NORTH CAROLINA REGISTER

VOLUME 27 • ISSUE 06 • Pages 628 - 704

September 17, 2012

PUBLISHED BY
The Office of Administrative Hearings
Rules Division
6714 Mail Service Center
Raleigh, NC 27699-6714
Telephone (919) 431-3000
Fax (919) 431-3104

Julian Mann, III, Director
Camille Winston, Deputy Director
Molly Masich, Codifier of Rules
Dana Vojtko, Publications Coordinator
Julie Edwards, Editorial Assistant
Tammara Chalmers, Editorial Assistant

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: Amy Bason amy.bason@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

This publication is printed on permanent, acid-free paper in compliance with G.S. 125-11.13

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:	270th 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
27:04	08/15/12	07/25/12	08/30/12	10/15/12	10/22/12	12/01/12	01/30/13	05/12/13
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

This publication is printed on permanent, acid-free paper in compliance with G.S. 125-11.13

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.

This publication is printed on permanent, acid-free paper in compliance with G.S. 125-11.13

State of North Carolina

BEVERLY EAVES PERDUE
GOVERNOR

EXECUTIVE ORDER 124

PROTECTING MILITARY INSTALLATIONS BY ENSURING THE COMPATIBILITY OF STATE ACTION WITH MILITARY NEEDS

WHEREAS, North Carolina is the home of six major Department of Defense (DOD)/Department of Homeland Security (DHS) installations: Coast Guard Station, Elizabeth City; Fort Bragg; Marine Corps Air Station Cherry Point; Marine Corps Air Station New River; Marine Corps Base Camp Lejeune; and Seymour Johnson Air Force Base as well as other DOD/DHS activities, properties and organizations; and

WHEREAS, the U.S. military is the second largest sector of North Carolina's economy, accounting for 8% of North Carolina's gross state product, worth $23.4 billion, and more than 416,000 individuals are either directly employed by the military or working in jobs providing goods or services that support the military's presence in North Carolina; and

WHEREAS, defense procurement contracts in North Carolina exceeded $4.1 billion in 2011, and businesses with defense related contracts operate in 87 of North Carolina's 100 counties; and

WHEREAS, North Carolina is committed to supporting and promoting the military within the state; and

WHEREAS, incompatible development of land close to a military installation can adversely affect the ability of such an installation to carry out its mission; and

WHEREAS, many military installations also depend on low altitude aviation training, which could be adversely affected by development; and

WHEREAS, the continued long-term military presence in North Carolina is directly dependent on DOD/DHS's ability to operate not only its installations but also its training and other readiness functions critical to national defense; and

WHEREAS, it is, therefore, of paramount importance to the future of North Carolina to maintain the best possible relationship with all branches of the U.S. military and to promote practices that maintain North Carolina's preeminent position as the best location for military bases and training installations; and

WHEREAS, to those ends, it is critical for all North Carolinians, all North Carolina businesses, all sectors of North Carolina's economy, and especially all branches and agencies of North Carolina's state and local governments to be knowledgeable about not only the military's presence and contributions to our state but also of the military's special and unique requirements that are critical to carrying out its national defense mission;

WHEREAS, North Carolina also seeks to promote the economic development, growth, and expansion of other industries within the state, such as the agriculture/agribusiness industry, the renewable energy industry, the tourism/outdoor recreation industry and the fisheries industry; and

WHEREAS, North Carolina has a vested economic interest in the preservation and enhancement of land uses that are compatible with military activities; and

WHEREAS, it is equally critical that activities of state agencies be planned and executed with full awareness of and sensitivity to their actual and potential impacts on the military; and

WHEREAS, the usefulness of such operational awareness is directly dependent on the timely exchange of information between all potentially affected parties at the earliest possible phase of any agency activity; and

WHEREAS, it is important for state agencies and local governments to consider the needs of our military installations, missions, and communities in their economic development activities.

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

Section 1.

The Secretary of each Cabinet Agency shall designate a Military Affairs Awareness Coordinator, whose responsibilities shall include:

a. Staying informed of the workings and activities of the North Carolina Advisory Commission on Military Affairs and maintaining regular and effective communications with its administrative head, the Governor's Military Advisor;
b. Staying informed of the workings and activities of the North Carolina Commanders' Council and maintaining regular and effective communications with its North Carolina communications portal, the Department of Environment and Natural Resources ("DENR") Military Liaison and the Governor's Military Advisor;
c. Becoming familiar with the North Carolina Working Lands Group and its implementation of the Governor's Land Compatibility Task Force Report;
d. Becoming familiar with the operations of his/her own agency as it could impact military readiness and training;
e. Regularly informing his/her Secretary of any military readiness or training concerns which could impact, or be impacted by, any of his/her Agency's activities or plans;
f. Regularly informing the Governor's Military Advisor of any military readiness or training concerns which could impact, or be impacted by, any of his/her Agency's activities or plans;

g. Regularly informing the North Carolina Commanders' Council, through the Governor's Military Advisor and the DENR Military Liaison, of any military readiness or training concerns which could impact, or be impacted by, any of his/her Agency's activities or plans; and
h. Regularly informing any other state or local agency of any military readiness or training concerns which could impact, or be impacted by, that agency's activities or plans.

Section 2.

All Cabinet Agencies shall:

a. Cooperate with military installations and missions to encourage compatible land use, help prevent incompatible encroachment, and facilitate the continued presence of major military installations in this state;
b. Notify the commanding military officer of a military installation and the governing body in affected counties and municipalities of any economic development or other projects that may impact military installations;
c. Obtain knowledge of military requirements within local communities and throughout the State;
d. Ensure that appropriate training on the requirements of military installations, missions, and communities is provided for staff members and others who work in the areas of land use planning, infrastructure siting, permitting, or economic development;
e. Ensure that land use planning activities take into account the compatibility of land near military installations;
f. Adopt processes to ensure that all agency planning, policy formulation, and actions are conducted with timely consideration having been given to relevant military readiness or training concerns, and with appropriate communications with all potentially affected military entities, including the entities listed in Section 1(a) and 1(b);
g. Collaborate with applicants for grants, site selection, permits or other agency actions to avoid adverse impacts on military readiness or authority and incompatible land uses; and
h. Share information and coordinate efforts with the North Carolina congressional delegation and other federal agencies, as appropriate, to fulfill the objectives of this Executive Order.

Section 3.

The Department of Commerce, DENR, the Department of Transportation, and the Department of Public Safety are specifically directed to work with the North Carolina Commanders' Council and the Advisory Council on Military Affairs to identify issues that could affect the compatibility of development with military installations and operations. Representatives from each aforementioned department shall coordinate with the Governor's Military Advisor regarding any issues identified.

Section 4.

The Secretary of the Department of Commerce and the Secretary of DENR are directed to work with the other cabinet agencies and other interested stakeholders to reexamine existing efforts, and to formulate new initiatives, designed to further the objectives set out in this Executive Order.

Section 5.

The heads of each Council of State Agency and all other state agencies, including boards and commissions, are encouraged to take the actions outlined above in Sections 1 and 2.

Section 6.

Local governments whose communities are affected by military installations are strongly encouraged to adopt criteria and address compatibility of lands adjacent to or closely proximate to existing military installations in their land use plans. Local governments are also strongly encouraged to comply with the provisions of Section 2 of this Executive Order.

Section 7.

This Executive Order is effective immediately. It supersedes and replaces all other executive orders on this subject. It shall remain in effect until rescinded.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this 18th day of August in the year of our Lord two thousand and twelve, and of the Independence of the United States of America the two hundred and thirty-seventh.

Beverly Eaves Perdue
Governor

ATTEST:

Elaine F. Marshall
Secretary of State

4

State of North Carolina

BEVERLY EAVES PERDUE
GOVERNOR

EXECUTIVE ORDER NO. 125

ESTABLISHING THE GOVERNOR'S TASK FORCE ON EMPLOYEE MISCLASSIFICATION

WHEREAS, North Carolina's economy and its workers are adversely affected when businesses hide their activities from government regulatory, taxing, and licensing requirements;

WHEREAS, certain businesses violate insurance, tax, employment, and occupational safety laws by failing to carry mandatory workers compensation insurance, comply with health, safety and licensing requirements, or pay income taxes and payroll taxes that provide funding for unemployment insurance, disability insurance, and other benefits;

WHEREAS, certain businesses also engage in the practice of illegally classifying their employees as independent contractors (a practice referred to as "employee misclassification") and obtain "ghost policies" (an insurance loophole by which an employer purports to insure an employee in the future who does not currently exist and whose hiring is not contemplated) in order to avoid complying with obligations imposed on employers by North Carolina and federal law;

WHEREAS, employee misclassification: (1) deprives employees of protections afforded to them under the law; (2) confers upon businesses who violate the law an unfair competitive advantage over businesses that comply with the law by unlawfully reducing their operating costs; and (3) prevents the government from collecting significant tax revenues;

WHEREAS, task forces serve as an effective tool for promoting cooperation and the sharing of information between state agencies as well as for identifying effective mechanisms to decrease instances by which persons and entities violate the law;

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

Section 1.

The Governor's Task Force on Employee Misclassification (the "Task Force") is hereby established.

Section 2.

The following individuals are invited to serve on the Task Force (or appoint designees to serve on their behalf): The Chair of the Industrial Commission, the Secretary of the Department of Revenue, the Secretary of the Department of Public Safety, the Secretary of the Department of Commerce, the Assistant Secretary of the Division of Employment Security. the Speaker of the House of Representatives, the President Pro Tempore of the Senate, the Commissioner of Insurance, the Commissioner of Labor, the Secretary of State, the Attorney General, the General Manager of the North Carolina Rate Bureau, the State Controller, the Director of the Administrative Office of the Courts, and the President of the North Carolina Sheriff's Association. The Commissioner of Insurance shall chair the Task Force.

Section 3.

The Task Force shall strive to: (a) protect the health, safety and benefits of workers; (b) eliminate any competitive advantage currently enjoyed by businesses who violate the law; and (c) educate employers and employees regarding applicable legal requirements relevant to the practice of employee misclassification.

The Task Force shall have the following duties:

(a) Identify those sectors of the economy where employee misclassification occurs most frequently and focus its efforts on eradicating such conduct within those industries;

(b) Utilize a cooperative approach in working with employers and community groups to reduce the prevalence of employee misclassification by providing educational materials explaining (1) the distinction between employees and independent contractors; and (2) raising public awareness of the problems resulting from employee misclassification;

(c) Determine regulatory or other changes in the laws of North Carolina likely to enhance efforts to enforce laws prohibiting employee misclassification;

(d) Establish a dialogue with the business community, the courts, and community groups regarding the mission and activities of the Task Force;

(e) Identify ways to increase the filing of complaints by employees and other members of the public against noncompliant employers, including a simplification of the process by which workers can report suspected violations of the laws;

(f) Reassess the efficiency of existing investigative and enforcement methods, and formulate new methods, for preventing employee misclassification;

(g) Solicit the assistance of law enforcement agencies and district attorneys with the goal of implementing effective procedures for referring appropriate cases for prosecution where appropriate;

(h) Establish relationships with social services agencies serving disadvantaged persons who have been injured by employee misclassification; and

(i) Promulgate methods for the sharing of relevant information between members of the Task Force.

Section 4.

The Task Force shall submit a report every six months to the Governor summarizing the Task Force's activities during the preceding period. The report shall include, without limitation: (a) a description of the Task Force's efforts and accomplishments during the prior six months; (b) a list of proposed legislative or regulatory changes for reducing the prevalence of employee misclassification, including a description of any existing legal or administrative barriers to accomplishing the mission of the Task Force.

Section 5.

The cabinet agencies are directed -- and the heads of each of the Council of State entities, all other state boards and commissions and the North Carolina Rate Bureau, are strongly encouraged -- to make all reasonable efforts to furnish such information and assistance as the Task Force reasonably deems necessary to accomplish its mission.

Section 6.

No per diem allowance shall be paid to members of the Task Force. Members of the Task Force and staff may receive necessary travel and subsistence expenses in accordance with State law and the policies and regulations of the Office of State Budget and Management.

Section 7.

Nothing in this Executive Order shall be interpreted as requiring any action inconsistent with applicable state or federal law.

Section 8.

This Executive Order shall be effective immediately and shall remain in effect until August 21, 2016, pursuant to N.C. Gen. Stat. 147-16.2, unless earlier rescinded.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this twenty-second day of August in the year of our Lord two thousand and twelve, and of the Independence of the United States of America the two hundred and thirty-seventh.

Beverly Eaves Perdue
Governor

ATTEST:

Elaine F. Marshall by Rodney S Maddox
Elaine F. Marshall
Chief Deputy Secretary of State

STATE BOARD OF ELECTIONS

6400 Mail Service Center • Raleigh, North Carolina 27699-6400

GARY O. BARTLETT
Executive Director

MAILING ADDRESS:
P.O. BOX 27255
RALEIGH, NC 27611-7255

August 23, 2012

John R. Wallace
Wallace and Nordan
3737 Glenwood Avenue, Suite 260
Raleigh, N.C. 27612

Re: Request for Advisory Opinion on Campaign Reporting Question Pursuant to N.C. Gen. Stat. § 163-278.23 in regards to the Bev Perdue Committee

Dear Mr. Wallace,

You have asked for an opinion, on behalf of your client, pursuant to G.S. § 163-278.23 on whether, under Article 22A of Chapter 163 of the General Statutes, some funds of Bev Perdue Committee may be spent organizing, reviewing, and publishing the papers and works of Governor Perdue resulting from her public service career. The opinion expressed in this letter is provided pursuant to G.S. § 163-278.23.

As you are aware, prior to October 1, 2006, a candidate could spend their campaign funds for any purpose. Legislation enacted in 2006 limited the allowable purposes for campaign expenditures by candidate campaign committees. Currently, there are only nine (9) allowable expenditures. If the purpose of an expenditure by a candidate campaign committee is not one of the nine allowed by G.S. § 163-278.16B(a), then the expenditure is prohibited. The permissible purposes are as follows:

(1) Expenditures resulting from the campaign for public office by the candidate or candidate's campaign committee.

(2) Expenditures resulting from holding public office.

(3) Donations to an organization described in section 170(c) of the Internal Revenue Code of 1986 (26 U.S.C. § 170(c)), provided that the candidate or the candidate's spouse, children, parents, brothers, or sisters are not employed by the organization.

(4) Contributions to a national, State, or district or county committee of a political party or a caucus of the political party.

(5) Contributions to another candidate or candidate's campaign committee.

(6) To return all or a portion of a contribution to the contributor.

(7) Payment of any penalties against the candidate or candidate's campaign committee for violation of this Article imposed by a board of elections or a court of competent jurisdiction.

LOCATION: 441 NORTH HARRINGTON STREET • RALEIGH, NORTH CAROLINA 27603 • (919) 733-7173

(8) Payment to the Escheat Fund established by Chapter 116B of the General Statutes.

(9) Legal expense donation not in excess of four thousand dollars ($4,000) per calendar year to a legal expense fund established pursuant to Article 22M of Chapter 163 of the General Statutes.

The expenses associated with the organization of Governor Perdue's papers generated by her years of public service and the publication of works derived there from, are allowable under subparagraph (a)(2) of the statutory provision as they relate to her holding public office. These expenses would include, but not be limited to, staff, academic and professional services, and technology support and hardware. It is an expectation that the papers of all Governors are assembled and organized for research and historical purposes after their term of office. In fact, this is a public service.

The stated intent of the Governor to assign the copyright and donate any proceeds from the copyright and publication of such works to a tax-exempt organization is clearly allowed under subparagraph (a)(3) of G.S.§ 163-278.16B subject to the provision of the non-hiring of family members of the Governor.

The purpose of G.S. § 163-278.16B is to limit the wide discretion candidates and political committees previously were allowed in how campaign funds were spent. That purpose should be kept in mind by all committees. Whenever a committee is in doubt about whether an expenditure is proper, it should, as has been done here, request an opinion pursuant to G.S. §163-278.23. This statute provides a safe harbor for candidates and political committees that comply with the advice of advisory opinions, even if the advice is ultimately determined to be in error. Because this opinion is based solely on the information you have shared, the opinion would not be binding if the facts or purpose changed. Therefore, if at any time the scope of your purpose should change, you will need to contact our office so that we could re-evaluate whether the expenditure would continue to be permissible. As required by law, this opinion will be filed with the Codifier of Rules to be published unedited in the North Carolina Register and the North Carolina Administrative Code.

If you should have any questions, please do not hesitate to contact me or Kim Strach, Deputy Director-Campaign Finance.

Sincerely,

Gary O. Bartlett

Gary O. Bartlett
Executive Director

cc: Julian Mann III, Codifier of Rules

STATE BOARD OF ELECTIONS
6400 Mail Service Center • Raleigh, North Carolina 27699-6400

GARY O. BARTLETT
Executive Director

MAILING ADDRESS:
P.O. BOX 27255
RALEIGH, NC 27611-7255

August 20, 2012

Mr. William Gilkeson Jr.
Ms. Sabra J. Faires
Post Office Box 1351
Raleigh, NC 27602

Re: Request for Advisory Opinion pursuant to N.C. Gen. Stat. § 163-278.23

Dear Mr. Gilkeson and Ms. Faires:

I am in receipt of your letter received May 23, 2012, in which you seek guidance on the following question:

> **"If, pursuant to G.S. 163-278.19(b), the officials or employees of a 501(c)(4) corporation establish a political committee with the 501(c)(4) corporation as the parent entity, is the political committee's solicitation of contributions limited to solicitation of officials, employees, or members of the 501(c)(4) corporation?"**

As provided with your request for opinion, there have been advisory opinions dating back prior to my tenure as Executive Director that provide that the solicitation of contributions to a political committee established by a corporation is limited to the officials and employees of that corporation. These opinions provide that solicitations made by political committees established pursuant to N.C. Gen. Stat. § 163-278.19(b) may not be made outside of the officials and employees of the corporation, insurance company, or business entity or the officials and members of the labor union or professional association. Reversing long-standing opinions of this office adopted well before I assumed this position, is not something to be lightly undertaken, particularly in a major election year. With respect to these prior opinions and after careful review of N.C. Gen. Stat. § 163-278.19(b), it is my opinion that the purpose and intent on this statute was to limit the solicitations of a political committee established under 501(c)(4) to solicitation of its officials, employees, or members of that 501(c)(4) corporation.

