ABC Commission v. Quick Quality Inc., T/A Quick Quality	11 ABC 2543	07/19/11	
ABC Commission v. Lead C. Corp v. T/A Burger King/Shell Convenience Store	11 ABC 5066	10/19/11	
ABC Commission v. GK Mart Inc., T/A GK Mart	11 ABC 02647	07/22/11	
ABC Commission v. Universal Entertainment, LLC T/A Zoo City Saloon (name changed to El Patron Night Club and Bar)	11 ABC 06892	11/04/11	
ABC Commission v. Triangle Food and Fun LLC, T/A Six Forks Pub	11 ABC 07107	09/16/11	
ABC Commission v. CH Pub LLC, T/A Kildares Irish Pub	11 ABC 07109	08/16/11	
ABC Commission v. Andrea Michelle Douglas T/A Hot Spot Convenience	11 ABC 10547	02/03/12	
ABC Commission v. MBM of NC Inc, T/A Super Mart 3	11 ABC 10549	11/15/11	
ABC Commission v. Octobers, Inc., T/A Toxaway House Restaurant	11 ABC 10955	12/20/11	
ABC Commission v. Charles Franklin Liles, T/A Leather Pockets Billiards and Lounge	11 ABC 11584	11/15/11	
ABC Commission v. Cueva de Lobos LLC v. T/A Cueva de Lobos Mexican Restaurant	11 ABC 11588	02/03/12	
ABC Commission v. FFM Bar Inc. T/A Drifters Country Saloon	11 ABC 11589	02/03/12	
ABC Commission v. Stanley Ray Edwards, T/A Woogies	11 ABC 12968	01/04/12	
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<u>BOARD OF NURSING</u>			
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<u>DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY</u>			
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Larry Overby v. Department of Crime Control Victim Compensation Division	10 CPS 06106	10/14/11	
Dianne Moody Costello v. Victim and Justice Services	11 CPS 05780	06/20/11	
Kimberly A. Whiteside v. Crime Victims Compensation Commission	11 CPS 08900	12/12/11	
Judy D. Hinson v. Department of Crime Control and Public Safety	11 CPS 08984	11/14/11	
Angie T. Hawkins v. Victims Compensation Commission	11 CPS 09142	12/19/11	
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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Gail Taylor-Hilliard v. DHHS	09 DHR 2455	11/02/11	
Scott M. Jensen, DMD v. DHHS, Division of Medical Assistance	09 DHR 3252	06/21/11	
Association of Home and Hospice Care of North Carolina, Inc., v. DMA, DHHS	09 DHR 6765	10/12/11	
Patricia Anne Edwards v. DHHS, Division of Child Development	10 DHR 0292	06/06/11	
Marchell Gunter, The Home of Marchell F Gunter v. DHHS	10 DHR 0557	06/03/11	
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Onie Whitely v. Gay Long Disability Determination Services	11 OSP 13211	12/22/11

OFFICE OF SECRETARY OF STATE

Husayn Ali Bey v. Department of Secretary of State	10 SOS 09195	06/28/11
Christopher R. Eakin v. Department of Secretary of State	11 SOS 0139	06/08/11
Jennifer M Bingham v. State of NC Department of Secretary of State, Notary Enforcement Section	11 SOS 12321	01/30/12

UNC HOSPITALS

Arthur R. Morris, Jr., v. UNC Hospitals	11 UNC 3693	11/16/11
Mirian Rodriguez Rayes v. UNC Hospitals	11 UNC 03556	12/06/11
Julie D Laramie v. UNC Hospital	11 UNC 03625	12/06/11
Elizabeth Pate v. UNC Hospital Systems	11 UNC 06879	08/31/11
Linda K Shaw v. UNC Hospitals	11 UNC 09432	09/30/11

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
10 DOJ 00583

Mark Mauldin,
Petitioner,

vs.

North Carolina Criminal Justice Education and
Training Standards Commission,
Respondent.

DECISION

In accordance with North Carolina General Statute §150B-40(e), Respondent requested the designation of an administrative law judge to preside at the hearing of a contested case, under Article 3A, North Carolina General Statute Chapter 150B. Based upon Respondent's request, Administrative Law Judge Beecher R. Gray heard this contested case in Raleigh, North Carolina on November 7, 2011.

APPEARANCES

Petitioner: Michael C. Byrne, Esq.

Respondent: Lauren Talley, Assistant Attorney General

ISSUES

Whether Respondent's finding of probable cause for suspension of Petitioner's law enforcement officer certification because of a positive drug screen result is supported by the evidence and, if so, whether Respondent's suspension of Petitioner's certification should be suspended or reduced.

FINDINGS OF FACT

Stipulated Facts

Prior to the contested case hearing the parties filed written stipulations of the following facts:

1. Petitioner was appointed, and subsequently certified, as a Law Enforcement Officer through the Charlotte-Mecklenburg Police Department ("CMPD"), on June 19, 1998.
2. On or about May 21, 2009, Petitioner submitted a urine sample which tested positive on a random drug screen for the controlled prescription substance propoxyphene. Petitioner's

urine sample tested negative for marijuana, cocaine, phencyclidine, benzodiazepines, methadone, amphetamines, opiates, and barbiturates.

3. Petitioner's urine sample was tested by Advanced Toxicology Network, a laboratory certified by the United States Department of Health and Human Services to conduct federal workplace drug testing. Advanced Toxicology Network reported Petitioner's urine sample to be positive for the presence of propoxyphene. Propoxyphene is a medication for treating mild to moderate pain. It is a synthetic opioid analgesic, chemically similar to methadone. Common brand names for propoxyphene include Darvocet and Wygesic. Petitioner's urine sample was reported positive for propoxyphene on May 26, 2009.
4. The drug screen conducted on Petitioner's urine sample was administered in accordance with the procedures authorized and mandated by the United States Department of Health and Human Services for federal workplace drug testing programs. These procedures require that an initial screen test of Petitioner's urine be conducted using the immunoassay method and that a confirmation test be conducted using the gas chromatography/mass spectrometry (GC/MS) method. The positive result revealed a level of propoxyphene above the threshold established for an initial screen and a confirmation test was conducted in accordance with the standards established by the United States Department of Health and Human Services.
5. The purpose of the initial screen and confirmation tests are to conduct a quantitative analysis of the amount of controlled substance in an individual's urine. The amount tested is measured in nanograms per milliliter (ng/mL) of the substance in the urine. The testing process is conducted such that there is a screen cutoff level and a confirmation cutoff level for the test. If either the initial screen or the confirmation tests report a level of the substance below the cutoff amount, the sample will be reported as negative. The current cutoff adopted by the United States Department of Health and Human Services is 300 ng/mL for propoxyphene as a screen cutoff and 200 ng/mL for the confirmation cutoff level. The purpose of this cutoff limit is to prevent any possibility of a small trace amount of the illicit drug from being reported as positive if it is detected in the person's system. Petitioner's sample tested at 1045 ng/mL.
6. There was no flaw in the chain of custody for Petitioner's urine sample.
7. Subsequent to Petitioner testing positive for propoxyphene on his drug screen, Petitioner was interviewed in the CMPD Internal Affairs Bureau by Sergeant Will Farrell regarding Petitioner's positive urinalysis test result for propoxyphene. After acknowledging his Employee Advice of Rights, Petitioner admitted to the use of propoxyphene in the form of Darvocet pills, having obtained this prescription medication from his mother-in-law who declined to use it. At the time of his use, Petitioner did not have a physician prescription for the substance. Petitioner obtained a prescription for migraine pain medication subsequent to the positive drug test.

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 adjudicated findings of fact. In making these adjudicated FINDINGS OF FACT, the undersigned Administrative Law Judge has weighed all the evidence and has assessed the credibility of 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.

Adjudicated Findings of Fact

1. Both parties received Notice of Hearing by certified mail more than 15 days prior to the hearing and each stipulated on the record that notice was proper.
2. The North Carolina Criminal Justice Education and Training Standards Commission ("Commission") has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9A, ("Title 12") to certify law enforcement officers and to revoke, suspend, or deny such certification.
3. Petitioner has been employed with the Charlotte-Mecklenburg Police Department for approximately 14 years. He has previous law enforcement experience with the Mecklenburg County Sheriff's Office. He has a total of approximately 18 years of law enforcement experience.
4. Petitioner has had no sustained departmental violations or disciplinary action until this incident. Petitioner previously had passed two employment drug screenings and three random drug tests. Petitioner has received the Chief of Police Award for Excellence in Policing.
5. Petitioner has a personal medical history of migraine headaches starting from childhood. As a result of consultations with medical care providers and resulting changes in diet and exercise, Petitioner has been able to keep his migraines under control with over-the-counter medication.
6. During a period of personal and familial stress in 2009, Petitioner's migraine headaches increased in frequency and intensity. Petitioner's mother-in-law shared with Petitioner a bottle of pain medication (trade name Darvocet) that had been prescribed for her but that she had declined to take. Each of these pills is equivalent to approximately 600mg of aspirin in analgesic capacity. Petitioner estimated that he took three of these Darvocet pills to relieve migraine symptoms over a period of some months. Petitioner admitted that he did not think at the time he used these pills that he was violating the law or that it was wrong.

7. On May 21, 2009, Petitioner was selected for a random drug test. Petitioner took one of the Darvocet pills within days of this test. There is no evidence that he hesitated or attempted to avoid taking the test. Petitioner subsequently was contacted by the screening authority and asked whether he had a prescription for the drug in question. Petitioner confirmed that he did not have a prescription.
8. Following the positive drug screen, Petitioner promptly went to his personal physician who examined Petitioner and gave him a prescription for a similar anti-migraine drug, Treximet (See Petitioner's Exhibit 1). The significance of this is that Petitioner, by and through his personal physician, demonstrates medical necessity for anti-migraine medication. Petitioner testified that, since the resolution of some of his familial problems, the Treximet keeps his migraines under control as needed.
9. The Charlotte-Mecklenburg Police Department initiated an internal investigation of the incident. By all the evidence, Petitioner was forthright in admitting his conduct, that it was wrong, and that he used poor judgment in sharing medication with a family member. Following the internal investigation, the CMPD convened a disciplinary panel at which it was decided Petitioner would be suspended for 16 hours without pay and then could return to work. Petitioner forfeited accrued vacation time to serve the suspension.
10. In accordance with 12 N.C.A.C. 9C.0310, the department reported the positive drug screen to Respondent, who moved to suspend Petitioner's certification. This was done in January, 2010. Through various procedural delays in the case filing and hearing process, none of which were the fault of Petitioner, Petitioner has been without certification for nearly one (1) year.
11. The Charlotte-Mecklenburg Police Department could have terminated Petitioner's employment after it learned of his positive drug screen. Instead, it placed him on administrative duty in which Petitioner worked with the department's electronic monitoring system. The evidence is that Petitioner did this job competently and professionally.
12. Wayne Woodard, director of Respondent North Carolina Criminal Justice Education and Training Standards Commission, testified that he could see no reason other than the one positive drug screen which would Petitioner's return to duty. Mr. Woodard testified that Respondent acted in accordance with the law upon receiving a report of a positive drug screen.
13. Petitioner presented a letter of recommendation from his deputy chief (Petitioner's Exhibit 3) which spoke of Petitioner in glowing terms both personally and professionally. A former supervisor of Petitioner, Sergeant D. Morefield, also testified to Petitioner's personal and professional character in similarly glowing terms and indicated that he wished Petitioner could be back on duty "this afternoon." Four other uniformed Charlotte-Mecklenburg police officers attended the hearing in support of Petitioner. Sergeant Morefield stated his opinion that each would testify about Petitioner's personal and professional character in terms similar to his testimony.

14. At the hearing, Petitioner was candid about the incident and admitted that he unwittingly broke the law when he shared medication with a family member. Petitioner said that he had learned from the experience and would not repeat it.

Based upon these findings of fact, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.
2. Under 12 N.C.A.C. 9A.0205, when Respondent suspends or denies the certification of a criminal justice officer, the period of sanction shall be not less than five years; however, Respondent may either reduce or suspend the period of sanction under Paragraph (b) of this Rule or substitute a period of probation in lieu of suspension of certification following an administrative hearing, where the cause of sanction is production of a positive result on a drug screen reported to Respondent under 12 NCAC 9C .0310, where the positive result cannot be explained to Respondent satisfaction.
3. Petitioner has been without his law enforcement certification during the hearing process for approximately one (1) year.
4. In addition to the strong support of his fellow officers, his employer, and his strong record, the factual situation here, involving family members "sharing" medication, is distinguished from the situation of one who actively seeks illegal drugs on the outside or who uses drugs (such as marijuana or cocaine) that are per se illegal.
5. Such medication sharing, while contrary to law, is believed to be a common occurrence and not indicative of general illegal practice on the part of Petitioner, especially given Petitioner's past clean record on these points and the total absence of any other evidence suggesting Petitioner is unfit to serve in a law enforcement capacity. All other evidence is strongly to the contrary, indicating that Petitioner is a diligent and dedicated officer whose employer, the Charlotte-Mecklenburg Police Department, desires to return to service. Petitioner's actions throughout the internal investigation and hearing process demonstrate candor.
6. Accordingly, the Undersigned finds it appropriate that no suspension of Petitioner's law enforcement certification take place by Respondent.

PROPOSAL FOR DECISION

NOW, THEREFORE, based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the Undersigned finds that Petitioner's retention of his law enforcement certification is supported by the evidence. Respondent's suspension of Petitioner's

law enforcement certification should be REVERSED by the full Commission, with authorization for Petitioner to be cleared to return to duty at the earliest possible date.

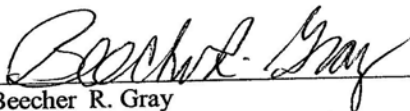
NOTICE AND ORDER

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

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

IT IS SO ORDERED.

This the 23 day of November, 2011.


Beecher R. Gray
Administrative Law Judge

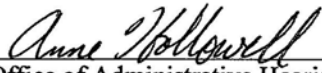
A copy of the foregoing was mailed to:

Alan Briones Jr.
Attorney at Law
PO Box 2887
Raleigh, NC 27601
ATTORNEY FOR PETITIONER

Michael C Byrne
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ATTORNEY FOR PETITIONER

Lauren D Tally
J Joy Strickland
NC Department of Justice
Law Enforcement Liaison Section
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEYS FOR RESPONDENT

This the 28th day of November, 2011.



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

STATE OF NORTH CAROLINA

COUNTY OF BLADEN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
10 DOJ 05279

Bryson Lawrence Cornett
Petitioner

vs.

NC Criminal Justice Education and
Training Standards Commission
Respondent

PROPOSAL FOR DECISION

On August 24, 2010, pursuant to N.C.G.S. § 150B-40(e), Respondent requested 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. On May 11 and 16, 2011, the undersigned Administrative Law Judge heard this contested case in Raleigh, North Carolina. On September 14, 2011, the parties filed their respective proposed Decisions with the Office of Administrative Hearings.

APPEARANCES

Petitioner: J. Michael McGuinness, Attorney for Petitioner, The McGuinness Law Firm, Post Office Box 952, Elizabethtown, North Carolina 28337

Respondent: Lauren D. Tally, Attorney for Respondent, Department of Justice, Law Enforcement Liaison Section, P.O. Box 629, Raleigh, N.C. 27602-0629

ISSUES

1. Whether Petitioner knowingly made material misrepresentations on forms required for law enforcement certification in light of the totality of the facts and circumstances?
2. Whether Petitioner lacks sufficient good moral character to serve as a North Carolina justice officer?
3. Whether Petitioner committed an offense of attempted obstruction of justice?

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 1 – 17

For Respondent: 1 - 20

FINDINGS OF FACT

Background Facts

1. On June 13, 2008, Respondent awarded Petitioner a full-time law enforcement officer certification with the North Carolina Alcohol Law Enforcement Division (hereinafter "ALE") (Respondent's Exhibit 20). During his employment with ALE, Petitioner served as an agent in training.
2. On February 26, 2009, Petitioner Cornett submitted a letter of resignation to ALE Director Bill Chandler. (Respondent's Exhibit 10, p 3)
3. On March 2, 2009, Director Chandler wrote and mailed a Receipt of Notice of Intent to Resign to Petitioner. In that memorandum, Chandler expressed his appreciation for Petitioner's "dedication and enthusiasm in achieving our goals and missions over the past year." (T p 43)
4. On March 2, 2009, Director Chandler signed and submitted a Report of Separation Form to Respondent. (Respondent's Exhibit 11) On that form, Chandler indicated that Petitioner had resigned on February 26, 2009. Chandler also indicated that ALE would not consider Petitioner for reappointment with that agency. (Respondent's Exhibit 11)
5. In February 2010, Petitioner began serving as a reserve campus police officer for Wake Forest University Police Department. After a background investigation by that department, University Police Chief Regina Lawson offered Petitioner a full-time position with the Wake Forest University Police Department.
6. On March 1, 2010, Respondent received a Report of Appointment/Application for Certification Form, dated February 21, 2010, from Wake Forest University Police Department on Petitioner's behalf, seeking certification as a part time campus police officer (Respondent's Exhibit 1). Respondent also received Petitioner's Personal History Statement Form F-3 (Respondent's Exhibit 2), and Petitioner's Mandated Background Investigation Form F-8 (Respondent's Exhibit 3) from Marvin Clark, Company Police Administrator.
7. Respondent's Investigator Richard Squires investigated why Petitioner separated from employment with ALE. Squires requested all material and reports surrounding Petitioner's separation from employment from ALE. ALE provided:
 - a. ALE Special Agent Kyle Barbee (hereinafter Barbee) (Respondent's Exhibit 5),
 - b. Statement from ALE Assistant Special Agent in Charge, Berryhill (hereinafter Berryhill) (Respondent's Exhibit 6),

- c. Statement from Petitioner (Respondent's Exhibit 7),
- d. Property Report AL-50 form that Petitioner completed on February 18, 2009 (Respondent's Exhibit 8),
- e. Temporary Storage Log AL-17 for January through March of 2009 (Respondent's Exhibit 9), and
- f. ALE Personnel Complaint against Petitioner (Respondent's Exhibit 10).
- g. Regina Lawson, Chief of Police at Wake Forest University Police Department, also sent a letter to Squires. (Respondent's Exhibit 12)

8. Based on his investigation, Squires prepared a memorandum summarizing his findings, and presented his findings to the Probable Cause Committee at their May 27, 2010 committee meeting.

9. Petitioner completed a Personal History Statement, Form F-3 for employment with Wake Forest University Police Department. Question #31 asked Petitioner to list all jobs he had held in the last 10 years, including his present or most recent job first, military service in proper time sequence, and list temporary part-time jobs. Petitioner responded by documenting that he was employed with N.C. Alcohol Law Enforcement. He indicated the reason for leaving as "To pursue interests in local law enforcement."

10. The Probable Cause Committee found probable cause to believe that Petitioner committed a material misrepresentation, committed the felony offense of "Attempted Obstruction of Justice," and lacked good moral character. By letter dated June 24, 2010, Respondent's Probable Cause Committee notified Petitioner of its findings. (Respondent's Exhibit 16)

11. By letter dated July 20, 2010, Petitioner requested an administrative hearing of Respondent's denial of Petitioner's application for certification. (Respondent's Exhibit 17)

Adjudicated Facts

12. Kyle Barbee is an ALE Agent with almost eight years of service. He served as a field-training officer for Petitioner while Petitioner was a "training agent" with ALE. (T pp 46-47) Agent Barbee thought Petitioner "was performing well." (T p 48)

13. Agent Barbee had a good professional working relationship with Petitioner. Petitioner was respectful of him as a supervisor and of everybody that he met. (T p 71) Petitioner was consistently professional and had a good work-related attitude. (T p 72) Petitioner was motivated and dedicated as an "agent in training." (T p 72) Petitioner exhibited good enthusiasm for his work, and was performing well. (T p 73) Yet, there were obvious things Petitioner needed to work on including securing evidence properly. Barbee described examples of how Petitioner left evidence in a

patrol vehicle, and, on a different occasion, left a bag of seized marijuana on top of the patrol car trunk, unsecured.

