

# ***NORTH CAROLINA REGISTER***

**VOLUME 28 • ISSUE 02 • Pages 45 - 153**

**July 15, 2013**

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**PUBLISHED BY**

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

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

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

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1711 New Hope Church Road (919) 431-3000  
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contact: Joe DeLuca Jr., Commission Counsel joe.deluca@oah.nc.gov (919) 431-3081  
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### **Fiscal Notes & Economic Analysis and Governor's Review**

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

NC Association of County Commissioners  
215 North Dawson Street (919) 715-2893  
Raleigh, North Carolina 27603  
contact: Amy Bason amy.bason@ncacc.org

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

### **Legislative Process Concerning Rule-making**

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

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

**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.

North Carolina Department of Labor  
Division of Occupational Safety and Health  
1101 Mail Service Center  
Raleigh, NC 27699-1101  
(919) 807-2875

**NOTICE OF VERBATIM ADOPTION OF FEDERAL STANDARDS**

In consideration of G.S. 150-B-21.5(c) the Occupational Safety and Health Division of the Department of Labor hereby gives notice that:

- rule changes have been submitted to update the *North Carolina Administrative Code* at 13 NCAC .0101, .0201, and .0501, to incorporate by reference the occupational safety and health related provisions of Title 29 of the *Code of Federal Regulations* Parts 1910 promulgated as of February 8, 2013, Part 1915 promulgated as of February 8, 2013, and Part 1926 promulgated as of April 23, 2013, except as specifically described, and
- the North Carolina Administrative Code at 13 NCAC 07A .0301 automatically includes amendments to certain parts of the Code of Federal Regulations, including Title 29, Part 1904—Recording and Reporting Occupational Injuries and Illnesses.

This update encompasses the following recent verbatim adoptions:

- Hazard Communications; Corrections and Technical Amendment  
(78 FR 9311 - 9315, February 8, 2013)
- Cranes and Derricks in Construction: Underground Construction and Demolition  
(78 FR 23837 - 23843, April 23, 2013)

The *Federal Registers* (FR), as cited above, contain both technical and economic discussions that explain the basis for the changes.

For additional information, please contact:

Bureau of Education, Training and Technical Assistance  
Occupational Safety and Health Division  
North Carolina Department of Labor  
1101 Mail Service Center  
Raleigh, North Carolina 27699-1101

For additional information regarding North Carolina's process of adopting federal OSHA Standards verbatim, please contact:

Erin T. Gould, Agency Rulemaking Coordinator  
North Carolina Department of Labor  
Legal Affairs Division  
1101 Mail Service Center  
Raleigh, NC 27699-1101

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

Statutory reference: G.S. 150B-21.2.

## TITLE 12 – DEPARTMENT OF JUSTICE

**Notice** is hereby given in accordance with G.S. 150B-21.2 that the Criminal Justice Education and Training Standards Commission intends to amend the rules cited as 12 NCAC 09B .0205, .0209, .0226, .0227, .0232, .0233, .0305, .0405, .0502; 09E .0105; and 09G .0311.

### Agency obtained G.S. 150B-19.1 certification:

- ☐ OSBM certified on:  
☒ RRC certified on: All rules May 16, 2013; 12 NCAC 09B .0205 also certified on June 19, 2013  
☐ Not Required

**Link to agency website pursuant to G.S. 150B-19.1(c):**  
[http://ncdoj.gov/getdoc/35610350-5dd7-4624-b803-e54de7ddaef6/Rule-Revision\\_Fiscal-Notes\\_Web\\_6-6-13.aspx](http://ncdoj.gov/getdoc/35610350-5dd7-4624-b803-e54de7ddaef6/Rule-Revision_Fiscal-Notes_Web_6-6-13.aspx)

**Proposed Effective Date:** November 1, 2013

### Public Hearing:

**Date:** August 22, 2013

**Time:** 9:00 a.m.

**Location:** Wake Technical Community College, 321 Chapanoke Road, Raleigh, NC 27603

**Reason for Proposed Action:** To better distinguish between course completion (successfully completing course curricula) and certification (successfully passing a certification exam); To make concurrent the general and specialized instructor certification periods; To make the Basic Law Enforcement Training curriculum consistent with the Administrative Code governing curriculum testing; Lengthens the certification period for and changes the annual training requirement for school directors; Changes the term "hours" to "credits" and allows for on-line training methods and mandates that instructors successfully pass topic tests they teach.

**Procedure by which a person can object to the agency on a proposed rule:** The objection, reason for the objection and the clearly identified portion of the rule to which the objection pertains, must be submitted in writing to: Trevor Allen, Department of Justice, Criminal Justice Standards Division, P. O. Drawer 149, Raleigh, NC 27602.

**Comments may be submitted to:** Trevor Allen, 1700 Tryon Park Drive, Raleigh, NC 27602; phone (919) 779-8211; fax (919) 779-8210; email [tjallen@ncdoj.gov](mailto:tjallen@ncdoj.gov)

**Comment period ends:** September 13, 2013

### Procedure for Subjecting a Proposed Rule to Legislative Review:

If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

### Fiscal impact (check all that apply).

- ☐ State funds affected  
☐ Environmental permitting of DOT affected  
☐ Analysis submitted to Board of Transportation  
☐ Local funds affected  
☐ Date submitted to OSBM:  
☐ Substantial economic impact (≥\$500,000)  
☒ Approved by OSBM  
☒ No fiscal note required by G.S. 150B-21.4

## CHAPTER 09 - CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS

### SUBCHAPTER 09B - STANDARDS FOR CRIMINAL JUSTICE EMPLOYMENT: EDUCATION: AND TRAINING

#### SECTION .0200 - MINIMUM STANDARDS FOR CRIMINAL JUSTICE SCHOOLS AND CRIMINAL JUSTICE TRAINING PROGRAMS OR COURSES OF INSTRUCTION

#### 12 NCAC 09B .0205 BASIC LAW ENFORCEMENT TRAINING

(a) The basic training course for law enforcement officers consists of instruction designed to provide the trainee with the skills and knowledge to perform those tasks essential to function in law enforcement.

(b) The course entitled "Basic Law Enforcement Training" shall consist of a minimum of ~~620~~ 616 hours of instruction and shall include the following identified topical areas and minimum instructional hours for each:

# PROPOSED RULES

- |     |  |             |  |   |
|-----|--|-------------|--|---|
| (1) | LEGAL UNIT   | (D)         | Physical Fitness (classroom instruction) | 8 Hours                                       |
| (A) | Motor Vehicle Laws   | 20 Hours    | (E)                                      | Fitness Assessment and Testing                |
| (B) | Preparing for Court and Testifying in Court                  | 12 Hours    | (F)                                      | Physical Exercise 1 hour daily, 3 days a week |
| (C) | Elements of Criminal Law                                     | 24 Hours    | (G)                                      | Subject Control Arrest Techniques             |
| (D) | Juvenile Laws and Procedures                                 | 40 8 Hours  |  | UNIT TOTAL                                    |
| (E) | Arrest, Search and Seizure/Constitutional Law                | 28 Hours    | (6)                                      | SHERIFF-SPECIFIC UNIT                         |
| (F) | ABC Laws and Procedures                                      | 4 Hours     | (A)                                      | Civil Process                                 |
|     | UNIT TOTAL   | 98 Hours    | (B)                                      | Sheriffs' Responsibilities: Detention Duties  |
| (2) | PATROL DUTIES UNIT   |             | (C)                                      | Sheriffs' Responsibilities: Court Duties      |
| (A) | Techniques of Traffic Law Enforcement                        | 24 Hours    |  | UNIT TOTAL                                    |
| (B) | Explosives and Hazardous Materials Emergencies               | 12 Hours    | (7)                                      | COURSE ORIENTATION                            |
| (C) | Traffic Crash Investigation                                  | 20 Hours    | (8)                                      | TESTING                                       |
| (D) | In-Custody Transportation                                    | 8 Hours     |  | TOTAL COURSE HOURS                            |
| (E) | Crowd Management   | 12 Hours    |  |   |
| (F) | Patrol Techniques  | 26 28 Hours |  |   |
| (G) | Law Enforcement Communication and Information Systems        | 8 Hours     |  |   |
| (H) | Anti-Terrorism   | 4 Hours     |  |   |
| (I) | Rapid Deployment   | 8 Hours     |  |   |
|     | UNIT TOTAL   | 122 Hours   |  |   |
| (3) | LAW ENFORCEMENT COMMUNICATION UNIT                           |             |  |   |
| (A) | <del>Dealing with</del> Responding to Victims and the Public | 10 Hours    |  |   |
| (B) | Domestic Violence Response                                   | 12 Hours    |  |   |
| (C) | Ethics for Professional Law Enforcement                      | 4 Hours     |  |   |
| (D) | Individuals with Mental Illness and Mental Retardation       | 8 Hours     |  |   |
| (E) | Crime Prevention Techniques                                  | 6 Hours     |  |   |
| (F) | Communication Skills for Law Enforcement Officers            | 8 Hours     |  |   |
|     | UNIT TOTAL   | 48 Hours    |  |   |
| (4) | INVESTIGATION UNIT   |             |  |   |
| (A) | Fingerprinting and Photographing Arrestee                    | 6 Hours     |  |   |
| (B) | Field Note-taking and Report Writing                         | 12 Hours    |  |   |
| (C) | Criminal Investigation                                       | 34 Hours    |  |   |
| (D) | Interviews: Field and In-Custody                             | 16 Hours    |  |   |
| (E) | Controlled Substances  | 12 Hours    |  |   |
| (F) | Human Trafficking  | 2 Hours     |  |   |
|     | UNIT TOTAL   | 82 Hours    |  |   |
| (5) | PRACTICAL APPLICATION UNIT                                   |             |  |   |
| (A) | First Responder  | 32 Hours    |  |   |
| (B) | Firearms   | 48 Hours    |  |   |
| (C) | Law Enforcement Driver Training                              | 40 Hours    |  |   |
- (c) The "Basic Law Enforcement Training Manual" as published by the North Carolina Justice Academy shall be used as the ~~basic~~ curriculum for this ~~basic~~ training course for law enforcement officers as administered by the Commission. Copies of this publication may be inspected at the office of the agency:
- Criminal Justice Standards Division  
North Carolina Department of Justice  
~~114 West Edenton Street~~  
~~Old Education Building~~ 1700 Tryon Park Drive  
Post Office Drawer 149  
Raleigh, North Carolina 27602
- and may be obtained from the Academy at the following address:
- North Carolina Justice Academy  
Post Office Drawer 99  
Salem, North Carolina 28385
- (d) The "Basic Law Enforcement Training Course Management Guide" as published by the North Carolina Justice Academy shall be used by school directors in planning, implementing and delivering basic training courses. ~~Each school director shall be issued a copy of the guide at the time of certification at no cost to the certified school. The public may obtain copies~~ Copies of this guide may be obtained from the Justice Academy.
- Authority G.S. 17C-6; 17C-10.
- 12 NCAC 09B .0209 CRIMINAL JUSTICE INSTRUCTOR TRAINING**
- (a) The instructor training course required for general instructor certification shall consist of a minimum of ~~77~~ 74 hours of instruction presented during a continuous period of not more than two weeks.
- (b) Each instructor training course shall be designed to provide the trainee with the skills and knowledge to perform the function of a criminal justice instructor.
- (c) Each instructor training course shall include the following identified topic areas and minimum instructional hours for each area:

## PROPOSED RULES

- (1) Orientation/Self Assessment 3 Hours
- (2) Curriculum Development: ISD Model 3 Hours
- (3) Law Enforcement Instructor Liabilities and Responsibilities 2 Hours
- (4) Interpersonal Communication in Instruction 4 Hours
- (5) Lesson Plan Preparation: Professional Resources 2 Hours
- (6) Lesson Plan Preparation: Format and Objectives 6 Hours
- (7) Teaching Adults 4 Hours
- (8) Principles of Instruction: Demonstration Methods and Practical Exercise 6 Hours
- (9) Methods and Strategies of Instruction 4 Hours
- (10) The Evaluation Process 4 Hours
- (11) Principles of Instruction: Audio-Visual Aids 6 Hours
- (12) Student 10-Minute Talk and Video Critique 6 Hours
- (13) Student Performance:
  - First 30-Minute Presentation 6 Hours
  - Second 30-Minute Presentation 6 Hours
  - Final 80-Minute Presentation and Review 12 Hours
- ~~(14) Examination and Course Closing 3 Hours~~

(d) The ~~"Basic Instructor Training Manual"~~ "Instructor Training" manual as published by the North Carolina Justice Academy shall be ~~applied~~ used as the ~~basic~~ curriculum for delivery of ~~basic~~ instructor training courses. Copies of this publication may be inspected at the agency:

Criminal Justice Standards Division  
North Carolina Department of Justice

~~114 West Edenton Street~~  
~~Old Education Building 1700 Tryon Park Drive~~  
Post Office Drawer 149

Raleigh, North Carolina 27602

and may be purchased from the Academy at the following address:

North Carolina Justice Academy  
Post Office Drawer 99  
Salemberg, North Carolina 28385

*Authority G.S. 17C-6.*

### 12 NCAC 09B .0226 SPECIALIZED FIREARMS INSTRUCTOR TRAINING

(a) The instructor training course for specialized firearms instructor certification shall consist of a minimum of ~~83~~ 81 hours of instruction presented during a continuous period of not more than two weeks.

(b) Each specialized firearms instructor training course shall be designed to provide the trainee with the skills and knowledge to perform the function of a criminal justice firearms instructor in a Basic Law Enforcement Training Course or a "Law Enforcement Officers' In-Service Firearms Training and Qualification Program".

(c) Each applicant for specialized firearms instructor training shall:

- (1) have completed the criminal justice general instructor training course; and
- (2) present a written endorsement by either
  - (A) a certified school director indicating the student will be utilized to instruct firearms in the Basic Law Enforcement Training Course; or
  - (B) a department head, certified school director, or in-service training coordinator, indicating the student will be utilized to instruct firearms in a ~~"Law Enforcement Officers' In-Service Firearms Training and Qualification Program."~~ law enforcement officer in-service firearms training program.

(d) Each specialized firearms instructor training course shall include the following identified topic areas and minimum instructional hours for each area:

- (1) Orientation/Pretest 8 Hours
- (2) Range Operations 38 Hours
- (3) Civil Liability 4 Hours
- (4) Night Firing 2 Hours
- (5) Combat Shooting 8 Hours
- (6) Mental Conditioning 1 Hours
- (7) Shotgun Operation and Firing 4 Hours
- (8) Service Handgun - Operation and Use 5 Hours
- (9) Rifle - Operation and Maintenance 4 Hours
- (10) Service Handgun - Maintenance and Cleaning 2 Hours
- (11) Range Medical Emergencies 2 Hours
- (12) In-Service Firearms Requirements 2 Hours
- (13) BLET Lesson Plan ~~Review/Post Test Review~~ 3 Hours 1 Hour

(e) The "Specialized Firearms Instructor Training Manual" as published by the North Carolina Justice Academy shall be used as the ~~basic~~ curriculum for delivery of specialized firearms instructor training courses. Copies of this publication may be inspected at the:

Criminal Justice Standards Division  
North Carolina Department of Justice  
1700 Tryon Park Drive  
Post Office Drawer 149  
Raleigh, North Carolina 27610

and may be obtained at no cost to the student from the Academy at the following address:

North Carolina Justice Academy  
Post Office Box 99  
Salemberg, North Carolina 28385

(f) The Commission-certified school that is certified to offer the "Specialized Firearms Instructor Training" course is the North Carolina Justice Academy.

*Authority G.S. 17C-6.*



**12 NCAC 09B .0227 SPECIALIZED DRIVER INSTRUCTOR TRAINING**

(a) The instructor training course required for specialized driver instructor certification shall consist of a minimum of ~~35~~ 33 hours of instruction presented during a continuous period of not more than one week.

(b) Each specialized driver instructor training course shall be designed to provide the trainee with the skills and knowledge to perform the function of a criminal justice driver instructor in a Basic Law Enforcement Training Course or a "Law Enforcement Officers' Annual In-Service Training Program."

(c) Each applicant for specialized driver instructor training shall:

- (1) have completed the criminal justice general instructor training course;
- (2) present a written endorsement by either
  - (A) a certified school director indicating the student will be utilized to instruct driving in Basic Law Enforcement Training Courses; or
  - (B) a department head, certified school director, or in-service training coordinator, indicating the student will be utilized to instruct driver training in the "Law Enforcement Officer's Annual In-Service Training Program";
- (3) possess a valid operator driver's license; and
- (4) maintain a safe driving record where no more than four points have been assigned against the driving record within the past three years.

(d) Each specialized driver instructor training course shall include the following identified topic areas and instructional hours for each area:

- |     |   |                                  |
|-----|---|----------------------------------|
| (1) | Orientation   | 1 Hours                          |
| (2) | Lesson Plan Review (BLET)                           | 4 Hours                          |
| (3) | General Mechanical Knowledge                        | 1 Hour                           |
| (4) | Before - Operation Inspection                       | 1 Hours                          |
| (5) | Laws of Natural Force & Operating Characteristics   | 2 Hours                          |
| (6) | Driver Practicum/Pre-Test                           | 19 Hours                         |
| (7) | Fundamentals of Professional Liability for Trainers | 4 Hours                          |
| (8) | Course <del>Review/State Exam</del> <u>Review</u>   | <del>3 Hours</del> <u>1 Hour</u> |

(e) The "Specialized Driver Instructor Training Manual" as published by the North Carolina Justice Academy shall be used as the basic curriculum for delivery of specialized driver instructor training courses. Copies of this publication may be inspected at the:

Criminal Justice Standards Division  
North Carolina Department of Justice  
1700 Tryon Park Drive  
Post Office Drawer 149  
Raleigh, North Carolina 27610

and may be obtained at no cost to the student from the Academy at the following address:

North Carolina Justice Academy  
Post Office Box 99

Salemberg, North Carolina 28385

(f) Commission-certified schools that are certified to offer the "Specialized Driver Instructor Training" course ~~are~~ are The North Carolina Justice Academy and The North Carolina State Highway Patrol.

*Authority G.S. 17C-6.*

**12 NCAC 09B .0232 SPECIALIZED SUBJECT CONTROL ARREST TECHNIQUES INSTRUCTOR TRAINING**

(a) The instructor training course required for specialized subject control arrest techniques instructor certification shall consist of a minimum of ~~80~~ 78 hours of instruction presented during a continuous period of not more than two weeks.

(b) Each specialized subject control arrest techniques instructor training course shall be designed to provide the trainee with the skills and knowledge to perform the function of a criminal justice subject control arrest techniques instructor in a Basic Law Enforcement Training Course or a "Law Enforcement Officers' Annual In-Service Training Program."

(c) Each applicant for specialized subject control arrest techniques instructor training shall:

- (1) have completed the criminal justice general instructor training course;
- (2) present a letter from a licensed physician stating the applicant's physical fitness to participate in the course; and
- (3) present a written endorsement by either
  - (A) a certified school director indicating the student will be utilized to instruct subject control arrest techniques in Basic Law Enforcement Training Courses; or
  - (B) a department head, certified school director, or in-service training coordinator indicating the student will be utilized to instruct Subject Control Arrest Techniques for the "Law Enforcement Officers' In-Service Training Program."

(d) Each specialized subject control arrest techniques instructor training course shall include the following identified topic areas and minimum instructional hours for each area:

- |                 |  |                                      |
|-----------------|--|--------------------------------------|
| (1)             | Orientation  | 1 Hour                               |
| (2)             | Skills Pre-Test  | 1 Hour                               |
| (3)             | Student Instructional Practicum  | 3 Hours                              |
| (4)             | Practical Skills Evaluation  | 3 Hours                              |
| (5)             | Response to Injury   | 4 Hours                              |
| (6)             | Combat Conditioning  | 12 Hours                             |
| (7)             | Safety Guidelines/Rules  | 2 Hours                              |
| (8)             | Practical Skills Enhancement   | 4 Hours                              |
| (9)             | Subject Control/Arrest Techniques Practical Skills and Instructional Methods | 44 Hours                             |
| (10)            | Fundamentals of Professional Liability For Law Enforcement Trainers          | 4 Hours                              |
| <del>(11)</del> | <del>State Comprehensive Examination/Course Closing</del>                    | <del>2 Hours</del>                   |
|                 | <b>TOTAL</b>   | <b><del>80</del> <u>78</u> Hours</b> |

(e) The "Specialized Subject Control Arrest Techniques Instructor Training Manual" as published by the North Carolina Justice Academy shall be used as the basic curriculum for delivery of specialized subject control arrest techniques instructor training courses. Copies of this publication may be inspected at the:

Criminal Justice Standards Division  
North Carolina Department of Justice  
1700 Tryon Park Drive  
Post Office Drawer 149  
Raleigh, North Carolina 27610

and may be obtained at no cost to the student from the Academy at the following address:

North Carolina Justice Academy  
Post Office Box 99  
Salemberg, North Carolina 28385

(f) The Commission-certified school that is certified to offer the "Specialized Subject Control Arrest Techniques Instructor Training" course is the North Carolina Justice Academy.

*Authority G.S. 17C-6.*

### **12 NCAC 09B .0233 SPECIALIZED PHYSICAL FITNESS INSTRUCTOR TRAINING**

(a) The instructor training course required for specialized physical fitness instructor certification shall consist of a minimum of ~~60~~ 58 hours of instruction presented during a continuous period of not more than two weeks.