LOCATION: 506 NORTH HARRINGTON STREET • RALEIGH, NORTH CAROLINA 27603 • (919) 733-7173

This opinion is based upon the information provided in your May 22, 2012 letter. If any information in that letter should change, you should consult with our office to ensure that this opinion would still be binding. Finally, this opinion will be filed with the Codifier of Rules to be published unedited in the North Carolina Register and the North Carolina Administrative Code.

Sincerely,

Gary O. Bartlett

Mr. Gary O. Bartlett
Executive Director

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

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

Application by: Douglas Everson
Plastic Tubing Industries of Georgia, Inc.
303 Industrial Dr.
Warrenton, GA 30828

For: Modification of Innovative Approval for Multi-Pipe gravelless subsurface wastewater systems

DHHS Contact: Ted Lyon
1-919-707-5875
Fax: 919-845-3973
ted.lyon@dhhs.nc.gov

These applications may be reviewed by contacting the applicant or at 5605 Six Forks Rd., Raleigh, NC, On-Site Water Protection Branch, Environmental Health Section, Division of Public Health. Draft proposed innovative approvals and proposed final action on the application by DHHS can be viewed on the On-Site Water Protection Branch web site: http://www.deh.enr.state.nc.us/osww_new/new1/index.htm.

Written public comments may be submitted to DHHS within 30 days of the date of the Notice publication in the North Carolina Register. All written comments should be submitted to Mr. Ted Lyon, Branch Head, On-site Water Protection Branch, 1642 Mail Service Center, Raleigh, NC 27699-1642, or ted.lyon@dhhs.nc.gov, or fax 919-845-3973. Written comments received by DHHS in accordance with this Notice will be taken into consideration before a final agency decision is made on the innovative subsurface wastewater system application.

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

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

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

For: Modification of Innovative Approval for Infiltrator, EZflow and Biodiffuser gravelless subsurface wastewater systems

DHHS Contact: Ted Lyon
1-919-707-5875
Fax: 919-845-3973
ted.lyon@dhhs.nc.gov

These applications may be reviewed by contacting the applicant or at 5605 Six Forks Rd., Raleigh, NC, On-Site Water Protection Branch, Environmental Health Section, Division of Public Health. Draft proposed innovative approvals and proposed final action on the application by DHHS can be viewed on the On-Site Water Protection Branch web site: http://www.deh.enr.state.nc.us/osww_new/new1/index.htm.

Written public comments may be submitted to DHHS within 30 days of the date of the Notice publication in the North Carolina Register. All written comments should be submitted to Mr. Ted Lyon, Branch Head, On-site Water Protection Branch, 1642 Mail Service Center, Raleigh, NC 27699-1642, or ted.lyon@dhhs.nc.gov, or fax 919-845-3973. Written comments received by DHHS in accordance with this Notice will be taken into consideration before a final agency decision is made on the innovative subsurface wastewater system application.

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

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 14 - COSMETIC ART EXAMINERS

Notice *is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Cosmetic Art Examiners intends to amend the rules cited as 21 NCAC 14H .0401-.0402; and 14R .0105.*

Link to agency website pursuant to G.S. 150B-19.1(c): *http://www.nccosmeticarts.com/uploads/Board/PRAugust2012.pdf*

Proposed Effective Date: *January 1, 2013*

Public Hearing:
Date: *October 2, 2012*
Time: *9:00 a.m.*
Location: *1207 Front Street, Suite 110, Raleigh, NC 27609*

Reason for Proposed Action: *These rules prohibit licensees from working in a fraudulent manner and allow licensees to discard CE documents on a retention schedule.*

Procedure by which a person can object to the agency on a proposed rule: *Interested persons may present oral or written comments at the rule-making hearing. In addition, the record will be open for receipt of written comments from August 24, 2012 until November 16, 2012. Written comments not presented at the hearing should be directed to: Stefanie Kuzdrall, 1207 Front Street, Suite 110, Raleigh, NC 27609.*

Comments may be submitted to: *Stefanie Kuzdrall, 1207 Front Street, Suite 110, Raleigh, NC 27609*

Comment period ends: *November 16, 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 by G.S. 150B-21.4**

SUBCHAPTER 14H - SANITATION

SECTION .0400 - SANITATION PROCEDURES AND PRACTICES

21 NCAC 14H .0401 LICENSEES AND STUDENTS

(a) Each licensee and student shall wash his or her hands with soap and water or an equally effective cleansing agent immediately before and after serving each client.
(b) Each licensee and student shall wear clean garments and shoes while serving patrons.
(c) Licensees or students must not use or possess in a cosmetic art school or shop any of the following:
(1) Methyl Methacrylate Liquid Monomer a.k.a. MMA;
(2) Razor-type callus shavers designed and intended to cut growths of skin including but not limited to skin tags, corns and calluses;
(3) FDA rated Class III devices;
(4) Carbolic acid (phenol) over two percent strength;
(5) Animals including insects, fish, amphibians, reptiles, birds or mammals to perform any service; or
(6) Variable speed electrical nail file on the natural nail unless it has been designed for use on the natural nail.
(d) A licensee or student must not:
(1) Use any product, implement or piece of equipment in any manner other than the product, implement or equipment's intended use as described or detailed by the manufacturer;
(2) Diagnose any medical condition or treat any medical condition unless referred by a physician;

(3) Provide any service unless trained prior to performing the service;
(4) Perform services on a client if the licensee has reason to believe the client has any of the following:
(A) a contagious condition or disease;
(B) an inflamed, infected, broken, raised or swollen skin or nail tissue; or
(C) an open wound or sore in the area to be worked on;
(5) Alter or duplicate a license issued by the Board;
(6) Advertise or solicit clients in any form of communication in a manner that is false or misleading;
(7) Use any FDA rated Class II device without the documented supervision of a licensed physician; or
(8) Use any product that will penetrate the dermis.
(9) Make any statement to member of the public either verbally or in writing stating or implying action is required or forbidden by Board rules when such action is not required or forbidden by Board rules. A violation of this prohibition is considered practicing or attempting to practice by fraudulent misrepresentation.

(e) In using a disinfectant, the user shall wear any personal protective equipment, such as gloves, recommended by the manufacturer in the Material Safety Data Sheet.

Authority G.S. 88B-2; 88B-4; 88B-14.

21 NCAC 14H .0402 COSMETIC ART SHOPS AND SCHOOLS

(a) The cosmetic art facility shall be kept clean.
(b) Waste material shall be kept in receptacles with a disposable liner. The area surrounding the waste receptacles shall be maintained in a sanitary manner.
(c) All doors and windows shall be kept clean.
(d) Furniture, equipment, floors, walls, ceilings and fixtures must be clean and in good repair.
(e) Animals or birds shall not be in a cosmetic art shop or school. Fish in an enclosure and animals trained for the purpose of accompanying disabled persons are exempt.
(f) Cosmetic art shops and schools shall designate the entrance by a sign or lettering.
(g) The owner of a cosmetic art shop or school shall not post any sign that states or implies that some action is required or forbidden by Board rules when such action is not required or forbidden by Board rules. A violation of this prohibition is considered practicing or attempting to practice by fraudulent misrepresentation.

Authority G.S. 88B-2; 88B-4; 88B-14.

SUBCHAPTER 14R - CONTINUING EDUCATION

SECTION .0100 - CONTINUING EDUCATION

21 NCAC 14R .0105 CONTINUING EDUCATION

(a) Each licensee wishing to maintain his/her license shall obtain continuing education during each licensing period. The licensee shall maintain records of attendance of a continuing education course including the following information:
(1) Course title and description;
(2) Date conducted;
(3) Address of location where the course was conducted; and
(4) Continuing education hours earned.
(b) Each licensee must ensure at least 50 percent of subject matter broadens the licensee's knowledge of the cosmetic arts ~~profession.~~ profession in which licensed.
(c) Each instructor must ensure at least 50 percent of subject matter relates to teacher training techniques and enhance the ability to communicate.
(d) The continuing education shall be approved by the board providing it meets the requirements above.
(e) Audits of the licensee's continuing education may be conducted at any time. Upon the Board's request each licensee shall provide completed records to the ~~Board.~~ Board to support the last affirmation given. Records must be maintained until the end of the next renewal cycle after the affirmation for audit purposes.
(f) The Board may suspend a license, revoke a license, or deny the renewal of any license of any licensee who fails to comply with any provision of the rules in this Subchapter. Written justification of the suspension, denial, or revocation shall be given.
(g) Continuing education courses completed prior to an individual's being licensed by the Board shall not qualify for continuing education credit.
(h) Apprentices do not need to earn continuing education for renewal.
(i) Licensees are exempt from eight hours of continuing education requirements until the licensing period commencing after their initial licensure.
(j) After completion of the continuing education requirements for any licensing cycle the licensee shall forward the following:
(1) the license renewal application;
(2) the license renewal fee; and
(3) A date and signature affirming the following pledge: "I hereby certify that I have obtained all continuing education hours required in accordance with the general statute and board rules and regulations. I am aware that false or dishonest misleading information may be grounds for 1) disciplinary action against my license; and further that 2) false statements are punishable by law."
(k) Failure to produce documents or file a response to a request for audit from the Board within 30 days of the request shall result in civil penalty to the licensee in the amount of two hundred fifty dollars ($250.00).
(l) The presentation of fraudulent continuing education documentation to the Board by a licensee shall result in civil penalty of five hundred dollars ($500.00).

(m) Licensees in inactive status can reactivate licensure by taking no less than eight hours of continuing education per year of inactivity up to 24 total hours.

Authority G.S. 88B-2; 88B-4; 88B-21; 88B-24; 88B-29.

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

OFFICE OF ADMINISTRATIVE HEARINGS

Chief Administrative Law Judge
JULIAN MANN, III

Senior Administrative Law Judge
FRED G. MORRISON JR.

ADMINISTRATIVE LAW JUDGES

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

AGENCY	CASE NUMBER	DATE	PUBLISHED DECISION REGISTER CITATION
ALCOHOLIC BEVERAGE CONTROL COMMISSION			
James Ivery Smith, Ivy Lee Armstrong v. ABC Commission	11 ABC 08266	04/12/12	
Trawick Enterprises LLC v. ABC Commission	11 ABC 08901	05/11/12	27:01 NCR 39
Dawson Street Mini Mart Lovell Glover v. ABC Commission	11 ABC 12597	05/23/12	
ABC Commission v. Christian Broome Hunt T/A Ricky's Sports Bar and Grill	11 ABC 13161	05/03/12	
Alabarati Brothers, LLC T/A Day N Nite Food Mart, v. ABC Commission	11 ABC 13545	05/01/12	
Playground LLC, T/A Playground v. ABC Commission	11 ABC 14031	05/16/12	27:01 NCR 64
ABC Commission v. Quick Quality, Inc., T/A Rock Star Grill and Bar	11 ABC 14036	07/05/12	
ABC Commission v. D's Drive Thru Inc. T/A D's Drive Thru	12 ABC 00060	05/29/12	
ABC Commission v. Choudhary, LLC T/A Speedway	12 ABC 00721	05/01/12	
DEPARTMENT OF HEALTH AND HUMAN SERVICES			
Bright Haven Residential and Community Care d/b/a New Directions Group Home v. Division of Medical Assistance, DHHS	10 DHR 00232	04/27/12	
Warren W Gold, Gold Care Inc. d/b/a Hill Forest Rest Home, v. DHHS/Division of Health Service Regulation, Adult Care Licensure Section	10 DHR 01666	05/18/12	
Warren W Gold, Gold Care Inc. d/b/a Hill Forest Rest Home v. DHHS, Division of Health Service Regulation, Adult Care Licensure and Certification Section	10 DHR 05801	05/18/12	
Gold Care Inc. Licensee Hill Forest Rest Home Warren W. Gold v. DHHS, Adult Care Licensure Section	10 DHR 05861	05/18/12	
Mary Ann Barnes v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	11 DHR 6488	07/16/12	
Powell's Medical Facility and Eddie N. Powell, M.D., v. DHHS, Division of Medical Assistance	11 DHR 01451	03/05/12	27:01 NCR 75
Julie Sadowski v. DHHS, Division of Health Service Regulation	11 DHR 01955	04/03/12	
Cherry's Group Home, Alphonso Cherry v. DHSR Michelle Elliot	11 DHR 09590	07/12/12	
Teresa Diane Marsh v. DHHS, Division of Health Service Regulation	11 DHR 11456	04/27/12	
Betty Parks v. Division of Child Development, DHHS	11 DHR 11738	06/20/12	
Lorrie Ann Varner v. DHHS, Regulation Health Care Personnel Registry Section	11 DHR 11867	08/02/12	
Timothy John Murray v. DHHS, Division of Health Service Regulation	11 DHR 12594	06/15/12	
Holly Springs Hospital II, LLC v. DHHS, Division of Health Service Regulation, CON Section and Rex Hospital, Inc., Harnett Health System, Inc. and WakeMed	11 DHR 12727	04/12/12	27:04 NCR 486
Rex Hospital, Inc., v. DHHS, Division of Health Service Regulation, CON Section and	11 DHR 12794	04/12/12	27:04 NCR 486

WakeMed, Holly Springs Hospital II, LLC, and Harnett Health System, Inc.			
Harnett Health System, Inc., v. DHHS, Division of Health Service Regulation, CON Section and Rex Hospital, Inc., Holly Springs Hospital II, LLC, and WakeMed	11 DHR 12795	04/12/12	27:04 NCR 486
WakeMed v. DHHS, Division of Health Service Regulation, CON Section and Holly Springs Hospital II, LLC, Rex Hospital, Inc., and Harnett Health System, Inc	11 DHR 12796	04/12/12	27:04 NCR 486
Sandra Ellis v. DHHS	11 DHR 12959	07/11/12	
Vendell Haughton v. DHHS, Division of Medical Assistance	11 DHR 13616	07/05/12	
Tarsand Denise Morrison v. DHHS, Division of Health Service Regulation	11 DHR 13906	07/11/12	
Care Well of Charlotte Inc, Joy Steele v. DHHS	11 DHR 13909	08/02/12	
Michael Timothy Smith, Jr. v. DHHS, Division of Health Service Regulation	11 DHR 14184	08/01/12	
Cynthia Tuck Champion v. DHHS, Division of Health Service Regulation	11 DHR 14283	06/15/12	
Lauren Stewart v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	11 DHR 14570	06/08/12	
Alice M. Oakley v. Division of Child Development, DHHS	11 DHR 14571	05/15/12	27:04 NCR 508
Althea L. Flythe v. Durham County Health Department	12 DHR 00242	05/17/12	
Jerri Long v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	12 DHR 00361	07/06/12	
Jessica Lynn Ward v. DHHS	12 DHR 00643	05/17/12	
Trinity Child Care II & I v. DHHS, Division of Public Health, Child and Adult Care Food Program	12 DHR 00861	04/20/12	27:04 NCR 518
Faith Home Care of NC, Bonita Wright v. DHHS, DMA	12 DHR 00928	07/25/12	
Angela C Jackson v. DHHS	12 DHR 01097	06/19/12	
Paula N Umstead v. DHHS	12 DHR 01098	05/11/12	
ACI Support Specialists Inc. Case #2009-4249 v. DHHS	12 DHR 01141	06/06/12	
AriLand Healthcare Service, LLC, NCMHL #018-092, Shawn Kuhl Director of Operations v. DHHS, Emery E. Milliken, General Counsel	12 DHR 01165	05/25/12	
Kenneth Holman v. DHHS	12 DHR 01244	06/05/12	
Hillcrest Resthome Inc. ($2000 penalty) v. DHHS	12 DHR 01289	05/30/12	
Hillcrest Resthome Inc. ($4000 penalty) v. DHHS	12 DHR 01290	05/30/12	
Vivian Barrear v. DHHS, Division of Medical Assistance DHHS	12 DHR 01296	06/06/12	
Patricia Satterwhite v. DHHS	12 DHR 01338	07/23/12	
Clydette Dickens v. Nash Co DSS	12 DHR 01625	05/15/12	
Robert Lee Raines v. DHHS	12 DHR 01736	05/30/12	
Ms. Antoinette L. Williams v. DHHS	12 DHR 01739	06/15/12	
Tricia Watkins v. DHHS, Division of Medical Assistance, Office of Medicaid TLW-Auditing Office	12 DHR 01807	06/01/12	
First Path Home Care Services Gregory Locklear v. DHHS	12 DHR 01878	06/22/12	
John and Christina Shipman v. DHHS	12 DHR 02107	07/24/12	
Madeline Brown v. DHHS, Division of Health Service Regulation	12 DHR 02257	06/01/12	
Evelyn Evans v. DHHS, Division of Health Service Regulation	12 DHR 02258	07/02/12	
Precious Haven Inc. Melissa McAllister v. DHHS, Program Integrity	12 DHR 02430	05/18/12	
Michael and Jamie Hart v. Davidson County, Department of Social Services	12 DHR 02542	07/03/12	
Jessica L Thomas v. Randolph County DSS	12 DHR 02955	07/24/12	
Marco Evans v. DHHS, Division of Health Service Regulation	12 DHR 04110	07/30/12	
James C. Bartley v. DHHS, DMA	12 DHR 04116	07/25/12	
Cathy Crosland v. DHHS, Division of Health Service Regulation	12 DHR 05610	08/06/12	
DEPARTMENT OF CORRECTIONS			
Myron Roderick Nunn v. Jennifer O'Neal, Accountant DOC	12 DOC 01022	07/12/12	
DEPARTMENT OF JUSTICE			
Tommy Keith Lymon v. Criminal Justice Education and Training Standards Commission	09 DOJ 03751	07/30/12	27:06 NCR 649
Greary Michael Chlebus v. Criminal Justice Education and Training Standards Commission	11 DOJ 4829	04/27/12	
Dillan Nathanuel Hymes v. Criminal Justice Education and Training Standards Commission	11 DOJ 10315	07/23/12	27:06 NCR 661
Barbara Renay Whaley v. Criminal Justice Education and Training Standards Commission	11 DOJ 10316	04/25/12	
Robert Kendrick Mewborn v. Criminal Justice Education and Training Standards Commission	11 DOJ 10318	04/23/12	
Athena Lynn Prevatte v. Sheriffs' Education and Training Standards Commission	11 DOJ 13148	05/25/12	27:04 NCR 529
Shatel Nate Coates v. Sheriffs' Education and Training Standards	11 DOJ 13151	07/05/12	
Ko Yang v. Sheriff's Education and Training Standards Commission	11 DOJ 13153	06/14/12	
Walter Scott Thomas v. Sheriff's Education and Training Standards Commission	11 DOJ 13155	05/10/12	
Darryl Howard v. Criminal Justice Education and Training Standards Commission	11 DOJ 13157	04/12/12	
Charlesene Cotton v. Criminal Justice Education and Training Standards Commission	11 DOJ 13159	06/05/12	27:04 NCR 538
Steve Michael Galloway, Jr, Private Protective Services Board	11 DOJ 14434	04/23/12	

