

# NORTH CAROLINA REGISTER

VOLUME 27 • ISSUE 21 • Pages 1926 - 2022

May 1, 2013

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## **Contact List for Rulemaking Questions or Concerns**

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

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

Office of Administrative Hearings  
Rules Division  
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### **Fiscal Notes & Economic Analysis and Governor's Review**

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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  
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Raleigh, North Carolina 27603  
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215 North Dawson Street  
Raleigh, North Carolina 27603  
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### **Legislative Process Concerning Rule-making**

Joint Legislative Administrative Procedure Oversight Committee  
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**NORTH CAROLINA REGISTER**  
 Publication Schedule for January 2013 – December 2013

FILING DEADLINES			NOTICE OF TEXT		PERMANENT RULE			TEMPORARY RULES
Volume & issue number	Issue date	Last day for filing	Earliest date for public hearing	End of required comment period	Deadline to submit to RRC for review at next meeting	Earliest Eff. Date of Permanent Rule	Delayed Eff. Date of Permanent Rule 31st legislative day of the session beginning:	270 <sup>th</sup> day from publication in the Register
27:13	01/02/13	12/06/12	01/17/13	03/04/13	03/20/13	05/01/13	05/2014	09/29/13
27:14	01/15/13	12/19/12	01/30/13	03/18/13	03/20/13	05/01/13	05/2014	10/12/13
27:15	02/01/13	01/10/13	02/16/13	04/02/13	04/22/13	06/01/13	05/2014	10/29/13
27:16	02/15/13	01/25/13	03/02/13	04/16/13	04/22/13	06/01/13	05/2014	11/12/13
27:17	03/01/13	02/08/13	03/16/13	04/30/13	05/20/13	07/01/13	05/2014	11/26/13
27:18	03/15/13	02/22/13	03/30/13	05/14/13	05/20/13	07/01/13	05/2014	12/10/13
27:19	04/01/13	03/08/13	04/16/13	05/31/13	06/20/13	08/01/13	05/2014	12/27/13
27:20	04/15/13	03/22/13	04/30/13	06/14/13	06/20/13	08/01/13	05/2014	01/10/14
27:21	05/01/13	04/10/13	05/16/13	07/01/13	07/22/13	09/01/13	05/2014	01/26/14
27:22	05/15/13	04/24/13	05/30/13	07/15/13	07/22/13	09/01/13	05/2014	02/09/14
27:23	06/03/13	05/10/13	06/18/13	08/02/13	08/20/13	10/01/13	05/2014	02/28/14
27:24	06/17/13	05/24/13	07/02/13	08/16/13	08/20/13	10/01/13	05/2014	03/14/14
28:01	07/01/13	06/10/13	07/16/13	08/30/13	09/20/13	11/01/13	05/2014	03/28/14
28:02	07/15/13	06/21/13	07/30/13	09/13/13	09/20/13	11/01/13	05/2014	04/11/14
28:03	08/01/13	07/11/13	08/16/13	09/30/13	10/21/13	12/01/13	05/2014	04/28/14
28:04	08/15/13	07/25/13	08/30/13	10/14/13	10/21/13	12/01/13	05/2014	05/12/14
28:05	09/03/13	08/12/13	09/18/13	11/04/13	11/20/13	01/01/14	05/2014	05/31/14
28:06	09/16/13	08/23/13	10/01/13	11/15/13	11/20/13	01/01/14	05/2014	06/13/14
28:07	10/01/13	09/10/13	10/16/13	12/02/13	12/20/13	02/01/14	05/2014	06/28/14
28:08	10/15/13	09/24/13	10/30/13	12/16/13	12/20/13	02/01/14	05/2014	07/12/14
28:09	11/01/13	10/11/13	11/16/13	12/31/13	01/21/14	03/01/14	05/2014	07/29/14
28:10	11/15/13	10/24/13	11/30/13	01/14/14	01/21/14	03/01/14	05/2014	08/12/14
28:11	12/02/13	11/06/13	12/17/13	01/31/14	02/20/14	04/01/14	05/2014	08/29/14
28:12	12/16/13	11/21/13	12/31/13	02/14/14	02/20/14	04/01/14	05/2014	09/12/14

## 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.

*Note from the Codifier*

*Approved Rules Pending the General Assembly*

Rules approved by the Rules Review Commission subject to review pursuant to G.S. 150B-21.3 by the General Assembly in the session beginning in January 2013 have completed 30 legislative days.

Pursuant to G.S. 150B-21.3, if a bill that specifically disapproves a rule is introduced in either house of the General Assembly before the thirty-first legislative day of that session, the rule becomes effective on the earlier of either the day an unfavorable final action is taken on the bill or the day that session of the General Assembly adjourns without ratifying a bill that specifically disapproves the rule. A rule that is specifically disapproved by a bill ratified by the General Assembly before it becomes effective does not become effective.

Legislation has been introduced to disapprove the following rules:

	<b>RRC Approved</b>	<b>Bill Introduced</b>
<b>NC INDUSTRIAL COMMISSION</b>		
04 NCAC 10A .0102	10/18/2012	S174
04 NCAC 10A .0105	10/18/2012	S174
04 NCAC 10A .0404	11/15/2012	S174
04 NCAC 10A .0405	10/18/2012	S174
04 NCAC 10A .0406	10/18/2012	S174
04 NCAC 10A .0408	10/18/2012	S174
04 NCAC 10A .0601	10/18/2012	S174
04 NCAC 10A .0603	10/18/2012	S174
04 NCAC 10A .0604	10/18/2012	S174
04 NCAC 10A .0605	10/18/2012	S174
04 NCAC 10A .0607	10/18/2012	S174
04 NCAC 10A .0608	10/18/2012	S174
04 NCAC 10A .0609	10/18/2012	S174
04 NCAC 10A .0609A	10/18/2012	S174
04 NCAC 10A .0612	10/18/2012	S174
04 NCAC 10A .0613	10/18/2012	S174
04 NCAC 10A .0616	10/18/2012	S174
04 NCAC 10A .0701	10/18/2012	S174
04 NCAC 10A .0702	10/18/2012	S174
04 NCAC 10A .0704	10/18/2012	S174
04 NCAC 10A .0801	11/15/2012	S174
04 NCAC 10B .0203	11/15/2012	S174
04 NCAC 10B .0501	11/15/2012	S174
04 NCAC 10C .0101	10/18/2012	S174
04 NCAC 10C .0103	10/18/2012	S174
04 NCAC 10C .0107	10/18/2012	S174
04 NCAC 10C .0108	11/15/2012	S174
04 NCAC 10C .0109	10/18/2012	S174
04 NCAC 10C .0201	11/15/2012	S174
04 NCAC 10D .0110	11/15/2012	S174
04 NCAC 10E .0201	10/18/2012	S174
04 NCAC 10E .0202	10/18/2012	S174
04 NCAC 10E .0203	10/18/2012	S174
04 NCAC 10E .0301	11/15/2012	S174

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*IN ADDITION*

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04 NCAC 10G .0101	Order for Mediated Settlement Conference	10/18/2012	S174
04 NCAC 10G .0103	The Mediated Settlement Conference	10/18/2012	S174
04 NCAC 10G .0104A	Foreign Language Interpreters	10/18/2012	S174
04 NCAC 10G .0105	Sanctions	11/15/2012	S174
04 NCAC 10G .0107	Compensation of the Mediator	11/15/2012	S174
04 NCAC 10G .0110	Waiver of Rules	11/15/2012	S174
04 NCAC 10H .0206	Waiver of Rules	11/15/2012	S174
04 NCAC 10I .0204	Suspension of Rules	11/15/2012	S174
<b>WILDLIFE RESOURCES COMMISSION</b>			
15A NCAC 10B .0219	Coyote	06/20/2012	H352

Public Notice  
North Carolina Environmental Management Commission/NPDES Unit  
1617 Mail Service Center  
Raleigh, NC 27699-1617

Notice of Intent to Reissue an NPDES General Wastewater Permit

The North Carolina Environmental Management Commission proposes to reissue the following NPDES wastewater general permit:

NPDES General Permit No. NCG550000 for the discharge of domestic wastewater from single family residences and other 100% domestic discharges with similar characteristics.

Written comments regarding the proposed general permit will be accepted until 30 days after the publish date of this notice. The Director of the NC Division of Water Quality (DWQ) may hold a public hearing should there be a significant degree of public interest. Please mail comments and/or information requests to DWQ at the above address. Interested persons may visit the DWQ at 512 N. Salisbury Street, Raleigh, NC to review information on file. Additional information on this notice may be found on our website: <http://portal.ncdenr.org/web/wq/swp/ps/npdes/calendar>, or by calling John Hennessy at (919) 807-6377.

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**APPROVED RULES**

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

Rules approved by the Rules Review Commission at its meeting on March 21, 2013.

**REGISTER CITATION TO THE  
NOTICE OF TEXT**

**HOME INSPECTOR LICENSURE BOARD**

Suspension of Authority to Expend Funds 11 NCAC 08 .1012\* 27:12 NCR

**ENVIRONMENTAL MANAGEMENT COMMISSION**

Groundwater Quality Standards 15A NCAC 02L .0202\* 26:21 NCR

**PUBLIC HEALTH, COMMISSION FOR**

Definitions 15A NCAC 18A .2508\* 27:11 NCR

Special Purpose and Therapy Pools 15A NCAC 18A .2544\* 27:11 NCR

**HEARING AID DEALERS AND FITTERS BOARD**

Visual Inspection and Hearing Test 21 NCAC 22I .0103\* 27:10 NCR

Advertising 21 NCAC 22J .0103\* 27:10 NCR

**PODIATRY EXAMINERS, BOARD OF**

Examination 21 NCAC 52 .0202\* 27:10 NCR

Annual Renewal of License 21 NCAC 52 .0207\* 27:10 NCR

Fee Schedule 21 NCAC 52 .0613\* 27:10 NCR

**REAL ESTATE COMMISSION**

Broker Name and Address 21 NCAC 58A .0103\* 27:10 NCR

Advertising 21 NCAC 58A .0105\* 27:10 NCR

Handling and Accounting of Funds 21 NCAC 58A .0107 27:10 NCR

Retention of Records 21 NCAC 58A .0108\* 27:10 NCR

Drafting Legal Instruments 21 NCAC 58A .0111\* 27:10 NCR

Handling of Trust Money 21 NCAC 58A .0116\* 27:10 NCR

Accounting for Trust Money 21 NCAC 58A .0117\* 27:10 NCR

Trust Money Belonging to Property Owners' Associations 21 NCAC 58A .0118\* 27:10 NCR

License Renewal; Penalty for Operating While License Expired 21 NCAC 58A .0503\* 27:10 NCR

Active and Inactive License Status 21 NCAC 58A .0504\* 27:10 NCR

Provisional Broker to be Supervised by Broker 21 NCAC 58A .0506\* 27:10 NCR

Licensing of Persons Licensed in Another Jurisdiction 21 NCAC 58A .0511\* 27:10 NCR

Procedures for Requesting Hearings When Applicant's Chara... 21 NCAC 58A .0616\* 27:10 NCR

Application for Payment 21 NCAC 58A .1401\* 27:10 NCR

Notice of Hearing; Order/Pay't from/Real Estate Education... 21 NCAC 58A .1403 27:10 NCR



<u>Exhausted Liability Limits</u>	21	NCAC	58A .1404	27:10 NCR
<u>Applicability</u>	21	NCAC	58A .2201	27:10 NCR
<u>Standards</u>	21	NCAC	58A .2202*	27:10 NCR
<u>Registration Fee</u>	21	NCAC	58B .0102	27:10 NCR
<u>Renewal of Time Share Project Registration</u>	21	NCAC	58B .0103*	27:10 NCR

**TITLE 11 – DEPARTMENT OF INSURANCE**

**11 NCAC 08 .1012 SUSPENSION OF AUTHORITY TO EXPEND FUNDS**

In the event that the Board's authority to expend funds is suspended pursuant to G.S. 93B-2(d), the Board shall continue to issue and renew licenses. All fees tendered shall be placed in an escrow account maintained by the Board for this purpose. Once the Board's authority is restored, the funds shall be moved from the escrow account into the general operating account.

*History Note: Authority G.S. 93B-2(d); Eff. April 1, 2013.*

the naturally occurring concentration as determined by the Director.

(4) Where the groundwater standard for a substance is greater than the Maximum Contaminant Level (MCL), the Director shall apply the MCL as the groundwater standard at any private drinking water well or public water system well that may be impacted.

(c) Except for tracers used in concentrations which have been determined by the Division of Public Health to be protective of human health, and the use of which has been permitted by the Division, substances which are not naturally occurring and for which no standard is specified shall not be permitted in concentrations at or above the practical quantitation limit in Class GA or Class GSA groundwaters. Any person may petition the Director to establish an interim maximum allowable concentration for a substance for which a standard has not been established under this Rule. The petitioner shall submit relevant toxicological and epidemiological data, study results, and calculations necessary to establish a standard in accordance with Paragraph (d) of this Rule. Within three months after the establishment of an interim maximum allowable concentration for a substance by the Director, the Director shall initiate action to consider adoption of a standard for that substance.

(d) Except as provided in Paragraph (f) of this Rule, groundwater quality standards for substances in Class GA and Class GSA groundwaters are established as the least of:

- (1) Systemic threshold concentration calculated as follows: [Reference Dose (mg/kg/day) x 70 kg (adult body weight) x Relative Source Contribution (.10 for inorganics; .20 for organics)] / [2 liters/day (avg. water consumption)];
- (2) Concentration which corresponds to an incremental lifetime cancer risk of 1x10-6;
- (3) Taste threshold limit value;
- (4) Odor threshold limit value;
- (5) Maximum contaminant level; or
- (6) National secondary drinking water standard.

(e) The following references, in order of preference, shall be used in establishing concentrations of substances which correspond to levels described in Paragraph (d) of this Rule.

- (1) Integrated Risk Information System (U.S. EPA).
- (2) Health Advisories (U.S. EPA Office of Drinking Water).
- (3) Other health risk assessment data published by the U.S. EPA.

**TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

**15A NCAC 02L .0202 GROUNDWATER QUALITY STANDARDS**

(a) The groundwater quality standards for the protection of the groundwaters of the state are those specified in this Rule. They are the maximum allowable concentrations resulting from any discharge of contaminants to the land or waters of the state, which may be tolerated without creating a threat to human health or which would otherwise render the groundwater unsuitable for its intended best usage.

(b) The groundwater quality standards for contaminants specified in Paragraphs (h) and (i) of this Rule are as listed, except that:

- (1) Where the standard for a substance is less than the practical quantitation limit, the detection of that substance at or above the practical quantitation limit constitutes a violation of the standard.
- (2) Where two or more substances exist in combination, the Director shall consider the effects of chemical interactions as determined by the Division of Public Health and may establish maximum concentrations at values less than those established in accordance with Paragraphs (c), (h), or (i) of this Rule. In the absence of information to the contrary, in accordance with Paragraph (d) of this Rule, the carcinogenic risks associated with carcinogens present shall be considered additive and the toxic effects associated with non-carcinogens present shall also be considered additive.
- (3) Where naturally occurring substances exceed the established standard, the standard shall be

(4) Other relevant, published health risk assessment data, and scientifically valid peer-reviewed published toxicological data.

(f) The Commission may establish groundwater standards less stringent than existing maximum contaminant levels or national secondary drinking water standards if it finds, after public notice and opportunity for hearing, that:

- (1) more recent data published in the EPA health references listed in Paragraph (e) of this Rule results in a standard which is protective of public health, taste threshold, or odor threshold;
- (2) the standard will not endanger the public health and safety, including health and environmental effects from exposure to groundwater contaminants; and
- (3) compliance with a standard based on the maximum contaminant level or national secondary drinking water standard would produce serious hardship without equal or greater public benefit.

(g) Groundwater quality standards specified in Paragraphs (h) and (i) of this Rule and interim maximum allowable concentrations established pursuant to Paragraph (c) of this Rule shall be reviewed by the Director on a triennial basis. Appropriate modifications to established standards shall be made in accordance with the procedure prescribed in Paragraph (d) of this Rule where modifications are considered appropriate based on data published subsequent to the previous review.

(h) Class GA Standards. Unless otherwise indicated, the standard refers to the total concentration in micrograms per liter of any constituent in a dissolved, colloidal or particulate form which is mobile in groundwater. This does not apply to sediment or other particulate matter which is preserved in a groundwater sample as a result of well construction or sampling procedures. The Class GA standards are:

- (1) Acenaphthene: 80;
- (2) Acenaphthylene: 200;
- (3) Acetone: 6 mg/L;
- (4) Acrylamide: 0.008;
- (5) Anthracene: 2 mg/L;
- (6) Arsenic: 10;
- (7) Atrazine and chlorotriazine metabolites: 3;
- (8) Barium: 700;
- (9) Benzene: 1;
- (10) Benzo(a)anthracene (benz(a)anthracene): 0.05;
- (11) Benzo(b)fluoranthene: 0.05;
- (12) Benzo(k)fluoranthene: 0.5;
- (13) Benzoic acid: 30 mg/L;
- (14) Benzo(g,h,i,)perylene: 200;
- (15) Benzo(a)pyrene: 0.005;
- (16) Bis(chloroethyl)ether: 0.03;
- (17) Bis(2-ethylhexyl) phthalate (di(2-ethylhexyl) phthalate): 3;
- (18) Boron: 700;
- (19) Bromodichloromethane: 0.6;
- (20) Bromoform (tribromomethane): 4;
- (21) n-Butylbenzene: 70;

- (22) sec-Butylbenzene: 70;
- (23) tert-Butylbenzene: 70;
- (24) Butylbenzyl phthalate: 1 mg/L;
- (25) Cadmium: 2;
- (26) Caprolactam: 4 mg/L;
- (27) Carbofuran: 40;
- (28) Carbon disulfide: 700;
- (29) Carbon tetrachloride: 0.3;
- (30) Chlordane: 0.1;
- (31) Chloride: 250 mg/L;
- (32) Chlorobenzene: 50;
- (33) Chloroethane: 3,000;
- (34) Chloroform (trichloromethane): 70;
- (35) Chloromethane (methyl chloride): 3;
- (36) 2-Chlorophenol: 0.4;
- (37) 2-Chlorotoluene (o-chlorotoluene): 100;
- (38) Chromium: 10;
- (39) Chrysene: 5;
- (40) Coliform organisms (total): 1 per 100 mL;
- (41) Color: 15 color units;
- (42) Copper: 1 mg/L;
- (43) Cyanide (free cyanide): 70;
- (44) 2, 4-D (2,4-dichlorophenoxy acetic acid): 70;
- (45) DDD: 0.1;
- (46) DDT: 0.1;
- (47) Dibenz(a,h)anthracene: 0.005;
- (48) Dibromochloromethane: 0.4;
- (49) 1,2-Dibromo-3-chloropropane: 0.04;
- (50) Dibutyl (or di-n-butyl) phthalate: 700;
- (51) 1,2-Dichlorobenzene (orthodichlorobenzene): 20;
- (52) 1,3-Dichlorobenzene (metadichlorobenzene): 200;
- (53) 1,4-Dichlorobenzene (paradichlorobenzene): 6;
- (54) Dichlorodifluoromethane (Freon-12; Halon): 1 mg/L;
- (55) 1,1-Dichloroethane: 6;
- (56) 1,2-Dichloroethane (ethylene dichloride): 0.4;
- (57) 1,2-Dichloroethene (cis): 70;
- (58) 1,2-Dichloroethene (trans): 100;
- (59) 1,1-Dichloroethylene (vinylidene chloride): 350;
- (60) 1,2-Dichloropropane: 0.6;
- (61) 1,3-Dichloropropene (cis and trans isomers): 0.4;
- (62) Dieldrin: 0.002;
- (63) Diethylphthalate: 6 mg/L;
- (64) 2,4-Dimethylphenol (m-xyleneol): 100;
- (65) Di-n-octyl phthalate: 100;
- (66) 1,4-Dioxane (p-dioxane): 3;
- (67) Dioxin (2,3,7,8-TCDD): 0.0002 ng/L;
- (68) 1,1-Diphenyl (1,1-biphenyl): 400;
- (69) Dissolved solids (total): 500 mg/L;
- (70) Disulfoton: 0.3;
- (71) Diundecyl phthalate (Santicizer 711): 100;
- (72) Endosulfan: 40;
- (73) Endrin, total (includes endrin, endrin aldehyde and endrin ketone): 2;

**APPROVED RULES**

- |   |  |
|---|--|
| (74) Epichlorohydrin: 4;  | (124) n-Propylbenzene: 70;   |
| (75) Ethyl acetate: 3 mg/L;   | (125) Pyrene: 200;   |
| (76) Ethylbenzene: 600;   | (126) Selenium: 20;  |
| (77) Ethylene dibromide (1,2-dibromoethane): 0.02;  | (127) Silver: 20;  |
| (78) Ethylene glycol: 10 mg/L;  | (128) Simazine: 4;   |
| (79) Fluoranthene: 300;   | (129) Styrene: 70;   |
| (80) Fluorene: 300;   | (130) Sulfate: 250 mg/L;   |
| (81) Fluoride: 2 mg/L;  | (131) 1,1,2,2-Tetrachloroethane: 0.2;  |
| (82) Foaming agents: 500;   | (132) Tetrachloroethylene (perchloroethylene; PCE): 0.7;   |
| (83) Formaldehyde: 600;   | (133) 2,3,4,6-Tetrachlorophenol: 200;  |
| (84) Gross alpha (adjusted) particle activity (excluding radium-226 and uranium): 15 pCi/L; | (134) Toluene: 600;  |
| (85) Heptachlor: 0.008;   | (135) Toxaphene: 0.03;   |
| (86) Heptachlor epoxide: 0.004;   | (136) 2,4,5-TP (Silvex): 50;   |
| (87) Heptane: 400;  | (137) 1,2,4-Trichlorobenzene: 70;  |
| (88) Hexachlorobenzene (perchlorobenzene): 0.02;  | (138) 1,1,1-Trichloroethane: 200;  |
| (89) Hexachlorobutadiene: 0.4;  | (139) Trichloroethylene (TCE): 3;  |
| (90) Hexachlorocyclohexane isomers (technical grade): 0.02;                                 | (140) Trichlorofluoromethane: 2 mg/L;  |
| (91) n-Hexane: 400;   | (141) 1,2,3-Trichloropropane: 0.005;   |
| (92) Indeno(1,2,3-cd)pyrene: 0.05;  | (142) 1,2,4-Trimethylbenzene: 400;   |
| (93) Iron: 300;   | (143) 1,3,5-Trimethylbenzene: 400;   |
| (94) Isophorone: 40;  | (144) 1,1,2-Trichloro-1,2,2-trifluoroethane (CFC-113): 200 mg/L;   |
| (95) Isopropylbenzene: 70;  | (145) Vinyl chloride: 0.03;  |
| (96) Isopropyl ether: 70;   | (146) Xylenes (o-, m-, and p-): 500; and   |
| (97) Lead: 15;  | (147) Zinc: 1 mg/L.  |
| (98) Lindane (gamma hexachlorocyclohexane): 0.03;   | (i) Class GSA Standards. The standards for this class are the same as those for Class GA except as follows:  |
| (99) Manganese: 50;   | (1) chloride: allowable increase not to exceed 100 percent of the natural quality concentration; and   |
| (100) Mercury: 1;   | (2) dissolved solids (total): 1000 mg/L.   |
| (101) Methanol: 4 mg/L;   | (j) Class GC Standards.  |
| (102) Methoxychlor: 40;   | (1) The concentrations of substances that, at the time of classification, exceed the standards applicable to Class GA or GSA groundwaters shall not be caused to increase, nor shall the concentrations of other substances be caused to exceed the GA or GSA standards as a result of further disposal of contaminants to or beneath the surface of the land within the boundary of the area classified GC. |
| (103) Methylene chloride (dichloromethane): 5;  | (2) The concentrations of substances that, at the time of classification, exceed the standards applicable to GA or GSA groundwaters shall not be caused to migrate as a result of activities within the boundary of the GC classification, so as to violate the groundwater or surface water quality standards in adjoining waters of a different class.   |
| (104) Methyl ethyl ketone (2-butanone): 4 mg/L;   | (3) Concentrations of specific substances, that exceed the established standard at the time of classification, are listed in Section .0300 of this Subchapter.   |
| (105) 2-Methylnaphthalene: 30;  |  |
| (106) 3-Methylphenol (m-cresol): 400;   |  |
| (107) 4-Methylphenol (p-cresol): 40;  |  |
| (108) Methyl tert-butyl ether (MTBE): 20;   |  |
| (109) Naphthalene: 6;   |  |
| (110) Nickel: 100;  |  |
| (111) Nitrate (as N): 10 mg/L;  |  |
| (112) Nitrite (as N): 1 mg/L;   |  |
| (113) N-nitrosodimethylamine: 0.0007;   |  |
| (114) Oxamyl: 200;  |  |
| (115) Pentachlorophenol: 0.3;   |  |
| (116) Petroleum aliphatic carbon fraction class (C5 - C8): 400;                             |  |
| (117) Petroleum aliphatic carbon fraction class (C9 - C18): 700;                            |  |
| (118) Petroleum aliphatic carbon fraction class (C19 - C36): 10 mg/L;                       |  |
| (119) Petroleum aromatics carbon fraction class (C9 - C22): 200;                            |  |
| (120) pH: 6.5 - 8.5;  |  |
| (121) Phenanthrene: 200;  |  |
| (122) Phenol: 30;   |  |
| (123) Phorate: 1;   |  |

*History Note: Authority G.S. 143-214.1; 143B-282(a)(2); Eff. June 10, 1979; Amended Eff. November 1, 1994; October 1, 1993; September 1, 1992; August 1, 1989;*

Temporary Amendment Eff. June 30, 2002;  
Amended Eff. August 1, 2002;  
Temporary Amendment Expired February 9, 2003;  
Amended Eff. April 1, 2013; January 1, 2010; April 1, 2005.