14. Agt. Barbee explained that the ALE Evidence Policy in effect at that time, was to secure the evidence initially in the patrol car, or on the person of the officer. At the end of the shift, policy required securing the evidence in the officer's assigned temporary storage. The officer then had ten days to turn the evidence over to ALE permanent evidence storage. A supervisor is required to be with any officer who is turning evidence over into permanent storage, and the supervisor, along with the officer, signs an AL-50 Form titled Property Report. (Respondent's Exhibit 8) Barbee did not know of a case in which he (Barbee) had seized personal property as evidence. When seizing alcohol from an underage person, the alcohol seized is considered evidence of contraband, not personal property of the underage person, and thus, is never returned to the underage person.

15. On February 18, 2009, Agent Barbee and Petitioner were nearing the end of Petitioner's training. Barbee, Petitioner, and other ALE agents were conducting surveillance at a Food Mart in Chapel Hill, NC, looking for any violations of NC ABC laws. About 10:30pm, Barbee and Petitioner observed a possible underage white male (Mr. Lilly) in a vehicle in the parking lot of the Food Mart drinking a beer. He and Petitioner stopped the vehicle. Mr. Lilly consented to the agents searching his vehicle, where they found a twelve-pack box and two cans of Bud Light beer. They determined the driver to be under 21 years of age, and therefore, charged with underage possession of alcohol. Petitioner seized the beer as evidence, completed an AL-50 Property Report Form, and gave a copy to the defendant.

16. Once the stop was complete, Barbee and Petitioner left the scene to assist another ALE officer. While driving to the next location, Barbee asked Petitioner about the location of the seized beer. When Petitioner could not locate the beer in the patrol car, Barbee immediately turned around to locate the beer cans. It was Petitioner's responsibility to secure the beer cans, because they were evidence and because Petitioner wrote the citation and the AL-50 form. Upon arriving back at the scene, Petitioner took custody of the beer cans again. Barbee reminded Petitioner of the importance of properly securing evidence.

17. At the end of the shift, Agt. Barbee drove Petitioner to Petitioner's vehicle at the ALE Chapel Hill substation. Petitioner retrieved all equipment and evidence from Barbee's vehicle to place it into evidence at the office in Raleigh, NC. Petitioner then entered his vehicle and left the parking lot. While Barbee was leaving the parking lot, he observed the twelve-pack box containing the two cans of beer, which Petitioner had seized earlier in the night. Barbee saw the beer lying in the parking lot near where Petitioner's vehicle had been parked. Barbee retrieved the two cans of beer and placed them in his vehicle. Barbee then called his supervisor, Berryhill, to express concern about Petitioner's handling of evidence. Barbee expected a call from Petitioner once Petitioner realized he left the evidence in the parking lot, but he never heard from Petitioner.

18. On the next day, February 19, 2009, Agt. Barbee gave the two cans of beer that were left in the parking lot to Berryhill, and explained Petitioner's failure to properly secure evidence. Berryhill took custody of the beer cans and placed them under his desk.

19. A few days later, Agt. Barbee was shocked to learn Petitioner had placed 2 cans of beer into evidence under the same file number, as the beer Petitioner had left in the parking lot and that Barbee had later seized. Barbee was particularly surprised because the two beer cans Petitioner placed into evidence were not actual evidence, and constituted fabricated evidence. Agent Barbee further explained that the two seized cans of beer were out of his possession, and out of Petitioner's possession, thereby resulting in a broken chain of custody. (T p 84)

20. Barbee was called into a meeting with ALE Supervisor Lasater (hereinafter Lasater) and Berryhill, where Petitioner was questioned about the evidence in his storage locker. Petitioner was also questioned about the two beer cans in particular. Petitioner initially denied any problem with them until he was confronted with the two actual beer cans from Berryhill's desk. After being confronted, Petitioner admitted the error in judgment.

21. When Petitioner applied for work with the Wake Forest University Police Department, Agent Barbee was contacted as a reference for Petitioner. (T p 77) Agent Barbee responded that Petitioner was reliable, honest, and dependable. Agent Barbee indicated that Petitioner was mature and responsible. (T p 79) Agent Barbee opined that Petitioner has the ability to make sound decisions, and gets along with everybody. (T p 81) Agent Barbee indicated that Petitioner could perform law enforcement work. (T pp 81-82) When asked whether he would recommend Petitioner for the position at Wake Forest University, Barbee responded "yes." (T p 82)

22. When Agent Barbee was asked about making additional comments about Petitioner, he responded indicating "very good for the job." (T p 83) Based upon the totality of what he told the interviewer/investigator from the Wake Forest University Police Department, Agent Barbee gave Petitioner a very good recommendation. (T p 83)

23. Bill Berryhill was the ALE Assistant Special Agent in charge over Petitioner in 2009 during Petitioner's internship with ALE. During that program, Agent Berryhill saw Petitioner about every day and throughout the day. (T pp 107-108) It was a successful internship program as Agent Berryhill found Petitioner to be a dedicated and professional young man. Petitioner had a good work ethic. (T pp 108-09) Agent Berryhill explained how Petitioner treated him and other supervisors with appropriate respect and professionalism. (T p 109) Agent Berryhill found him to be a highly motivated young man, and opined that Petitioner appeared to be a young man of good character. (T p 109)

24. On February 19, 2009, Berryhill met with Agt. Barbee to discuss Petitioner's training issues. Barbee provided examples of Petitioner failing to maintain proper custody of evidence once it had been seized. Barbee explained that the evening before, Petitioner had twice failed to secure 2 cans of beer as evidence during a stop of an underage drinker. Barbee then turned the two cans of beer over to Berryhill.

25. On Monday, February 23, 2009, Petitioner transferred all the evidence from temporary storage into permanent storage. Berryhill signed off on the transfer as required by policy. While doing so, Berryhill and Petitioner entered two cans of Bud Light beer from case number 09-236-041 into the permanent storage evidence log (Respondent's Exhibit 8). Berryhill asked Barbee to review the storage log. Agt. Barbee advised Berryhill that case number 09-236-041 was the same case involving the beer left in the parking lot, which was in Berryhill's office, so there should be no evidence from Petitioner entered under that case number.

26. On Wednesday, February 25, 2009, Agts. Berryhill, Lasater, and Barbee met with Petitioner. Berryhill and Petitioner reviewed the past incidents where Petitioner had failed to store the evidence properly. Berryhill then asked Petitioner if there was anything in his evidence locker that should not be there. Petitioner stated there was not. Berryhill asked Petitioner again if he was sure there was not anything in his evidence locker that shouldn't be there. Petitioner answered "Not that I can think of."

27. Berryhill then showed Petitioner the beer box Barbee had turned over. He asked Petitioner if the beer in his locker was actually the beer seized and why there was beer with that particular case number in his locker. Petitioner stated he "was not sure." then admitted that he replaced the beer he had left in the police substation parking lot with beer he had brought from home. Petitioner admitted to an error in judgment, and was remorseful. Petitioner stated he realized halfway home he had left the beer in the parking lot. When he returned to get the beer, it was gone. Petitioner explained to Berryhill that he was afraid to admit to Barbee he had left the beer in the parking lot, so he replaced it with the two cans from home. Berryhill discussed with Petitioner how these actions could cause credibility issues. Petitioner then stated he understood and asked "Am I salvageable? I do not want to lose my job."

28. After Petitioner resigned from ALE, Wake Forest University contacted Agent Berryhill regarding Petitioner's application for employment at the University. Agt. Berryhill took notes of that interview. (T pp 114-15; see Petitioner's Exhibit 5) Agent Berryhill advised the interviewer that Petitioner was reliable, honest, dependable, mature, and responsible. (T p 115) Agent Berryhill explained that Petitioner could perform the duties of an ALE Agent, and that he successfully completed that field-training program. Berryhill recommended Petitioner for the position with the Wake Forest University Police Department. (T pp 117-119)

29. ALE Agt. Jeff Lasater first met Petitioner when Petitioner was an intern for four months in the ALE Raleigh office. At the end of his internship, Petitioner applied for full-time employment with ALE.

30. Agent Lasater explained that Petitioner was a good, dedicated, professional, hardworking worker who showed a great deal of initiative. (T p 140) Because Petitioner had done well in his internship, Agent Lasater readily recommended him for full time employment. (T p 141)

31. ALE subsequently hired Petitioner for an Agent I position. Lasater explained that as an Agent I, Petitioner was required to seize and store evidence of ABC violations in a proper manner, and according to ALE evidence policy (Respondents Exhibits 14, 19)

32. In 2009, ALE evidence policy required an agent to seize all alcoholic beverages involved in an ABC violation. Lasater explained that where an underage defendant, a person under 21 years of age, was found in possession of an alcoholic beverage, the beverage itself was considered evidence. The alcoholic beverage is never given back to the defendant, because it is illegal for him to possess the beverage.

33. Lasater first became aware of Petitioner's difficulty with properly storing evidence on February 19, 2009. On that day, Berryhill explained how Petitioner left two cans of beer, seized as evidence, in the Chapel Hill substation parking lot. Berryhill explained to Lasater that Barbee had turned over the beer cans to Berryhill. Lasater and Berryhill decided that Berryhill would retain the evidence, and wait to see how Petitioner came to them to explain the lost evidence. However, Petitioner never came to either of them about the lost evidence.

34. A few days later, Berryhill documentation to Lasater showing Petitioner had logged into two beer cans into evidence under the same file number as the case correlating with the two beer cans Berryhill had in his office. Lasater called Berryhill, Barbee, and Petitioner together for a meeting. Berryhill conducted the meeting and repeatedly questioned Petitioner about any evidence in his locker that should not be there. Petitioner denied having any such evidence. Once confronted with the beer cans Berryhill had in his position, Petitioner admitted that he placed his own personal 2 cans of beer into evidence. Petitioner admitted what he did, and Agt. Lasater thought that Petitioner was very honest about it. (T p 132-33)

35. Lasater called ALE Assistant Director Kendall Pike (hereinafter Pike) and advised him of the situation. Pike requested that Lasater have Petitioner sign an AL-29 Personnel Complaint form opening an internal investigation. (Respondents Exhibit 10)

36. The next day Petitioner requested to resign, but did not give any reasons for resigning. He appeared upset about leaving ALE.

37. At hearing, Lasater noted that he was disappointed in Petitioner and shocked that Petitioner would place something in evidence that was not in fact evidence. Lasater explained the Rules of Conduct for an Agent I include a section on truthfulness and obstruction of justice. (Respondent's Exhibit 13) Lasater also explained

the process for an internal affairs investigation. He noted that Petitioner resigned before the internal investigation was complete. (Respondent's Exhibit 15) Petitioner was still in the field-training program at the time of his resignation. (T p 142) Respondent's Exhibit 15)

38. Agent Lasater further explained that Petitioner made his own decision to resign, and there was not any coercion or pressure for Petitioner to resign. (T p 142) Agent Lasater described how Petitioner was fully cooperative with him and that he was forthcoming and honest. (T pp 143-44)

39. Ms. Marion Boone has been a licensed attorney in North Carolina for almost 25 years. Ms. Boone has known Petitioner for over 7 years. (T p 148) She sees Petitioner at church and occasionally talks to him there. (T p 149) She has also been involved in a number of church-related activities with Petitioner. Ms. Boone described Petitioner as an impressive young man who has a reputation of being very honest. Ms. Boone believes Petitioner to be trustworthy. She described how he has a very good reputation in the community, in the school system, at church and the community as a whole. (T pp 149-150) Ms. Boone described how he was active in the church and in the community, and that Petitioner is very well liked by everybody. (T p 149)

40. Dan Kiger has known Petitioner for one year through Wake Forest University Police Department. Mr. Kiger retired as a Sergeant with North Carolina Highway Patrol after 25 years of service, and has served at Wake Forest University Police Department since 2006. (T p 239)

41. Mr. Kiger served as Petitioner's training supervisor at the Wake Forest University Police Department. Kiger thinks that Petitioner is educated, articulate, friendly, detailed, and "very professional." (T p 240) Mr. Kiger explained, "Everybody got along with him. Everybody was very impressed with him. Our Chief and Assistant Chief were impressed with him..." (T p 241) Mr. Kiger opined that Petitioner "did his job very well." (T p 241) Kiger expounded that Petitioner is good at interacting with both students and administration. He explained that Petitioner was involved in his community and his church.

42. Mr. Kiger explained that Chief Regina Lawson's comments about Petitioner "were very favorable." (T pp 242-43) Mr. Kiger recommended Petitioner Cornett for the job at Wake Forest University Police Department even though Mr. Kiger was aware of the circumstances generally surrounding Petitioner's resignation, and the conduct involving replacing the two beers that were lost. (T pp 243-44) Mr. Kiger holds Petitioner in high regard, and would hire him. (T p 244)

43. For the past five years, Mark Reece has been Petitioner's Pastor at Piney Grove Baptist Church in Mt. Airy. (T p 249) Reverend Reese has known Petitioner Cornett for about 20 years, and has ministered the Cornett family for the past five years very intimately. (T p 250) Petitioner frequently attends services at his church. (T p 250)

Reverend Reese opined that Petitioner "has an impeccable reputation in our community [church community] and the surrounding community as well." (T p 251) Reverend Reese has never doubted Petitioner Cornett's integrity or his honesty. (T p 251)

44. Detective James Rae has been employed with the Wake Forest University Police Department as a detective for almost 15 years. Mr. Rae has served as a police officer since 1973, and retired from the Port Authority of New York and New Jersey Police Department in 1996. (T p 254) Mr. Rae has about 38 years of police service. (T p 254)

45. One of Detective Rae's areas of assignment at the Wake Forest University Police Department has been conducting background investigations on applicants. (T pp 254-55) Rae frequently briefs Chief Regina Lawson on developments, findings, and recommendations regarding background investigations on applicants for employment. (T p 255)

46. Detective Rae conducted the background investigation on Petitioner for the Wake Forest University Police Department. Det. Rae interviewed Petitioner as part of the background investigation. (T p 256, Petitioner's Exhibit 5) Petitioner's Exhibit 5 is the written questions and Petitioner's answers during Petitioner's interview. (T p 257) Mr. Rae talked with Petitioner about in the incident with ALE involving the two beers. (T pp 260-61) As a part of his investigation, Detective Rae had phone conversations with ALE officials regarding what occurred there regarding the two cans of beer. (T p 268) Rae found Petitioner's past problem with evidence to be concerning, and advised University Police Chief Regina Lawson of that concern. (T pp 260-61)

47. Overall, Rae believed Petitioner would make an excellent officer, and affirmatively recommended Petitioner for employment by Chief Lawson. (T p 261) He explained that Chief Lawson determines whether to hire based on the background check. After the background investigation and Rae's recommendation, Chief Lawson offered Petitioner a job with the Wake Forest University Police Department. (T p 262) Rae opined that the Wake Forest University Police Department was fully satisfied that Petitioner was suitable and qualified to work for the Department. (T p 262)

48. Detective Rae opined that "I believed at the time and to this day believe that he'd make an excellent candidate and a suitable campus police officer at Wake Forest University." (T pp 262-63)

49. Petitioner is 25 years old and grew up in Dobson, N.C. Petitioner graduated from Surry Central High School in 2004. (Petitioner's Exhibit 2) While a student at Campbell, Petitioner successfully completed internships with the Surry County District Attorney's Office and at the N.C. Alcohol Law Enforcement Agency. (T pp 310-11) In December 2007, Petitioner graduated from Campbell University with a degree in Criminal Justice Administration. (T p 309; Pet Exh 1)

50. In June 2008, Petitioner completed his basic law enforcement-training program at Surry Community College. After being hired by ALE, Petitioner completed the North Carolina Alcohol Law Enforcement basic school in Salemburg in August 2008. (T pp 160-162) After that, Petitioner began training with ALE Agt. Barbee.

51. During the 2009 calendar year, Petitioner had over 300 cases as an ALE agent. (T p 316)

52. On February 18, 2009, Petitioner was assisting Agt. Barbee in surveillance of ABC outlets for possible ABC violations in Chapel Hill, NC. Around 10:30 p.m., Petitioner and Barbee observed a possible underage male (identified as "Mr. Lilly") drinking a can of beer in the parking of the Food Mart. Petitioner approached the vehicle, spoke with the male, and determined him to be under the age of 21. The male blew into a handheld Alco sensor where he registered a .02. Petitioner searched the vehicle, and located two cans of Bud Light in a 12 pack cardboard box. Petitioner removed the beer and placed it beside the patrol vehicle. Petitioner completed an AL-50 Property Report for the underage male, listing the purpose for seizing the two cans of beer as "evidence." (Respondent's Exhibit 8)

53. After issuing a citation to the underage male, Petitioner received a call from another officer requesting assistance. Petitioner does not recall what he did with the seized cans of beer. However, he admitted at hearing that he did not place the two beers in the patrol car. As a result, after Petitioner initially seized the two beers, the two beers were out of Petitioner's custody and control for approximately two to three minutes, and out of the visual sight of Petitioner and Agent Barbee. (T p 318) Consequently, there was a broken chain of custody as to those two beers. (T p 319)

54. Petitioner and Agt. Barbee returned to the scene. Petitioner located the two beers and secured them in the patrol car.

55. At the end of the shift, Agt. Barbee drove Petitioner back to his car at the Chapel Hill substation parking lot. Petitioner removed all the evidence seized from Barbee's car to place it in his car. Petitioner left the parking lot first, but did not take the two cans of beer with him. Between Chapel Hill and Raleigh, Petitioner noticed he did not have the beer cans in his vehicle. Petitioner returned to the Chapel Hill substation parking lot to try to locate the beers, but could not find them. Petitioner admitted he never called Barbee or any supervisors to explain how he lost the two beer cans, or to seek advice.

56. At hearing, Petitioner admitted that after that, he purchased two Bud Light beers from a convenience store, matching the two beers he left in the Chapel Hill substation parking lot. He placed those two beers into his personal temporary storage in his office at the Raleigh ALE office. Petitioner kept it in his personal storage in his office until he later put it in his property locker that was assigned to him. (T p 185)

57. Petitioner admitted to placing the same 2 beers into ALE's permanent

evidence storage on February 23, 2009, even though they were not the same 2 beers from the scene. When Petitioner placed the 2 beers into permanent evidence storage, Agt. Berryhill signed the AL-50 form as Petitioner's supervisor. Petitioner admitted he did not disclose to Berryhill that the two beers entered as evidence in Lilly's case were not in fact the beers seized at the scene.

58. Petitioner explained that he did not intend to present that beer as evidence to the Court. (T209) He would not have been able to testify that the beer in his locker was the actual beer he seized during the February 18, 2009 arrest. (T p 209) Petitioner explained that after the chain of custody was broken, that he could not testify to the originality of the beer. (T p 233) He put the beer in the locker as personal property. (T p 233)

59. At hearing, Petitioner explained that on February 25, 2009, he met with Lasater, Berryhill, and Barbee about his training performance. Agts. Lasater, Berryhill, and Barbee asked Petitioner whether he had any evidence in storage that should not be there. Petitioner said he had no idea what they were talking about. Petitioner acknowledged though, at that time, he recalled the two beers he had purchased and placed into evidence. He believed those beer cans were properly in permanent evidence storage. Petitioner explained that at the time, he did not feel that he had done anything wrong. (T p 210) Petitioner gave his supervisors no reason for placing the purchased beer cans into evidence. He explained that in retrospect, he would have done things differently. (T p 210)

60. After the meeting with Lasater, Berryhill, and Barbee, Petitioner understood the situation was very serious. At hearing, he admitted asking his supervisors "is this a salvageable situation." However, he disagreed that replacing the beer could cause credibility issues for him as an ALE officer.