Justin Thomas Medlin v. Alarm Systems Licensing Board	11 DOJ 14493	04/23/12	
Angela Louise Giles v. Private Protective Services Board	12 DOJ 00557	04/18/12	
Marshall Todd Martin v. Sheriffs' Education	12 DOJ 00650	07/13/12	
Michael Wayne McFalling v. Private Protective Services Board	12 DOJ 00814	05/21/12	
Robert John Farmer v. Alarm Systems Licensing Board	12 DOJ 00887	05/04/12	
Ricky Lee Ruhlman v. Private Protective Services Board	12 DOJ 01211	04/18/12	
Leroy Wilson Jr., Private Protective Services Board	12 DOJ 01293	04/18/12	
Clyde Eric Lovette v. Alarm Systems Licensing Board	12 DOJ 01498	05/02/12	
Andre Carl Banks Jr., v. Alarm Systems Licensing Board	12 DOJ 01695	06/22/12	
Ryan Patrick Brooks v. Private Protective Services Board	12 DOJ 01696	06/05/12	
Dustin Lee Chavis v. Private Protective Services Board	12 DOJ 01697	06/01/12	
Jeffrey Adam Hopson v. Sheriffs' Education and Training Standards Commission	12 DOJ 01761	06/07/12	
John Henry Ceaser v. Sheriffs' Education and Training Standards Commission	12 DOJ 01762	06/18/12	
Jerome Douglas Mayfield v. Private Protective Services Board	12 DOJ 02381	06/15/12	
Elijah K. Vogel v. Private Protective Services Board	12 DOJ 02619	06/05/12	

DEPARTMENT OF STATE TREASURER

Russell E. Greene v. Department of State Treasurer Retirement Systems Division	11 DST 10875	06/14/12	27:04 NCR 543
Marsha W Lilly, Robert L Hinton v. Retirement System	12 DST 01108	05/22/12	

STATE BOARD OF EDUCATION

Louis A. Hrebar v. State Board of Education	11 EDC 01445	07/27/12	
Delene Huggins v. Department of Public Instruction	11 EDC 08899	06/28/12	
Myra F. Moore v. NC Board of Education	11 EDC 11927	05/01/12	
North Carolina Learns Inc. d/b/a North Carolina Virtual Academy	12 EDC 01801	05/18/12	

DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Pamlico-Tar River Foundation, NC Coastal Federation, Environmental Defense Fund, and Sierra Club v. DENR, Division of Water Quality and PCS Phosphate Company, Inc	09 EHR 1839	04/26/12	27:01 NCR 87
Don Hillebrand v. County of Watauga County Health Dept	10 EHR 00933	05/10/12	
House of Raeford Farms, Inc., v. DENR	10 EHR 05508	05/31/12	27:01 NCR 99
Lacy H Caple DDS v. Division of Radiation Protection Bennifer Pate	11 EHR 11454	05/09/12	
Save Mart of Duplin LLC v. DENR	12 EHR 02328	07/25/12	

DIVISION OF EMPLOYMENT SECURITY

Dwight Marvin Wright v. Department of Commerce, Division of Employment Security	12 ESC 05042	07/27/12	

MISCELLANEOUS

Richard Lee Taylor v. City of Charlotte	11 MIS 14140	05/15/12	
Lloyd M Anthony v. New Hanover County Sheriff Office	12 MIS 01803	06/07/12	

OFFICE OF STATE PERSONNEL

Dorothy H. Williams v. DHHS, Central Regional Hospital	10 OSP 5424	03/28/12	27:01 NCR 119
Larry F. Murphy v. Employment Security Commission of North Carolina	10 OSP 03213	06/04/12	
Walter Bruce Williams v. Dept. of Crime Control and Public Safety Butner Public Safety Division	10 OSP 03551	04/23/12	27:01 NCR 148
Daniel Chase Parrott v. Crime Control and Public Safety, Butner Public Safety Division	10 OSP 04792	05/30/12	
Beatrice T. Jackson v. Durham County Health Department	11 OSP 3835	06/08/12	
Brenda D. Triplett v. DOC	11 OSP 4605	03/20/12	27:06 NCR 669
Tommie J. Porter v. DOC	11 OSP 5352	06/05/12	27:06 NCR 678
Fortae McWilliams v. DOC	11 OSP 06236	05/30/12	27:06 NCR 684
Kimberly F. Loflin v. DOT, DMV	11 OSP 06762	07/10/12	
John Hardin Swain v. DOC, Hyde Correctional Inst.	11 OSP 07956	04/23/12	27:06 NCR 693
John Fargher v. DOT	11 OSP 08111	04/18/12	
Fredericka Florentina Demmings v. County of Durham	11 OSP 11498	06/12/12	
William C. Spender v. Dept. of Agriculture & Consumer Services, Veterinary Division	11 OSP 12479	04/27/12	

Terrence McDonald v. NCSU	11 OSP 12682	05/21/12
Terrence McDonald v. DHHS, Emery Milliken	11 OSP 12683	05/18/12
Raeford Quick v. DOC	11 OSP 14436	05/22/12
Bon-Jerald Jacobs v. Pitt County Department of Social Services	12 OSP 00634	06/12/12
Diane Farrington v. Chapel Hill-Carrboro City Schools	12 OSP 01300	07/12/12
Natalie Wallace-Gomes v. Winston-Salem State University	12 OSP 01627	05/15/12
Clark D. Whitlow v. UNC-Chapel Hill	12 OSP 01740	06/12/12
Jeffrey L Wardick, v. Employment Securities Commission of NC	12 OSP 02027	07/17/12
Brenda S. Sessoms v. Department of Public Safety	12 OSP 02507	07/25/12
Sheila Bradley v. Community College System Sandhills Community College	12 OSP 02473	06/06/12
Natalie Wallace-Gomes v. Winston Salem State University	12 OSP 02950	08/01/12
Jaymar v. Department of Corrections, Central Prison	12 OSP 03381	07/20/12

DEPARTMENT OF REVENUE

Jerry Lamont Lindsey v. Department of Revenue	11 REV 1914	07/25/12
Brian Daniel Reeves v. Department of Revenue	12 REV 01539	06/04/12

OFFICE OF SECRETARY OF STATE

Rezell Gore	12 SOS 00492	07/10/12
Jennifer Lynn Pierce-Founder Share Our Shoes v. Secretary of State's Office	12 SOS 01653	07/11/12

UNC HOSPITALS

Onyedika C Nwaebube v. UNC Hospitals	12 UNC 01110	06/25/12
Nephatiya Wade v. UNC Hospitals Chapel Hill NC	12 UNC 01209	07/17/12

STATE OF NORTH CAROLINA	Filed	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF WAKE	2012 JUL 30 PM 1:25	09 DOJ 03751
	Office of Administrative Hearings	
Tommy Keith Lymon, Petitioner,	)	
v.	)	**PROPOSAL FOR DECISION**
North Carolina Criminal Justice Education and Training Standards Commission Respondent.	)	

Pursuant to N.C. Gen. Stat. § 150B-40(e), and on remand from Superior Court Judge Lucy N. Inman's Order for a contested case hearing, Administrative Law Judge Melissa Owens Lassiter heard this case on March 26, 2012 in Raleigh, North Carolina.

APPEARANCES

For Petitioner: Jeffrey P. Gray
Bailey & Dixon, LLP
434 Fayetteville Street, Suite 2500
Raleigh, NC 27601

For Respondent: Catherine F. Jordan
Assistant Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

ISSUE

Did Respondent act properly in proposing to suspend Petitioner's certification as a law enforcement officer based upon Petitioner's criminal convictions of the Class B misdemeanors of Domestic Criminal Trespass, and Injury to Real Property?

STATUTES AND RULES AT ISSUE

12 NCAC 9A .0103(5) and (23)(b)
12 NCAC 9A .0204(b)(3)(A)
12 NCAC 9A .0205(b)(1)
NC.G.S. §14-127
N.C.G.S. § 14-134.3(a)
N.C.G.S. § 17C-10(c)

FINDINGS OF FACTS

Having weighed all the evidence, and assessed the credibility of the witnesses by judging each witness' credibility, demeanor, interests, bias, or prejudice, by considering each witness' opportunity to see, hear, know or remember the facts or occurrences about which the witness testified, and by judging whether the testimony of each witness is reasonable, and whether such testimony is consistent with all other believable evidence in the case, the undersigned finds as follows:

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received proper notice of hearing required pursuant to N.C.G.A. §150B-38, and Petitioner received notice of the proposed suspension of his certification as a law enforcement officer mailed by Respondent on May 7, 2009.

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 9A, to certify law enforcement officers, including denying, revoking or suspending such certification.

3. Rule 12 NCAC 09A .0204(b)(3)(A) provides that the Respondent 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 has committed or been convicted of a criminal offense or unlawful act defined in 12 NCAC 09A .0103 as a Class B Misdemeanor.

4. Rule 12 NCAC 09A .0205(b)(1) provides that when the Respondent Commission suspends or denies the certification of a criminal justice officer, the period of sanction shall be not less than five (5) years; however, the Commission 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 the proposed sanction is the commission or conviction of a criminal offense other than those listed in paragraph (2) of this rule. "Injury to Real Property" in violation of N.C.G.S. § 14-127 and "Domestic Criminal Trespass" in violation of N.C.G.S. § 14-134.3(a), each constitutes a "Class B Misdemeanor" as defined in 12 NCAC 09A .0103(23)(b) and neither are listed in paragraph (2) of this rule.

5. On August 15, 1997, Winterville Police Department submitted a Form F-5A Report of Appointment to Respondent on behalf of Petitioner for appointment as a law enforcement officer. (Resp. Exh. 1) On August 22, 1997, Petitioner received his probationary certification as a law enforcement officer with Respondent. (Resp. Exh. 2) On August 19, 1998, Petitioner received his general certification as a law enforcement officer with Respondent. (Resp. Exh. 3)

6. Petitioner was first employed as an officer with Winterville Police Department, after applying for certification with Respondent. Petitioner separated from the Winterville Police Department on April 30, 2009.

7. On October 28, 2002, Petitioner applied on a Form F-5A for appointment as a police officer with the Pinetops Police Department. On December 12, 2002, Respondent issued

Petitioner a general certification as a law enforcement officer with Respondent for Pinetops Police Department. (Resp. Exh. 5)

8. N.C.G.S. § 17C-10(c) empowers the Respondent Commission to fix other qualifications for employment of criminal justice officers.

9. Richard Squires is an investigator for Respondent Commission, and identified that Respondent received all documents identified as Respondent's Exhibits 1 – 7 in support of the above Findings of Facts.

10. On March 17, 2009, a warrant for arrest was issued to Petitioner for the criminal offenses of domestic criminal trespass and injury to real property. (Resp. Exh. 8) Such warrant stated that on March 17, 2009, Petitioner

> unlawfully and willfully did, at 1866 Centry Dr., Greenville, N.C., enter the premises after being forbidden to do so and remain in the premises after being ordered to leave by Jacqueline Lymon, the lawful occupant, the premises then being occupied by: the present spouse of the defendant, who was living separate and apart from the defendant at the time of the entry and refusal to leave." The warrant for arrest also alleged that on March 17, 2009, Petitioner "unlawfully and willfully did wantonly damage, injure and destroy real property, rear door, the property of the Tommy and Jacquelinc Lymon.

(Resp. Exh. 8) The warrant further alleged that the parties were living separate and apart at the time of entry and refusal to leave. Petitioner was also charged with injury to personal property for damaging the rear door of the property of Tommy and Jacquelyn Lymon. (Resp. Exh. 8)

11. On March 24, 2009, Pinetops Police Department Captain Cappelletti notified Respondent of Petitioner's two criminal charges of domestic criminal trespass and injury to real property. (Resp. Exh. 11) Captain Cappelletti stated that the Pinetops Police Department had not taken action in the incident beyond recovering their service weapon.

12. On April 29, 2009, Petitioner's two criminal charges came on at the Pitt County District Court, the Honorable H. Paul McCoy, presiding. (Resp. Exh. 8) Petitioner had retained an attorney, and pled not guilty to both charges. After a trial in which Ms. Jacqueline Lymon and the arresting deputy sheriff testified, Judge McCoy found Petitioner guilty beyond a reasonable doubt on both criminal charges. Petitioner received a prayer for judgment continued upon payment of costs for both criminal convictions.

13. On May 4, 2009, Winterville Police Department Chief Billy Wilkes sent a notification to Respondent of Petitioner's two criminal charges and their adjudication of a prayer for judgment. (Resp. Exhs 9-10) Chief Wilkes stated that Petitioner resigned his position effective immediately on April 30, 2009.

14. By letter dated May 7, 2009, Respondent's Wayne Woodard notified Petitioner that he was proposing a suspension of Petitioner's law enforcement certification based on Petitioner's two criminal convictions of the Class B misdemeanors of domestic criminal trespass

and injury to real property, and gave Petitioner notice of his right to request an administrative hearing. (Resp. Exh. 13)

15. On May 22, 2009, Captain Cappelletti notified Respondent that the trial court entered a guilty verdict against Petitioner for his two criminal charges of domestic trespass and injury to real property. (Resp. Exh. 12) Petitioner was in receipt of the Commission's Notification of Probable Cause and that he was requesting a hearing, and that on May 22nd, Petitioner had taken a "fit for duty" psychological evaluation and, pending a passing result, would be allowed to return to work.

16. On May 27, 2009, Respondent received Petitioner's request for an administrative hearing, appealing Respondent's proposal to suspend Petitioner's law enforcement certification. On cross-examination, Mr. Squires explained that the Notice letter to Petitioner was an administrative action, and that the "investigation" into the conviction goes no further than the record of the conviction itself. In addition, Respondent Commission's Probable Cause Subcommittee neither investigated nor heard this matter.

17. Petitioner is currently an officer with the Pinetops Police Department. At the time of the incident on March 17, 2009, he was an officer with both Winterville and Pinetops Police Departments.

18. Pursuant to *Krueger v. North Carolina Criminal Justice Education & Training Standards Commission*, 198 N.C. App. 569, 680 S.E.2nd 216 (2009), facts leading up to Petitioner's criminal charges and conviction was allowed into evidence. Since Respondent's administrative rules allow for a sanction less than the five (5) years set forth in 12 NCAC 09A .0205(b)(1), evidence must be placed on the record to provide Respondent Board with a complete record, including any mitigating evidence presented by Petitioner; thus, allowing Respondent full consideration of a possible lesser sanction.

19. At hearing, Petitioner explained that he and his wife, Jacquelyn Lymon, dated for three years, and married in June, 1992. In 1999, they purchased the marital home, located at 1866 Century Drive, Greenville, North Carolina, and lived at that address for approximately ten (10) years. About four (4) years before March 17, 2009, they began having marital problems. Petitioner was working two (2) jobs at Winterville Police Department and Pinetops Police Department, and his wife was working shifts at two (2) jobs as a nurse. He oftentimes worked the 3:00 p.m. to 3:00 a.m. shift and also filled in at the Pinetops Police Department, because they were short-handed. He and his wife worked opposing shifts each weekend and saw each other rarely. They had children in the home.

20. On occasion, Petitioner would leave the house for a few days after he and his wife had a verbal altercation, and would stay with friends until things calmed down at home, and he and his wife could talk through the matter. Before March, 2009, Petitioner left the marital home approximately three (3) times for short durations. Petitioner never had the intention of permanently leaving the marital home, but only wanted things to cool off.

21. Before leaving home for the fourth time, Petitioner and Jacquelyn had a verbal altercation, and Jacquelyn assaulted him. He told her that he was going to call the Sheriff's

Department. She later came into the kitchen, asked him if he had called the Sheriff's Office, and he said, "No." She told him that if he did, she would tell his Chief that he pointed his gun at her. Petitioner decided that he needed to leave to allow her to cool down, and left the house. Even when Petitioner had left the home to stay with friends, he would, on occasion, spend the night in the marital home, if he was working a late-night shift so as not to have to drive either to or from Pinetops or Winterville.

22. A week later, Petitioner and his wife decided to separate, and Petitioner began looking for an apartment.

23. Petitioner found an apartment to rent. On Thursday, March 12, 2009, the landlord of the apartment called Petitioner, and said the apartment would be ready the following week. On Friday, March 13, 2009, Petitioner stayed at the marital home as he worked at Winterville Police Department on Friday night, Saturday and Sunday. On Saturday (March 14), Sunday and Monday nights, Petitioner stayed elsewhere.

24. On Tuesday morning, March 17, 2009, Petitioner called Jacquelyn. She told Petitioner told that he could pick up his personal possessions. When Petitioner arrived at home, Jacquelyn told Petitioner that he could not have his personal possessions. He walked around to the side of the house, went to the back door, and kicked it in. He knew that his wife had called the Sheriff's Office. He waited for the Deputy to arrive, because he did not think he had done anything wrong; it was his house. He was repairing the back door when the Sheriff's Deputy arrived.

25. Petitioner did not leave the scene, because it was his house. There was no assaultive behavior on that day, just a verbal exchange.

26. Petitioner called and advised Lieutenant Eric Stallings, Petitioner's supervisor at Winterville Police Department, what had occurred and that his wife had called the Sheriff's Office. Lt. Stallings came to Petitioner's home.

27. The Deputy Sheriff charged Petitioner with domestic criminal trespass and injury to real property. Petitioner retained an attorney, and pled not guilty. The Judge did not ask him any questions at the trial. The arresting Deputy Sheriff testified and Jacquelyn Lymon testified. The District Court judge found Petitioner guilty of the criminal charges of domestic criminal trespass, and injury to real property. Petitioner received a Prayer for Judgment Continued (PJC.)

28. Petitioner does not recall his attorney telling him the ramifications of the PJC (i.e. that it constitutes a conviction), and he understood that it would not affect his law enforcement certification. He later learned from Chief Wilkes and Lieutenant Stallings that it would affect his law enforcement certification.

29. Chief Wilkes conducted an internal affairs investigation, and suspended Petitioner from the Winterville Police Department.