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15A NCAC 18A .2508 DEFINITIONS

The following definitions apply throughout this Section:

- (1) "Equipment replacement" means replacement of individual components of the hydraulic and disinfection systems such as pumps, filters, and automatic chemical feeders.
- (2) "Public swimming pool" means public swimming pool as defined in G.S. 130A-280. Public swimming pools are divided into five types:
  - (a) "Swimming pools" are public swimming pools used primarily for swimming.
  - (b) "Spas" are public swimming pools designed for recreational and therapeutic use that are not drained, cleaned, or refilled after each individual use. Spas may include units designed for hydrojet circulation, hot water, cold water mineral bath, air induction bubbles, or any combination thereof. Common terminology for spas includes "therapeutic pool," "hydrotherapy pool," "whirlpool," "hot spa," and "hot tub."
  - (c) "Wading pools" are public swimming pools designed for use by children, including wading pools for toddlers and children's activity pools designed for casual water play ranging from splashing activity to the use of interactive water features placed in the pool.
  - (d) "Specialized water recreation attractions" are pools designed for special purposes that differentiate them from swimming pools, wading pools and spas. They include:
    - (i) water slide plunge pools and run out lanes, which transfer the kinetic energy of the users' velocity through friction to the slide;
    - (ii) wave pools;
    - (iii) rapid rides;
    - (iv) lazy rivers;
    - (v) interactive play attractions that incorporate devices using sprayed, jetted, or other water sources contacting the users and that

- (vi) do not incorporate standing or captured water as part of the user activity area; and training pools deeper than a 24 inch deep wading pool and shallower than a 36 inch deep swimming pool.
- (e) "Special purpose and therapy pools" are pools designed and used for therapeutic treatments or physical training and fitness outside of a licensed medical facility or practice of a licensed physical therapist. They include:
  - (i) float tanks used for float therapy in a salt brine solution;
  - (ii) swim spa training pools which use jetted water for stationary swimming against a water current;
  - (iii) exercise therapy and treadmill pools equipped for water resistance exercise therapy; and
  - (iv) scuba pools designed and used for training swimmers to use self-contained underwater breathing apparatus.
- (3) "Registered Design Professional" means an individual who is registered or licensed to practice engineering as defined by G.S. 89C or architecture as defined by G.S. 83A.
- (4) "Remodeled" means renovated in a manner requiring disruption of the majority of the pool shell or deck, changes in the pool profile, or redesign of the pool hydraulic system.
- (5) "Repair" means returning existing equipment to working order, replastering or repainting of the pool interior, replacement of tiles or coping and similar maintenance activities. This term includes replacement of pool decks where the Department has determined that no changes are needed to underlying pipes or other pool structures.
- (6) "Safety vacuum release system" means a system or device capable of providing vacuum release at a suction outlet caused by a high vacuum occurrence due to suction outlet flow blockage.
- (7) "Splash zone" means the area of an interactive play attraction that sheds water to a surge tank or container to be recirculated.
- (8) "Unblockable drain" means a drain of any size and shape that a human body cannot sufficiently block to create a suction entrapment hazard.

*History Note: Authority G.S. 130A-282; Eff. May 1, 1991; Temporary Amendment Eff. June 1, 1994 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Amended Eff. April, 1, 2013; May 1, 2010; March 1, 2004; April 1, 1999; January 1, 1996; October 1, 1994.*

**15A NCAC 18A .2544 SPECIAL PURPOSE AND THERAPY POOLS**

(a) Special purpose and therapy pools shall comply with the requirements for public swimming pools and spas except as specified in this Rule.

(b) Float tanks:

- (1) The requirement in Rule .2522 of this Section for a deck or walkway continuous with the top of the pool wall does not apply to isolation float tanks where a clear floor space of at least eight feet by four feet is provided adjacent to the entrance to the tank.
- (2) The requirement in Rule .2532 of this Section for the minimum ceiling height of 7 ½ feet above the rim of the pool does not preclude use of a canopy of a lower height to enclose an isolation float tank provided the canopy can be opened to allow users a standing entry and exit from the float tank.
- (3) The minimum lighting requirement in Rule .2524 of this Section does not apply to float tanks provided lighting is available for cleaning and is sufficient to provide visibility for entry and exit from the float tank.
- (4) The requirements in Rule .2518 of this Section that recirculation pumps operate 24 hours per day do not preclude turning off the pump during float sessions when a sanitizing cycle is provided that filters and disinfects the entire capacity of the float tank system at least twice before every user enters the pool. When the float tank is not being used, the pump shall either operate continuously or intermittently to filter and disinfect the capacity of the pool twice every hour.
- (5) The requirement in Rule .2518 of this Section that pool pumps three horsepower or smaller meet NSF/ANSI Standard 50 is not applicable when the mineral content of the brine in a float tank is incompatible with standard pool pumps. Pumps that do not meet NSF/ANSI standard 50 shall be approved by the Department when the viscosity of the mineral solution in the float tank requires a pump impeller or magnetic coupling designed to pump viscous liquids. Electrical safety of such pumps shall be verified by an independent third-party testing lab to meet applicable Underwriters Laboratories (UL) Standards.
- (6) The requirement in Rule .2532 of this Section for a caution sign at spas with a water

temperature above 90 degrees Fahrenheit is not applicable to float tanks that do not exceed an operating temperature of 95 degrees Fahrenheit. Float tanks that exceed an operating temperature of 95 degrees Fahrenheit shall have a posted sign with the same warnings required for hot spas except references to spas may be reworded to reference float tanks or float spas.

(c) Swim Spas:

- (1) Irrespective of Rule .2522(k) of this Section, swim spa training pools that use jetted water for training swimmer athletes under constant supervision of a swim coach may be located above deck level. Swim spa training pools located above deck level shall be in an enclosure secured against unauthorized access or use when a swim coach is not present.
- (2) The maximum operational water depth of four feet required for spas in Rule .2532 of this Section does not apply to swim spas.
- (3) Ladders, steps or stairs required by Rule .2521 of this Section are not required for an above-ground swim spa where a handhold or handrail is provided to facilitate transfer over the pool wall.

(d) Exercise Therapy and Treadmill Pools:

- (1) The maximum operational water depth of four feet required for spas in Rule .2532 of this Section does not apply to exercise therapy and treadmill pools.
- (2) The 30 minute turnover rate required for spa recirculation systems in Rule .2532 of this Section does not apply to exercise therapy or treadmill pools with a water capacity exceeding 1,000 gallons provided that the turnover time does not exceed two hours.

(e) Scuba Training Pools:

- (1) The prohibition of underwater ledges in Rule .2516(b) of this Section does not preclude drop-off ledges to the deep-diving portion of pools designed and used for training swimmers to use self-contained underwater breathing apparatus.
- (2) Scuba pools shall comply with the requirements for swimming pools and are not required to meet the requirements for spas in Rule .2532 of this Section.

*History Note: Authority G.S. 130A-282; Eff. April 1, 2013.*

**TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS**

**CHAPTER 22 - HEARING AID DEALERS AND FITTERS BOARD**

**21 NCAC 22I .0103 VISUAL INSPECTION AND HEARING TEST**

(a) All licensees and registered apprentices shall make a visual inspection of the external auditory canal and the tympanic membrane, using a device having its own light source in order to fulfill the requirements of 21 CFR 801 (effective August 15, 1977), Subpart 801.420 concerning the warning to hearing aid dispensers.

(b) All licensees and registered apprentices shall conduct a hearing test using an audiometer, the calibration for which is on file at the Board office, or equivalent physiologic testing.

(c) A hearing test shall be conducted within 90 days prior to the dispensing of a hearing aid and a copy of the hearing test shall be maintained for a period of at least three years.

(d) The hearing test shall be conducted in an environment conducive to obtaining accurate results and shall include the following, unless physiologic testing is utilized:

- (1) pure tone audiometry, including air conduction testing and bone conduction testing;
- (2) live voice or recorded voice speech audiometry, including speech reception threshold testing and speech discrimination testing;
- (3) effective masking, if audiometric testing reveals a difference between the ears at any one frequency equal to or greater than 40 decibels or if there is audiometric air-bone gap of 15 dB or greater;
- (4) testing at least at the following frequencies: 500 Hz, 1000 Hz, 2000 Hz, 3000Hz, and 4000 Hz; and
- (5) mid-octave testing performed when there is a 20 dB or greater difference between any adjacent octaves.

(e) All licensees and registered apprentices shall evaluate dispensed products to determine effectiveness. Measures of evaluation shall include at least one of the following:

- (1) sound field measurements;
- (2) real ear measurements; or
- (3) client evaluation sheets.

*History Note: Authority G.S. 93D-3(c); Eff. April 23, 1976; Amended Eff. April 1, 2013; April 1, 1989; May 1, 1988.*

**21 NCAC 22J .0103 ADVERTISING**

It shall be unethical to perform any of the following acts:

- (1) To advertise a particular model, type, or kind of hearing aid for sale when purchasers or prospective purchasers responding to such advertisements cannot have it demonstrated to them or cannot purchase the advertised hearing aid from the licensee or registered apprentice;
- (2) To advertise that a product is offered for sale at a special or reduced price, or words of similar meaning such as "sale price," when, within the past six months from the date of the advertisement, less than 50 percent of all sales

of that specific model of the product were sold at a price higher than the special or reduced price;

- (3) To advertise a testimonial or endorsement by a living person unless the advertisement:
  - (a) contains the actual full name of the person directly following the quote or directly under any picture,
  - (b) lists the person's city and state of residence, and
  - (c) discloses whether the person making the endorsement or testimonial received compensation for making the endorsement or testimonial;
- (4) To advertise titles or credentials by the use of initials unless the meaning of the initials are written out in the advertisement; or
- (5) To advertise using words of comparison or performance specifications not based on verifiable data (for example, lowest price, MSRP, highest quality, fits up to 35dB hearing loss).

*History Note: Authority G.S. 93D-3(c); 93D-13(a); Eff. April 23, 1976; Amended Eff. April 1, 2013; May 1, 1988.*

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**CHAPTER 52 - BOARD OF PODIATRY EXAMINERS**

**21 NCAC 52 .0202 EXAMINATION**

(a) The board shall conduct an examination as set out in G.S. 90-202.6. The examination shall be scheduled so as not to conflict with the APMLE.

(b) An applicant who has qualified to sit for the examination must pass written and oral sections on medical and clinical subjects related to the practice of podiatric medicine.

(c) An applicant who has successfully completed the examination in Paragraph (b) of this Rule must also pass an examination section on podiatric office practice and ethics within 30 months of successfully completing the examination in Paragraph (b).

*History Note: Authority G.S. 90-202.6; Eff. February 1, 1976; Amended Eff. April 1, 2013; June 1, 2011; December 1, 1988.*

**21 NCAC 52 .0207 ANNUAL RENEWAL OF LICENSE**

The executive secretary of the board shall mail to the last known address of each license holder each year a form on which to apply for renewal of his or her license. The renewal form and accompanying documents shall be returned to the board with the original signatures of the licensed podiatrist. The penalties for failure to comply with this Rule are specified in G.S. 90-202.10.

*History Note: Authority G.S. 90-202.4(g); 90-202.10; Eff. February 1, 1976;*

Amended Eff. April 1, 2013; January 1, 2005; December 1, 1988.

**21 NCAC 52 .0613 FEE SCHEDULE**

The following fees shall apply:

- (1) Application for examination (non-refundable) \$300.00
- (2) Examination (non-refundable) \$50.00
- (3) Re-Examination (application + exam fee, non-refundable) \$350.00
- (3) License certificate \$100.00
- (4) Annual License Renewal \$200.00
- (5) License Renewal Late Fee (per month, up to 6 months) \$25.00
- (6) Data Processing Fee for Pharmaceutical Verification as set forth in Rule .0210 of this Chapter \$300.00
- (7) Returned check the fee as set forth in Rule .0612 of this Section. As of the effective date of this Rule that fee is \$12.00
- (8) Incorporation for PA/PC/PLLC \$50.00
- (9) Annual Corporate Renewal \$25.00
- (10) Corporate Renewal Late Fee \$10.00

History Note: Authority G.S. 90-202.5(a);90-202.6(c); 90-202.9; 90-202.10; 55B-10; 55B-11;55B-12; 150B-19(5)(e); Eff. April 1, 2013.

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**CHAPTER 58 – REAL ESTATE COMMISSION**

**21 NCAC 58A .0103 BROKER NAME AND ADDRESS**

(a) Upon initial licensure and at all times thereafter, every broker shall assure that the Commission has on record the broker's current personal name, firm name, trade name, residence address and firm address. Every broker shall notify the Commission in writing of each change of personal name, firm name, trade name, residence address and firm address within 10 days of said change. All addresses shall be sufficiently descriptive to enable the Commission to correspond with and locate the broker.

(b) Registration of Assumed Name. In the event that any broker shall advertise in any manner using a firm name or an assumed name which does not set forth the surname of the broker, the broker shall first file the appropriate certificate with the office of the county register of deeds in each county in which the broker intends to engage in brokerage activities in compliance with G.S. 66-68 and notify the Commission in writing of the use of such a firm name or assumed name.

(c) Business names. A broker shall not include the name of a provisional broker or an unlicensed person in the name of a sole proprietorship, partnership or business entity other than a corporation or limited liability company. No broker shall use a business name that includes the name of any active, inactive, or cancelled broker without the permission of that broker or that broker's authorized representative.

History Note: Authority G.S. 55B-5; 66-68; 93A-3(c); 93A-6(a)(1); Eff. February 1, 1976; Readopted Eff. September 30, 1977; Amended Eff. April 1, 2013; August 1, 1998; February 1, 1989; May 1, 1984.

**21 NCAC 58A .0105 ADVERTISING**

(a) Authority to Advertise.

(1) A provisional broker shall not advertise any brokerage service or the sale, purchase, exchange, rent or lease of real estate for another or others without the consent of his or her broker-in-charge and without including in the advertisement the name of the broker or firm with whom the provisional broker is associated.

(2) A broker shall not advertise or display a "for sale" or "for rent" sign on any real estate without the written consent of the owner or the owner's authorized agent.

(b) Blind Ads. A broker shall not advertise the sale, purchase, exchange, rent or lease of real estate, for another or others, in a manner indicating the offer to sell, purchase, exchange, rent, or lease is being made by the broker's principal only. Every such advertisement shall conspicuously indicate that it is the advertisement of a broker or brokerage firm and shall not be confined to publication of only a post office box number, telephone number, street address, internet web address, or e-mail address.

(c) A person licensed as a limited nonresident commercial broker shall comply with the provisions of Rule .1809 of this Subchapter in connection with all advertising concerning or relating to his or her status as a North Carolina broker.

History Note: Authority G.S. 93A-2(a1); 93A-2(a2); 93A-3(c); 93A-9; Eff. February 1, 1976; Readopted Eff. September 30, 1977; Amended Eff. April 1, 2013; July 1, 2009; January 1, 2008; April 1, 2006; July 1, 2004; October 1, 2000; August 1, 1998; April 1, 1997; July 1, 1989; February 1, 1989.

**21 NCAC 58A .0107 HANDLING AND ACCOUNTING OF FUNDS**

History Note: Authority G.S. 93A-3(c); 93A-9; Eff. February 1, 1976; Readopted Eff. September 30, 1977; Amended Eff. January 1, 2012; April 1, 2006; July 1, 2005; July 1, 2004; July 1, 2003; September 1, 2002; August 1, 2000; August 1, 1998; July 1, 1996; July 1, 1993; May 1, 1990. Repealed Eff. April 1, 2013.

**21 NCAC 58A .0108 RETENTION OF RECORDS**

(a) Brokers shall retain records of all sales, rental, and other transactions conducted in such capacity, whether the transaction is pending, completed or terminated prior to its successful conclusion. The broker shall retain such records for three years

after all funds held by the broker in connection with the transaction have been disbursed to the proper party or parties or the successful or unsuccessful conclusion of the transaction, whichever occurs later. However, if the broker's agency agreement is terminated prior to the conclusion of the transaction, the broker shall retain such records for three years after the termination of the agency agreement or the disbursement of all funds held by or paid to the broker in connection with the transaction, whichever occurs later.

(b) Such records shall include the following:

- (1) contracts of sale,
- (2) written leases,
- (3) agency contracts,
- (4) options,
- (5) offers to purchase,
- (6) trust or escrow records,
- (7) earnest money receipts,
- (8) disclosure documents,
- (9) closing statements,
- (10) brokerage cooperation agreements,
- (11) declarations of affiliation,
- (12) broker price opinions and comparative market analyses prepared pursuant to G.S. 93A, Article 6, including any notes and supporting documentation, and
- (13) any other records pertaining to real estate transactions.

(c) All such records shall be made available for inspection and reproduction by the Commission or its authorized representatives without prior notice.

*History Note: Authority G.S. 93A-3(c); 93A-9; Eff. February 1, 1976; Readopted Eff. September 30, 1977; Amended Eff. July 1, 2004; September 1, 2002; August 1, 1998; February 1, 1989; February 1, 1998; Temporary Amendment Eff. October 1, 2012; Amended Eff. April 1, 2013.*

**21 NCAC 58A .0111 DRAFTING LEGAL INSTRUMENTS**

(a) A broker acting as an agent in a real estate transaction shall not draft offers, sales contracts, options, leases, promissory notes, deeds, deeds of trust or other legal instruments by which the rights of others are secured; however, a broker may complete preprinted offers, option contracts, sales contracts or lease forms in a real estate transaction when authorized or directed to do so by the parties.

(b) A broker may use electronic, computer, or word processing equipment to store preprinted offer and sales contract forms which comply with Rule .0112, as well as preprinted option and lease forms, and may use such equipment to complete and print offer, contract and lease documents. Provided, however, a broker shall not alter the preprinted form before it is presented to the parties. If the parties propose to delete or change any word or provision in the form, the form must be marked to indicate the change or deletion made. The language of the form shall not be modified, rewritten, or changed by the broker or their clerical employees unless directed to do so by the parties.

(c) Nothing contained in this Rule shall be construed to prohibit a broker from making written notes, memoranda or correspondence recording the negotiations of the parties to a real estate transaction when such notes, memoranda or correspondence do not themselves constitute binding agreements or other legal instruments.

*History Note: Authority G.S. 93A-3(c); Eff. July 1, 1988; Amended Eff. April 1, 2013; April 1, 2006; October 1, 2000; February 1, 1989.*

**21 NCAC 58A .0116 HANDLING OF TRUST MONEY**

(a) Except as provided in Paragraph (b) of this Rule, all monies received by a broker acting in his or her fiduciary capacity (hereinafter "trust money") shall be deposited in a trust or escrow account as defined in Rule .0117(b) of this Section no later than three banking days following the broker's receipt of such monies.

(b) Exceptions to the requirements of Paragraph (a):

- (1) All monies received by a provisional broker shall be delivered upon receipt to the broker with whom he or she is affiliated.
- (2) All monies received by a non-resident commercial broker shall be delivered as required by Rule .1808 of this Subchapter.
- (3) Earnest money or tenant security deposits paid by means other than currency and received by a broker in connection with a pending offer to purchase or lease shall be deposited in a trust or escrow account no later than three days following acceptance of such offer to purchase or lease; the date of such acceptance of such offer or lease shall be set forth in the purchase or lease agreement.
- (4) A broker may accept custody of a check or other negotiable instrument made payable to the seller of real property as payment for an option or due diligence fee, but only for the purpose of delivering the instrument to the seller. While the instrument is in the custody of the broker, the broker shall, according to the instructions of the buyer, either deliver it to the seller or return it to the buyer. The broker shall safeguard the instrument and be responsible to the parties on the instrument for its safe delivery as required by this Rule. A broker shall not retain such an instrument for more than three business days after the acceptance of the option or other sales contract.

(c) Prior to depositing trust money into a trust or escrow account that bears interest, the broker having custody over such money shall first secure written authorization from all parties having an interest in the money. Such authorization shall specify and set forth in a conspicuous manner how and to whom the interest shall be disbursed.

(d) In the event of a dispute between buyer and seller or landlord and tenant over the return or forfeiture of any deposit



other than a residential tenant security deposit held by the broker, the broker shall retain the deposit in a trust or escrow account until the broker has obtained a written release from the parties consenting to its disposition or until disbursement is ordered by a court of competent jurisdiction. Alternatively, the broker may deposit the disputed monies with the appropriate Clerk of Superior Court in accordance with the provisions of G.S. 93A-12. If it appears that one of the parties has abandoned his or her claim to the funds, the broker may disburse the money to the other claimant according to the written agreement. Before doing so, however, the broker must first make a reasonable effort to notify the absent party and provide that party with an opportunity to renew his or her claim to the funds. Tenant security deposits shall be disposed of in accordance with G.S. 42-50 through 56 and G.S. 42A-18.

(e) A broker may transfer an earnest money deposit from his or her trust or escrow account to the closing attorney or other settlement agent no more than 10 days prior to the anticipated settlement date. A broker shall not disburse prior to settlement any earnest money in his or her possession for any other purpose without the written consent of the parties.

(f) A broker shall not disburse trust money to or on behalf of a client in an amount exceeding the balance of trust money belonging to the client and held in the trust account.

(g) Every broker shall safeguard any money or property of others which comes into the broker's possession in a manner consistent with the Real Estate License Law and Commission Rules. A broker shall not convert the money or property of others to his or her own use, apply such money or property to a purpose other than for which it was intended or permit or assist any other person in the conversion or misapplication of such money or property.

*History Note: Authority G.S. 93A-3(c); 93A-6; Eff. April 1, 2013.*

**21 NCAC 58A .0117 ACCOUNTING FOR TRUST MONEY**

(a) A broker shall create, maintain and retain records sufficient to identify the ownership of all funds belonging to others. Such records shall be sufficient to show proper deposit and disbursement of such funds into and from a trust or escrow account and to verify the accuracy and proper use of the trust or escrow account.

(b) A trust or escrow account shall satisfy the requirements of G.S. 93A-6(g) and shall be designated as a "Trust Account" or "Escrow Account." All bank statements, deposit tickets and checks drawn on said account shall bear the words "Trust Account" or "Escrow Account." A trust account shall provide for the full withdrawal of funds on demand without prior notice and without penalty or deduction to the funds.

(c) A broker shall create, maintain or retain the following records:

- (1) bank statements;
- (2) canceled checks and other evidence or memoranda of payments from the trust or escrow account, whether by transfer between accounts, wire payments, or payments by electronic means, which shall be referenced to

the corresponding journal entry or check stub entries and to the corresponding sales transaction ledgers or for rental transactions, the corresponding property or owner ledgers. Checks and other evidence or memoranda of payments from the account shall identify the payee by name and shall bear a notation identifying the purpose of the disbursement. When a payment is used to disburse funds for more than one sales transaction, owner, or property, the check or other evidence or memoranda of payment shall bear a notation identifying each sales transaction, owner, or property for which disbursement is made, including the amount disbursed for each, and the corresponding sales transaction, property, or owner ledger entries. When necessary, the check notation may refer to the required information recorded on a supplemental disbursement worksheet which shall be cross-referenced to the corresponding check or payment. In lieu of retaining canceled checks, a broker may retain digitally imaged copies of the canceled checks or substitute checks provided that such images are legible reproductions of the front and back of such instruments with no smaller images than 1.1875 x 3.0 inches and provided that the broker's bank retains for a period of at least five years the original checks, "substitute checks" as described in 12 C.F.R. 229.51 or the capacity to provide substitute checks as described in 12 C.F.R. 229.51 and makes the original or substitute checks available to the broker and the Commission upon request;

(3) deposit tickets or other evidence or memoranda of deposits or payments into the account, whether by transfer between accounts, wire payments, or payments by electronic means:

(A) for a sales transaction, the deposit ticket or other evidence or memoranda of deposits or payments into the account shall identify the purpose and remitter of the funds deposited, the property, the parties involved, and a reference to the corresponding sales transaction ledger;

(B) for a rental transaction, the deposit ticket or other evidence or memoranda of deposits or payments into the account shall identify the purpose and remitter of the funds deposited, the tenant, and the corresponding property or owner ledger;

(C) for deposits of funds belonging to or collected on behalf of a property

- owner association, the deposit ticket or other evidence or memoranda of deposits or payments into the account shall identify the property or property interest for which the payment is made, the property or interest owner, the remitter, and the purpose of the payment;
- (D) when a single deposit ticket or payment is used to deposit funds collected for more than one sales transaction, property owner, or property, the required information shall be recorded on the ticket or other evidence or memoranda of deposits or payments into the account for each sales transaction, owner, or property, or it may refer to the same information recorded on a supplemental deposit worksheet which shall be cross-referenced to the corresponding deposit ticket;
- (4) a separate ledger for each sales transaction, for each property or owner of property managed by the broker and for company funds held in the trust account:
- (A) the ledger for a sales transaction shall identify the property, the parties to the transaction, the amount, date, and purpose of the deposits and from whom received, the amount, date, check number, and purpose of disbursements and to whom paid, and the running balance of funds on deposit for each deposit and disbursement entry;
- (B) the ledger for a rental transaction shall identify the particular property or owner of property, the tenant, the amount, date, and purpose of the deposits and from whom received, the amount, date, check number, and purpose of disbursements and to whom paid, and the running balance of funds on deposit for each deposit and disbursement entry. Monies held as tenant security deposits in connection with rental transactions may be accounted for on a separate tenant security deposit ledger for each property or owner of property managed by the broker. For each security deposit the tenant security deposit ledger shall identify the remitter, the date the deposit was paid, the amount, the tenant, landlord, and subject property as well as the check number, amount, date, payee, purpose and a running balance for each disbursement. When tenant security deposit monies are accounted for on a separate ledger as provided in this Rule, deposit tickets, canceled checks and supplemental worksheets shall reference the corresponding tenant security deposit ledger entries;
- (C) a broker may maintain a maximum of one hundred dollars (\$100.00) in company funds in a trust account for the purpose of paying service charges incurred by the account. In the event that the services charges exceed one hundred dollars (\$100.00) monthly, the broker may deposit an amount each month sufficient to cover the service charges. A broker shall maintain a separate ledger for company funds held in the trust account identifying the date, amount and running balance for each deposit and disbursement;
- (5) a general journal, check register or check stubs identifying in chronological order each bank deposit and disbursement of monies to and from the trust or escrow account, including the amount and date of each deposit and a reference to the corresponding deposit ticket and any supplemental deposit worksheet, and the amount, date, check number, and purpose of disbursements and to whom paid. The journal or check stubs shall also show a running balance for each entry into the account;
- (6) a payment record for each property or interest for which funds are collected and deposited into a property owner association trust account as required by Rule .0118 of this Section. Payment record(s) shall identify the amount, date, remitter, and purpose of payments received, the amount and nature of the obligation for which payments are made, and the amount of any balance due or delinquency;
- (7) copies of earnest money checks, due diligence fee checks, receipts for cash payments, contracts, and closing statements in sales transactions;
- (8) copies of leases, security deposit checks, property management agreements, property management statements, and receipts for cash payments in leasing transactions;
- (9) copies of covenants, bylaws, minutes, management agreements and periodic statements relating to the management of property owner associations;
- (10) copies of invoices, bills, and contracts paid from the trust account; and

- (11) copies of any documents not otherwise described in this Rule necessary and sufficient to verify and explain record entries.

(d) Records of all receipts and disbursements of trust or escrow monies shall be maintained in such a manner as to create an audit trail from deposit tickets and canceled checks to check stubs or journals and to the ledger sheets.

(e) Brokers shall reconcile their trust or escrow accounts monthly. The trust account reconciliation shall be performed in the following manner as of a specific cutoff date selected by the broker:

- (1) a trial balance shall be prepared showing a list of the property or owner ledgers, their balances, and the total of all of the property or owner ledger balances as of the cutoff date;
- (2) a bank statement shall be reconciled by deducting from the statement's ending balance the amount of any outstanding checks and then adding to the balance the amount of any deposits-in-transit as of the cutoff date; and
- (3) the trial balance, reconciled bank statement balance, and the journal balance shall be compared as of the cutoff date. If the amounts on the trial balance, journal balance and reconciled bank balance do not agree, the broker shall investigate the reason for any variation between the balances and make the necessary corrections to bring the balances into agreement.

A broker shall maintain and retain a worksheet for each monthly trust account reconciliation showing the balance of the journal or check stubs, the trial balance and the reconciled bank statement balance to be in agreement as of the cutoff date.