(b) Each specialized physical fitness instructor training course shall be designed to provide the trainee with the skills and knowledge to perform the function of a criminal justice physical fitness instructor in a Basic Law Enforcement Training Course or a "Law Enforcement Officers' Annual In-Service Training Program."

(c) Each applicant for specialized physical fitness training shall:

- (1) qualify through one of the following three options:
  - (A) have completed the criminal justice general instructor training course; or
  - (B) hold a current and valid North Carolina Teacher's Certificate and hold ~~a minimum of~~ a baccalaureate degree in physical education and be teaching in physical education topics;
  - (C) be presently instructing physical education topics in a community college, college or university and ~~hold a minimum of~~ possess a baccalaureate degree in physical education; and
- (2) present a written endorsement by either
  - (A) a school director indicating the student will be utilized to instruct physical fitness in Basic Law Enforcement Training Courses; or
  - (B) a certified school director, or in-service training coordinator indicating the student will be utilized to instruct physical fitness for the

"Law Enforcement Officers' In-Service Training Program";

- (3) present a letter from a physician stating fitness to participate in the course.

(d) Each specialized physical fitness instructor training course shall include the following identified topic areas and minimum instructional hours for each area:

- |     |   |                                      |
|-----|---|--------------------------------------|
| (1) | Orientation   | 5 Hours                              |
| (2) | Lesson Plan Review  | 4 Hours                              |
| (3) | Physical Fitness Assessments, Exercise Programs and Instructional Methods | 31 Hours                             |
| (4) | Injury Care and Prevention  | 4 Hours                              |
| (5) | Nutrition   | 6 Hours                              |
| (6) | Civil Liabilities for Trainers  | 2 Hours                              |
| (7) | CVD Risk Factors  | 2 Hours                              |
| (8) | Developing In-Service Wellness Programs and Validating Fitness Standards  | 4 Hours                              |
| (9) | <del>State Examination</del>  | <del>2 Hours</del>                   |
|     | <b>TOTAL</b>  | <b><del>60</del> <u>58</u> Hours</b> |

(e) The "Physical Fitness Instructor Training Manual" as published by the North Carolina Justice Academy shall be used as the basic curriculum for delivery of specialized physical fitness instructor training courses. Copies of this publication may be inspected at the:

Criminal Justice Standards Division  
North Carolina Department of Justice  
1700 Tryon Park Drive  
Post Office Drawer 149  
Raleigh, North Carolina 27610

and may be obtained at no cost to the student from the Academy at the following address:

North Carolina Justice Academy  
Post Office Box 99  
Salemberg, North Carolina 28385

(f) The Commission-certified school that is certified to offer the "Specialized Physical Fitness Instructor Training" course is the North Carolina Justice Academy.

*Authority G.S. 17C-6.*

### **SECTION .0300 - MINIMUM STANDARDS FOR CRIMINAL JUSTICE INSTRUCTORS**

#### **12 NCAC 09B .0305 TERMS AND CONDITIONS OF SPECIALIZED INSTRUCTOR CERTIFICATION**

(a) An applicant meeting the requirements for Specialized Instructor Certification shall be issued a certification to run concurrently with the existing General Instructor Certification, except as set out in (d). The applicant must apply for certification as a specialized instructor within 60 days from the date of completion of a specialized instructor course.

(b) The requirements for certification as a specialized instructor are determined by the expiration date of the existing General Instructor Certification. The following requirements apply during the initial period of certification:

- (1) where certification for both general probationary instructor and Specialized Instructor Certification are issued on the same

date, the instructor is required to satisfy the teaching requirement for only the general probationary instructor certification. The instructor may satisfy the teaching requirement for the general probationary instructor certification by teaching any specialized topic for which certification has been issued;

- (2) when Specialized Instructor Certification is issued during an existing period of General Instructor Certification, either probationary status or full general status, the specialized instructor may satisfy the teaching requirement for the general certification by teaching the specialized subject for which certification has been issued;
- (3) where Specialized Instructor Certification becomes concurrent with an existing ~~36-month~~ active period of General Instructor Certification, and there are 12 months or more until the certifications' expiration date, the instructor must teach 12 hours for each specialized topic for which certification has been issued; and
- (4) where Specialized Instructor Certification becomes concurrent with an existing active period of General Instructor Certification, and there are less than 12 months until the certification expiration date, the instructor is not required to teach any hours for the specialized subject.

(c) The term of certification as a specialized instructor shall not exceed the 36 month period of full General Instructor Certification. The application for renewal shall contain, in addition to the requirements listed in Rule .0304 of this Section, documentary evidence that the applicant has remained active in the instructional process during the previous three-year period. Such documentary evidence shall include the following:

- (1) proof that the applicant has, within the three year period preceding application for renewal, instructed at least 12 hours in each of the topics for which Specialized Instructor Certification was granted and ~~such instruction must be that instruction was provided~~ in a Commission-accredited training course or a Commission-recognized in-service training course. Acceptable documentary evidence shall include official Commission records submitted by School Directors or in-service training coordinators and written certification from a School Director or in-service training coordinator;
- (2) proof that the applicant has, within the three year period preceding application for renewal, attended and successfully completed any instructor updates that have been issued by the Commission. Acceptable documentary evidence shall include official Commission records submitted by School Directors or In-Service Training Coordinators, or copies of

certificates of completion issued by the institution which provided the instructor updates; and either:

- (3)
  - (A) a favorable written recommendation from a School Director or In-Service Training Coordinator completed on a Commission Renewal of Instructor and Professional Lecturer Certification Form that the instructor successfully taught at least 12 hours in each of the topics for which Specialized Instructor Certification was granted. Such teaching must have occurred in a Commission-certified training course or a Commission-recognized in-service training course during the three year period of Specialized Instructor Certification; or
  - (B) a favorable evaluation by a Commission or staff member, based on an on-site classroom evaluation of a presentation by the instructor in a Commission-certified training course or a Commission-recognized in-service training course, during the three-year period of Specialized Instructor Certification. Such evaluation shall be certified on a Commission Instructor Evaluation Form.

Upon submission of the required documentation for renewal the Commission staff shall renew the certification as a Specialized Instructor. Such renewal shall occur at the time of renewal of the General Instructor certification.

(d) Certification as a specialized instructor in the First Responder, Physical Fitness, Explosive and Hazardous Materials, and Juvenile Justice Medical Emergencies topical areas as outlined in Rule .0304(d)(1), (g)(2), (i)(1), and (j)(1) of this Section, specifically those certifications not based upon General Instructor Certification, shall remain in effect for 36 months from the date of issuance. During the 36 month term all non-Commission certificates required in Rule .0304(d)(1), (g)(2), (i)(1), and (j)(1) for specialized instructor certification in the First Responder, Physical Fitness, Explosive and Hazardous Materials, and Juvenile Justice Medical Emergencies topical areas must be maintained.

(e) All instructors shall remain active during their period of certification. ~~If an instructor does not teach at least 12 hours in each of the topic areas for which certification is granted, the certification shall not be renewed for those topics in which the instructor failed to teach.~~ Any specialized instructor training courses previously accepted by the Commission for purposes of certification shall no longer be recognized if the instructor does not teach at least 12 hours in each of the specialized topics during the three year period for which certification was granted.

Upon application for re-certification, such applicants shall meet the requirements of Rule .0304 of this Section.

(f) The use of guest participants in a delivery of the "Basic Law Enforcement Training Course" is permissible. However, such guest participants are subject to the direct on-site supervision of a Commission-certified instructor and must be authorized by the School Director. A guest participant shall be used only to complement the primary certified instructor of the block of instruction and shall in no way replace the primary instructor.

*Authority G.S. 17C-6.*

## **SECTION .0400 - MINIMUM STANDARDS FOR COMPLETION OF TRAINING**

### **12 NCAC 09B .0405 COMPLETION OF BASIC LAW ENFORCEMENT TRAINING COURSE**

(a) Each delivery of an accredited basic training course is considered to be a unit as specified in ~~12 NCAC 9B .0205(b)~~. Rule .0205 of this Subchapter. Each trainee shall attend and satisfactorily complete the full course during a scheduled delivery. The school director may develop supplemental rules as set forth in ~~12 NCAC 9B .0202(a)(6)~~, Rule .0206 of this Subchapter, but may not add substantive courses, or change or expand the substance of the courses as set forth in ~~12 NCAC 9B .0205(b)~~ Rule .0205 of this Subchapter for purposes of Commission credit. This Rule does not prevent the instruction on local agency rules or standards but such instruction shall not be considered or endorsed by the Commission for purposes of certification. The Director of the Standards Division may issue prior written authorization for a specified trainee's limited enrollment in a subsequent delivery of the same course where the trainee provides evidence that:

- (1) the trainee attended and satisfactorily completed specified class hours and topics of Basic Law Enforcement Training Course but through extended absence occasioned by illness, accident, emergency, or other good cause was absent for more than five percent of the total class hours of the course offering; or
- (2) the trainee was granted excused absences by the school director that did not exceed five percent (5%) of the total class hours for the course offering and the school director has obtained approval from the Standards Division pursuant to ~~12 NCAC 9B.0404(e)~~ Rule .0404 of this Section for make up work to be completed in a subsequent enrollment; or
- (3) the trainee participated in an accredited course but had an identified deficiency in essential knowledge or skill in either one but no more than two of the specific topic areas incorporated in course content as prescribed under ~~12 NCAC 9B .0205~~; Rule .0205 of this Subchapter;
- ~~(4) a trainee who is deficient in more than two topical areas shall be dismissed from the course delivery and shall be required to~~

~~complete a subsequent training delivery in its entirety.~~

The trainee who is deficient in more than two topical areas shall be dismissed from the course delivery and shall be required to complete a subsequent training delivery in its entirety.

(b) The trainee shall demonstrate proficiency in the school's cognitive topical area tests by achieving a minimum score of 70 percent on each topical area test and shall also demonstrate proficiency in the motor skills and performance subjects:

- (1) a trainee who fails to achieve a passing score on the first attempt shall have one opportunity for reexamination following remediation;
- (2) a trainee shall be allowed failure, remediation, and reexamination in no more than four topical area tests;
- (3) upon initial failure of a fifth topical area test, the trainee shall not be allowed remediation or reexamination and shall be immediately dismissed from the course and shall be required to complete a subsequent delivery of Basic Law Enforcement Training in its entirety.

(c) An authorization of limited enrollment in a subsequent delivery of the Basic Law Enforcement Training Course may not be issued by the Standards Division unless in addition to the evidence required by Paragraph (a) of this Rule:

- (1) The school director of the previous course offering submits to the Standards Division a certification of the particular topics and class hours attended and satisfactorily completed by the trainee during the original enrollment; and
- (2) The school director makes written application to the Standards Division for authorization of the trainee's limited enrollment.

(d) An authorization of limited enrollment in a subsequent course delivery permits the trainee to attend an offering of the Basic Law Enforcement Training Course commencing within 120 calendar days from the date of administration of the state comprehensive examination in the trainee's prior course delivery.

- (1) The trainee shall attend and satisfactorily complete in its entirety each topical area identified by the school director as an area of trainee deficiency in the prior course participation with the exception of the "Physical Fitness" topical area:
  - (A) There are two options available for satisfying a deficiency in the "Physical Fitness" topical area with the school director's approval:
    - (i) the student shall be allowed to make up the deficiency at the original training site without enrolling in a subsequent delivery of BLET. Under this option, the student shall be given 120 calendar days from the date that the comprehensive

state examination was administered to the original BLET course in order to successfully satisfy this deficiency. Students who select this option shall be allowed ~~one opportunity (two attempts at each obstacle)~~ two attempts to complete the entire Police Officer Physical Abilities Test (POPAT) Course with a minimum of 24 hours of rest between attempts during the 120-day period to satisfy the deficiency; or

- (ii) the student shall be allowed to enroll in a subsequent delivery of BLET as a "limited enrollee". This delivery shall begin within 120 calendar days from the date that the comprehensive state examination was administered to the original BLET course in order to successfully satisfy this deficiency. Students who select this option shall be allowed ~~one opportunity (two attempts at each obstacle)~~ two attempts to complete the entire POPAT Course with a minimum of 24 hours of rest between attempts during the delivery period of the subsequent BLET course.

- (B) A certified "Physical Fitness" instructor is the only person qualified to administer and grade the fitness re-test. At the time of the re-test, the school director or the Qualified Assistant shall be present.
- (2) Following proper enrollment in the subsequent course offering, scheduled class attendance, and active participation with satisfactory achievement in the course, the trainee shall be eligible for administration of the comprehensive written examination by the Commission and possible certification of successful course completion.

*Authority G.S. 17C-6; 17C-10.*

#### **SECTION .0500 - MINIMUM STANDARDS FOR CRIMINAL JUSTICE SCHOOL DIRECTORS**

#### **12 NCAC 09B .0502 TERMS AND CONDITIONS OF SCHOOL DIRECTOR CERTIFICATION**

(a) The term of certification as a school director is two years from the date the Commission issues the certification, unless earlier terminated by action of the Commission. Upon application the certification may subsequently be renewed by the Commission for ~~two-year~~ three year periods. The application for renewal shall contain documentation meeting the requirements of Rule .0501(b)(2) and (3) of this Section.

(b) To retain certification as a school director, the school director shall:

- (1) ~~Attend an annual school directors conference~~ Participate in annual training conducted by commission staff;
- (2) Maintain and comply with the current version of the "Basic Law Enforcement Training Course Management Guide";
- (3) Maintain and ensure compliance with the current version of the "Basic Law Enforcement Training Instructor Notebook" assigned to each certified school; and
- (4) Perform the duties and responsibilities of a school director as specifically required in Rule .0202 of this Subchapter.

*Authority G.S. 17C-6.*

#### **SUBCHAPTER 09E – IN-SERVICE TRAINING PROGRAMS**

#### **SECTION .0100 - LAW ENFORCEMENT OFFICER'S IN-SERVICE TRAINING PROGRAM**

#### **12 NCAC 09E .0105 MINIMUM TRAINING SPECIFICATIONS: ANNUAL IN-SERVICE TRAINING**

(a) The following topical areas and specifications are established as minimum topics, specifications and ~~hours~~ credits to be included in each law enforcement officers' annual in-service training courses. For the purposes of this Subchapter, a credit shall be equal to one hour of traditional classroom instruction. These specifications shall be incorporated in each law enforcement agency's annual in-service training courses:

- (1) Firearms ~~(4):~~ Training and Qualification (4 credits);
  - (A) Use of Force: review the authority to use deadly force [G.S. 15A-401(d)(2)] including the relevant case law and materials;
  - (B) Safety:
    - (i) range rules and regulations;
    - (ii) handling of a firearm; and
    - (iii) malfunctions; and
  - (C) Review of Basic Marksmanship Fundamentals:
    - (i) grip, stance, breath control and trigger squeeze;
    - (ii) sight and alignment/sight picture; and
    - (iii) nomenclature; ~~and~~

- (2) Legal Update ~~(4); (4 credits);~~
- (3) ~~Career Survival: Social Networking and Digital Communications (4); Domestic Violence: The Children are Watching (2 credits);~~
- (4) Juvenile Minority Sensitivity Training: ~~Interaction Skills in Building Rapport (2); Don't Press Send (2 credits); and~~
- (5) ~~Awareness of Issues Surrounding Returning Military Personnel (2); and~~
- ~~(6)(5) Department Topics of Choice (8); (12 credits).~~

(b) The "Specialized Firearms Instructor Training Manual" as published by the North Carolina Justice Academy shall be applied as a guide for conducting the annual in-service firearms training program. Copies of this publication may be inspected at the office of ~~the agency; the:~~

Criminal Justice Standards Division  
North Carolina Department of Justice  
1700 Tryon Park Drive  
Raleigh, North Carolina 27610

(c) ~~The In-Service Lesson Plans~~ The "In-Service Lesson Plans" as published by the North Carolina Justice Academy shall be applied as a minimum curriculum for conducting the annual in-service training program. Copies of this publication may be inspected at the office of ~~the agency; the:~~

Criminal Justice Standards Division  
North Carolina Department of Justice  
1700 Tryon Park Drive  
Raleigh, North Carolina 27610

and may be obtained at cost from the Academy at the following address:

North Carolina Justice Academy  
Post Office Drawer 99  
Salemberg, North Carolina 28385

(d) Lesson plans are designed to be delivered in hourly increments. A student who completes an online in-service training topic shall receive the number of credits that correspond to the number of hours of traditional classroom training, regardless of the amount of time the student spends completing the course.

(e) Successful completion of training shall be demonstrated by passing a written test for each in-service training topic, as follows:

- (1) A written test comprised of at least five questions per credit shall be developed by the delivering agency, or the agency may use the written test developed by the North Carolina Justice Academy, for each in-service training topic requiring testing. Written courses which are more than four credits in length are required to do a written test comprising of a minimum of 20 questions. The Firearms Training and Qualifications in-service course is exempt from this written test requirement.
- (2) A student shall pass each test by achieving 70 percent correct answers.
- (3) A student who completes a topic of in-service training in a traditional classroom setting or online and fails the end of topic exam shall be

given one attempt to re-test. If the student fails the exam a second time, the student must complete the in-service training topic in a traditional classroom setting before taking the exam a third time.

Authority G.S. 17C-6; 17C-10.

## **SUBCHAPTER 09G - STANDARDS FOR CORRECTIONS EMPLOYMENT, TRAINING, AND CERTIFICATION**

### **SECTION .0300 - CERTIFICATION OF CORRECTIONAL OFFICERS, PROBATION/PAROLE OFFICERS, PROBATION/PAROLE OFFICERS-INTERMEDIATE, AND INSTRUCTORS**

#### **12 NCAC 09G .0311 TERMS AND CONDITIONS OF SPECIALIZED INSTRUCTOR CERTIFICATION**

(a) An applicant meeting the requirements for Specialized Instructor Certification shall be issued a certification to run concurrently with the existing General Instructor Certification. The applicant must apply for certification as a specialized instructor within 60 days from the date of completion of a specialized instructor course.

(b) The terms of certification as a specialized instructor shall be determined by the expiration date of the existing General Instructor Certification. The following requirements shall apply during the initial period of certification:

- (1) where certifications for both general probationary instructor and Specialized Instructor Certification are issued on the same date, the instructor shall only be required to satisfy the teaching requirement for the general probationary instructor certification. The instructor may satisfy the teaching requirement for the general probationary instructor certification by teaching any specialized topic for which certification has been issued;
- (2) when Specialized Instructor Certification is issued during an existing period of General Instructor Certification, either probationary status or full general status, the specialized instructor may satisfy the teaching requirement for the General Certification by teaching the specialized subject for which certification has been issued; ~~and~~
- (3) where Specialized Instructor Certification becomes concurrent with an existing ~~36-month~~ active period of General Instructor Certification, and there are 12 months or more until the certifications' expiration date, the instructor must teach 12 hours for each specialized topic for which certification has been issued; and
- (4) where Specialized Instructor Certification becomes concurrent with an existing active period of General Instructor Certification, and there are less than 12 months until the certification expiration date, the instructor is

not required to teach any hours for the specialized subject.

(c) The term of certification as a specialized instructor shall not exceed the 36 month period of full General Instructor Certification. The certification may subsequently be renewed by the Commission at the time of renewal of the full General Instructor Certification. The application for renewal shall contain, in addition to the requirements listed in ~~42 NCAC 09G .0310~~ Rule .0310 of this Section, documentary evidence that the applicant has remained active in the instructional process during the previous three year period. Such documentary evidence shall include the following:

- (1) proof that the applicant has, within the three year period preceding application for renewal, instructed at least 12 hours in each of the topics for which Specialized Instructor Certification was granted and such instruction must be in a Commission-certified training course or a Commission-recognized in-service training course. Acceptable documentary evidence shall include official Commission records submitted by School Directors and written certification from a School Director; and
- (2) either:
  - (A) a favorable written recommendation from a School Director accompanied by certification that the instructor successfully taught at least 12 hours in each of the topics for which Specialized Instructor Certification was granted. Such teaching must have occurred in a Commission-certified training course or a Commission-recognized in-service training course during the three year period of Specialized Instructor Certification; or
  - (B) a written evaluation by a staff member, based on an on-site classroom evaluation of a presentation by the instructor in a Commission-certified training course or a Commission-recognized in-service training course, during the three year period of Specialized Instructor Certification.

(d) ~~If an instructor does not teach at least 12 hours in each of the topic areas for which certification is granted, the certification shall not be renewed for those topics in which the instructor failed to successfully teach.~~ Any specialized instructor training courses previously accepted by the Commission for purposes of certification shall no longer be recognized if the instructor does not successfully teach at least 12 hours in each of the specialized topics during the three year period for which certification was granted. Upon application for re-certification, such applicants shall be required to meet the requirements of ~~42 NCAC 09G .0310.~~ Rule .0310 of this Section.

Authority G.S. 17C-6.

## TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

### CHAPTER 16 – STATE BOARD OF DENTAL EXAMINERS

*Notice is hereby given in accordance with G.S. 150B-21.2 that the NC State Board of Dental Examiners intends amend the rule cited as 21 NCAC 16H .0203.*

**Agency obtained G.S. 150B-19.1 certification:**

- ☐ OSBM certified on:
- ☐ RRC certified on:
- ☒ Not Required

**Link to agency website pursuant to G.S. 150B-19.1(c):**  
[www.ncdentalboard.org](http://www.ncdentalboard.org)

**Proposed Effective Date:** *November 1, 2013*

**Public Hearing:**

**Date:** *August 8, 2013*

**Time:** *7:00 p.m.*

**Location:** *NC State Board of Dental Examiners office, 507 Airport Boulevard, Suite 105, Morrisville, NC 27560*

**Reason for Proposed Action:** *The amendment clarifies that courses in coronal polishing taken to qualify a Dental Assistant as a DA II must be approved by the Dental Board.*

**Procedure by which a person can object to the agency on a proposed rule:** *Comments may be mailed to the Dental Board to the attention of Mr. Bobby D. White or sent to Mr. White via email at [bwhite@ncdentalboard.org](mailto:bwhite@ncdentalboard.org).*

**Comments may be submitted to:** *Bobby D. White, 507 Airport Blvd., Ste. 105, Morrisville, NC 27560*

**Comment period ends:** *September 13, 2013*

**Procedure for Subjecting a Proposed Rule to Legislative Review:** If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

**Fiscal impact (check all that apply).**

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected  
Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Date submitted to OSBM:
- ☐ Substantial economic impact (≥\$500,000)
- ☐ Approved by OSBM
- ☒ No fiscal note required by G.S. 150B-21.4

**SUBCHAPTER 16H - DENTAL ASSISTANTS**

**SECTION .0200 - PERMITTED FUNCTIONS OF DENTAL ASSISTANT**

**21 NCAC 16H .0203 PERMITTED FUNCTIONS OF DENTAL ASSISTANT II**

(a) A Dental Assistant II may perform all acts or procedures which may be performed by a Dental Assistant I. In addition, a Dental Assistant II may be delegated the following functions to be performed under the direct control and supervision of a dentist who shall be personally and professionally responsible and liable for any and all consequences or results arising from the performance of such acts and functions:

- (1) Take impressions for study models and opposing casts which will not be used for construction of dental appliances, but which may be used for the fabrication of adjustable orthodontic appliances, nightguards and the repair of dentures or partials;
- (2) Apply sealants to teeth that do not require mechanical alteration prior to the application of such sealants, provided a dentist has examined the patient and prescribed the procedure;
- (3) Insert matrix bands and wedges;
- (4) Place cavity bases and liners;
- (5) Place and remove rubber dams;
- (6) Cement temporary restorations using temporary cement;

- (7) Apply acid etch materials/rinses;
- (8) Apply bonding agents;
- (9) Remove periodontal dressings;
- (10) Remove sutures;
- (11) Place gingival retraction cord;
- (12) Remove excess cement;
- (13) Flush, dry and temporarily close root canals;
- (14) Place and remove temporary restorations;
- (15) Place and tie in or untie and remove orthodontic arch wires;
- (16) Insert interdental spacers;
- (17) Fit (size) orthodontic bands or brackets;
- (18) Apply dentin desensitizing solutions;
- (19) Perform extra-oral adjustments which affect function, fit or occlusion of any temporary restoration or appliance;
- (20) Initially form and size orthodontic arch wires and place arch wires after final adjustment and approval by the dentist; and
- (21) Polish the clinical crown using only;
  - (A) a hand-held brush and appropriate polishing agents; or
  - (B) a combination of a slow speed handpiece (not to exceed 10,000 rpm) with attached rubber cup or bristle brush, and appropriate polishing agents.

(b) A Dental Assistant II must complete a Board-approved course in coronal polishing consisting of at least seven hours before using a slow speed handpiece with rubber cup or bristle brush attachment. A polishing procedure shall not be represented to the patient as a prophylaxis and no specific charge shall be made for such unless the dentist has performed an evaluation for calculus, deposits, or accretions and a dentist or dental hygienist has removed any substances detected.

*Authority G.S. 90-29(c)(9); 90-48.*



*This Section contains information for the meeting of the Rules Review Commission on June 19, 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**

July 18, 2013 August 15, 2013  
September 19, 2013 October 17, 2013

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**RULES REVIEW COMMISSION MEETING**

**MINUTES**

***June 19, 2013***

The Rules Review Commission met on Thursday, June 19, 2013, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Anna Baird Choi, Margaret Currin, Jeanette Doran, Garth Dunklin, Bob Rippy and Stephanie Simpson.

Staff members present were: Joe DeLuca and Amanda Reeder, Commission Counsel; Molly Masich, Dana Vojtko, Julie Edwards and Tammara Chalmers.

The meeting was called to order at 10:09 a.m. with Vice-Chairman Currin presiding. She reminded the Commission members that they have a duty to avoid conflicts of interest and the appearances of conflicts as required by NCGS 138A-15(e).

**APPROVAL OF MINUTES**

Vice-Chairman Currin asked for any discussion, comments, or corrections concerning the minutes of the May 16, 2013 meeting. There were none and the minutes were approved as distributed.

Commissioner Doran introduced Ashley Berger, an intern with her office.

Vice-Chairman Currin asked if there were any other visiting interns and Melissa Schoeman with the Department of Justice introduced herself.

**FOLLOW-UP MATTERS**

**Office of Information Technology Services**

09 NCAC 06A .0101, .0102, .0103; 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 – There has been no response from the agency and no action was taken on these rules.

**Board of Barber Examiners**

21 NCAC 06A .0103, .0303; 06C .0907, 06F.0101, .0116; 06H .0101; 06I .0105; 06J .0101; 06K .0104; 06L .0103; .0114, .0118, .0119; 06M .0101, .0102; 06N .0104, .0105, .0108, .0109, .0112; 06Q .0101, .0103; 06S .0101 - There has been no response from the agency and no action was taken on these rules.

**Hearing Aid Dealers and Fitters Board:**

21 NCAC 22F .0120, .0201, .0202, .0203, .0204, .0205, .0206, .0207, .0208, .0209 – There has been no response from the agency as the rules are still in the public comment period. No action was taken on these rules.

**Board of Podiatry Examiners**

21 NCAC 52 .0211 - The Commission unanimously approved the re-written rule.

**LOG OF FILINGS**

Vice-Chairman Currin presided over the review of the log of permanent rules.

**Department of Commerce – Credit Union Division**

All rules were unanimously approved.

**Department of Cultural Resources**

07 NCAC 04N .0202 was unanimously approved.

**Commission for Public Health**

10A NCAC 41A .0101 was unanimously approved.

**Private Protective Services Board**

The rules were withdrawn at the request of the agency. They have been refiled for Commission review at the July meeting.

**Environmental Management Commission**

All rules were unanimously approved with the following exception:

15A NCAC 02B .0295 – The Commission objected to this rule based on ambiguity.

The Commission objected to Paragraph (c) of this rule based on ambiguity. On its face it requires that an applicant:

“shall submit to the Division a . . . mitigation proposal . . . [that] shall include conservation easements . . . to ensure perpetual maintenance and protection of the site’s . . . functions, a non-wasting endowment or other financial mechanism for perpetual maintenance and protection, and a completion bond . . . .”

It would appear that the rule requires an applicant to submit with his proposal a signed conservation easement (if applicable), an endowment, and a completion bond, all of which could be quite costly. This is before the application is acted upon and could be rejected. However, it appears the agency does not intend to require fulfillment of all these conditions until after the application is approved. At the very least this creates some ambiguity in the way the rule reads and the way the agency has indicated that it intends to enforce the rule.

The Commission objected to Paragraph (g) of this rule based on ambiguity. In (g), page 6 line 12, it is unclear what constitutes a “forested riparian buffer.” There is no definition for “forested” and no definition for “riparian buffer.” Since attaining this condition is one of the purposes for or goals of engaging in either “enhancement” or “restoration” it has to be clear if it is attained or at least attainable.

In (g)(6)(B), page 7 lines 16 and 17, it is unclear whether in approving alternative plans the division is permitted to waive the requirements of (c) or merely the requirements in this sub-sub-paragraph. In either case the goal or purpose of this part of the rule, and what the alternative plan is to be measured against, must be made clear.

The Commission objected to Paragraphs (j) and (k) based on the same ambiguity. In (j) on page 9 of the rule, it is unclear whether an applicant can mix various mitigation possibilities in all cases. Paragraph (c)(1) – (3) (page 3 of the rule) appears to allow an applicant to use any of certain means to mitigate that damage:

- (1) The applicant can take physical steps to repair or replace the damage at that site or another site;
- (2) The applicant can pay money into a fund; or
- (3) The applicant can donate real property to use as a conservation easement.

In (c) lines 19 – 22, the rule states that an applicant can propose “any of [the above] types of mitigation.” This belief that the rule appears to allow a mixture also reappears in (j)(1) lines 3 – 5. That part of the rule states that donation of real property interests may be used to either “partially or fully satisfy” the payment of a compensatory mitigation fee. That same sub-paragraph, in lines 8 and 9, goes on to say that if the value of the donated property is less than the required fee, the applicant shall “pay the remaining balance due.” However (j)(3)(C) requires that the size of the buffer of donated real property must equal the required mitigation area. That appears to limit the application of (c)(3) and (j)(1). The last line of sub-sub-paragraph (j)(3)(D) in line 1 at the top of page 10 also requires that “[r]estoration of the [donated] property shall be capable of fully offsetting the adverse impacts of the requested use.” (Emphasis added.) This also appears to limit the application of (c)(3) and (j)(1). At any rate both of these provisions certainly make the rule unclear as to whether or not using a mix applies in all cases.

This lack of clarity as to what mitigation means are available occurs again in (k)(2)(B) page 13, lines 4 through 6, where precise area requirements for restoration or enhancement projects are set out.

If the applicant is not permitted to use a mix of the allowed mitigations, then the rule needs to be rewritten to state that “the applicant shall use one of the following forms of mitigation” (or similar language) rather than “any of the following.”

Mr. DeLuca informed the Commission that three letters of objection had been filed for this rule, and the Commission could continue to receive these letters until the day after it approved the rule.

Jennifer Everett with the agency addressed the Commission.

#### **Coastal Resources Commission**

All rules were unanimously approved.

#### **Commission for Public Health**

15A NCAC 18C .0203 – The Commission unanimously approved Paragraph (a) of the rule. The Commission took no action on Paragraph (b) of the rule because S.L. 2011-394 requires the agency to adopt rules “substantively identical” to the session law and exempts those rules from the application of G.S. 150B-21.9 through 150B-21.14. Paragraph (b) is substantively identical to the rules in the session law. The session law further stated that the rule would become effective as provided in G.S. 150B-21.3(b1), as though ten or more letters of objection were received pursuant to G.S. 150B-21.3(b2), so the rule requires legislative review before it can be entered into the Code.

#### **G.S 150B-19.1(h) RRC CERTIFICATION**

#### **Home Inspector Licensure Board**

The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed rules 11 NCAC 08 .1202, .1203, .1204, .1205.

Commissioner Dunklin left the room and was not present for the vote on these rules.

#### **Private Protective Services Board**

The Commission did not certify that the agency adhered to the principles in G.S. 150B-19.1 for proposed rules 12 NCAC 07D .0501, .0502, .0503, .0504.

12 NCAC 07D .0501 - There is no authority cited for the provision in (a)(4) lines 16 and 17 that the military trained applicant for a polygraph license under G.S. 93B-15.1 have served as a “manager, supervisor, or administrator” performing polygraph examinations. The only requirement in the statute is that the applicant be a “military-trained applicant” who meets the four listed requirements in (a)(1) – (4). Being a “manager, supervisor, or administrator” is not one of those requirements. For the same reason there is no authority to require that a military spouse applying for licensure under G.S. 93B-15.1 have served as a “manager, supervisor, or administrator” performing polygraph examinations. That person’s requirements are in (b)(1) – (5).

12 NCAC 07D .0502, .0503, .0504 - The agency has not answered all the questions on the certification form and therefore the Commission is not able to certify that the agency has complied with G.S. 150B-19.1.

**Criminal Justice Education and Training Standards Commission**

The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed rules 12 NCAC 09B .0205, .0241; 09E .0104; 09F .0107; 09G .0415 and .0416.

**State Board of Education**

The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed rule 16 NCAC 06G .0312.

**COMMISSION BUSINESS**

Molly Masich updated the Commission on H.B. 74.

Amanda Reeder updated the Commission on legislation being tracked by staff.

The meeting adjourned at 11:59 a.m.

The next scheduled meeting of the Commission is Thursday, July 18th at 10:00 a.m.

There is a digital recording of the entire meeting available from the Office of Administrative Hearings / Rules Division.

Respectfully Submitted,

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Julie Edwards  
Editorial Assistant

Minutes approved by the Rules Review Commission:

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Margaret Currin, Vice-Chair

Rules Review Commission  
Meeting  
Please Print Legibly

JUNE 19, 2013

Name	Agency
ERIC KULZ	NCDWR
Ross Smith	PCS PHOSPHATE COMPANY, INC.
Karen Higgins	NCDWQ
Del Williams	NC DPH/EPIDEMIOLOGY
Josh Davis	NCDCR
Karen Blum	NCDOT
KEITH HARDISON	NCDCR
Katie Cornetto	NCSBE/DPI
R Bradford	DOS/ITS
Ellen Lorscheider	DENR - DWM
<del>Borisa Borisa</del>	NC DOS
Sarah Rice	DENR - DWM
Jessica Montie	DENR - DWM
Melissa Schoeman	NCDOS
Tony Knox	NCCUD
Fenney DePas	NCBPE
Jennifer Holleyfield	NCDOI/NCILCB
Mike Hejduk	NCDOI/NCILCB
Ashley Berger	NCICL
Karen Waddell	NCDOT
Bradly Bennett	NCDWQ

Rules Review Commission  
Meeting  
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**LIST OF APPROVED PERMANENT RULES  
June 19, 2013 Meeting****COMMERCE, DEPARTMENT OF - CREDIT UNION DIVISION**

<u>Notice of Rule Making Hearing</u>	04 NCAC 06B .0302
<u>Rule Making Hearings: General Information</u>	04 NCAC 06B .0303
<u>Definitions</u>	04 NCAC 06C .0101
<u>Listing of Officials and Operating Hours</u>	04 NCAC 06C .0307
<u>Surety Bond and Insurance Coverage</u>	04 NCAC 06C .0311
<u>Financial Statements and Other Information</u>	04 NCAC 06C .0801

**CULTURAL RESOURCES, DEPARTMENT OF**

<u>State Historic Site Fees</u>	07 NCAC 04N .0202
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**PUBLIC HEALTH, COMMISSION FOR**

<u>Reportable Diseases and Conditions</u>	10A NCAC 41A .0101
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**ENVIRONMENTAL MANAGEMENT COMMISSION**

<u>Neuse River Basin: Nutrient Sensitive Waters Management S...</u>	15A NCAC 02B .0242
<u>Catawba River Basin: Mitigation Program for Protection an...</u>	15A NCAC 02B .0244
<u>Randleman Lake Water Supply Watershed: Mitigation Program...</u>	15A NCAC 02B .0252
<u>Tar-Pamlico River Basin - Nutrient Sensitive Waters Manag...</u>	15A NCAC 02B .0260
<u>Jordan Water Supply Nutrient Strategy: Mitigation for Rip...</u>	15A NCAC 02B .0268
<u>Site Specific Water Quality Management Plan for the Goose...</u>	15A NCAC 02B .0609
<u>Development in Urbanizing Areas</u>	15A NCAC 02H .0152
<u>Development in Urbanizing Areas</u>	15A NCAC 02H .1016

**COASTAL RESOURCES COMMISSION**

<u>Program Costs</u>	15A NCAC 07I .0401
<u>Application Fees</u>	15A NCAC 07I .0406

**PUBLIC HEALTH, COMMISSION FOR**

<u>Out-of-State Waste in Sanitary Landfills</u>	15A NCAC 13B .0108
<u>Option to Apply for Issuance of 10-Year Permit for Sanita...</u>	15A NCAC 13B .0206
<u>Application Requirements for Sanitary Landfills</u>	15A NCAC 13B .0504
<u>Public Well Water Supplies</u>	15A NCAC 18C .0203

**PODIATRY EXAMINERS, BOARD OF**

<u>Military License</u>	21 NCAC 52 .0211
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**LIST OF CERTIFIED RULES  
June 19, 2013 Meeting****HOME INSPECTOR LICENSURE BOARD**

<u>Complaints</u>	11 NCAC 08 .1202
<u>Board Staff</u>	11 NCAC 08 .1203

<u>Investigation</u>	11 NCAC 08 .1204
<u>Disciplinary Hearing</u>	11 NCAC 08 .1205

**CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION**

<u>Basic Law Enforcement Training</u>	12 NCAC 09B .0205
<u>Juvenile Justice Specialized Instructor Training - Restra...</u>	12 NCAC 09B .0241
<u>Instructors: Annual In-Service Training</u>	12 NCAC 09E .0104
<u>Filing and Fees</u>	12 NCAC 09F .0107
<u>Corrections Specialized Instructor Training - Firearms</u>	12 NCAC 09G .0415

**STATE BOARD OF EDUCATION**

<u>Annual Performance Standards Under the Ready Accountabiit...</u>	16 NCAC 06G .0312
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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  
Selina Brooks  
Melissa Owens Lassiter  
Don Overby

Randall May  
A. B. Elkins II  
Joe Webster

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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	
ABC Commission v. Double Zero, LLC, T/A Bad Dog	12 ABC 11398	04/08/13	
<b><u>DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY</u></b>			
Maggie Yvonne Graham v. Victims Compensation Commission	09 CPS 05287	04/09/13	
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	
Harold Eugene Merritt v. State Highway Patrol	12 CPS 07852	05/24/13	
Vanda Lawanda Johnson v. Office of Victim Compensation	12 CPS 09709	04/25/13	
Latoya Nicole Ritter v. Crime Victim Compensation Commission, Janice Carmichael	12 CPS 10572	04/25/13	
<b><u>DEPARTMENT OF HEALTH AND HUMAN SERVICES</u></b>			
Stonestrow 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	

# CONTESTED CASE DECISIONS

Bright Haven Residential and Community Care d/b/a New Directions Group Home v. Division of Medical Assistance, DHHS	10 DHR 00232	04/27/12	
Warren W Gold, Gold Care Inc. d/b/a Hill Forest Rest Home, v. DHHS/Division of Health Service Regulation, Adult Care Licensure Section	10 DHR 01666	05/18/12	
Warren W Gold, Gold Care Inc. d/b/a Hill Forest Rest Home v. DHHS, Division of Health Service Regulation, Adult Care Licensure and Certification Section	10 DHR 05801	05/18/12	
Gold Care Inc. Licensee Hill Forest Rest Home Warren W. Gold v. DHHS, Adult Care Licensure Section	10 DHR 05861	05/18/12	
Robert T. Wilson v. DHHS, DHSR	10 DHR 07700	01/29/13	
Daniel J. Harrison v. DHHS Division of Health Service Regulation	10 DHR 07883	04/12/13	28:02 NCR 73
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
Andrea D. Pritchett v. DHHS Healthcare Personnel Registry Section	11 DHR 14885	01/04/13	28:02 NCR 91
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	

# CONTESTED CASE DECISIONS

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	
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	
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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
Jesus A. Cabrera v. Department of Revenue	12 REV 08968	01/03/13
Sybil Hyman Bunn v. Department of Revenue	12 REV 08973	05/06/13

**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
Bethany Thompson v. Department of the Secretary of State	12 SOS 11648	05/02/13

Holley Shumate Knapp v. Ann Wall, General Counsel Department of the Secretary	13 SOS 09039	05/23/13
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**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

**WILDLIFE RESOURCES COMMISSION**

People for the Ethical Treatment of Animals, Inc., v. NC Wildlife Resources Commission	12 WRC 07077	11/13/12	27:22 NCR 2165
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STATE OF NORTH CAROLINA

FILED

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS

COUNTY OF CABARRUS

2013 APR 12 AM 12:11

10 DHR 07883

Daniel J. Harrison,  
Petitioner,

OFFICE OF  
ADMINISTRATIVE HEARINGS

vs.

DECISION

DHHS Division of Health Service Regulation,  
Respondent

THIS MATTER came for hearing before the undersigned, the Honorable Selina M. Brooks, Administrative Law Judge presiding, on November 13, 2012, in the Vanguard Center, 5501 Seventy Seven Center Drive, Suite 150, Charlotte, North Carolina.

#### APPEARANCES

For Petitioner:

Christopher J. Neeson, Esquire  
RAWLS, SCHEER, FOSTER & MINGO, PLLC  
1011 East Morehead Street, Suite 300  
Charlotte, NC 28204  
COUNSEL FOR PETITIONER

For Respondent:

Derek L. Hunter  
Assistant Attorney General  
North Carolina Department of Justice  
Post Office Box 629  
Raleigh, NC 27602-0629

#### ISSUE

Whether Respondent substantially prejudiced Petitioner's rights and acted erroneously; failed to use proper procedure; or acted arbitrarily or capriciously when Respondent substantiated the allegations that Petitioner misappropriated a facility's property; committed fraud against a facility; misappropriated the property of ten (10) residents; and committed fraud against ten (10) residents of Mecklenburg Open Door in Charlotte, North Carolina, by transferring the residents' funds from the payee services account to Mecklenburg Open Door's operating account, and Respondent entered said findings on the North Carolina Health Care Personnel Registry.

**APPLICABLE STATUTES AND RULES**

N.C. Gen. Stat. § 131E-256  
N.C. Gen. Stat. § 150B-1, *et seq.*  
42 CFR § 488.301  
10A N.C.A.C. 13O .0101(5)  
10A N.C.A.C. 13O .0101(8)  
10A N.C.A.C. 13O .0101(9)

**EXHIBITS**

Respondent's Exhibits 1 – 22 were admitted into the record.