30. Petitioner explained that all of the door locks on his home had a separate key, so he and Jacquelyn decided to have them all keyed alike. He paid the locksmith to have the doors

re-keyed. On Saturday, March 14, 2009, the locksmith re-keyed all the locks, so Petitioner did not have a key when he went to the marital home on Tuesday, March 17, 2009.

31. Since the incident in question, Petitioner and Jacquelyn have divorced. She is still living in the former marital home, and they currently have a good relationship.

32. Petitioner has never had an allegation of unlawful use of force in his law enforcement career, and has never been charged with an act of violence. In fact, he has never been charged with any crime. He is an eight-year veteran of the U.S. Army.

33. Petitioner considers law enforcement to be his career. He acknowledged that he would have handled things differently if he had to do it all over again.

34. Jacquelyn Lymon, Petitioner's ex-wife, testified at the contested case hearing. She explained that they were married on June 22, 1996. They began purchasing the house in 1999, and she still lives there following their divorce. She has been a nurse for 11 years, and has two (2) children from a previous relationship. Petitioner and she did not have any children together. Their marital problems began in 2006, when both were working two (2) jobs and shifts. At the time of the incident in question, she was working at the Walter B. Jones Center and Port Human Services, both of which are detoxification centers. She was working eight and ten-hour shifts, including weekends.

35. Mrs. Lymon was present during Petitioner's testimony. She explained that when Petitioner left the home after a verbal altercation, he would leave for no more than four (4) days at a time. She also recalls that he was there on Friday night and Saturday morning before the incident on Tuesday, March 17th, but did not return to the house until that Tuesday morning. He called first, and she knew he was coming. She agreed with Petitioner's testimony as to the events of that day. She said that she changed her mind about letting him have his personal possessions, because "reality [was] setting in."

36. She confirmed that they had agreed to have all the doors keyed alike and that Petitioner paid for it.

37. Mrs. Lymon did not think that Petitioner had left the marital home, and thought he would be coming back, until Tuesday morning when he came to pick up his personal possessions. She still thought they could work it out, even if he rented an apartment and their daughter could live in it.

38. Throughout their marriage, Petitioner had never threatened her or harmed her in anyway. She was never scared of Petitioner. Mrs. Lymon admitted that she had hit Petitioner in the past, and that she had also damaged his car on one (1) occasion. She attributed their marital problems to the stress of them both working two (2) jobs, including night shifts, and not seeing each other.

39. She never told Petitioner that he could not come by the house; he was always free to stay there. She stated, "It was his home."

40. She admitted that she had called the Sheriff's Office, and was present when the Deputy arrived. She called the Sheriff's Office because she thought it might keep Petitioner from leaving, the Deputy might counsel them, and Petitioner might change his mind. Now, she regrets calling the Sheriff's Office.

41. She did not think Petitioner had committed a crime in what he did, and he immediately went to the work shed to get tools to repair the door.

42. She always supported Petitioner as a law enforcement officer, and continues to do so. She never saw or heard anything that made her think Petitioner has a temper. She opined that Petitioner is a "good person," and that he "took a lot off me." She has no doubts about Petitioner serving as a law enforcement officer in the future.

43. On cross-examination, Mrs. Lymon indicated that it was not hard for Petitioner to break the back door in. It did not have a deadbolt; it just had a lock on the knob. She was not scared of Petitioner on the day in question.

44. At hearing, Lieutenant Eric Stallings was present during the testimony of the Petitioner, Tommy Keith Lymon, and his wife, Jacquelyn Lymon. At the time of the incident in question, Lieutenant Stallings was employed by the Winterville Police Department. He received a call from either Petitioner or the Sheriff's Office notifying him that a Deputy had been dispatched to the scene.

45. Lieutenant Stallings was Petitioner's supervisor at the Winterville Police Department, and they had worked together for ten (10) years. The Winterville Police Department has 21 officers. At the time of the incident, Lieutenant Stallings was Petitioner's supervisor. Upon his arrival at the scene, Sergeant Keith Godley of the Pitt County Sheriff's Office was either present or arrived shortly thereafter. Lieutenant Stallings did not know Sergeant Godley in that he was new to the Sheriff's Office's Domestic Violence Unit. Petitioner briefed Lieutenant Stallings on what had occurred.

46. Lieutenant Stallings noted that while he was present, and while they were waiting on the Deputy, Jacquelyn Lymon put some of Petitioner's personal possessions into his car for him. At the scene, Lieutenant Stallings tried to explain to Sergeant Godley that no crime had occurred. He explained to him that just because Petitioner had rented an apartment, he had not moved into it, nor had he relinquished the marital residence. Lieutenant Stallings also tried to explain to Sergeant Godley that there could not be an injury to personal property for the same reason; it was still Petitioner's property, and he had not moved out into the apartment or relinquished the marital house to his spouse.

47. Lieutenant Stallings remained at the scene and accompanied Petitioner to the Magistrate's Office and his first appearance. He brought Petitioner back home, then reported the incident to Chief Wilkes of the Winterville Police Department.

48. The Winterville Police Department initiated an internal affairs investigation, however it suspended the investigation when Petitioner resigned from the Department.

49. Lieutenant Stallings has known Petitioner since 2001. He knows him both as a law enforcement officer and personally. He considers him to be a person of "outstanding character." He had never witnessed anything that would call into question Petitioner's fitness to serve as a law enforcement officer. He has never witnessed any act of violence or aggression by Petitioner and has never seen him be rude or untold to anyone, professionally or personally. Lieutenant Stallings has "seen him [Petitioner] take a lot of crap" and remain calm.

50. In Stallings' opinion, there is nothing about the incident in question that should keep him from serving as a law enforcement officer in the future. Although what Petitioner did "may not be right, it was not criminal." He believes that Petitioner was charged only because he was a law enforcement officer.

51. On cross-examination, Lieutenant Stallings acknowledged that he separated from the Winterville Police Department in 2009, as he resigned over the stress of the loss of a fellow officer and friend who was killed in the line of duty. He merely lost interest in being a law enforcement officer.

52. Lieutenant Stallings has never been charged with anything other than a worthless check and speeding except that his wife charged him with communicating threats after he caught her with her boyfriend; the charge was dismissed.

53. Corey Dixon, Sr. has been a detective with the Roanoke Rapids Police Department since December, 2006, and is formerly with the Winterville Police Department. He has known Petitioner since late 2003. Petitioner was his supervisor at the Winterville Police Department.

54. Detective Dixon was familiar with the March 17, 2009, incident, first through media reports and then through Petitioner. He first learned about it on television, called a friend in Winterville, and then attempted to reach Petitioner. It took him a couple of days to contact him, but once he did, Petitioner explained what had occurred.

55. He considers himself to be a personal friend of Petitioner and was familiar with his domestic situation in 2009 and before. He had witnessed arguments between Petitioner and his wife. He was present during the testimony of Petitioner and Mrs. Lymon and their testimony was consistent with his observations. He was aware of Petitioner leaving the marital residence on a number of occasions for "cooling down time" and could recall at least two or three times that he did so.

56. He has never known any incidence of violence and never known Petitioner to threaten anyone with harm. Detective Dixon has no concern over Petitioner ever harming anyone and considers Petitioner to be a "good guy." Professionally, he has always known Petitioner to take the extra step. In his opinion, law enforcement needs more people with Petitioner's abilities. He is a good problem solver without having to arrest people. He considers him to be a good officer and believes he needs to remain a law enforcement officer.

57. On cross-examination, Detective Dixon that nothing about his knowledge of the criminal charges that would change his opinion. In his experience, law enforcement officers are always held to a higher standard. An officer will be arrested when a non-law enforcement

officer would have been released. He agreed with Lieutenant Stallings' assessment that Petitioner was only charged with these two (2) criminal offenses because he was a law enforcement officer. Detective Dixon would not have charged under similar circumstances.

58. Captain James A. Cappelletti was in charge of daily operations for the Pinetops Police Department. He has been employed by the Pinetops Police Department for five (5) years, and before that, was employed by the Tarboro Police Department for three (3) years. Prior to his employment in Tarboro, he was a reserve officer with the Edgecombe County Sheriff's Office for two (2) years. He met Petitioner when he came to the Pinetops Police, and has supervised Petitioner over the last four (4) years. On March 17, 2009, he was Petitioner's supervisor.

59. On the day of the incident, Lieutenant Stallings from the Winterville Police Department called Captain Cappelletti at Petitioner's request. They were both at the Magistrate's Office. Captain Cappelletti could not leave the town limits because he was the only officer on duty. Upon learning the nature of the charges, he asked Lieutenant Stallings to retrieve Petitioner's duty weapon and badge and hold them for the Pinetops Police Department. This request was made in accordance with the personnel handbook for the Pinetops Police Department, which requires an officer to surrender his or her duty weapon and law enforcement identification whenever they are charged with a criminal offense.

60. The Pinetops Police Department did not initially conduct an internal investigation, but upon Petitioner's resignation from the Winterville Police Department, opened an investigation. Captain Cappelletti, as the officer in charge of daily operations, conducted the internal affairs investigation. He became very frustrated with his inability to obtain cooperation from the Deputy that charged Petitioner, the Pitt County Sheriff's Office, the District Attorney's Office, and Mrs. Lymon as all refused to cooperate with him. He was able to interview Lieutenant Stallings, who was present on the scene. It was Lieutenant Stallings' opinion, which he testified to in court, that both the charge and the adjudication were not proper. Captain Cappelletti attempted to talk with the District Court Judge to ask him to make findings of facts in order to determine the reason for the finding of guilt, but the Judge refused to talk to him.

61. Petitioner told him that it was his understanding that a PJC would not cause a problem with his certification. The Chief and he notified Petitioner otherwise.

62. Since there was an inability to complete the internal investigation, Captain Cappelletti relied upon the only witness with knowledge of the incident, Lieutenant Eric Stallings), and therefore requested Petitioner undergo a psychological evaluation.

63. After successfully completing the psychological evaluation, Petitioner was returned to service on May 29, 2009, part-time, pending a hearing before the Criminal Justice Education & Training Standards Commission's Probable Cause Committee.

64. However, the Probable Cause Committee never heard this matter, as Mr. Woodard issue a Notice of Proposed Suspension of Petitioner's certification:

65. In Captain Cappelletti's opinion, the charges were not proper; he would not have charged under similar circumstances and related to the court a factual situation he was faced with similar to this one where he made the decision not to charge.

66. Captain Cappelletti has worked with Petitioner for five (5) years, part-time and full-time, and worked with him "intensely" for the past three (3) years. In his opinion, Petitioner is an "outstanding officer." Captain Cappelletti has no doubts about Petitioner's abilities if he were to continue as a law enforcement officer. He has never known Petitioner to be violent or engaged in any assaultive behavior. In fact, he described Petitioner as "actually, too peaceful." (See Petitioner's Exhibit 1, an open letter from Captain Cappelletti to Respondent)

67. Respondent did not present any rebuttal evidence to rebut the testimony of Petitioner, Mrs. Lymon, or the three (3) officers who testified as to the facts, their opinion of the charges, and Petitioner's character and abilities as a law enforcement officer.

CONCLUSIONS OF LAW

1. Both parties are properly before this Administrative Law Judge. Jurisdiction and venue are proper and both parties received proper notice of the hearing.

2. Respondent North Carolina Criminal Justice Education and Training Standards Commission has certain authority under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapters 9A and 9B, to certify criminal justice officers and to suspend, revoke or deny certification under appropriate circumstances with proof of a rule violation.

3. 12 NCAC 09A .0205(b)(1) provides that when the Respondent Commission suspends or denies the certification of a criminal justice officer, the period of sanction shall be not less than five (5) years. However, the Commission 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 the proposed sanction is the commission or conviction of a criminal offense other than those listed in paragraph (2) of this rule. "Injury to Real Property" in violation of N.C.G.S. § 14-127 and "Domestic Criminal Trespass" in violation of N.C.G.S. § 14-134.3(a), each constitutes a "Class B Misdemeanor" as defined in 12 NCAC 09A .0103(23)(b) and neither are listed in paragraph (2) of this rule.

4. Although Petitioner was convicted of two (2) Class B misdemeanors, the preponderance of the evidence demonstrates that Petitioner did not "commit" either of the crimes as a matter of law. Further, the mitigating evidence shows Petitioner is a dedicated professional law enforcement officer, a peaceful person, a person of good character and fit to continue to serve as a law enforcement officer in North Carolina.

5. Since Petitioner was convicted the two Class B misdemeanors, Respondent is authorized under 12 NCAC 9A.0204(b)(3)A to suspend Petitioner's law enforcement certification. However, given preponderance of the evidence at hearing and the mitigating circumstances produced, the undersigned proposes Respondent not suspend Petitioner's law enforcement certification.

PROPOSED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent finds that while there has been a rule violation, there is no basis to revoke or suspend Petitioner's law enforcement certification. In light of the mitigating circumstances, Respondent should exercise its discretion, and not suspend Petitioner's law enforcement certification.

ORDER AND 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 Criminal Justice Education and Training Standards Commission.

This the 30th day of July, 2012

Melissa Owens Lassiter
Administrative Law Judge

CERTIFICATE OF SERVICE

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

Jeffrey P. Gray
Baily & Dixon
PO Box 1351
Raleigh, NC 27601
ATTORNEY FOR PETITIONER

Catherine F. Jordan
Special Deputy Attorney General
NC Department of Justice
Law Enforcement Liaison Section
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEYS FOR RESPONDENT

This the 30th day of July, 2012.

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

STATE OF NORTH CAROLINA	)	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF WAKE	)	11 DOJ 10315
DILLAN NATHANUEL HYMES	)	
Petitioner,	)	
v.	)	
NORTH CAROLINA CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION,	)	PROPOSAL FOR DECISION
Respondent.	)	

On June 14, 2012, Administrative Law Judge Donald W. Overby, heard this case in Raleigh, North Carolina. This case was heard after Respondent requested, pursuant to N.C. Gen. Stat. § 150B-40(e), designation of an Administrative Law Judge to preside at the hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

APPEARANCES

Petitioner: Dillan Nathanuel Hymes, Pro Se
1516 Quiet Oaks Road
Knightdale, North Carolina 27545

Respondent: Lauren D. Tally, Assistant Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

ISSUE

Does substantial evidence exist to revoke Petitioner's correctional officer certification?

RULES AT ISSUE

12 NCAC 09G.0504(a)
12 NCAC 09G.0505(a)(1)

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.

In making the FINDINGS OF FACT, the undersigned Administrative Law Judge has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to, the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received notice of hearing, and that the Petitioner received by certified mail, the Proposed Revocation of Correction Officer's Certification letter, mailed by Respondent, the North Carolina Criminal Justice Education and Training Standards Commission, on May 25, 2011.

2. The Respondent, 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 09G.0504 (a) provides that the North Carolina Criminal Justice Education and Training Standards Commission shall revoke the certification of a correctional officer . . . when the Commission finds that the officer has committed or been convicted of a felony offense.

4. 12 NCAC 09G.0505(a)(1) provides that when the North Carolina Criminal Justice Education and Training Standards Commission revokes or denies the certification of a correction officer pursuant to 12 NCAC 09G.0504 of this Section, the period of sanction shall be 10 years where the cause of sanction is: (1) the commission or conviction of a felony offense.

5. Petitioner was awarded probationary correctional officer certification by the North Carolina Criminal Justice Education and Training Standards Commission on September 7, 2007, and received general correctional officer certification on September 7, 2008. (Respondent's Exhibit 1)

6. The Criminal Justice Standards Division, on behalf of the Respondent, received notification from the North Carolina Department of Corrections in a letter dated March 22, 2010, that the Petitioner had been charged with the felony offense of obtaining property by false pretense. Edward Zapolsky (hereinafter "Zapolsky"), an investigator with the Criminal Justice Standards Division, then obtained certified copies of the court paperwork related to the Petitioner's criminal charges from the Clerk of Superior Court in Wake County file number 10 CR 202604. (Respondent's Exhibit 1)

7. On February 2, 2010, in Wake County, Petitioner was served with a warrant for his arrest for the felony charge of Obtaining Property by False Pretense in violation of North Carolina General Statute §14-100. This incident involved Petitioner attempting to falsely obtain monies from Jose Mauricio Morataya and North State Acceptance following the transfer of ownership of a motor vehicle. Petitioner demonstrated false pretense by presenting to Morataya a North Carolina title free and clear of a lien when in fact the Petitioner knew that a lien was in effect with the lienor, North State Acceptance. (Exhibit 1 p. 4)

8. Ed Bayne, currently employed by the secondary finance company North State Acceptance, testified at the hearing. Mr. Bayne has worked for North State Acceptance for over five years and serves primarily as a sub-prime auto loan specialist. Bayne works in conjunction with North State Acceptance's car dealership Central Carolina Pre-Owned.

9. Bayne testified that he first became acquainted with Petitioner on November 4, 2009, when Petitioner purchased a 2006 Scion Xb from Central Carolina Pre-Owned. Petitioner financed this vehicle through Bayne's office at North State Acceptance. Bayne testified that the financing agreement between North State Acceptance and Petitioner required Petitioner to place a one thousand dollar down payment on the vehicle. Pursuant to the contract, North State Acceptance retained a lien on the vehicle and Petitioner accrued monthly payments of $310.17. Bayne testified that the financed value of the vehicle at the time of purchase was $10,195.56. On December 10, 2009, Petitioner made his first payment on the vehicle by certified check for $310.17. After this initial payment, however, Bayne testified that Petitioner stopped making payments altogether. (Respondent's Exhibit 2)

10. Bayne testified that North State Acceptance customarily receives title documentation for mortgaged vehicles within twenty days of sale. When North State Acceptance did not receive title to Petitioner's mortgaged vehicle within twenty days, Bayne accessed North Carolina Department of Motor Vehicle records to complete a missing title report. During this inquiry, Bayne noticed that the title for the Scion Xb was listed neither in Petitioner's name nor the previous owner's name. Instead, the title was listed in the name of Jose Mauricio Morataya. Bayne testified that he "knew something was wrong" when he saw Morataya's name on a clean title that did not include North State Acceptance's lien. Bayne testified that he then contacted a sales agent at Central Carolina Pre-Owned who informed him that the paperwork for the vehicle, including North State Acceptance's lien, had been properly submitted to NCDMV weeks prior.

11. Bayne contacted NCDMV to inquire about the status of the title. Shortly thereafter, NCDMV Inspector Cathy Callahan discovered that North State Acceptance's lien on the vehicle had been left off of the title by clerical error. Rather than issuing the title to the mortgage holder North State Acceptance, NCDMV had erroneously issued the title to Petitioner. Further review of the vehicle's records indicated that after receiving a clean title, Petitioner sold the vehicle to Jose Morataya who then assumed title without North State Acceptance's lien.