(f) In addition to the records required by Paragraph (d) of this Rule, a broker acting as agent for the landlord of a residential property used for vacation rentals shall create and maintain a subsidiary ledger sheet for each property or owner of such properties on which all funds collected and disbursed are identified in categories by purpose. On a monthly basis, the broker shall reconcile the subsidiary ledgers to the corresponding property or property owner ledger. In lieu of maintaining a subsidiary ledger, the broker may maintain an accounts payable ledger for each owner or property and each vendor to whom trust monies are due for monies collected on behalf of the owner or property identifying the date of receipt of the trust monies, from whom the monies were received, rental dates, and the corresponding property or owner ledger entry including the amount to be disbursed for each and the purpose of the disbursement. The broker may also maintain an accounts payable ledger in the format described above for vacation rental tenant security deposit monies and vacation rental advance payments.

(g) Upon the written request of a client, a broker shall promptly, but in no event later than ten days after receipt of the request, furnish the client with copies of any records retained as required by Rule 21 NCAC 58A .0108 that pertain to the transaction to which the client was a party.

(h) All trust or escrow account records shall be made available for inspection by the Commission or its authorized representatives in accordance with Rule 21 NCAC 58A .0108.

*History Note: Authority G.S. 93A-3(c); 93A-6; Eff. April 1, 2013.*

**21 NCAC 58A .0118 TRUST MONEY BELONGING TO PROPERTY OWNERS' ASSOCIATIONS**

(a) The funds of a property owners' association, when collected, maintained, disbursed or otherwise controlled by a broker, are trust money and shall be treated as such in the manner required by this Rule. Such trust money must be deposited into and maintained in a trust or escrow account dedicated exclusively for trust money belonging to a single property owners' association and may not be commingled with funds belonging to other property owners' associations or other persons or parties. A broker who undertakes to act as manager of a property owners' association or as the custodian of trust money belonging to a property owners' association shall provide the association with periodic statements which report the balance of association trust money in the broker's possession or control and which account for the trust money the broker has received and disbursed on behalf of the association. Such statements must be made in accordance with the broker's agreement with the association, but not less frequently than every 90 days.

(b) A broker who receives trust money belonging to a property owners' association in his or her capacity as an officer of the association in a residential development in which the broker is a property owner and for which the broker receives no compensation is exempt from the requirements of Rule .0116 of this Section except that said broker shall not convert trust money belonging to the association to his or her own use, apply such money or property to a purpose other than that for which it was intended or permit or assist any other person in the conversion or misapplication of such money or property.

*History Note: Authority G.S. 93A-3(c); 93A-6; Eff. April 1, 2013.*

**21 NCAC 58A .0503 LICENSE RENEWAL; PENALTY FOR OPERATING WHILE LICENSE EXPIRED**

(a) All real estate licenses issued by the Commission under G.S. 93A, Article 1 shall expire on the 30th day of June following issuance. Any broker desiring renewal of a license shall apply for renewal within 45 days prior to license expiration by submitting a renewal application on a form prescribed by the Commission and submitting with the application the required renewal fee of forty-five dollars (\$45.00).

(b) Any person desiring to renew his or her license on active status shall, upon the second renewal of such license following initial licensure, and upon each subsequent renewal, have obtained all continuing education required by G.S. 93A-4.1 and Rule .1702 of this Subchapter.

(c) A person renewing a license on inactive status shall not be required to have obtained any continuing education in order to renew such license; however, in order to subsequently change his or her license from inactive status to active status, the broker

must satisfy the continuing education requirement prescribed in Rule .1703 or .1711 of this Subchapter.

(d) Any person or firm that engages in the business of a real estate broker while his, her, or its license is expired is subject to the penalties prescribed in G.S. 93A-6.

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

*Eff. February 1, 1976;*

*Readopted Eff. September 30, 1977;*

*Amended Eff. July 1, 1994; February 1, 1991; February 1, 1989;*

*Temporary Amendment Eff. April 24, 1995 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;*

*Amended Eff. April 1, 2013; April 1, 2006; January 1, 2006; July 1, 2004; December 4, 2002; April 1, 1997; July 1, 1996; August 1, 1995.*

**21 NCAC 58A .0504 ACTIVE AND INACTIVE LICENSE STATUS**

(a) Except for licenses that have expired or that have been revoked, suspended or surrendered, all licenses issued by the Commission shall be designated as being either on active status or inactive status. Subject to compliance with Rule .0110 of this Subchapter, the holder of a license on active status may engage in any activity requiring a real estate license and may be compensated for the provision of any lawful real estate brokerage service. The holder of a license on inactive status shall not engage in any activity requiring a real estate license, including the referral for compensation of a prospective seller, buyer, landlord or tenant to another real estate broker or any other party. A broker holding a license on inactive status must renew the license and pay the prescribed license renewal fee in order to continue to hold the license. The Commission may take disciplinary action against a broker holding a license on inactive status for any violation of G.S. 93A or any rule adopted by the Commission, including the offense of engaging in an activity for which a license is required.

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

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

(d) A broker, other than a provisional broker, with an inactive license who desires to have the license placed on active status shall file with the Commission a request for license activation on a form provided by the Commission containing identifying information about the broker, a statement that the broker has satisfied the continuing education requirements prescribed by Rule .1703 of this Subchapter, the name and address of any broker-in-charge, the date of the request, and the signature of the broker. Upon the mailing or delivery of this form, the broker's status will be considered to be active. If the broker is eligible for license activation, the Commission shall send a written acknowledgement of the license activation to the broker and his or her affiliated broker-in-charge, if any. If neither the broker nor his or her affiliated broker-in-charge receive from the Commission a written acknowledgment of the license activation within 30 days of the date shown on the form, the broker shall immediately terminate his or her real estate brokerage activities pending receipt of the written acknowledgment from the Commission. If either the broker or his or her affiliated broker-in-charge, if any, is notified that he or she is not eligible for license activation due to a continuing education deficiency, the broker shall terminate all real estate brokerage activities until such time as the continuing education deficiency is satisfied and a new request for license activation is submitted to the Commission.

(e) Upon an active, non-provisional broker's affiliation with a firm and broker-in-charge, the broker-in-charge of the office where the broker will be engaged in the real estate business shall notify the Commission of the affiliation on a form provided by the Commission containing identifying information about the affiliating broker and the broker-in-charge, and the signature of the broker-in-charge. If neither the broker nor the broker-in-charge receive from the Commission a written acknowledgment of the license affiliation within 30 days of the date shown on the form, the broker and his or her broker-in-charge shall cease representing the broker as being affiliated with such broker-in-charge pending receipt of the written acknowledgment from the Commission.

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

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

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

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

*Eff. February 1, 1976;*

*Readopted Eff. September 30, 1977;*

*Amended Eff. April 1, 2013; February 1, 2012; January 1, 2012; July 1, 2009; April 1, 2006; July 1, 2005; July 1, 2004; October 1, 2000; April 1, 1997; July 1, 1996; July 1, 1995; July 1, 1994; February 1, 1989; December 1, 1985.*

**21 NCAC 58A .0506 PROVISIONAL BROKER TO BE SUPERVISED BY BROKER**

(a) This Rule shall apply to all real estate provisional brokers.

(b) A provisional broker may engage in or hold himself or herself out as engaging in activities requiring a real estate license only while his or her license is on active status and he or she is supervised by the broker-in-charge of the real estate firm or office with which the provisional broker is affiliated. A provisional broker may be supervised by only one broker-in-charge at a time.

(c) Upon a provisional broker's affiliation with a real estate broker or brokerage firm, the broker-in-charge of the office where the provisional broker will be engaged in the real estate business shall immediately file with the Commission a provisional broker supervision notification on a form provided by the Commission containing identifying information about the provisional broker and the broker-in-charge, a statement from the broker-in-charge certifying that he or she will supervise the provisional broker in the performance of all acts for which a license is required, the date that the broker-in-charge assumes responsibility for such supervision, and the signature of the broker-in-charge. If the provisional broker is on inactive status at the time of associating with a broker or brokerage firm, the broker-in-charge shall also file, along with the provisional broker supervision notification, a request for license activation on a form provided by the Commission containing identifying information about the provisional broker, the statement of the broker-in-charge that he or she has verified that the provisional broker has satisfied the continuing education requirements prescribed by Rule .1703 of this Subchapter, and the postlicensing education requirements, if applicable, prescribed by Rule .1902 of this Subchapter, the date of the request, and the signature of the proposed broker-in-charge. Upon the mailing or delivery of the required form(s), the provisional broker may engage in real estate brokerage activities requiring a license under the supervision of the broker-in-charge; however, if the provisional broker and broker-in-charge do not receive from the Commission a written acknowledgment of the provisional broker supervision notification and, if appropriate, the request for license activation, within 30 days of the date shown on the form, the broker-in-charge shall immediately terminate the provisional broker's real estate brokerage activities pending receipt of the written acknowledgment from the Commission. If the provisional broker and broker-in-charge are notified that the

provisional broker is not eligible for license activation due to a continuing education or postlicensing education deficiency, the broker-in-charge shall cause the provisional broker to immediately cease all activities requiring a real estate license until such time as the continuing education or postlicensing education deficiency is satisfied and a new provisional broker supervision notification and request for license activation is submitted to the Commission.

(d) A broker-in-charge who certifies to the Commission that he or she will supervise a provisional broker shall actively and directly supervise the provisional broker in a manner that reasonably assures that the provisional broker performs all acts for which a real estate license is required in accordance with the Real Estate License Law and Commission rules. A supervising broker who fails to supervise a provisional broker as prescribed in this Rule may be subject to disciplinary action by the Commission.

(e) Upon the termination of the supervisory relationship between a provisional broker and his or her broker-in-charge, the provisional broker and the broker-in-charge shall provide written notification of the date of termination to the Commission not later than 10 days following said termination.

*History Note:* Authority G.S. 93A-2(b); 93A-3; 93A-9;

*Eff. February 1, 1976;*

*Readopted Eff. September 30, 1977;*

*Amended Eff. April 1, 2013; April 1, 2006; July 1, 2005; July 1, 2004; October 1, 2000; August 1, 1998; July 1, 1996; July 1, 1995; July 1, 1993.*

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

(a) Persons applying for a North Carolina broker license who hold a current real estate license that has been on active status within the previous three years in another state of the United States, a United States territory or possession or a Canadian jurisdiction shall meet the licensing requirements prescribed in G.S. 93A-4 except that such persons shall be exempt from the "national" section of the North Carolina real estate license examination, but shall pass the "state" section of that examination. A person qualifying for licensure under this provision shall be issued a North Carolina broker license on a status comparable to the category of license held by the person in the jurisdiction where the qualifying license is held.

(b) Brokers who were licensed in North Carolina by reciprocity shall be entitled to retain such license indefinitely, unless suspended, revoked or surrendered pursuant to G.S. 93A-6, so long as the license is continuously renewed or is reinstated within six months of expiration. A person who was previously licensed in North Carolina by reciprocity and who seeks reinstatement of that license after the license has been expired for more than six months, suspended, revoked or surrendered shall satisfy the requirements described in Rule .0505 of this Section.

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

*Eff. January 1, 2012;*

*Amended Eff. April 1, 2013; February 1, 2012.*

**21 NCAC 58A .0616 PROCEDURES FOR REQUESTING HEARINGS WHEN APPLICANT'S CHARACTER IS IN QUESTION**

(a) When the moral character of an applicant for licensure or approval is in question, the applicant shall not be licensed or approved until the applicant has affirmatively demonstrated that the applicant possesses the requisite honesty, truthfulness, integrity, good moral character, and general fitness, including mental and emotional fitness, necessary to protect the public interest and promote public confidence in the real estate brokerage business. For the purposes of this Rule, applicant means any person or entity making application for licensure as a real estate broker or for licensure or approval as a prelicensing or continuing education instructor, director, coordinator, school or sponsor.

(b) When the applicant is an entity, it shall be directed and controlled by persons who possess the requisite honesty, truthfulness, integrity, good moral character, and general fitness, including mental and emotional fitness, necessary to protect the public interest and promote public confidence in the real estate brokerage business.

(c) When the character of an applicant is in question, the Commission shall defer action upon the application until the applicant is notified by letter. The letter informing the applicant that his or her moral character is in question shall be sent by certified mail, return receipt requested, to the address shown upon the application. The applicant shall have 60 days from the date of receipt of this letter to request a hearing before the Commission. If the applicant fails to request a hearing within this time or if a properly addressed letter is returned to the Commission undelivered, applicant's right to a hearing shall be considered waived and the application shall be deemed denied. If the applicant makes a timely request for a hearing in accordance with the provisions of this Rule, the Commission shall provide the applicant with a Notice of Hearing and hearing as required by G.S. 150B, Article 3A.

(d) Nothing in this Rule shall be interpreted to prevent an unsuccessful applicant from reapplying for licensure or approval if such application is otherwise permitted by law.

*History Note: Authority G.S. 93A-4; Eff. September 1, 2002; Amended Eff. April 1, 2013; January 1, 2012; April 1, 2006.*

**21 NCAC 58A .1401 APPLICATION FOR PAYMENT**

(a) Any person or entity desiring to obtain payment from the Real Estate Education and Recovery Fund shall file an application with the Commission on a form provided by the Commission. The form shall require the following information concerning the applicant and the claim: the applicant's name and address, the amount of the claim, a description of the acts of the broker which constitute the grounds for the claim and a statement that all court proceedings are concluded. With the form, the applicant shall submit copies of the civil complaint, judgment, and the return of execution marked as unsatisfied. If the application is incomplete or not filed in correct form, or if the Commission is without jurisdiction over the claim or the parties, counsel for the Commission may file a motion to dismiss the application. The Commission shall conduct a hearing on the

motion at which the only issues to be determined shall be whether the application is complete or in correct form or whether the Commission has jurisdiction over the claim or the parties.

(b) Forms for application for payment from the Real Estate Education and Recovery Fund shall be available from the Commission on request.

*History Note: Authority G.S. 93A-3(c); 93A-17; Eff. February 1, 1988; Amended Eff. April 1, 2013; September 1, 2002.*

**21 NCAC 58A .1403 NOTICE OF HEARING: ORDER/PAYT FROM/REAL ESTATE EDUCATION AND RECOVERY FUND**

(a) The Commission shall give notice of the time, place and date of a hearing on a claim for payment from the Real Estate Education and Recovery Fund to any applicant and the broker.

(b) After conducting a hearing, the Commission shall issue an order either authorizing payment or denying the claim, in whole or in part. This order shall be served upon the broker and any applicant.

(c) The existence of subsequent notices of potential claims or subsequent applications shall not be considered by the Commission in the issuance of an Order for Payment in those cases where the award is allowable but must be reduced pursuant to the provisions of G.S. 93A-21.

*History Note: Authority G.S. 93A-16(d); 93A-20; Eff. February 1, 1988; Amended Eff. April 1, 2013; February 1, 1989.*

**21 NCAC 58A .1404 EXHAUSTED LIABILITY LIMITS**

Applications for payment from the Real Estate Education and Recovery Fund received or considered by the Commission after the liability of the Real Estate Education and Recovery Fund as described in G.S. 93A-21 has been exhausted shall be dismissed.

*History Note: Authority G.S. 93A-3(c); 93A-21; Eff. February 1, 1988; Amended Eff. April 1, 2013; February 1, 1989.*

**21 NCAC 58A .2201 APPLICABILITY**

This Section applies to broker price opinions and comparative market analyses provided for a fee by a real estate broker whose license is not on provisional status pursuant to Article 6, Chapter 93A of the General Statutes.

*History Note: Authority G.S. 93A-83(d); Temporary Adoption Eff. October 1, 2012; Eff. April 1, 2013.*

**21 NCAC 58A .2202 STANDARDS**

(a) A broker performing a broker price opinion or comparative market analysis for a fee shall comply with all the requirements in G.S. 93A-83 and in this Rule.

(b) A broker shall only accept an assignment to provide a broker price opinion or comparative market analysis for a property if

the broker has knowledge of the real estate market, direct access to real estate market sales or leasing data, and brokerage or appraisal experience in the subject property's geographic location.

(c) A broker shall not provide a broker price opinion or comparative market analysis for a property unless the broker can exercise objective, independent judgment free of any influence from any interested party in the performance of his or her analysis of the facts relevant to determination of a probable selling or leasing price.

(d) A broker shall not provide a broker price opinion or comparative market analysis for a property unless the broker has personally inspected the exterior and interior of that property, provided, however, that an inspection of the exterior or interior is not required if this is waived in writing by the party for whom the opinion or analysis is being performed.

(e) When developing a broker price opinion or comparative market analysis for a property or interest therein, a broker shall utilize methodology such as analysis of sales or income of sold or leased properties comparable to the subject property or capitalization as is appropriate for the assignment and type of subject property.

(f) When analyzing sales or income of properties comparable to the property that is the subject of a broker price opinion or comparative market analysis assignment, a broker shall comply with the following standards:

- (1) The broker shall select from reliable information sources a minimum of three sold or leased comparable properties for use in his or her analysis that are similar to the subject property with regard to characteristics such as property type, use, location, age, size, design, physical features, amenities, utility, property condition and conditions of sale. The comparable properties selected shall reflect the prevailing factors or market conditions influencing the sale or lease prices of similar properties in the subject property's local market; and
- (2) The broker shall make adjustments to the selling or leasing price of selected comparable properties for differences between the characteristics of the comparable properties and the subject property as necessary to produce a credible estimate of the probable selling or leasing price. Adjustments shall be considered for differences in property characteristics such as location, age, size, design, physical features, amenities, utility, condition, economic or functional obsolescence and conditions of sale. The amounts of adjustments shall reflect the values that the local real estate market places on the differences in the characteristics in question.

(g) A broker price opinion or comparative market analysis provided to the party for whom the opinion or analysis is being performed shall address, in addition to matters required to be addressed by G.S. 93A-83 and other provisions of this Rule, the following items:

- (1) a description of the comparable properties used in the analysis (including any unsold properties listed for sale or rent that were used as comparable properties);
- (2) the adjustments made to the selling or leasing prices of comparable properties;
- (3) local real estate market conditions;
- (4) if the date on which the sale or lease of a comparable property became final is more than six months prior to the effective date of the broker price opinion or comparative market analysis, an explanation of why the comparable property was used in the analysis and a description of the market conditions affecting the comparable property at the time the sale or lease became final; and
- (5) each method used in deriving the estimate of probable selling or leasing price.

(h) In connection with a broker price opinion or comparative market analysis, an estimated probable leasing price may be reported by a broker as a lease rate and an estimated probable selling or leasing price may be reported by a broker either as a single figure or as a price range. When the estimated probable selling or leasing price is stated as a price range and the higher figure exceeds the lower figure by more than 10 percent, the broker shall include an explanation of why the higher figure exceeds the lower figure by more than 10 percent.

*History Note: Authority G.S. 93A-83(d);  
Temporary Adoption Eff. October 1, 2012;  
Eff. April 1, 2013.*

**21 NCAC 58B .0102 REGISTRATION FEE**

(a) Every application for time share project registration must be accompanied by a certified check made payable to the North Carolina Real Estate Commission. For the initial registration or subsequent registration of a time share project by a developer proposing to sell or develop 16 or more time shares, the fee is one thousand dollars (\$1,000). For an initial or subsequent registration of a time share project in which the developer proposes to sell 15 or fewer time shares, the fee is seven hundred dollars (\$700.00). For any time share registration by a homeowner association for the purpose of re-selling time shares in its own project which it has acquired in satisfaction of unpaid assessments by prior owners, the fee is four hundred fifty dollars (\$450.00).

(b) Applications for registration not accompanied by the appropriate fee shall not be considered by the Commission.

(c) In the event a properly completed application filed with the Commission is denied for any reason, or if an incomplete application is denied by the Commission or abandoned by the developer prior to a final decision by the Commission, the amount of two hundred fifty dollars (\$250.00) shall be retained by the Commission from the application fee and the balance refunded to the applicant developer.

*History Note: Authority G.S. 93A-51; 93A-52;  
Eff. March 1, 1984;  
Amended Eff. April 1, 2013; July 1, 2000.*

**21 NCAC 58B .0103      RENEWAL OF TIME SHARE  
PROJECT REGISTRATION**

(a) Every developer desiring the renewal of a time share project registration shall apply for the same in writing upon a form provided by the Commission during the month of June. Every such renewal application shall be accompanied by a certified check made payable to the North Carolina Real Estate Commission in the amount of            eight hundred dollars (\$800.00). To renew the time share project registration, the properly completed renewal application accompanied by the prescribed fee must be received at the Commission's office prior to the expiration of the certificate of registration.

(b) Applications for the renewal of a time share project registration shall be signed by the developer, by two executive

officers of the developer, or by the developer's attorney at law and shall certify that the information contained in the registration filed with the Commission is accurate and current on the date of the renewal application. Making a false certification on a time share project registration renewal application shall be grounds for disciplinary action by the Commission.

*History Note:    Authority G.S. 93A-51; 93A-52(d);*

*Eff. March 1, 1984;*

*Temporary Amendment Eff. May 23, 1985;*

*Amended Eff. April 1, 2013; February 1, 1989; September 1, 1985.*



*This Section contains information for the meeting of the Rules Review Commission on May 16, 2013 at 1711 New Hope Church Road, RRC Commission Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-431-3000. Anyone wishing to address the Commission should notify the RRC staff and the agency no later than 5:00 p.m. of the 2<sup>nd</sup> business day before the meeting. Please refer to RRC rules codified in 26 NCAC 05.*

**RULES REVIEW COMMISSION MEMBERS**

**Appointed by Senate**

Addison Bell  
Margaret Currin  
Pete Osborne  
Bob Rippy  
Faylene Whitaker

**Appointed by House**

Ralph A. Walker  
Anna Baird Choi  
Jeanette Doran  
Garth K. Dunklin  
Stephanie Simpson

**COMMISSION COUNSEL**

Joe Deluca (919)431-3081  
Amanda Reeder (919)431-3079

**RULES REVIEW COMMISSION MEETING DATES**

May 16, 2013                      June 20, 2013  
July 18, 2013                      August 15, 2013

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**AGENDA**

**RULES REVIEW COMMISSION**

**Thursday, May 16, 2013 10:00 A.M.**

**1711 New Hope Church Rd., Raleigh, NC 27609**

- I. Ethics reminder by the chair as set out in G.S. 138A-15(e)
- II. Approval of the minutes from the last meeting
- III. Follow-Up Matters:
  - A. Department of Commerce-Division of Employment Security – 04 NCAC 24E .0102, .0104 (Reeder)
  - B. Office of Information Technology Services – 09 NCAC 06A .0101, .0102, .0103 (DeLuca)
  - C. Office of Information Technology Services – 09 NCAC 06B .0101, .0102, .0103, .0201, .0202, .0203, .0204, .0205, .0206, .0207, .0301, .0302, .0303, .0304, .0305, .0306, .0307, .0308, .0309, .0310, .0311, .0312, .0313, .0314, .0315, .0316, .0401, .0402, .0403, .0404, .0405, .0501, .0502, .0503, .0504, .0505, .0601, .0602, .0603, .0701, .0702, .0703, .0801, .0901, .0902, .1001, .1002, .1003, .1004, .1005, .1006, .1008, .1101, .1102, .1103, .1104, .1105, .1106, .1107, .1108, .1109, .1110, .1111, .1112, .1114, .1115, .1117, .1118, .1120, .1121, .1201, .1202, .1203, .1204, .1205, .1206, .1207, .1301, .1302, .1303, .1304, .1305, .1402 (DeLuca)
  - D. Child Care Commission – 10A NCAC 09 .3004 (DeLuca)
  - E. Hearing Aid Dealers and Fitters Board – 21 NCAC 22F .0120, .0201, .0202, .0203, .0204, .0205, .0206, .0207, .0208, .0209 (Reeder)
  - F. Board of Physical Therapy Examiners – 21 NCAC 48A .0107 (Reeder)
- IV. Review of Log of Filings (Permanent Rules) for rules filed between March 21, 2013 and April 22, 2013
- V. G.S. 150B-19.1 Certification
  - G. Criminal Justice Education and Training Standards Commission – 12 NCAC 09B .0205, .0209, .0210, .0211, .0226, .0227, .0232, .0233, .0305, .0405 (Reeder)
  - H. Criminal Justice Education and Training Standards Commission – 12 NCAC 09E .0105 (Reeder)

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**RULES REVIEW COMMISSION**

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- I. Criminal Justice Education and Training Standards Commission – 12 NCAC 09G .0311 (Reeder)
  - J. State Board of Education – 16 NCAC 06D .0508 (DeLuca)
  - K. State Board of Education – 16 NCAC 06G .0312, .0503, .0504 (DeLuca)
- VI. Commission Business
- Next meeting: June 20, 2013

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**Commission Review  
Log of Permanent Rule Filings  
March 21, 2013 through April 22, 2013**

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**ALCOHOLIC BEVERAGE CONTROL COMMISSION**

The rules in Chapter 2 are from the Alcoholic Beverage Control Commission.

The rules in Subchapter 2S concern retail beer, wine, mixed beverages, brownbagging, advertising, and special permits. The rules include definitions and permit application procedures (.0100); general rules affecting retailers and brownbagging permittees (.0200); malt beverages and the wine retailer/wholesaler relationship (.0300); additional requirements for brownbagging permittees (.0400); additional requirements for mixed beverages permittees (.0500); special requirements for convention centers, community theatres, sports clubs, and nonprofit and political organizations (.0600); special occasions permits (.0700); culinary permits (.0800); wine and beer tastings (.0900); advertising (.1000); and effect of administrative action, fines, and offers in compromise (.1100).

Dispensing Alcoholic Beverages: Production Identification 04 NCAC 02S .0228  
Amend/\*

**COMMERCE, DEPARTMENT OF - CREDIT UNION DIVISION**

The rules in Chapter 6 are from the Credit Union Division.

The rules in Subchapter 6B concern rulemaking (.0300); declaratory rulings (.0400); and contested cases (.0500).

Notice of Rule Making Hearing 04 NCAC 06B .0302  
Amend/\*

Rule Making Hearings: General Information 04 NCAC 06B .0303  
Amend/\*

The rules in Subchapter 6C concern credit unions and include general information (.0100); organization of credit unions (.0200); basic internal controls: accounting procedures and operation standards for state-chartered credit unions (.0300); loans (.0400); impairment and insolvency (.0500); dividends deposits and interest rebate (.0600); accounts (.0700); reports to administrator (.0800); pension plans (.0900); retention of records (.1000); forms used by credit union division (.1100); investments (.1200); reserves (.1300); and signature guarantee services.

Definitions 04 NCAC 06C .0101  
Amend/\*

Listing of Officials and Operating Hours 04 NCAC 06C .0307  
Amend/\*

Surety Bond and Insurance Coverage 04 NCAC 06C .0311  
Amend/\*

Financial Statements and Other Information 04 NCAC 06C .0801  
Amend/\*

**CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION**

The rules in Chapter 9 are from the Criminal Justice Education and Training Standards Commission. This Commission has primary responsibility for setting statewide education, training, employment, and retention standards for criminal justice personnel (not including sheriffs).

The rules in Subchapter 9B cover minimum standards for: employment (.0100); schools and training programs (.0200); criminal justice instructors (.0300); completion of training (.0400); school directors (.0500); and certification of post-secondary criminal justice education programs (.0600).