**WITNESSES**

**Petitioner**

Daniel J. Harrison (Petitioner)

**Respondent**

James R. Cook, Ph.D. (Professor, UNC-Charlotte; Former President of the Board of Directors,  
Mecklenburg Open Door)

Terry Christopher Thompson (Budget Manager, Monarch; Former Finance Director for the  
Board of Directors, Mecklenburg Open Door)

Lynn M. Lee (Financial Support Specialist, Monarch; Former Finance Manager, Mecklenburg  
Open Door)

M. Lawrencette McSwain, RN (Investigator, Health Care Personnel Registry)

**BASED UPON** careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, the undersigned makes the following findings of fact and conclusions of law. 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 witnesses may have, the opportunity of the witnesses to see, hear, know or remember the facts or occurrences about which the witnesses testified, whether the testimony of the witnesses is reasonable, and whether the testimony is consistent with all other believable evidence in the case. From the sworn testimony of the witnesses, the undersigned makes the following:

# FINDINGS OF FACT

1. From July 2008 until August 24, 2010, Daniel J. Harrison ("Harrison" or "Petitioner") was employed as a health care personnel—namely, the Chief Financial Officer ("CFO")—at Mecklenburg Open Door ("MOD") in Charlotte, North Carolina.
2. At all times relevant to this matter, MOD was a residential facility, as defined by N.C.G.S. § 122C-3(14)(e), and is therefore subject to N.C.G.S. § 131E-256.
3. The "finance department" at MOD consisted of two (2) employees—Harrison, the CFO, and Lynn Lee ("Lee"), the Finance Manager.
4. As CFO, Harrison was responsible for all of the financial operations of MOD, including financial strategy and analysis for various MOD programs and services, managing the financial growth of MOD, managing employees, developing budgets, and evaluating the profitability of programs, among other duties. (T pp. 15, 156)
5. MOD served as representative payee for several of its residents. A representative payee is an individual or organization appointed by the Social Security Administration to receive Social Security and/or Social Supplemental Income (SSI) benefits for someone who cannot manage or direct someone else to manage his or her money. A representative payee may not use the beneficiary's money for anything other than the beneficiary's needs and expressly cannot deposit a beneficiary's Social Security and/or SSI benefits into his, her, or another person's account or, if an organization, into the organization's operating account. (Resp. Exh. 3; T pp. 59-61)
6. Prior to and during Harrison's tenure as CFO, MOD deposited the funds of several of its residents into MOD's operating account instead of the payee services account. In addition, on numerous occasions between 2009 and 2010, when MOD began to experience financial difficulties and was rendered unable to meet its payroll and other financial obligations, Harrison authorized Lee to transfer residents' monies from MOD's payee services account to MOD's operating account so that MOD could meet its various financial obligations. MOD planned to return the residents' monies to the payee services account when MOD received payment from its various income sources. (Resp. Exhs. 14 and 15; T, pp. 21-24, 109-112, 117)
7. There were at least ten (10) residents whose monies were either deposited directly or transferred into MOD's operating account to cover MOD's financial obligations. Those residents were E.G., L.F., T.G., V.W., M.A., B.F., L.G., R.F., M.S., and J.M. (Resp. Exhs. 5-14)
8. The amount of residents' monies deposited or transferred into MOD's operating account and used by MOD to cover its operating expenses was at least Two Hundred One Thousand Three Hundred Fifty and 93/100 Dollars (\$201,350.93). (Resp. Exhs. 4-14; T pp. 64-72)

9. In or around May 2010, MOD's Board of Directors ("the Board") was informed that its Executive Director had stolen funds from the company and that the company's finances had been mismanaged. As a result, the Board hired a forensic accountant to investigate the company's finances. The forensic accountant discovered, among other things, that various grant funds were not in the accounts in which they should have been, payroll taxes had not been paid, and funds were missing from the payee services account. The Board specifically directed Harrison, as CFO, to locate and place the missing funds back into the appropriate accounts. (T pp. 16-17, 20, 21)
10. On August 24, 2010, the Board terminated Harrison as CFO of MOD. (T pp. 14, 29-30)
11. On or about August 25, 2010, MOD's Board of Directors hired Terry Christopher Thompson ("Thompson"), an accountant, to reconcile MOD's bank statements and provide an accurate and trustworthy assessment of MOD's finances. (T pp. 17, 54)
12. Thomas determined that as of September 2010, MOD still owed its residents Thirty-Five Thousand Five Hundred Seventy-Six and 99/100 (\$35,576.99). (Resp. Exhs. 4-14; T pp. 64-72)
13. All of the monies were eventually paid back to the residents by the time MOD dissolved and ceased operations. (T pp. 20, 23-24, 74-75)
14. On or about October 28, 2010, MOD notified the North Carolina Health Care Personnel Registry ("HCPR") of the allegations that Harrison had misappropriated the funds of numerous residents and had committed fraud against said residents. (Resp. Exh. 20)
15. The HCPR investigates allegations against unlicensed health care personnel working in health care facilities in North Carolina. The allegations investigated by HCPR include, but are not limited to, misappropriation of resident property and fraud against residents. With the exception of a finding of a single instance of neglect, substantiated findings against health care personnel are permanently listed on the HCPR. N.C.G.S. § 131E-256.
16. Upon receipt of the allegations against Harrison, M. Lawrencette McSwain, RN ("McSwain"), Investigator for HCPR, determined that the matter required further investigation.
17. At all times relevant to this matter, McSwain was employed as an Investigator for the HCPR. She is charged with investigating allegations of misappropriation of resident property and fraud against residents, among others, against unlicensed health care personnel, and was assigned to conduct the investigation into the allegations against Harrison.
18. As a part of her investigation, McSwain interviewed at least ten (10) individuals with knowledge of the allegations, including Harrison, and reviewed a copious amount of MOD's documentation regarding these allegations. (Resp. Exhs. 16-18)

19. Based on her investigation, McSwain determined that Harrison misappropriated the property of ten (10) residents, committed fraud against said ten (10) residents, misappropriated MOD's property, and committed fraud against MOD, and, accordingly, substantiated these twenty-two (22) allegations against Harrison. (Resp. Exh. 20)

20. By certified letter dated December 22, 2010, McSwain notified Harrison that said allegations had been substantiated and said findings would be listed on the HCPR. Harrison was further notified of his right to appeal.

Based upon the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following:

#### **CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to Chapters 131E and 150B of the North Carolina General Statutes.

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

3. Pursuant to N.C.G.S. § 131E-256, the North Carolina Department of Health and Human Services ("Department") is required to establish and maintain a health care personnel registry that contains the names of all unlicensed health care personnel working in health care facilities in North Carolina who are subject to a finding by the Department that they, among other things, misappropriated the property of or committed fraud against a resident in a health care facility, or have been accused of such an act if the Department has screened the allegation and determined that an investigation is warranted.

4. At all times relevant to this matter, Mecklenburg Open Door was a residential facility, as defined by N.C.G.S. § 122C-3(14)(e), and therefore subject to N.C.G.S. § 131E-256.

5. As a health care personnel working in a residential facility, Harrison is subject to the provisions of N.C.G.S. § 131E-256.

6. Misappropriation of resident property means the deliberate misplacement, exploitation, or wrongful, temporary or permanent use of a resident's belongings or money without the resident's consent. 10A N.C.A.C. 130 .0101(8); 42 CFR § 488.301

7. The preponderance of the admissible evidence in the record shows that Harrison misappropriated the property of ten (10) residents by authorizing and directing that said residents' monies be transferred from the payee services account to MOD's operating account to cover various MOD operating expenses.

8. Respondent's action to substantiate against Harrison the ten (10) allegations of misappropriation of resident property is supported by a preponderance of the evidence.

9. Misappropriation of the property of a health care facility means the deliberate misplacement, exploitation, or wrongful, temporary or permanent use of a health care facility's property without the facility's consent. 10A N.C.A.C. 130 .0101(9)

10. The preponderance of the admissible evidence in the record does not support the finding that Harrison misappropriated the property of MOD.

11. Fraud means an intentional deception or misrepresentation made by a person with the knowledge that the deception could result in some unauthorized benefit to himself or some other person. It includes any act that constitutes fraud under applicable Federal or State law. 10A N.C.A.C. 130 .0101(5)

12. The preponderance of the admissible evidence in the record does not support the findings that Harrison committed fraud against MOD or the residents of MOD.

13. Harrison failed to meet his burden that Respondent substantially prejudiced his rights and acted erroneously; failed to use proper procedure; or acted arbitrarily or capriciously when Respondent substantiated the allegations that Harrison misappropriated the property of ten (10) residents of Mecklenburg Open Door by transferring the residents' funds from the payee services account to Mecklenburg Open Door's operating account, and Respondent entered said findings on the North Carolina Health Care Personnel Registry.

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

#### **RECOMMENDED DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that Respondent's decision to place findings on the North Carolina Health Care Personnel Registry that Petitioner misappropriated the property of ten (10) residents should be **UPHELD**.

#### **NOTICE**

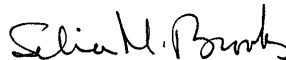
The Agency that will make the final decision in this contested case is the North Carolina Department of Health and Human Services, Division of Health Service Regulation.

The Agency is required to give each party an opportunity to file exceptions to the recommended decision by the Administrative Law Judge and to present written arguments to those in the Agency who will make the final decision. N.C.G.S. § 150-36(a). The Agency 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. N.C.G.S. § 150B-36(b3).

In accordance with N.C.G.S. § 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 12th day of April, 2013.



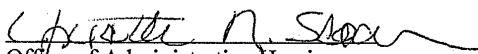
The Honorable Selina M. Brooks  
Administrative Law Judge

A copy of the foregoing was sent to:

Christopher J. Neeson, Esq.  
Rawls, Scheer, Foster & Mingo, PLLC  
1011 East Morehead St., Ste. 300  
Charlotte, NC 28204  
ATTORNEY FOR PETITIONER

Derek L. Hunter  
Assistant Attorney General  
NC Dept of Justice  
PO Box 629  
Raleigh, NC 27602-0629  
ATTORNEY FOR RESPONDENT

This the 12 day of April, 2013.

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



STATE OF NORTH CAROLINA  
COUNTY OF ALEXANDER

FILED  
IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
2013 APR -5 AM 12:44  
10 DST 0233

DWAINE C. COLEY,

Petitioner,

v.

NORTH CAROLINA  
DEPARTMENT OF STATE TREASURER,

Respondent.

OFFICE OF  
ADMIN HEARINGS

DECISION

THIS MATTER came on to be heard and was heard before the undersigned Administrative Law Judge Selina M. Brooks on December 18, 2012.

APPEARANCES

The parties were present and represented by counsel, Jason White, of Sigmon, Clark, Mackie, Hanvey, and Ferrell, P.A., on behalf of Petitioner and Susannah Holloway for the Attorney General, Roy Cooper, on behalf of Respondent.

ISSUE

Whether Respondent's determination that he was not a full-time employee of a covered employer in the North Carolina Teachers' and State Employees' Retirement System (hereinafter the "TSERS") and, therefore, was not entitled to membership in the TSERS from May 2005 through September 2009 was correct?

EXHIBITS ADMITTED INTO EVIDENCE

At the beginning of the hearing the Parties stipulated that the following exhibits would be admitted into evidence:

Petitioner's Exhibits 1, 2 (under seal) and 3

Respondent's Exhibits 1, 2, 3, 4, 5, 8, 9, 10A, 10B, 11, 12, 13, 14, 15, 16, 19 (under seal), 20, 25, 26, 27, 28, 29, 30 and 31.

During the hearing, the following exhibits were admitted into evidence: Respondent's Exhibits 6, 7A, 7B, 7C, 7D, 17, 18, 22, 23, and 32.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, including the deposition testimony of Jack Hoke whose deposition was taken in lieu of in court testimony due to his unavailability, and based upon careful consideration of all the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility, including but not limited to the demeanor of the witness, any interest, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. Wherefore, based upon the preponderance of the substantial admissible evidence, the Undersigned makes the following Findings of Fact, Conclusions of Law and Decision:

FINDINGS OF FACT

1. The Parties stipulated that Petitioner was an employee of the Hiddenite Center as early as 1987. (T., p. 74.)
2. At all times relevant to the instant proceeding, from May 2005 through September 2009, Petitioner was employed on a full-time basis as the Executive Director of the Hiddenite Center, Inc. located in Alexander County. (T. Walker, pp. 130, 149)
3. Petitioner was employed on a full-time basis as the Executive Director of the Hiddenite Center, Inc. until May 4, 2010. (T. Walker, p. 149; T. Houchins, pp. 191-92; R. Ex. 8, p. 4, No. 2 & p. 5, No. 5)
4. The Hiddenite Center is a private non-profit corporation. (R. Ex. 23, p. 189)
5. The Hiddenite Center is not an agency of the State of North Carolina and it is not a participating employer with the TSERS. (R. Ex. 8 p. 13, Nos. 24 & 25)
6. The Executive Director of the Hiddenite Center was subject to being hired and fired by the Hiddenite Center Board of Directors. (R. Ex. 8, p. 17, Nos. 31 and 33; T. Sellers, pp. 168, 186; T. Houchins, pp. 191-92)
7. The Board of Directors of the Hiddenite Center has the authority to direct the duties of the Executive Director of the Hiddenite Center. (R. Ex. 8, p. 17, No. 32; T. Sellers, p. 168)
8. The salary of the Executive Director of the Hiddenite Center was compensation for a full-time position with the Hiddenite Center. (R. Ex. 8, p. 5, No. 5)
9. The Hiddenite Center paid Petitioner approximately \$80,000 per year as his salary for being the Executive Director of the Hiddenite Center. (R. Ex. 8 p. 5, No. 4; T. Walker, p. 141)

10. The Hiddenite Center Board of Directors voted on the Executive Director's salary, included as part of its budget, every year; and that salary was paid from Hiddenite Center funds. (T. Sellers, pp. 168-69)

11. The Hiddenite Center and the Alexander County Schools entered into a "Contract for Services" on April 22, 2005. (R. Ex. 11)

12. The "Contract for Services" between the Alexander County Schools and the Hiddenite Center was in effect from April 22, 2005 to June 30, 2010 and provided in pertinent part that:

The Hiddenite Center, Incorporated will provide its Executive Director to serve as the Artistic Director for the day-to-day operation of the [Alexander County Schools'] auditorium.

...

The Center will pay a sum equal to the Executive Director's salary to the Alexander County Schools on a monthly basis and the Alexander County Board of Education will provide a benefit package to the Executive Director as a full-time employee of the school system.

This agreement contains the entire understanding between the parties.

(R. Ex. 11)

13. Pursuant to the Contract for Services, the Hiddenite Center agreed to have its Executive Director serve as the Artistic Director promoting programming for the Alexander County Central Auditorium and to pay its Executive Director's salary on a monthly basis to the Alexander County Schools. (R. Ex. 11; T. Sellers, p. 172; T. Walker, p. 151.) Petitioner is not a party to the Contract or named in the Contract. (T. Austin, pp. 239-41.)

14. The Minutes for the Hiddenite Center's Board of Directors meeting held on April 19, 2005, state in pertinent part:

Under the Agreement, the Hiddenite Center will transfer dwaine's [sic] salary to [Alexander County] Schools, and the Schools will provide dwaine's [sic] benefit package.

(R. Ex. 23, p. 178)

15. At all times during the period covered by the Contract for Services, the Hiddenite Center was paying its Executive Director his salary through the Alexander County Schools. (T. Sellers pp. 172-73; T. Walker, p. 151; R. Ex. 8 p. 8, No. 10)

16. During the pendency of the Contract for Services, Petitioner's entire salary as Executive Director of the Hiddenite Center was paid by the Hiddenite Center through the Alexander County Schools. (R. Ex. 8 p. 16, No. 30)

17. The Hiddenite Center budget incorporated Petitioner's salary and lists payments from the Hiddenite Center to Alexander County Schools for each of the years 2006 through 2010. (R. Ex. 12)

18. The Hiddenite Center reimbursed Alexander County Schools in full for Petitioner's entire compensation which was reported to TSERS. (T. Austin, pp. 199-200; R. Ex. 26.)

19. Petitioner testified that these payments were for his employment as Artistic Director at Alexander County Schools and not as Executive Director for the Hiddenite Center. (T. Coley, pp. 58-61.)

20. There was no credible evidence presented of a contract of employment, either oral or written, between Petitioner and the Alexander County Schools.

21. The Undersigned finds as fact that there was no contract of employment between Petitioner and the Alexander County Schools.

22. Jack Hoke's testimony that Petitioner was an employee of the Alexander County Schools is not credible in light of the wording of the Contract for Services, stating that the Executive Director of the Hiddenite Center would perform the work at the Schools, and in light of the fact that the Hiddenite Center's Executive Director's salary was paid through the Schools to its Executive Director.

23. Jack Hoke's deposition testimony that he would have fired Petitioner had he been displeased with his performance was contradicted by his testimony during the same deposition that, had he been displeased with Petitioner's performance, he would have cancelled the Contract for Services. (Depo. Hoke T. pp. 10, 39)

24. The Minutes for the Annual Meetings of the Hiddenite Center's Board of Directors in 2005 and 2006 record that the Personnel Committee conducted annual evaluations of Petitioner as the Hiddenite Center's Executive Director and recommended a salary increase which was approved by the Board. (R. Ex. 23, pp. 143 & 180.)

25. During the period covered by the Contract for Services, Petitioner submitted reports to the Hiddenite Center Board of Directors in his capacity as Executive Director for the Hiddenite Center. (T. Coley, pp. 89-94.)

26. For each year of 2005, 2006, 2007, 2008, 2009 and 2010, Petitioner submitted an Annual Report as "dwaine c. colely [sic] Executive Director" to the Board of Directors of the Hiddenite Center at their Annual Meeting. (R. Ex. 23, pp. 36-46, 84-111, 115-27, 156-68 & 189-202.)

27. At quarterly meetings of the Board of Directors of the Hiddenite Center in each year of 2005, 2006, 2007, 2008, 2009 and 2010, Petitioner submitted an Executive Director's Report, and in seven of these as recently as 2009 and 2010, he identified himself as "dwaine c. coley [sic] Executive Director". (R. Ex. 23, pp. 16-19, 26-31, 47-50, 74-79, 80-83, 107-11, 112-14, 128-33, 146-51, 152-55, 169-72, 184-88 & 203-12.)

28. Testimony by Iva Moree, principal of Alexander Central High School, that she thought of Petitioner as being an employee of Alexander County Schools is not substantial evidence of an employment contract between Petitioner and the Alexander County Schools. (T. Moree, p. 112)

29. The purported "position" of "Artistic Director" with the Alexander County Schools was never posted and Petitioner never submitted an application to be considered for the position. (R. Ex. 1, p. 515; Depo. T. Hoke, pp. 8-9; R. Ex. 20, p. 222)

30. Petitioner has never been licensed to teach in the State of North Carolina. (R. Ex. 5)

31. The Alexander County Schools attached the Local Supplement of 9% to the funds coming through its payroll to Petitioner and also caused contributions to be paid to the Retirement System. (R. Ex. 8 Nos. 10, 14, 30 & 34; T. Depo. Hoke, p. 11; R. Ex. 18)

32. The Hiddenite Center did not subgrant its funds for its Executive Director position to create a full-time position at the Alexander County Schools for Petitioner. (T. Sellers p. 172; T. Houchins, p. 191; T. Walker, p. 138)

33. While Petitioner was physically performing work on the campus of the Alexander County Schools, he was also working representing the Hiddenite Center and doing work on behalf of the Hiddenite Center. (T. Sellers, p. 174; T. Walker, p. 163)

34. The cultural mission of the Hiddenite Center was to promote cultural opportunities and programming to the whole community. (T. Walker, p. 142; T. Houchens, p. 192)

35. Karen Walker was employed at the Hiddenite Center from 1984 to the time of the hearing. She testified that Petitioner held the full-time position of Executive Director of the Hiddenite Center for the period of May 2005 to September 2009. (T. Walker, pp. 149, 162-64.)

36. Petitioner was Executive Director of the Hiddenite Center until May 2010. (T. Sellers, p. 185.)

37. The programming which Petitioner was sponsoring at the High School auditorium during the period of the Contract for Services was listed in the Hiddenite Center's annual report of public programs. (T. Sellers, p. 174; R. Ex. 23 pp. 118-20)

38. No time records were kept for Petitioner documenting the hours he was physically located each day at the High School and the hours he was physically located each day at the Hiddenite Center. (R. Ex. 20, p. 222, No. 19; T. Moree, p. 115; T. Coley, p. 40)

39. The witness testimony is inconclusive regarding how many hours each day Petitioner physically spent either at the Hiddenite Center or at the High School Auditorium. (T. Coley, pp. 36-37; T. Moree, pp. 117-18; T. Sellers, pp. 175, 182-83; T. Houchens, p. 194).

40. The Undersigned can make no findings of fact regarding how many hours each day Petitioner spent either at the Hiddenite Center or the High School Auditorium during the pendency of the Contract for Services.