12. Bayne testified that he called Petitioner in mid-December to inquire about the sale of the vehicle. Despite the sale being confirmed by NCDMV records, Petitioner denied having sold the vehicle. North State Acceptance tracked the vehicle to Burlington and re-possessed it on December 18, 2009.

13. Jose Morataya, to whom the vehicle was sold, testified at the hearing. Morataya recalled that he was first made aware of the vehicle and Petitioner by an ad on Craigslist in December of 2009. Morataya testified that he contacted Petitioner on December 15, 2009 because he was interested in seeing and potentially purchasing the vehicle. The two arranged to meet later that evening at a McDonald's on Miami Boulevard in Durham, North Carolina. Upon meeting, Morataya recalled that Petitioner appeared as though he wanted to complete the deal quickly. Morataya cited the fact that Petitioner came to the meeting with a title that had already been notarized and wanted cash only. Petitioner represented that he owned the vehicle outright, that the title was clean, and that he wanted $10,000 for the car. After test driving the vehicle and comparing the title document to Petitioner's license, Morataya negotiated with Petitioner regarding the price. Morataya ultimately paid Petitioner approximately $7,000 in cash and took possession of both the vehicle and the title documentation.

14. Morataya testified that a week later, on December 18, 2009, he left work and found his vehicle missing. Believing the vehicle to have been stolen, Morataya contacted the police who initiated an investigation. North State Acceptance later contacted Morataya and informed him that they had repossessed the vehicle because Petitioner had falsely sold it when he still owed money.

15. Based on NCDMV Inspector Callahan's inquiry, she served as the complainant and secured a warrant for Petitioner's arrest for the felony charge of obtaining property by false pretense. Petitioner was served on February 2, 2010. (Respondent's Exhibit 1)

16. There is no question that NCDMV erroneously issued the title to Petitioner without having properly recorded the lien.

17. The case was referred to Wake County District Court, but dismissed on January 18, 2011 for lack of jurisdiction. The case was transferred to Durham County, but the county did not pursue prosecution. (Respondent's Exhibit 1)

18. Zapolsky presented Petitioner's case to the Probable Cause Committee of the North Carolina Criminal Justice Education and Training Standards Commission on May 19, 2011. Petitioner did not attend. The Probable Cause Committee found probable cause to believe that the Petitioner had committed the felony offense of obtaining property by false pretense in violation of N.C. GEN. STAT. 14-100. The Petitioner was notified of the findings of the Probable Cause Committee via a certified letter sent to him on May 25, 2011.

19. Petitioner testified at the hearing stating that shortly after purchasing the vehicle from Central Carolina Pre-Owned in November of 2009 he became dissatisfied

with its quality. Petitioner claims that he returned to Central Carolina Pre-Owned in order to return the vehicle, but was informed that the deal was complete. Petitioner claimed that an agent from Central Carolina Pre-Owned informed him he could terminate his ownership responsibilities by transferring the monthly payments to someone else or selling the car and reimbursing North State Acceptance the balance owed.

20. Petitioner testified that he advertised the vehicle on Craigslist and met with Morataya on December 15, 2009 in Durham, North Carolina. Petitioner testified that he informed Morataya that North State Acceptance was owed a balance of roughly $10,000 on the vehicle and that the monthly payments were approximately $300. Petitioner claimed that he took only $1,000 from Morataya so that he could recoup his down payment on the vehicle. Petitioner denied receiving $7,000 from Morataya. Petitioner testified that he "didn't know exactly what he was doing" regarding the transfer of the vehicle to Morataya, and that any mistakes should be attributed to the fact that he is not "in auto-financing."

21. Petitioner's version of the facts is implausible when he claims he allowed Morataya to leave with a $10,000 vehicle while Morataya only paid Petitioner $1,000. He presents no evidence that he and Morataya made an agreement that Morataya would continue the payments on the vehicle. Petitioner lacks credibility and his account is not believable. Petitioner took advantage of erroneously receiving a clean titled to the vehicle from NCDMV, knowing there was a lien on the vehicle, by quickly selling it to Morataya under the false pretense that he owned it outright.

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 Respondent, 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. Pursuant to 12 NCAC 09G .0504(a), the Commission shall revoke the certification of a correctional officer when the Commission finds that the officer has committed or been convicted of a felony offense.

4. Pursuant to 12 NCAC 09G.0505(a)(1), when the Commission revokes the certification of a corrections officer pursuant to 12 NCAC 09G .0504, the period of the sanction shall be 10 years where the cause of sanction is... commission or conviction of a felony offense.

5. The party with the burden of proof in a contested case must establish the facts required by N.C. GEN. STAT. § 150B-23(a) by a preponderance of the evidence. N.C. Gen. Stat. § 150B-29(a). The administrative law judge shall decide the case based upon the preponderance of the evidence. N.C. Gen. Stat. § 150B-34(a).

6. Respondent has the burden of proof in the case at bar. Respondent has shown by a preponderance of the evidence that Respondent's proposed suspension of Petitioner's correctional officer certification is supported by substantial evidence.

7. Respondent may properly suspend the Petitioner's certification pursuant to 12 NCAC 09G .0504(a) for the commission of a felony offense which occurs after certification.

8. "Obtaining Property by False Pretense", in violation of N.C.Gen. Stat. § 14-100 is a Class H felony. A person is guilty of "Obtaining Property by False Pretense" if that person:

(1) obtains or attempts to obtain
(2) anything of value
(3) from another person
(4) with the intent to cheat or defraud that person of the value of the item in question

9. A preponderance of the evidence shows that Petitioner committed the felony criminal offense of obtaining property by false pretense when he falsely represented to Jose Morataya that he owned a vehicle with a clean title for the purpose of profiting from the sale of the mortgaged vehicle. Petitioner's claims that he was given permission to sell the car by Central Carolina Pre-Owned, that he informed Morataya of the payment schedule, and that he only received $1,000 to recoup his down payment lack credibility when weighed against the record of investigation presented by Zapolsky, the testimony sworn by Bayne and Morataya, and the documentation presented by DMV Inspector Callahan. Petitioner's statements are not believable. All substantive evidence in this case suggests that Petitioner knowingly misrepresented the state of his ownership of the vehicle and the title documentation in order to profit from the sale.

10. The findings of the Probable Cause Committee of the Respondent are supported by substantial evidence and are not arbitrary and capricious.

PROPOSAL FOR DECISION

NOW, THEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned recommends Respondent suspend the Petitioner's correctional officer certification for a period of not less than ten (10) years based upon Petitioner's commission of a felony offense, after certification to wit; obtaining property by false pretenses in violation of N.C. Gen. Stat. § 14-100.

NOTICE

The Agency making the Final Decision in this contested case is required to give each party an opportunity to file Exceptions to the Proposal for Decision, to submit Proposed Findings of Fact and to present oral and written arguments to the Agency. N.C. Gen. Stat. §150B-40(e).

The Agency that will make the Final Decision in this contested case is the North Carolina Criminal Justice Education and Training Standards Commission.

This the 23rd day of July, 2012.

Donald W. Overby
Administrative Law Judge

CERTIFICATE OF SERVICE

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

Dillan Nathanuel Hymes
1516 Quiet Oaks Road
Knightdale, NC 27545
PETITIONER

Lauren D. Talley
Assistant Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 23rd day of July, 2012.

Vicky Bullock

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

STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF BURKE	**11 OSP 4605**
Brenda D. Triplett, Petitioner, vs. NC Dept of Correction, Respondent.	**DECISION**

This contested case was heard before Administrative Law Judge Selina M. Brooks on November 28 and 29, 2011 in Morganton, North Carolina.

APPEARANCES

For Petitioner: Robert C. Carpenter, Esq.
Adams Hendon Carson Crow & Saenger, PA
PO Box 2714
Asheville, NC 28802
Phone: (828) 252-7381
Facsimile: (828) 252-5018

For Respondent: Terence D. Friedman
Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Phone: (919) 716-6650
Facsimile: (919) 716-6763

WITNESSES

For Petitioner: Petitioner

For Respondent: Benjamin M. Anderson
Lander Corpening
Shelia Greene
Sarah Lindquist
Gary M. Moore
Sandra H. Morgan
Jane W. Welch

EXHIBITS

For Petitioner, Petitioner's Exhibits ("P. Exs ") 8, 13 (same as R. Ex. 17), 20, 21.

For Respondent, Respondent's Exhibits ("R. Exs.") 1 - 4, 6 - 14, 16, 17.

FINDINGS OF FACT

1. The parties acknowledged proper notice of the date, time and place of the hearing.

2. Respondent employed Petitioner as a correctional health assistant II ("CHA") at Foothills Correctional Institute ("Foothills"). CHAs have relatively minimal medical training and can only perform specific tasks assigned to them by registered nurses ("RNs"). Transcript ("Tr.") 172; Respondent's Exhibit ("R. Ex.") 14 at 483, 487 and Health Services Policy. Among the things that RNs are not permitted to assign to CHAs are tasks involving "ongoing assessment, interpretation or decisionmaking that cannot be logically separated from the task itself." R. Ex. 14 at 487. Respondent reminded Petitioner to remain familiar with Respondent's medical policies. Tr. at 84; R. Ex. 16 at 383. Petitioner was familiar with this restriction on her scope of duty. Tr. at 24. Further, Petitioner admits that she had access to the policy regarding her scope of duty and could have reviewed it at any time but elected not to do so. *Id.* at 81-82.

Sick Call Policy

3. At Foothills, Respondent has a medical section ("Medical") that receives sick call requests ("Sick Call Requests") from inmates. Respondent has a sick call policy ("Sick Call Policy"). *See* R. Ex. 12 at 250-52 (Sick Call Policy in effect as of the date of Petitioner's termination). The Policy provides in pertinent part that Sick Call "shall be conducted" by RNs and that the "original [Sick Call Request] will be filed in sections for outpatient health records under the physician order sheet at the time of the encounter. The yellow copy will be kept on file at the facility as permanent record of sick call requests attached to [a separate form] for that date." *Id.* at 250, 252. In practice at Foothills, the Policy means that the original copies of the Sick Call Requests are sent to a facility in Raleigh and the yellow copies are kept at Foothills. Tr. at 51.

4. This language in the Sick Call Policy did not change from the date Petitioner was hired to the date her employment was terminated. *See* R. Ex. 12 at first three pages (Sick Call Policy in effect when Respondent hired Petitioner in 2008) and 250, 252; *see also* Tr. at 164-65, 171. Petitioner received and reviewed the Sick Call Policy on February 1, 2008. Tr. at 25, 30; R. Ex. 2 at 1588. Petitioner never reviewed the Policy again, including when she began participating in sick calls. *Id.* at 27, 82. Respondent's employees, however, are responsible for reading and acquainting themselves with Respondent's policies. Tr. at 256. Indeed, Respondent

reminded Petitioner to remain familiar with Respondent's medical policies. *Id.* at 84; Ex. 16 at 383. Petitioner admits she may have received updated versions of the Sick Call Policy but, if she did, she did not take the time to review them. Tr. at 397-98.

5. Regional Nurse Supervisor Shelia Greene testified that retaining the two copies of Sick Call Requests pursuant to the Sick Call Policy is necessary in case one copy is lost. Tr. at 158, 173. Maintaining copies of Requests is necessary to ensure continuity of care so that Respondent's medical professionals can ascertain what treatment an inmate previously received. *Id.* Retaining copies of Sick Call Requests is necessary to help Respondent defend itself against internal grievances and lawsuits filed against Respondent by inmates. *Id.* at 174, 257-58.

6. RNs and, if necessary, licensed practical nurses ("LPNs") are responsible for reviewing Sick Call Requests and determining who will be seen by the physician. R. Ex. 12 at 250-52. Petitioner admits all Requests had to be triaged by an RN. Tr. at 28. Ms. Greene testified that the importance of having an RN (rather than a CHA such as Petitioner) review a Sick Call Request is that a CHA is only minimally trained and, therefore unable to make any determinations on the merits of a Request. *Id.* at 172. Petitioner admitted that handling sick call is a core activity for Respondent's medical personnel. *Id.* at 358.

Petitioner's Destruction of Inmate Edmond Gauld's Sick Call Request

7. Jane Welch was the RN assigned to supervise Petitioner on August 10, 2010. Tr. at 32. Michael Jones, an LPN, was also working in Medical at Foothills that day. *Id.* In the afternoon of August 10, Ms. Welch and Mr. Jones were reviewing inmate Requests and ascertaining who would be seen by a physician the next day. *Id.* at 33. Petitioner was sitting with Ms. Welch and Mr. Jones in Medical but her only role in their review process was to indicate which of the inmates who had submitted Requests worked on or off the Foothills campus. *Id.* at 34.

8. Mr. Jones read out loud a Sick Call Request filed by inmate Edmond Gauld for a new pair of "Dr. 2" shoes, a specially ordered type of orthopedic shoes used for, among other things, inmates with diabetes, back injuries, and leg injuries. Tr. at 35-36, 72.

9. To obtain a pair of Dr. 2 shoes, an inmate has to be prescribed the shoes by a physician and then the shoes must be approved by a utilization review board. *Id.* at 36, 39.

10. After Mr. Jones read out Mr. Gauld's Sick Call Request, an inmate nearby claimed that Mr. Gauld had sold his Dr. 2 shoes. *Id.* at 39. Petitioner took the Request from Mr. Jones and, without being asked to do so by anybody, went to another room to see another of Respondent's employees, Sunny Vanderbloom, who Petitioner claims told her that Mr. Gauld had already received a pair of Dr. 2 shoes that year. *Id.* at 35-36. Petitioner admits that Ms. Vanderbloom was not qualified to determine whether Mr. Gauld had a medical need for the shoes requested in the Sick Call Request. *Id.* at 42, 329, 390. Petitioner admits that Ms. Welch

never told her Mr. Gauld was not entitled to a new pair of shoes. *Id.* at 391.

11. Petitioner then returned to where Ms. Welch and Mr. Jones were and paged Mr. Gauld twice over the intercom. Tr. at 43. Ms. Welch and Mr. Jones told Petitioner that she sounded "aggressive" when she paged Mr. Gauld the second time. *Id.* at 75. Ms. Welch testified that Petitioner sounded stern and "pretty loud" when she paged Mr. Gauld. *Id.* at 110-11. Sergeant Benjamin Anderson testified that Petitioner's tone of voice was "loud and aggressive" over the intercom, which concerned him. *Id.* at 147.

12. Mr. Gauld appeared at Medical shortly after Petitioner's second page. Petitioner then told Mr. Gauld that "he would not be eligible" to receive the Dr. 2 shoes he had requested until the next year. Tr. at 45. Petitioner also stated to Mr. Gauld that she had been informed he had sold his prior pair of shoes. *Id.* at 45, 327. Mr. Gauld denied he had done so. *Id.* at 45-46, 48. Petitioner then told Mr. Gauld a second time that he was not eligible to receive a new pair of shoes. *Id.* at 48. Mr. Gauld acknowledged what Petitioner told him and left Medical. *Id.* at 48-49. Petitioner then took the Request to another room and shredded it in a shredder. *Id.* at 49, 76.

13. Petitioner admits that her destruction of the Sick Call Request violated the Policy. Tr. at 49-50. Petitioner admits that, in destroying the Request, she acted outside the scope of her duty as a CHA. *Id.* at 80, 339; *see also id.* at 114 (Ms. Welch confirmed she never instructed Petitioner to destroy the Request and that doing so was against the Policy). Petitioner acknowledged that she did not have the discretion to determine whether an inmate would receive Dr. 2 shoes or had a medical need for them. *Id.* at 39, 46-47. Petitioner acknowledged that, by destroying the Sick Call Request, she was herself deciding whether Inmate Gauld was eligible for the shoes. *Id.* at 40. Petitioner admits that, because she destroyed the Request, Respondent had no record of Mr. Gauld's Request at all. *Id.* at 50-51. In describing her destruction of the Note, Petitioner later wrote: "I am used to trying to weed non-true sick calls while trying to prepare the sick call clinic on third shift. These include things like boots, pharmacy issues and activities." R. Ex. 1 at 135. Petitioner testified that she intended but forgot to write the word "out" after "weed" so that her statement would have read in relevant part: "I am used to trying to weed out non-true sick calls while trying to prepare the sick call clinic on third shift." Tr. at 334.

14. Petitioner claimed at trial that, while working on the third shift (a different shift than that she worked with Ms. Welch on the day Petitioner destroyed Mr. Gauld's Sick Call Request), other RNs destroyed Requests or requested Petitioner to do so. Tr. at 95-97. Petitioner testified that among the RNs who destroyed Requests was Sarah Lindquist. *Id.* at 91-92, 316. Ms. Lindquist testified, however, that neither she nor other RNs on the third shift destroyed Sick Call Requests. *Id.* at 236. Moreover, Ms. Greene testified that Medical staff are not permitted to disregard medical protocols such as the Policy merely because they observe others doing so. *Id.* at 220-21. Further, although Petitioner's scope of duties limited her to following the directions of the RN, Petitioner admits Ms. Welch never instructed her to destroy the Sick Call Request and that she had never seen Ms. Welch destroy such Requests. *Id.* at 80, 100-101, 114 & 391.

15. Regardless of Petitioner's claims about what occurred on the third shift, Petitioner admitted at trial that she disregarded the Policy because she claimed she simply "did not remember" the Policy. Tr. at 101-02.

16. Mr. Corpening testified that Petitioner's discrediting and destruction of Mr. Gauld's Sick Call Request created the potential for Mr. Gauld to be deprived of proper and correct individual medical care. Tr. at 258-59. Ms. Greene testified that where an unqualified individual decides on the merits of a patient's Sick Call Request it creates the potential for injury to the patient because the patient is deprived of review by a qualified medical professional. *Id.* at 175-77. Further, Petitioner's destruction of the Request not only violated the Sick Call Policy but was outside Petitioner's scope of duty as well. *Id.* at 164.

17. Based upon the Undersigned's observation of the demeanor of the witnesses and evaluation of their testimony, the Undersigned finds as fact that the Petitioner's testimony is not credible and the testimony of the witnesses for Respondent is credible.