<u>Responsibilities of the School Director</u> Amend/*	12	NCAC	09B	.0202
<u>Specialized Instructor Certification</u> Amend/*	12	NCAC	09B	.0304
<u>Comprehensive Written Exam - Specialized Instructor Training</u> Amend/*	12	NCAC	09B	.0414
<u>Satisfaction of Minimum Training - Specialized Instructor</u> Amend/*	12	NCAC	09B	.0415
<u>Specialized Explosives and Hazardous Materials Instructor...</u> Adopt/*	12	NCAC	09B	.0417

**TRANSPORTATION, DEPARTMENT OF**

The rules in Chapter 2 are from the Division of Highways.

The rules in Subchapter 2D concern highway operations including standards for design and construction (.0100); landscape (.0200); field operations-maintenance and equipment (.0400); ferry operations (.0500); oversize-overweight permits (.0600); highway design branch (.0700); prequalification advertising and bidding regulations (.0800); regulations for informal construction and repair contracts (.0900); adopt-a-highway program (.1000); and disadvantaged business enterprise, minority business enterprise and women business enterprise programs for highway and bridge construction contracts (.1100).

<u>Free Operations</u> Amend/*	19A	NCAC	02D	.0531
<u>Toll Operations</u> Amend/*	19A	NCAC	02D	.0532

**BARBER EXAMINERS, BOARD OF**

The rules in Subchapter 06A are departmental rules including organizational rules (.0100); and rules about the executive secretary (.0300).

<u>Office Hours</u> Repeal/*	21	NCAC	06A	.0103
<u>Executive Director</u> Amend/*	21	NCAC	06A	.0301
<u>Duties of Executive Director</u> Amend/*	21	NCAC	06A	.0303

The rules in Subchapter 06C concern contested cases including general rules (.0100); request for a hearing (.0200); notice (.0500); who shall hear contested cases (.0600); place of hearing (.0700); intervention (.0800); and hearing officers (.0900).

<u>Disqualification</u>	21	NCAC	06C	.0907
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Amend/\*

The rules in Subchapter 06F concern barber schools.

<u>Physical Structure</u> Amend/*	21	NCAC	06F	.0101
<u>Students with Criminal Records</u> Amend/*	21	NCAC	06F	.0116

The rules in Subchapter 06H concern barber school owners and managers.

<u>Duties and Responsibilities</u> Amend/*	21	NCAC	06H	.0101
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The rules in Subchapter 06I concern out-of-state transfers.

<u>Apprentice Barber</u> Amend/*	21	NCAC	06I	.0105
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The rules in Subchapter 06J concern apprentice barbers.

<u>Registered Apprentice</u> Amend/*	21	NCAC	06J	.0101
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The rules in Subchapter 06K concern registered barbers.

<u>Out-of-State Applicants</u> Amend/*	21	NCAC	06K	.0104
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The rules in Subchapter 06L concern barber shops.

<u>Equipment</u> Amend/*	21	NCAC	06L	.0103
<u>Policy Prohibiting Pets</u> Amend/*	21	NCAC	06L	.0114
<u>Sanitary Ratings and Posting of Ratings</u> Amend/*	21	NCAC	06L	.0118
<u>Systems of Grading Barber Shops</u> Amend/*	21	NCAC	06L	.0119

The rules in Subchapter 06M concern barbershop inspectors.

<u>Qualifications</u> Amend/*	21	NCAC	06M	.0101
<u>Duties and Responsibilities</u> Amend/*	21	NCAC	06M	.0102

The rules in Subchapter 6N establish fees and provide for the use of various forms.

<u>Form Bar-3</u> Amend/*	21	NCAC	06N	.0104
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**RULES REVIEW COMMISSION**

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<u>Form Bar-4</u> Amend/*	21	NCAC	06N	.0105
<u>Form Bar-5</u> Amend/*	21	NCAC	06N	.0106
<u>Form Bar-7</u> Amend/*	21	NCAC	06N	.0108
<u>Form Bar-8</u> Amend/*	21	NCAC	06N	.0109
<u>Access to Forms</u> Amend/*	21	NCAC	06N	.0112

The rules in Subchapter 6Q concern prohibited acts.

<u>Additional Grounds for Denial or Discipline</u> Amend/*	21	NCAC	06Q	.0101
<u>Registered Sex Offender</u> Amend/*	21	NCAC	06Q	.0103

The rules in Subchapter 6S concern examinations.

<u>General Examination Instructions</u> Amend/*	21	NCAC	06S	.0101
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#### **COSMETIC ART EXAMINERS, BOARD OF**

The rules in Subchapter 14H are sanitation rules for both operators and facilities including sanitation (.0100); shop licensing and physical dimensions (.0200); cosmetic art shop and equipment (.0300); sanitation procedures and practices (.0400); and enforcement, maintenance of licensure (.0500).

<u>Water Supply</u> Amend/*	21	NCAC	14H	.0301
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The rules in Subchapter 14P are civil penalty rules.

<u>Revocation of Licenses and Other Disciplinary Measures</u> Amend/*	21	NCAC	14P	.0108
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The rules in Subchapter 14T concern cosmetic art schools including the scope of the rules and school applications (.0100); physical requirements for cosmetic art schools (.0200); school equipment and supplies (.0300); student equipment (.0400); record keeping (.0500); curricula for all cosmetic art disciplines (.0600); school licensure, operations, closing and relocating schools (.0700); school inspections (.0800); and disciplinary actions (.0900).

<u>Permanent Records, Forms and Documentation</u> Amend/*	21	NCAC	14T	.0502
<u>Cosmetology Curriculum</u> Amend/*	21	NCAC	14T	.0602
<u>Apprentice Cosmetology Curriculum</u> Amend/*	21	NCAC	14T	.0603
<u>Natural Hair Care Styling Curriculum</u> Amend/*	21	NCAC	14T	.0606
<u>Instruction Guidelines</u> Amend/*	21	NCAC	14T	.0612
<u>School Operations/Licensure Maintenance</u>	21	NCAC	14T	.0701

Amend/\*

**PODIATRY EXAMINERS, BOARD OF**

The rules in Chapter 52 concern Board of Podiatry Examiners including organization of the Board (.0100); examination and licensing (.0200); professional corporations (.0300); revocation or suspension of license (.0400); certification of podiatric assistants (.0500); general provisions (.0600); petitions for rules (.0700); notice of rulemaking hearings (.0800); rulemaking hearings (.0900); declaratory rulings (.1000); administrative hearing procedures (.1100); administrative hearings decisions related rights and procedures (.1200); nominations for podiatrist members of the board of podiatry examiners; the board of podiatry examiners constituting a board of podiatry elections; and procedures for holding an election (.1300); and scope of practice (.1400).

<u>Continuing Education</u> Amend/*	21	NCAC	52	.0208
<u>Military License</u> Amend/*	21	NCAC	52	.0211

**BUILDING CODE COUNCIL**

<u>2012 NC Energy Conservation Code/Building Envelope Requir...</u> Amend/*	502.1.2, 502.2(1), 502.2(2)
<u>2012 NC Residential Code/Exterior Walls</u> Amend/*	Table R302.1
<u>2012 NC Residential Code/Ground Vapor Retarder</u> Amend/*	R408.2
<u>2012 NC Residential Code/Minimum Width of Concrete or Mas...</u> Amend/*	Table R403.1
<u>2012 NC Energy Conservation, Residential Codes/Duct Leaka...</u> Amend/*	Chapter 4, Chapter 11

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**CONTESTED CASE DECISIONS**

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

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<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>DATE</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<b><u>ALCOHOLIC BEVERAGE CONTROL COMMISSION</u></b>			
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	
ABC Commission v. Dos Perros Restaurant LLC T/A Dos Perros Restaurant	12 ABC 05312	09/25/12	
ABC Commission v. Bobby Warren Joyner T/A Hillsdale Club	12 ABC 06153	11/06/12	
ABC Commission v. Quick Quality, Inc., T/A Rock Star Grill and Bar	12 ABC 07260	12/11/12	
ABC Commission v. Fat Cats Grill and Oyster Bar Inc, T/A Fat Cats Grill and Oyster Bar	12 ABC 08988	12/19/12	
ABC Commission v. Wachdi Khamis Awad T/A Brothers in the Hood	12 ABC 09188	03/06/13	
<b><u>DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY</u></b>			
Brian J. Johnson v. Department of Public Safety Victim Services	12 CPS 01664	12/21/12	
George H. Jagers, III v. Crime Victims Compensation Commission	12 CPS 01693	11/01/12	
Teresa Herbin v. Department of Public Safety Victim Services	12 CPS 03680	08/10/12	
Jacqueline M Davis victim-Antonio T Davis v. Dept. of Public Safety	12 CPS 05919	11/06/12	
Demario J. Livingston v. Dept. of Public Safety Victim Services	12 CPS 06245	10/19/12	
Shirley Ann Robinson v. N.C. Crime Victims Compensation Commission	12 CPS 07601	12/07/12	
<b><u>DEPARTMENT OF HEALTH AND HUMAN SERVICES</u></b>			
Stonethrow Group Home Medicaid Provider #6603018 Owned by Alberta Professional Services Inc v. DHHS, Division of Mental Health/Development Disabilities/ Substance Abuse, and DMA	09 DHR 05790	01/11/13	
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	

**CONTESTED CASE DECISIONS**

Gold Care Inc. Licensee Hill Forest Rest Home Warren W. Gold v. DHHS, Adult Care Licensure Section	10 DHR 05861	05/18/12	
Robert T. Wilson v. DHHS, DHSR	10 DHR 07700	01/29/13	
Mary Ann Barnes v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	11 DHR 6488	07/16/12	
Comprehensive PT Center v. DHHS, Division of Medical Assistance	11 DHR 9197	08/14/12	27:12 NCR 1204
Cherry's Group Home, Alphonso Cherry v. DHSR Michelle Elliot	11 DHR 09590	07/12/12	
Leslie Taylor v. DHHS, Division of Health Regulation	11 DHR 10404	10/19/12	
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	
Carlos Kendrick Hamilton v. DHHS, Division of Social Services	11 DHR 11161	10/16/12	27:16 NCR 1679
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	
Brenda Brewer v. DHHS, Division of Child Development	11 DHR 12064	08/03/12	27:12 NCR 1210
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 WakeMed, Holly Springs Hospital II, LLC, and Harnett Health System, Inc.	11 DHR 12794	04/12/12	27:04 NCR 486
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	
Shirley Dowdy v. DHHS	11 DHR 13267	03/25/13	
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	
Carrie's Loving Hands Inc. #MHL #040-047 Felicia McGee v. DHHS, DHSR, Mental Health Licensure and Certification	11 DHR 14172	01/22/13	
Carrie's Loving Hands Inc. #MHL #010-047 Felicia McGee v. DHHS, DHSR, Mental Health Licensure and Certification	11 DHR 14173	01/22/03	
Michael Timothy Smith, Jr. v. DHHS, Division of Health Service Regulation	11 DHR 14184	08/01/12	
John S. Won v. DHHS	11 DHR 14232	09/05/12	27:15 NCR 1547
Cynthia Tuck Champion v. DHHS, Division of Health Service Regulation	11 DHR 14283	06/15/12	
Leslie Taylor, and Octavia Carlton v. Mecklenburg County Department of Social Services Youth and Family Services Division	11 DHR 14335	10/12/12	
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
McWilliams Center for Counseling Inc., v. DHHS, Division of Mental Health, Developmental Disabilities, Substance Abuse Services, and agency of the State of NC	11 DHR 15098	11/13/12	
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	
Renal Advantage, Inc., v. DHHS, Division of Health Service Regulation, CON Section and DVA Healthcare Renal Care, Inc	12 DHR 00518	08/28/12	27:15 NCR 1553
Angela Moye v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	12 DHR 00642	08/23/12	27:12 NCR 1218
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
Dr. Karen J. Williams, LPC v. DHHS, Division of Medical Assistance	12 DHR 00926	09/18/12	
Faith Home Care of NC, Bonita Wright v. DHHS, DMA	12 DHR 00928	07/25/12	
Olar Underwood v. Division of Child Development and Early Education	12 DHR 00990	10/22/12	
Angela C Jackson v. DHHS	12 DHR 01097	06/19/12	
Paula N Umstead v. DHHS	12 DHR 01098	05/11/12	
Daniel W. Harris, Jr., v. DHHS, Division of Health Service Regulation	12 DHR 01138	10/19/12	
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	



**CONTESTED CASE DECISIONS**

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	
Timothy L Durham v. DHHS, Division of Health Services Regulation	12 DHR 01396	09/04/12	
Clydette Dickens v. Nash Co DSS	12 DHR 01625	05/15/12	
American Mobility LLC, Norman Mazer v. DHHS	12 DHR 01733	11/20/12	27:21 NCR 1980
Robert Lee Raines v. DHHS	12 DHR 01736	05/30/12	
Ms. Antoinette L. Williams v. DHHS	12 DHR 01739	06/15/12	
Felicia McGee Owner of Carrie's Loving Hand Inc. and Caring Arms Inc v. DHHS, DHSR Mental Health Licensure Certification	12 DHR 01796	01/22/13	
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	
Patriotic Health Care Systems, LLC v. DHHS	12 DHR 02105	09/19/12	
John and Christina Shipman v. DHHS	12 DHR 02107	07/24/12	
Team Daniel, LLC v. DHHS, DMA	12 DHR 02162	09/11/13	27:16 NCR 1696
Leslie Taylor, Octavia Carlton, Paula Carlton	12 DHR 02217	08/31/12	
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	
Shannon Santimore v. DHHS, Division of Public Health, Epidemiology Section	12 DHR 02348	12/20/12	
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	
Annamae R. Smith v. DHHS, Division of Medical Assistance	12 DHR 02657	11/05/12	
Our Daily Living, Christopher OnWuka, Director v. DHHS	12 DHR 02777	10/17/12	
Jessica L Thomas v. Randolph County DSS	12 DHR 02955	07/24/12	
Moses E Shoffner v. DHHS, Division of Child Development	12 DHR 03459	08/15/12	
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	
Estate of Mary P Lipe Medicaid ID #901463645S Alvena C Heggins v. DHHS, DMS (DHHS Medicaid)	12 DHR 04260	01/16/13	
Emelda Bih Che v. Health Care Personnel Registry	12 DHR 04834	01/24/13	
LaBrenda Jane Elliot v. DHHS, Division of Medical Assistance	12 DHR 04993	09/24/12	
Esther H Beal v. Office of Chief Medical Examiner	12 DHR 05094	11/14/12	27:21 NCR 1987
James Johnson v. DHHS, Division of Health Service Regulation	12 DHR 05148	09/11/12	
Cathy Crosland v. DHHS, Division of Health Service Regulation	12 DHR 05610	08/06/12	
Brenda Triplett Andrews v. DHHS, Division of Health Service Regulation	12 DHR 05745	12/10/12	
Southern Living Home Care Agency Inc., v. DHHS	12 DHR 05864	11/06/12	
Beverly Coleman v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry Section	12 DHR 05961	09/05/12	
Dwight William Osborne v. Glana M Surles, DHHS (Medicaid)	12 DHR 05693	09/14/12	
Gregory Howard v. Health Care Personnel Registry	12 DHR 06157	09/07/12	
Joshua Goss v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	12 DHR 06158	03/04/13	
Harrison E Shell Jr v. Wake County Human Services	12 DHR 06203	08/28/12	
Valtina Bronson v. DHHS, Division of Health Service Regulation	12 DHR 06365	08/29/12	
Danny Skipper AKA Danny Skipper v. DHHS, Division of Health Services Regulation	12 DHR 06403	10/22/12	
Stalin Bailon v. Department of Social Services	12 DHR 06528	10/17/12	
Tonya Diane Warfield v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry Section	12 DHR 06682	01/07/13	
Our Daily Living, Christopher OnWuka, Director v. DHHS	12 DHR 06683	10/17/12	
Brittney Nicole Brabham v. DHHS, Division Health Service Regulation, Healthcare Personnel Registry	12 DHR 06786	03/27/13	
Darina Renee Ford v. DHHS	12 DHR 07166	11/19/12	
Marquis Gerade Harrell v. DHHS, Health Care Personnel Registry, Leslie Chabet	12 DHR 07170	10/23/12	
KMG Holdings Inc. - The Lighthouse II of Clayton MHL #051-138 v. DHHS, Division of Health Licensure and Certification	12 DHR 07292	11/08/12	
Curtain Climbers, Rhonda Corn v. Division of Child Development, DHHS	12 DHR 07295	01/16/13	
Denise Marie Shear v. DHHS, Division of Health Service Regulation	12 DHR 07547	11/07/12	
Terique Epps, Family Legacy Mental Health Services DBA Task Inc v. DHHS and PBH	12 DHR 07616	11/09/12	
Angela Mackey v. DHHS, Division of Health Service Regulation	12 DHR 07619	10/05/12	
Eloise Dowtin v. The Emmanuel Home IV v. Division of Health Service Regulation	12 DHR 07620	11/06/12	
Orlando Stephen Murphy v. DHHS, DHSR, Health Care Personnel	12 DHR 07640	02/05/13	
Yolanda McKinnon v. DHHS	12 DHR 07711	01/11/13	

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**CONTESTED CASE DECISIONS**

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Koffi Paul Aboagye v. DHHS, Division of Health Service Regulation	12 DHR 07731	11/20/12	
Mark Thomas v. DHHS, Division of Health Service Regulation	12 DHR 07853	01/04/13	
Annie Garner Ham v. DHHS, Division Health Service Regulation	12 DHR 08103	03/04/13	
Daniel Saft, A+ Residential Care (MHL #092-811) v. DHHS, DHSR, Mental Health Licensure and Certification Section	12 DHR 08197	01/16/13	
Ronald Dixon v. Division of Child Development, DHHS	12 DHR 08446	11/14/12	
Jah Mary Weese v. DHHS, Division of Health Service Regulation	12 DHR 08672	01/09/13	
Natasha Dionne Howell v. DHHS, Division of Health Service Regulation	12 DHR 08814	03/07/13	
White Oak Homes II Inc., Lisa Atkinson v. DHHS, Mental Health Licensure and Certification Section, Division of Health Service	12 DHR 08994	02/08/13	
Carolyn Ragin v. DHHS, Division of Health Services Regulation	12 DHR 09373	12/18/12	
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Tyshon & Shannetta Barfield v. DHHS	12 DHR 09692	02/08/13	
Cynthia M Rose v. Division of Child Development, DHHS	12 DHR 09846	01/23/13	
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Speech and Therapy Solutions v. DHHS	12 DHR 12402	03/27/13	
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Jonathan Dryden Dunn v. Sheriffs' Education and Training Standards	12 DOJ 03845	03/28/13	
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Greary Michael Chlebus v. Criminal Justice Education and Training Standards Commission	11 DOJ 4829	04/27/12	
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Barbara Renay Whaley v. Criminal Justice Education and Training Standards Commission	11 DOJ 10316	04/25/12	
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**CONTESTED CASE DECISIONS**

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Timmy Dean Adams v. Department of Justice, Company Police Program	12 DOJ 02778	12/21/12	
Carlito Soler v. Alarm Systems Licensing Board	12 DOJ 03457	09/26/12	
Rodney Lyndolph Bland v. Criminal Justice Education and Training Standards Commission	12 DOJ 03839	01/11/13	
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Antonio Cornelius Hardy v. Criminal Justice Education and Training Standards Commission	12 DOJ 03844	11/19/12	27:21 NCR 1994
Barry Louis Christopher, Jr v. Private Protective Services Board	12 DOJ 05041	08/27/12	27:15 NCR 1570
Bettina Hedwig Vredenburg v. Sheriffs' Education and Training Standards Commission	12 DOJ 05140	11/09/12	27:21 NCR 2002
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Dustin Wilson Grant v. Sheriffs' Education and Training Standards Commission	12 DOJ 05145	10/25/12	
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Lawrence W. Sitgraves v. Private Protective Services	12 DOJ 06059	09/13/12	
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Clinton Weatherbee Jr v. Criminal Justice Education and Training Standards Commission	12 DOJ 10206	03/25/13	
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Lia C Long v. DPI	12 EDC 00805	10/18/13	27:16 NCR 1716
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Holmes Development & Realty, LLC, and H.L. Homes v. DENR – Land Quality Section (Re: LQS 11-018)	11 EHR 13208	06/29/12	27:07 NCR 774
Ik Kim IT and K Enterprise v. DENR	11 EHR 13910	11/06/12	
Edward Dale Parker v. DENR	11 EHR 14390	02/22/13	
Janezic Building Group LLC v. Orange County	12 EHR 01104	12/03/12	27:21 NCR 2008
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	
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**DEPARTMENT OF INSURANCE**

Susan E. Montgomery Lee v. State Health Plan; Blue Cross Blue Shield	12 INS 10145	03/25/13	
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**MISCELLANEOUS**

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Lloyd M Anthony v. New Hanover County Sheriff Office	12 MIS 01803	06/07/12	
Jackie Poole, Jamyam Brooks v. Orange County	12 MIS 02379	11/09/12	27:21 NCR 2016

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Dorothy H. Williams v. DHHS, Central Regional Hospital	10 OSP 5424	03/28/12	27:01 NCR 119
Stephen R. West v. The University of North Carolina at Chapel Hill	10 OSP 01567	11/26/12	27:21 NCR 1959
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
Teresa J. Barrett v. DENR	10 OSP 04754	10/22/12	27:16 NCR 1726
Daniel Chase Parrott v. Crime Control and Public Safety, Butner Public Safety Division	10 OSP 04792	05/30/12	
Steven M Mukumgu v. DAG	10 OSP 05199	08/07/12	
Beatrice T. Jackson v. Durham County Health Department	11 OSP 3835	06/08/12	
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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	
Tammy Cagle v. Swain County, Department of Social Services	11 OSP 10307	09/26/12	27:16 NCR 1747
Doris Wearing v. Polk Correctional Inst. Mr. Soloman Superintendent	11 OSP 11023	10/19/12	
Fredericka Florentina Demmings v. County of Durham	11 OSP 11498	06/12/12	
Derick A Proctor v. Crime Control and Public Safety, State Capital Police Division	11 OSP 11499	12/06/12	
David B. Stone v. Department of Cultural Resources	11 OSP 11926	08/10/12	27:12 NCR 1245
Pattie Hollingsworth v. Fayetteville State University	11 OSP 12152	02/27/13	
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	
Phyllis Campbell v. DOC	11 OSP 13381	08/27/12	27:15 NCR 1579
Raeford Quick v. DOC	11 OSP 14436	05/22/12	
Tawana McLaurin v. DOC	12 OSP 00116	08/21/12	
Thomas B. Warren v. DAG, Forest Services Division	12 OSP 00615	11/27/12	
Bon-Jerald Jacobs v. Pitt County Department of Social Services	12 OSP 00634	06/12/12	
Sherry Baker v. Department of Public Safety	12 OSP 00841	10/09/12	
Diane Farrington v. Chapel Hill-Carrboro City Schools	12 OSP 01300	07/12/12	
Cynthia Moats v. Harnett County Health Dept	12 OSP 01536	08/10/12	
Natalie Wallace-Gomes v. Winston-Salem State University	12 OSP 01627	05/15/12	

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**CONTESTED CASE DECISIONS**

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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	
Ricco Donnell Boyd v. NC A&T University	12 OSP 02219	01/31/13	
Larry C. Goldston v. UNC-Chapel Hill	12 OSP 02222	09/26/12	27:16 NCR 1754
Larry Batton v. Dept of Public Safey	12 OSP 02320	02/18/13	
Sheila Bradley v. Community College System Sandhills Community College	12 OSP 02473	06/06/12	
Brenda S. Sessoms v. Department of Public Safety	12 OSP 02507	07/25/12	
Donnette J Amaro v. Onslow County Department of Social Services	12 OSP 02578	11/21/12	
Ronald Gilliard v. N.C. Alcoholic Law Enforcement	12 OSP 02618	09/26/12	
Kimberly Hinton v. DOT	12 OSP 02848	10/05/12	
James B. Bushardt III v. DENR, Division of Water Quality	12 OSP 02872	02/19/13	
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	
Ronald Wayne Crabtree Jr., v. Butner Public Safety	12 OSP 03846	10/09/12	
Natalie Wallace-Gomes v. Winston Salem State University	12 OSP 03910	10/22/12	
Natalie Wallace-Gomes v. Winston Salem State University	12 OSP 04107	10/22/12	
Michelle Houser v. Department of Public Safety, Division of Prisons	12 OSP 04826	09/26/12	
Audrey Melissa Tate v. Department of Public Safety, Division of Juvenile Justice	12 OSP 05182	08/03/12	
Jonathan Ashley Stephenson v. UNC-Chapel Hill	12 OSP 05223	01/15/13	
Charles E. Rouse v. DMV, Dist Sup Stacey Wooten	12 OSP 05315	09/05/12	
Edwards Robert Esslinger v. DPI	12 OSP 05459	09/12/12	
Barry L. Pruett v. DMV, Driver and Vehicle Services	12 OSP 05785	09/11/12	
Joseph Sandy v. UNC Chapel Hill	12 OSP 06152	09/05/12	
Natalie Wallace-Gomes v. Winston Salem State University	12 OSP 06309	10/22/12	
Paul Jeffrey Treadway v. Department of Public Safety, Division of Adult Supervision	12 OSP 06634	12/18/12	
Phillip W Smith v. Department of Commerce, Division of Employment Security	12 OSP 06821	09/20/12	
Shirley M. Parker v. Department of Public Safety Caledonia Correctional Institution	12 OSP 07617	04/04/13	
Christopher Rashad Pippins v. PCS BOE PCS Facility Services	12 OSP 07744	10/18/12	
Wanda Edwards v. UNC School of Dentistry	12 OSP 07851	01/09/13	
Gary C. Clement v. DHHS	12 OSP 08105	11/14/12	
Oswald Woode v. DHHS, Central Regional Hospital	12 OSP 08664	01/09/13	
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Thomas E Gust v. Department of Revenue	11 REV 13557	08/15/12	
James Cooper III Sui Juris v. Department of Revenue	11 REV 13792	11/14/12	
Brian Daniel Reeves v. Department of Revenue	12 REV 01539	06/04/12	
David Roser v. Department of Revenue	12 REV 01694	09/10/12	
Ronnie Lee Nixon v. Department of Revenue	12 REV 01881	10/03/12	
William S. Hall v. Department of Revenue	12 REV 04115	08/27/12	
Noah D. Sheffield v. Department of Revenue	12 REV 07074	11/14/12	
Jenny M. Sheffield v. Department of Revenue	12 REV 07075	11/14/12	
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**OFFICE OF SECRETARY OF STATE**

Michael Anthony Farrow-Bey v. Department of Secretary of State	12 SOS 07865	12/14/12	
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	
Fredia R Wall v. UNC Physicians & Associates	12 UNC 02256	10/04/12	
Carolyn A. Green v. UNC Hospitals	12 UNC 02259	09/19/12	
Annie E. Jarrett v. UNC Hospitals	12 UNC 03716	10/09/12	
Vikki J Goings v. UNC Hospital	12 UNC 04109	09/18/12	
Elonnie Alston v. UNC Hospitals	12 UNC 04551	09/11/12	
Diara Z Andrews v. UNC Hospitals	12 UNC 04827	08/15/12	
David Ryan Pierce v. UNC Hospitals, Patient Account Services, SODCA	12 UNC 05306	03/20/13	
Shonte Hayes v. UNC P&A	12 UNC 05746	09/10/12	
Tracy A. Spaine (Currier) v. UNC Hospitals	12 UNC 06822	11/06/12	

**STATE OF NORTH CAROLINA**  
**COUNTY OF ALAMANCE**

Filed  
 2012 May 28 PM 2:09  
**IN THE OFFICE OF**  
**ADMINISTRATIVE HEARINGS**  
**10 OSP 01567**

**STEPHEN R. WEST,**  
 Petitioner,

Office of  
 Administrative Hearings

v.