41. Hiddenite Center Board member and officer Cindy Sellers served on the steering committee for oversight of the Executive Director's duties at the Auditorium. That steering committee met and helped decide what entertainment was to be used at the Auditorium. (T. Sellers, p. 173)

42. The Hiddenite Center viewed the Contract for Services as a "win-win" situation. (T. Sellers, p. 173; T. Coley, p. 67; R. Ex. 20, p. 222 No. 21; R. Ex. 23, p. 178)

43. In entering into the Contract for Services, the Hiddenite Center was looking for a way to defray some of its costs by having the State pay for the health insurance and the retirement benefits for its Executive Director. (R. Ex. 22, pp. 150-53; R. Ex. 20, p. 222 No. 21)

44. According to Hiddenite Center Board member and officer Cindy Sellers, the Board wanted Petitioner to be vested in the Teachers' and State Employees' Retirement System to get State retirement benefits. (T. Sellers, p. 177)

45. In May 2010, the Hiddenite Center Board decided to terminate the Contract for Services and gave sixty days notice to the Alexander County Schools in accordance with the terms of the Contract for Services. (T. Houchins, p. 191; T. Sellers, p. 188)

46. In May 2010, the Hiddenite Center Board asked for Petitioner's resignation. (T. Sellers, p. 186)

47. As of May 4, 2010, Petitioner was no longer employed by the Hiddenite Center. (T. Houchens, p. 192; R. Ex. 8, p. 289, No. 1)

48. Petitioner's testimony that he was a full-time employee of the Alexander County Schools during the time-period in question is not believable in the absence of any evidence of an employment contract between him and the Schools, given the evidence of his continuing full-time employment by the Hiddenite Center and the evidence by the Hiddenite Center that it had not made a grant to the Alexander County Schools to create a full-time position for Petitioner with the Schools.

49. The testimony of Jack Hoke, former Superintendent of the Alexander County Schools, that Petitioner was a Level VII School Administrator with instructional and supervisory responsibilities, entitled to a 9% Local Supplement even though Petitioner was not paid in accordance with the salary schedule for teachers and school administrators published by the Department of Public Instruction, was not believable given the evidence presented from the public records of North Carolina that teachers in the North Carolina Public Schools are required to be licensed, that Petitioner had never been licensed in North Carolina, and that teachers and school administrators are also required to be paid in accordance with DPI's salary schedules, unless the School District has its own salary schedule which Alexander County Schools did not have.

50. I find as fact that from May 2005 through September 2009, Petitioner was not a full-time employee of the Alexander County Schools.

51. I find as fact that Petitioner's salary was reported in error to TSERS for May 1, 2005 through September 2009 for a total error of \$23,499.01 in contributions. These contributions plus 4% interest accruing from January 2006 to the present should be reimbursed to Petitioner. (T. Austin, pp. 220-21, 238; R. Ex. 18)

52. As a nonprofit organization, the Hiddenite Center is not eligible to be in the retirement system and is not in the retirement system. The compensation paid to the Executive Director of the Hiddenite Center is not eligible to be reported to the Retirement System. (T. Austin, p. 222.)

BASED ON the foregoing FINDINGS OF FACT, and the preponderance of the admissible substantial evidence, the Undersigned hereby makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The North Carolina Teachers' and State Employees' Retirement System (hereinafter the "TSERS") was "established . . . for the purpose of providing retirement allowances and other benefits . . . for teachers and State employees of the State of North Carolina." N.C.G.S. § 135-2.

2. Membership in the TSERS is limited to "[a]ll persons who shall become teachers or State employees after the date as of which the Retirement System is established." N.C.G.S. § 135-3.

3. Under N.C.G.S. § 135-1(14), "[m]embership service' shall mean service as a teacher or State employee rendered while a member of the Retirement System."

4. Under N.C.G.S. § 135-1(10), "[e]mployee' shall mean all full-time employees, agents or officers of the State of North Carolina or any of its departments, bureaus and

institutions other than educational[.] . . . In all cases of doubt, the Board of Trustees shall determine whether any person is an employee as defined in this Chapter.”

5. Under N.C.G.S. § 135-1(25), “[t]eacher” shall mean any teacher . . . or any full-time employee in any educational institution supported by and under the control of the State: Provided, that the term ‘teacher’ shall not include any part-time, temporary, or substitute teacher or employee[.] . . . In all cases of doubt, the Board of Trustees, hereinbefore defined, shall determine whether any person is a teacher as defined in this Chapter.”

6. N.C.G.S. §135-1(11) states: “‘Employer’ shall mean the State of North Carolina . . . or any other agency of and within the State by which a teacher or other employee is paid.”

7. N.C.G.S. § 135-1(7a)a. states in pertinent part: “‘Compensation’ shall mean all salaries and wages . . . derived from public funds which are earned by a member of the Retirement System for service as an employee or teacher in the unit of the Retirement System for which he is performing full-time work.”

8. Petitioner was not a “teacher” or “employee,” as defined by the governing statutes of the TSERS, from May 2005 through September 2009. Nor was the Hiddenite Center, his employer, an employer participating in TSERS during that period.

9. Petitioner was not entitled to be a member of the TSERS from May 2005 through September 2009 and was, therefore, not entitled to any membership service in the TSERS from May 2005 through September 2009.

10. Respondent correctly determined that Petitioner was not entitled to membership service from May 2005 through September 2009 and correctly determined that Respondent owed Petitioner a refund with 4% interest of Petitioner’s contributions made to the Retirement System during that time-period.

#### DECISION

NOW, THEREFORE, based on the preponderance of the admissible substantial evidence presented, the above Findings of Fact, and Conclusions of Law, the decision of Respondent is UPHELD and it is hereby DECIDED that the preponderance of the admissible substantial evidence supports Respondent’s determination that Petitioner was not entitled to be a member of the TSERS from May 2005 through September 2009 and was, therefore, not entitled to membership service in the TSERS during this period of time, and that all of Petitioner’s purported “employee” contributions submitted to Respondent for that time-period should be returned to Petitioner by Respondent with 4% interest attached.

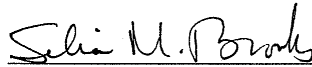
#### NOTICE

The decision of the Administrative Law Judge in this contested case will be reviewed by the agency making the final decision according to the standards found in G.S. 150B 36(b), (b1) and (b2). The agency making the final decision is required to give each party an opportunity to



file exceptions to the decision of the Administrative Law Judge and to present written arguments to those in the agency who will make the final decision. G.S. 150B-36(a). The Agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorneys of record and to the Office of Administrative Hearings. The agency that will make the final decision in this contested case is the Board of Trustees of the State Employees' Retirement System.

This the 4th day of April, 2013.




Selina M. Brooks  
Administrative Law Judge

A copy of the foregoing was sent to:

Jason White, Esq.  
Sigmon Clark Mackie Hutton Hanvey & Ferrell, PA  
P.O. Drawer 1470  
Hickory, NC 28601  
ATTORNEY FOR PETITIONER

Susannah P. Holloway  
Assistant Attorney General  
NC Dept. of Justice  
PO Box 629  
Raleigh, NC 27602-0629  
ATTORNEY FOR RESPONDENT

This the 5<sup>th</sup> day of April, 2013.

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

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OFFICE OF ADMINISTRATIVE HEARINGS  
1/4/2013 8:46 AM

STATE OF NORTH CAROLINA

COUNTY OF GUILFORD

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
11DHR14885

Andrea D Pritchett Petitioner,  v.  NC DHHS Healthcare Personnel Registry Section Respondent.	<b>DECISION</b>
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THIS MATTER came on for hearing before the undersigned, J. Randall May, Administrative Law Judge, on June 29, 2012, in High Point, North Carolina.

**APPEARANCES**

For Petitioner:     Lee Andrews  
                             P.O. Box 21472  
                             Greensboro, NC 27420

For Respondent:    Josephine N. Tetteh  
                             Assistant Attorney General  
                             North Carolina Department of Justice  
                             9001 Mail Service Center  
                             Raleigh, NC 27699-9001

**ISSUE**

Whether Respondent otherwise substantially prejudiced Petitioner's rights and failed to act as required by law or rule when Respondent substantiated the allegation that Petitioner abused a resident of Guilford Health Care in Greensboro, North Carolina and entered findings of abuse by Petitioner's name in the Health Care Personnel Registry.

**APPLICABLE STATUTES AND RULES**

N.C. Gen. Stat. § 131E-255  
N.C. Gen. Stat. § 131E-256  
N.C. Gen. Stat. § 150B-23  
42 CFR § 488.301  
10A N.C.A.C. 130.0101

**EXHIBITS**

Respondent's exhibits 1-9, 14, 16, 18-20, 22 were admitted into the record. Exhibits 17 and 21 were admitted after redaction.

**WITNESSES**

Andrea Pritchett (Petitioner)  
Kelly Moton (co-worker and friend of Petitioner)  
Donita Odom (Unit Manager)  
Jenny Baxter (HCPR Nurse Investigator)

**CONTESTED CASE PROCEEDURAL HISTORY**

This contested case was initially filed in an incomplete fashion with the Office of Administrative Hearings (herein after OAH) on December 23, 2011, by the Petitioner. Further information was requested of Petitioner and complied with, contemporaneously with Administrative Law Judge Augustus B. Elkins II being assigned to the case. Subsequent to this, Greensboro attorney Lee Andrews made an appearance for the Petitioner and on January 13, 2012 filed a signed Hearing Assistant Request form with OAH. After the filing of several pleadings the case was reassigned to Administrative Law Judge J. Randall May on February 28, 2012. Numerous other filings were recorded by the parties and the case was then duly noticed for hearing in the Guilford County Courthouse, High Point Division on June 29, 2012. At the hearing both parties were present and represented by counsel, as appears above.

At the conclusion of the contested case hearing the parties were asked to submit proposed decisions within thirty days of receipt of the transcript, which was to be ordered by the Respondent. Of record, both counsel acknowledged the undersigned's requests for proposed decisions. The hearing transcript was received by the OAH High Point office on July 25, 2012 and subsequently Respondent's proposal was timely filed; however, no proposal was filed by the Petitioner.

When the time for submission of proposals had passed, the Undersigned ordered Counselor Andrews to again submit his proposal by October 1, 2012. This was mailed to Counselor Andrews' regular mailing address. On September 25 the above Order was returned to the undersigned stating that he, Andrews, had "been ill for two months now and hospitalized since 9/1/12". He further advised that he would keep the Court informed of his status. A follow-up letter was posted to Counselor Andrews by the undersigned requesting further information from him on September 2, 2012 -- this correspondence was neither returned nor answered, and no information has been subsequently received from Andrews giving any hint of his status.

A Notice of Post Hearing Matters was filed and mailed to the parties on October 31, 2012. However, Counselor Andrews' (for Petitioner) Notice was returned by USPS, unclaimed, on November 6, 2012. This notice was posted by certified mail to Andrews' address of record. Also, a copy was mailed to Petitioner.

It should be noted that throughout these entire proceedings Assistant Attorney General Josephine Tetteh has always fulfilled her duty to be responsible to this Court.

On November 29, 2012 this matter had been duly noticed for hearing of the Post-Hearing Matter (of Petitioner's failed proposed decision submission). With this background, and with the requirement to conclude this case in a timely fashion, and after having made diligent efforts to hear from the Petitioner, the undersigned rules accordingly.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence, or the lack thereof, 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 of witnesses and the evidence, the Undersigned makes the following:

#### **FINDINGS OF FACT**

1. At all times relevant to this matter Petitioner, Andrea Pritchett, was a certified nursing assistant at Guilford Health Care Center (GHC) in Greensboro, North Carolina. GHC is a residential care facility. It is therefore subject to N.C. Gen. Stats. § 131E-255 and § 131E-256. (T. pp. 8, 72-73; Resp't Ex. 1).
2. Petitioner was trained for her position at GHC. Petitioner's training included care of the cognitively-impaired, and residents' rights including abuse. (T. pp. 14-15, 18-19; Resp't Exs. 2-4).
3. Petitioner's job responsibilities included providing gentle, direct assistance to residents. (Resp't Ex. 2).
4. Petitioner was working at GHC on August 5, 2011. Petitioner was to perform showers for residents of the 200 hall, including Resident MR. (T. p. 15; Resp't Ex. 6).
5. At all times relevant to this proceeding, Resident MR was a resident of GHC. Resident MR's diagnoses include Alzheimer's and Chronic Renal Insufficiency. According to Resident MR's care plan, she was at risk for abuse related to her combative behavior. Petitioner had worked with Resident MR previously and in her experience Resident MR "would always fight." (T. p. 9; Resp't Exs. 17-18, 20).
6. According to Petitioner's testimony, Resident MR was fighting on August 5, 2011 and Petitioner asked her co-worker, Kelly Moton ("Moton"), to help her with Resident MR. Maria Vilnor ("Vilnor") came into the shower room while Petitioner and Resident MR were there. Vilnor stood in front of Petitioner, Moton, and Resident MR while Petitioner and Moton were

dressings Resident MR. Vilnor put Resident MR's pants on after Moton and Petitioner had put Resident MR's blouse on. Following Resident MR's shower on August 5, 2011, Petitioner was accused of hitting Resident MR during the shower by Maria Vilnor. At all times relevant to this proceeding, Vilnor was a new employee at GHC and **did not offer testimony** at the contested case hearing. (T. pp. 9, 11, 13, 15-17, 61; Resp't Ex. 14).

7. It has reported by Donita Odom, ("Odom") that Vilnor reported her observations to Odom. At all times relevant to this proceeding, Odom was the unit manager at GHC. (T. pp. 14, 52-53; Resp't Exs. 14, 17).

8. After becoming aware of this information, Odom filed a 24-hour Report with the Health Care Personnel Registry ("HCPR"). The facility expectation for when a Resident becomes combative is that the resident would be left alone, or another staff member would be asked for assistance. (T. pp. 57, 59; Resp't Ex. 14).

9. Odom then conducted a facility investigation. As part of her investigation, Odom spoke to Petitioner, Vilnor, and Resident MR. (T. p. 55; Resp't. Ex. 17)

10. At the conclusion of her investigation, Odom reported her findings on the 5-day Working Report with the HCPR. Odom believed that she had substantiated the allegation of abuse and terminated Petitioner's employment with GHC. (T. p. 59; Resp't Ex.).

11. At all times relevant to this matter, Jenny Baxter ("Nurse Investigator Baxter") was an investigator with the Health Care Personnel Registry. Nurse Investigator Baxter is charged with investigating allegations against health care personnel in Guilford County, North Carolina. Accordingly, she received the allegation that Petitioner had abused Resident MR at GHC. (T. pp. 68-70; Resp't. Ex. 14).

12. Nurse Investigator Baxter independently reviewed the facility documents and conducted her own investigation. As part of her investigation, Nurse Investigator Baxter interviewed people involved with the incident, including Petitioner and Vilnor. Nurse Investigator Baxter also reviewed the facility investigation and statements. At the conclusion of her investigation Nurse Investigator Baxter substantiated the allegation of abuse. (T. pp. 71, 73, 75-76; Resp't. Exs. 19-21).

13. Nowhere during Petitioner's interview with Nurse Investigator Baxter does Petitioner indicate Moton was present. Nowhere during Petitioner's subsequent unsolicited letter to Nurse Investigator Baxter does Petitioner mention that Moton was present. GHC routinely interviews anyone identified as a witness during an investigation and obtains a statement from them. Petitioner also did not mention Moton in her facility statement. Moton was not identified during the facility investigation as a witness or being present. (T. pp. 12-13, 27-28, 30-31, 60-61; Resp't Exs. 7-9).

14. The following testimony was offered by Moton:
  - a. Resident MR was holding her hands and her arms close to her body and was kicking on the day in question (T. pp. 34-37). Moton makes no mention of Resident MR swinging her arms on the day in question.
  - b. After saying Petitioner had asked her (Moton) for assistance with Resident MR, instead of Vilnor (who was assigned to Resident MR) because Vilnor was unwilling to take care of Resident MR when Resident MR was combative, Moton then stated that Vilnor put on Resident MR's pants by herself. (T. pp. 39-40).
  - c. Moton gave conflicting information about her presence in the shower room. After first saying she went to the shower room to specifically help with Resident MR (to whom she was not assigned), Moton then stated Petitioner had asked for Moton's assistance. Finally Moton stated that she had gone to the shower room to pick up her resident. (T. pp. 38, 43).
  - d. Moton offered contradictory statements about Vilnor's role that day. Moton first said Vilnor was unwilling to take care of Resident MR because Resident MR was combative, then stated Vilnor did nothing while Moton and Petitioner were taking care of Resident MR. Finally, Moton stated that Vilnor put Resident MR's pants on. (T. pp. 37, 39, 44).
  - e. Moton's statement that Vilnor put on Resident MR's pants when Resident MR was kicking is contrary to her testimony during the hearing that she (Moton) had been asked by Petitioner to assist with Resident MR because Vilnor did not want to take care of Resident MR when Resident MR was being combative.
15. Nurse Investigator Baxter did not interview Moton because neither Vilnor nor Petitioner indicated that Moton was present on August 5, 2011. (T. p. 78).
16. According to Petitioner's testimony, Resident MR was "swinging and fighting, and maybe that's how [Vilnor] thought that I was fighting her because she was swinging as we were trying to get her dressed." (T. pp. 12-13).
16. According to Petitioner, there is no reason why Vilnor would want to make up an allegation of abuse against Petitioner. (T. pp. 29-30).
17. Following the conclusions of her investigation, Nurse Investigator Baxter notified Petitioner of her decision to substantiate the allegation of abuse. (T. p. 79; Resp't Ex. 22).
19. "Abuse" is defined as the "willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish." (T. p. 78; Resp't. Ex. 21).

BASED UPON the foregoing Findings of Fact, the Undersigned makes the following:

**CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to Chapters 131E and 150B of the North Carolina General Statutes.

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

3. As a certified nursing assistant working in a residential treatment and group home facility, Petitioner is a health care personnel and is subject to the provisions of N.C. Gen. Stat. § 131E-255 and § 131E-256.

4. "Abuse" is defined as the "willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish."

5. However, in this case there are only three witnesses to the alleged abuse: MR, who did not offer testimony; the Petitioner, who has offered testimony in court, subject to cross-examination, denying the abuse; and Vilnor, the new employee who was the only eyewitness making this allegation, and who did not offer admissible testimony to this tribunal.

6. The conundrum presented by the evidence, or **lack thereof**, is that this case originated and was, in pertinent part, based on the allegation of the Respondent's sole eye witness, Vilnor. Respondent's entire investigation has been based on this allegation. Great efforts were taken by the Respondent to properly and thoroughly investigate this case. However, in keeping with the Respondent's notice of an alleged substantiated finding of abuse, Petitioner was given notice of her right to appeal this finding before an impartial administrative law judge.

7. Petitioner elected to exercise her right to such an appeal and to challenge the case that Respondent had made against her. Thus, she acquired counsel and proceeded to have the case proved against her. The right of such a fair and impartial hearing, with the right to cross-examine witnesses for the Respondent, is afforded to petitioners to enable them to hear and contest the evidence against them. (N.C.G.S. § 150B-40[a]). Herein lays the missing link to the Respondent's case; for without the testimony of its sole witness to the abuse which allegedly occurred, the case simply cannot be bootstrapped upon hearsay to prove the heart of the allegation. Parties cannot control the appearance or the testimony of their witnesses; however, without the required proof of the abuse, Respondent's case must fail.

6. Respondent was unable to prove that it did not act capriciously, substantially prejudicing the rights of Petitioner, as there was insufficient admissible evidence to support Respondent's conclusion that Petitioner abused Resident MR.



**ACKNOWLEDGMENT**

It is acknowledged that whenever, in this document, reference is made to the Undersigned, the undersigned Judge, or the Court, reference is being made to the undersigned Administrative Law Judge with the Office of Administrative Hearings.

**DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned hereby determines that Respondent's decision to place a finding of abuse by Petitioner's name on the Nurse Aide Registry and the Health Care Personnel Registry should be REVERSED.

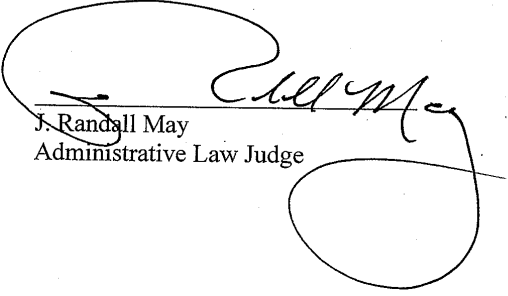
**NOTICE**

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

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 4th day of January, 2013.

  
J. Randall May  
Administrative Law Judge

On this date mailed to:

Lee Andrews, Esq.  
P.O. Box 21472  
Greensboro NC 27420  
ATTORNEY FOR PETITIONER

Andrea D. Pritchett  
1409 Pinchard Street  
Greensboro NC 27401  
PETITIONER

Josephine N. Tetteh  
Assistant Attorney General  
North Carolina Department of Justice  
9001 Mail Service Center  
Raleigh NC 27699-9001  
ATTORNEY FOR RESPONDENT

*SH*  
This the 4th day of January, 2013.



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 ORANGE

Filed

2013 MAR 28 PM 1:24

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
11 OSP 09374

Office of  
Administrative Hearings

Maria Isabel Prudencio-Arias,  
Petitioner,

v.

University of North Carolina at  
Chapel Hill,  
Respondent.

DECISION

THIS MATTER came on for hearing before Administrative Law Judge Melissa Lassiter on September 17, 18, 19, 20, and 26, 2012 in Chapel Hill, North Carolina. On January 3, 2013, the parties filed their respective proposed Decisions with the Office of Administrative Hearings. On February 13, 2013, Chief Administrative Law Judge Julian Mann, III extended the deadline for filing the Decision in this case until March 29, 2013.