61. At the administrative hearing, Petitioner admitted that he resigned on February 26, 2009 after being given a copy of an ALE Personnel Complaint AL-29 beginning an internal investigation. Petitioner explained that had he not resigned, he would have explained to the district attorney, in court, that the two beer cans at issue were not actual evidence, before they were used in trial.

62. During the hearing, Petitioner explained that he resigned for several reasons. Approximately one month beforehand, Petitioner's mother was diagnosed with a brain tumor. He decided to resign to go home to assist his mother with her medical needs (T p 219), not because he was concerned about losing his job at ALE.

63. During the February 25, 2009 meeting with his supervisors, Petitioner was not threatened with termination. He was not told that if he did not resign, then he would be terminated. Petitioner did not feel any coercion from any of his supervisors. (T pp 326-27) Petitioner admitted that did not have any other jobs lined up, and had not applied for any other positions in law enforcement when he resigned from ALE.

64. Petitioner explained that when he was speaking to ALE Agent Pike in Internal Affairs, Agt. Pike made it very clear that he was not asking for Petitioner's resignation, and that Pike was not offering any punishment in lieu of it. (T p 214) Petitioner asked Agent Pike about the possibility of working for ALE again. Agent Pike indicated that employment by ALE was not a closed door to Petitioner. (T p 217)

65. Petitioner had discussed with Agt. Berryhill, the scope and detail of information expected to be written in the F-3 Form. (T pp 325-26) Petitioner asked Berryhill several questions as to how he should fill out the form. Petitioner specifically sought Agent Berryhill's recommendation or advice regarding how he should consider answering the question relating to his reason for leaving, and Petitioner followed his recommendation and advice in that regard. (T p 326) Agent Berryhill informed Petitioner that Petitioner left ALE of his own fruition, that it was Petitioner's decision to resign, and there was no punishment or risk of termination that was offered to elicit that. (T p 326)

66. On or about December 13, 2009, Agts. Kyle Barbee and Bill Berryhill completed questionnaires for the Wake Forest University Company Police Program. (Petitioner's Exhibit 5) Among other things, Agent Barbee indicated that Petitioner has the ability to make sound decisions, and could perform law enforcement work. Barbee recommended Petitioner for the position at the Wake Forest University Police Department. Agt. Berryhill answered the same as Agt. Barbee, noting that Petitioner was reliable, honest, dependable, mature, and responsible. Similarly, Agent Berryhill recommended Petitioner for the position with the Wake Forest University Police Department. Both individuals, the most intricately involved with the issues involving Petitioner's seizure of the two beers and his resulting explanations and conduct, gave extremely positive recommendations for Petitioner's future employment.

67. Both Agent Barbee and Agent Berryhill strongly recommended Petitioner for a continued career in law enforcement with the Wake Forest University Police Department, and otherwise gave him extremely strong positive characterizations of key character traits.

68. On March 24, 2010, Petitioner submitted a statement to Investigator Squires. In December 2010, Petitioner provided answers to Respondent's Request for Admissions and Interrogatories. (Respondent's Exhibits 4 & 18)

69. By letter dated May 4, 2010 and sent to Investigator Squires, Chief Regina Lawson of the Wake Forest University Police Department summarized her interview of Petitioner for a position with her Department. Chief Lawson also reviewed the facts that Petitioner disclosed to her regarding the two beers seized from Mr. Lilly, and regarding his resignation of employment from ALE. (Petitioner's Exhibit 4) After interviewing Petitioner, Chief Lawson offered Petitioner a position with the University Police.

70. Petitioner Exhibits 6-16 include statements and interviews of various individuals who were references for, and who have known Petitioner for many years.

These exhibits demonstrate the Petitioner has favorably impressed a wide variety of individuals whom he has met under different circumstances. These individuals reached similar observations of extraordinary character, conduct, work performance, and community activities.

71. In answering Question 31 of Respondent's Personal History Statement (Form F-3), Petitioner wrote his "Reason for leaving" ALE was "To pursue interests in local law enforcement." Petitioner responded to that question with one of the reasons he believed he resigned from ALE. The question did not request that Petitioner provide any detailed explanation and whether there may have been secondary or other reasons for leaving. The question in fact requested a singular "reason" for leaving, as opposed to eliciting whether there might have been additional factors under some consideration as well. Petitioner was not asked for a detailed account of his resignation. Later when asked for such, he responded appropriately and no one was misled.

72. A preponderance of the evidence showed that Petitioner was not coerced or forced to resign, but chose to resign due to an ill mother and to pursue other law enforcement interests. The preponderance of the evidence proved that the officials of ALE were very positive with Petitioner as he resigned. For example, Director W.C. Chandler issued a memorandum dated March 2, 2009 to Petitioner acknowledging his letter of resignation and observing that: "We appreciate your dedication and enthusiasm in achieving our goals and missions over the past year. I wish you the best of luck." Additionally, Agent Barbee and Agent Berryhill, who worked closely with and supervised Petitioner, gave him very favorable references.

73. The pertinent regulation regarding material misrepresentations appears in 12 NCAC 9A .0204(b)(6). The regulation provides in pertinent part that the Commission may deny certification of a criminal justice officer where the applicant "has knowingly made a material misrepresentation of any information required for certification or accreditation." The evidence before the undersigned fails to establish either of the crucial elements of this particular alleged offense.

a. First, the evidence does not establish that Petitioner made any type of "material misrepresentation" of information required for certification. There is no meaningful evidence that Petitioner made any misrepresentation at all, much less one that rises to the high level of constituting a "material" misrepresentation.

b. Finally, there is no basis to believe that Petitioner "knowingly" made a material misrepresentation of information required for certification. In preparing F-3 and F-5 forms, and otherwise providing information about his background, Petitioner did not knowingly make material misrepresentations on his F-3 forms. Petitioner has acted in good faith and honestly in addressing the issues surrounding his F-3 forms.

74. The preponderance of the evidence established that Petitioner possesses the good moral character required for certification. The undersigned was able to

evaluate the credibility of the witnesses, including Petitioner and other witnesses offered by Petitioner. Each of these witnesses was credible and believable, and their testimony was helpful and persuasive. Each of these witnesses has opined, in various degrees, that Petitioner is an honest, hard working professional person and who has excellent character traits for honesty, integrity and trustworthiness. Petitioner Cornett enjoys many positive character traits, which form the basis of being an excellent law enforcement officer. Further, the testimonies of Petitioner's witnesses corroborate Petitioner's testimony on critical issues of credibility and believability. The undersigned finds that the testimony of Petitioner and each of his witnesses is credible, believable and should be credited.

75. There was no evidence that Petitioner intended or attempted to obstruct justice through his actions. Petitioner did not intend to offer the two replaced beers as evidence in any trial. While Petitioner's actions, of placing two beers he purchased into permanent storage as "evidence," appeared misleading and suspicious, there was no evidence that Petitioner intended to mislead any ALE agents, or any Court, or intended to obstruct justice. At best, Petitioner's repeated inability to account for seized alcoholic beverages was the result of Petitioner's carelessness, inattention to detail, and inexperience.

CONCLUSIONS OF LAW

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

2. The North Carolina Criminal Justice Education and Training Standards Commission has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9G, to certify correctional officers and to revoke, suspend, or deny such certification.

3. 12 NCAC 9A.0204(b)(6) states that:

b) The Commission may suspend, revoke, or deny the certification of a criminal justice officer when the Commission finds that the applicant for certification or the certified officer:

(6) has knowingly made a material misrepresentation of any information required for certification or accreditation[.]

4. 12 NCAC 09A.0204(b)(2) states that:

(b) The Commission may suspend, revoke or deny the certification of a criminal justice officer when the Commission finds that the applicant for certification or the certified officer:

(2) fails to meet or maintain one or more of the minimum standards required by 12 NCAC 09B.0100 for the category of the officer's certification or fails to meet or maintain one or more of the minimum training standards required by 12 NCAC 9B.0200 or 12 NCAC 9B.0400 for the category of the officer's certification[.]

5. 12 NCAC 09B.0111(1)(a) states that: In addition to the requirements for criminal justice officers contained in Rule .0101 of this Section, every law enforcement officer employed by an agency in North Carolina shall:

(1) Not have committed or been convicted of:

(a) A felony[.]

6. 12 NCAC 09B.0101(3) states that: Every criminal justice officer employed by an agency in North Carolina shall:

(3) [B]e of good moral character pursuant to G.S.17C-10 and as determined by a thorough background investigation[.]

7. The totality of the evidence before the Court is insufficient to establish that Petitioner violated any of the Commission's rules.

8. The evidence failed to establish that there are valid grounds for denial of a law enforcement certification to Petitioner.

9. In *Royall v. N.C. Sheriffs Education and Training Standards Commission*, 09 DOJ 5859 (January 27, 2011), the N.C. Sheriffs Education Training and Standards Commission issued a final decision whereby the Commission thoroughly addressed its good moral character rule and its reasoning is applicable here.

10. Moral character is a vague and broad concept. E.g. *Royall*; *Jonathan Mims v. North Carolina Sheriff's Education and Training Standards Commission*, 02 DOJ 1263, 2003 WL 22146102 at page 11 - 12 (Gray, ALJ) and cases cited therein. (See *Mims* at page 11) The United States Supreme Court has described the term "good moral character" as being "unusually ambiguous." In *Konigsberg v. State*, 353 U.S. 252, 262-63 (1957), the Court explained: The term good moral character...is by itself...*unusually ambiguous*. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, *can be a dangerous instrument* for arbitrary and discriminatory denial....(emphasis added). Police administrators, officers and others have

considerable differences of opinion as to what constitutes good moral character." *Mims, supra*, at page 12, Conclusion of Law 12.

11. In *Mims*, the Respondent offered the testimony of someone who claimed to be knowledgeable regarding moral character. That person explained that there are six components to good moral character of law enforcement officers: trustworthiness, respect, responsibility, fairness, citizenship, and being a caring individual. *Mims*, page 7 at Finding of Fact 48. Applying those criteria here, the evidence demonstrates that Petitioner met each of those criteria and other moral character components, which demonstrated his good moral character.

12. As ALJ Gray explained in *Mims*, while having good moral character is an ideal objective for everyone to enjoy, the lack of consistent and clear meaning of that term within the Respondent's rule, and the lack of clear enforcement standards or criteria for application of the rule, renders enforcement actions problematic and difficult. *Mims, supra*. at page 12, Conclusion of Law 4.¹

13. Because of these concerns about the flexibility and vagueness of the good moral character rule, any suspension or revocation of an officer's law enforcement certification based on an allegation of a lack of good moral character should be "reserved for clear and severe cases of misconduct." *Royall; Mims, supra*. at page 12 and 13.

14. Generally, isolated instances of conduct are insufficient to conclude that someone lacks good moral character. See *In Re Rogers*, 297 N.C. 48, 58 (1979) ("whether a person is of good moral character is seldom subject to proof by reference to one or two incidents."); *Daniel Brannon Gray v. N.C. Sheriffs Education and Training Standards Commission*, 09 DOJ 4364 (March 15, 2010; May, ALJ).

15. The alleged conduct in this case is insufficient to rise to the required level of proof to establish that Petitioner lacks good moral character. Under *In Re Rogers*, a single instance of conduct amounting to poor judgment, especially where there is no malice or bad faith, would not ordinarily rise to the high level required to reflect a lack of good moral character.

16. In *Daniel Brannon Gray v. N.C. Sheriffs Education and Training Standards Commission*, 09 DOJ 4364 (March 15, 2010; May, ALJ), the good moral character rule was interpreted. Good moral character has been defined as "honesty, fairness, and respect for the rights of others and for the laws of state and nation." *Gray*, at page 18, Conclusion of Law 5, citing *In Re Willis*, 299 N.C. 1, 10 (1975). *Gray* further explained, "[g]enerally, isolated instances of conduct are insufficient to properly conclude that

¹ Cases reaffirm fundamental requirements that there must be uniform rules for consistent application to everyone including law enforcement officers. See, e.g., *Mims*, citing *Toomer v. Garrett*, 574 S.E.2d 76 (N.C. App. 2002)(government agencies may not engage in disparate treatment or arbitrariness in treating law enforcement officers; constitutional claims stated).

someone lacks good moral character. However, if especially egregious, even a single incident could suffice to find that an individual lacks good moral character in places [sic] of clear and especially severe misconduct," citing *In Re Rogers*, 297 N.C. 48, 59 (1979). Here, there is clearly no severe, egregious, or clear misconduct warranting any finding of a lack of good moral character. Petitioner is a person of very good moral character.

17. *Royall* and other cases demonstrate that police officers and others make occasional honest mistakes and sometimes exercise poor judgment. For example, in *Andreas Dietrich v. N.C. Highway Patrol*, 2001 WL 34055881, 00 OSP 1039 (August 13, 2001, Gray, ALJ), Administrative Law Judge Gray addressed a case involving very poor communications by a state trooper characterizing state officials harshly. Judge Gray reasoned that: "Troopers, like other public employees and officials, will occasionally say things that they should probably not say. Ideally, it is desired that law enforcement officers be near perfect; however, that is not a realistic standard." *Dietrich, supra*, page 13 at Conclusion of Law 12.

18. In this case, the evidence does not establish that Petitioner knowingly made material misrepresentations on forms required for certification. Petitioner provided the requested singular response regarding his resignation. When later asked for a more detailed account, he responded appropriately. Nobody was misled. Petitioner did not obstruct justice or attempt to do so. Felony obstruction of justice requires that the offense is "infamous, done in secrecy and malice, or [done] with deceit and intent to defraud..." *State v. Blount*, 703 S.E.2d 921, 925 (N.C. App. 2011)

20. Here, Petitioner did not act with malice, deceit or intent to defraud. Accord *State v. Preston*, 73 N.C. App. 174, 325 S.E.2d 686 (1985) There must be an act which "prevents, obstructs, impedes or hinders public or legal justice." *State v. Taylor*, 2011 WL 2207568 (N.C. App. 2011); *In Re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442 (1983) Petitioner did not prevent, obstruct, impede or hinder public or legal justice.

21. As our Supreme Court has explained: "The elements of an attempt to commit a crime are (1) an intent to commit the crime, (2) an overt act done for that purpose, going beyond mere preparation, (3) but falling short of the completed offense." *State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993); see *State v. Powell*, 277 N.C. 672, 178 S.E.2d 417 (1971); *State v. McNeely*, 244 N.C. 737, 94 S.E.2d 853 (1956). There are some cases suggesting a specific intent standard for an attempted crime. Under those cases, an attempted crime requires proof of a specific intent to commit the crime that is attempted. There must be: (1) specific intent to commit the crime; and (2) the accused committed an overt act for the purpose, which goes beyond mere preparation, but falls short of the complete offense. *State v. Farmer*, 158 N.C. App. 699, 582 S.E.2d 352 (2003); *State v. Robertson*, 149 N.C. App. 563, 567, 562 S.E.2d 551, 554 (2002) See *State v. Graham*, 224 N.C. 347, 30 S.E.2d 151 (1944) ("Such an intent alone is not sufficient for a conviction even of an attempt to commit the offense charged.")

22. The preponderance of the evidence established that Petitioner had no such intent to commit a crime under either a general intent standard, or a specific intent standard, and Petitioner did not violate any of the Commission's rules.

23. For the foregoing reasons, there is insufficient evidence in the record to support Respondent's denial of Petitioner's law enforcement certification for the reasons stated in Respondent's June 24, 2010 proposed denial.

PROPOSAL FOR DECISION

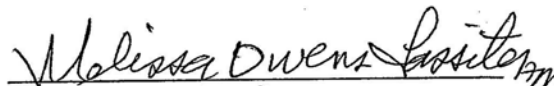
Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned recommends that Respondent **REVERSE** its initial denial of Petitioner's application for certification as a law enforcement officer for its stated reasons, and **ISSUE** Petitioner a law enforcement certification.

NOTICE AND ORDER

The North Carolina Criminal Justice Education and Training Standards 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 the 31st day of October, 2011.

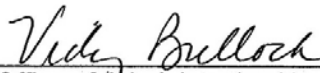

Melissa Owens Lassiter
Administrative Law Judge

A copy of the foregoing was mailed to:

J. Michael McGuinness
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ATTORNEY FOR PETITIONER

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ATTORNEYS FOR RESPONDENT

This the 1st day of November, 2011.



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Filed

STATE OF NORTH CAROLINA

COUNTY OF HOKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 DOJ 6784

LISA MICHELLE THOMAS,

Petitioner,

v.

NORTH CAROLINA SHERIFFS
EDUCATION AND TRAINING
STANDARDS COMMISSION,

Respondent.

PROPOSAL FOR DECISION

THE ABOVE-ENTITLED MATTER was heard before the undersigned Augustus B. Elkins II, Administrative Law Judge, on September 12, 2011, in Fayetteville, North Carolina. This case was heard 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. The Parties were given 30 days to submit all proposals, memorandum or other material. Mailing time was allowed for submission on the thirtieth day and the record was closed on October 17, 2011.

APPEARANCES

Petitioner: Lisa Michelle Thomas, *pro se*
131 Raymond Street
Raeford, North Carolina 28376

Respondent: William P. Hart, Jr., Assistant Attorney General
Attorney for Respondent
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

ISSUE

Did Petitioner commit a Class B misdemeanor after the date of her appointment as a detention officer with the Hoke County Sheriff's Office?

Does Petitioner lack the good moral character required of all justice officers?

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 this case.

FINDINGS OF FACT

1. Both parties received timely notice of the hearing in this matter.
2. On 2 September 2009, Petitioner was appointed as a detention officer with the Hoke County Sheriff's Office. On 10 December 2009, Petitioner was awarded probationary detention officer certification by Respondent, pending successful completion of mandatory training by 2 September 2010. As of the date this matter was heard before the Undersigned, Petitioner remained in probationary certification status due to this administrative action.
3. On 11 April 2010, Petitioner signed and submitted a time sheet to her employer reflecting the time she worked during the two-week pay period from Sunday 28 March 2010 through Saturday 10 April 2010. By Petitioner's subsequent admission, the total hours reflected on this time sheet (88.5 hours) exceeded by 14 hours the actual time which Petitioner worked during the applicable two-week period (74.5 hours). Additionally, 4.5 of the 14 excess hours submitted by Petitioner were credited as overtime hours because Petitioner's time exceeded the standard 84-hour limit by this amount.
4. Pertinent to these discrepancies was the fact that Petitioner was attending a Detention Officer Certification Course (DOCC) at various times during the applicable two-week period, for which times she would have been entitled to compensation by her employer. However, the DOCC training was not held either on 3 April 2010 (a Saturday) or on 5 April 2010 (a training course holiday). Therefore, Petitioner was not entitled to compensation either for the recorded time of 8:00 a.m. to 5:00 p.m. (9 hours) on 3 April 2010 or for the recorded time of 5:30 p.m. to 10:30 p.m. (5 hours) on 5 April 2010.
5. On two other dates during the applicable two-week period (29 March 2010 and 7 April 2010), Petitioner's recorded times did not match the DOCC schedule. However, both of these discrepancies were later resolved by Petitioner's employer due to the fact that the DOCC classes on those dates finished later than scheduled.

6. Petitioner was one of four detention officers investigated by her employer on suspicion of submitting falsified time sheets for the pay period of 28 March 2010 through 10 April 2010. One of the other employees under investigation was identified as Gina Shaff.

7. Petitioner has testified consistent with her explanation to her employer that Petitioner filled out her time sheet on the employer's computer after Officer Shaff did the same, and that Petitioner retained the same data for hours worked because she had worked exactly the same hours as Officer Shaff during the two-week period. The Undersigned finds this testimony credible.