**DECISION**

**THE UNIVERSITY OF NORTH**  
**CAROLINA AT CHAPEL HILL,**  
 Respondent.

The above-captioned case was heard before the Honorable Donald W. Overby, Administrative Law Judge, on 27 and 28 June 2012, in Raleigh, North Carolina.

**APPEARANCES**

**For Respondent:** Katherine A. Murphy  
 Assistant Attorney General  
 N.C. Department of Justice  
 P.O. Box 629  
 Raleigh, N.C. 27602

**For Petitioner:** David G. Schiller  
 Schiller & Schiller  
 5540 Munford Rd., Suite 101  
 Raleigh, N.C. 27612

**EXHIBITS**

**Admitted for Respondent:**

<u>Exhibit No.</u>	<u>Date</u>	<u>Document</u>
1	09/01/08	Email correspondence between Jim Bodfish and Stephen West
2	06/17/09	Email from Linda Martin to Stephen West
3	07/02/09	Email correspondence between John Hart, Stephen West, and Lisa Apple
4	07/14/09	Email correspondence between Stephen West, Lisa Apple, John Hart, et al.

5	07/15/09	Email correspondence between Stephen West, Laura Martin, and Tom Struchen
6	07/16/09	Performance Review for Stephen West
7	09/22/09	Letter from Thomas Struchen to Stephen West re: written warning for unacceptable personal conduct
8	09/22/09	Notes of disciplinary meeting for Stephen West
9	09/23/09	Letter from Tom Struchen to Stephen West re: notice of placement on investigative leave
10	10/20/09	Letter from Tom Struchen to Stephen West re: notice to attend pre-disciplinary conference
11	10/22/09	Letter from Tom Struchen to Stephen West re: disciplinary decision of dismissal
12	N/A	Information Security Policy and Standards
13	N/A	Privacy/Confidentiality of Protected Health Information (PHI)

**Admitted for Petitioner:**

<u>Exhibit No.</u>	<u>Date</u>	<u>Document</u>
1	10/20/09	Letter from Tom Struchen to Stephen West re: notice to attend pre-disciplinary conference
2	10/22/09	Letter from Tom Struchen to Stephen West re: disciplinary decision of dismissal
5	05/28/09	Performance Review for Stephen West
6	07/16/09	Work Plan for Stephen West, with handwritten comments
7	07/16/09	Work Plan for Stephen West
10	02/12/09	Email correspondence between Stephen West, Jennifer Hiemenz, and Deborah Fuller
11	03/09/09	Email correspondence between Angela Rosenberg, Stephen West, Jim Bodfish, Jeffrey Low, et al.
12	05/13/09	Email correspondence between Jim Bodfish and Stephen West
14	06/10/09	Email from Jim Kenny to Stephen West, transmitting NFRD Reports Overview and Guidelines

15	06/18/09	Email from Jim Kenny to Stephen West
16	06/18/09	Email correspondence between Robert Berger, Allen Daugird, Mary-Ann Minsley, and Stephen West
18	06/30/09	Letter from Stephen West to Laura Martin and Jeff Low
19	07/01/09	Emails from Angela Rosenberg to Stephen West
20	07/02/09	Email from Jim Bodfish to Stephen West
21	07/02/09	Email correspondence between Stephen West and Lisa Apple
22	07/02/09	Email correspondence between John Hart, Stephen West, and Lisa Apple
24	07/13/09	Email from Stephen West to Lisa Apple
32	10/04/09	Email from Jim Bodfish to Pamela McBane
36	N/A	Photographs of office and computer
38	06/18/09 & 06/24/09	CDL HIPAA Compliance (Report)
40	07/01/09	Drawing of CDL floor plan
41	10/06/09	Email from Stephen West to Derek Hoar
44	09/21/09	Email from Stephen West to Janet Furman
47	02/12/09	Email from Melissa Cobb to Ellen Kwa, with copy to Stephen West, etc.

**WITNESSES**

**Called by Respondent:**

Laura Martin  
 Thomas Struchen  
 Jeffry Low  
 John Hart  
 Dr. James Bodfish

**Called by Petitioner:**

Stephen R. West



**ISSUES**

1. Whether Respondent had just cause to dismiss Petitioner.
2. Whether Petitioner's discharge was in retaliation for his reporting instances of what he perceived as being HIPAA violations

Based on careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the undersigned makes the following findings of fact. In making these findings, the undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness; any interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case.

**FINDINGS OF FACT**

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case pursuant to Chapters 126 and 150B of the North Carolina General Statutes.
2. Petitioner Stephen R. West was a permanent State employee subject to Chapter 126 of the General Statutes of North Carolina ("the State Personnel Act").
3. Respondent University of North Carolina at Chapel Hill ("UNC-CH") is subject to Chapter 126 and was Petitioner's employer.
4. Petitioner began his employment with UNC-CH in July of 2007, first as a temporary employee, and then permanently in September 2007. Petitioner was hired as a receptionist to work in the Center for Development and Learning ("the CDL"), which, organizationally, was part of the UNC Medical School. T. pp. 7-8, 34, 78, 141 Jeffrey Low, who was the Deputy Director for Administration, Finance, and Information Technology, hired Petitioner and initially served as Petitioner's immediate supervisor. T. pp. 77-79
5. In 2008, the CDL and several other departments on campus merged to form the Carolina Institute for Developmental Disabilities ("the CIDD"). T. p. 7. Although the CDL technically ceased to exist as an entity, the witnesses continued to refer to the group that had comprised the CDL as the "CDL".
6. The CDL's mission was to provide education, research, and service for people with developmental disabilities and their families. The CDL included a clinic for people with developmental disabilities. T. p. 34. Working within the CDL were both faculty and

staff. The faculty members reported to their respective Department Heads and Dean, while the staff reported to CDL personnel. Testimony of James Bodfish (not recorded)

7. One of the duties assigned to Petitioner while in the position of receptionist was to attend meetings related to transitioning the CDL into a new electronic scheduling and billing system referred to as "GE," which was already being used by other departments on campus. As the receptionist, Petitioner was familiar with the complications associated with scheduling appointments for patients in the CDL. The CDL was also beginning to use "WebCIS," an electronic system for managing patient records, but Petitioner was not assigned duties with respect to WebCIS. T. pp. 35, 45-46; Testimony of James Bodfish (not recorded); Pet. Ex. 5
8. While working as the receptionist, Petitioner developed concerns regarding protected health information ("PHI") of patients in the clinic. The issues about which Petitioner was concerned included PHI being left on the counter in the front lobby; diagnoses being discussed in the front lobby and the playroom where others could hear; consultations being conducted in those same areas; and other chart issues. T. p. 143
9. Petitioner brought up HIPAA concerns as early as August of 2008.
10. Petitioner brought some of his concerns to Laura Martin, who was the Clinic Coordinator for the CDL and became Petitioner's supervisor sometime in 2008; Ms. Martin thought that Petitioner had some good suggestions for improving confidentiality and many of his suggestions were implemented. T. pp. 8, 48
11. Petitioner also brought his concerns to Dr. James Bodfish, who was the Director of the CDL and the Associate Director of the CIDD. His concerns were well-received by Dr. Bodfish. Testimony of James Bodfish (not recorded); Resp. Ex. 1
12. Petitioner also brought his concerns to Jeffrey Low, Deputy Director for Administration, Finance, and Information Technology, who was also the HIPAA officer for the CDL. T. pp. 9-10, 79-80
13. Among other items, Petitioner mentioned to Mr. Low that he overheard a conversation in the lobby about sensitive information. Mr. Low reminded the people involved not to have such conversations in a public place. Mr. Low encouraged Petitioner to bring any HIPAA concerns to his attention. T. pp. 9-10, 77-81
14. Many of those about who Petitioner complained were physicians. In Mr. Low's experience, with respect to policies and regulations, working with physicians was at times difficult. In his opinion, physicians are trying to deliver good care and some view HIPAA as an impediment. Violations repeatedly occur and it is necessary to keep reminding some doctors to do things correctly concerning HIPAA. T. p. 87
15. Whenever Petitioner brought an issue to Mr. Low's attention, Mr. Low would address it.

Mr. Low would not necessarily report back to Petitioner, especially if there was a confidential personnel issue involved. This was also true of Dr. Bodfish, Ms. Martin and others to whom Petitioner reported. T. pp. 87-88

16. Dr. Bodfish engaged in discussions with John Hart, the Chief Audit and Compliance Officer for the UNC Health Care System, about HIPPA matters unrelated to Petitioner's complaints. There was overlap between some of the issues Petitioner raised and some of the issues Dr. Bodfish was addressing with Mr. Hart. Dr. Bodfish did not report back to Petitioner what if anything was done in order to address matters raised by Petitioner nor those about which he discussed with Mr. Hart. Testimony of James Bodfish (not recorded); T. pp. 113-14; Resp. Ex. 3
17. Some of the issues Petitioner brought to the attention of Dr. Bodfish involved faculty members, who were not under Dr. Bodfish's supervision. This made it difficult for Dr. Bodfish in terms of correcting their behavior. Testimony of James Bodfish (not recorded)
18. Petitioner was not in a job wherein it would have been appropriate or necessary for Dr. Bodfish or anyone else to report back to him about any actions taken to address HIPAA violations.
19. Ms. Martin supervised Petitioner until August 2009. Petitioner did well as the receptionist, and he indicated that he wished to take on more responsibility. In March of 2009, he was promoted to training coordinator. T. pp. 8-9, 142. Mr. Low had encouraged Petitioner to take the training coordinator position and supported his promotion. Dr. Bodfish was also in favor of promoting Petitioner. T pp. 80-81; Testimony of James Bodfish (not recorded)
20. When Petitioner became training coordinator, he acquired additional duties and an increase in pay. Petitioner's duties as training coordinator did not include any duties related to the transitioning of the GE scheduling system. T. pp. 36, 80
21. By the time Petitioner was promoted to training coordinator, he had already begun reporting HIPAA violations and concerns to Dr. Bodfish and Mr. Low.
22. Ms. Martin was Petitioner's supervisor when he moved into the position of training coordinator. Within a couple of months, it appeared that Petitioner was struggling in the new position. Ms. Martin was meeting with Petitioner frequently, and he seemed to be overwhelmed with the duties of his job. T. pp. 11-12
23. Petitioner's performance review for this period was dated May 28, 2009. The overall rating on Petitioner's performance review was "very good." At the time this performance review was prepared, Petitioner had only been in the training coordinator position for a few months. The evaluation was primarily based, though not entirely, on Petitioner's performance as the receptionist, which is reflected in the comments.

24. Ms. Martin met with Petitioner to discuss his performance review on June 16 or 17, 2009. Petitioner's contention that the evaluation only had glowing and positive remarks and therefore is not in keeping with the events that followed is not an accurate depiction. Petitioner vehemently objected to negative written comments on the evaluation. Petitioner was so upset about the comments that he refused to sign the review and asked about the process for grieving it. It simply does not make sense that Petitioner would refuse to sign a performance evaluation that was only positive.
25. On June 17, 2009, Ms. Martin sent Petitioner a link to the website for the signature policy and the appeals process. Ultimately, in response to Petitioner's reaction, the comments were removed from the evaluation. T. pp. 13-16; Resp. Ex. 2, Pet. Ex. 5
26. On June 18, 2009, the day after his performance review, Petitioner contacted Mr. Hart to bring to his attention certain privacy issues at the CDL. Mr. Hart was already familiar with some of Petitioner's issues. In January or February of 2009, Dr. Bodfish had contacted the University Counsel's office with some issues of concern, which were then referred to Mr. Hart's office. Mr. Hart worked with Dr. Bodfish then, and found him to be open to correcting problems and trying very hard to move in the right direction T. pp. 115-19; Resp. Ex. 3
27. Petitioner continued to struggle as the training coordinator and asked to be returned to his former position as receptionist. During this period, Petitioner began making vague references to a HIPAA report that he was creating. T. pp. 16-17, 88
28. Ms. Martin encouraged Petitioner to focus on his job duties because there were problems with his assigned work not getting done. Petitioner was advised that developing a HIPAA report was not one of his assigned duties, T. p. 17. While it is the province of those working in the health care industry to be mindful of and report HIPAA violations when appropriate, it was never Petitioner's job to prepare a report of any sort for HIPAA violations. He had been reporting violations as he noticed them and they were being addressed, although he was not specifically told that they were being addressed nor any outcome or follow up for those reports. He was being treated the same as anyone else who reported HIPAA violations. T. pp. 47-48
29. Petitioner was seeking out HIPAA issues that were not related to his job as training coordinator. There was an issue raised that Petitioner was seeking information from others during his work hours when he was supposed to be doing other duties. Petitioner did not dispute that assertion.
30. On June 29, 2009, Petitioner submitted a written "report" to Mr. Hart and to Lisa Apple, Mr. Hart's administrative assistant. (Pet Ex. 38). The report consisted of documentation of issues which Petitioner viewed as being HIPAA violations, specifically charts being left on the floor in the front lobby, reports being left in an open office, and using the playroom and front lobby to conduct clinical evaluations and diagnoses. T pp. 120-21, 179-82; Pet. Ex. 38

31. On June 30, 2009, Mr. Hart asked Petitioner to meet with Dr. Bodfish to discuss the concerns Petitioner had brought to Mr. Hart's attention. Mr. Hart felt that Dr. Bodfish was in the best position to get Petitioner's concerns addressed. Petitioner met with Dr. Hart and Dr. Bodfish soon thereafter. Mr. Hart believed that Dr. Bodfish was very receptive to Petitioner's issues. Mr. Hart did not have any sense that Dr. Bodfish was angry or that he had any negative reaction to Petitioner's concerns. T. pp. 119-23
32. In mid-July of 2009, management decided to move Petitioner to the position of chart room coordinator, which was at the same level as the training coordinator position. July was a critical time for the training coordinator, and Petitioner had not been performing those duties satisfactorily. Management felt the position of chart room coordinator would be a better fit for Petitioner. T. pp. 18-19, 82-83; Resp. Ex. 5 In addition, several employees at the CDL had approached Mr. Low and Dr. Bodfish saying they or others felt intimidated by Petitioner's questioning about possible HIPAA violations. T. pp. 84-85, 95-98; Testimony of James Bodfish (not recorded)
33. Both Mr. Low and Dr. Bodfish wanted Petitioner to succeed at the CDL/CIDD and believed the training coordinator position was just not a good fit for Petitioner. They thought the chart room coordinator position would be a better fit for Petitioner because it was related to HIPAA, and they hoped that Petitioner could succeed in the new position. T. pp. 81-82; Testimony of James Bodfish (not recorded)
34. Petitioner had asked Mr. Hart to maintain his anonymity when he reported the HIPAA violations to Mr. Hart in June 2009 and Petitioner felt that he had not done so. Petitioner felt then and contends now that he was being moved to the chartroom coordinator position in retaliation for his reporting the HIPAA violations. He expressed that concern in an email to Ms. Apple. His contention is without merit in that he was being moved to a new position which seemingly better suited his abilities and because he was not performing adequately in the training coordinator position. T. pp. 205, 199, 202; Pet.'s Ex. 17, 24)
35. The decision was made to reassign Petitioner's duties and he was informed of the upcoming change during the week of July 13, but because of a planned vacation, Petitioner did not resume his new duties until he returned from vacation during the first week of August. Petitioner's new duties as chart room coordinator included keeping track of charts, which allowed Petitioner to address one of his HIPAA concerns. T. pp. 19-21, 142, 148; Resp. Ex. 5; Resp. Ex. 6
36. When Petitioner moved to the position of chart room coordinator, Tom Struchen, who is the operations manager for the CIDD, became Petitioner's supervisor, although Ms. Martin continued to meet with Petitioner regularly. T. pp. 21-22, 51
37. Petitioner told Mr. Struchen that he had a comprehensive report detailing HIPAA violating in the CDL, but Petitioner would not share his report with Mr. Struchen. T. pp. 52-53

38. Petitioner seemed to do well with the new position; however, on September 22, 2009, Petitioner received a written warning for unacceptable personal conduct. T. pp. 22-23, 55-56; Resp. Ex. 7
39. On July 13, 2009, Petitioner had forwarded several emails to Lisa Apple, Mr. Hart's administrative assistant, which contained PHI and which Petitioner had forwarded to an unsecure g-mail account. This constituted a violation of UNC Healthcare's privacy policy. Mr. Hart informed both Petitioner and Harvey Lineberry, the Assistant Dean for Human Resources in the Medical School, that the violation had occurred. T. pp. 25, 53, 115, 123-26; Resp. Ex. 4; Resp. Ex. 7; Resp. Ex. 13
40. Petitioner does not deny having sent PHI to his personal g-mail account. Petitioner contends that he thought using his g-mail account was acceptable because he had sent several emails containing PHI to Mr. Hart using his g-mail account. T. pp. 155,156.
41. Mr. Hart never instructed Petitioner to send PHI using his g-mail account, nor did Mr. Hart know that Petitioner intended to use his g-mail account to store or send PHI. There was nothing in the email string in question to show that Petitioner had encrypted the PHI prior to mailing it to his g-mail account. T. pp. 125-26
42. On July 31, 2009, during the period that Petitioner was away on vacation, Petitioner's WebSys and CIDD passwords were found taped to his computer monitor. The WebSys password would have allowed access to all patient records for all of the UNC hospitals and clinics. The CIDD password would have allowed access to all of the network files for the CIDD, including clinic information and trainee records. Leaving his passwords taped to his computer monitor was a violation of the University's Information Security Policy and Standards. T. pp. 23, 53-55; Resp. Ex. 7; Resp. Ex. 12
43. Petitioner contends that he was given short notice of the transfer just prior to going on his planned vacation. As a result, he hastily cleared his desk and packed in order to move to the new position. In the move, he contends, the password may have dropped from papers he was moving, but he denies actually taping the password or any confidential information to the monitor. T. pp. 207, 209. Petitioner's version of how the password may have been placed on the monitor has changed several times. While there is no "smoking gun" eyewitness that he taped the information to his computer, the believable credible evidence under the totality of the circumstances is that Petitioner taped the information to his computer prior to leaving for vacation.
44. Mr. Lineberry informed Ms. Martin, who was then the human resources manager for CIDD, and Mr. Struchen, who was Petitioner's supervisor, that Petitioner had to receive at least a written warning for his violation of policy regarding sending PHI to an unsecure server. Ms. Martin and Mr. Struchen requested and received approval for combining the two violations into one written warning, rather than issuing two separate written warnings, which would have been an option. It should be noted that Petitioner had been a well-liked employee and Ms. Martin and Mr. Struchen were attempting to help him by combining the two violations into one written warning. T. pp. 8, 21, 25-27, 53, 55

45. The decision to issue a written warning for the first incident, involving confidential patient information, was made in July, soon after the first incident occurred. While Ms. Martin was working with the Office of Human Resources and the Medical School on the written warning for the first incident, the second incident occurred.
46. Regrettably there were a number of things that contributed to a delay in issuing the written warnings to Petitioner. There was a period during which Ms. Martin and Mr. Struchen were attempting to negotiate combining both incidents into one written warning instead of two. There followed a period during which Ms. Martin was extremely busy with other human resources matters, and then there was a period when one or another of the interested parties was out of the office. As a result, Ms. Martin and Mr. Struchen were not able to meet with Petitioner to give him the written warning until September. While it is somewhat disconcerting that it took two months or more to issue the written warning, it is of no real consequence in disposition of the issues herein. T. pp. 29-31.
47. Ms. Martin and Mr. Struchen met with Petitioner to discuss the written warning on September 22, 2009. Ms. Martin and Mr. Struchen began the meeting by complimenting Petitioner on the job he had been doing in the chart room. When they attempted to discuss the policy violations, Petitioner exploded and said "this is bull!" Petitioner was visibly agitated and upset. He began talking about his HIPAA report, said that he had two versions, one with names and one without, and he said that he was going to submit the one with names to the State auditor. Petitioner stated that he had a reputation as someone who was trying to take down the CDL and that he was going to live up to his reputation. Petitioner also said he was going to call meetings with Mr. Lineberry and Bill Roper, the Dean of the Medical School. Finally, Petitioner said that he was not going to do his job in the chart room, that he would no longer advise faculty of what they were supposed to do, and that he was not going to check the charts in and out. T. pp. 23-26, 56-59; Resp. Ex. 8
48. Petitioner over-reacted to receiving the written warning. Ms. Martin stated that Petitioner was ranting. Ms. Martin and Mr. Struchen believed Petitioner's threats. They believed that he would attempt to live up to his perception of his own reputation, whatever that may be. They believed that he would try to take down the CDL, ostensibly by releasing the report he compiled and which he had refused to share with anyone. They believed that he was going to stop enforcing the policies in the chart room.
49. Mr. Struchen had heard that Petitioner had been interviewing people in the CDL in order to try to document HIPAA violations and that people felt intimidated. Ostensibly he was gathering information in creating his report. In particular, one expressed additional concern because Petitioner was also interacting and questioning students. Although Petitioner would not share the report with Mr. Struchen, the issues Petitioner had shared with Mr. Struchen were issues which Petitioner had already raised and were issues which had been addressed or were actively being addressed by Dr. Bodfish in meetings with John Hart. T. pp. 25-27, 57, 59-62; 91-99

50. The next morning, September 23, 2009, Ms. Martin checked in with Petitioner in the chart room and found that Petitioner was still very angry and hostile and did not seem to have calmed down much from the meeting the previous afternoon. There was no indication that he was not performing his assigned duties in the chart room. Petitioner asked Ms. Martin why he was only written up for these two HIPAA violations because he had committed violations by photographing patients in the CDL waiting room in order to document HIPAA violations. He stated again that he was going to send his HIPAA report to the auditor, that he was going to live up to his reputation and try to take down the CDL, and that he was not going to do the HIPAA part of his duties in the chart room. T. pp. 27-28, 32; Resp. Ex. 8; Resp. Ex. 10
51. Following Ms. Martin's interaction with Petitioner on September 23, Mr. Struchen placed Petitioner on investigatory leave with pay. T. p. 63; Resp. Ex. 9
52. Petitioner was notified on October 20, 2009, that he was to attend a pre-disciplinary conference on October 21, 2009. The letter notifying Petitioner of the pre-disciplinary conference informed him of the conduct that was being considered regarding whether disciplinary action up to and including dismissal was warranted, including Petitioner's threats to turn over his HIPAA report to the State auditor; reports that Petitioner had been interviewing people at the CDL about HIPAA violations, which some found intimidating; the written warning for unacceptable personal conduct, which Petitioner had received on October 22, 2009; inappropriate statements made by Petitioner at the meeting on October 22, 2009; and Petitioner's stated refusal to enforce the policies and procedures of the chart room. Resp. Ex. 10
53. Mr. Struchen and Ms. Martin held a pre-disciplinary conference with Petitioner on October 21, 2009. Petitioner did not deny the conduct for which he received the written warning. His only defense against possible disciplinary action was that his threatening comments were taken out of context. T. pp. 63-65
54. Petitioner was dismissed from his employment effective October 22, 2009, for unacceptable personal conduct, specifically, his unprofessional and inappropriate statements and insubordinate behavior. T. pp. 31-33, 65-67; Resp. Ex. 11
55. The final decision to dismiss Petitioner was made by Dr. Bodfish and Mr. Low, with input from Ms. Martin and Mr. Struchen, as well as from the Office of Human Resources. The reason for Petitioner's dismissal was his conduct and the disruption to the workplace which his conduct had caused and threatened to cause if he remained employed. Ms. Martin concurred with the decision because Petitioner's behavior had grown so erratic and had begun to affect the CDL's business operations and ability to run the clinic. Mr. Struchen agreed with the decision because Petitioner threatened that he would not do his job duties and that he was going to try to take down the CDL. T. pp. 31-32, 65-66, 84-85; Testimony of James Bodfish (not recorded)
56. Neither Dr. Bodfish nor Mr. Low had any reason to fear Petitioner's HIPAA report, nor was there any reason for them to worry that Petitioner had sent his report to Mr. Hart.



Petitioner's report had no bearing on his dismissal. Based on his interactions with Dr. Bodfish, Petitioner, and the CDL/CIDD, Mr. Hart did not believe that Petitioner was dismissed in retaliation for his concerns regarding HIPAA. T pp. 89-91, 127; Testimony of James Bodfish (not recorded)

57. The testimony of Ms. Martin, Mr. Struchen, Mr. Low, Dr. Bodfish, and Mr. Hart was credible.
58. Petitioner never denied that he sent patient information to an unsecured email account. Petitioner never denied, prior to the hearing, leaving his password taped to his computer monitor. T. pp. 32-33, 55
59. Petitioner was dismissed because of his unacceptable personal conduct, not due to any reports of HIPAA violations nor any form of retaliation.
60. Respondent had just cause to dismiss Petitioner for his unacceptable personal conduct.

**CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over the just cause issue in this contested case pursuant to Chapter 126 and Chapter 150B of the North Carolina General Statutes.
2. On the first issue to be heard, Respondent met its burden to show that it had just cause to dismiss Petitioner.
3. A career State employee may be dismissed only for just cause. N.C. Gen. Stat. § 126-35(a). The State employer has the burden of proving that there was just cause for the dismissal. N.C. Gen. Stat. § 126-35(d).
4. Pursuant to regulations promulgated by the Office of State Personnel, there are two bases for the dismissal of an employee for just cause: (1) unsatisfactory job performance; and (2) unacceptable personal conduct. 25 N.C.A.C. 1J.0604(b).
5. An employee may be dismissed without any prior warning or disciplinary action when the basis for dismissal is unacceptable personal conduct. 25 N.C.A.C. 1J.0608(a). One instance of unacceptable conduct constitutes just cause for dismissal. Hilliard v. North Carolina Dep't of Corr., 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).
6. In order to prove just cause based on unacceptable personal conduct, Respondent must prove (1) Petitioner engaged in the conduct Respondent alleged; and (2) the conduct constitutes just cause for dismissal. North Carolina Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004).
7. Insubordination is unacceptable personal conduct "for which any level of discipline, including dismissal, may be imposed without prior warning." 25 N.C.A.C. 1J0614(h).