#### APPEARANCES

For Petitioner: Alan McSurely, Attorney at Law  
H. Clay Turner, Attorney at Law  
109 N. Graham Street, Suite 100  
Chapel Hill, NC 27516

For Respondent: Ms. Katherine Murphy  
Asst. Attorney General  
N.C. Department of Justice  
P.O. Box 629  
Raleigh, N.C. 27602-0629

#### ISSUES

1. Whether Respondent, its agents and/or employees sexually harassed Petitioner, and created a hostile work environment for Petitioner in violation of N.C. Gen. Stat. § 126-34.1(a)(10), and N.C. Gen. Stat. § 126-36(b)(1)?
2. Whether Respondent discriminated against Petitioner, based on her sex, by failing to respond in a timely and effective manner to her complaint of sexual harassment?
3. Whether Respondent's acted arbitrary and capriciously in applying its "Policy on Prohibited Harassment and Discrimination" (PPHD)(Pet Exh 9, p D-1 to D-5),

in investigating Petitioner's allegations, and acted in violation of the Statutory and Constitutional protections of a public employee in North Carolina?

4. Whether Respondent, its agents and/or employees retaliated against Petitioner, based on her race, sex, color, national origin and handicapping condition, because Petitioner reported allegations of sexual harassment and discrimination by her immediate supervisor, in violation of N.C. Gen. Stat. §§ 126-36(b)(2)?

5. Whether Respondent retaliated against Petitioner, because she reported sexual harassment and discrimination, in violation of N.C. Gen. Stat. § 126-34.1(7) and 126-84, and 126-85(a1)?

**WITNESSES**

For Petitioner: Petitioner, Rayna Rivera, Jackie Jones, Ann Penn

For Respondent: Ann Penn, Gina Carter, Martha Fowler, Mary Crabtree, Carolyn Efland

**EXHIBITS ADMITTED INTO EVIDENCE**

For Petitioner:

<u>Exhibit No.</u>	<u>Date</u>	<u>Document</u>
1	various	HR log of Arias contacts
2	11/04/10	Typewritten notes of Ann Penn
3	various	Typewritten notes of Ann Penn
4	03/17/11	Typewritten notes of Ann Penn
4.5	03/17/11	Typewritten notes of Gena Carter
4.8	03/21/11	Typewritten notes of Ann Penn
5	03/31/11	Typewritten notes of Ann Penn (Faith Thompson interview)
6	03/31/11	Typewritten notes of Ann Penn (Wayne Blair interview)
7	04/01/11	Typewritten notes of Ann Penn (Irene Ramirez interview)
8	04/01/11	Typewritten notes of Ann Penn (Jackie Jones interview)
9	03/25/11	Typewritten notes of Ann Penn (interview of Petitioner)
10	05/13/11	Confidential Memorandum from Ann Penn to Van Dobson
10.5	05/19/11	Confidential Memorandum from Ann Penn to Petitioner
11	05/06/11	Administrative Review Complaint Investigative Report
12	05/24/11	Email from Ann Penn to Gena Carter, Mari Forbes with attached report from Ann Penn to Van Dobson (05/23/11)
13	06/10/11	Email from Angela Campbell to La-Kristyn McLean re: VSL donations to Maria Arias
14		PRM Report
15	N/A	UNC-CH Policy on Prohibited Harassment and Discrimination

16	N/A	Web page from U.S. Department of Veterans Affairs
17	02/02/11	Memorandum from C. Ray Doyle re: PC Fundamentals Interest Session
18	various	HR log of Arias contacts
19	04/29/11	Talking points for meeting
21	06/10/11	Email from Danna Richards to Ronald Garcia-Fogarty
23	09/17/10	EEOC Charge of Discrimination filed by Amanda Hulon
24	10/21/10	Email from Faith Thompson to Sean Downing re: Good Morning

For Respondent:

Exhibit No.	Date	Document
1	09/30/10	Counseling Memo to Isabel Arias
2	10/20/10	Counseling Documentation to Maria I Arias
3	03/04/11	Handwritten notes of Gena Carter
4	N/A	Brochure for the University Ombuds Office
5	various	Journal of Maria Isabel Prudencio-Arias (in Spanish)
6	various	English translation of Exhibit 5
7	01/10/11	Memo to Isabel from Tonya Sell
8	01/28/11	Letter from Yvonne Duffey to Maria P. Arias
9	12/09/10	UNC Health Care provider's note for Isabel Prudencio-Arias
10	12/03/10	Return to duty note for Maria Prudencio-Arias
11	12/16/10	Return to duty note for Maria Prudencio-Arias
12	N/A	Leave Record for Maria I Prudencio-Arias
13	09/20/10	Form 19 for Isabel Arias, date of injury 9-13-10
14	various	Return to duty notes for Maria Prudencio-Arias
15	N/A	CorVel Log for Maria Prudencio-Arias
16	12/02/10	Form 19 for Maria Isabel Prudencio-Arias, date of injury 12-2-10
17	12/29/10	Emergency Room notes for Maria Prudencio-Arias
18	various	Typewritten notes of Ann Penn
19	various	Emails provided to Ann Penn during investigation
20	06/18/11	Letter to William T. Burston from Ann Penn
21	various	ADA forms for Maria Isabel Prudencio-Arias
22	04/05/11	Typewritten notes of Ann Penn
23	various	Typewritten notes of Ann Penn

### **FINDINGS OF FACT**

#### **Procedural Background**

1. On May 19, 2011, Respondent issued an Administrative Review Report regarding its investigation into Petitioner's complaints of alleged sexual harassment,

retaliation, and discrimination against Housekeeping Services Director William "Bill" Burston. The Director of Respondent's Equal Opportunity/ADA Office, Ann Penn, conducted such investigation, and issued such report. Pet Ex 11.

a. Ms. Penn did not substantiate Petitioner's claims of being sexually harassed by Bill Burston as "many of the most significant allegations came down to the Complainant's word versus the Accused's because there were no witnesses to the majority of the incidents in question."

b. Penn did find that Bill Burston "demonstrated inappropriate behavior and a severe deficiency in judgment for someone at his level." Penn identified some unacceptable management practices and concerns, and recommended that appropriate disciplinary action be taken to address the concerns noted in her review.

2. On July 19, 2011, Petitioner filed a petition with the Office of Administrative Hearings appealing Respondent's May 19, 2011 administrative review. Petitioner's ground for appeal were (1) sexual harassment and (2) retaliation for reporting sexual harassment and harassment due to race (Latino), (3) discrimination and/or retaliation against based on race, sex, color, handicapping condition, and national origin in the form of denial of training, retaliatory transfer, and constructive termination. Petitioner wrote:

I was subjected to continuing hostile and offensive work environment based on my sex; I was subjected to a campaign of continuing racial harassment after initial investigation resulted in discipline for the first harasser; I was subjected to a poorly conducted initial investigation and retaliatory transfer, denied training, and denied adequate notice of rights after providing Agency with 60 days, and agency's scheme for protecting female employees after they complained about sexual harassment subjects them to a second round of humiliation because of their sex. I lost four weeks of vacation leave when retaliation campaign began.

Petition.

#### The Parties

3. The parties received a Notice of Hearing by certified mail more than 15 days prior to the hearing, and each stipulated on the record that notice was proper.

4. Petitioner was born in El Salvador, and raised in Honduras. She is a native Spanish speaker. Petitioner can speak in broken English, and understands some written English. She has difficulty understanding spoken English, especially if the speaker is speaking fast. Petitioner moved to Chapel Hill, North Carolina in 1999.

5. In October of 2006, Respondent hired Petitioner as a "Building and Environmental Specialist," the new term for almost 400 housekeepers, primarily women, who clean the Respondent's facilities. Petitioner is a permanent State employee subject to Chapter 126 of the General Statutes of North Carolina ("the State Personnel Act"). Currently, Petitioner remains employed with Respondent as a housekeeper in the residence halls, or dorms. T. pp. 796-797.

6. Respondent University of North Carolina at Chapel Hill ("UNC-CH") is subject to Chapter 126, and is Petitioner's employer.

Respondent's Grievance Process vs. Administrative Review

7. Respondent has two separate policies by which an employee subject to the State Personnel Act ("SPA") may file a complaint. A SPA employee may file a complaint of sexual harassment with Office of Human Resources (OHR) under Respondent's Dispute Resolution and Staff Grievance Policy ("the Grievance Policy"). Under the grievance policy, an internal grievance is heard first by a supervisor, but may be appealed to a staff appeals panel, and then appealed and heard by the Chancellor as a final decision maker. After completion of the internal grievance process, an appeal may be filed with the Office of Administrative Hearings.

8. Alternatively, a SPA employee may file an administrative complaint with the Equal Opportunity Office ("EEO"). The EEO office conducts an administrative review investigation under Respondent's Policy on Prohibited Harassment and Discrimination (PPHD). If the EEO Office finds that the PPHD has been violated, the EO Office makes recommendations to the appropriate administrator in the department where the complaint originated, including possible recommendations for discipline against the employee who violated the policy. Even if the EEO Office does not find a violation of the PPHD, the EEO Office may make recommendations for addressing other issues, which are discovered during the course of the investigation. T. pp. 547-49

9. Nevertheless, if an employee does not want to move forward with either a grievance or the administrative review process, but the EEO Office learns about allegations of behavior that would have been inappropriate under the sexual harassment policy, the EEO Office may still must conduct an administrative review. T. p. 553

10. Respondent also has an Ombuds Office. This office is a confidential, informal, and independent place where university employees can talk about problems in the workplace, without necessarily having to go forward with a formal investigation or grievance. A complaint made by an employee to the Ombuds Office does not provide notice to the University, under Respondent's grievance or administrative policies that require the Respondent respond to such complaint.

11. By contrast, if an employee advises Respondent's Human Resources or EEO Office that she is being sexually harassed, the University is on notice, and is

obligated to take those allegations forward, even if the complainant does not want to move forward with a complaint. T. pp. 198-200. The OHR acknowledges that as soon as allegations of sexual harassment, discrimination, and retaliation are brought to "our attention, it is our duty and responsibility to look into them." T. pp. 256-57; Resp Ex 4.

#### Petitioner's Claims

12. Approximately 50% of the housekeeping employees at UNC-CH work the night shift, approximately 25% work the evening shift, and the remaining 25% work the day shift. Of the housekeepers working the day shift, one group is assigned to clean the residence halls, and the remainders serve as "day porters." The day porters attend to any housekeeping needs that arise during the day. Most buildings share a group of day porters. Since the School of Government ("SOG") has a lot of conferences and trainings during the day, it has day porters assigned exclusively to it. T. pp. 406-07

13. Within three months of being hired at UNC-CH, Petitioner began working in the SOG as a day porter. Initially, she worked with Jackie Jones, who was also a day porter at the School of Government. The day porters did whatever tasks the night crew did not do, and took care of any cleaning required during the day, such as emptying trash, cleaning the bathrooms, and cleaning up spills. T. pp. 267-69, 295, 332, 334 Petitioner and Jackie Jones were the two day porters at the School of Government from 2006 to January 2010.

14. About the same time Petitioner began working at SOG, Housekeeping Services Director Bill Burston (African American) began meeting Petitioner at her punch out station at the end of her workday. The area where Petitioner clocked in and out of work was an isolated area. Petitioner was usually by herself when she clocked in and out of work, and Burston's statements and looks towards Petitioner made Petitioner feel uncomfortable.

a. Petitioner told her co-worker, Ms. Jones about Burston's behavior. Ms. Jones told Petitioner that Burston's words and actions towards her were not normal. Ms. Jones told Director Burston she knew he was arranging to meet Petitioner as Petitioner was getting off work.

b. Burston became upset, and confronted Petitioner, demanding to know why she told Ms. Jones about his afternoon visits when Petitioner was leaving work. Petitioner said there was nothing wrong with her talking to a coworker. Director Burston told Petitioner she should "be careful because Ms. Jones is not your friend. Don't trust her." (Petitioner's testimony) From 2007 to 2009, Burston did not engage in any of these actions toward Petitioner.

15. Ms. Jones was involved in a car accident, and was out of work for three months. In August of 2009, Dallas Burnette became the supervisor for Ms. Jones and Petitioner. T. p. 296



16. When Jones returned to work in September 2009, Mr. Burnette had become their supervisor. T. pp. 269-70

17. In October 2009, Mr. Burnette and employee Robert Reese informed Petitioner and Jones that one of them needed to move, because of budget cuts. Ms. Jones was given the choice of remaining in the School of Government, and working the night shift, or moving to one of the residence halls and working the day shift. T. pp. 277-79; Pet Ex 11 (UNC-CH 382). Ms. Jones decided to remain at the School of Government, and work nights.

18. After Ms. Jones moved to night porter, Petitioner was the only day porter assigned to the School of Government. Petitioner remained as the day porter at the School of Government until after Christmas. T. pp. 278, 281-82, 288-89; Pet Ex 11 (UNC-CH 378).

19. Around this time, Petitioner informed Ms. Jones that Dallas Burnette was sexually harassing her. Ms. Jones counseled Petitioner to "get you a little tape recorder and record it," when Mr. Burnette said or did things to Petitioner which made her feel uncomfortable and offended her, "so that she would have proof." Ms. Jones also advised Petitioner to give the tapes to HR [Human Resources]." T. pp. 270-73. Ms. Jones also suggested to Petitioner that she tape her interactions with Mr. Burston, but Petitioner did not do so. T. pp. 290-91, 555-56.

20. On January 25, 2010, Petitioner filed a complaint of sexual harassment against her supervisor, Dallas Burnette at Respondent's Office of Human Resources ("OHR"). Pet Ex 18. The OHR referred Petitioner to Ann Penn, Director of Respondent's Equal Employment Office ("EEO").

21. As the Director of the EEO Office at UNC-CH, Ms. Penn's responsibilities included investigating complaints of sexual harassment, and administering and enforcing the University's Policy on Prohibited Harassment and Discrimination ("the PPHD"). T. pp. 27, 557-58; Resp. Mot. to Dismiss Ex. 2; Pet Ex. 15. Penn had conducted over 100 investigations into sexual harassment and retaliation complaints.

a. On January 25, 2010, Penn met with Petitioner and Meredith Wales, who interpreted for Petitioner. Petitioner informed Penn how Dallas Burnette was touching her, and making comments about her breasts. Petitioner also told Penn that she told Bill Burston that Burnette had denied her vacation. T. pp. 659-661.

b. Penn explained to Petitioner, through interpreter Meredith Wales, about that she could file a complaint through the grievance process or through the administrative review process. Ms. Penn also explained to Petitioner the administrative review route, which is conducted by Penn's office. Penn did not explain to Petitioner that if she came to Penn's office, she could not file a grievance at OAH, and she would not be triggering her 60 days under the Whistle Blower Act. T. pp. 46-49.

c. A few days later, Ms. Wales called Ms. Penn, and indicated that Petitioner wanted to pursue the administrative review process with the EEO Office. Penn's office started an administrative review of Petitioner's complaints against Dallas Burnette. T. pp. 46-49, 139-40, 552-53, 559-561; Pet Ex 18.

22. Camille Brooks, with Respondent's EEO Office, conducted the administrative review investigation into Petitioner's complaint against Mr. Burnette. Ms. Penn knew that Petitioner was scared about the investigation involving Mr. Burnette, because she was in contact with Camille Brooks in her office. T. pp. 35-36.

23. On February 9, 2010, Ann Penn informed Burnette's up-line manager, Director Bill Burston, by letter, about Petitioner's complaint against Burnette. (Id.)

24. On February 10, 2010, Petitioner reported to Respondent that no changes had been made in her reporting chain, as she still had to report to Mr. Burnette. Pet Ex 18. Burnette was removed from supervising Petitioner.

25. At Ms. Jones' suggestion, Petitioner had tape recorded her interactions with Mr. Burnette. Petitioner gave the tapes to Ms. Brooks, which were helpful in the investigation of Mr. Burnette.

26. The EEO investigation into Petitioner's allegations against Mr. Burnette "ended March 26, 2010" (Pet Exh 11, p 3). Respondent's EEO office determined that Dallas Burnette had sexually harassed Petitioner. Respondent dismissed Mr. Burnette from his position of Housekeeping Zone Manager on April 15, 2010. Pet Ex 18.

27. In May 2010, Mr. Burnette grieved his dismissal, and later filed a petition with the Office of Administrative Hearings. Burnette grieved such dismissal through at least December 2010-January 2011. Pet Ex 18. Mr. Burston represented management during the grievance hearing, defending his action in dismissing Mr. Burnette. Pet Ex11 (UNC-CH 378)

28. During the time that Burnette appealed his dismissal, Director Burston began spending more time at the School of Government, where Petitioner and Ms. Jones worked. "Director Burston met her [Petitioner] one afternoon and asked, 'Why did you go over there to that office, instead of trusting [me].' . . . He was angry that I had told Ann Penn that Bill Burston should not be asking her about the allegations against Dallas Burnette." T. p. 770 Burston asked Petitioner to give him the evidence she had against Burnette. This upset Petitioner, and she and her interpreter, Meredith Wales, advised the EEO office of Burston's comments.

29. On May 11, 2010, Camille Brooks learned that Director Burston had been asking Petitioner questions "similar to the administrative investigation." Petitioner and her interpreter also told the EEO office that Mr. Burnette was conducting his own

investigation, and "calling employees at Housekeeping and asking questions." Pet Exh 18.

30. Ms. Brooks advised Ann Penn of Burston's remarks to Petitioner. Penn informed Brooks that she should advise Burston that he needed to contact the EEO office regarding any information he needed, and not to contact Petitioner. Brooks told Petitioner that she did not have to tell Director Burston anything about her complaint against Mr. Burnette, and that he could get information about that case from the EEO. Petitioner relayed this to Director Burston, and Burston was upset with Petitioner. (Id.)

31. Director Burston asked Petitioner to ride with him to the grievance hearing in the Burnette case. She declined. Burston explained to Petitioner that he was only asking her to drive with him, because he did not want her to "get in trouble," and "she was special to him." He told her that he knew she did not want Mr. Burnette to come back. After Petitioner declined, Burston seemed angry or upset. (Petitioner's Testimony)

32. Ms. Penn knew about Burston's offering Petitioner a ride to Burnette's grievance hearing, and knew Petitioner was uncomfortable with that. T. p. 46.

33. Jackie Jones advised Petitioner to tape Director Burston also, and to get some pepper spray to defend herself. Petitioner decided not to record Burston's conversations with her. She was afraid of what he might do to her. (T. p. 766-7) Ms. Jones saw Director Burston talking with Petitioner about her vacation. "[Burston] He tried to hug her, she backed away. He would try to close the door when she was by herself, she would say no, I don't feel good." Pet Ex 8.

34. On September 13, 2010, Petitioner lifted a "large trash can barrel filled with a couple of bags of trash" and injured her lower back, ankle, left arm, and shoulder. She reported the incident to her new supervisor, Mr. Corey Parker. Resp Exh 13; Petitioner's testimony.

35. On September 20, 2010, Petitioner filed a Worker's Compensation Form 19, and went to UNC-CH's Employee Occupational Health Clinic (the "EOHC") to be seen for her injured back. The EOHC doctors gave Petitioner restrictions of no wet mopping and no vacuuming, and cleared her to return to work. On September 24, 2010, Petitioner returned to the EOCH, where she was referred to physical therapy, and told to be re-checked in 2-3 weeks. At the same time, Respondent deducted 40 hours of vacation leave from Petitioner's September 24, 2010 paycheck, even though Petitioner had 89.40 hours of sick leave in her account.

36. On September 30, 2010, Housekeeping Zone Manager Juanita Williams issued a counseling session memo for "Poor Job Performance" to Petitioner. The memo stated, "Earlier this week you were observed telling another employee not to take out card board boxes from Knapp-Sanders Building." Resp Ex 1, Pet Ex 1.

37. After Petitioner was injured around the end of September and the beginning of October 2010, some SOG employees complained to Housekeeping Services about the lack of cleanliness in the SOG building, particularly in the restrooms, entrance area, and main stairwell. Resp Ex 19. All of the complaints about the cleanliness of the SOG were communicated to Housekeeping Services by Sean Downing, SOG Director of Facilities and Distribution Services. Resp Ex 23 (specifically, Robert Reese Statement)

38. In October 2010, Petitioner returned to the EPOCH two times concerning her September 13th injuries.

39. On October 5, 2010, Petitioner went to Respondent's Office of Human Resources, and talked with Martha Fowler about the September 30, 2010 counseling session memo. Petitioner did not understand the memo, and told Fowler that she was "working alone in the Knapp-Sanders (SOG) building, that she needs someone to work with her." Pet Ex 1.

a. Martha Fowler took the report from Petitioner, and began a log of all communications she had with Petitioner. T pp 143-44, Pet Ex 1. In her log, Ms. Fowler noted the content of the September 30, 2010 memo. She also noted that the email given to Petitioner, in reference to the September 30, 2010 memo, stated that:

[N]o housekeeper replenished the toilet paper or hand towels in the bathroom near the bookstore in the SOG on September 28, 2010. There were over 160 clients in the building that day.

Pet Ex 1.

b. Ms. Fowler explained to Petitioner that a counseling memo is not a disciplinary action and cannot be grieved. A counseling memo is issued to provide an employee with notice of a deficiency in performance, but does not constitute formal discipline, and is not placed into the employee's personnel file.

40. On October 20, 2010, Mr. Corey Parker, Petitioner's direct supervisor, filed the incident report about the injury Petitioner suffered on September 13, 2010. Parker wrote that Petitioner had been "given an extra trash can to be kept in area so [she] will not have to lift trash can." Resp Ex 13, p 3.