8. There was nothing inherently improper about Petitioner's reliance upon technical assistance from other detention officers when completing time sheets for her employer. In this case, Petitioner has testified, and it is credible, that she did not know how to use the computer and correctly enter her time. She in fact needed someone to "stand behind" her and show her how to "back space" so she could add her name to a time sheet that she trusted accounted for her hours correctly. She relied entirely on Officer Shaff's entries and did not look at the time sheet as she knew her hours during the time period to be the same as Officer Shaff. Petitioner did not know that Officer Shaff was intentionally engaging in altering her own time.

9. An internal investigation conducted by the Hoke County Sheriff's Office found that Officer Shaff specifically intended to permanently deprive the Sheriff's Office of compensation. Further Officer Shaff attempted to obstruct the investigation by discussing matters with the other officers under investigation. Based upon Officer Shaff's statements and conduct toward her employer, her employment was terminated following the internal investigation.

10. Lieutenant Cathy LaBuz with the Hoke County Sheriff's Office was the Investigating Officer regarding the alleged misconduct of Petitioner, Officer Shaff and two other individuals. Lt. LaBuz testified at the hearing that Petitioner cooperated completely in the investigation and was very candid "even though she did not have to tell me everything." Lt. LaBuz related that Petitioner answered honestly and completely realizing that it was going to "compromise her relations with others."

11. Lt. LaBuz concluded that Petitioner should have checked her time sheet which was her responsibility but that the claiming of extra hours by Petitioner was a mistake and not an intentional act to defraud the Sheriff's Office. Lt. LaBuz was confident that Petitioner has learned and grown from this experience and would never make this type of error again.

12. Petitioner's signature on the 11 April 2010 time sheet submitted to her employer constituted a certification that the time recorded was a correct statement and included total hours worked each workday for the period covered. Submitting a correct statement of time worked was then, and is a non-delegable duty owed by Petitioner, meaning she is responsible for the content and accuracy of her time sheet.

13. By Petitioner's admission, the erroneous time sheet which she submitted on 11

April 2010 resulted in her employer compensating her for an additional 14 hours of work to which Petitioner was not entitled. Petitioner has repaid the amount she was overpaid back to the Hoke County Sheriff's Department.

14. Hoke County Sheriff Hubert A. Peterkin testified on the Petitioner's behalf. Sheriff Peterkin stated that he knew the Petitioner very well and was very familiar with the incident that was the subject of this hearing. The Petitioner is hard working and besides her normal working hours, when the Department needs her, she does not hesitate to come in and give it her all. Though he found Petitioner's action negligent, he was certain that there was no willfulness involved at all. Petitioner was issued a Letter of Reprimand. Sheriff Peterkin has total confidence in the Petitioner and knows the Petitioner is extremely well thought of by the entire staff and officer force of the Department. He knows the Petitioner to be an outstanding mother who is very involved in her church. He had no doubt that the Petitioner possessed the highest moral and ethical standards. Though he has rarely testified on behalf of a Petitioner, he felt compelled to come forward in this case as Petitioner having to leave the Hoke County Sheriff's Office would be a tremendous loss.

15. Petitioner did not demonstrate a lack of good moral character through the above actions. Based on the testimonies of Sheriff Hubert A. Peterkin, Lieutenant Cathy LaBuz, and Petitioner, the Undersigned finds that the good moral character of Petitioner has been maintained by her dependability and job performance during the course of her continued employment with the Hoke County Sheriff's Office as of the date this matter was heard.

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. 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, Chapter 10B of the North Carolina Administrative Code, to certify detention officers and to deny, revoke or suspend such certification.

3. Pursuant to 12 NCAC 10B .0204(d)(1), the Commission may revoke, deny, or suspend the certification of a detention officer when the Commission finds that the officer has committed or been convicted of a crime or unlawful act defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor and which occurred after the date of appointment.

4. Under 12 NCAC 10B .0103(10)(b), Class B Misdemeanor is defined by reference to the Class B Misdemeanor Manual published by the North Carolina Department of Justice and adopted by Respondent. Accordingly, the criminal offense of larceny of not more than \$1,000, in violation of N.C.G.S. § 14-72, constitutes a Class B misdemeanor.

5. In accordance with *State v. Griffin*, 239 N.C. 41, 79 S.E.2d 230 (1953), "Larceny is a common law offense not defined by statute." *Griffin* goes on to state that, "Generally speaking, to constitute larceny there must be a wrongful taking and carrying away of the personal property of another without his consent, and this must be done with felonious intent; that is, with intent to deprive the owner of his property and to appropriate it to the taker's use fraudulently."

6. 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.

7. 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.

8. Returning to the language found in *State v. Griffin*, that case instructs that "the taker must have had the intent to steal at the time he unlawfully takes the property from the owner's possession."

9. The preponderance of the evidence supports the conclusion that Petitioner did not knowingly have the intent to fraudulently take monies from the Hoke County Sheriff's Department at the time she signed her time sheet under the circumstances described above. The Petitioner did not knowingly intend to steal. The essential requirement of felonious intent is absent in this case.

10. 12 NCAC 10B .0301(a)(8) requires that every justice officer employed or certified in North Carolina shall be of good moral character as defined in case law. *See generally In re Legg*, 325 N.C. 658, 386 S.E.2d 174 (1989); *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983); *In re Willis*, 299 N.C. 1, 215 S.E.2d 771, *appeal dismissed*, 423 U.S. 976 (1975); *State v. Harris*, 216 N.C. 746, 6 S.E. 854 (1940); *In re Dillingham*, 188 N.C. 162, 124 S.E. 130 (1924); *In re Applicants for Licensure*, 143 N.C. 1, 55 S.E. 635 (1906).

11. Given the unique facts of this case, insufficient evidence exists to show Petitioner currently lacks the good moral character required of all justice officers. In fact, the evidence points to the fact that Petitioner is a person of good moral character. Although Petitioner's actions were indicative of poor professional and personal judgment, they are not indicative of bad character. Petitioner was truthful and cooperative during her employer's internal investigation, and remains employed in good standing with the Hoke County Sheriff's Office. Petitioner has maintained her good name as a consequence. *See generally In re Farmer*, 191 N.C. 235, 130 S.E. 661 (1926).

12. 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."

13. 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.

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 take the property of the Hoke County Sheriff's Office with the felonious intent to steal at the time she signed an incorrect time sheet or received pay stemming from that time sheet. In the alternative, extenuating circumstances, 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, Lisa Michelle Thomas, receive/retain her justice officer certification.

NOTICE

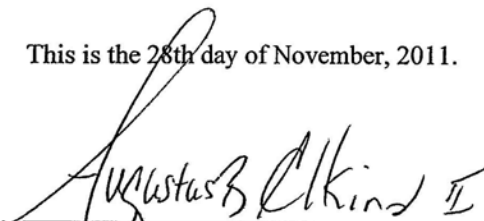
The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this Proposal for Decision, to submit proposed findings of fact, and to present oral and written arguments to the agency. N.C.G.S. § 150B-40(e).

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 28th day of November, 2011.



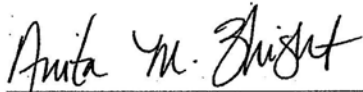
Augustus B. Elkins II
Administrative Law Judge

A copy of the foregoing was mailed to:

Lisa Michell Thomas
131 Raymond Street
Raeford, NC 28376
PETITIONER

Lauren D. Talley
William P Hart Jr
Assistant Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEYS FOR RESPONDENT

This the 30th day of November, 2011.



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

STATE OF NORTH CAROLINA

COUNTY OF HYDE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
10 EHR 6501

Office of

Administrative Hearings

Rose Acre Farms, Inc.)
NPDES Permit No. NCA 148024)
Petitioner,)
and)
North Carolina Poultry Federation, Inc.)
Petitioner-Intervenor,)
v.)
Department of Environment and Natural)
Resources.)
Respondent.)

DECISION
by SUMMARY JUDGMENT

THIS MATTER was heard before the undersigned Administrative Law Judge, Augustus B. Elkins II, on a Petition for a Contested Case Hearing to appeal the issuance of an NPDES Permit and its terms against Petitioner, Rose Acre Farms, Inc. (Rose Acre). Petitioner moved for a Summary Judgment on the basis that the Department of Environment and Natural Resources, Division of Water Quality (DWQ) had no statutory authority to require Petitioner to have an NPDES Permit in the first instance or to require certain terms in that permit, and that DWQ violated the strategy set forth by the Environmental Management Commission (EMC) in its 2001 Order found at 15A NCAC 02B.0256(a)(2) by requiring best management practices in the NPDES Permit to reduce atmospheric deposition of ammonia. A hearing was held on Petitioner's Motion for a Summary Judgment on August 15, 2011 in Raleigh, North Carolina.

APPEARANCES

For Petitioner: Gary H. Baise
Anson M. Keller
R. Sarah Compton
Joseph A. Miller

For Respondent: Anita LeVeaux

For Intervenor: Henry W. Jones, Jr.

ISSUES

1. Whether DWQ has authority pursuant to the Clean Water Act or N.C.G.S. §§ 143-215 *et seq.* to require Rose Acre to obtain an NPDES Permit or establish Best Management Practices (BMPs) in that Permit “for reducing airborne ammonia emissions from the facility.”

2. Whether DWQ has authority to reduce airborne emissions of ammonia in light of the fact that in 2001, the EMC has specifically excluded the regulation of airborne emissions of ammonia under its Nutrient Sensitive Waters Program for the Tar-Pamlico River Basin. *See*: 15 NCAC 02B.0256.

3. Whether DWQ exceeded its authority in requiring the contested BMPs because DWQ failed to comply with the procedures set by the Legislature and the EMC for the Tar-Pamlico River Basin found in 15 NCAC 02B.0256.

BASED UPON careful consideration of the testimony and evidence received during the summary judgment hearing, as well as the entire record of this proceeding, the Undersigned finds the following:

UNCONTESTED FACTS

1. Rose Acre Farms, Inc. (Rose Acre) operates an egg farm in Hyde County, North Carolina pursuant to an NPDES permit issued in 2004 which is authorized by the federal Clean Water Act 33 U.S.C. §§1251 *et seq.*

2. This 2004 NPDES permit prohibited discharges to any waters of the State. No discharge has ever occurred because Rose Acre’s egg farm is a dry litter facility.

3. In 2010, DWQ renewed the Rose Acre NPDES permit but included several BMPs which are the subject of this contested case. The 2010 NPDES Permit states that these BMPs were included for the purpose of “reducing airborne ammonia emissions from the facility.” (Permit II 32).

4. DWQ has not imposed the contested BMPs on any other facility in the State of North Carolina. (*See* Answer to Rose Acre’s Interrogatory No. 29).

5. The 2010 Permit prohibits discharges to any waters. No discharge has ever occurred because Rose Acre Farms, Inc. is a dry litter facility.

6. On March 15, 2011, the federal Fifth Circuit Court of Appeals, in *National Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011), held that concentrated animal feeding operations (CAFOs) that did not discharge to the waters of the United States did not have to

apply for, or have, an NPDES permit under the federal Clean Water Act and therefore vacated that part of 40 CFR §122 requiring such a permit for facilities that did not discharge.

7. Rose Acre Farms, Inc. also operates an egg washing facility in Hyde County, North Carolina which DWQ admits does not discharge to any waters of the State or the United States.

8. Rose Acre has a Storm Water Permit and a Solid Waste Composting Permit from the State of North Carolina.

9. Rose Acre's Hyde County egg farm is located within the Tar-Pamlico River Basin.

10. DWQ has found that: "Of the water bodies mentioned in this comment, only the upper Pungo River is in a position to be affected by ammonia emissions from the RAF facility. The canals adjacent to the RAF facility drain to the upper Pungo River . . . The upper reach of the Pungo River is not impaired for chlorophyll-a, only for copper, which cannot be tied back to the RAF facility. . . there are no impairments tied to the RAF facility . . ." (Rose Acre Farms Comment Summary written by Mr. Keith Larick of DWQ, page 3). Further DWQ has found that: ". . . in reviewing the 303(d) list and monitoring data for the Tar-Pam River Basin, it does not appear that there are any water quality impairments that can be tracked back to the RAF facility." (Rose Acre Farms Comment Summary written by Mr. Keith Larick of DWQ, page 4).

11. The contested BMPs were never proposed to, or approved by, the Basin Oversight Committee or to the Local Advisory Committee for Hyde County.

BASED UPON the foregoing findings of fact, the undersigned Administrative Law Judge enters the following:

CONCLUSIONS OF LAW

1. All parties properly are before the Office of Administrative Hearings and the Office has jurisdiction over the parties and the subject matter. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder.

2. Petitioner is a person within the meaning of N.C.G.S. § 143-212(4). Respondent is a State agency established pursuant to North Carolina General Statutes §§ 143B-275 *et seq.*

3. This contested case involves BMPs that have been set by DWQ to reduce air emissions of ammonia. The permit however, is an NPDES permit issued pursuant to the Clean Water Act and labeled so. There is authority that air emissions should not be regulated under the Clean Water Act. See *No Spray Coalition, Inc. v City of New York*, 2000 WL 1401458 (S.D.N.Y. 2000) *aff'd* 252-F, 3d 148 (2nd Cir. 2001); *Chemical Weapons Working Group v. U.S.*

Department of the Army, 111 F.3d 1485 (10th Cir. 1997); and *American Canoe Assn. v. D.C. Water and Sewer Authority*, 306 F. Supp. 2d 30 (D.D.C. 2004).

4. In *No Spray Coalition, Inc. v City of New York* the City of New York engaged in an extensive spraying of insecticides in an attempt to eradicate mosquitoes that carry the West Nile Virus. Plaintiffs sought to enjoin the spraying program alleging that the City was discharging a pollutant into the waters of the United States. The Court stated:

While the trucks and helicopters used to spray insecticides may be point sources . . . they discharge the insecticides into the atmosphere and not into navigable waters. It would be stretching the language of the [Clean Water Act] well beyond the intent of Congress to hold that the de minimus incidental drift over navigable waters of a pesticide is a discharge from a point source into those waters. The fact that a pollutant might ultimately end up in navigable waters as it courses through the environment does not make its use a violation of the Clean Water Act. . . To so hold would bring within the purview of the Clean Water Act every emission of smoke, exhaust fumes, or pesticides in New York City. Plaintiffs have cited no case that supports such a strained reading of the language of the Clean Water Act. (2000 WL 1401458 at 3)

The other two above cited cases rest upon the same rationale.

5. In addition to the Clean Water Act, N.C.G.S. § 143-215.1 *et seq.* provides the statutory authority to DENR to regulate pollutants in the waters of the State and, specifically, N.C.G.S. § 143-215.10C provides the specific criteria for requiring an NPDES permit.

6. N.C.G.S. §143-215.1 provides in pertinent part:

(a) Activities for Which Permits Required - No person shall do any of the following things or carry out any of the following activities unless that person has received a permit from the Commission and has complied with all conditions set forth in the permit.

* * *

(12) Construct or operate an animal waste management system, as defined in G.S. 143-215.10B, without obtaining a permit under either this Part or Part 1A of this Article.

Part 1A is not applicable to this case because it deals with close-loop groundwater remediation systems.

7. N.C.G.S. § 143-215.10A sets out the Legislative findings and intent regarding animal waste management systems. N.C.G.S. §143-215.10A states, *inter alia*:

The General Assembly finds that animal operations provide significant economic and other benefits to this State. The growth of animal operations in recent years has increased the importance of good animal waste management

practices to protect water quality. . . . To this end, the General Assembly intends to establish a permitting program for animal waste management systems that will protect water quality and promote innovative systems and practices while minimizing the regulatory burden. Technical assistance, through operations reviews, will be provided by the Division of Soil and Water Conservation. Permitting, inspection, and enforcement will be vested in the Division of Water quality.

8. N.C.G.S. §143-215.10C, specifically sets forth what is required of persons who must obtain a permit. The present N.C.G.S. §143-215.10C has been amended several times at dates later than the enactment of N.C.G.S. §143-215.1

9. Section N.C.G.S. §143-215.10C provides in pertinent part:

(a) No Person shall construct or operate an animal waste management system for an animal operation or operate an animal waste management system for a dry litter poultry facility that is required to be permitted under 40 Code of Federal Regulations § 122, as amended at 73 Federal Register 70418 (November 20, 2008), without first obtaining an individual permit or a general permit under this Article.

10. In order for DWQ to require Rose Acre to obtain a permit, therefore, the facility must fall under at least one criteria of N.C.G.S. §143-215.10C. The facility:

- is required to be permitted under the Federal Regulations set forth in 40 CFR § 122; or
- must “operate an animal waste management system for an animal operation,” as defined.

11. One type of facility that is required by the North Carolina statute to have an NPDES permit is a dry litter poultry facility that is required to “be permitted under 40 CFR § 122, as amended at 73 Federal Register 70418 (November 20, 2008).” (N.C.G.S. §143-215.10C).

12. That section in the CFR applies to the Concentrated Animal Feeding Operation (CAFO) regulations applicable to state NPDES programs where the total Part 122 deals with regulations issued by EPA regarding NPDES regulations in general.

13. In its 2008 amendments, the EPA required CAFOs that did not discharge but “proposed” to discharge to first obtain an NPDES permit. That CAFO regulation, as applied to Rose Acre, was recently vacated in the case of *National Pork Producers Council v. EPA*, 635 F. 3d 738 (5th Cir. 2011). The Fifth Circuit ruled that such amendment was not authorized by the Clean Water Act and vacated the 2008 amended rule. The Court held that the EPA’s authority is limited to the regulation of only those CAFOs that actually discharge to the waters of the United States. It stated “that the EPA’s requirement that CAFOs that ‘propose’ to discharge apply for an NPDES permit is *ultra vires* and cannot be upheld.”

14. Rose Acre's facility does not and cannot discharge, and is thus not covered by 40 CFR § 122. The Fifth Circuit Court of Appeals in vacating the 2008 EPA rule did not remand the matter to the EPA but said the EPA had no authority to require certain CAFOs (such as Rose Acre's Hyde County facility) to obtain an NPDES permit. As stated in the *National Pork Producers Council* case, "the Supreme Court has explained: 'Agencies may play the sorcerer's apprentice but not the sorcerer himself.'" *Alexander v. Sandoval*, 532 U.S. 275, 292, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). In other words, an agency's authority is limited to what has been authorized by Congress. Here, the "duty to apply", as it applies to CAFOs that have not discharged, and the imposition of failure to apply liability is an attempt by the EPA to create from whole cloth new liability provisions. The CWA does not authorize this type of supplementation to its comprehensive liability scheme. Nor has Congress been compelled, since the creation of the NPDES permit program, to make any changes to the CWA, requiring a non-discharging CAFO to apply for an NPDES permit or imposing failure to apply liability."

15. The Undersigned finds the Fifth Circuit Court of Appeals case persuasive and applicable in this matter.

16. N.C.G.S. §143-215.10B(3) defines the term "animal waste management system" to mean "a combination of structures and nonstructural practices serving a feedlot that provide for the collection, treatment, storage, or land application of animal waste."

17. N.C.G.S. §143-215.10B(1) defines the term "animal operation" to mean "any agricultural feedlot activity involving . . . 30,000 or more confined poultry with a liquid animal waste management system, or any agricultural feedlot activity with a liquid animal waste management system that discharges to the surface waters of the State."

18. By uncontested affidavit proof, Rose Acre contends and the Undersigned finds that:

after the eggs are produced in the hen houses, each egg rolls down a slight incline to a conveyor belt which takes the eggs to another building not otherwise connected to the hen houses which have a grader which separates the eggs by size. There are no animals kept in this building. There the eggs are washed with water and a sanitizer pursuant to regulations of the United States Food and Drug Administration. After being inspected, the eggs are then packaged and ready for shipment. The egg wash water is then pumped to a lagoon where an air jammer aerates the water. The wash water then goes to another, smaller lagoon to allow any solids such as dirt, egg white and yolks from broken eggs and broken egg shells that might be in the water to settle out. From there, the wash water is pumped to an irrigation system located on land permitted by DENR. The procedure has been approved by the County Agent and included in the nutrient management plan that is also approved by DENR.