- “Insubordination” is defined as the “willful failure or refusal to carry out a reasonable order from an authorized supervisor.” *Id.*
8. Petitioner stated on two separate occasions that he was not going to perform his duties. Refusing to carry out one’s assigned duties constitutes a “willful refusal to carry out a reasonable order from an authorized supervisor.”
  9. “Unacceptable personal conduct” also includes “conduct unbecoming a state employee that is detrimental to state service.” 25 N.C.A.C. 1J.0614(i). In the case of “conduct unbecoming a state employee that is detrimental to state service,” the State employer is not required to make a showing of actual harm, “only a potential detrimental impact (whether conduct like the employee’s could potentially adversely affect the mission or legitimate interests of the State employer).” *Hilliard v. North Carolina Dep’t of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).
  10. Mr. West’s disrespectful and disruptive behavior on September 22 and 23, constitute conduct unbecoming any employee. His manner in interviewing other employees for the HIPAA report he was compiling was confrontational and intimidating to them. Even if unintentional, his confrontational and intimidating interviews was “conduct unbecoming a state employee that is detrimental to state service.” The disruption caused both by his attitude and disrespectful behavior, his refusal to carry out his duties, and his intimidating behavior, is potentially, if not actually, detrimental to state service.
  11. Petitioner’s conduct constituted unacceptable personal conduct, which justified his dismissal.
  12. Respondent followed the procedures required before dismissing Petitioner for unacceptable personal conduct.
  13. On the second issue to be heard, whether Petitioner was dismissed in retaliation for reporting HIPAA violations, Petitioner has the burden of proof. In order to prevail on a retaliation claim, a petitioner must first establish a prima facie case of retaliation.
  14. To establish a prima facie case of retaliation, a plaintiff must prove “the following three essential elements: (1) that the plaintiff engaged in a protected activity, (2) that the defendant took adverse action against the plaintiff in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken against the plaintiff.” *Demurry v. North Carolina Dep’t of Corr.*, 195 N.C. App. 485, 495-96, 673 S.E.2d 374, 382 (2009) (internal quotation marks omitted).
  15. If the petitioner makes out a prima facie case, then the respondent must come forward with evidence of a non-retaliatory reason for the adverse action. Once the respondent articulates a non-retaliatory reason for the adverse action, the petitioner must prove that the respondent’s articulated reason was a pretext for retaliation.
  16. Petitioner failed to establish a prima facie case of retaliation. Assuming *arguendo* that

Petitioner made out a prima facie case of retaliation, Respondent had just cause to dismiss Petitioner based upon other grounds. Petitioner failed to meet his burden to show that the reason given by Respondent for his dismissal was a pretext for retaliation.

On the basis of the above Conclusions of Law, the undersigned issues the following:

**DECISION**

It is hereby ordered that Respondent has sufficiently proved that it had just cause to dismiss Petitioner based on his unacceptable personal conduct, and that Petitioner did not sufficiently prove that his dismissal was in retaliation for reporting HIPAA violations. Petitioner's dismissal is therefore **AFFIRMED**.

**ORDER**

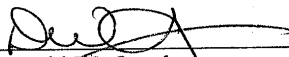
It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Services Center, Raleigh, N.C. 27699-6714, in accordance with N.C.G.S. § 150B-36(b).

**NOTICE**

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

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 26<sup>th</sup> day of November, 2012.

  
\_\_\_\_\_  
Donald W. Overby  
Administrative Law Judge

On this date mailed to:

David G Schiller  
Schiller & Schiller  
5540 Munford Road, Suite 101  
Raleigh, NC 27612  
Attorney - Petitioner

Katherine A Murphy  
Assistant Attorney General  
NC Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
Attorney - Respondent

This the 27th day of November, 2012.



N. C. Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh NC 27699-6714  
919 431 3000  
Facsimile: 919 431 3100

FILED  
OFFICE OF ADMINISTRATIVE HEARINGS  
11/9/2012 9:24 AM

STATE OF NORTH CAROLINA  
COUNTY OF GUILFORD

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
11EDC14077

Jeffrey Sloan Petitioner,  v.  NCDPI Respondent.	<b>DECISION</b>
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THIS MATTER CAME ON TO BE HEARD for hearing before Administrative Law Judge J. Randall May on September 24, 2012, in High Point, North Carolina.

For the Petitioner: Candace M. Morton, Esq.  
P.O. Box 16812  
Greensboro, North Carolina 27416

For the Respondent: Tiffany Y. Lucas  
Assistant Attorney General  
North Carolina Department of Justice  
PO Box 629  
Raleigh, North Carolina 27602-0629

**FINDINGS OF FACT**

The findings of fact are made after careful consideration and observation of the sworn testimony of the witnesses presented at the hearing, either by their audio and/or video presentation and the entire record in this proceeding. 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. From the sworn testimony and the admitted evidence, or the lack thereof, the undersigned makes the following:

1. Petitioner was employed by Alamance-Burlington School System at a substitute teacher rate during the 2010-2011 school year as the Petitioner's North Carolina teaching certificate had expired on June 30, 2010.

2. At some point during his employment with the Alamance-Burlington School System, the HR executive director of the Alamance-Burlington School System discovered that the Petitioner needed to take the Praxis exam in addition to completing the required coursework in order to clear his teaching license for renewal.

3. Petitioner indicated to the HR executive director that he was possibly interested in pursuing an administrative position in the future as he was then currently enrolled in a Masters of School Administration program at North Carolina A&T University.

4. Petitioner took the Praxis exam in the spring of 2011 but failed.

5. In a letter dated May 24, 2011, the Alamance-Burlington School System notified the Petitioner that it would not renew the Petitioner's employment contract for the 2011-2012 school year.

6. In August 2011, the HR executive director of the Alamance-Burlington School System received a phone call from the Director of Internships at North Carolina A&T University regarding a reference letter she (the Director of Internships) had received through Petitioner purportedly from the Alamance-Burlington HR executive director. The reference letter stated that Alamance-Burlington had offered the Petitioner "a contract for the 2011-2012 school year as a fully license teacher"; that Petitioner had "successfully completed all requirements to obtain a clear license"; and that the "Alamance-Burlington School System welcomes [Petitioner] the opportunity to intern" in the school district.

7. The HR executive director of Alamance-Burlington schools confirmed to the Director of Internships that although the signature and letterhead on the letter were hers, she did not write the letter.

8. The matter was reported to the Department of Public Instruction in August 2011.

9. The Petitioner was called in to be interviewed by the Superintendent's Ethics Committee in September 2011. The Superintendent's Ethics Committee is made up of professional educators appointed by Superintendent June Atkinson to, among other things, follow up on inquiries made concerning a teacher's fitness to teach in the State of North Carolina. Petitioner was interviewed by members of the Committee and he admitted that he had used his computer to take a letter that had been sent to him from the Alamance-Burlington HR director, and rewrote the body of the letter to misrepresent that he had a valid teaching license and was eligible to be employed by the Alamance-Burlington school system during the 2011-2012 school year.

10. The Ethics Committee recommended to Superintendent Atkinson that the Petitioner's license be revoked. Superintendent Atkinson initiated revocation proceedings and sent notice of same to the Petitioner on October 4, 2011.

11. At the hearing in this matter, Petitioner admitted that he intentionally misrepresented to the Director of Internships at A&T University that he had a valid teaching

license and that he was eligible to be employed by the Alamance-Burlington School System during the 2011-2012 school year by cutting and pasting the letterhead and signature from a letter from the HR Executive Director at Alamance Burlington School System and creating the body of the letter himself. Petitioner also admitted at the hearing that as a consequence of his dishonest conduct and misrepresentations, he had been suspended from A&T University through the fall semester of 2012, and that if he wishes to return to A&T University, he was required to apply for readmission.

12. The standards of professional conduct set forth at 16 N.C.A.C. 6C.0602(b) require every licensed educator (i) to practice the professional standards of federal, state, and local governing bodies (.0602(b)(1)); (ii) to serve as a positive role model and to demonstrate a high standard of personal character and conduct (.0602(b)(2)); and (iii) not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation in the performance of professional duties. (.602(b)(3)(A,B))

13. The State Board of Education has adopted a rule, codified as 16 N.C.A.C. 6C.0312, that governs the suspension or revocation of licenses. That rule provides, in part, that the State Board of Education may revoke or deny a teaching license for fraud, material misrepresentation or concealment (.0312(a)(1)) and for any illegal, unethical or lascivious conduct if there is an adverse relationship between that conduct and the continuing ability of the person to perform any of his/her professional functions in an effective manner (.0312(a)(8))

14. The undersigned finds that the Petitioner used his computer to take a letter that had been sent to him from the Alamance-Burlington HR director, and rewrote the body of the letter to misrepresent that he had a valid license and his eligibility to be employed by the Alamance-Burlington School System during the 2011-2012 school year.

15. The undersigned further finds that the Petitioner's conduct – as outlined above – violated the standards of professional conduct for educators in the State of North Carolina and renders him unfit to continue to hold a license to teach the children of this State. Teachers are required in this State, both by Rule and by case law, to maintain the highest level of ethical and moral standards, and to serve as a positive role model for children. 16 N.C.A.C. 6C.0602(b)(2); Faulkner v. New Bern-Craven Board of Education, 311 N.C. 42, 59, 316 S.E.2d 281, 291 (1984)

16. As our Supreme Court observed in Faulkner:

Our inquiry focuses on the intent of the legislature with specific application to teachers who are entrusted with the care of small children and adolescents. We do not hesitate to conclude that these men and women are intended by parents, citizenry, and lawmakers alike to serve as good examples for their young charges. **Their character and conduct may be expected to be above those of the average individual not working in so sensitive a relationship as that of teacher to pupil.** It is not inappropriate or unreasonable to hold our teachers to a **higher**

**standard of personal conduct**, given the youthful ideals they are supposed to foster and elevate.

Id. (emphasis added)

17. In this case, inquiry has been made into the Petitioner's fitness to hold a teaching license in light of certain fraudulent acts and/or material misrepresentations by the Petitioner, as well as in light of the illegal, unethical and/or lascivious conduct engaged in by the Petitioner in connection with his application for a teaching license. Petitioner has admitted to the conduct for which the inquiry into his fitness to hold a teaching license was based. Teachers in this State are expected to be role models for their students. Petitioner's past conduct simply does not demonstrate the high level of ethical and moral standards expected of teachers in this State. Parents are entitled to have their children entrusted to individuals of the highest moral character. Persons engaged in the conduct admitted to by the Petitioner simply do not meet the threshold requirement demanded by communities and parents for the school teachers we expect to be examples for our children.

18. The conduct that Petitioner was alleged to have been engaged in and to which he has admitted fails to rise to the high standards of moral behavior demanded of teachers in this State and there is clearly an adverse relationship between Petitioner's conduct and his ability to perform his duties in a professionally effective manner.

**CONCLUSIONS OF LAW**

1. The burden is on Petitioner to demonstrate, by a preponderance of the evidence, that the State Board of Education erred in initiating revocation of his North Carolina teaching license. Peace v. Employment Sec. Comm'n, 349 N.C.315, 507 S.E.2d 272 (1988)

2. Petitioner's conduct bears a "reasonable and adverse relationship" to the Petitioner's ability to perform any of his professional functions in an effective manner.

3. Petitioner's conduct is not consistent with the high standards of conduct expected of teachers in this State. See Faulkner v. Board of Education, 311 N.C. 42, 316 S.E.2d 281 (1984)

4. Respondent did not act arbitrarily or capriciously in revoking Petitioner's license to teach in North Carolina.

5. Respondent did not and has not unlawfully deprived Petitioner of any property to which he is entitled.

6. Respondent has not prejudiced the rights of Petitioner nor acted arbitrarily or capriciously.

BASED ON THE FOREGOING, the undersigned makes the following:



**DECISION**

The Respondent properly initiated revocation of the Petitioner's teaching license, and the undersigned recommends that the State Board of Education enter a final decision upholding the Department of Public Instruction's recommendation to revoke Petitioner's teaching license.

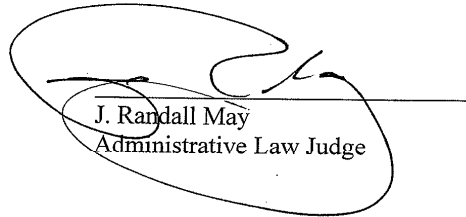
**NOTICE**

The Agency that will make the final decision in this contested case is the North Carolina State Board of Education.

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

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

This the 10 day of November, 2012.

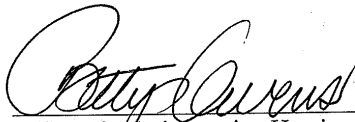
  
J. Randall May  
Administrative Law Judge

A copy was mailed to:

Candace M. Morton, Esq.  
PO Box 16812  
Greensboro NC 27416  
ATTORNEY FOR PETITIONER

Tiffany Y. Lucas  
Assistant Attorney General  
NC Department of Justice  
PO Box 629  
Raleigh NC 27602-0629  
ATTORNEY FOR RESPONDENT

This 14th day of November, 2012.



Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh NC 27699-6714  
Telephone: 919/431-3000  
Fax: 919/431-3100

STATE OF NORTH CAROLINA

Filed

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS

COUNTY OF WAKE

2012 NOV 20 PM 5: 15

12 DHR 01733

AMERICAN MOBILITY LLC,  
NORMAN MAZER,  
Petitioner,

Office of  
Administrative Hearings

**DECISION**

v.

N.C. DEPARTMENT of HEALTH  
and HUMAN SERVICES,  
Respondent.

**THIS MATTER** came on to be heard before the undersigned Administrative Law Judge on July 26, 2012 in Raleigh, North Carolina, with the final day of hearing concluding the presentation of witnesses and admission of exhibits. The record was left open for the parties' submission of further materials, including but not limited to supporting briefs, memorandums of law and proposals. Petitioner filed proposals with the Clerk of the Office of Administrative Hearings on August 21, 2012. Respondent filed proposals with the Clerk of the Office of Administrative Hearings (OAH) on Friday, September 7, 2012 and the record was received by and closed on Monday, September 10, 2012. By Order of the Chief Administrative Law Judge the time in which to file a decision in this case was extended to November 30, 2012.

**APPEARANCES**

**For Petitioner:** Norman Mazer, *pro se*  
2851 Van Huron Drive, Suite 103  
Raleigh, North Carolina 27615

**For Respondent:** Brenda Eaddy  
Assistant Attorney General  
N.C. Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001

**ISSUE**

Whether the requested recoupment by Respondent of \$13,644.54 in alleged Medicaid overpayments to the Petitioner is proper, lawful and without error?

WITNESSES

**For Petitioners:** Norman Mazer, Petitioner

**For Respondent:** Nicole Gates, Department of Health and Human Services

EXHIBITS

**For Petitioners:** Exhibits 1 through 3 and 5 through 7 were admitted.

**For Respondent:** Exhibits A through H were admitted.

**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 these Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. Petitioner is a Durable Medical Equipment (DME) supplier. Petitioner filed a Petition for a Contested Case Hearing to appeal the decision of the North Carolina Department of Health and Human Services, Division of Medical Assistance (DMA) on March 19, 2012. Petitioner contests an amount of \$13,644.54 which Respondent contends is a Medicaid overpayment due back to Respondent.
2. Respondent alleges Petitioner supplied a wheelchair to a Medicaid beneficiary without obtaining a physician prescription. Nicole Gates, a Nurse Consultant with the Division of Medical Assistance, reviewed this matter in preparation of this hearing at the Office of Administrative Hearings (OAH) and asserted that Medicaid DME wheelchair providers must obtain a physician prescription for a wheelchair as a first step to supplying the chair to the beneficiary.
3. Petitioner, American Mobility, received a signed and dated Certificate of Medical Necessity and Prior Approval Form signed by a "Provider/Board Certified Practitioner" on February 3, 2011 and a "Physician, Physician Assistant, Nurse Practitioner" on February 10, 2011

for the Medicaid patient. (Res. Ex. C) Petitioner did not receive a prescription from an ordering physician since the Medicaid patient called American Mobility directly. Petitioner did have the signed *Certificate of Medical Necessity and Prior Approval Form for Durable Medical Equipment and Prosthetic Devices*, as well as other documentation before ordering and supplying the Durable Medical Equipment listed on the Certificate of Medical Necessity to the beneficiary on or about March 22, 2011.

4. On or about June 1, 2011, the wheelchair recipient telephoned a complaint about receiving a wheelchair she did not order. The evidence shows that this was done after she had surgery and needed a Bi-Pap machine and that "Medicaid denied her the Bi-Pap machine because of the wheelchair." (Res. Ex. A) It appears the complaint was resolved with no penalty to the Petitioner and is not an issue in this case.

5. In accordance with the February 13, 2012 Notice of Decision regarding the Reconsideration Review held by the Respondent, a witness for DMA, Ms. Lukosius, stated that "the medical necessity of the equipment for Recipient J. [was] not at issue." The issue and findings according to the Notice of Decision was that Petitioner failed to obtain a prescription. (Res. Ex. H)

6. Attachment C, How a Recipient Obtains Durable Medical Equipment and Supplies, of Respondent's Clinical Coverage Policy No. 5A sets forth the steps on "how a recipient receives DME and related supplies." It goes on to state that the "steps are in the order that they are usually accomplished." Ms. Lukosius stated at the Reconsideration Review that the "DMA interprets this to mean that obtaining the physician's prescription is a different step; required in addition to the step 2, involving the completion of the Certificate of Medical Necessity/Prior Approval (CMN/PA)." She went on to state that "DMA interprets the word *usually* as referencing the order in which the required steps are accomplished." (Res. Ex. H)

7. Petitioner had provided the recipient with a power chair in 2006 and her conditioned had worsened since that time. Petitioner testified that American Mobility tries to help clients obtain services they need. Mr. Mazer stated that to do that in this case he accepted a self referral, and then the proper Certificate of Medical Necessity and Prior Approval Form was completed and submitted to the recipient's physician and appropriate prior approval was received.

8. Ms. Gates testified that a reason for the prescription was for the physician to list on it the type of power wheelchair and all its accessories needed so that the provider would deliver to the patient exactly what the physician ordered and assists Respondent in maintaining the accuracy of its records.

9. Petitioner stated that in his years of experience, physicians rarely list on the prescription the details of a wheelchair. Petitioner attached to his proposal copies of prescriptions which were taken from some of the files that we were audited by Dionne Manning and Robin Wilkins from DMA/Program Integrity Dept on April 12, 2011 in support of his assertion.

**BASED UPON** the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

**CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. To the extent that the findings of fact contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels.

2. Respondent's Clinical Coverage Policy No. 5A broadly sets out "Requirements for and Limitations on Coverage" regarding durable medical equipment. Section 5.1 states that a "referral authorization must be obtained from the primary care physician before providing DME ... to a Carolina ACCESS participant." Section 5.1 goes on to state that the "referral authorization is required in addition to other requirements for the service, such as prior approval."

3. Attachment C , How a Recipient Obtains Durable Medical Equipment and Supplies, of Respondent's Clinical Coverage Policy No. 5A sets forth the steps on "how a recipient receives DME and related supplies." It goes on to state that the "steps are in the order that they are usually accomplished."

4. In accordance with 42 U.S.C. § 1396a, State plans for medical assistance, and particularly § 1396a (a)(17), the federal law mandates that a state's plan must include "reasonable standards . . . [[to] the extent of medical assistance" in accordance with the purpose of the Medicaid statute. Moreover pursuant to 42 U.S.C. § 1396a(a)(19), the state must furnish "safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided, in a manner consistent with simplicity of administration and the best interests of the recipients."

5. The federal Medicaid program has the broad primary objective to furnish medical assistance to individuals whose income and resources are insufficient to meet the costs of medically necessary services and equipment.

6. The Petitioner in this case obtained the proper Certificate of Medical Necessity and Prior Approval Form signed by a "Provider/Board Certified Practitioner" on February 3, 2011 and a "Physician, Physician Assistant, Nurse Practitioner" on February 10, 2011 which was prior to the recipient receiving a wheelchair. The Respondent has stated that the medical necessity of the wheelchair is not an issue.

7. Though not receiving a prescription, Petitioner did have prior referral authorization as set forth and evidenced in the title of Respondent's own form. Though the usual order of obtaining the referenced wheelchair would normally perhaps involve a prescription, in light of the language of the federal law and even Respondent's own policy, it is not an absolute requirement, as Petitioner did have the required prior approval by a physician, physician assistant and/or nurse practitioner. This conclusion particularly fulfills the federal mandates of "simplicity of administration and the best interests of the recipients" in light of the fact that the recipient had previously received a wheelchair from the Petitioner and she and/or her agent initiated the request for the current wheelchair which she owns and operates.

**BASED UPON** the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following:

**DECISION**

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. Based on those conclusions and the facts in this case, the Undersigned holds that Petitioner has properly complied with the purposes and letter of both federal and State law. The Undersigned holds that the Petitioner has carried its burden of proof by a greater weight of the evidence that recoupment by Respondent would be erroneous, arbitrary or capricious, and not in accordance with applicable law.

**NOTICE**

With cases filed at the Office of Administrative Hearings (OAH) on or after January 1, 2012, the OAH issues a final decision appealable to North Carolina Superior Court with some exceptions. Pending approval by federal authorities of a State Plan Amendment waiving the single state agency requirement under the federal Medicaid program, the final decision in this case is presently issued by the North Carolina Department of Health and Human Services.

The agency making the final decision in this contested case shall adopt the Decision of the Administrative Law Judge unless the agency demonstrates that the Decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record. The agency is required to give each party an opportunity to file exceptions to this Decision issued by the Undersigned, and to present written arguments to those in the agency who will make the final decision.


In accordance with the former N.C. Gen. Stat. § 150B-36 (now repealed), the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to

the opportunity of the Administrative Law Judge to evaluate the credibility of witnesses. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency. Every finding of fact not specifically rejected as required by Chapter 150B shall be deemed accepted for purposes of judicial review. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency establishing that the new finding of fact is supported by a preponderance of the evidence in the official record.

The North Carolina Department of Health and Human Services is required to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorneys of record and to the Office of Administrative Hearings.

**IT IS SO ORDERED.**

This the 20th day of November, 2012.

  
Augustus B. Elkins II  
Administrative Law Judge

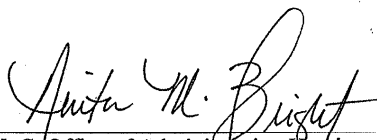


On this date mailed to:

American Mobility LLC  
Norman Mazer  
2851 Van Huron Drive  
Suite 103  
Raleigh, NC 27615-  
Petitioner

Brenda Eaddy  
N.C. Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
Attorney - Respondent

This the 20th day of November, 2012.



N. C. Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh NC 27699-6714  
919 431 3000  
Facsimile: 919 431 3100

Filed

STATE OF NORTH CAROLINA  
COUNTY OF LEE

2012 NOV 14 PM 1:42

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
12DHR05094

Office of  
Administrative Hearings

<p>ESTHER H BEAL,  Petitioner,  v.  OFFICE OF THE CHIEF MEDICAL EXAMINER,  Respondent.</p>	<p><b>FINAL DECISION</b></p>
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A contested case hearing was conducted in this matter on September 26, 2012, in Raleigh, North Carolina before Beecher R. Gray, Administrative Law Judge. Petitioner, Esther H. Beal, appeared *pro se*. Respondent, Department of Health and Human Services, Office of the Chief Medical Examiner, was represented by John P. Barkley, Assistant Attorney General. A proposed decision was submitted by Respondent on November 01, 2012.

ISSUE

Whether Respondent properly determined that the decedent's manner of death should be classified as suicide.

EXHIBITS

Respondent's exhibits (hereinafter "R. Exs.") 1-7 were admitted.

Based upon the testimony presented at the hearing, the exhibits admitted, and all other relevant material, 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. On October 22, 2011, Emergency Medical Services ("EMS") was called to the home of Bobby G. Beal, the decedent in this matter. Bobby Beal was a 51-year-old male who was found unconscious with what EMS described as "an apparently self-inflicted gunshot wound to the right chest." EMS took the decedent to Central Carolina Hospital in Sanford where he was pronounced dead 20 minutes after EMS arrived.

3. This death came under the jurisdiction of the Office of the Chief Medical Examiner; the deceased body was sent to the Office of the Chief Medical Examiner in Chapel Hill for autopsy. Following the autopsy and review of all information in the investigation file, Dr. Christopher Gordon, Assistant Medical Examiner and Dr. Clay Nichols, Deputy Chief Medical Examiner, determined that the cause of death was a self-inflicted gunshot wound to the right chest and that the manner of death was suicide.
4. Petitioner, Esther Beal, wife of the decedent, is contesting the classification of the manner of death as suicide. Petitioner argues that the decedent's manner of death should be classified as accidental.
5. Dr. Clay Nichols is the Deputy Chief Medical Examiner for North Carolina, in the Office of the Chief Medical Examiner. Dr. Nichols is board certified in both anatomic and forensic pathology and has over 25 years of experience working as a medical examiner and teaching forensic pathology (R. Ex. 7). During his career, he has made close to 7,000 determinations of the cause and manner of death. Dr. Nichols was tendered and accepted by the Administrative Law Judge as an expert in forensic pathology and forensic examinations.
6. Dr. Nichols testified as to the autopsy and investigation by the Office of Chief Medical Examiner ("OCME") and his participation in the investigation and determination of the manner of death of Bobby Beal.
7. An autopsy on the decedent's body was performed at OCME on October 25, 2011. Dr. Gordon performed the autopsy, with Dr. Nichols supervising. During the autopsy, a "near contact range" gunshot wound to the right chest was found. The autopsy found that "[n]o unburned gunpowder particles or stippling are present on the skin at the entrance wound" and that microscopic evaluation of the entrance wound showed "dark foreign material at the junction between the epidermis and dermis-- findings consistent with soot" (R. Ex. 1). Similar findings were made on the shirt the decedent had been wearing, over the area of the gunshot wound.
8. Dr. Nichols explained that these findings show that the gun was pressed directly against the body, with the only separation being the clothing decedent was wearing. Dr. Nichols testified that this indicates a certain amount of intention to have the gun right up against the chest when the trigger on the gun was pulled. Dr. Nichols testified that if the gun accidentally had fired, it would not have been a near contact range wound exhibiting the signs of soot in the wound and absent unburned gunpowder. In this case, all of the unburned gunpowder went into the wound because the gun was pressed against the body. This shows that the gun was placed directly against the chest and the trigger was pulled, which could not be the result of an accidental shooting.
9. The autopsy determined that the cause of death was a near contact range gunshot wound to the right chest. The autopsy found no other cause contributing to the decedent's death.
10. The medical examiner's report states that "No suicide note was found, but per family

members the decedent was experiencing life stressors and previously had expressed suicidal thoughts" (R. Ex. 2). This included statements by the decedent to his brother that he did not want to live without his wife, which Petitioner admitted in her own testimony at the hearing. One of the life stressors decedent was experiencing was that he and Petitioner were in the process of separating. Petitioner confirmed this in her testimony, stating that it was because of decedent's long history of mental abuse of her.