Petitioner's Response to Inmate Tyrone Hunter

18. Petitioner, Mr. Jones and Ms. Welch were working in Medical on September 13, 2010. At around 8:30 p.m. that evening, Correctional Officer Sandra Morgan telephoned Medical about inmate Tyrone Hunter's complaints of ankle pain and spoke to Petitioner. Tr. at 52-53. Ms. Morgan testified that, after she told Petitioner about Mr. Hunter's complaints, Petitioner stated to her: "Call someone who cares!" *Id.* at 138, 142. Petitioner denied that she ever told Ms. Morgan this and instead claims Ms. Morgan stated it to her. *Id.* at 343.

19. Although Ms. Morgan testified she believed Petitioner was joking, Ms. Greene testified that Respondent does not permit its medical professionals to joke at the expense of patients because doing so can discourage inmates from seeking the care they need. *Id.* at 179-80. Indeed, Petitioner herself admitted that joking by Respondent's medical personnel about patients is "extremely inappropriate." *Id.* at 369.

20. Petitioner also told Ms. Morgan that Mr. Hunter should have reported his ankle pain earlier in the day. *Id.* at 138.

21. Ms. Morgan relayed what Petitioner had said to Sergeant Gary Moore, who then went to Medical to request that somebody see Mr. Hunter. Tr. at 153-54. Mr. Hunter was taken to Medical, where Ms. Welch examined him, put a bandage on him, and gave him Ibuprofen. *Id.* at 53, 344. Mr. Hunter was returned from Medical to his dormitory, and approximately 45 minutes later, Ms. Morgan telephoned Medical again and spoke with Petitioner. *Id.* at 54. Ms. Morgan told Petitioner that Mr. Hunter was still complaining of pain and was now trying to take his bandage off. *Id.* Petitioner spoke with Ms. Welch, who told Petitioner that if Mr. Hunter removed his bandage then it should be sent back to Medical. *Id.* at 54.

22. Approximately five to ten minutes later, Ms. Morgan called Medical again and asked for Petitioner to visit Mr. Hunter's dormitory. Tr. at 55. Petitioner went to the dormitory, where Mr. Hunter told her "very loudly" that he "needed to go to" the emergency room. *Id.* at 56. Petitioner then told Mr. Hunter: "The nurse already told you your injuries didn't warrant it, but I will tell her [Ms. Welch] when I go back to Medical." *Id.* At this point, approximately an hour had passed since Mr. Hunter had been seen by Ms. Welch.

23. Ms. Greene testified that Petitioner acted outside the scope of her duty as a CHA by telling Mr. Hunter that he could not go to the emergency room over an hour after Ms. Welch had seen Mr. Hunter. Tr. at 181, 209. Ms. Greene also testified that, by holding herself out as being able to opine on Mr. Hunter's medical needs when she was unqualified to do so, Petitioner created the potential for serious bodily injury to Mr. Hunter. *Id.* at 181-83.

24. As Petitioner and Ms. Welch left work, Petitioner testified that Ms. Welch asked Petitioner "Are you not going to call Turner?" Tr. at 353. Brandy Turner was an RN at Foothills, and Petitioner testified that she interpreted Ms. Welch's question to her as Ms. Welch "mean[ing] for [Petitioner] to call Brandy and give her the heads up" about Mr. Hunter. *Id.* at 353. Petitioner then telephoned Ms. Turner and told her that Mr. Hunter was complaining of ankle pain, that Ms. Welch thought Mr. Hunter was "faking" his pain and did not need to go the emergency room, and that somebody from Mr. Hunter's dormitory would probably call Ms. Turner that evening. Tr. 58-59, 352.

25. Ms. Greene testified that Petitioner's statement to Ms. Turner was inappropriate and outside Petitioner's scope of duty as a CHA because she was not entitled to convey the assessment, only Ms. Welch was. Tr. 180-81, 210.

26. Based upon the Undersigned's observation of the demeanor of the witnesses and evaluation of their testimony, the Undersigned finds as fact that the Petitioner's testimony is not credible and the testimony of the witnesses for Respondent is credible.

Respondent's Termination of Petitioner

27. Respondent initiated an investigation of Petitioner's destruction of Mr. Gauld's Sick Call Request and later expanded that investigation to include the interaction of Petitioner and other medical staff with Mr. Hunter on September 13 and the following days. As a result of the investigation, Respondent terminated Petitioner's employment. R. Ex. 3.

28. Respondent's personnel manual advises employees that they may be terminated for unacceptable personal conduct or grossly inefficient job conduct and defines both. R. Ex. 12 at 255-56, 259. Petitioner's termination letter ("Termination Letter") states first that Petitioner's destruction of Mr. Gauld's Sick Call Request alone "constitutes unacceptable personal conduct sufficient to warrant [Petitioner's] dismissal." R. Ex. 3 at 267; Tr. at 255. The Termination

Letter then states that Petitioner's "actions in this matter on September 13, 2010" regarding Mr. Turner constituted grossly inefficient job performance alone "sufficient to warrant [Petitioner's] dismissal." R. Ex. 3 at 270. Finally, the Termination Letter states that Petitioner's statement to Ms. Morgan to "call someone who cares" about Mr. Turner was "inappropriate, unprofessional and constitutes unacceptable personal conduct." *Id.*

CONCLUSIONS OF LAW

1. 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).

2. One of the bases for "just cause" is "unacceptable personal conduct," 25 NCAC 01J .0604(b)(2), which includes "conduct for which no reasonable person should expect to receive prior warning," "the willful violation of known or written work rules," and "conduct unbecoming a state employee that is detrimental to state service." 25 NCAC 01J .0614(8)(a),(8)(d), and (8)(e).

3. Respondent complied with the procedural requirements for dismissal for unacceptable personal conduct.

4. Petitioner's determination that Mr. Gauld was not entitled to Dr. 2 shoes, her discouragement of Mr. Gauld requesting them, and her intentional destruction of Mr. Gauld's Sick Call Request qualify as unacceptable personal conduct under the three independent and alternative definitions of 25 NCAC 01J .0614(8)(a),(8)(d), and (8)(e). This is particularly so given Petitioner's status as a medical professional assigned to safeguard inmates and in light of her admissions that she had received and reviewed the Sick Call Policy and that her actions with regard to Mr. Gauld were also outside her scope of duty. The Court concludes that Respondent had just cause to terminate Petitioner for the Gauld incident alone.

5. Additionally, and as an alternative ground, the Court concludes that Petitioner's conduct on September 13, 2010 constitutes unacceptable personal conduct sufficient for Respondent to terminate her employment under 25 NCAC 01J .0614(8)(a), 8(d) and (8)(e). Petitioner joked at the expense of Mr. Turner, indicating she did not take his complaint seriously. Petitioner acted outside of her scope of duty in telling Mr. Hunter that he could not go to the emergency room over an hour after Ms. Welch had seen Mr. Hunter and in communicating to Ms. Turner that Ms. Welch thought Mr. Hunter was "faking" his pain and did not need to go the emergency room.

6. Given Petitioner's status as a medical professional, her conduct on September 13 was conduct (a) for which no reasonable person should expect to receive prior warning, (b)

violative of Petitioner's written scope of duty restrictions, and (c) unbecoming a State employee and detrimental to Respondent's mission to safeguard its inmates, all within the meanings of 25 NCAC 01J .0614(8)(a), 8(d) and (8)(e).

7. As a third alternative ground, the Court finds that, combined, Petitioner's conduct detailed above on August 10 and September 13, 2011 constitutes unacceptable personal conduct under 25 NCAC 01J .0614(8)(a), 8(d) and (8)(e).

8. Another basis for dismissal for just cause is grossly inefficient job performance, which includes instances where an employee "fails to satisfactorily perform job requirements as specified in the job description, work plan, or as directed by the management of the work unit or agency; and, that failure results in . . . the creation of the potential for death or serious bodily injury to an employee(s) or to members of the public or to a person(s) over whom the employee has responsibility." 25 NCAC 01J .0606 and .0614(5).

9. Respondent complied with the procedural requirements for dismissal for grossly inefficient job performance.

10. As a fourth alternative ground for Petitioner's dismissal, the Court concludes that Petitioner's conduct on September 13, 2011 constitutes grossly inefficient job performance. Respondent's scope of duty policy did not permit Petitioner to hold herself out as able to make an assessment, interpretation or decision regarding an inmate's health. Petitioner's statement to Mr. Hunter that he could not go to the emergency room over an hour after Ms. Welch had seen him and her communication to Ms. Turner that Ms. Welch thought Mr. Hunter was "faking" his pain and did not need to go the emergency room created the potential for serious bodily injury to Mr. Hunter. Further, by the terms of 25 NCAC 01J .0614(5), it is not necessary that Petitioner's conduct have actually resulted in serious bodily injury to Mr. Hunter.

DECISION

The undersigned affirms Respondent's dismissal of Petitioner because Respondent had just cause for this disciplinary action per N.C.G.S. § 126-35.

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 and to present written arguments to those in the agency who will consider this decision.

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

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

This the 20th day of March, 2012.

Selina M. Brooks
Administrative Law Judge

A copy of the foregoing was sent to:

Robert C. Carpenter
Hunter & Carpenter, PLLC
One North Pack Square, Suite 402
Asheville, NC 28601
ATTORNEY FOR PETITIONER

Terence D. Friedman
Assistant Attorney General
NC Dept. of Justice
PO Box 629
Raleigh, NC 27602-0629
ATTORNEY FOR RESPONDENT

This the 20th day of March, 2012.

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

NORTH CAROLINA
COUNTY OF GRANVILLE

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
11 OSP 5352

Tommie J. Porter, Petitioner, v. The North Carolina Dept. of Correction Polk Correctional, Respondent.	)	**DECISION**

This contested case was heard by Administrative Law Judge Joe. L. Webster on February 13 and 14, 2012 in Raleigh, North Carolina.

APPEARANCES

For Petitioner: Rachael D. Rogers, Attorney at Law, Raleigh, North Carolina of the firm Russell Goetcheus & Associates.

For Respondent: Terence D. Friedman, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina.

ISSUE

Whether the Respondent had just cause to terminate Petitioner's employment with the North Carolina Department of Correction for unacceptable personal conduct.

WITNESSES

Petitioner testified on his own behalf and presented no further witnesses.

Respondent presented testimony from the following witnesses: Officer Shawn Studwick, Officer Latisha Hawkins, Captain Claudia Sherrod, Petitioner Tommie J. Porter, and Superintendent Lawrence Solomon.

EXHIBITS

Petitioner's Exhibits 6 through 12 were entered into evidence.

Respondent's Exhibits 1 through 2, 4, 6 through 11 were entered into evidence.

FINDINGS OF FACT

Based upon the official documents in the file, the sworn testimony of the witnesses, and the other competent evidence admitted at the hearing, the undersigned finds the following facts:

1. The petitioner began working for the Department of Correction on March 17, 1999. Petitioner was terminated on January 24, 2011. At the time of Petitioner's dismissal, he was a Sergeant.

2. Respondent terminated Petitioner's employment following an investigation related to an incident that occurred on November 14, 2010 in which Respondent alleged that Petitioner used unnecessary force on an inmate, specifically inmate Villarreal Breyci (1156142).

3. On November 14, 2010 while in Dorm II A-Pod Petitioner gave inmates a verbal command to come to the dayroom for further instruction on the appropriate procedure for conducting count.

4. As a Sergeant, Petitioner had the authority to issue verbal commands to inmates.

5. Inmate Villarreal Breyci failed to follow Petitioner's first verbal command. As a result, Petitioner issued several verbal commands to Inmate Breyci, which Inmate Breyci continued to ignore.

6. Inmate Breyci walked in the direction of the bathroom in Dorm II A-Pod. Petitioner issued a verbal command to Inmate Breyci to not go into the bathroom. Inmate Breyci continued on into the bathroom.

7. Petitioner walked to the bathroom, picked up a plastic chair lying in his path, and threw the chair into the bathroom away from Inmate Breyci.

8. Petitioner threw the chair in an attempt to gain the attention of Inmate Breyci. Petitioner did not attempt to strike, nor did he strike, Inmate Breyci.

9. Inmate Breyci was observed in the bathroom, away from the area in which the chair was thrown, looking out the bathroom window.

10. The chair did not hit or injure Inmate Breyci, and Inmate Breyci exited the bathroom without any injury and with no problem.

11. Upon exiting the bathroom, Petitioner attempted to escort Inmate Breyci out of the Dorm to be counseled.

12. While escorting Inmate Breyci out of the Dorm, Petitioner placed his hand on Inmate Breyci's neck/shoulder area to assist him out the door.

13. Petitioner placed his hand on Inmate Breyci to assist him out the door because the inmate was stalling as he was leaving the Dorm. The inmate was also resisting Petitioner and speaking in an angry manner.

14. Inmate Breyci attempted to grab the Petitioner's baton. Petitioner used a baton retention technique to regain control of his baton. The technique the Petitioner used is one taught in training and approved by the Department of Correction.

15. Petitioner placed Inmate Breyci in a holding cell.

16. The Department of Correction Division of Prisons Policy and Procedures Use of Force Policy (Chapter F, Section .1500) allows for the use of hands-on force. Hands-on physical force may be used to restrain or move a non-aggressive, non compliance inmate.

17. Inmate Breyci acted in an aggressive, non compliant manner towards Petitioner.

18. Petitioner did not use unnecessary force on Inmate Breyci.

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings and received proper notice of the hearing in this matter. This office has jurisdiction to hear the matter and to issue a decision to the State Personnel Commission, which shall render a final agency decision.

2. At the time of his dismissal, Petitioner was a career state employee entitled to the protection of the North Carolina Personnel Act; specifically, the just cause provision of N.C. Gen. Stat. § 126-35.

3. N.C. Gen. Stat. § 126-35(a) provides that "No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." In a career state employee's appeal of a disciplinary action, the department or agency employer bears the burden of proving that "just cause" existed for the disciplinary action. N.C. Gen. Stat. § 126-35(d) (2007).

4. 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.

5. 25 NCAC 1I.2301(b) enumerates two grounds for disciplinary action, including dismissal, based upon just cause: (1) unsatisfactory job performance, including grossly inefficient job performance; and (2) unacceptable personal conduct. "Unacceptable personal conduct" is defined as:

    a. conduct for which no reasonable person should expect to receive prior warning;

b. job-related conduct which constitutes a violation of state or federal law;
c. conviction of a felony or an offense involving moral turpitude that is detrimental or impacts the employee's service to the State;
d. the willful violation of known or written work rules;
e. conduct unbecoming a state employee that is detrimental to state service;
f. absence from work after all authorized leave credits and benefits have been exhausted; or
g. falsification of a state application or in other employment documentation. 25 NCAC 1J.0614.

6. Petitioner was dismissed from his employment with the Department of Correction for unacceptable personal conduct.

7. Respondent has not met the burden of persuading me by the greater weight of the evidence presented that it had just cause to terminate Petitioner's employment.

8. None of the alleged bases for Petitioner's termination amount to "unacceptable personal conduct."

9. None of the alleged bases for Petitioner's termination amount to "unacceptable personal conduct" because he did not break any of the Department's written work rules. See *North Carolina Department of Correction v. McNeely,* 135 N.C. App. 587, 593-94, 521, S.E.2d 730, 734 (1999) (holding that an employee's acts rose to the level of "unacceptable personal conduct" where the employee violated written Department rules by leaving his post and failing to remain alert while on duty as the Dormitory Patrol Officer at a correctional center and thereby threatening the security and safety of the department, citizens, employees, inmates, and others).

10. None of the alleged basis for Petitioner's termination amount to "unacceptable personal conduct" because Petitioner in good faith believed that he was not breaking any of the Department's rules. *Gainey v. North Carolina Dept. of Justice*, 121 N.C. App. 253, 465 S.E.2d 36 (1996)(holding that the employee had not committed "unacceptable personal conduct" where the employee in good faith believed that he was not violating the rules of the Department).

11. None of the alleged bases for Petitioner's termination amount to "unacceptable personal conduct" because his acts did not seriously disrupt the Department. *See Wiggins v. North Carolina Department of Human Resources,* 105 N.C. App. 302, 307, 413 S.E.2d 3, 6 (1992) (holding that a state health care center employees argument with his supervisor did not constitute personal misconduct where the argument did not cause "a serious disruption of the normal operations of his work unity which affected both the residents and employees of the unit.").

12. A reasonable person would expect to receive a warning prior to being terminated for any of the alleged bases for Petitioner's termination. Petitioner did not violate any state or federal law. Nor was Petitioner convicted of any offense. Petitioner did not willfully

violate a known or written work rule. Petitioner did not engage in any conduct that was unbecoming a state employee that is detrimental to state service. Petitioner was not absent from work after all authorized leave credits and benefits have been exhausted.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent's decision to terminate Petitioner's employment should be reversed. Petitioner should be reinstated to the position he held at the time of his termination or a substantially similar position with full back pay accruing from January 24, 2011, the date of his termination, to the date of his reinstatement; that he be awarded all benefits to which he would have become entitled, including any legislative salary increases, but for his termination; and that he be awarded reasonable attorney's fees and costs. Petitioner's personnel file should be appropriately rectified so as to reflect the fact that he was terminated without just cause. Any and all documents in his personnel file which indicate to any degree a contrary fact should be removed.

ORDER AND NOTICE

The North Carolina State Personnel Commission will make the Final Decision in this contested case. N.C. Gen. State § 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 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 4th day of June 2012.

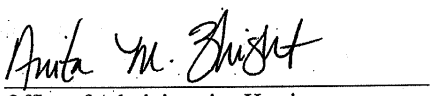
Joe L. Webster
Administrative Law Judge

A copy of the foregoing was mailed to:

Rachael D Rogers
Russell Goetchens & Associates
727 W. Hargett Street,
Suite 109
Raleigh, NC 27603
ATTORNEY FOR PETITIONER

Terence D. Friedman
Assistant Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 6th day of June, 2012.



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

STATE OF NORTH CAROLINA		IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF EDGECOMBE		11 OSP 06236
Fortae McWilliams, Petitioner,	)	
vs.	)	**DECISION**
North Carolina Department of Correction, Respondent.	)	

This contested case was heard before Beecher R. Gray, Administrative Law Judge, on March 15, 2012, at the Office of Administrative Hearings in Raleigh, North Carolina.