There is never a discharge of this wash water to the waters of the State of North Carolina and it is used solely to irrigate the plants and crops approved by DENR. It is not used for the purpose of fertilization. Much of the water simply evaporates.

The Rose Acre facility does not discharge or have the potential to discharge manure, litter, or process wastewater to navigable waters of the United States or the State of North Carolina. Rose Acre has several years of experience in operating this facility and the facility is designed, constructed, operated, and maintained in such a manner that no discharge of wastewater can occur as required by N.C.G.S. §143-215.10C(b).

19. DWQ argues that Rose Acre's egg-washing facility, which is separate from the hen barns, is a "liquid animal waste management system."

20. As a matter of law, the Undersigned finds first that without the egg washing facility, Rose Acre does not have a liquid system.

21. As to the egg washing facility, the Undersigned finds as a matter of law that it is not an animal waste management system because it is not a combination of structures and nonstructural practices serving a feedlot that provide for the collection, treatment, storage, or land application of animal waste nor does it involve any agricultural feedlot activity.

22. Until the 2004 amendment to the applicable statutes, the term "Animal operation" meant "any agricultural farming activity." However, in 2004, the word farming was stricken and the word "feedlot" substituted its place in the definition. Thus, while it might be argued that the grading, inspection, and washing of the eggs might have been an agricultural farming activity, it is not an agricultural feedlot activity. It is totally divorced from any feedlot activity today. And, it neither collects nor stores any animal waste.

23. The term "feedlot" is defined by the statute, N.C.G.S. § 143-215.10B(5) as:

a lot or building or combination of lots and buildings intended for the confined feeding, breeding, raising, or holding of animals and either specifically designed as a confinement area in which animal waste may accumulate or where the concentration of animals is such that an established vegetative cover cannot be maintained. . . . Pastures shall not be considered feedlots for purposes of this Part.

24. Because the building in which the egg grading and washing functions occur has nothing to do with the feeding, breeding, raising or holding of animals and because it is not a "feedlot activity," the egg wash water fails to meet the definition of an animal operation as a matter of law. The activity does not involve any activity in which there is a confined feeding, breeding, raising, or holding of animals as N.C.G.S. §143-215.10B(5) requires. And the fact that the definition excludes pastures also makes it clear that one farm can consist of various separate parts.

25. Moreover, as the reply affirmation pointed out:

Federal government agencies consider the egg processing facility separate from the egg-laying facility. This is aptly noted by the fact that when eggs are

inspected by a government agency the United States Department of Agriculture's Food Safety and Inspection Services (USDA FSIS) does the inspection. On the other hand, when egg-laying houses are inspected they are inspected by the Food and Drug Administration (FDA), a completely different government agency. FDA does not inspect the egg processing facilities and USDA FSIS does not inspect the egg laying facilities. This was aptly pointed out last summer when an egg recall situation developed at the Wright County farm of a competitor of Rose Acres' and legislators, as well as the media, were asking why the USDA FSIS inspectors did not detect Salmonella in the egg laying portion of the facility. It was promptly explained by both FDA and USDA that these are two separate facilities and that each agency has specific jurisdiction over a particular facility, but not both facilities. (Affirmation, ¶12.)

26. The egg wash operation cannot be the basis for requiring an NPDES permit. In North Carolina an agency may only control what is intended to be regulated. *Hensley v. N.C. DWQ*, 364 N.J.C. 285 (N.C. 2010). The BMPs in this case have nothing to do with the egg wash water as a matter of law.

27. Conditions imposed in an NPDES permit must be related to the discharge. If DWQ were correct that the egg water processing water is a liquid animal waste management system which the Undersigned holds it is not, then the BMPs DWQ has placed in the Rose Acre permit must be related to the discharge, i.e. the egg wash water. *United States v. Mango*, 199 F.3d 85, 93 (2d Cir. 1999); *NRDC v. EPA*, 859 F.2d 156 (D.C. Cir. 1988); *Nat'l Assoc. of Home Builders v. United States Army Corp of Engineers*, 453 F. Supp. 2d 116, 133-34 (D.D.C. 2006); *Save our Sonoran, Inc. v. Flowers*, 2006 WL 1160191 (D. Ariz. 2006); *Waterwatch of Oregon v. U.S. Army Corp of Engineers*, 2000 WL 1100059 (D.Ore. 2000).

28. DWQ has no authority at this time to require Rose Acre to obtain an NPDES Permit for its Hyde County facility and even if it did, the contested BMPs are not sustainable.

29. Respondent opines that feathers, bedding, and dust from Rose Acre's fans discharge into Rose Acre's storm water runoff system.

30. DWQ's argument that Rose Acre is required to obtain an NPDES permit because its ventilation fans release ammonia, feed, bedding, feathers, dust, litter, and other particles which, through atmospheric deposition, settles in a nearby stormwater pond, and then, occasionally in turn, discharges into waters of the State is without merit.

31. This argument is a *post hoc* rationalization for an otherwise unauthorized action. The contested NPDES Permit was issued on September 24, 2010. The *National Pork Producers Council v. EPA* decision was issued on March 15, 2011 and the argument concerning feed, bedding, dust and feathers arises from an issue in that case. DWQ never raised the "dust-and-feather" issue as providing jurisdiction until the filing of DWQ's response brief. Not raising this issue until the Respondent's summary judgment motion is a *post hoc* rationalization of DWQ's assertion that Rose Acre is required to obtain a permit. Such *post hoc* rationalization for an agency action is impermissible in North Carolina. See *Amanini v. North Carolina Dept. of*

Human Resources, 114 N.C. App. 668, 681, 443 S.E.2d 114, 122 (N.C. Ct. App. 1994) (citing *Cone Mills Corp. v. N.L.R.B.*, 413 F.2d 445, 452 (4th Cir. 1969)).

32. There is nothing in the record that alleges that Rose Acre's ventilation fans release ammonia, feed, bedding, feathers, dust, litter, and other particles into the atmosphere, which then settle in a nearby stormwater pond, and then, in turn, discharges into waters of the State.

33. The proper forum to raise the above allegations is in an enforcement proceeding. In such an enforcement proceeding for discharging without an NPDES permit, penalties may be based on the following factors such as:

- a. The degree and extent of harm to the natural resources of the state, to the public health or to private property resulting from the violation;
- b. The duration and gravity of the violation;
- c. The effect on ground or surface water quantity or quality or on air quality;
- d. The cost of rectifying the damage;
- e. The amount of money saved by the violator through noncompliance;
- f. Whether the violation was committed willfully or intentionally;
- g. The prior record of the violator in complying or failing to comply with programs over which the EMC has regulatory authority; and
- h. The cost to the state of the enforcement procedures.

34. None of these factors are relevant to this proceeding.

35. The Undersigned concludes that DWQ's present dust and feathers *post hoc* argument is faulty and arises because of dicta arising in *National Pork Producers Council v. EPA*. There a group of poultry interests challenged three letters issued by EPA as a final agency action. The letters, issued by EPA officials, explained why EPA felt Delaware's CAFO program was inadequate. The letters indicated examples of what the agency considered pollutants and potential sources of pollutants from CAFOs. The letters indicated that pollutants included "raw materials, products, or byproducts, including manure, litter, and feed." See Letter from James D. Giattinia, Director, EPA Water Protection Division to Jeff Smith, Corporate Environmental Manager, Perdue Farms, Inc. (Mar. 4, 2009). The letters indicated that potential sources of these pollutants include: "manure handling and storage activities, feed storage, litter storage, exposed stockpiles of manure/litter, and litter released through confinement house ventilation fans." *Id.* The EPA Letters further elaborated that a discharge occurred if the ventilation dust comes into contact with any point source discharge of water. *Id.*

36. In *National Pork Producers Council*, the Fifth Circuit held that the EPA letters did not constitute a reviewable final agency action because the letters were merely guidance.

37. DWQ bases its assertion that Rose Acre discharges via its ventilation fans on the affidavit of William N. "Chips" Everhart. Mr. Everhart's affidavit indicates that "there are air emissions of ammonia and dust from the ventilation emanating from the bird litter or manure." Although Rose Acre acknowledges that its fans emit ammonia and dust from the farm buildings, DWQ never alleged any facts indicating that the ventilation dust came into contact with a water body. Furthermore, Mr. Everhart provided an affidavit clarifying Rose Acre's ventilation system, which indicated that the ventilation fans are designed so that dust and feathers from the operation will not enter the nearby storm water retention pond. The ventilation fans are pointed at a ninety degree angle away from the storm water retention pond. Furthermore, the stormwater retention pond is over one-fifth of a mile away from the farm. DWQ has never contested these facts.

38. No court has previously ruled on the effect of EPA's guidance on ventilation dust serving as the basis of a discharge. This occasion does not require the Undersigned to pass judgment on the validity of EPA's guidance. Instead, DWQ's assertion that ventilation dust requires Rose Acre to obtain a permit is invalid because there are no facts indicating that a discharge is actually occurring. The EPA Letters indicated that a discharge may occur when pollutants from ventilation fans come into contact with point sources of water. There are no facts supporting the claim that ventilation dust is coming into contact with point sources of water.

39. If there is merit to these allegations, it should be raised by DWQ in an enforcement action for discharging to the waters of the State and United States without an NPDES permit.

40. Even if DWQ had authority to require Rose Acre to have an NPDES Permit and even if DWQ had the authority to regulate airborne emissions of ammonia in an NPDES permit, the North Carolina Environmental Management Commission (EMC) established a nutrient strategy in 2001 for requiring BMP's for facilities located in the Tar-Pamlico River Basin.

41. That nutrient strategy binds DWQ until it is amended. DWQ does not have the statutory authority to impose BMPs to control the airborne deposition of ammonia by Rose Acre in an NPDES permit setting. Neither does DWQ have the regulatory authority to issue BMPs to control airborne deposition of ammonia in the Tar-Pamlico river basin.

42. The EMC was created by N.C.G.S. §143B-282 *et seq.* which is entitled "Environmental Management Commission – creation; powers and duties." The members are appointed by the Governor of the State. The EMC's functions include overseeing and adopting rules for the several divisions of DWQ, including the Divisions of Water Quality and Water Resources. It administers the State's authority under the federal Clean Water Act (*Id.* at § 282 (a)(u) and has the authority to adopt rules for water quality standards and classifications pursuant to N.C.G.S. § 143-214.1 and N.C.G.S. § 143-215.

43. N.C.G.S. § 143B-282 begins:

(a) There is hereby created the Environmental Management Commission of the Department of Environment and Natural Resources with the power and

duty to promulgate rules to be followed in the protection, preservation, and enhancement of the water and air resources of the State.

44. The statute also states at (a)(2) that the EMC shall adopt rules to implement basin-wide water quality management plans developed pursuant to N.C.G.S. § 143-215.8B. Section (a)(4) states:

The Commission shall make rules consistent with the provisions of this Chapter. All rules adopted by the Commission shall be enforced by the Department of Environment and Natural Resources.

(c) The Environmental Management Commission shall implement the provisions of subsections (d) and (e) of 33 U.S.C. § 1313 by identifying and prioritizing impaired waters and by development of appropriate total maximum daily loads of pollutants for those impaired waters.

* * *

(d) The Environmental Management Commission may adopt rules setting out strategies necessary for assuring that water quality standards are met by any point or nonpoint source or by a category of point or nonpoint sources that is determined by the Commission to be contributing to the water quality impairment. These strategies include, but are not limited to, additional monitoring, effluent limitations, supplemental standards or classifications, best management practices, protective buffers, schedules of compliance, and the establishment of and delegations to intergovernmental basinwide groups.

45. N.C.G.S §143-214.1 also gave the EMC the authority “to develop and adopt a series of classifications and standards applicable to each such classification, which will be appropriate for the purpose of classifying each of the waters of the State.”

46. The General Assembly has provided in N.C.G.S. §143-215.8B:

(a) The Commission shall develop and implement a basinwide water quality management plan for each of the 17 major river basins in the State. In developing and implementing each plan, the Commission shall consider the cumulative impacts of all of the following:

(1) All activities across a river basin and all point sources and nonpoint sources of pollutants, including municipal wastewater facilities, industrial wastewater systems, septic tank systems, stormwater management systems, golf courses, farms that use fertilizers and pesticides for crops, public and commercial lawns and gardens, atmospheric deposition, and animal operations.

47. Pursuant to this authority, the EMC adopted in October 1995 15A NCAC 02B.0223 which provides in relevant part:

(a) In addition to existing classifications, the Commission may classify any surface waters of the state as nutrient sensitive waters (NSW) upon a finding

that such waters are experiencing or are subject to excessive growths of microscopic or macroscopic vegetation. Excessive growths are growths which the Commission determines impair the use of the water for its best usage as determined by the classification applied to such waters.

* * *

(e) Nutrient strategies applicable to NSW shall be developed by the Commission to control the magnitude, duration, or frequencies of excessive growth of microscopic or macroscopic vegetation so that the existing and designated uses of the waterbody are protected or restored.

48. The EMC declared the Tar-Pamlico River Basin to be Nutrient Sensitive Waters on April 1, 1997 by stating that "(a) All waters of the Tar-Pamlico River Basin have been supplementally classified nutrient sensitive waters (NSW) pursuant to 15A NCAC 02B.0223." (See 15A NCAC 02B.0229 (1997))

49. Pursuant to that designation in 2001, the EMC developed a Tar-Pamlico River Basin Nutrient Sensitive Waters Management Strategy taking into account all the factors listed by N.C.G.S. §143-215.8B. (15A NCAC 02B-.0255 and 02B-.0256. (2001)) In this action, the EMC clearly limited the Tar-Pamlico Strategy only to land application of the nutrients and specifically excluded the regulation of air emissions or atmospheric deposition of ammonia. The EMC stated in the Strategy that:

LIMITATION. This Rule may not fully address the agricultural nitrogen reduction goal of the Tar-Pamlico Nutrient Sensitive Waters Strategy in that it does not address atmospheric sources of nitrogen to the Basin, including atmospheric emissions of ammonia from sources located both within and outside of the Basin. As better information becomes available from ongoing research on atmospheric nitrogen loading to the Basin from these sources, and on measures to control this loading, the Commission may undertake separate rule-making to require such measures it deems necessary from these sources to support the goals of the Tar-Pamlico Nutrient Sensitive Waters Strategy. (15A NCAC 02B.0256 (a)(2).)

50. The clear language of the regulation excludes the regulation of atmospheric emissions of ammonia from the Tar-Pamlico River Basin Strategy.

51. The regulation provides specifically that if atmospheric sources of nitrogen to the Tar-Pamlico Basin were to be regulated, the EMC could, through a "separate rule-making," require new measures to control the sources of nitrogen.

52. Such rule-making regarding atmospheric emissions of ammonia by the EMC have never occurred.

53. DWQ has attempted to regulate air deposition of ammonia from Rose Acre's barns by imposing the contested BMPs for the purpose of "reducing airborne ammonia emissions from the facility." (2010 Permit at II 32, p. 6.)

54. The Undersigned find as a matter of law that DWQ has exceeded its authority and the contested BMPs are void. To sustain Respondent's position that it has the authority to set its own strategy would mean that every agency in DENR including DWQ, the Division of Air Quality, the Division of Waste Management, the Division of Water Resources and others could do what each agency wished in attempting to protect the environment. Conflicting positions could be taken and they have here with EMC on the one hand and DWQ on the other.

55. Moreover, like jurisdictions within the Ninth Circuit, North Carolina must also look to protect the integrity of its APA procedures, by not permitting "an agency to rely on its unexpressed intentions to trump the ordinary import of its regulatory language." *Safe Air for Everyone v. U.S. E.P.A.*, 475 F.3d 1096 (9th Circuit, 2007). The Court in *Safe Air* further states:

Courts' reliance on the "plain meaning" rule in this setting [of interpreting administrative regulations] is not a product of some fetishistic attraction to legal "formalism." In order to infuse a measure of public accountability into administrative practices, the APA mandates that agencies provide interested parties notice and an opportunity for comment before promulgating rules of general applicability. This right to participate in the rulemaking process can be meaningfully exercised, however, only if the public can understand proposed rules as meaning what they appear to say. Moreover, if permitted to adopt unforeseen interpretations, agencies could constructively amend their regulations while evading their duty to engage in notice and comment procedures. As applied to agency regulations, then, the plain meaning doctrine is an interpretive norm essential to perfecting the scheme of administrative governance established by the APA.

Safe Air for Everyone v. U.S. E.P.A., 475 F.3d 1096, 1106 (9th Circuit, 2007)

56. The Undersigned finds that when the EMC sets a strategy such as the one here, and it limits activity in a certain area, that limitation is binding upon all DENR entities until properly and lawfully amended in the correct manner.

57. The EMC, in addition to forbidding such regulation in 15A NCAC 02.0256 on January 13, 2011, approved and endorsed DWQ's updated plan for the Tar-Pamlico river basin. It is entitled The Tar-Pamlico River Basinwide Water Quality Management Plan, which guides DWQ in carrying out its Water Quality Program duties and responsibilities in the Tar-Pamlico River Basin.

58. That Plan indicated two relevant matters here. First, the EMC did not believe in 2001 that it had sufficient information available from ongoing research on atmospheric nitrogen loading to the Basin to control and regulate atmospheric nitrogen. It reiterated that position in 2011 in the Plan. Second, The EMC admits, in effect, that until the statutes were specifically amended to give the authority to DWQ to control atmospheric emissions from swine farms, it does not have statutory authority to regulate such atmospheric emissions and that the swine amendments did not give it the same authority as to cattle or poultry operations.

59. The Plan stated:

Emissions from concentrated animal operations comprise the great majority of atmospheric ammonia emissions Currently, these outputs are not directly regulated. However, one recent improvement addresses new and expanding operations. In 2007, the NC legislature enacted a new law (SB1465) requiring animal waste systems that serve new and expanding swine farms to meet or exceed five performance standards. One of the standards requires such farms to “substantially eliminate atmospheric emission of ammonia.” This new regulation may be expected to substantially cap NH₃ emissions from swine farms at current levels. *However, it does not require reductions from existing operations, nor does it apply to other types of CAFOs, such as cattle and poultry operations.* Thus, NH₃ emissions from existing CAFOs remain the largest unregulated source of atmospheric nitrogen emissions.

Additional research and monitoring is needed to obtain a complete understanding of the magnitude and variability of all atmospheric nitrogen inputs into the Pamlico River estuary. Due to the dynamic nature of the airshed, it is also necessary to develop a better understanding of the relationship between emission levels and deposition rates of atmospheric nitrogen.

See Plan at p. 6.28. (emphasis supplied).

60. DWQ failed to follow the basic steps outlined in that strategy and which was required by a clear legislative mandate of the General Assembly to require BMPs to be developed by the Soil and Water Conservation Commission and chosen by Local Advisory Committees (LAC) and approved by the Basin Oversight Committee (BOC).

61. The only strategy identified to control nitrogen loading to the Tar-Pamlico River Basin by the EMC is the regulation found in 15A NCAC 02B.0256. The EMC followed its statutory mandate by setting up a basinwide strategy for the Tar-Pamlico River Basin by delegating to basinwide groups, not DWQ. Assuming that the limitation as to air deposition of ammonia is applicable in this case, the procedures themselves in 15A NCAC 02B.0256 have not been followed by DWQ in issuing the Rose Acre permit. 15A NCAC 02B.0256 explains in its first provision (a)(1) that:

PROCESS. This Rule requires farmers in the Basin to implement land management practices that collectively, on a county or watershed basis, will achieve the nutrient goals. Local committees and a Basin committee will develop strategies, coordinate activities and account for progress.