11. Dr. Nichols also testified that he had reviewed the investigation report from the Lee County Sheriff's Office as part of his review of the manner of death. The officer on the scene immediately after the shooting stated that "Once EMS arrived I spoke with Petitioner and she stated that she was sitting in her bedroom with Bobby who put a gun to his chest and said 'I will end this right now'" (R. Ex. 3).
12. Petitioner does not question that the decedent died as the result of a gunshot wound to the chest. She only contends that it was accidental, not suicide. Dr. Nichols testified that there was never any question for him that the manner of death in this case might be accidental. He said the question for the medical examiner's office to determine was whether it was suicide or homicide. Initially the gun was not found with the body, and there apparently had been some attempt to clean up the scene, according to the police report. Eventually it was determined that one of the decedent's sons had moved the weapon; the evidence showed that the decedent was the only one handling the gun. For the reasons stated above, Dr. Nichols' expert opinion was that the nature of the wound showed that the gun deliberately was placed directly against the decedent's chest when the gun was fired, and the near contact range wound could not have resulted from an accidental shooting. Either the decedent deliberately shot himself or someone else shot him. From the information OCME had, Dr. Nichols and Dr. Gordon determined to a reasonable degree of medical certainty that the manner of death was consistent with suicide.
13. Based on his education and experience, Dr. Nichols' expert opinion was that Bobby G. Beal's manner of death was properly classified as suicide. The near contact range wound, the events in Bobby's life, the statements in the police report that Bobby made, and previous suicidal thoughts all support this conclusion. Dr. Nichols stated that in his opinion, even if the only information available had been the findings concerning the nature of the wound--which showed that the decedent deliberately held the gun against his chest and pulled the trigger--the manner of death properly was classified as suicide.
14. The testimony and expert opinion of Dr. Nichols, as well as the evidence in Respondent's exhibits 1-7 admitted into evidence at the hearing, all support the determination by the medical examiner's office that the decedent's manner of death was suicide. Dr. Nichols' testimony as to the nature of the wound, with no unburned gunpowder, soot in the wound, and the evidence showing that the gun had to have been held up against the chest when the trigger was pulled, shows an intentional act on the part of the decedent when he shot himself. The testimonial evidence from Petitioner and her son Chad demonstrates that Bobby Beal was very familiar with guns and with this particular weapon. The evidence also shows that the decedent's death could not be the result of an accidental shooting

because of what was described by Petitioner as a hairline trigger on the gun. An accidental shooting caused by the gun could not have led to the wound found by the medical examiner's office; such a wound could only have been the result of a deliberate act. Therefore Petitioner's unsupported assertion on this point is contradicted by the evidence.

15. While Petitioner claims that her husband did not mean to commit suicide, but only to scare her, as he had attempted to do multiple times over many years, the evidence of his abuse of Petitioner paints the picture of an unstable individual. The decedent apparently had no compunction about putting a gun to Petitioner's head or actually firing a gun over her head, both of which she testified that he had done during her 30 years with him. She stated that there was something wrong with him, although he never went to get a diagnosis. She was separating from him because of his continuing mental abuse of her. He clearly could act rashly, and was very comfortable in using a gun in dangerous and potentially fatal ways. He had told his brother that he didn't want to live without her. All of these factors support a state of mind at the time he pointed the gun at his chest and pulled the trigger that he intended to commit suicide. Under such circumstances, the statement in the police report that he told Petitioner that "he would end this right now" is credible. Even if he later stated, after the shooting, that he did not want to die, as his son stated in his testimony, that does not mean that he did not intentionally shoot himself. In the light of all of the evidence, I find Respondent's finding of suicide more credible in explaining the decedent's death.
16. Petitioner provided no scientific or medical evidence, or expert testimony, to support her theory of the manner of death as accidental because of an extremely light amount of trigger pressure required to fire the gun.
17. Respondent is charged by G.S. 130A-383 with investigating "the death of any person resulting from violence, poisoning, accident, suicide, or homicide; . . . or occurring under suspicious, unusual, or unnatural circumstances . . . ."
18. Under G.S. 130A-385, when a medical examiner takes charge of a body under G.S. 130A-383, the medical examiner is required to make findings regarding the cause and manner of death and report such findings to the Chief Medical Examiner.
19. G.S. 130A-385 requires the medical examiner to complete a death certificate and, "[I]f the death was from external causes, the medical examiner shall state on the certificate of death the means of death, and whether, in the medical examiner's opinion, the manner of death was accident, suicide, homicide, execution by the State, or undetermined." G.S. 130A-385(b).

Based upon the foregoing findings of fact, I make the following:

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.
2. Petitioner in this matter is contesting the statutorily-required classification of the manner of death by the medical examiner. Therefore, the burden of proof lies with Petitioner.
3. There is substantial evidence in the record to support the action of Respondent in classifying decedent's death as a suicide, and Respondent has demonstrated by a preponderance of the evidence that the decedent's death is properly classified as suicide.
4. Petitioner has not met her burden of proof. Petitioner suggested that the decedent's death was the result of an accidental shooting because of a gun with a hairline trigger. The evidence does not support that theory. The expert testimony demonstrates that the nature of the gunshot wound that killed decedent could not have been the result of an accidental shooting. The expert testimony establishes that the gun was directly held against decedent's right chest when the trigger was pulled and that would have required the decedent to intentionally place the gun to his chest with the intent to shoot himself. Petitioner provided no medical or scientific evidence to refute the medical examiner's findings and made no attempt to refute Dr. Nichols' expert testimony. Petitioner provided no evidence that the gun in question had an extremely light trigger pull or was subject to misfiring. Her only evidence was her statement under oath that she knew he never would commit suicide and her son's testimony that his father had come into the son's bedroom after the shooting and stated that he did not intend to shoot himself. Petitioner has failed to meet her burden of proof and Respondent has demonstrated by a preponderance of the evidence that the decedent's death properly is classified as suicide.
5. The language of the statute also is important in determining the basis for supporting the agency's decision in this case. G.S. §130A-385 requires the medical examiner to "state on the certificate of death the means of death, and whether, *in the medical examiner's opinion*, the manner of death was accident, suicide, homicide, execution by the State, or undetermined." (Emphasis added). The statute simply requires a finding by the medical examiner as to the medical examiner's "opinion" as to the manner of death. Obviously, the medical examiner cannot state to an absolute certainty the manner of death, except in extremely rare circumstances where the medical examiner is present when death occurs. While the means of death is often, but not always, easier to identify, the manner of death must remain an opinion based on the medical examiner's training and experience and the information available to the medical examiner from other sources such as EMS and law enforcement. The medical examiner's opinion cannot be based on pure whim, but it also cannot be held to a standard that requires the medical examiner to prove that his decision is absolutely correct. In the present case, there is ample evidence to show that the medical examiner made a reasoned decision on the evidence available and arrived at a decision based on his training and experience in light of such evidence. The decision was reviewed by another unbiased professional who concurred in this decision. Both Dr.

Gordon and Dr. Nichols determined that suicide was the most probable manner of death based on all of the evidence available.

FINAL DECISION

Based upon the above findings of facts and conclusions of law, I find that in making its decision to classify the manner of death as suicide, Respondent acted properly as required by law or rule; did not act erroneously, arbitrarily or capriciously; and did not substantially prejudice Petitioner's rights. Respondent's action is supported by a preponderance of substantial evidence in the record. Respondent's determination of the manner of death as suicide should be, and hereby is, AFFIRMED.

NOTICE

Under the provisions of North Carolina General Statute §150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 14 day of November, 2012.



Beecher R. Gray  
Administrative Law Judge

On this date mailed to:

Esther H Beal  
1941 Post Office Road  
Sanford, NC 27330-  
Petitioner

John P. Barkley  
NC Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
Attorney - Respondent

This the 14<sup>th</sup> day of November, 2012.



Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh NC 27699-6714  
Telephone: 919/431-3000  
Fax: 919/431-3100



Filed

STATE OF NORTH CAROLINA  
COUNTY OF PITT

2012 NOV 19 PM 2:00

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
12 DOJ 03844

ANTONIO CORNELIUS HARDY,  
Petitioner,

Office of  
Administrative Hearings

v.

N.C. CRIMINAL JUSTICE  
EDUCATION AND TRAINING  
STANDARDS COMMISSION,  
Respondent.

PROPOSAL FOR DECISION

This case came on for hearing on October 17, 2012, before Administrative Law Judge Donald W. Overby in Greenville, North Carolina. This case was heard after Respondent requested, pursuant to N.C.G.S. § 150B-40(e), designation of an Administrative Law Judge to preside at the hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

APPEARANCES

Petitioner: Antonio Cornelius Hardy, pro se

Respondent: Catherine F. Jordan  
Department of Justice  
Law Enforcement Liaison Section  
P.O. Box 629  
Raleigh, N.C. 27602-0629

ISSUE

Did substantial evidence show that Petitioner committed the Department of Correction misdemeanor of resist, delay, and obstruct a law enforcement officer while in the performance of his duties while Petitioner was certified as a Correctional officer which justified revocation of Petitioner's certification?

RULES

12 NCAC 09G .0504(b)(3)  
12 NCAC 09G .0102(9)(cc)  
12 NCAC 09G .0505(b)(1)  
N.C.G.S. § 14-223

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 Petitioner received the notification of Proposed Suspension of Correctional Officer Certification through a letter mailed by Respondent on March 14, 2012. (Respondent's Exhibit 19)
2. The North Carolina Criminal Justice Education and Training Standards Commission has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9G, to certify correctional officers and to revoke, suspend, or deny such certification.
3. On October 18, 2004, Respondent received a Report of Appointment Form F-5A on behalf of Petitioner for his application for certification as a correctional officer. (Respondent's exhibit 1)
4. On October 21, 2004, Petitioner received his Probationary Certification as a correctional officer from Respondent. (Respondent's exhibit 2) On October 18, 2005, Petitioner received his General Certification as a correctional officer from Respondent. (Respondent's exhibit 3) Petitioner has been employed as a correctional officer since October 18, 2004. (Respondent's exhibit 4)
5. On December 30, 2008, Respondent received a Craven County Sheriff's Department Incident/Offense Report. (Respondent's exhibit 5) The report stated that on November 30, 2008, law enforcement officers responded to the Hardy residence at 5610 Highway 118 in Vanceboro, North Carolina at 04:16 hours. The report lists the Petitioner as the suspect for committing the offenses of assault on a female and resist, delay, and obstruct. The victim is listed as Kokeisha Hardy ("Ms. Hardy"), who is Petitioner's wife. The report states that Ms. Hardy had a swollen lip and cuts and that she was sober. Although this report states that the victim had cuts, the only weapon listed as shown in three separate places on the form is "hands." The form does not speak to Petitioner's sobriety. The report listed that Petitioner was 6 feet, 2 inches tall and weighed 350 pounds. Included with the report are three narrative reports from Craven County Sheriff's Office Deputies Jason Buck ("Deputy Buck"), Scott Gaskins ("Deputy Gaskins"), and Bradley Tabor ("Deputy Tabor"). (Respondent's exhibits 6-8)
6. On November 30, 2008, Deputy Buck obtained a magistrate's order for Petitioner for the charges of assault on a female, alleging that Petitioner "unlawfully and willfully did assault and strike Kokeisha Hardy, a female person, by hitting her about the head and face with his hands. The defendant is a male person and was at least 18 years of age when the assault

and striking occurred.” (Respondent’s exhibit 9) Petitioner was also charged with resisting a public officer, alleging that Petitioner “unlawfully and willfully did resist, delay and obstruct J Buck, a public officer holding the office of deputy sheriff with the Craven County Sheriff’s Department, by refusing to obey commands and pushing away from that officer. At the time, the officer was discharging and attempting to discharge a duty of his office, arresting the defendant for domestic violence assault on a female.”

7. On December 1, 2008, a release order was entered by the presiding District Court Judge. Conditions of release were established requiring a secured bond. Further conditions were set as customary in domestic violence case in that Petitioner would be arrested if he has contact with Ms. Hardy or if he uses, possesses, or consumes illegal drugs, alcohol, firearms, or weapons. (Respondent’s exhibit 10)
8. On December 30, 2008, Respondent received a statement from Petitioner about the incident. (Respondent’s exhibit 11) Petitioner stated that on November 30, 2008, he was arrested for assault on a female and resisting arrest. He stated that he and Ms. Hardy were having an argument and that she hit him a few times, and that when the deputies arrived he could not understand them so he placed his hands behind his head. He also notes that his mother in law posted the secured bond for his release.
9. On December 30, 2008, Respondent also received a memorandum from the North Carolina Department of Corrections written by Michael Lamm, Superintendent of the Pamlico Correctional Institution to Danny Safrit, Eastern Region Director, concerning Petitioner’s arrest for assault on a female and resisting a public officer. (Respondent’s exhibits 12, 13) The memo summarized Mr. Lamm’s understanding of the facts of the incident. Mr. Lamm states that he initiated an internal investigation. Both the Petitioner and his wife submitted written statements which refute the allegations of the police report concerning the alleged assault on a female. Both contend that both were drinking and that Petitioner did not hit her, but instead she did strike him.
10. Mr. Lamm concluded in the December 30, 2008 memorandum that Petitioner’s “personal conduct is no longer acceptable for an employee of the Department of Correction. I have lost faith in his ability to properly perform his duties as a Correctional Officer. It is my recommendation that the Criminal Justice Standards and Training Council suspend his certification.” (Respondent’s exhibit 12)
11. On May 21, 2009, Respondent received two memoranda from the North Carolina Department of Corrections written by Michael Lamm, Superintendent of the Pamlico Correctional Institution to Danny Safrit, Eastern Region Director, both dated May 5, 2009. (Respondent’s exhibits 13 and 14). The first memo indicated that the charges of assault on a female and resisting a public officer were dismissed based upon agreement of the parties and “compliance.” According to the memo, the only requirement with which Petitioner was required to comply was a substance abuse assessment. Petitioner obtained that assessment which required no treatment, indicative of no substance abuse problem. (Respondent’s exhibit 13). Mr. Lamm states in this memo that he has obtained permission from Mr. Safrit to pursue dismissal of Petitioner through the chain of command. (Respondent’s exhibit 13)

12. In the second memo dated May 21, 2009, Mr. Lamm restates at length the facts from the officers reports and briefly the facts as alleged by Petitioner and his wife. He restates his intention to seek dismissal of Petitioner through the chain of command. (Respondent's exhibit 14)
13. Prior to the last two memos from Mr. Lamm, Petitioner's charges for assault on a female and resist, delay, and obstruct a public officer were dismissed in Craven County District Court on April 21, 2009, as Mr. Lamm acknowledges. (Respondent's exhibit 15-17)
14. More than three years after the incident was first reported to the Respondent, on January 26, 2012, Respondent's investigator Edward Zapolsky ("Zapolsky") drafted a memorandum to be submitted to Respondent's probable cause committee for consideration of suspension of Petitioner's correctional officer certification based upon the allegation of the commission of the DOC misdemeanor offenses of assault on a female and resist, delay, and obstruct. (Respondent's exhibit 18)
15. On March 14, 2012, Respondent's probable cause committee found probable cause to suspend Petitioner's correctional officer certification based upon the commission of the DOC misdemeanor of resist, delay and obstruct a public officer. (Respondent's exhibit 19)
16. Petitioner requested an administrative hearing.
17. At the administrative hearing, Mr. Zapolsky testified that he investigates administrative rules violations on Department of Correction officers. Mr. Zapolsky testified that he collected the documents concerning Petitioner's criminal charges, and drafted a memorandum to be submitted to Respondent's probable cause committee. Mr. Zapolsky was asked why it took so long to bring this issue before Respondent's probable cause committee, and Mr. Zapolsky stated that at the time when he received these documents in 2008, he was handling several other investigations, and that this case "just fell through the cracks."
18. Craven County Sheriff's Office Deputy Jason Buck ("Deputy Buck"), Deputy Scott Gaskins ("Deputy Gaskins"), and Deputy Bradley Tabor ("Deputy Tabor") completed three separate narrative reports for the incident. Each testified at the administrative hearing generally in accord with his respective written report. (Respondent's exhibit 6-8) Although there are some discrepancies between the reports and the officer's testimonies, the deputies are found to be credible.
19. According to Deputy Buck's testimony, he responded to a call for a domestic assault on November 30, 2008. The call indicated that there was a screwdriver was involved. It took Deputy Buck approximately ten minutes to respond to the call. On arriving on the scene, he and Deputy Tabor spoke with Petitioner's wife Ms. Hardy, who had a swollen cut lip and a cut on the top of her right hand. Ms. Hardy stated that Petitioner had started drinking heavily and that he was intoxicated. Ms. Hardy indicated that Petitioner was next door at their residence. As Deputy Buck and Deputy Tabor walked next door to find Petitioner and before they could knock on his front door, Petitioner started yelling profanities across the front yard at the officers. Immediately Deputy Buck told Petitioner that he was under arrest, to which Petitioner responded with more profanity. Deputy Buck repeated the

command that Petitioner was under arrest and for Petitioner to put his hands behind his back. Deputy Buck and Deputy Tabor continued to yell loud verbal commands to Petitioner, telling him that he was under arrest for domestic assault and telling him to put his hands behind his back. Petitioner put his hands behind his head, not behind his back. Deputy Buck and Deputy Tabor were dressed in their uniforms, and their service weapons on their persons.

20. While Deputy Buck and Deputy Tabor were continuing to give loud verbal commands to Petitioner, Deputy Gaskins arrived and approached Petitioner from behind. When Deputy Buck told Petitioner to put his hands behind his back, Petitioner placed his hands behind his head. Deputy Gaskins walked behind Petitioner and attempted to handcuff him. The officers generally agree that Petitioner did not know Deputy Gaskins was behind him and that he was startled when Deputy Gaskins grabbed his wrist. Petitioner turned abruptly and in doing so bumped Deputy Gaskins, pushing him away. Petitioner did not put his hands on Deputy Gaskins to push him in any regard. Deputy Gaskins was also in his uniform and had his service weapon on his person when he approached and interacted with Petitioner.
21. Deputy Buck deployed his Taser which struck Petitioner on his shirt in the center of his chest. Petitioner bent over, then stated "this ain't shit" and pulled the probes from his body.
22. Deputy Buck grabbed Petitioner and started leaning him towards the ground when Deputy Gaskins stated that he was going to deploy his Taser. Deputy Buck stepped away from Petitioner to avoid the Taser, and Deputy Gaskins deployed his Taser and struck Petitioner on his chest. Petitioner bent over and stated again "this ain't shit," and broke off the probes.
23. Deputy Buck extended his ASP baton and struck Petitioner three times on his right leg while giving him verbal commands to stop resisting and to put his hands behind his back. Deputy Gaskins also extended his ASP Baton and struck Petitioner on his left leg. Petitioner's knees buckled and he fell to the ground. Deputy Buck placed handcuffs on Petitioner. Deputy Gaskins removed the Taser probes from Petitioner's stomach.
24. Deputy Gaskins and Deputy Tabor picked up Petitioner and walked him to Deputy Buck's patrol vehicle. Petitioner refused to enter the vehicle and told the officers to "give me some names and I'll get in your vehicle." The deputies were able to force Petitioner into the patrol vehicle. Deputy Buck testified that he was on the scene approximately twenty to thirty minutes.
25. Deputy Buck transported Petitioner to the Craven County jail. Petitioner vomited in the back seat of Deputy Buck's patrol vehicle while he was being transported. Deputy Buck asked whether he was okay, and Petitioner stated "I work for the Department of Corrections, I'm not worried."
26. On the date of this administrative hearing Petitioner had been employed by the Department of Correction for one day short of exactly eight years. Petitioner testified that he has had a good career with the Department of Corrections and he had been promoted to sergeant

since the date of the incident at issue herein. Petitioner contends that what happened one night four years ago should not cause him to lose his certification.

**CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. The parties received proper notice of the hearing in the matter. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.
2. The North Carolina Criminal Justice Education and Training Standards Commission has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 09G, to certify correctional officers and to revoke, suspend, or deny such certification.
3. 12 NCAC 09G .0504(b)(3) states:  
  
(b) The Commission may, based on the evidence for each case, suspend, revoke, or deny the certification of a corrections officer when the Commission finds that the applicant for certification or the certified officer:  
  
    (3) has committed or been convicted of a misdemeanor as defined in 12 NCAC 09G .0102 after certification[.]
4. 12 NCAC 09G .0102(9)(cc) states:  
  
The following definitions apply throughout this Subchapter only:  
  
(9) "Misdemeanor" for corrections officers means those criminal offenses not classified under the laws, statutes, or ordinances as felonies. Misdemeanor offenses for corrections officers are classified by the Commission as follows:  
  
    (cc) 14-223 Resisting officers
5. N.C.G.S. §14-223 (2011) states: If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor.
6. 12 NCAC 09G .0505(b)(1) states:  
  
(b) When the Commission suspends or denies the certification of a corrections officer pursuant to 12 NCAC 09G .0504 of this Section, the period of sanction shall be not less than three years; however, the Commission may either reduce or suspend the period of sanction under Paragraph (c) of this Rule or substitute a period of probation in lieu of suspension of certification following an administrative hearing, where the cause of sanction is:

(1) commission or conviction of a misdemeanor as defined in 12

NCAC 09G .0102[.]

7. The party with the burden of proof in a contested case must establish the facts required by N.C.G.S. § 150B-23(a) by a preponderance of the evidence. N.C.G.S. § 150B-29(a). The administrative law judge shall decide the case based upon the preponderance of the evidence. N.C.G.S. § 150B-34(a). Respondent has the burden of proof in the case at bar.
8. Respondent has shown by a preponderance of the evidence that Petitioner committed the offense of resist, delay, and obstruct law enforcement officers on November 30, 2008.
9. Although Mr. Lamm stated in his December 30, 2008, memo that he had "lost faith in [Petitioner's] ability to properly perform his duties as a Correctional Officer and in two separate memos dated May 21, 2009 that he was going to seek dismissal of Petitioner through the chain of command, nevertheless Respondent did not dismiss Petitioner. In fact, Respondent promoted Petitioner to sergeant since all of the events at issue took place.
10. The fact that it took almost four years to bring this case forward worked in Petitioner's benefit. In light of the Petitioner's continued valuable service to Respondent, sufficient enough for a promotion, it would be a grave miscarriage of justice to revoke his certification at this point. Had the process was started in a more timely fashion, then the outcome may have been different. The Petitioner's interaction with the deputies cannot be totally ignored simply because of the passage of time. The passage of time merely mitigates in his favor.

**PROPOSAL FOR DECISION**

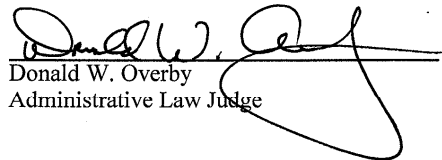
NOW, THEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned recommends Respondent Commission impose a suspension for thirty days but that his suspension is stayed for three years and Petitioner is placed on probationary status for a period of three years. The Undersigned also recommends thirty days without pay.

**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 19<sup>th</sup> day of November, 2012.

  
Donald W. Overby  
Administrative Law Judge

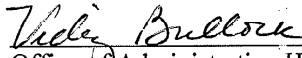
**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that a copy of the foregoing PROPOSAL FOR DECISION has been duly served upon the Petitioner of record by depositing a copy of same in the United States Mail, first-class, postage prepaid, addressed as follows:

Antonio Cornelius Hardy  
5610 Highway 118  
Grifton, North Carolina 28530

Catherine F. Jordan  
Department of Justice  
Law Enforcement Liaison Section  
9001 Mail Service Center  
Raleigh, N.C. 27602-9001

This the 19<sup>th</sup> day of November, 2012.

  
\_\_\_\_\_  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714  
919-431-3000



Filed

STATE OF NORTH CAROLINA  
COUNTY OF GUILFORD

2012 NOV -9 PM 4:44

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
12 DOJ 5140

Office of  
Administrative Hearings

BETTINA HEDWIG VREDENBURG, )

Petitioner, )

v. )

PROPOSAL FOR DECISION

NORTH CAROLINA SHERIFFS' )

EDUCATION AND TRAINING )

STANDARDS COMMISSION, )

Respondent. )

On October 22, 2012, this contested case was heard before the undersigned in the High Point Courthouse, Guilford County, North Carolina. Without objection, Respondent requested pursuant to N.C.G.S. § 150B-40(e), designation of an administrative law judge to preside at the hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

APPEARANCES

Petitioner: William L. Hill, Attorney at Law  
Respondent: William P. Hart, Jr., Assistant Attorney General

ISSUES

1. Whether Petitioner committed the offense of larceny?
2. What sanction, if any, should be imposed against Petitioner under the Respondent's rules?

EXHIBITS ADMITTED

Petitioner's Exhibit #1

STIPULATIONS

1. Petitioner Bettina Hedwig Vredenburg was appointed as a detention officer with the Guilford County Sheriff's Office and has been certified as such with the Respondent North Carolina Sheriffs' Education and Training Standards Commission.

2. On or about April 4, 2012, Petitioner was notified that the Commission found probable cause exists to believe her detention officer certification should be revoked.

3. Petitioner timely requested an administrative hearing, and the Commission thereafter requested the assignment of an administrative law judge to hear the contested case.

4. The Office of Administrative Hearings has jurisdiction over the subject matter and over both parties in this case, and venue is proper.

5. During the year 2010, Petitioner committed the following misdemeanor criminal offense in Forsyth County: larceny in violation of N.C.G.S. § 14-72(a). Pursuant to the Commission's rules, this offense is classified as a Class B misdemeanor. 12 NCAC 10B .0103(10)(b)(1).

6. Accordingly, Petitioner has committed a crime or unlawful act defined as a Class B misdemeanor and which occurred after the date of appointment, subjecting her certification to revocation or suspension by the Commission. 12 NCAC 10B .0204(d)(1). Pursuant to the Commission's rules, the period of sanction is not less than five years. 12 NCAC 10B .0205(2)(a).

7. Following an administrative hearing, the Commission may reduce or suspend this five-year period of sanction, or substitute a period of probation in lieu of revocation or suspension, if extenuating circumstances brought out at the administrative hearing warrant such action. 12 NCAC 10B .0205(2).

8. At the hearing in this matter, Petitioner may present such evidence as may be admissible and relevant to prove extenuating circumstances as permitted under 12 NCAC 10B .0205(2). The Commission may challenge Petitioner's evidence and may present such rebuttal evidence as may be admissible and relevant to the Commission's determination whether extenuating circumstances, if any, warrant a reduction or suspension of the sanction set forth in 12 NCAC 10B .0205(2)(a).

9. Additionally, the parties stipulate to the following circumstances relevant to Petitioner's commission of misdemeanor larceny:

a. Petitioner began working at J.C. Penney in Winston-Salem in 1994. She left this employment when she began working for the Guilford County Sheriff's Office. In or around the year 2006 or 2007, Petitioner went back to work at J.C. Penney as a loss prevention officer.

b. On multiple occasions, and during the course of several months leading up to January 3, 2011, Petitioner took various items of merchandise from the J.C. Penney store without paying for them. These included, but were not necessarily limited to, articles of clothing, hand gloves, and a

straightening iron. The total market value of the merchandise which Petitioner took from J.C. Penney was approximately \$500. Petitioner was continuously employed by J.C. Penney as a loss prevention officer at the store during the relevant time period.

c. On January 3, 2011, Petitioner approached her store manager at J.C. Penney and admitted to taking the merchandise.

d. On January 3, 2011, Petitioner was charged with one count of misdemeanor larceny in Forsyth County. (11 CR 700221) On February 25, 2011, this charge was voluntarily dismissed by the State. On January 30, 2012, this charge was expunged by the Court by Order of Expunction.

e. Following an internal investigation by the Guilford County Sheriff's Office, Petitioner was placed on one-year probation, during which time she was not permitted to perform duties requiring contact with money or property. She remains employed with the Guilford County Sheriff's Office.

f. The Guilford County Sheriff's Office has expressed its desire for Petitioner to retain her Certification and employment with the Guilford County Sheriff's Office.