APPEARANCES

For Petitioner:
Jeffrey R. Worley, Esq.
Law Office of Jeffrey R. Worley, P.A.
3737 Glenwood Avenue, Suite 100
Raleigh, North Carolina 27612
Phone: (919) 573-1882
Facsimile: (919) 573-6026
E-mail: jworley@jworley.com
N.C. Bar No.: 33608

For Respondent:
Yvonne B. Ricci
Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Phone: (919) 716-6540
Facsimile: (919) 716-6761
E-mail: yricci@ncdoj.gov
N.C. Bar No.: 21641

WITNESSES

Respondent, North Carolina Department of Correction, effective January 1, 2012, the Division of Adult Correction in the Department of Public Safety, (hereinafter "Respondent" or "NCDOC") presented testimony from the following five witnesses: Niquandra Barrios, a former Correctional Officer at Nash Correctional Institution (hereinafter "Nash"); Cleo Jenkins, the Assistant Superintendent for Custody and Operations at Nash; Juanita James, a Correctional Captain at Nash; Butcharoni Jackson, the Correctional Administrator at Nash; and George

Solomon, the Central Region Director for Respondent. Petitioner, Fortae McWilliams, who testified during the hearing, did not present any other witnesses.

EXHIBITS

Respondent offered the following sixteen exhibits which were admitted into evidence:

- R. Ex. 1 (Ms. Niquandra Barrios' witness statement dated November 10, 2010 [former Nash Correctional Institution Correctional Officer])
- R. Ex. 2 (Petitioner's written statement dated November 10, 2010)
- R. Ex. 3 (Petitioner's written statement dated November 12, 2010)
- R. Ex. 4 (Petitioner's written statement dated November 23, 2010)
- R. Ex. 5 (Internal investigation on Sgt. McWilliams and Officer Barrios from Captain Juanita R. James to Mr. Butch Jackson dated November 19, 2010)
- R. Ex. 6 (Letter to Petitioner from Nash Correctional Institution Administrator Butch Jackson - Re: Pre-Disciplinary Conference dated November 29, 2010)
- R. Ex. 7 (Pre-Disciplinary Conference Acknowledgment Form)
- R. Ex. 8 (Letter to Petitioner from Nash Correctional Institution Administrator Butch Jackson - Re: Recommendation for Disciplinary Action dated December 7, 2010)
- R. Ex. 9 (Letter to Central Region Director Randy Lee from Nash Correctional Institution Administrator Butch Jackson - RE: Fortae McWilliams dated December 10, 2010)
- R. Ex. 10 (Letter dated January 27, 2011 - Dismissal letter)
- R. Ex. 11 (North Carolina Department of Correction, Division of Prisons Policy & Procedures, Chapter A, Section .0200, Title: Conduct of Employees)
- R. Ex. 12 (North Carolina Department of Correction Personnel Manual – Disciplinary Policy and Procedures, Section 6, Pages 1, 4-5, 7, 23, 25-26 - Appendix C-Personal Conduct [pages 38-41])
- R. Ex. 13 (North Carolina Department of Correction, Division of Prisons Memorandum - RE: Personal Relationships Between Division Staff dated February 6, 2003)
- R. Ex. 14 (Memorandum related to Guidelines: Personal Relationships Between Division Staff signed February 14, 2003)
- R. Ex. 15 (Memorandum related to Guidelines: Personal Relationships Between Division Staff signed October 5, 2007)
- R. Ex. 16 (Certified True Copy of Complaint and Motion for Domestic Violence Protective Order and Ex Parte Domestic Violence Order of Protection in File No. 10-CVD-1221 in the District Court Division of Nash County)

The following exhibit was admitted for Petitioner:

- P. Ex. 1 (Domestic Violence Order in File No. 10 CVD 1221 - dismissal of ex parte order issued in this case filed on January 25, 2011)

ISSUE

Whether Respondent had 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. 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. 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. 20 at pp. 38-41) 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 at p. 38) Unacceptable personal conduct includes: (1) "conduct for which no reasonable person should expect to receive prior warning;" (4) "the willful violation of known or written work rules; and (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)

3. NCDOC, Division of Prisons also has a policy regarding personal relationships between division staff that is found in the NCDOC, Division of Prisons Policy and Procedures Manual at Chapter A, Section .0200, Title: Conduct of Employees. (R. Ex. 11 at pp. 4-8) The policy states, "(2) While romantic, intimate or personal relationships between Division employees are not prohibited, supervisory and management level personnel are strongly discouraged from seeking to date, dating or engaging in romantic, intimate or personal relationships with subordinate level personnel. Further all employees are reminded that disruption of the workplace caused by employee personal relationships will not be tolerated. (3) Romantic, intimate or personal relationships between Division supervisory and subordinate level personnel who are assigned to or are working at the

same workplace have a significant potential for creating disruption at the workplace, including by generating complaints of favoritism and unequal treatment from other employees, by causing personal disagreements to be brought into the work site, and by giving rises to allegations of harassment . . . (4) Therefore, any Division of Prisons employee: (A) Who is or becomes involved in a personal/romantic/intimate relationship as outlined in section 7(B) below with a supervisory or subordinate level Division employee who is assigned to or works at the same work site MUST report the existence of such relationship in writing to the highest level of authority at that workplace, e.g., the Facility Head, Region Director, Director of Prisons." (R. Ex. 11 at pp. 4-5.; R. Ex. 13 at p. 002)

4. Petitioner began work for Respondent as a correctional officer in March 2000 and was promoted to Correctional Sergeant at Nash in 2006. (Transcript (hereinafter "T.") p. 179)

5. Prior to Respondent's termination of Petitioner's employment, Respondent afforded Petitioner a pre-disciplinary letter and a pre-dismissal conference. (R. Exs. 6-7; T. pp. 116-119)

6. Respondent sent, and Petitioner received, a letter terminating his employment ("Dismissal Letter") and affording Petitioner the opportunity to administratively appeal his termination. (R. Ex. 10; T. pp. 120-121)

7. Effective January 20, 2011, Petitioner was dismissed from his position as a correctional officer at Nash for unacceptable personal conduct. (R. Ex. 10; T. pp. 120-121)

8. Niquandra Barrios began work for Respondent at Nash as a (female) correctional officer in June 2007 and began to be supervised by Petitioner in the summer of 2009. (T. p. 15)

9. Correctional Officer Barrios testified that at some date in March 2010, Petitioner and she started a relationship that became personal and intimate outside of work. Correctional Officer Barrios further testified that their relationship involved calling and texting each other, walking around a local lake holding hands and kissing, and Petitioner sending pictures of himself to her cell phone. (T. pp. 15-17)

10. Correctional Officer Barrios stated that in November 2010, she posted comments to her "Facebook" page (a social networking service and website) related to her relationship with Petitioner. (R. Ex. 5 at p. 006; T. pp. 18, 22-23) She further testified that she was aware of the NCDOC's policy related to reporting personal relationships; nevertheless, she did not report her relationship with Petitioner because he told her not to report it because he wanted to keep their relationship "hush-hush." (T. pp. 17-18)

11. On November 22, 2010 Correctional Officer Barrios filed a Complaint and Motion for Domestic Violence Protective Order in Nash County against Petitioner, and an Ex Parte Domestic Violence Order of Protection was entered by a Nash County District Court Judge the same day. (R. Ex. 16; T. pp. 54-55)

12. Petitioner testified that he became the supervisor of Correctional Officer Barrios on April 23, 2010. (T. p. 162)

13. Petitioner acknowledged that he was aware and understood that Respondent has a policy related to the reporting of personal relationships between division staff and that he did not report anything to Butch Jackson, Nash's Correctional Administrator/Facility Head, related to his personal interactions and dealings with Correctional Officer Barrios. (T. pp. 194, 196-197, 199-200; R. Exs. 14-15)

14. Under cross examination, Petitioner admitted that Correctional Officer Barrios had expressed to him that she had an interest in him beyond friendship; that he would meet with her at a local park and engage in walks and long conversations with her; that he sent Correctional Officer Barrios pictures of himself; that he exchanged approximately 200 text messages with her; and that he had visited with her in the home that she shares with her grandmother, all without reporting to Administrator Jackson that he had a personal/romantic/intimate relationship with Correctional Officer Barrios. (T. pp. 195-200)

15. Correctional Captain Juanita James testified that when she reported to work on November 5, 2010, a copy of a page of Correctional Officer Barrios' "Facebook" postings relating to her personal dealings with Petitioner had been slipped under her door. Additionally, Captain James testified that she received seven or eight phone calls from Nash staff and talked in-person with three or four staff regarding these "Facebook" postings that caused a disruption in Nash's workplace. (T. pp. 82-83, 109-110)

16. Further, Captain James testified that she was assigned to conduct an internal investigation into incidents involving Correctional Officer Barrios and Petitioner and that she reported her findings in writing to Administrator Jackson. (T. pp. 79-80)

17. Captain James testified that when she interviewed Petitioner about Correctional Officer Barrios' "Facebook" postings and his relationship with her, Petitioner denied being engaged in a sexual, intimate relationship with her. Petitioner did admit to Captain James, however, that Correctional Officer Barrios had approached him, and they had engaged in many conversations of a personal nature, exchanged phone numbers and texts, and had gone on walks together in a park. (T. pp. 83-85)

18. After being confronted by Captain James concerning cell phone images of Petitioner that were on Correctional Officer Barrios' cell phone, Petitioner later admitted to Captain James that he had taken pictures of himself and sent them to Correctional Officer Barrios. (T. p. 88.)

19. In the internal investigation report, addressed to Administrator Jackson, Captain James outlined her investigation conclusions that Petitioner failed to report to the proper administrative staff his personal relationship with one of his subordinate officers, Correctional Officer Barrios. Captain James' investigation concluded, in part, as follows:

> "The overwhelming and constant attempts to communicate with Sgt. McWilliams either via texting, calls to his home, lengthy questionable conversations while at work and showing up uninvited to his home created an uncomfortable situation resulting in additional legal charges against her where a 'restraining order' is in place. Consequently this has generated disruption in the workplace. Her peers voiced a sense of mistrust towards Officer Barrios creating a possible breech in security and hostile environment where the morale among employees is affected." (R. Ex. 5 at p. 004; T. pp. 89-90)

20. Administrator Jackson received and reviewed the written investigation prepared by Captain James and concluded that disciplinary action was warranted. (T. pp. 116-117)

21. In a letter dated December 10, 2010, Administrator Jackson recommended to Central Region Director Randy Lee that Petitioner be dismissed for unacceptable personal conduct. (R. Ex. 9; T. pp. 119-120)

22. The Dismissal Letter indicated that the recommendation for dismissal was approved because Petitioner failed to report his relationship with one of his subordinate staff, Correctional Officer Barrios, in violation of the NCDOC, Division of Prison staff relationship policy and that he was not completely forthcoming in his initial responses to Captain James on November 10, 2010. (R. Ex. 10)

23. Further, the Central Region Director for Respondent, George Solomon, explained the practical importance of Respondent's staff policy regarding personal relationships between division staff in the unique context of a prison such as Nash and why Respondent instituted this particular policy. (T. pp. 154-156) Region Director Solomon testified that, "as soon as . . . a subordinate employee approaches a superior employee or supervising employee and shows interest of a relationship, it should be reported immediately in writing to the highest ranking person at that facility to protect that facility and to protect that employee as well." (T. p. 156)

24. After completing internal agency appeals, Petitioner filed this contested case at the Office of Administrative Hearings on May 20, 2011. In his contested case petition, Petitioner alleged that Respondent lacked "just cause" to end his employment for disciplinary reasons.

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 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. At the time of his discharge, Petitioner was a career State employee subject to the provisions of the State Personnel Act, N.C. Gen. Stat. § 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. Gen. Stat. §126-35(d) (2011).

3. 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," "the willful violation of known or written work rules," and "conduct unbecoming a state employee that is detrimental to state service." 25 NCAC 01J .0614(8)(a),(8)(d), and (8)(e).

4. The Dismissal Letter specified that Petitioner was being discharged for unacceptable personal conduct.

5. Respondent complied with the procedural requirements for dismissal for unacceptable personal conduct under 25 NCAC 01J .0608 and .0613.

6. It is well settled that judgment should be rendered in favor of the State agency when the evidence presented establishes that the employee committed at least one of the acts for which he/she was disciplined and that the act committed constituted just cause for dismissal. *Hilliard v. Dept. of Correction*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).

7. Respondent's Personnel Manual outlines specific types of conduct that may result in disciplinary action, including unacceptable personal conduct. (R. Ex. 12)

8. Respondent met its burden of proof and established by substantial evidence in the record that it had just cause to terminate its employment of Petitioner for unacceptable personal conduct that violated NCDOC's Job Performance and Personal Conduct Policies. (R. Ex. 12) Additionally, Petitioner's failure to report the existence of a personal/romantic/intimate relationship with one of his subordinate staff, Correctional Officer Barrios, was willful and violated known and written work rules. Petitioner acknowledged that he never reported to Nash's Facility Head, Correctional Administrator Butch Jackson, that he had a personal relationship with Correctional Officer Barrios despite his admissions that she had expressed to him that she had an interest in him beyond friendship; that he would meet with Correctional Officer Barrios at a local park and engage in walks and long conversations with her; that he sent her pictures of himself; that he exchanged approximately 200 text messages with her; and that he had visited with Correctional Officer Barrios in the home that she shares with her grandmother.

9. Therefore, Respondent has met its burden of proof and established by substantial evidence in the record that it had just cause to terminate its employment of Petitioner for unacceptable personal conduct.

On the basis of the above Findings of Fact and Conclusions of Law, the undersigned makes the following:

DECISION

Respondent's decision to dismiss Petitioner from its employment for unacceptable personal conduct is supported by the evidence as constituting just cause for his dismissal and is AFFIRMED.

NOTICE AND ORDER

It hereby is ordered that the agency serve a copy of the FINAL DECISION on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C. Gen. Stat. § 150B-26(b).

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 30 day of May, 2012.

Beecher R. Gray
Administrative Law Judge

A copy of the foregoing was mailed to:

Jeffrey Worley
Law Office of Jeffrey R. Worley, P.A.
3737 Glenwood Ave. Suite 100
Raleigh, NC 27612
ATTORNEY FOR PETITIONER

Yvonne B Ricci
Assistant Attorney General
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 30th day of May, 2012.

Anne Bellamell

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

STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF WASHINGTON	11 OSP 07956
John Hardin Swain, Petitioner, vs. Department of Corrections Hyde Correctional Inst., Respondent.	**DECISION**

This contested case was heard before Administrative Law Judge Beecher R. Gray on January 24 and February 3, 2012 in Greenville and Raleigh, North Carolina, respectively.

APPEARANCES

For Petitioner: John Hardin Swain, *Pro Se*
1402 Tom Pepper Rd.
Creswell, North Carolina 27928

For Respondent: Terence D. Friedman
Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Phone: (919) 716-6650
Facsimile: (919) 716-6763

WITNESSES

For Petitioner: Petitioner

For Respondent: Tom Brickhouse
London Mackenzie Evans Bundy
Seth Carawan
Mike Hardee
Maria Jones
Chad Marshall
Ricky Matthews
Hugh Patrick
James Topping
Annie Williams

EXHIBITS

Petitioner's Exhibits ("P. Exs."): 1 & 2

Respondent's Exhibits ("R. Exs."): 1, 2, 4, 5, 6, 7, 8, 9, 10

ISSUE

Whether Respondent had just cause for Petitioner's demotion.

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. Petitioner worked for Respondent as a Lieutenant at Hyde Correctional Institute ("Hyde") and, as part of his job, served as the officer in charge ("OIC") of the facility when he was the ranking officer present.

3. London Mackenzie Evans Bundy began work at Hyde as a Records Clerk in February 2010. (Tr. 187) She had offices both in the programs section ("Programs") of Hyde and in the hallway outside the superintendent's office at Hyde ("Superintendent's Hallway").

4. In the first week of February, Mrs. Bundy attended training. (Tr. 190) Ms. Bundy testified that she did not meet Petitioner until either the second or third week of working at the facility. (Tr. 190) Mrs. Bundy alleged that when she met Petitioner, he introduced himself as "John Holmes," and then laughed and explained that John Holmes was a pornography star. (Tr. 192) Mrs. Bundy admits she did not refer to the alleged "Holmes" comment in her first statement to Respondent's Equal Employment Opportunity Office ("EEO Office") but only remembered it later. (Tr. 193; R. Ex. 1)

5. Throughout approximately the next three weeks, Mrs. Bundy claims that Petitioner "would tell me that I really looked good that day, or he liked my outfit, or I looked hot, or something along those lines." (Tr. 194) Mrs. Bundy also claims that, on two occasions, while she was working in an office, Petitioner "came in there and acted like he was helping me look for files and would brush his side arm against my side arm." (Tr. 196)

6. On other occasions over this three-week period, Mrs. Bundy claimed that Petitioner would come into her office "with no work related things, just standing and talking, sitting and talking, things of that nature" for up to 45 minutes. (Tr. 197) Mrs. Bundy also alleged that Petitioner asked her "general questions" about her boyfriend, such as "Were we in a relationship? How long have we been dating? Was I happy? Things like that." (Tr. 199-200)

7. She further alleged that, on one occasion, Petitioner saw a picture of Mrs. Bundy's boyfriend in her office and asked whether he was a "jarhead." (Tr. 233) Also, Mrs. Bundy alleges that, on one occasion, when she told Petitioner she had been speaking to her boyfriend at home via an internet camera, Petitioner stated "I bet you did more than talk on the web cam; I wish I had a web cam too." (Tr. 234)

8. Mrs. Bundy also alleged that Petitioner told her that his relationship with his wife "wasn't great" and that "his wife had gained weight since she had babies, but I hadn't." (Tr. 200) Mrs. Bundy further claimed that, on one occasion, Petitioner told her she looked good and asked why her "panty line" did not show; she replied, "Why do you think?" (Tr. 201-202)

9. Mrs. Bundy testified that the above statements constituted all of the inappropriate comments Mrs. Bundy claims Petitioner made to her over the three-week period at issue. (Tr. 201-202)

10. Additionally, on Friday, March 5, 2010, Petitioner asked Sergeant Chad Marshall ("Sgt. Marshall") Hyde to locate a writ for a prisoner. (Tr. 36-37) Sgt. Marshall called Mrs. Bundy on her cell phone at home to ask her whether she had seen the writ, and she told him she had processed it correctly. (Tr. 37, 202) Mrs. Bundy testified that Sgt. Marshall did not tell her that she had to return to work to find the writ but that he stated, "We do have to find the writ," which made Petitioner feel she needed to return to work to help look for it. (Tr. 203) Mrs. Bundy admits she was not ordered to return to work, however. (Tr. 203) Likewise, Sgt. Marshall denied that he asked Mrs. Bundy to drive back to the facility to look for the writ. (Tr. 203)

11. Mrs. Bundy voluntarily made the ten-minute drive from her home back to Hyde. (Tr. 204) She testified that, when she arrived at the facility, she met with Petitioner in Programs to look for the writ. (Tr. 204) Ms. Bundy testified that she spent between 30 and 45 minutes looking for the writ and that, during this time, Petitioner "pretty much sat in the offices with me while I was looking for the writ talking about, you know, what I was doing that weekend, just my personal stuff, what I had plans to do and things of that nature." (Tr. 205) Mrs. Bundy also testified that, after she could not locate the writ, she started to leave, at which time Petitioner handed her a post-it note with her cell phone number on it and stated "I don't need this." (Tr. 207)

12. Mrs. Bundy testified that the next day, March 6, 2010, Petitioner telephoned her on her cell phone, told her they had located the writ, and then asked "what was I doing this weekend with my boyfriend or things of that nature." (Tr. 209) Mrs. Bundy does not recall any specifically sexual comments in this conversation of "several minutes" but testified that she "took it as sexual." (Tr. 209)

13. At trial, Petitioner denied all of Mrs. Bundy's harassment allegations. Among other things, he denied that: he stated to Mrs. Bundy that his name was "John Holmes" or said anything about a pornography star; he ever stated anything sexual to Mrs. Bundy; he ever spoke to her about his wife gaining weight; he ever asked Mrs. Bundy about her own life,

including her romantic life; he ever complimented her based on what she was wearing; he ever mentioned her "panty lines"; he ever said anything to Mrs. Bundy about a "web cam"; and that he said anything inappropriate to Mrs. Bundy on the occasion she returned to the facility to look for the writ or thereafter.