62. The Rule also provided for its implementation:

(c) METHOD FOR RULE IMPLEMENTATION. This Rule shall be implemented through a cooperative effort between a Basin Oversight Committee and Local Advisory committees in each county or watershed.

The membership, roles and responsibilities of these committees are set forth in Paragraphs (f) and (g) of this Rule.

63. In July 1999, the EMC adopted a proposed rule which was the predecessor of the present 15A NCAC 02B.0256. In disagreement with certain aspects of that rule, the North Carolina Legislature passed a law (S.L. 2001-355) that "modified" certain things in the then 15A NCAC 02B.0256. It required, among other things, that five to ten farmers, instead of only two, in the impacted area be appointed to the Local Advisory Committee. Furthermore, these farmers would be appointed by the North Carolina Commissioner of Agriculture, not the Directors of DWQ's Division of Water Quality and the Division of Soil and Water Conservation. By this statute, the Legislature indicated that it wanted the agricultural community in each county to choose the BMPs it wished to use to limit nitrogen loading to the Tar-Pamlico River Basin.

64. 15A NCAC 02B.0256, in addition to exempting air deposition of ammonia, also mandates certain procedures, none of which DWQ has followed as pointed out. The DWQ did not follow the directions of the EMC and has, therefore, no authority to issue the BMPs.

65. The nutrient goals set by the EMC was a thirty-percent total nitrogen net loading reduction from 1991 loading from agriculture to the basin and no net increase in total phosphorus loading over 1991 levels. 15A NCAC 02B.0255. The affirmation of Mac Gibbs, a member of the Hyde County Local Advisory Committee, declared that the goal was more than met and has been met every year. Indeed, he testifies that: "If the nitrogen reduction goal is not achieved some day, I expect that the Committee will look at the alternative BMPs and decide what action to take to reduce the nitrogen loading to achieve the goal set in 2001.

I do not remember the issue of atmospheric deposition of ammonia or any other gas has ever been raised at any of the Committee meetings." (Affidavit of Mac Gibbs, ¶¶5 and 6.)

66. An Administrative Law Judge may rule on any prehearing motions authorized by the North Carolina Rules of Civil Procedure, including summary judgment motions. N.C.G.S. §150B-33(b)(3a); 26 N.C.A.C. 3.0105(1).

67. Summary judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. N.C. R. Civ. P. 56(c).

68. A party moving for summary judgment satisfies its burden of proof (1) by showing an essential element of the opposing party's claim is nonexistent or cannot be proven, or (2) by showing that the opposing party cannot produce evidence to support an essential element of his or her claim or (3) the opposing party cannot surmount an affirmative defense which would bar the claim. See *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982).

69. Once such a showing is made, the non-movant must "produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that [it] . . . can at least establish a *prima facie* case at trial." *Hoffman v. Great American Alliance Insurance Co.*, 166 N.C. App. 422, 426, 601 S.E.2d 908, 911 (2004).

70. Where an issue presented is one of statutory interpretation of plain language, the reviewing court is not bound by the agency's interpretation of the statute. *Christenbury Surgery Center v. N.C. Dep't of Health & Human Services*, 138 N.C. App. 309, 531 S.E. 2d 219 (2000).

71. The facts of this case and the applicable law warrant summary judgment in favor of the Petitioner as a matter of law.

DECISION by SUMMARY JUDGMENT

NOW, THEREFORE, based on the foregoing, the Undersigned hereby finds proper authoritative support of the Conclusions of Law noted above. Based upon the foregoing facts in this matter and the Conclusions of Law, it is hereby found and so decided that Petitioner's Motion for Summary Judgment is **GRANTED**.

DWQ is without authority pursuant to the Clean Water Act or N.C.G.S. §§ 143-215 *et seq.* to require Rose Acre Farms, Inc. to obtain an NPDES Permit or establish Best Management Practices (BMPs) in that Permit "for reducing airborne ammonia emissions from the facility." Further, DWQ is without authority to reduce airborne emissions of ammonia in light of the fact that in 2001, the EMC has specifically excluded the regulation of airborne emissions of ammonia under its Nutrient Sensitive Waters Program for the Tar-Pamlico River Basin. Lastly, DWQ exceeded its authority in requiring the contested BMPs because DWQ failed to comply with the procedures set by the North Carolina Legislature and the Environmental Management Commission for the Tar-Pamlico River Basin found in 15 NCAC 02B.0256.

Reversal of the decision of the Division of Water Quality requiring the issuance of an NPDES permit to Rose Acre Farms, Inc. and declaration that the NPDES Permit be declared null and void is proper and correct as a matter of law.

NOTICE

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

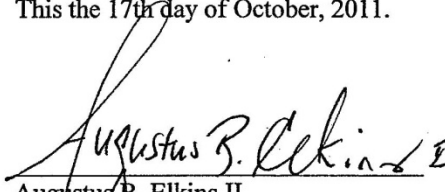
In accordance with N.C. Gen. Stat. § 150B-36 the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set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

each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

The agency shall adopt the Decision of the Administrative Law Judge unless the agency demonstrates that the Decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record. The agency that will make the final decision in this case is the Environmental Management Commission.

IT IS SO ORDERED.

This the 17th day of October, 2011.


Augustus B. Elkins II
Administrative Law Judge

A copy of the foregoing was mailed to:

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This the 19th day of October, 2011.



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STATE OF NORTH CAROLINA
COUNTY OF BURKE

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JUN 22 2011 10:20 AM
IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
10 OSP 6901
Office of
Administrative Hearings

VIVIAN PARKER,

Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF
CORRECTION,

Respondent.

DECISION

This contested case was heard before the Honorable Joe L. Webster, Administrative Law Judge, on 8 June 2011 at the Brunswick County Courthouse, Bolivia, North Carolina.

APPEARANCES

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WITNESSES

The Respondent, North Carolina Department of Correction (hereinafter "Respondent" or "NCDOC") presented testimony from the following six witnesses: Michael Maready, Surveillance Officer for the NCDOC, Division of Community Corrections (hereinafter "DCC"); Jason DeBose, Detective with the Duplin County Sheriff's Department; Michael Tyndall, Detective with the Duplin County Sheriff's Department; Thomas Shane Miller, Detective with the Duplin County Sheriff's Department; Robert Norville, Correctional Captain over Special Operations at Pender Correctional Institution (hereinafter "Pender"); and Ricky Rivenbark, Assistant Superintendent of Custody and Operations at Pender. The Petitioner, Vivian Parker, who testified during the hearing, also presented testimony from her husband Bobby Parker and her mother Vianne Newkirk.

EXHIBITS

Respondent offered the following thirteen exhibits which were admitted into evidence:

- R. Ex. 1 (Michael Maready's 5-14-10 written statement)
- R. Ex. 2 (Jason Debose's written statement)
- R. Ex. 3 (Thomas Shane Miller's written statement)
- R. Ex. 4 (Office Memorandum dated 6-9-10 Re: Lt. Vivian Parker - Internal Investigation)
- R. Ex. 5 (Office Memorandum dated 5-28-10 Re: Lt. Vivian Parker - Internal Investigation)
- R. Ex. 6 (Letter dated 6-2-10 Re: Pre-Disciplinary Conference)
- R. Ex. 7 (Pre-Disciplinary Conference Acknowledgment Form)
- R. Ex. 8 (Letter dated 6-3-10 Re: Recommendation for Disciplinary Action)

- R. Ex. 9 (Letter dated 6-25-10 Re: Dismissal)
- R. Ex. 10 (Letter dated 9-30-10 from Carol Caldwell)
- R. Ex. 11 (NCDOC Personnel Manual - Alcohol/Drug-Free Work Place Policy)
- R. Ex. 12 (NCDOC Personnel Manual - Disciplinary Policy and Procedures)
- R. Ex. 13 (Certified copy of 4-13-11 plea entered by Petitioner)

Petitioner offered the following seventeen exhibits which were admitted into evidence:

- P. Ex. 1 (Recommendation to promote Petitioner to Correctional Sergeant dated 10-15-2004)
- P. Ex. 2 (Performance Appraisal for Petitioner - 11-1-06 through 10-31-07)
- P. Ex. 3 (Recommendation to promote Petitioner to Correctional Lieutenant dated 8-22-08)
- P. Ex. 4 (Personnel Action Report dated 8-21-08)
- P. Ex. 5 (Performance Appraisal for Petitioner - 11-1-07 through 10-31-08)
- P. Ex. 6 (Performance Appraisal for Petitioner - 9/08 through 8/09)
- P. Ex. 7 (Office Memorandum dated 6-9-10 Re: Lt. Vivian Parker - Internal Investigation)
- P. Ex. 8 (Statement of Narcotics Detective T.S. Miller - 4-27-10)
- P. Ex. 9 (Statement of Narcotics Detective J. DeBose - 4-27-10)
- P. Ex. 10 (Statement of Mike Maready - 5-14-10)
- P. Ex. 12 (Excerpt from NCDOC Personnel Manual - Disciplinary Policy and Procedures)
- P. Ex. 13 (Excerpt from Appendix to the NCDOC Personnel Manual - Disciplinary

Policy and Procedures)

- P. Ex. 14 (E-mail from Patricia Chavis to Michael Bell dated 5-17-10)
- P. Ex. 15 (NCDOC transmittal slip dated 5-19-10)
- P. Ex. 16 (Respondent's Response to Petitioner's First Request for Admission, First Set of Interrogatories and First Request for Production of Documents)
- P. Ex. 17 (NCDOC DCC Narratives Report for Brandon Huffin)
- P. Ex. 18 (Arrest warrant for Brandon Huffin)

ISSUE

1. Did Respondent have just cause to terminate its employment of Petitioner 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 Findings of Fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

FINDINGS OF FACT

1. All parties have been correctly designated and jurisdiction and venue are proper.
2. NCDOC has a policy governing the personal conduct of its employees. (R. Ex.12.) The personal conduct policy is found in the NCDOC Personnel Manual as Appendix C to the Disciplinary Policy and Procedures. (R. Ex. 12.) The policy states, "All employees of the Department of Correction shall maintain personal conduct of an acceptable standard as an employee and member of the community. Violations of this policy may result in disciplinary action including dismissal without prior warning." (R. Ex. 12.)
3. An employee of NCDOC is subject to disciplinary action, including dismissal, for unacceptable personal conduct. (R. Ex. 12 at p. 38.) Unacceptable personal conduct includes: (5) "conduct unbecoming a state employee that is detrimental to state service," as listed in the NCDOC Personnel Manual. (R. Ex. 12 at p. 38.) Additionally, "[a]ctions which could result in a conviction of a felony, misdemeanor, or alcohol/drug related offenses including DWI;" "[f]ailure to cooperate with Federal, State, Local or Departmental officials;" and "[v]iolations of law" are listed in the NCDOC Personnel Manual as examples of unacceptable personal conduct. (R. Ex. 12 at pp. 38, 40-41.)
4. Respondent's Alcohol/Drug-Free Workplace policy states in relevant part:

Policy

It is the policy of the Department of Correction to provide a work environment free of alcohol and drugs in order to ensure the safety and well being of employees, correctional clientele, and the general public.

Purpose

This Alcohol and Drug Free Work Place Policy is intended to advise managers and employees of the guidelines of an alcohol/drug free work place,

and to set out the penalties of violation(s) of the guidelines.

Coverage

All employees of the Department of Correction, including permanent full-time, trainee, permanent part-time, permanent hourly, probationary, and temporary shall abide by this policy.

Procedures/Operational Guidelines

...

Possession of an illegal substance in any situation, at work or away from the work site shall be cause for discipline. Possession of controlled substances, i.e. prescription medication or alcohol, must be in compliance with existing laws. Violations will result in discipline up to and including dismissal based on personal misconduct.

Employees who are arrested, detained, or served a warrant for any alcohol/drug related incident, at the work site or away from the work site have 24 hours to file a written report of the situation with the work unit supervisor/manager, i.e., Warden, Superintendent, Judicial District Manager, etc. The work unit supervisor/manager shall make a recommendation for appropriate disciplinary action based on the facts of the case after conducting a thorough investigation.

(R. Ex. 11.)

5. Petitioner began work for Respondent as a correctional officer at its Pender Correctional Institution ("Pender") in October 2000 and was promoted to a correctional lieutenant in September 2008. (Transcript ("Tr.") 152, 153.) Following Petitioner's promotion to correctional lieutenant, she received a performance evaluation from her supervisor for the time period from November 1, 2007 to October 31, 2008. ("Tr." p. 133, P. Ex. 5.) Petitioner's supervisor gave her an overall rating of "outstanding" on said evaluation and wrote the following comments:

Sgt. Parker has been promoted to Lt. in September. Lt. Parker is well deserving of this promotion and highly capable of fulfilling these duties. She is professional and a great role model for all staff. (P. Ex. 5)

6. On August 27, 2009, Petitioner received a performance evaluation for the time period from September 1, 2008 to August 31, 2009. (Tr. p. 133, P. Ex. 6) Petitioner received an overall rating of “outstanding” on said evaluation. (Id.) Based upon the testimony of Superintendent Rivenbark the undersigned finds that Petitioner was a valuable employee and did a good job. (Tr. p. 134)
7. Petitioner was dismissed from her position as a correctional lieutenant at Pender effective June 25, 2010 for unacceptable personal conduct. (R Ex. 9.)
8. The circumstances leading up to Petitioner’s dismissal were as follows. On April 27, 2010, Surveillance Officer Michael Maready with assistance from Duplin County Sheriff’s Office narcotics detectives conducted a warrantless search at Petitioner’s home address located at 724 Ivey Street in Wallace, North Carolina. She had lived at this address for approximately 15 years. (T. 154) This was also the address of record for Petitioner’s 22 year old son, Brandon Huffin. (Tr. 14-15.) Mr. Huffin had lived at 724 Ivey St. with his mother only sporadically since 2008. (T. p. 155) However, he was not living at that address on April 27, 2010, but instead lived with his grandmother Vianne Pigford Newkirk at 726 Bray Street in Wallace for approximately six months prior to said date. (Tr. pp. 1155, 199-200, 215, 227) Ms. Newkirk is Petitioner’s mother. (Tr. pp. 173, 213)
9. On April 27, 2010, Michael Maready was a surveillance officer with the Division of Community Corrections and responsible for conducting warrantless searches of offenders whom had been placed on probation. On April 27 Officer Maready decided to conduct a warrantless search of what he believed to be Brandon Huffin’s residence, who was on probation. (Tr. p. 15) Maready had received a complaint about drug activity in the Ivey Street area. Prior to going to the 724 Ivey Street address on April 27, 2010, Maready requested and obtained the assistance of three narcotics

detectives with the Duplin County Sheriff's Department. Those detectives were Jason Douglas Debose, Michael Glen Tyndall and Thomas Shane Miller. (Tr. pp. 48, 73-74, 156-157, R. Ex. 1-3) Upon arriving at that address, Brandon Huffin was in the front yard. (T. p. 16) Maready told Brandon Huffin he was there to conduct a warrantless search of his residence. Huffin told Maready he did not reside at that address. (T. pp. 16-17) Mr. Maready called his office at the DCC and confirmed that 724 Ivey Street was Mr. Huffin's residence of record, that contact had been made with Huffin at this address previously, and that the DCC office had not been notified that Huffin's residence had changed. (Tr. pp. 16-17, 45.)

10. On April 27, 2010, not long after she returned to her home from purchasing material to build a screened in porch on the back of her house, Petitioner noticed a car in her driveway that she did not recognize. (Tr. p.p. 156-157) Petitioner then went outside and saw her son, Brandon Huffin sitting on the picnic table in the front yard wearing handcuffs. (Id.) Petitioner asked who these individuals were and Maready identified himself as a probation officer. (Id.) Petitioner asked Maready what was happening and Maready explained that Brandon Huffin had refused to allow a search of his residence. (Tr. pp. 17, 157) Petitioner told Maready that Brandon Huffin did not live at her home but instead lived at nearby Bray Street. (T. pp. 17, 49, 75, 155-158) During the same time period, Petitioner's mother, Ms. Newkirk, arrived at the house and told the officers that Brandon Huffin did not live at the 724 Ivey Street address (Tr. pp. 217-219) Ms. Newkirk asked the officers questions about their authority to search the Ivey Street residence. (Tr. p. 219) Brandon Huffin was in Petitioner's home on April 27, 2010 as he was helping the contractor build the screened in porch. (Tr. 156)

11. Petitioner asked Maready and the other officers why they would not search Brandon Huffin's

actual residence at 726 Bray Street. (Tr. p. 159). The officers then asked if Brandon Huffin sometimes stayed with Petitioner and she stated that he did sometimes stay with her. (Tr. pp. 159-160) The officers then asked if they could search where Brandon Huffin slept when he stayed with Petitioner. (Tr. p. 160) Petitioner replied that he sometimes slept in the living room and agreed to allow the officers to search that area. (Id.)

12. Detectives Tyndall and DeBose accompanied Petitioner into her residence at 724 Ivey Street and found documentation indicating that Mr. Huffin lived there at some point in time. The items found by the officers included release orders, arrest warrants, and bank cards which had Huffin's picture, name, and the Ivey Street address on them. (Tr. pp. 20, 49, 75-76, 160; R. Ex. 1.)

13. Detective Tyndall testified that the Petitioner was loud, very rude and disrespectful, "trying to interrupt us, making it very hard for us to do our job." (Tr. p. 75.) While Detective Tyndall was standing in the hallway of a common area in the Petitioner's home he smelled an odor of marijuana that got stronger as he walked down the hallway. (Tr. p. 76.) DeBose told Tyndall that he did not smell marijuana. (Id.) Detective Tyndall asked Petitioner if there was any marijuana in the house, and she responded that there was not any reason for there to be marijuana in the house and that the search had to be stopped and a warrant obtained in order to continue any search of the remainder of the house. (Tr. pp. 76-77.) The officer then began the process of obtaining a search warrant for the residence. (Tr. pp. 60, 77-78)

14. Petitioner was asked to go outside of her house and she complied with this request. (Tr. p. 163) Sometime after going outside, she asked if she could go into her home to get her work uniform so that could report for her scheduled shift at Pender Correctional Facility. (Tr. pp. 63, 86, 164.) The officers did not allow Petitioner to reenter her home. (Tr. pp. 63-64, 164)

15. While the officers were waiting for the search warrant, Petitioner's brother, Tommy Huffin, arrived at the house on 724 Ivey Street. (Tr. pp. 53, 65, 78, 88, 164) DeBose observed Tommy Huffin taking photographs with his cell phone and confiscated Tommy Huffin's cell phone. (Tr. pp. 66, 165) Tommy Huffin and DeBose then began to argue and an altercation ensued which resulted in DeBose pulling his gun. (Tr. pp. 65-66, 165) During this altercation, Petitioner yelled "Fat, shut up" on two separate occasions. (Tr. pp. 66, 166) "Fat" is the nickname that Tommy Huffin's family has given him. (Tr. p. 166) Tommy Huffin was then restrained and handcuffed. (Tr. pp. 66, 89) Petitioner did not interfere with DeBose nor did she argue with him. (Tr. pp. 69, 167)

16. After handcuffing Tommy Huffin, Tyndall decided to have Petitioner handcuffed because "once a fight like that breaks out, everybody around there is going to get secured." (Tr. pp. 88-89). Tyndall concedes, however, that he is not sure if Petitioner was trying to break up the altercation or assist her brother. (Id.) DeBose placed the handcuffs on Petitioner and told her that "you can thank your brother for this." (Tr. p. 167)

17. After the search warrant was obtained officers entered the Petitioner's residence to begin the search. The detectives discovered a loaded Taurus .357 magnum revolver under the mattress in the Petitioner's bedroom (this weapon was reported stolen by a Larry Newkirk in 2008), a .45 pistol and a 9 millimeter assault rifle were discovered in a child's room, some marijuana buds and drug paraphernalia was found in one of the bedrooms (Tr. p. 54); and outside the residence detectives found a black trash bag beside a structure that contained approximately one pound of marijuana and a set of digital scales. (Tr. pp. 20, 43-44, 53-54, 68, 79-80, 90-91, 171; R. Exs. 1 and 4.) The firearm found under Petitioner's mattress had been reported stolen by Larry Newkirk, Petitioner's step-father and Petitioner's mother's husband. (Tr. pp. 67, 169-170) Petitioner did not know that the firearm had

been placed under her mattress by her mother, Ms. Newkirk, during a time at which Ms. Newkirk lived with Petitioner. (Tr. pp. 169-170, 221) Petitioner had no knowledge that the marijuana was present on her property. (Tr. pp. 171-172) The backyard of Petitioner's house is in a known drug area and can be accessed from other houses and yards in the area. (Tr. pp. 43-44, 54, 68, 82, 90-91, 171-172)

18. Petitioner was arrested in part because of her perceived attitude and non-cooperation on that day, specifically, that the Petitioner was not compliant with law enforcement, was adamant in her attempts to re-enter her house while the search was being conducted, and was not in general listening to what the detectives were instructing her to do. (Tr. pp. 80-81.)