41. That same day, Burston gave Petitioner a "counseling session." He told her that she was not responsive to the SOG employees who had asked her to do something for them, she talked on her cell phone too much, she talked with SOG employees too much, she talked about her harassment case, and she cried at work. Burston told Petitioner that because "trash seems to still be a problem for you," he was putting 10 small cans in the kitchen and cafeteria areas. He also advised Petitioner that

she should not respond to SOG employees' request for help when she is eating lunch, and she should not exceed her doctors' medical restrictions.

42. On October 21, 2010, Faith Thompson, Assistant Dean for Development at SOG, sent an email to Sean Downing regarding the complaints about Petitioner's cleaning. Ms. Thompson advised that:

I am very disturbed that our request to have the hallway, where the mural is located, kept free of debris and large trash dumpsters has [sic] been interpreted as a complaint against Isabel Arias.

When I arrive at 6:15 am, Isabel has not yet arrived in the building, yet the dumpster is sitting near the elevator.

If there are questions concerning our concerns, I would appreciate your checking with us for further clarification. I hope that this helps to identify the issue as an operating/procedural issue and not as a complaint against a particular employee.

Pet Ex 24.

43. On October 22, 2010, Director Burston handed Petitioner a second counseling memo about the verbal counseling session he had with Petitioner two days earlier. The memo was being issued because "the customer contact in your building has communicated to management that you have continued to do things that are unacceptable," and listed all the matters he addressed with Petitioner on October 20, 2010. Resp Ex 2. The memo was dated "10/20/10." Burston wrote that:

The trash seems to still be [sic] a problem for you. I have order ten small trashcans to put in the kitchen and cafeteria areas. These will replace the large cans. With these, you should be able to empty them without assistance from anyone daily. As soon as they are received, I will have them installed.

Resp Ex 2.

44. During this same period, Burston told Petitioner that she must clean floors on her knees, because she was not permitted to use a mop, and that he was not giving her any help. He also told her not to talk to anyone about her injuries or her emotional health.

45. After receiving the October 22, 2010 counseling memo, Petitioner contacted Martha Fowler. Because Fowler did not speak Spanish, and had communication difficulties with Petitioner, Fowler scheduled an appointment to meet with Petitioner on October 27, 2010, and arranged to have a Spanish-speaking employee from Human Resources there to translate. T. p. 147-49; Pet Ex1, Resp Ex 2.

46. On October 27, 2010, Petitioner met with Martha Fowler, Naomi Bullock, and Laura Gonzalez at Respondent's Human Resources office. Petitioner advised them that Burston had told her that she is not allowed a 15-minute break in the morning or afternoon, but is only allowed a lunch break. She is not notified of changes when they occur in the unit. Petitioner reported that Director Burston questioned her about what Jackie [Jones] is doing. Burston also told Petitioner to "stop bringing up the issue of Dallas Burnette." Yet, Petitioner stated that Burston is the one who continues to raise the Burnette issue when she wants to forget about it. Petitioner told the OHR staff that "[s]he feels like the supervisor may not be the one bringing up these issues, but it is Bill [Burston] who keeps coming to her now." Pet Ex 1. During this meeting, OHR staff told Petitioner that Mr. Burnette's second grievance hearing was scheduled for December 2010 or January 2011. Pet Ex 1.

47. At hearing, Petitioner explained that she told Ms. Fowler:

I went to tell them that I didn't accept these documents, because everything that appears here in writing is just a bunch of lies. I told them in the first place, Ms. Juanita Williams wasn't my supervisor. And everybody now was wanting to go around giving me orders. Even the housekeepers from the night shift wanted to give me orders to go ahead and do the stuff that they should have done, but weren't able to do on the night shift.

T. p. 305.

48. Martha Fowler initially understood that Petitioner was complaining about workplace issues. At hearing, she indicated that if she had understood Petitioner to be alleging retaliation, she would have advised Petitioner that she could file a grievance; although counseling memos are not grievable, retaliation is grievable. T. pp. 156-57.

49. Ms. Fowler acknowledged that she does not speak Spanish. T. p. 157. She also acknowledged that based on her observation of Petitioner, such as Petitioner's voice, demeanor, and crying during the October 27, 2010 conversation, she thought Petitioner was terrified. She thought Petitioner was afraid to come to her office. T. pp. 157, 164.

50. On November 4, 2010, Martha Fowler and Naomi Bullock contacted Ann Penn, Director of Respondent's Equal Opportunity/ADA Office ("the EEO Office"), and told Penn about the conversations Fowler had with Petitioner. T. pp. 52-53, 149-50; Pet. Exs. 1, 2

51. Since 2006, Ann Penn has been the Director of Respondent's EEO Office. Before working at UNC-CH, Penn was the Director of Equal Opportunity and the Director of the Women's Center at Kent State University for 10 1/2 years. Before that, she was the Director of Equal Opportunity at Case Western Reserve University for 15

years. T. pp. 25-26. As Director of Respondent's EEO Office, Ms. Penn's responsibilities included investigating complaints of sexual harassment, and administering and enforcing the University's Policy on Prohibited Harassment and Discrimination ("the PPHD"). T. pp. 27, 557-58; Pet Ex. 15.

52. On November 4, 2010, Ms. Penn met with Petitioner, and interpreter Ginia West. Penn took notes of Ms. West's interpretations of Petitioner's statements. T. p. 56; Pet Ex 2.

a. In her notes, Penn wrote that, "The situation is worse than it was before with Dallas [Burnette.] . . . It is not so much the other supervisors, but Mr. Burston." Pet Ex 2. Penn wrote that:

Bill told her she couldn't have a 15 minute break in the morning and afternoon, just her lunch. . . . Bill told her not to use the mop, but she needed to get down on the floor and clean. She still needed to do everything in the building. Told her not to discuss her medical restrictions with anyone. Pet Ex 2, p. 2.

b. At the contested case hearing, Ms. Penn acknowledged that she recalled Petitioner telling her on November 4, 2010 that things were worse since she filed her complaint, and she thought Mr. Burston wanted to bring Mr. Burnette back and wanted her to leave. T. p. 56.

c. During the November 4, 2010 meeting, Petitioner also told Ms. Penn that she "has depression, takes medicine . . . but it doesn't help. She has felt like killing herself." Pet Ex 2, p. 2. Penn acknowledged in her notes that Petitioner told her:

Retaliation, because she filed her complaint. Bill has changed a lot always there looking over her shoulder. [Petitioner] Needs help in the building or she's going to leave. Pet Ex 2, p 3.

53. Based on her November 4, 2010 meeting with Petitioner, Ms. Penn knew as of November 4, 2010 that Petitioner was complaining about retaliation by Burston, and the creation of a hostile work environment from Director Burston. T. p. 64.

54. After the November 4, 2010 meeting, Ms. Penn contacted Respondent's Office of Human Resources and the human resources administrator for Facilities Services. Ms. Penn thought it was unusual that the Director of Housekeeping would give a counseling memo to an employee, rather than a direct supervisor or someone else closer in the chain of command to the employee.

55. On November 12, 2010, Ms. Penn talked with Mr. Burston. Mr. Burston advised Penn that he had received complaints about Petitioner's work performance from SOG management before issuing the October counseling memo to Petitioner. Mr.

Burston explained that Petitioner's direct supervisor, Corey Parker, worked nights and did not work during Petitioner's daytime work hours. Since Mr. Burnette, the zone manager, had not yet been replaced, various people were filling in, including Juanita Williams, who had given Petitioner the first counseling memo. Burston alleged that Robert Reese, the Assistant Director, was afraid to meet with Petitioner since she had filed a complaint against Mr. Burnette, so Burston met with Petitioner, and followed up with the written counseling memo. T. pp. 364-65, 567-73; Resp Ex 18. Penn found Burston's explanation satisfactory.

56. As of November 2010, the University knew there were a large number of concerns about climate in the Housekeeping Department, including allegations of sexual harassment, and "HR could not get a handle on them." There were "rumblings and a number of different incidents" which prompted the University to hire an outside consultant, PRM, to study the problems. Elfland Testimony; Pet Exh 14 - PRM Report.

57. During the fall of 2010, Petitioner reported Director Burston's warm and cold actions towards her to Wayne Blair at the University's Ombuds office.

58. On December 1, 2010, at 10:38 am, Burston came to the SOG building. He told Petitioner that she shouldn't ask anyone for help, and that she had to do it by herself. He told Petitioner that she should get that medical restriction lifted at her next doctor's appointment. He also said:

[A] bunch of other things that I didn't understand because he was talking too fast. Mr. Robert [Reese] repeated what he was saying like a child. Mr. Robert is also afraid of him, everyone is afraid of him.

Resp Ex 6, December 1, 2010 entry.

59. On December 2, 2010, Petitioner filed a report (Form 19) with Respondent, advising that she was emptying a big trashcan, the trashcan fell, and pinned her hands against the wall. T. pp. 499-500; Resp Ex 16.

60. On December 3, 2010, Petitioner was seen by the EOHC. The EOHC cleared Petitioner to return to work, with restrictions, on December 4, 2010. The restrictions were "no wet mopping, no vacuuming, ok to clean classroom." Resp Ex 10.

61. On December 7, 2010, Nancy Burton, Burston's secretary, beeped Petitioner, while Petitioner was working on the second floor of the SOG, and told Petitioner that she had to vacuum inside and outside the SOG. Later on, Burton beeped Petitioner, and told her that Burston said she would have to do it by his orders. Petitioner thought this was a violation of her medical restrictions.

a. After Bill Burston beeped Petitioner, and told to her to clean the second floor men's bathroom, Petitioner mopped the men's bathroom. At 1:58 pm,



Burston beeped Petitioner again, but she didn't answer as she was on her lunch break.

b. At 3:10 pm, Petitioner called Burston back. He ordered her to put hand sanitizer on the walls. Petitioner told Burston she had no idea what he was talking about, and no other supervisor had ever mentioned that to her, or showed her how to do it. Burston said that Petitioner never knows anything. The pain in Petitioner's hands, back, and arm worsened.

c. On December 8, 2010, the pain was so bad that Petitioner "couldn't even walk," and she did not report to work. Resp Exs 6, 16.

62. On December 9, 2010, Petitioner was seen by her personal physician for continued injuries. Petitioner's doctor restricted Petitioner to lifting less than 10 pounds, "no vacuuming, wet mopping for at least 3 weeks." The doctor cleared Petitioner for returning to work on December 20, 2010. Petitioner left the letter for her supervisor, Corey Parker, and went home. T. pp. 392-93; Resp Ex 9.

63. Under University policy, in order for Petitioner to have lost time covered by worker's compensation, she needed a note from the EOHC, not her personal physician. T. pp. 507-08.

64. On December 13, 2010, Petitioner's co-worker called Ann Penn, and reported that Petitioner was receiving harassing phone calls from Mr. Burston about her doctor's note. Ms. Penn talked with Mr. Burston that same day. Burston told Penn that he had asked Mr. Parker, Petitioner's supervisor, to call her and let her know that she needed to get a note from EOHC in order to have her lost time counted under worker's compensation. T. pp. 64-65, 574-575; Resp Ex 18 (UNC 415); Resp Ex 19 (UNC-CH 542)

65. On December 16, 2010, Petitioner returned to the EOHC, and received a note clearing her to return to work on December 16, 2010. Subsequently, Petitioner's return to work date was changed to December 17, 2010. T. pp. 394-96; Resp Ex 11.

66. On December 16, 2010, Ms. Penn met with Petitioner, and an interpreter, Irene Ramirez. Petitioner advised that Penn that on [Tuesday] December 7, 2010, Burston specifically told Nancy Burton that Petitioner had to vacuum leaves outside the entrance to the SOG building. Burston told Petitioner he wasn't going to give her any help. Petitioner told Penn that Burston knew she was in pain, but required her to clean the men's bathroom, including mopping. When she tells Burston she is in pain, he says it is not his problem, not to call her doctor, or get help from anyone. Petitioner did not come to work on Wednesday, December 8, 2010. Petitioner told Penn that she visited her personal doctor on Thursday, December 9, 2010, because they speak Spanish. The Occupational Health [EOHC] does not have Spanish translation, and Petitioner could not understand her options. Resp Ex 18.

67. After talking with Petitioner on December 16, 2010, Ms. Penn "assumed that I may have spoken to Mr. Burston or I may not have, because I'd already had a conversation with him." T. pp. 66-67, 576; Resp Ex 6.

68. From December 20, 2010 through December 29, 2010, Petitioner took vacation leave, along with holiday leave, and returned to work January 3, 2011. Resp Ex 6.

69. On December 29, 2010, Petitioner went to the Emergency Department at UNC Hospitals, complaining of a sore throat, increasing pain in leg, hands, and shoulder, and swelling. The physician who examined Petitioner referred Petitioner to a rheumatologist, and noted a clinical impression as "polyarthritis, possible rheumatoid arthritis." T. pp. 503-05; Resp Ex 17.

70. On January 3, 2011, Petitioner returned to work. Robert Reese advised Petitioner that Director Burston had transferred her, without notice, from her SOG assignment to a large dorm in zone 219. Mr. Reese told Petitioner that he did not know what happened, because he was also on vacation. Resp Exs 6, 18. Petitioner called Ms. Penn, and was very upset because she was being moved from the SOG to a residence hall. That day, Petitioner also saw the doctor. The doctor sent Petitioner home until January 10, 2011. Resp Exh 6; Petitioner's testimony.

71. On January 3, 2011, an adjuster at CorVel requested that Petitioner's worker's compensation case be transferred to a lost time adjuster for investigation, noting that there were discrepancies in the description of the incident. On January 9, 2011, the adjuster noted that Petitioner had a personal medical issue, which should not be addressed as worker's compensation. Resp Exs 8, 15.

72. On January 5, 2011, Ms. Penn talked with Mr. Burston. Burston said the SOG was unhappy with Petitioner's performance. He had another employee who was coming back from a disciplinary action that needed to be placed on day shift, but could not return to the residence halls. Due to Petitioner's medical restrictions, she was unable to do all of the work required in the SOG. Petitioner would work as part of a team in the residence hall, and other people working with Petitioner could support her. For these reasons, Burston decided to place the returning employee in the SOG, and to move Petitioner to the residence hall. T. pp. 63, 289, 320, 576-78, 601-03; Resp Ex 18

73. Ms. Penn talked with Petitioner again on January 7, 2011. Petitioner was still upset about being transferred to the residence hall. She had not been given a reason for the move. Ms. Penn asked if Petitioner would like Ms. Penn to set up a meeting between Petitioner and Mr. Burston, so that Petitioner could have her questions answered. Petitioner agreed to have a meeting, as long as she did not have to meet with Mr. Burston alone. Ms. Penn arranged a meeting for Petitioner, Mr. Burston, and herself. T. pp. 579-81; Resp Ex 18

74. On January 10, 2011, Petitioner returned to work. Tonya Sell, the Assistant Director of Housekeeping for the residence halls, gave Petitioner a memo, in both English and Spanish, explaining Petitioner's duties, given her medical restrictions. Petitioner and the other housekeepers on her team would split the tasks within each bathroom, but each was responsible for their tasks in more bathrooms. T. pp. 380, 601-03; Resp Ex 7

75. In January 2011, Petitioner was "thinking about taking all her pills." She just "wanted to lay in bed in the dark." Pet Ex 4.8. Jackie Jones was aware of the stress Petitioner was under, and called Petitioner. When Petitioner did not answer the phone, Jones drove to Petitioner's home. Petitioner thought about "jumping out of the window." She thought, "there was no escape." Pet Ex 4.8.

76. On January 24, 2011, Petitioner was working on the 7<sup>th</sup> floor, room 714 of her assigned residence hall. She was cleaning a toilet when she suddenly felt a shadow coming up behind her, and it scared her. She turned around to find Bill Burston standing directly behind her. He said, "Hello, lady," and asked how she was. Burston advised Petitioner that he needed the keys to the law school building, and that she needed to empty the closets there. Burston denied Petitioner's request to leave work early so she could retrieve her things from the closet in the other building. He told Petitioner to use her lunch hour to retrieve her things, and told her that if she didn't get her stuff out that day, he would order someone to cut the lock, take her stuff out, and bring it to the dorm. He left very upset. Resp Ex 6, Petitioner's testimony.

77. On January 26, 2011, Ms. Penn facilitated a meeting with Petitioner and Mr. Burston. Tonya Sell and an interpreter also attended. The purpose of the meeting was for Petitioner to learn from Mr. Burston why she had been transferred to the residence hall. Petitioner asked Burston why she was moved without any notice. T pp. 317-18, 586-87; Resp Ex 6. The next day, Petitioner began working in her assigned areas. Her supervisor arrived, and told Petitioner her that she wasn't going to work in her assigned bathrooms, but instead, would have to clean the 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> floors in their entirety. That is 84 toilets, picking up the trash, and three mirrors for each bathroom. Resp Ex 6.

78. On January 28, 2011, CorVel notified Petitioner that it was denying her worker's compensation claim from her work-related injury on December 2, 2010. CorVel denied Petitioner's claim, because the condition "Petitioner is experiencing is personal in nature and not related to her work injury." Resp Ex 8. CorVel had not denied Petitioner's prior worker's compensation claims filed in September 2010. T. pp. 503-04, 506-07; Resp Exs 8, 15, 17.

79. On February 2, 2011, Petitioner and two dozen other housekeepers were invited to attend an introductory computer training session on February 15, 2011 from 8:15 to 9:15 a.m. Pet Ex 17.

80. On morning of February 15, 2011, Petitioner's supervisor, "Mr. Sean" planned to drive Petitioner to the class. When Sean called Director Burston to make sure his driving Petitioner to the class was authorized, Burston told Mr. Sean that he could not drive Petitioner to the class. Burston said Petitioner needed to drive herself to the class, to clock out, and clock back in at 9:00 am. Pet Ex 17, p 2; Resp Ex 6; Petitioner's testimony.

81. On March 2, 2011, Martha Fowler received a call from Dr. James Hill in the EOHC, stating that Petitioner had reported that she "was being persecuted by the supervisors in her unit." Resp Ex 1.

82. Ms. Fowler arranged to meet with Petitioner on March 4, 2011. Ms. Fowler's supervisor, Gena Carter, also attended. During the March 4, 2011 meeting, Petitioner said that Mr. Burston was harassing her and discriminating against her. T. pp. 150-51, 172, 194-95; Pet Ex 1. Ms. Fowler and Ms. Carter made notes of this meeting as follows:

a. Petitioner alleged that Bill Burston was harassing her by coming to the building looking for her. Petitioner was suffering from depression, does not feel good, and cries a lot. She was moved to Hinton-James, a residence hall, without being given a reason.

b. Her doctor placed her on restrictions including the amount of mopping and vacuuming she has to do. She now works 6-hour days from 9 am to 4 pm. Bill told her to paper mop the floor.

b. Before Petitioner moved to Hinton James, Bill never came to the building. Now he comes to the building looking for her. Petitioner is scared of Burston. When he meets with her, he closes the door, and sits too close to her. When Petitioner asked him to open the door, he will open it, but he is not nice to her anymore, but is mad. He waits for her, spends a lot of time on the phone over there. Burston brings up the issue with Dallas Burnette, and yells at her a lot.

c. On February 15, 2011, Petitioner came to work early at 8:00 am to attend a computer class. Her supervisor had agreed to drive her to the class. However, Burston called the supervisor and said he could not drive Petitioner to a computer class, that Petitioner should drive her own car to the class, and for Petitioner to clock back out, and clock in at 9 am.

d. Petitioner's regular doctor told her to rest, but Burston told her he had only accepted note from EOHC. Burston told her not to talk to other employees or the doctor, but only to talk to him.

e. Petitioner talked with Ann Penn on February 25, 2011. She told Burston that she had talked with Ann Penn. On February 25, 2011,

Burston gave her 42 bathrooms to clean. On February 25, her locker was cut, and her supervisor, Sean, said he would pay for the lock.

Pet Ex 1; Resp Ex 3.