Based upon the foregoing stipulations, the admitted documentary evidence, the testimony of witnesses, including determination of witness credibility, the undersigned makes the following:

**FINDINGS OF FACT**

1. Petitioner was charged with larceny on January 3, 2011.
2. In 2010 and 2011, Petitioner went through some serious health issues which resulted in her taking six (6) weeks of FMLA from the Guilford County Sheriff's Office. Ms. Holly Ingram, Licensed Professional Counselor, High Point Regional Health System, made assessments as to the mental health of Petitioner and the effect Petitioner's childhood experience, including PTSD, may have had on Petitioner's criminal behavior. Ms. Ingram is not a psychologist or a psychiatrist either by educational degree or professional licensing. Ms. Ingram referred Petitioner to a psychologist for testing and diagnosis, but the psychologist's subsequent report was not in evidence.
3. Petitioner was terminated from her employment as a loss prevention officer with J.C. Penney on or about January 3, 2011 after self-reporting her shoplifting of items to her supervisor. Petitioner remains highly regarded by her former supervisor and is still permitted to shop at the store where she was formerly employed.
4. By stipulation of the parties at the hearing, Petitioner expressed a willingness to

pay restitution to J.C. Penney in the amount of \$500. Petitioner would have done so, except when the criminal charge against Petitioner was dismissed, the company was no longer able to accept payment from her.

5. Major Deborah Montgomery and Captain Eddie Maness of the Guilford County Sheriff's Office testified on Petitioner's behalf at the hearing. Petitioner continues to perform well as a detention officer with Guilford County. Petitioner's latest performance appraisal indicates that she received a final performance rating of 4.14 out of a possible 5. (Petitioner's Ex. 1).

6. Had Petitioner not voluntarily self-reported her crime to the store manager at J.C. Penney, she would likely have never been suspected of or charged with larceny.

7. Petitioner's supervisors at J.C. Penney urged the Winston-Salem Police Department not to charge Petitioner with the felony offense of larceny by employee. On January 3, 2011, Petitioner was charged with one count of misdemeanor larceny; she committed larceny on three or more occasions. On February 25, 2011, this charge was voluntarily dismissed. On January 30, 2012, this charge was expunged by the court.

8. Petitioner's larceny charge can be considered as a negative factor in future promotion consideration as a detention officer with Guilford County.

9. Petitioner was 46 years old when she committed the larceny. As a loss prevention officer for her employer, she held a position of trust to prevent theft from the store.

Based on the foregoing Stipulations and Findings of Fact, the undersigned makes the following:

**CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case.

2. The North Carolina Sheriffs' Education and Training Standards Commission has the authority granted under Chapter 17E of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 10B, to certify justice officers and to deny, revoke or suspend such certification.

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

4. Pursuant to 12 NCAC 10B .0103(10)(b)(i), a Class B Misdemeanor is defined in pertinent part as:

(i) an act committed or omitted in violation of any common law, criminal statute, or criminal traffic code of this state which is classified as a Class B Misdemeanor as set forth in the "Class B Misdemeanor Manual" as published by the North Carolina Department of Justice and shall automatically include any later amendments and editions of the incorporated material as provided by G.S. 150B-21.6. . . .

5. Pursuant to N.C.G.S. § 14-72(a), 12 NCAC 10B .0103(10)(b), and the Class B Misdemeanor Manual adopted by the Respondent, the crime of misdemeanor larceny constitutes a Class B misdemeanor.

6. By stipulation, Petitioner committed the Class B misdemeanor offense of larceny in violation of N.C.G.S. § 14-72(a). Therefore, Petitioner's detention officer certification is subject to revocation or suspension on this asserted basis. However, the undersigned concludes that contained in the findings, there are extenuating circumstances that warrant a probationary suspension in lieu of revocation or active suspension.

7. The undersigned has weighed all factors in extenuation.

Based on the foregoing STIPULATIONS, FINDINGS OF FACT AND CONCLUSIONS OF LAW, the undersigned makes the following:

**PROPOSAL FOR DECISION**

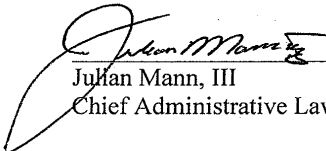
Respondent revoke Petitioner's justice officer certification for a period of five (5) years and recommends that Respondent, in lieu of the five year revocation, suspend the period of revocation and place Petitioner on probation, with appropriate conditions, for a period of one year.

**NOTICE**

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

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

This the 9<sup>th</sup> day of November, 2012.

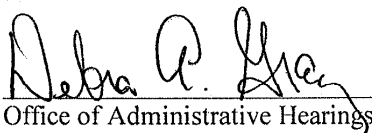
  
Julian Mann, III  
Chief Administrative Law Judge

On this date mailed to:

William L. Hill  
Attorney at Law  
500 West Friendly Ave  
Suite 100  
Greensboro, NC 27402-  
ATTORNEY FOR PETITIONER

William P. Hart Jr.  
Assistant Attorney General  
N.C. Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
ATTORNEY FOR RESPONDENT

This the 9th day of November, 2012.

  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh NC 27699-6714  
Telephone: 919/431-3000  
Fax: 919/431-3100

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

FILED  
2012 OCT -3 11 10:44

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
12 EHR 01104

JANEZIC BUILDING GROUP LLC,  
Petitioner,

)  
ADMINISTRATIVE HEARINGS

v.

FINAL DECISION

ORANGE COUNTY,  
Respondent.

)  
)  
)  
)  
)  
)

**THIS MATTER** came on to be heard before the undersigned Administrative Law Judge on August 10, 2012 in Raleigh, North Carolina, with the final day of hearing concluding the presentation of witnesses and admission of exhibits. The record was left open for the parties' submission of further materials, including but not limited to supporting briefs, memorandums of law and proposals. Petitioner filed proposals with the Clerk of the Office of Administrative Hearings on September 11, 2012. Respondent filed proposals with the Clerk of the Office of Administrative Hearings (OAH) on September 10, 2012. The record was received by the Undersigned and closed on September 12, 2012. By Order of the Chief Administrative Law Judge the time in which to file a decision in this case was extended to November 30, 2012.

APPEARANCES

**For Petitioner:** John A. Michaels, Attorney at Law  
107 Glenwood Avenue  
Raleigh, North Carolina 27603

**For Respondent:** Jennifer Galassi, Associate Attorney  
Orange County Attorney's Office  
200 S. Cameron Street  
P.O. Box 8181  
Hillsborough, NC 27278

ISSUES

1. Did Petitioner deliver clean or contaminated loads to the Orange County Landfill between October 1, 2010 and October 11, 2010 and if contaminated, is Respondent owed \$5,855.03 by Petitioner for costs and late payment interest for use of the Landfill?

2. Has Respondent properly complied with the requirements of the Setoff Debt Collection Act such that the Petitioner's debt, if any, may be sent to the North Carolina Department of Revenue for collection?

**WITNESSES**

**For Petitioner:** Darrell Janezic  
**For Respondent:** Bobby Blake  
Clarence Torain  
Robert Willis  
Richard McNeal

**EXHIBITS**

**For Petitioners:** Exhibits 1 through 10 were admitted.  
**For Respondent:** Exhibits A through K were admitted.

**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 these Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case.

**FINDINGS OF FACT**

1. Petitioner Janezic Building Group LLC is a North Carolina corporation with its principal place of business located at 1912 Bowling Green Trail, Raleigh, North Carolina 27613. Respondent Orange County, is a political subdivision of the State of North Carolina, organized and operating as a county government, pursuant to North Carolina General Statute §153A-10 and § 153A-11.

2. Orange County Solid Waste's Policy regarding construction and demolition waste allows for dumping at no cost provided the materials are clean. Clean materials include only



those items that can be reused by Solid Waste as roadbeds. Clean concrete and brick are accepted free of charge provided they are not too large. Objects such as rebar, wood, buckets, or lunch bag trash mixed in with otherwise clean materials disqualify a load for free dumping. If the materials are not clean, the hauler is told that they are contaminated. The hauler then determines if he wants to dump the materials at the Landfill. If he does, the hauler of the waste receives a receipt for charges made to the appropriate account, which indicates the particulars of the load.

3. The Respondent agreed that clean loads with brick, mortar and concrete coming from demolition performed by Petitioner at the University of North Carolina at Chapel Hill (UNC) would be accepted by Respondent at no charge. In the past the parties had made a similar arrangement with regard to certain debris that the Petitioner had hauled to the Respondent from an unrelated demolition project, namely, brick and block from houses being demolished for the North Carolina Department of Transportation (NCDOT).

4. The demolition debris which is the subject of this case was generated by two phases of renovation and construction at the UNC Dental School at Manning Drive and Columbia Street in Chapel Hill. Most of the Petitioner's work and debris that its work generated was from existing buildings at the Dental School on Manning Drive. This work would have generated waste that would have been "unclean" and not subject to the parties' no-charge arrangement, but the Petitioner's demolition work on this phase occurred almost a year and a half before its work in the project's phase just across Manning Drive, which generated the waste in issue in this case. The demolition work that generated the waste at issue in this case was of brick pavers, concrete stair risers and planters from the Thurston-Bowles building area.

5. Janezic Building Group contracted with Waste Industries USA, Inc. (Waste Industries) to transport its demolition waste during the period of October 1 through October 11, 2010. Waste Industries transported over 115 tons of demolition waste to the Orange County Landfill during this time which included loads on October 1, 4, 5, 6, 7, and 11.

6. Darrell Janezic with the Janezic Building Group testified that he visited and was on site every day of the first week of the Thurston-Bowles building area demolition project. He stated the waste container area was fenced off and that he opened up the container while he was there to see if it was clean. Mr. Janezic stated that concrete and bricks were the only materials he observed in the container. He stated that a supervisor was on site and coordinated with Waste Industries when the dumpster was full. No supervisor reported any contaminants to Mr. Janezic.

7. Mr. Janezic felt that with the work area in question being fenced, the waste container being inside the fence, and the construction work in progress at the time behind another fence, it was unlikely that third-parties would have been tossing any significant amount of trash into the container.

8. Petitioner provided photographs (Petitioner's Exhibits 2-5) of the work site. There is no plywood in any of the relevant photographs. There were no photographs taken of the loads that were billed as unclean.

9. Mr. Janezic stated that arrangements had been made with Waste Industries that if there were any issues, Janezic Building Group would be called. He did not receive any calls regarding any contaminated loads.

10. Bobby Blake, Weigh Master with the Orange County Landfill, stated he knew the Waste Industries driver, Richard McNeal, who drove the Janezic Building Group loads in October 2010 to the Landfill because "Richard came in all the time". Clarence Torain, Weigh Master with the Orange County Landfill has known Richard McNeal for 10 to 15 years. Both Mr. Blake and Mr. Torain provided specific testimony about their recollections of Petitioner's loads in October 2010. These two weigh masters testified that the hauler of these loads, Richard McNeal, informed them that the loads were not clean.

11. Robert Willis is the Orange County Landfill Supervisor. He stated that if a concrete load has steel in it then it is not clean. He recalled seeing one of the loads brought to the Landfill by Petitioner's driver and it was contaminated with wood and lunch bags.

12. Richard McNeal is a driver with Waste Industries. He has made a hundred or more trips to the Orange County Landfill. Mr. McNeal explained that he had been assigned as the exclusive driver to transport loads from the Petitioner's worksite to the Landfill. He described details of the worksite, his process for gaining entry to the worksite and for retrieving the full roll off and for replacing it with an empty one. He stated that he never saw Mr. Janezic at the worksite when he came for the loads and in fact did not talk to anyone from the site. No employees of Petitioner appeared to testify about the loads that were taken to the Landfill. Other than the witnesses for the County, no witnesses were present at the Landfill when the loads were dumped.

13. Mr. McNeal, the hauler, recounted seeing buckets, planks, rebar, workers' lunch trash, and other non-construction and demolition materials in the loads he transported. The testimony at the hearing showed that Mr. McNeal either communicated to the weigh masters that the loads were not clean and/or an inspector from Orange County Solid Waste determined the loads were contaminated. Contaminants found in the loads included, among other items, buckets, rebar, wood, and assorted trash. As a result, all loads that arrived to the Landfill from Janezic were ineligible for free dumping.

14. Per Waste Industries policy, a hauler is prohibited from cleaning any loads. As a result, a charge for each load in this case was assessed and a receipt was generated and given to the hauler, providing Janezic with notice of the occasions that the materials were not clean.

15. As of the filing of this case, Petitioner disputed the Landfill bill of \$5,855.03 and has not rendered payment. Respondent's Exhibit G shows a charge of \$950.84 for a load taken to the Orange County Landfill on October 5, 2010. The ticket however is to Waste Industries with a Durham address and not to Janezic Building Group as are the other tickets in the Respondent's exhibits. The amount in Exhibit G is not however part of the total bill cited above.

16. On or about December 13, 2011, the County sent written notices to Petitioner, informing Petitioner that it intended to submit the debt owed to collection by setoff as provided

by Chapter 105A of the NC General Statutes, the Setoff Debt Act. The notice informed the Petitioners of a collection assistance fee, the debtor's right to contest the matter, the procedure for requesting a hearing to do so, and that failure to request a hearing will result in setoff of the debt.

17. Petitioner exercised its right to request a hearing to contest the setoff. A hearing was scheduled and occurred on Wednesday, February 8, 2012. Petitioner, accompanied by counsel, attended the hearing. The County sent Petitioner a letter on February 14, 2012, providing notice that the debt had been upheld. This notice informed Petitioner of its right to file a petition for a contested case if it disagreed with the decision of the Hearing Officer.

**BASED UPON** the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

**CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. To the extent that the findings of fact contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels.

2. "The North Carolina courts have generally allocated the burden of proof in any dispute on the party attempting to show the existence of a claim or cause of action, and if proof of his claim includes proof of negative allegations, it is incumbent on him to do so." *Peace v. Empl. Sec. Com'n of N.C.*, 349 N.C. 315, 507 S.E.2d 272 (1998) citing *Johnson v. Johnson*, 229 N.C. 541, 50 S.E.2d 569 (1948). Petitioners in this case carry the burden of proof. To meet this burden, Petitioner must show that Respondent substantially prejudiced its rights and exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule. "The party with the burden of proof in a contested case must establish the facts required by G.S. 150B-23(a) by a preponderance of the evidence." *Britthaven v. N.C. Dept. of Human Resources*, 118 N.C. App. 379, 455 S.E. 2d 455, rev. den., 341 N.C. 418, 461 S.E. 2d 754 (1995).

3. In accordance with *Painter v. Wake County Bd of Ed.*, 217 S.E.2d 650, 288 N.C. 165 (1975), absent evidence to the contrary, it will be presumed that "public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. Every reasonable intentment will be made in support of the presumption." See also *Huntley v. Potter*, 122 S.E.2d 681, 255 N.C. 619 (1961). The burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to

support a conclusion.” *Rusher v. Tomlinson*, 119 N.C. App. 458, 465, 459 S. E. 2d 285, 289 (1995), *affd.*, 343 N.C. 119, 468 S.E. 2d 57 (1996); *Comm’r of Insurance v. Fire Insurance Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). In weighing evidence which detracts from the agency decision, “[i]f, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand” *Little v. Bd. of Dental Examiners*, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983)(citations omitted).

4. The testimony and evidence at this hearing, particularly the testimony of the actual Waste Industries hauler of the Janezic Building Group’s loads to the Orange County Landfill, show that the Petitioner did not deliver clean loads to the Landfill between October 1, 2010 and October 11, 2010; and, as the loads delivered were contaminated the Respondent is owed \$5,855.03 by Petitioner for costs and late payment interest for use of the Landfill.

5. The testimony and evidence at the hearing show that the Respondent complied with the statutory requirements of the Setoff Debt Collection Act. A valid debt has been established. The County sent written notice to the Petitioner of its intention to setoff the debt, a hearing was held at the request of the Petitioner to contest the proposed setoff, and the decision of the hearing officer was sent to the Petitioner, which included information detailing Petitioner’s right to file a petition for a contested case.

**BASED UPON** the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following:

**DECISION**

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above.

Based on those conclusions and the facts in this case, the Undersigned holds that the Petitioner has failed to carry its burden of proof by a greater weight of the evidence that Respondent erred in its assessment of a Landfill debt and did not properly comply with the requirements of the Setoff Debt Collection Act. The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side. Petitioner’s evidence does not overbear in that degree required by law the weight of evidence of Respondent.

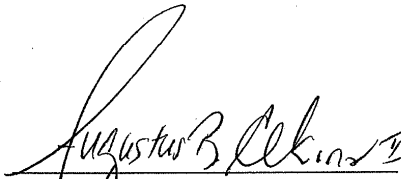
**NOTICE**

**This is a Final Decision** issued under the authority of N.C. GEN. STAT. § 150B-34.

**UNDER** the provisions of NORTH CAROLINA GENERAL STATUTES Chapter 150B, Article 4, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision. N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

**IT IS SO ORDERED.**

This the 30th day of November, 2012.

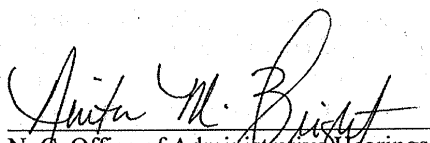
  
Augustus B. Elkins II  
Administrative Law Judge

On this date mailed to:

John A. Michaels  
107 Glenwood Avenue  
Raleigh, NC 27603-  
Attorney - Petitioner

Jennifer Galassi  
P.O. Box 8181  
Hillsborough, NC 27278-  
Attorney - Respondent

This the 3rd day of December, 2012.

  
N. C. Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh NC 27699-6714  
919 431 3000  
Facsimile: 919 431 3100

Filed

STATE OF NORTH CAROLINA

2012 NOV -9 PM 3:46

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
12 MIS 02379

COUNTY OF ORANGE

Office of  
Administrative Hearings

JACKIE POOLE,  
JAMYAN BROOKS  
Petitioners,

v.

ORANGE COUNTY,  
Respondent.

)  
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FINAL DECISION

**THIS MATTER** came on to be heard before the undersigned Administrative Law Judge on August 10, 2012 in Raleigh, North Carolina, with the final day of hearing concluding the presentation of witnesses and admission of exhibits. The record was left open for the parties' submission of further materials, including but not limited to supporting briefs, memorandums of law and proposals. Respondent filed proposals with the Clerk of the Office of Administrative Hearings (OAH) on September 10, 2012. The record was kept open an additional 10 business days for filing by the Petitioners. Receiving none, the record was closed on September 24, 2012.

**APPEARANCES**

**For Petitioner:** Jackie Poole, *pro se*  
Jamyan Brooks, *pro se*  
Chapel Hill, North Carolina

**For Respondent:** Jennifer Galassi  
Associate Attorney  
Office of the Orange County Attorney  
P.O. Box 8181  
Hillsborough, NC 27278

**ISSUE**

Has Respondent properly complied with the requirements of the Setoff Debt Collection Act such that each Petitioner's debt may be sent to the North Carolina Department of Revenue for collection to satisfy debts owed to Orange County Animal Services?

WITNESSES

**For Petitioners:** Jamyan Brooks, Petitioner  
Jackie Poole, Petitioner

**For Respondent:** Irene Phipps, Animal Control Manager

EXHIBITS

**For Petitioners:** No Exhibits were presented.

**For Respondent:** Exhibits 1 through 9 were submitted and admitted.

**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 these Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. Petitioners Jamyan Brooks and Jackie Poole are residents of Orange County, North Carolina. They reside at 8006 Rogers Road, Chapel Hill, North Carolina 27516.
2. Respondent Orange County, is a political subdivision of the State of North Carolina, organized and operating as a county government, pursuant to North Carolina General Statute §153A-10 and § 153A-11.
3. In 2005, Mr. Brooks received citations for violations of the Orange County Animal Control Ordinance. Orange County Animal Services filed a Complaint for Money Owed in Small Claims Court in January 2006 against Mr. Brooks for failure to pay those citations. Mr. Brooks was served, and the case was heard by a Magistrate in Small Claims Court. The Magistrate granted judgment against Mr. Brooks in favor of Orange County in the amount of \$305.00—\$80.00 for court costs and \$225.00 for the violations plus 8% interest.



4. Since the award of judgment against Mr. Brooks, interest has accrued and the total amount due on the judgment is approximately \$420.00. As of this date, the judgment is still active.

5. In 2006, Ms. Poole received a citation for a violation of the Orange County Animal Control Ordinance. Orange County Animal Services filed a Complaint for Money Owed in Small Claims Court in March 2006 against Ms. Poole for failure to pay that citation. Ms. Poole was served, and the case was heard by a Magistrate in Small Claims Court. The Magistrate granted judgment against Ms. Poole in favor of Orange County in the amount of \$180.00—\$80.00 for court costs and \$100.00 for the violations plus 8% interest.

6. In 2007, Ms. Poole received a citation for a violation of the Orange County Animal Control Ordinance. Orange County Animal Services filed a Complaint for Money Owed in Small Claims Court in October 2007 against Ms. Poole for failure to pay that citation. Ms. Poole was served, and the case was heard by a Magistrate in Small Claims Court. The Magistrate granted judgment against Ms. Poole in favor of Orange County in the amount of \$190.00—\$90.00 for court costs and \$100.00 for the violations plus 8% interest.

7. Since the award of judgments against Ms. Poole, interest has accrued and the total amount due on the 2006 and 2007 judgments are approximately \$230.00 and \$227.00 respectively. As of this date, the judgments are still active.

8. On or about January 25, 2012, the County sent written notices to Petitioner Poole and to Petitioner Brooks, informing them that it intended to submit the debt owed by each of them to collection by setoff as provided by Chapter 105A of the NC General Statutes, the Setoff Debt Act. The notice informed the Petitioners of a collection assistance fee, that the debtor has a right to contest the matter, the procedure for requesting a hearing to do so, and that failure to request a hearing will result in setoff of the debt.

9. Petitioner Brooks testified that he did not live at the address the January 25<sup>th</sup> letter was mailed to and did not get the letter. He stated that he did request a hearing and knew to be at a hearing as a result of a conversation with his mother, Petitioner Poole. Both Petitioners Brooks and Poole challenged issues that had been before the Magistrate including dog ownership issues and Orange County Animal Control Officer interactions regarding the violations and notices they received fines for. They understood from the Undersigned that the Office of Administrative Hearings was not the proper appeals forum regarding Small Claims Court decisions. Petitioners Brooks and Poole testified that they did not appeal the decisions rendered in Small Claims Court.

10. Petitioners exercised their right to request a hearing to contest the setoff. A hearing was scheduled and occurred on Tuesday, March 6, 2012. Petitioners attended the hearing. The County sent Petitioners a letter on March 7, 2012, providing notice that the debt had been upheld. This notice informed Petitioners of their right to file a petition for a contested case if they disagreed with the decision of the Hearing Officer.

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 regarding adherence by Respondent to the requirements of the Setoff Debt Collection Act.
2. The Office of Administrative Hearings (OAH) does not have jurisdiction over the issue of whether Petitioners were in violation of the Orange County Control Ordinances which were previously addressed by the Parties before a Magistrate in Small Claims Court and which appeal lies through other courts.
3. 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.
4. “The North Carolina courts have generally allocated the burden of proof in any dispute on the party attempting to show the existence of a claim or cause of action, and if proof of his claim includes proof of negative allegations, it is incumbent on him to do so.” *Peace v. Empl. Sec. Com’n of N.C.*, 349 N.C. 315, 507 S.E.2d 272 (1998) citing *Johnson v. Johnson*, 229 N.C. 541, 50 S.E.2d 569 (1948). Petitioners in this case carry the burden of proof. To meet this burden, Petitioner must show that Respondent substantially prejudiced its rights and exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule. “The party with the burden of proof in a contested case must establish the facts required by G.S. 150B-23(a) by a preponderance of the evidence.” *Britthaven v. N.C. Dept. of Human Resources*, 118 N.C. App. 379, 455 S.E. 2d 455, rev. den., 341 N.C. 418, 461 S.E. 2d 754 (1995).
5. In accordance with *Painter v. Wake County Bd of Ed.*, 217 S.E.2d 650, 288 N.C. 165 (1975), absent evidence to the contrary, it will be presumed that “public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. Every reasonable intentment will be made in support of the presumption.” See also *Huntley v. Potter*, 122 S.E.2d 681, 255 N.C. 619 (1961). The burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence. “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Rusher v. Tomlinson*, 119 N.C. App. 458, 465, 459 S. E. 2d 285, 289 (1995), *aff’d*, 343 N.C. 119, 468 S.E. 2d 57 (1996); *Comm’r of Insurance v. Fire Insurance Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). In weighing evidence which detracts from the agency decision, “[i]f, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand”

*Little v. Bd. of Dental Examiners*, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983)(citations omitted).

6. The Petitioners are debtors as set out in North Carolina Gen. Stat. § 105A-2. Pursuant to North Carolina Gen. Stat. § 105A-3, Respondent may submit a debt owed to it for collection, provided it establishes the debt by following the procedure provided in North Carolina Gen. Stat. § 105A-5.

7. The testimony and evidence at the hearing showed that the Respondent complied with the statutory requirements of the Setoff Debt Collection Act. A valid debt was established based on judgments obtained in Small Claims Court. The County sent written notice to the Petitioners of its intention to setoff the debt, a hearing was held at the request of the Petitioners to contest the proposed setoff, and the decision of the hearing officer was sent to the Petitioners, which included information detailing their right to file a petition for a contested case.

**BASED UPON** the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following:

**DECISION**

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above.

Based on those conclusions and the facts in this case, the Undersigned holds that the Petitioners have failed to carry their burden of proof by a greater weight of the evidence that Respondent did not properly comply with the requirements of the Setoff Debt Collection Act. The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side. Petitioners' evidence does not overbear in that degree required by law the weight of evidence of Respondent.

**NOTICE**

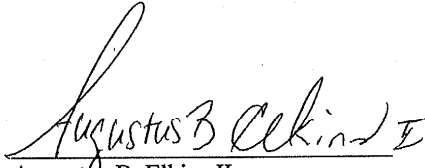
**This is a Final Decision** issued under the authority of N.C. GEN. STAT. § 150B-34.

**UNDER** the provisions of NORTH CAROLINA GENERAL STATUTES Chapter 150B, Article 4, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code

03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

**IT IS SO ORDERED.**

This the 8th day of November, 2012.

  
Augustus B. Elkins II  
Administrative Law Judge

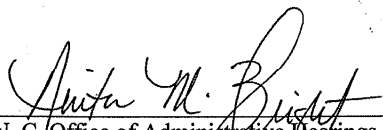
On this date mailed to:

Jackie Poole  
8006 Rogers Road  
Chapel Hill, NC 27516-  
Petitioner

Jamyan Brooks  
8006 Rogers Road  
Chapel Hill, NC 27516-  
Petitioner

Jennifer Galassi  
P.O. Box 8181  
Hillsborough, NC 27278-  
Attorney - Respondent

This the 9th day of November, 2012.



N. C. Office of Administrative Hearings  
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919 431 3000  
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