19. Petitioner was arrested and charged with possession of a stolen firearm. (Tr. pp. 170-175) She was not charged with possession of the other two firearms that were found in her house. (Id.) Petitioner was also charged with felony possession of marijuana, resisting arrest and maintaining a dwelling which is used by other persons to use, possess, or sell controlled substances. (Tr. pp. 170-177)

20. Brandon Huffin was also arrested and charged with possession of a stolen firearm, possession of firearm by a felon, and malicious conduct by a felon. (Tr. p. 178, P. Ex. 18). The arrest warrant, which was dated April 27, 2010, listed 726 Bray Street in Wallace, North Carolina as Brandon Huffin's address -- not the 724 Ivey Street address. (Tr. pp. 193-194, P. Ex. 18)

21. In accordance with Respondent's rules and policies, Petitioner properly and timely reported the charges to her superior, Captain Cavanaugh, on April 27, 2010. (Tr. pp. 110, 175) At Respondent's request, Petitioner submitted to a drug test on her next scheduled day of work and

passed said drug test. (Tr. pp. 147-148, 175)

22. Robert Lynn Norville, a correctional captain at Pender Correctional facility was subsequently assigned to conduct, and did conduct, an investigation of the April 27, 2010 incident. (Tr., pp. 105-108) As part of his investigation, Captain Norville obtained information from Petitioner, Officer Maready, Detective Tyndall, Detective DeBose and Detective Miller. (R. Ex. 4). He also obtained written statements from Maready, Tyndall and DeBose. (R. Ex. 1-4). Captain Norville subsequently submitted a written report concerning his investigation to Assistant Superintendent of Custody Ricky Rivenbark. (R. Ex. 4) In his report, Captain Norville noted that he believed it was significant that the offender narrative log for Brandon Huffin showed that a probation officer had spoke with Brandon Huffin's mother on August 26, 2009. (Tr. pp. 110-112) Captain Maready did not, however, check the attendance log at Pender Correctional to determine if Petitioner was at work at the time of the alleged contact shown in the offender narrative. (Tr. p. 112, P. Ex.17, p. 10)

23. Assistant Superintendent Rivenbark reviewed Captain Norville's written report. (Tr. p. 117) In describing his role in the investigative and disciplinary process, Assistant Superintendent Rivenbark testified "The investigator puts facts together, presents them to me. I read the facts. I present a letter of recommendation to the Superintendent, and at that point, I'm through with it."

(Id.) On May 28, 2010, Assistant Superintendent Rivenbark submitted a written memorandum to Correctional Administrator Michael T. W. Bell and recommended that Petitioner be dismissed for unacceptable personal conduct. (Tr. p. 118, R. Ex. 5) Assistant Superintendent Rivenbark did not speak with Petitioner prior to making his recommendation even though he testified that Petitioner had always been truthful with him. (Tr. pp. 134, 140) Respondent did not request that Petitioner submit to a polygraph examination even though Respondent had requested other employees to do so

in the past. (Tr. pp. 140, 176)

24. On June 2, 2010, Plaintiff was sent a written notice of a pre-disciplinary conference to be conducted by Correctional Administrator Bell on June 3, 2010. (R. Exhibit 6). Following said pre-disciplinary conference, Correctional Administrator Bell drafted and sent Petitioner a letter, dated June 25, 2010, that notified Petitioner of her dismissal from employment for alleged unacceptable personal conduct. (R. Ex. 9)

25. Assistant Superintendent Rivenbark testified that he was not involved in the decision to dismiss Petitioner. (Tr. p 127) He did not attend the pre-disciplinary conference nor did he discuss the contents of the dismissal letter with Correctional Administrator Bell. (Tr. pp. 128-129)

Norville investigated the April 27, 2010 incident for Respondent and reported his findings to Ricky Rivenbark. (Tr. 106, 109.) Mr. Rivenbark, the Assistant Superintendent of Custody and Operations at Pender, recommended the termination of Petitioner's employment to Michael T.W. Bell, who was the superintendent at Pender at the time. (Tr. 116, 118.) Mr. Rivenbark testified that Petitioner's actions and conduct were unbecoming a state employee that is detrimental to state service. (Tr. 118.)

26. The June 25, 2010 dismissal letter describes the investigation that was conducted concerning the April 27, 2010 incident. (R. Ex. 9) On page 5 of said letter, Correctional Administrator Bell makes the following conclusions with respect to Petitioner's actions on April 27, 2010:

Based on the findings of this investigation, it has been determined that your actions of April 27, 2010 included you interfering with officer of the Duplin County Sheriff's Department during their attempt to conduct their duties, detain and arrest your brother. Your actions resulted in you being charged with the criminal offense of Resisting Public Officer. Your actions in this matter were inappropriate.

In addition, the findings of the search of your residence conducted by law enforcement officials on April 27, 2010 resulted in you being charged with other criminal offenses to include Felony Possession Marijuana, PWISD Marijuana, Maintain Vehicle/Dwelling/Place for Controlled Substance, Manufacture Marijuana, Possession of Drug Paraphernalia and Possession of Stolen Firearm.

Management cannot condone your actions in this matter. Your actions constitute unacceptable personal conduct sufficient to warrant your dismissal. In addition, your actions have the potential to bring discredit to the Department.

Your commission of these offenses will be reported to the Criminal Justice Standards Commission and may have an impact on your cortication. (Id.)

27. With respect to Petitioner's alleged interference with the officer's conduct of their duties, Officer Maready testified that Petitioner "was uncooperative to the point that she was trying to deny that this was the offender's residence." Maready conceded that his Division's own records showed there had a previously been a question as to Brandon Huffin's correct address. (Tr. p. 35, P. Ex. 17, page 18) Brandon Huffin's offender narrative report shows the following entry on November 18, 2008:

Ask DEF why he did not let me know he moved even if it was just up the street. (P. Ex. 17, p. 18)

28. The 726 Bray Street address at which Brandon Huffin resided on April 27, 2010 is just up the street from Petitioner's home on 724 Ivey Street. (Tr. pp. 155-156)

29. With respect to Maready's assertion that he had visited Brandon Huffin at the 724 Ivey Street address on multiple occasions, Brandon Huffin's offender narrative record shows no visits by

Maready to the 724 Ivey Street address between June 14, 2006 and April 26, 2010. (Tr. p. 41, P. Ex. 17)

30. In the June 25, 2010 dismissal letter, Correctional Administrator Bell wrote that Petitioner had to be pushed away more than once before Tommy Huffin could be handcuffed. (R. Ex. 9, p. 2) Significantly, only one witness, Officer Maready, testified at the contested case hearing in this matter that Petitioner had to be pushed away during the altercation between Tommy Huffin and Detective DeBose. While Officer Maready submitted a written statement in which he alleged that Petitioner had to be pushed away, he admitted at the hearing that he was not present during the altercation and thus did not personally observe Petitioner being pushed away. (Tr. p. 39) Of greater significance is the fact that DeBose, who was involved in the altercation with Tommy Huffin, did not testify that Petitioner in any way interfered with his attempts to restrain Tommy Huffin nor did he make such an allegation in the written statement that he provided as part of the investigation. (Tr. pp. 47-73, R. Ex. 2).

31. The individual who made the decision to dismiss Petitioner, Correctional Administrator Bell, did not testify at the contested case hearing in this matter. As such, the record is silent as to the factors that Bell considered and whether he believed there was a rational nexus between Petitioner's alleged conduct and the potential adverse impact of said conduct on the Petitioner's future ability to perform her job duties. The record is also silent as to whether Bell considered a lesser disciplinary action such as a demotion.

32. With the exception of the charge of maintaining a dwelling, all the charges filed against Petitioner as a result of the April 27, 2010 incident were ultimately dismissed. (Tr. pp. 176-193) Petitioner pled no contest to a misdemeanor charge of maintaining a dwelling and was required to

pay a fine and court costs. (Tr. pp. 176-183, R. Ex. 13) Petitioner entered such a plea because she had been advised that she could be found guilty of this charge even though she had no knowledge that the marijuana was present on her property. (Tr. p. 178)

32. The Pender Correctional Facility employs some correctional officers and correctional sergeants who have been convicted of misdemeanors. (Tr. pp. 136-137)

33. On May 28, 2010, Assistant Superintendent of Custody and Operations Rivenbark submitted his findings and recommendation to Michael T.W. Bell, Pender's Correctional Administrator. (R. Ex. 5.) Mr. Rivenbark recommended that Petitioner be dismissed based on his findings that Petitioner's actions and behavior were unbecoming of a state employee and were detrimental to state service. (R. Ex. 5.) Mr. Rivenbark recommended Petitioner's dismissal, in part because she was uncooperative with the law enforcement officers in the performance of their duties on April 27, 2010 and that a search of her home resulted in the discovery of marijuana, drug paraphernalia, and a stolen gun found under her bed. (R. Ex. 5; Tr. 119, 124-125, 142-146.) 20. Further Mr. Rivenbark testified concerning the Respondent's Alcohol/Drug-Free Workplace policy and its practical importance in the context of a prison such as Pender, and why Respondent had lost confidence and trust in Petitioner's ability to properly conduct her job responsibilities based on the drugs that were found in Petitioner's home on April 27, 2010. (Tr. 120, 143-145.)

34. A Pre-Disciplinary Conference was held on June 3, 2010 to provide Petitioner with an opportunity to respond to the issues supporting Correctional Administrator Bell's recommendation for dismissal. (R. Exs. 6-7.) At that conference, Petitioner denied that she was disruptive or raised her voice during the April 27, 2010 incident at her house, that she had never seen a probation officer at her residence, denied that marijuana could be smelled in her home, and denied knowledge of the

gun that was found in her bedroom. (R. Ex. 9 at p. 5.)

35. On June 3, 2010, Petitioner acknowledged by her signature receipt of a letter that it was Correctional Administrator Bell's intention to recommend dismissal. (R. Ex. 8.)

36. Respondent sent Petitioner a letter terminating her employment ("Dismissal Letter") and afforded Petitioner the opportunity to administratively appeal her termination, which Petitioner did. (R. Exs. 9, 10; Tr. 123.)

37. On June 25, 2010, Petitioner acknowledged by her signature receipt of the Dismissal Letter that indicated the NCDOC had approved her dismissal for unacceptable personal conduct. (R. Ex. 9.) In the letter, Correctional Administrator Bell indicated that Petitioner's actions on April 27, 2010 were inappropriate and included Petitioner interfering with officers of the Duplin County Sheriff's Department, and the search of Petitioner's residence resulting in her being charged with resisting a public officer, felony possession marijuana, PWISD marijuana, maintain vehicle/dwelling/place for controlled substance, manufacture marijuana, possession of drug paraphernalia, and possession of a stolen firearm. (R. Ex. 9.)

38. Finally, in response to the Court's question of what was the worst thing Petitioner did during the incident on April 2010 Mr. Rivenbark responded that it was Petitioner not being cooperative with law enforcement to the point of being arrested. (Tr. 14-143.) Viewing the credible testimony in its entirety, the evidence does not show by a preponderance of the evidence that Petitioner was arrested because of her conduct that day. The undersigned finds as a fact and as a matter of law that Petitioner had the right to ask for explanations and the right to stop the search after she had first consented for the officers to search her home. Petitioner also had the right to deny that her home was her son's residence without her assertion being viewed as being uncooperative. Officer Maready apparently

viewed Petitioner's denial that Brandon Huffin lived in her home as being the worst of Petitioner's conduct that day. (T. p. 35, P. Ex. 17.)

39. Although Mr. Rivenbark testified that he personally believed that the Petitioner's actions and conduct in and of itself should constitute just cause for termination, he testified that the criminal charges caused a loss in trust of Petitioner as a supervisory officer. (See generally Tr. 126-127, 143-146.) Further, it is specifically noted in the Dismissal Letter that Petitioner was arrested on April 27, 2010 for resisting a public officer, felony possession marijuana, PWISD marijuana, maintain vehicle/dwelling/place for controlled substance, manufacture marijuana, possession of drug paraphernalia, and possession of a stolen firearm and that management could not condone Petitioner's actions in this matter. Further, the Dismissal Letter indicated that Petitioner's commission of these offenses would be reported to the Criminal Justice Standards Commission and may have an impact on Petitioner's certification. (R. Ex. 9 at pp. 3-5.)

40. On April 13, 2011, Petitioner pled no contest misdemeanor maintain vehicle/dwelling/place for controlled substance. (R. Ex. 13; Tr. 177, 183.)

41. The undersigned does not find that the Respondent witnesses were any more or less credible than the Petitioner or her witnesses.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case per Chapter § 126 and § 150B of the North Carolina General Statutes. 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. In *North Carolina Department of Environment and Natural Resources, Division of Parks and*

Recreation v. Carroll, 358 N.C. 649, 599 S.E.2d 888 (2004) the North Carolina Supreme Court stated: [D]etermining whether a public employer had just cause to discipline its employee requires two separate inquiries: first, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for [the disciplinary action taken]. Citing *Sanders v. Parker Drilling Co.*, 911 F.2d 191 (9th Cir. 1990), *cert. denied*, 500 U.S. 917, 114 L. Ed. 2d 101 (1991).

3. An employer may dismiss an employee for just cause based upon unacceptable personal conduct. 25 NCAC 1J.0604 "Unacceptable Personal Conduct is (4) the willful violation of known or written work rules ;...(6) the abuse of ...patient(s)...over whom the employee has charge or to whom the employee has a responsibility..." 25 N.C.A.C. 1J.0614 "Employees may be dismissed for a current incident of unacceptable personal conduct, without any prior disciplinary action." 25 N.C.A.C.1J.0608
4. At the time of her discharge, Petitioner was a career State employee subject to the provisions of the State Personnel Act, N.C.G.S. § 126-1 et seq. Petitioner, therefore, could only "be warned, demoted, suspended or dismissed by" Respondent "for just cause." 25 NCAC 01J .0604(a). The burden of showing just cause for dismissal rests with the department or agency employer. N.C.G.S. §126-35(d) (2011).
5. One of the two bases for "just cause" is "unacceptable personal conduct," 25 NCAC 01J .0604(b)(2), which includes, inter alia, "conduct for which no reasonable person should expect to receive prior warning," and "conduct unbecoming a state employee that is detrimental to state service." 25 NCAC 01J .0614(8)(a) and (8)(e).
6. The Dismissal Letter specified that Petitioner was being discharged for unacceptable personal

conduct.

7. The Respondent has its own Personnel Manual which outlines specific types of conduct constituting unacceptable personal conduct for which an employee can be disciplined. (R. Ex. 12.)

8. The NCDOC's Personnel Manual states that actions which could result in a conviction of a felony, misdemeanor, or alcohol/drug related offenses including DWI constitutes unacceptable personal conduct for which an employee can be disciplined. (R. Ex. 12.)

9. The NCDOC's Personnel Manual also states that failure to cooperate with Federal, State, Local or Departmental officials constitutes unacceptable personal conduct for which an employee can be disciplined. (R. Ex. 12.) The undersigned finds as a matter of law that Petitioner's conduct did not rise to this level.

10. The NCDOC's Personnel Manual also states that violations of law constitute unacceptable personal conduct for which an employee can be disciplined. (R. Ex. 12.) The undersigned finds as a matter of law that Petitioner's misdemeanor conviction could give rise to discipline, but under the facts and circumstances of this case, the discipline should have been a penalty less than termination.

11. The undersigned finds as a matter of law that Petitioner's participation in the events on April 27, 2010 did not constitute unacceptable personal conduct for which she should have been disciplined with termination.

12. If the Commission shall find that Respondent met its burden that it had just cause to discipline the Petitioner based upon facts and circumstances of this case, the undersigned recommends that the Commission find that penalty of dismissal imposed by Respondent did not match the deed done by Petitioner. Under the specific facts of this case, Respondent should have considered suspending Petitioner without pay, a demotion and other penalties rather than terminating

her employment. She was a long term, outstanding and valued employee of the Agency as evidenced by her work history, performance evaluations, and recent promotion. Moreover, had it not been for Petitioner, the events taking place that day could have been worse. Petitioner sought to calm her brother down by asking him to shut up, cooperated with the officers while in her house, and left her house when asked to do so. Petitioner finds herself in this situation, mostly not because of her own conduct, but because of the conduct of her son.

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

DECISION

The Respondent has not carried its burden of proof that Petitioner's conduct arises to the level of "just cause" for termination, and even if Petitioner's conduct did rise to that level, the undersigned finds as a matter of law that Respondent should have disciplined Petitioner with other than by termination as it has done with other employees who have had misdemeanor convictions. Should the Commission find that there was just cause for disciplining Petitioner, the undersigned recommends that Petitioner be suspended for 30 days and be required to attend additional training as determined by Respondent.

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this decision. N.C. Gen.Stat. Section 150-B-36(a).


In accordance with N.C. Gen.Stat. Section 150B-36 the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the

agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

The agency that will make the final decision in this case is the North Carolina State Personnel Commission. State Personnel Commission procedures and time frames regarding appeal to the Commission are in accordance with Appeal to Commission, section 0.0400 *et. seq.* of Title 25, Chapter 1, Subchapter B of the North Carolina Administrative Code (25 NCAC 01B.0400 *et seq.*).

IT IS SO ORDERED.

This the 26th day of September, 2011.



Joe L. Webster
Administrative Law Judge

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
10 OSP 05078

Major Anthony Moss,
Petitioner,

vs.

Butner Public Safety, a Division of the North
Carolina Department of Crime Control and
Public Safety,
Respondent.

DECISION

THIS MATTER came on for hearing before Beecher R. Gray, Administrative Law Judge,
on September 15-16, 2011, in Raleigh, North Carolina.

APPEARANCES

For Petitioner: Alan McSurely, Attorney at Law
H. Clay Turner, Attorney at Law
P.O. Box 1290
Chapel Hill, NC 27514

For Respondent: Hal Askins, Special Deputy Attorney General
Tamara Zmuda, Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602

WITNESSES

The following Witnesses appeared and testified on behalf of Respondent:

R. Lynn Rudd
Anthony Moss, Petitioner
Robert Stocks
Wayne Hobgood
Atul Patel
Reuben F. Young

EXHIBITS

The following exhibits were admitted into evidence on behalf of Respondent:

- 1A. CD Audio Communications/Calls
- 1B. Transcript of Radio and Telephone Recordings
2. May 6, 2010 – Memo from Hobgood to Moss re: Notification of Complaint and Personnel Complaint Form
3. Butner Public Safety – Policy E.1
4. Butner Public Safety – Policy D.14
5. May 6, 2010 – Memo from Hobgood to Moss re: Notification of Investigatory Placement
6. May 10, 2010 – Letter from Secretary Young to Director John Ledford requesting internal investigation
7. May 11, 2010 – Letter from Secretary Young to Public Disclosure File
8. Call Log [right column labels not admitted for the truth of the matter asserted]
9. Interview with Major Moss
10. April 3, 2010 – Cell Phone Records of Parrot and Williams
11. June 17, 2010 – Memo from Hobgood to Moss re: Pre-Disciplinary Conference
12. June 18, 2010 – Pre-Disciplinary Conference Consent Form
14. Disciplinary Charge Form
15. Appeal of Grievance to Secretary
16. Employee Advisory Committee Report
17. Decision of Secretary in Appeal of Grievance
19. Reservation Modification Log from Best Western

ISSUE

Whether Respondent had just cause to terminate Petitioner's employment.