14. At trial, Petitioner did admit that he stopped to talk to Mrs. Bundy on numerous occasions before she filed her Charge. (Tr. 150) He also admitted that, on one occasion, he took a phone call in Mrs. Bundy's office, but he denied that his arm brushed against her arm as they were looking for a file folder on this occasion. (Tr. 155) Petitioner admitted that he telephoned Petitioner on her cell phone on March 6, the day after she came in to look for the writ, but he denies that he asked her whether she had plans that day with her boyfriend. (Tr. 165)

15. On March 10, 2010, Ms. Bundy filed an internal charge with Respondent ("Charge") alleging that Petitioner sexually harassed her. (R. Ex. 1; Tr. 213) After Mrs. Bundy turned in the Charge, Hyde faxed it to Respondent's EEO Office, which began an investigation. (Tr. 116)

16. Ricky Matthews is the Assistant Superintendent for Custody Operations at Hyde. On three occasions before Mrs. Bundy filed her Charge, Assistant Superintendent Matthews observed Petitioner and Mrs. Bundy speaking in an office. (Tr. 97) On one of these occasions, Assistant Superintendent Matthews was with Hyde's Assistant Superintendent for Programs, Hugh Patrick, and told him that if Petitioner and Mrs. Bundy speaking excessively "ever gets to be an issue," Assistant Superintendent Patrick should feel free to address it. (Tr. 98)

17. After Mrs. Bundy filed her Charge, Assistant Superintendent Matthews and Hyde Superintendent Mike Hardee spoke to Petitioner. (Tr. 99) At that time, Assistant Superintendent Matthews and Superintendent Hardee instructed Petitioner as follows:

> You are not to make any contact with Ms. [Bundy], no physical contact, and you are not to do so by telephone. You are not to do so by third party. You are not to converse with her in any form or fashion during the course of the investigation.
>
> If you have any business with the records office, you are to conduct that business by using another person. You are not to do so directly. The instructions literally boiled down to absolutely no physical contact and no verbal contact.
>
> . . . [Y]ou are to go about your duties as the OIC as you normally would. If you should so happen to find yourself coming through a gate or walking up the sidewalk or going in a sally port and meeting or traveling in any form or fashion physically with Ms. Evans, that you are not to initiate conversation and if spoken to be professionally cordial but not to initiate

conversation in any form if you should so happen to find yourself in that situation."

18. Superintendent Hardee confirmed that these were the instructions given to Petitioner. (Tr. 118)

19. Mrs. Bundy testified that she never spoke with Petitioner again after she filed her Charge. (Tr. 214) She also testified that Petitioner never made any physical gestures toward her after she filed her Charge. (Tr. 229) Mrs. Bundy did not testify that she was demoted after she filed her Charge, that her shifts were changed, that Respondent disciplined her, or that Respondent changed her pay in any way.

20. Mrs. Bundy testified that, on March 15, 2010, while seated in her office at the end of the Superintendent's Hallway, she saw Petitioner standing in the Hallway, looking in her direction. (Tr. 216-217) Mrs. Bundy also testified that, on March 16 and various other occasions, she saw Petitioner in the Hallway, allegedly looking in her direction. (Tr. 216-217, 220-222) On "pretty much every occasion" when she saw Petitioner in the Hallway, Mrs. Bundy would close her office door so that she did not have to see him. (Tr. 222)

21. Additionally, on at least one occasion after she filed her Charge, Mrs. Bundy testified that she saw Petitioner in the Superintendent's break room, where Petitioner bought drinks and then walked out. (Tr. 217-218)

22. Employees in the Master Control Room control access to a number of doors through which Mrs. Bundy had to pass regularly. Before she filed the Charge, Mrs. Bundy testified that she had seen Petitioner working in the Master Control Room. (Tr. 219) After she filed her Charge, Mrs. Bundy claimed that she saw Petitioner in the Control Room more often when she had to pass through. (Tr. 225-226) On these occasions, Mrs. Bundy alleged that Petitioner would stand in the Master Control Room looking at her. (Tr. 226) Mrs. Bundy also claimed that, on occasions when Petitioner was working in the Master Control Room, he would allow prisoners to pass through a set of doors before opening the door for her. (Tr. 227) Mrs. Bundy did not allege that Petitioner caused her to interact directly with the prisoners.

23. Mrs. Bundy also testified that, prior to her Charge, she did not recall ever seeing Petitioner working in the gate house of Hyde at the times she passed through the gate house when entering or exiting the facility. (Tr. 231) After her Charge, Mrs. Bundy testified that she saw Petitioner regularly in the gate house when she entered or exited Hyde. (Tr. 229-231) On some of these occasions, Mrs. Bundy claimed that Petitioner was swiping employees' identification cards and, on some occasions, he was merely standing in the gate house, observing employees enter and exit. (Tr. 231)

24. Assistant Superintendent Matthews testified that all OICs are expected to visit the Superintendent's Office (which leads to the Hallway) at least once during the day to pick up materials; Assistant Superintendent Matthews and Superintendent Hardee did not prohibit Petitioner from doing so. (Tr. 101-102) Assistant Superintendent Matthews also

testified that anybody who came to the Superintendent's Office to pick up materials would have been visible from Mrs. Bundy's office in the Superintendent's Hallway. (Tr. 103)

25. Superintendent Hardee testified that he would have expected that Petitioner not assign himself to Hyde's outside gate house unnecessarily. (Tr. 118)

26. Assistant Superintendent Matthews testified that Petitioner, as OIC, would have discretion to locate himself at various locations throughout Hyde, including at the gate house and the Master Control Room. (Tr. 104-105) Assistant Superintendent Matthews testified, however, that, as OIC, Petitioner also had the discretion not to assign himself to the gate house. (Tr. 104-105)

27. Petitioner testified that, as OIC, he was expected to visit the gate house daily while making rounds and that he would work the gate house when necessary. (Tr. 167-168) He testified in particular that, on one occasion after the Charge was filed, he was screening cards at Hyde's gate house when Mrs. Bundy passed through because one of the guards assigned to work the gate house was absent that day. (Tr. 169-170) Petitioner testified that, after the Charge was filed, he visited the Superintendent's Office leading to the Hallway to pick up materials, to see the Superintendent, and to pick up his mail. (Tr. 170-171)

28. James Toppings works in Programs at Hyde. Mr. Toppings observed Petitioner visit Mrs. Bundy regularly in the Programs section in the first month of her employment, before she filed her Charge. (Tr. 11) The amount of contact Petitioner had with Mrs. Bundy struck Mr. Toppings as abnormal. (Tr. 12-13) After Mrs. Bundy filed the Charge, Mr. Toppings noticed Petitioner regularly in the gate house when Mrs. Bundy came to and left from work. (Tr. 15-17) After Mrs. Bundy filed the Charge, Mr. Toppings also observed Petitioner in the Superintendent's Hallway, within the sight of Mrs. Bundy's office while she was in it. (Tr. 15-20)

29. After the Charge was filed, Mr. Toppings observed Petitioner, more than Mr. Toppings thought was usual, in the Master Control Room at the same time that Mrs. Bundy was passing through the doors. (Tr. 20-22)

30. Sgt. Marshall was familiar with Mrs. Bundy prior to her application to work at Hyde. (Tr. 34) Before she began work, Sgt. Marshall mentioned to Petitioner that Mrs. Bundy was very religious and professional because he (Sgt. Marshall) did not want Petitioner to say anything inappropriate to her. (Tr. 35)

31. Seth Carawan is a Correctional Training Specialist whose office is in the Superintendent's Hallway. Before Mrs. Bundy began working at Hyde, Specialist Carawan rarely saw Petitioner in the Hallway. (Tr. 47) After Mrs. Bundy began working but before she filed her Charge, Specialist Carawan saw Petitioner in the Hallway more often, stopping by Mrs. Bundy's office to speak to her. (Tr. 47-48) After Mrs. Bundy filed her Charge, Specialist Carawan observed Petitioner in the Superintendent's Hallway

at least five times, and, according to Specialist Carawan, Petitioner could have been looking down the Hallway toward Mrs. Bundy's office. (Tr. 49-50, 54)

32. Annie Williams worked with Mrs. Bundy in Programs. After Mrs. Bundy filed her Charge, Ms. Williams observed Petitioner looking down the Superintendent's Hallway at Mrs. Bundy. (Tr. 59-60) On one occasion after the Charge was filed, Ms. Williams was entering Hyde with Mrs. Bundy through the gate house and observed Petitioner working the gate house. (Tr. 61) Ms. Williams also observed Petitioner working in the Master Control Room at the same time that Mrs. Bundy walked through the doors that were controlled from the Control Room. (Tr. 61-62)

33. Maria Jones used to work as an Administrative Officer at Hyde. Her office was in the Superintendent's Hallway. Before Mrs. Bundy filed her Charge, Administrative Officer Jones observed Petitioner speaking to Mrs. Bundy in her office in the Hallway. (Tr. 67-68) After Mrs. Bundy filed her Charge, Administrative Officer Jones observed Petitioner standing in the Hallway on numerous occasions, looking down it toward Mrs. Bundy's office. (Tr. 70-71)

34. On another occasion, Administrative Officer Jones observed Petitioner in the office of Cindy Mason, midway down the Hallway. (Tr. 72) Administrative Officer Jones asked Petitioner to step into an adjoining room and informed him that, in light of the Charge, Petitioner should not be in the Hallway area. (Tr. 72) Administrative Officer Jones told Petitioner that, unless Petitioner was called by the Superintendent, he should not be in the Hallway or the Superintendent's Office. (Tr. 73) Petitioner told Administrative Officer Jones that he was visiting Ms. Mason to fill out paperwork. (Tr. 72-73) Petitioner admitted that he was in the Superintendent's Hallway seeing Cindy Mason on this day but stated that he was there to complete an insurance form. (Tr. 175)

35. Additionally, on one occasion when Administrative Officer Jones was leaving work with Mrs. Bundy through the gate house, Administrative Officer Jones observed Petitioner swiping personnel cards in the gate house. (Tr. 74) This struck Administrative Officer Jones as abnormal because she had never observed an OIC, such as Petitioner, swiping cards. (Tr. 74)

36. Before Mrs. Bundy filed the Charge, Assistant Superintendent Patrick observed Petitioner talking with Mrs. Bundy for extended periods of time, which struck Assistant Superintendent Patrick as an "unusual amount of time" for Petitioner to spend with her. (Tr. 91, 93) On one occasion, Assistant Superintendent Patrick observed Petitioner in an office with Mrs. Bundy and asked Petitioner to step outside. (Tr. 92) Assistant Superintendent Patrick then informed Petitioner that he should not be spending so much time with Mrs. Bundy because it might lead to an internal investigation. (Tr. 92-93)

37. Mrs. Bundy went on unpaid leave in July 2010 and never returned to work.

38. Respondent's personnel policies prohibit workplace harassment based on sex and retaliation against an employee who has reported sexual harassment. (R. Ex. 10; Tr. 124-125)

39. When Mrs. Bundy filed her charge of sexual harassment on March 10, 2010, Respondent faxed it to the EEO Office. The EEO Office sent an investigator to Hyde Correctional Institution to investigate Mrs. Bundy's charge.

40. Mrs. Bundy was not satisfied with the investigator or the investigation first commissioned by the Department of Correction's EEO Office and filed a complaint. The EEO Office acquiesced; it then sent a different investigator to conduct another investigation. The second investigator added a retaliation claim to the investigation scope, which was not in the original complaint.

41. Ultimately, the second investigation conducted by the EEO Office found that Petitioner was not credible when he denied speaking inappropriately to Ms. Bundy or having excessive contact with her after the Charge, in violation of Respondent's personnel policies. (R. Ex. 8) The EEO finding did not purport, however, to reach any determination about whether Petitioner's alleged conduct violated federal or state law. (R. Ex. 8)

42. Based on the second EEO investigation and finding, Respondent demoted Petitioner from his position as Lieutenant to a position as a Correctional Officer and lowered his salary by 10%, effective February 4, 2011. (R. Ex. 9) Respondent's demotion letter found that Petitioner had violated its personnel policies but did not purport to reach any determination about whether Petitioner's alleged conduct violated federal or state law. (R. Ex. 9)

43. Michael Hardee became the Superintendent at Hyde in early March 2010. Mrs. Bundy already was employed at Hyde when he arrived. She filed her Charge during the first week Superintendent Hardee assumed his duties. The crucial determination of the credibility of the complaining party, Mrs. Bundy, was made solely by the second EEO investigator; no one else interviewed Mrs. Bundy prior to demoting Petitioner. Mrs. Bundy refused to appear in a courtroom for the hearing of this contested case so long as Petitioner also was in the same courtroom. After accommodating her desire to avoid the same courtroom as Petitioner by allowing her to appear and testify via video link while she was in Greenville, North Carolina and while Petitioner and other witnesses were in the courtroom in Raleigh, North Carolina, she stared down at the table where she was sitting and refused to look up at the video monitor when Petitioner asked her questions during his *pro se* cross-examination. Her multiple statements made during the investigations were admitted into evidence and show a pattern of her statements alleging that she was experiencing depression, anxiety, lack of sleep, nightmares, hot sweats, headaches, lots of crying, weight change, and fear. On or about June 21, 2010, her family physician prescribed medications for her for depression and anxiety. One of Mrs. Bundy's statement states that she attempted suicide on July 12, 2010--and had achieved it

but for the fact that her boyfriend found her in time to revive her and get her admitted to a hospital.

44. Based on the unique perspective as factfinder able to observe the demeanor of the witnesses, the undersigned finds that neither Mrs. Bundy nor Petitioner was entirely credible in their accounts of their interactions before the Charge was filed. In particular, the undersigned does not credit Mrs. Bundy's allegations that Petitioner made many of the overtly sexual comments she claims. At the same time, the undersigned believes that Petitioner, particularly as a senior officer, asked too many questions of Mrs. Bundy, some of which possibly could be construed by her as personal in nature, and spent an undue amount of time in or near her work area in the three weeks before she filed her Charge.

45. The undersigned finds that the actual conduct Petitioner engaged in--both before and after the Charge was filed--did not violate the personnel policies cited in Petitioner's demotion letter but that such conduct did create cause for concern that Petitioner was spending too much time in Mrs. Bundy's work area, even after being cautioned by coworkers that others were noticing his presence around Mrs. Bundy.

46. Assistant Superintendent Matthews told Petitioner, after Mrs. Bundy filed her Charge, that:

> You are not to make any contact with Mrs. Bundy by any means directly or indirectly during the investigation; any business you have with records is to be done through a third person.

Assistant Superintendent Matthews stated under oath at this hearing that Petitioner had complied with his noncontact directive. Assistant Superintendent Matthews also stated under oath that it was a mistake to not move Petitioner to a different location during the investigation.

47. With regard to Petitioner's alleged retaliatory conduct after the Charge was filed, the undersigned finds essentially no dispute that Petitioner was present in the sites where Mrs. Bundy testified she saw him. Petitioner and Respondent's witnesses established, however, that, as OIC, Petitioner had the responsibility to be in such sites and that Respondent did not prohibit him from being there after the Charge was filed. The undersigned therefore finds that the conduct Petitioner engaged in after the Charge was filed did not violate the personnel policies cited in Petitioner's demotion letter.

CONCLUSIONS OF LAW

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

2. At the time of his demotion, 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 "be warned, demoted, suspended, or dismissed by" Respondent only "for just cause." 25 NCAC 01J .0604(a).

3. 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," "the willful violation of known or written work rules," and "conduct unbecoming a state employee that is detrimental to state service." 25 NCAC 01J .0614(8)(a),(8)(d), and (8)(e). In this case, the demotion letter specified that Petitioner was being demoted for unacceptable personal conduct.

4. Respondent complied with the procedural requirements for demotion for unacceptable personal conduct under 25 NCAC 01J .0608 and .0613.

5. The undue attention and comments Petitioner directed toward Mrs. Bundy before she filed her Charge constitute sufficient just cause to merit Petitioner receiving a written warning, especially after he had been cautioned by coworkers that he was spending too much time around Mrs. Bundy. They do not constitute just cause for his demotion.

DECISION

Respondent's decision to demote Petitioner effective on February 4, 2011, with a ten (10) percent reduction in pay is not supported by a preponderance of the evidence constituting just cause and is REVERSED. Petitioner is entitled to reinstatement to the position he held just prior to his termination on February 04, 2011; Petitioner is entitled to back pay and all other benefits to which he would have been entitled but for his demotion.

NOTICE & ORDER

It hereby is ordered that the agency serve a copy of the FINAL DECISION on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C. Gen. Stat. § 150B-26(b).

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.

10

This the 23 day of April, 2012.

Beecher R. Gray
Administrative Law Judge

A copy of the foregoing was mailed to:

John Hardin Swain
1402 Tom Pepper Road
Creswell, NC 27928
PETITIONER

Terence D. Friedman
Assistant Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 23rd day of April, 2012.

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