BASED UPON careful consideration of the sworn testimony by witnesses present at the hearing, giving due regard to the opportunity of the administrative law judge to evaluate the credibility of witnesses, based upon the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, I make the following findings of fact:

FINDINGS OF FACT

1. The parties received notice of hearing by certified mail more than 15 days prior to the hearing and each stipulated on the record that notice was proper.
2. On the night of April 2, 2010 and early morning of April 3, 2010, Petitioner was the on-call administrator ("AOC"), at Butner Public Safety ("BPS").
3. Secretary Reuben Young was, at all times relevant to Petitioner's disciplinary dismissal, Secretary of the North Carolina Department of Crime Control and Public Safety, of which BPS is a division.
4. Chief M. Wayne Hobgood ("Director Hobgood") was, at all times relevant to Petitioner's disciplinary dismissal, the Director of BPS.
5. On the evening of April 2, 2010, all available BPS officers were called to a residential fire scene. The fire was considered a major event for BPS. After the fire was under control, Lt. Daniel Chase Parrott ("Lt. Parrot") left the fire scene to assist with a public request for a bank deposit escort.
6. On April 3, 2010 at 1:48:14 a.m., Lt. Parrot responded to a request from his shift commander, Captain W. Bruce Williams ("Capt. Bruce Williams") by stating via radio that he could not bring a camera as requested to a large house fire Capt. Bruce Williams was working because, "I got one getting on the interstate now that's extremely 10-56 on the 191. He can't hold her in the road. I'm gonna have to go 10-61 [stop] with him." 10-56 is the radio call sign for an intoxicated *pedestrian*. Lt. Parrot later used 10-55, the correct call sign for an intoxicated *driver*.
7. About a minute later, at 1:49:37 a.m., Lt. Parrot radioed Capt. Bruce Williams and said, "You're going to need to 25 [come] here as soon as possible." During that same radio transmission, Lt. Parrott stated that he needed a supervisor on the scene as soon as possible. Capt. Bruce Williams replied that he was "enroute."
8. At 1:56:22 a.m., Capt. Bruce Williams telephoned BPS telecommunicator Lynn Rudd ("Telecommunicator Rudd") and said, "I need you to call Major Moss's home number. Advise him that I have a Trooper stopped. He is a Captain with the Highway Patrol and he is extremely 10-55."
9. Petitioner was asleep in his bed during these calls. He did not know about the radio or telephone communications noted above in paragraphs 6, 7, and 8.

10. At 1:58:08 a.m., Petitioner was awakened by a telephone call from Telecommunicator Rudd who said, "I'm so sorry I have to keep waking you up." Petitioner said, "Aah, what you got?" Telecommunicator Rudd said, "Are you real awake now?" Petitioner said, "Yeah, I am." Telecommunicator Rudd then said, "Chase Parrott has a 10-55 stopped 85 southbound, at 191. Capt. [Bruce] Williams is out with him, and he was described to me as extremely drunk. He's a Highway Patrol Captain, James Williams, Jr. Capt. [Bruce] Williams asked me to ask you to call him on his cell phone." Telecommunicator Rudd told Petitioner he had Capt. Bruce Williams' cell phone number.
11. Petitioner interrupted Telecommunicator Rudd, and asked, "James Williams, he's a Captain?" Telecommunicator Rudd said, "Sorry, I can't hear you." Petitioner asked, "You say he's extremely drunk?" Telecommunicator Rudd said, "Yes, that's what Capt. [Bruce] Williams told me to tell you."
12. At 2:00 a.m., after simultaneous calls, Capt. Bruce Williams and his supervisor, Petitioner, connected with each other using Lt. Parrott's cell phone. Capt. Bruce Williams addressed Petitioner saying, "Major, Parrot stopped a trooper that he thought was a 10-55, but all we've got is a 10-82 ['stranded motorist']."
13. As of the time the incident took place, Lt. Parrot had a reputation within Butner Public Safety for being prone to exaggeration. BPS Director Hobgood noted that Lt. Parrot previously brought in a motorist on suspicion of drunk driving who blew a 0.00 on the breathalyzer.
14. Lt. Parrott has a reputation for being untruthful. Petitioner stated that Lt. Parrott "lies a lot."
15. Petitioner did not trust Capt. Bruce Williams. Petitioner recently had recommended that Capt. Bruce Williams be relieved from his supervisory duties because of bad decisions and had previously written him up for multiple disciplinary actions. Petitioner did not fully believe what Capt. Bruce Williams relayed regarding the traffic stop but took his word in good faith.
16. During the telephone conversation with Capt. Bruce Williams, who was in charge of all patrol activities that shift, Petitioner asked, "Why did he stop him?" Capt. Bruce Williams said, "He thought he was drunk."
17. Petitioner asked, "Did you smell alcohol on him?" Capt. Bruce Williams replied, "No...Parrot smelled a faint odor of alcohol on his breath."
18. Petitioner again asked whether Capt. Bruce Williams smelled alcohol. Capt. Bruce Williams again responded, "No sir, Major. All we've got is a 10-82." The phone call ended in less than two minutes, and Petitioner went back to bed.
19. Petitioner did not instruct Capt. Bruce Williams or Lt. Parrot to not enforce the law during the only communication Petitioner had with them that night: a 2 a.m. phone call, lasting less than two minutes, while Petitioner sat on the side of his bed at home. Respondent called

Petitioner, who testified that he did not instruct Lt. Parrot or Capt. Bruce Williams to not enforce the law. Respondent did not call Capt. Bruce Williams or Lt. Parrot as witnesses.

20. The decision as to what, if any, sobriety tests should be administered was in the judgment and discretion of the law enforcement officers at the scene of the stop, as it is with any other stop, and depends on the actual observations made by the attending on-scene officers.
21. Later in the day, Petitioner called the motorist involved in the incident, James Williams, and asked whether he had been intoxicated the night before, and whether he was treated in a professional manner by Capt. Bruce Williams and Lt. Parrott.
22. Although Petitioner had reservations about Capt. Bruce Williams and Lt. Parrott, Petitioner believed in good faith, based upon what he was told by Capt. Bruce Williams that night, that Capt. Bruce Williams and Lt. Parrott acted appropriately and lawfully, and that they found a stranded motorist at the scene rather than an intoxicated motorist.
23. Director Hobgood became aware of the stop of James Williams when a newspaper reporter from the News and Observer called him on or about April 10, 2010. Prior to the reporter's call, Director Hobgood had no knowledge of the traffic stop.
24. After speaking with the newspaper reporter, Director Hobgood called Petitioner. Petitioner admitted to knowing about the stop, but recalled that it was a stranded motorist. Petitioner failed to inform Director Hobgood that the James Williams stop originally was radioed in as an impaired driver or that Petitioner had been called during the stop.
25. After talking to Petitioner, Director Hobgood reviewed recordings from the communication center of the radio traffic, but not the telephone traffic, regarding the traffic stop. According to Director Hobgood, the radio traffic sounded like James Williams was drunk. Therefore, Director Hobgood called Lt. Parrott in and questioned him about the stop. Lt. Parrott stated that James Williams was a stranded motorist. Director Hobgood asked Lt. Parrott to write a statement regarding the incident. Director Hobgood subsequently called Capt. Bruce Williams on the telephone to discuss the stop. Capt. Bruce Williams said that James Williams was a stranded motorist. Neither Lt. Parrott nor Capt. Bruce Williams informed Director Hobgood that James Williams' vehicle had been towed, that James Williams was taken to a motel, or that Petitioner had been contacted the night of the vehicle stop.
26. On April 13, 2010, Director Hobgood reviewed the recordings from the communications center of the telephone traffic regarding the traffic stop. This was the first time Director Hobgood heard the telephone call where Capt. Bruce Williams told Telecommunicator Rudd to call Petitioner and advising him, "I have a Trooper stopped. He is a Captain with the Highway Patrol and he is extremely 10-55 [impaired]. ... Have him, have him call me I'm out at the scene right now..." This was also the first time Director Hobgood heard Telecommunicator Rudd relay this information to Petitioner, and time he had heard the telephone call from Debbie at the Best Western. (See Res. Ex. 1B)

27. Director Hobgood was very upset that he was not notified about the stop. Director Hobgood considered the stop of James Williams a significant event.
28. After hearing the telephone traffic from the communications center, Director Hobgood confronted Petitioner. At that time, however, Petitioner did not inform Director Hobgood that he had started his own investigation of the April 3, 2010 stop of James Williams.
29. Director Hobgood determined that an investigation of the incident needed to be done and filed Personnel Complaints against both Capt. Bruce Williams and Lt. Parrot.
30. During the investigation of Capt. Bruce Williams and Lt. Parrott, Director Hobgood learned that Petitioner called James Williams on April 3, 2010.
31. Director Hobgood was concerned that Petitioner did not tell him that he had been called the night of the stop and that Director Hobgood was not notified of the stop. Director Hobgood also thought that Petitioner's response to the situation should have been different.
32. On May 6, 2010, Director Hobgood filed a complaint against Petitioner related to his involvement with the stop of James Williams. (Res. Ex. 2)
33. Secretary Reuben Young ("Secretary Young"), Director of the North Carolina Department of Crime Control and Public Safety, directed that an internal investigation of Petitioner be conducted. Secretary Young "thought it would be better if an agency or division other than Butner Public Safety conducted the investigation" of Petitioner, so the investigation of Petitioner was conducted by a sister agency, the North Carolina Alcohol Law Enforcement Division ("ALE").
34. Bob Stocks ("Assistant Director Stocks"), Assistant Director of ALE, conducted the investigation of Petitioner. Stocks testified that he did "an investigation to see if [...] [Petitioner] had had any involvement in the decision to release James Williams during a traffic stop that occurred in April."
35. Assistant Director Stocks found no evidence that Petitioner directed his officers to release a drunken Highway Patrol Captain. Stocks testified: "I found no evidence that [Petitioner] had instructed anybody to do anything based on the witnesses I had available. I found nothing of that nature."
36. Petitioner did not engage in any acts or omissions intended by him to conceal any unlawful conduct by Capt. Bruce Williams or Lt. Parrot stemming from the incident.
37. On June 21, 2010 Petitioner was dismissed from BPS and Assistant Director Stocks was listed as the "Chief Investigator" on the Disciplinary Charge Form.
38. BPS Director Wayne Hobgood was listed as the "Authorizing Person" and signed the Disciplinary Charge Form dismissing Petitioner based upon "Personal Conduct." The boxes for "Grossly Inefficient Job Performance" and "Job Performance" violations were

not checked. Instead, Petitioner was charged with violating BPS Policy E.01 Section IV. Unbecoming Conduct.

39. The Disciplinary Charge Form alleged the following "Specific Acts or Omissions" as the basis for dismissing Petitioner:

It is charged that on or about April 03, 2010 at or near 1:50 am, Major Anthony W. Moss did violate Butner Public Safety Policy E.01 Section IV. Unbecoming Conduct in that he/she: failed to notify BPS Director M. Wayne Hobgood immediately regarding a traffic stop involving NCSHP Captain James Williams, Jr., who was stopped by Lt. Daniel Chase Parrot at or near 1:50 a.m. on April 03, 2010, on suspicion of driving while impaired. In failing to notify Director Hobgood of the incident, Major Moss intended to conceal a serious violation of law by another law enforcement officer.

It is charged that on or about April 03, 2010, Major Anthony W. Moss did violate Butner Public Safety Policy E.01 Section IV. Unbecoming Conduct in that he/she: failed to respond appropriately regarding the traffic stop involving NCSHP Captain James Williams, Jr. In failing to respond appropriately to the traffic stop, Major Moss intended to conceal a serious violation of law by another law enforcement officer.

It is charged that on or about April 03, 2010, Major Anthony W. Moss did violate Butner Public Safety Policy E.01 Section IV. Unbecoming Conduct in that he/she: instructed BPS employees under his supervision to not enforce the law. In instructing the employees to not enforce the law, Major Moss intended to conceal a serious violation of law by another law enforcement officer.

40. Director Hobgood did not write the charges on the Disciplinary Charge Form. They were emailed to him by somebody in Secretary Young's office.
41. Director Hobgood, Petitioner's immediate supervisor, believed the incident involved issues of job performance rather than personal conduct. He believed that since it was a job performance issue, a written warning was appropriate. Secretary Young and Director Hobgood both testified that, in their discussions about Petitioner's case, Director Hobgood pushed for a written warning based on job performance, while Secretary Young desired a disciplinary dismissal premised on unacceptable personal conduct. Secretary Young testified, "[t]o put it plainly, he [Director Hobgood] and I had a different view of it."

BASED UPON the foregoing Findings of Fact, the undersigned hereby makes the following:

CONCLUSIONS OF LAW

1. The parties properly were noticed for a Contested Case hearing before the Office of Administrative Hearings, which has personal and subject matter jurisdiction over this case.
2. When Respondent dismissed him, Petitioner was a career State employee entitled to the protections of the North Carolina State Personnel Act, including the just cause provision of N.C. Gen. Stat. § 126-35.
3. The State Personnel Act permits disciplinary action against career state employees for "just cause." N.C. Gen. Stat. § 126-35. Although "just cause" is not defined in the statute, 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). "The fundamental question... is whether the disciplinary action taken was 'just.' Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations." *N.C. Dept. of Environment and Natural Resources, Division of Parks and Recreation v. L. Clifton Carroll*, 358 N.C. 649, 669; 599 S.E. 2d 888, 900 (2004).
4. "'Just cause' like justice itself, is not susceptible of precise definition.... 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." *Id.* [cites omitted.] "Just cause requires 'misconduct of a substantial nature' and does not encompass 'technical violations of statute or official duty without a wrongful intention'" (emphasis added). *Id.* At 669, 901.
5. Respondent has the burden of proof in this contested case hearing to show that it had just cause to dismiss Petitioner in accordance with N.C. Gen. Stat. § 126-35(d). See also *Teague v. N.C. Dep't of Transportation*, 177 N.C. App. 215, 628 S.E.2d 395, *disc. rev. denied*, 360 N.C. 581 (2006).
6. Administrative regulations provide two grounds for discipline or dismissal based on just cause: Unsatisfactory job performance and unacceptable personal conduct. N.C. Admin. Code tit. 25 r. U.0604(b).
7. Respondent dismissed Petitioner for unacceptable personal conduct.
8. Unacceptable personal conduct includes: (1) conduct for which no reasonable person should expect to receive prior warning; ... or (5) conduct unbecoming a state employee that is detrimental to state service. N.C. Admin. Code tit. 25 r. 1 J.0614(i); see also *Hilliard v. N.C. Dep't of Correction*, 173 N.C. App. 594, 620 S.E.2d 14 (2005).
9. Unacceptable personal conduct is misconduct of a serious nature. *N.C. Dep't of Env't and Natural Resources v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004). One act of unacceptable personal conduct presents just cause for any discipline, up to and including dismissal. *Hilliard*, 173 N.C. App. at 597, 620 S.E. 2d at 17.

10. Petitioner was discharged for allegedly violating Butner Public Safety Policy E.01 Section IV. Unbecoming Conduct. It provides:

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

11. “Unbecoming conduct” under Butner Public Safety Policy E.01 Section IV. is not the same as “unacceptable personal conduct” under N.C. Admin. Code tit. 25 r. 1 J.0614(i). “Unbecoming conduct” under the Butner Public Safety policy encompasses a wide array of behaviors that might include both personal conduct and job performance issues. It provides aspirational as well as prescriptive guidelines for employee conduct.
12. Reviewing whether disciplinary action is supported by just cause generally requires a two-part inquiry: (1) “whether the employee engaged in the alleged conduct,” and (2) “whether that conduct constitutes just cause for the disciplinary action taken.” *N.C. Dep’t of Env’t & Natural Res. v. Carroll*, 599 S.E.2d 888, 898 (N.C. 2004) (quoting *Sanders v. Parker Drilling*, 911 F.2d 191, 194 (9th Cir. 1990)) (internal quotation marks omitted).
13. Here, Respondent alleged three “Specific Acts or Omissions,” for which the Disciplinary Charge Form imposed “Disciplinary Dismissal from Butner Public Safety” on Petitioner.

As to the first charge, Respondent has shown that Petitioner engaged in the alleged conduct of “fail[ing] to notify BPS Director M. Wayne Hobgood immediately regarding a traffic stop involving NCSHP Captain James Williams.” Respondent has failed to demonstrate, however, that “[i]n failing to notify Director Hobgood of the incident, Major Moss *intended to conceal a serious violation of law by another law enforcement officer.*” In this situation, Petitioner’s conduct raises a performance issue, as urged by Petitioner’s immediate supervisor, Director Hobgood, and does not constitute “unacceptable personal conduct” within the meaning of N.C. Admin. Code tit. 25 r. 1 J.0614(i). Nevertheless, given Lt. Parrot’s reversal from his initial statement that he “had” an “extremely intoxicated” motorist to his and Capt. Bruce Williams’ more benign conclusion later that the driver was a “stranded motorist,” and, given that the motorist was a law enforcement officer, it would have been better practice for Petitioner to inform his Director of what he knew about the incident. Respondent was entitled, under the facts of this case, to issue Petitioner a written warning for this performance issue.

As to the second charge, Respondent has failed to show that Petitioner “failed to respond appropriately regarding the traffic stop,” except insofar as Petitioner failed to inform Director Hobgood of the incident as noted above.

As to the third charge, Respondent has failed to show that Petitioner “instructed BPS employees under his supervision to not enforce the law,” and the undersigned has found as fact, that

Petitioner did not do so (Finding of Fact 19). Even though he had reservations about Officers Bruce Williams and Chase Parrott, he appropriately left the law enforcement decisions within the judgment of the officers on the scene of the stop.

14. Respondent has failed to make a showing that Petitioner engaged in "unacceptable personal conduct" under the meaning of N.C. Admin. Code tit. 25 r. 1 J.0614(i).
15. Respondent has failed to meet its burden of proving it had just cause to dismiss Petitioner in accordance with N.C. Gen. Stat. § 126-35.

BASED UPON the foregoing Findings of Fact and Conclusions of Law, I make the following:

DECISION

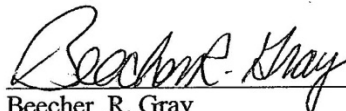
Respondent did not meet its burden of showing, by a preponderance of the evidence, that it had just cause to dismiss Petitioner. Respondent's decision to dismiss Petitioner from his position as a Major in Butner Public Safety is **REVERSED**. Petitioner shall be reinstated to his position with Respondent with all back pay and other benefits retroactively, as if he never had been discharged. Should Respondent find it appropriate, Respondent has sufficient evidence to issue a written warning to Petitioner based on job performance in keeping with Conclusion of Law 13 of this decision. Petitioner shall also be reimbursed his reasonable attorney's fees.

ORDER AND NOTICE

It hereby is ordered that the agency serve a copy of the FINAL DECISION on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C. Gen. Stat. § 150B-26(b).

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

This the 22 day of November, 2011.



Beecher R. Gray
Administrative Law Judge

A copy of the foregoing was mailed to:

Alan McSurely
Attorney at Law
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ATTORNEYS FOR RESPONDENT

This the 22nd day of November, 2011.



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