83. Ms. Fowler did not have any further contact with Petitioner after March 4, 2011, as Gena Carter took the lead on moving forward with Petitioner's allegations. T. pp. 172, 197-98 Before March 4, 2011, Ms. Carter had been aware that Petitioner had met with Ms. Carter's staff, but Carter understood from Ms. Fowler that Petitioner had complained about some counseling memos and work performance issues raised in the counseling memos. T. pp. 197-98

84. Based on Petitioner's harassment allegations against Mr. Burston, and given that Petitioner was very emotional, Ms. Carter determined that her office was on notice of an allegation of sexual harassment that needed to be investigated. Petitioner mentioned that she had talked with Wayne Blair, the Ombuds at UNC-CH, and with Ann Penn, so Ms. Carter called Mr. Blair and Ms. Penn. T. pp. 198, 201

85. On March 17, 2011, Ms. Carter met with Ann Penn, Petitioner, Ombudsman Wayne Blair, Petitioner, and a friend of Petitioner, Ronald Garcia. Petitioner gave details of specific examples and situations in which she believed she had been harassed by Mr. Burston. T. pp. 198, 201-04; Pet Ex 4; Pet Ex 4.5. Ms. Carter wrote in her notes of that meeting that Wayne Blair was "taken aback" by what was said. Pet Ex 4.5.

a. Petitioner explained how Bill Burston always waited for her to punch in for work. It is a very isolated area. He pretended to be her friend. He told her there was only 34 years difference in their ages, and he had enough energy to play with her son. She told Burston to play with his wife's grandkids. Burston told Petitioner what he had with this wife wasn't formal. Petitioner then knew he wanted to be more than friends. She asked why he was there, and he replied that he was the big boss, and was there to check on the supervisors. Pet Ex 4; Pet Ex 4.5.

b. When Petitioner asked a friend why Burston is here every afternoon, the friend told her to be careful, because Bill likes her. Petitioner's friend Irene told Petitioner to be careful, because he likes the young ones, and that's how he stays young. After Irene asked Burston why he was waiting for Petitioner at the punch in machine, Burston went to Petitioner's workplace and asked Petitioner why she told Irene about him being at Petitioner's workplace in the afternoon. He told Petitioner to be careful because Irene is not your friend. Pet Ex 4; Pet Ex 4.5.

c. Petitioner also advised how Burston sat at a table with Petitioner at a Christmas party maybe two years ago. Burston stuck out his tongue and made faces at Petitioner. Petitioner was uncomfortable. One time, after Petitioner cut

her hair, Burston asked why she cut her hair, and said that beautiful women have long hair. Pet Ex 4; Pet Ex 4.5.

d. Nancy, a SOG secretary, told Petitioner that Burston is waiting for her in the break room. Burston says "Hi lady!" to Petitioner and hugged her. He sits really close to her, tells her she looks sexy, makes tongue gestures at her, looks at her breasts, and talks to her about her breasts. Burston would hug her to the point she couldn't break away. Burston didn't like it when Petitioner offered her hand to him, instead of hugging him. When she and Burston were in the housekeeping room Burston would pull his chair so close that his legs contacted her leg. His mouth was so close, she thought he'd kiss her. Burston would get mad when Petitioner asked him to open the door when they were meeting. Pet Ex 4; Pet Ex 4.5.

e. The last time Petitioner talked with Ann Penn, she returned to work, and had to clean three extra floors, including 84 toilets. She had difficulty cleaning because of her shoulder. Burston sent someone to help Petitioner but he only looked. Pet Ex 4; Pet Ex 4.5.

86. Petitioner also claimed that Burston had discriminated against her by telling her she couldn't take her morning and afternoon 15 minute breaks, and by moving her to the residence hall without notice. Robbie claimed he was following Burston's orders to move her [to residence hall]. Burston also disrespected her medical restrictions by telling her she had to clean the bathroom on her hands and knees. Burston prohibited Petitioner's supervisor from driving her to a February 15, 2011 computer class; yet another employee, Berta, gets a ride at the same time, and to the same class for which Petitioner had signed up. Pet Exs 4, 4.8; Resp Ex 6.

87. On or about March 17 or 18, 2011, Respondent placed Mr. Burston on investigatory leave. He never resumed his duties as Director of Housekeeping. Petitioner never saw Mr. Burston again. T. pp. 390-91, 414-15, 591

88. From March 17, 2011 through May 6, 2011, Ms. Penn and Ms. Mari Forbes, Manager of the Employment and Management Relations Office, conducted an investigation into Petitioner's retaliation, discrimination, and sexual harassment complaints against Director Bill Burston.

89. On March 21, 2011, Ms. Penn and Ms. Forbes met again with Petitioner and an interpreter, because they had not had enough time on March 17 to cover all of Petitioner's allegations. T. pp. 591-92; Pet Ex 4.8. Ms. Penn and Ms. Forbes met again with Petitioner on March 25, 2011 to get clarification of Petitioner's allegations, and to attempt to establish a timeline for the alleged conduct. Penn thought it was difficult to establish such a timeline, because Petitioner was not clear about when things occurred. Penn never asked Petitioner if she tape-recorded Bill Burston, because "my assumption is that if she had any, just as she had with Dallas, that she would have brought those tape recordings." T. p. 743.

90. During the course of the investigation, Ms. Penn and Ms. Forbes interviewed eleven people, in addition to Petitioner, and received emails and other documentation from witnesses. T. pp. 595-97, 609-10; Pet Exs 5 – 8, 11; Resp Exs 1, 2, 7, 19, 22, 23

91. Penn interviewed Burston during the investigation. Burston told Penn that housekeeping employees “are not hired for a particular building, that they are hired for a shift and a zone.” Pet Ex 11, p 5. Director Burston admitted that he directed Petitioner’s supervisor not to transport Petitioner to the computer class. Burston said this because it was before Petitioner’s shift started. Penn said she was unable to determine if Petitioner was treated differently from any of the other employees that morning. Pet Ex 11. Burston admitted driving to the home of another housekeeper, and sitting outside her home to see if she was home. He claimed he did so, because the housekeeper would clock into work, but then go home. Pet Ex 11, p 11; Resp Ex 23.

92. On March 31, 2011 and April 1, 2011 respectively, Ms. Penn and Ms. Forbes interviewed Faith Thompson, Wayne Blair, Irene Ramirez, and Jackie Jones, and made notes of those interviews. Pet Exs 5-8.

a. Faith Thompson (African American) told Penn that Petitioner’s work was excellent, but she had heard there was some concern about her work towards the end. Petitioner told Thompson that she was afraid to punch out of work alone. When Thompson accompanied Petitioner to her punch out area, Burston asked Thompson, “Who are you?” Burston told Petitioner that he “needed to talk to her.” Petitioner looked afraid, so Thompson offered to go with her.

b. Ms. Thompson called Bill Burston after Petitioner was written due to complaints from people in the SOG [in September 2010]. Burston told Thompson that she was sticking her nose in where it didn’t belong, and the complaints were coming from people in pay grades higher than hers.

c. Thompson informed Penn that Petitioner didn’t want to talk to Thompson, and Petitioner wanted to take her life. Thompson reported that Petitioner told her that Bill was having sexual relations with another housekeeper, and the employee told Petitioner, “He’s not that bad to leave it alone.” Petitioner told Thompson that Burston went to the employee’s house and fired her. Pet Ex 5. Even though Ms. Penn saw Thompson’s email telling Sean Downing that the night shift, not Petitioner, left trash by the mural in the SOG, Ms. Penn did not ask Ms. Thompson about that email. T. p. 720-721. Pet Ex 5.

93. Irene Ramirez has known Petitioner for five years. During the investigation, she informed Penn and Forbes that she translated for Petitioner, when an incident happened with Bill Burston in the break room. “Bill was acting kind of frisky touching her hand, felt out of place, strange.” Pet Ex 7. She verified that Burston came to the SOG about little things, screamed at Petitioner about the soap dispenser, and got

angry with Petitioner, calling her dumb. She felt Burston was discriminating against Petitioner because of things that happened with Dallas Burnette. Ramirez confirmed that Burston came to see Petitioner clock in and out of work, and telling Petitioner to be here at a certain or do certain things or she would be written up. Ramirez also confirmed Petitioner's story that Burston "looked like he was coming on to" Petitioner at a Christmas party. Ramirez named other women who expressed concerns about Burston. Pet Ex 7.

94. Jackie Jones informed Penn and Forbes that she observed Burston try to hug Petitioner, and Petitioner backed away. Petitioner told Jones how Burston would try to hug her when she came into the building, and he will "pop up" at SOG and in the dorms when Petitioner was working. Jones confirmed that most of the SOG complaints were about the night shift, but then Dallas moved her to nights. Petitioner then worked the day shift by herself, with "too much work for one person, the building doubled in size." Jones also explained that there was more work in the dorms, bathrooms, and showers. "All this is because of Dallas, retaliation. The supervisors aren't going to do against Bill." Petitioner is afraid of Bill. Pet Ex 8.

95. On April 29, 2011, Penn, and Forbes met with Van Dobson, Facilities Manager and Burston's supervisor, and Carolyn Efland, Vice Chancellor for Facilities, Dobson's supervisor.

a. Penn advised Dobson and Efland that the investigation is taking longer than anticipated. Another female housekeeper had come forward, alleging that Bill Burston sexually harassed her. T. pp. 707 – 709. That housekeeper was Caucasian. She was "terrified of what will happen to her, and we need assurance that there will not be any retaliation against her." Pet Ex 19. Based on the new information, Penn and Forbes requested additional time to investigate the new claim, as part of Petitioner's complaint, and talk with Burston about that new complaint.

b. Ms. Penn and Forbes advised Dobson and Efland of their initial findings, such as substantiation of some inappropriate conduct by Burston, and inappropriate judgment and behavior by Burston. They also found that Burston's direct involvement with Petitioner "could be viewed as punitive and retaliatory since it comes on the heels of a prior complaint made by the employee." Pet Ex 19.

96. Based on what Complainant #2 told Penn, Penn determined that some of the concerns raised by "Complainant #2" against Bill Burston were consistent with those raised by Petitioner. T. p. 713. Specifically, that housekeeper, like Petitioner, complained that Burston met alone with her and closed the door. Like Petitioner, that housekeeper was afraid that something would happen to her. She was also afraid if they used her name, and she was afraid she might lose her job. T. pp. 713-715. That housekeeper told Ms. Penn that Burston got too close to her, and she felt uncomfortable. T. pp. 723-24.



97. A few days later, Penn and Forbes interviewed Burston. Burston admitted meeting alone with the second complainant in his office, but did not admit to any inappropriate behavior. Penn thought, "it was troubling that he met with the employee alone in his office," where he pulled the blinds and shut the door. T. p. 722.

98. On May 6, 2011, Ann Penn issued her investigative report, concluding that Director Burston's actions toward Petitioner:

did not result in a conclusive finding of sexual harassment, the inappropriate behavior demonstrated by [Director Burston] speaks to a severe deficiency in judgment for someone at [his] level.

Pet Ex 11, p 11.

99. Ms. Penn and Ms. Forbes did not substantiate Petitioner's allegations about inappropriate touching, because Mr. Burston denied it and there were no witnesses. They concluded that while Petitioner was clearly upset about things that had happened, it was very difficult to determine what specifically had occurred with Mr. Burnette. Furthermore, Ms. Penn was concerned that Petitioner did not come forward with her allegations against Mr. Burston earlier; in particular, Petitioner did not come forward until after she was moved to the residence hall, which obviously upset her. In Penn's opinion, Mr. Burston, on the other hand, was forthcoming in admitting that he had closed the door when he met with Petitioner, but he denied that he had touched Petitioner inappropriately. T. pp. 610-25; Pet Ex 11.

100. Penn concluded there was evidence of performance issues in the School of Government after Petitioner was injured in September 2010, and that Petitioner was transferred to the residence hall so that her work restrictions could be honored. Penn also found that the investigation revealed evidence contradicting Petitioner's allegation that she was denied the opportunity to attend a computer class, and evidence contradicting Petitioner's allegation that her worker's compensation claim was denied in retaliation for her reporting sexual harassment. T. pp. 610-21; Pet Ex 11.

101. Ms. Penn concluded that Director Burston's actions toward Petitioner "did not result in a conclusive finding of sexual harassment, the inappropriate behavior demonstrated by [Director Burston] speaks to a severe deficiency in judgment for someone at [his] level." Pet Exh 11, p 11.

102. The EEO Report recommended "appropriate disciplinary action or such other action deemed appropriate be taken to address the concerns identified." These concerns included:

- a. Director Burston "being more directly involved with [Petitioner] and her day to day supervision than one would expect of a Director which could be viewed by the employee as punitive and in retaliation for filing a prior sexual harassment complaint against a former supervisor." Pet Ex 11

b. Director Burston did hug Petitioner on one occasion; made faces at her at a Christmas party, and made inappropriate comments about women at the party. (Id.)

c. Director Burston demonstrated questionable judgment and a "lack of situational awareness" in meeting with female employees alone in an office with the door and/or blinds closed, "especially while interacting with an employee who had been the subject of a sustained sexual harassment complaint by a former supervisor." Pet Exh 11, pp 11-12.

d. Director Burston's behavior "could be perceived as invasion of privacy, intimidation, harassment, and stalking-like behavior when he drove to the home of a housekeeper and sat outside her house, waiting to see if she would come out of the house." (Pet Exh 11, p 12)

103. In her additional investigative findings, Penn reported that in approximately 2007, a second housekeeper (Complainant #2) went to Bill Burston's office to discuss extending her schedule changes. After Complainant #2 sat down in Burston's office, Burston closed the door, and blinds to his office. Burston propositioned the housekeeper by telling her "if I do you a favor, you'll do me a favor." He put his hands in his pockets, and shook his hips when he made the comment. It scared her, and her face turned beet red. The housekeeper reported that when Burston saw her face, he said, "You are bad." She left his office. The next day, the housekeeper's schedule was changed, her request was denied, and her direct supervisor, Corey Parker, assigned her more work to do. Penn wrote in her report that Burston denied the allegations, other than meeting with Complainant # 2, and denied giving her more work. Burston claimed Complainant # 2 had been upset for years over the amount of her workload, and that Corey Parker's analysis showed she had less work than another employee in the same building. Pet Ex 11.

104. On May 13, 2011, Ms. Penn sent a copy of her Administrative Review Report to Van Dobson. Pet Ex. 10.

a. On May 18, 2011, Respondent transferred Director Burston to be a Special Assistant to Vice Chancellor Carolyn Elfland. Later, Respondent transferred Burston to a position at the University airport. Burston eventually resigned from employment at the University.

b. On May 23, 2011, Dobson responded to Penn's report, indicating that it had issued a written warning to Bill Burston addressing Burston's poor judgment, ineffective leadership and management practices, and insufficient coordination with OHR and Facilities Services Human Resources. Pet Ex 12. Dobson also indicated that they would review the responsibilities of the Housekeeping Director position, the organizational design, and supervisory structure of the

Housekeeping Services Department, and the Facilities Services Human Resources' interaction with employees. Pet Ex 12.

105. During the summer of 2011, Petitioner was out of work, and took extended medical leave, because of the stress and injuries from her work.

106. On June 19, 2011, the University's shared sick leave coordinator notified Petitioner that her co-workers had donated 344 of their sick leave hours to her. Pet Ex 13.

107. When Petitioner told Ms. Penn that she had suicidal thoughts, Ms. Penn referred Petitioner to the Employee Assistance Program for counseling, but Petitioner could not afford the co-pay. After Petitioner's personal physician referred to her counseling in January 2011, Petitioner received mental health care until July 2011. From July 2011 until June 2012, Petitioner saw a therapist, Rayna Rivera, at El Futuro, for psychotherapy. Ms. Rivera diagnosed and treated Petitioner for Post-Traumatic Stress Disorder (PTSD) and Major Depressive Disorder, Single Episode. Rivera Testimony, Pet Ex 16. Petitioner also saw a psychiatrist on El Futuro's staff for a number of sessions. She was treated by another El Futuro staff member after Ms. Rivera moved to another clinic. T. p. 129.

108. Petitioner's stress disorder was caused and triggered by the actions of Mr. Burnette and Mr. Burston, and being fearful of having to relive the shame and humiliation caused by the acts of her supervisor. After Petitioner worked up the courage to file a complaint against Burnette, the same thing happened again, because of Bill Burston's actions toward her.

109. From March 2011 through September 2011, PRM consultants interviewed 355 housekeepers in Respondent's housekeeping department, Human Resource staff and leadership members, and Respondent's Chancellor to "gain an understanding of the current working conditions and culture in the Housekeeping Department." Pet Ex 14. In its September 29, 2011 report, PRM concluded that:

The overall results indicate that the current practices in the Department have created a culture with employee moral issues, lack of trust, and overall frustration. Analysis of data from all respondents flagged at a "disagree" or "strongly disagree" for 30% or more are summarized below:

- In my work zone, work assignments are made fairly and distributed equitably among employees. 30.1%
- Housekeeping management promotes an environment of treating employees with dignity and respect. 32.7%
- Housekeeping management cares about and is interested in the welfare of its employees. 33.2%
- I am satisfied with communication between Housekeeping management and staff. 33.5%

- Housekeeping management fairly and consistently administers policies and work rules. 34.4%
- Housekeeping management promotes an environment free from harassment, discrimination, and intimidation. 34.6%

Pet Ex 14, pp 4-5.

110. The PRM study found that 49.2% of first-shift housekeepers felt Housekeeping management did not promote a working environment where employees are treated with dignity and respect. The racial and cultural breakdown on this issue is just as troubling. Over 47% of English-speaking Housekeepers felt management did not promote a work environment that treated them with dignity and respect, as opposed to only 11.2% of the non-English speaking staff. Pet Ex 14, p 35.

111. The PRM report noted its interviews were confidential, but "a large number of employees indicated they were fearful they would be fired if management became aware of what they said in the interviews." Pet Ex 14, p 20

a. "Many of those employees seemed anxious and nervous about the possibility" and the outside consultants expressed concern "that this fear may have translated into a more positive assessment of their work environment during the interview than how they actually felt." Pet Ex 14, p 20

b. This concern was found to be justified when the consultants were told "some Housekeeping employees had decided together that they would not say anything negative in the interviews, for fear of the comments leading to retaliation, specifically to the termination of their employment." Pet Ex 14, p 20

c. As opposed to nearly half of the senior and English-speaking staff, which believed they were treated with disrespect, only 11% of non-English speakers dared speak out against management.

112. The PRM report found:

There is a perception among employees that going to central Human Resources results in retaliation and mistreatment when Zone Managers find out about any complaints.

Pet Ex 14, p 39. Some employees did not feel that the central Human Resource Department offered any solutions to their problems, and the "HR representative was not responsive to their needs." Pet Ex 14, p 43.

113. At hearing, a preponderance of the evidence established that as of February 2010, Ms. Penn knew there were harassment and discrimination complaints made from other housekeepers. T. pp. 677-679. In the fall of 2010, Penn was aware that PRM consulting group was asked to come in:

because there were a lot of concerns about the climate and the environment in the housekeeping department. The harassment and discrimination was just one of those issues. There were other issues about the climate and the environment.

T. p. 671. Before completing her investigation into Bill Burston, Penn knew PRM was beginning to interview housekeepers about the working environment in housekeeping services, including people being afraid of filing grievances. In April 2011, Penn had to continue her investigation into Bill Burston after she received a second harassment complaint against Burston by another housekeeper. T. p. 670.

114. A preponderance of the evidence established that on November 4, 2010, Petitioner put Respondent on notice of her retaliation claim when she told Ann Penn and Martha Fowler that Bill Burston was retaliating against her for filing a complaint. T. p. 64. Petitioner told Penn she was depressed, and felt like killing herself. Ms. Penn asked Petitioner if she wanted to file a complaint with the EEO Office, but Petitioner declined. After meeting with Petitioner on November 4, 2010, Ms. Penn contacted Respondent's Office of Human Resources and the human resources administrator for Facilities Services. Ms. Penn acknowledged that she thought it was unusual that the Director of Housekeeping would give a counseling memo to an employee, rather than have a direct supervisor, or someone else closer in the chain of command to the employee.

115. When Petitioner complained to Ann Penn about Bill Burston's behavior in 2010, Ann Penn had been Director of Respondent's EEO office since 2006, and had administered the equal opportunity and sexual harassment/discrimination laws for over twenty-five years. Given Penn's twenty-five years of experience, and her awareness of the ongoing harassment and discrimination complaints in the housekeeping department, she knew, or should have known, as of November 4, 2010, that she had probable cause to investigate Director Burston for retaliating against Petitioner, and for creating adverse and hostile working conditions for Petitioner.

116. Respondent's Grievance Policy obligated the OHR, and Respondent's Policy on Prohibited Harassment and Discrimination (PPHD) obligated Respondent's EEO office, respectively, to investigate Petitioner's allegations of retaliation, harassment, and discrimination when Petitioner advised them of her retaliation and harassment allegations in November of 2010. Pet. Ex. 15; PPHD (Respondent's Motion to Dismiss) However, Respondent failed to properly exercise its duty under its policies as it failed to begin an investigation into Petitioner's allegations until March 2011. Given what Penn knew about the "climate issues" in the housekeeping department and Petitioner being terrified of Burston, Ms. Penn failed to fulfill her duty under the PPHD policy when she simply accepted Burston's explanations for his actions toward Petitioner without any further investigation.

117. At hearing, Respondent's witnesses maintained that they explained to Petitioner, that she could either file a complaint through the administrative review process with the EEO office, or she could file a complaint as a grievance with the OHR. However, neither the OHR nor the EEO office gave Petitioner a copy of the Grievance Policy or the PPHD policy in Spanish. Neither Ms. Penn nor Ms. Fowler spoke Spanish, but instead, relied upon an interpreter to explain the grievance and administrative review options to Petitioner. At hearing, Ms. Penn acknowledged that she did not advise Petitioner that she was waiving her rights to file a grievance at the Office of Administrative Hearings if she chose the administrative review process, instead of the grievance process. T. p. 48. Neither did Respondent have Petitioner sign any waiver, or any other kind of form, acknowledging that she was knowingly choosing to pursue her case against Bill Burston through the administrative review process, and thus, waiving her rights to file a grievance, and pursue a hearing against Bill Burston through Respondent's Grievance Policy.

118. A preponderance of the evidence established that Bill Burston began sexually harassed Petitioner in 2006 by making sexual comments and suggestive sexual faces towards Petitioner when she clocked into work and at a work Christmas party. Beginning in 2010, Burston sexually harassed Petitioner, in an on-again off-again manner, and created a hostile work environment for Petitioner. Burston made frequent visits to locations where Petitioner was working, constantly hugged or attempted to Petitioner, sat close enough to touch her, made sexual comments and gestures towards her, and forced Petitioner to meet with him alone in his office with closed door and blinds. Petitioner was not only uncomfortable with Burston's attention, but was terrified of him.

119. A preponderance of the evidence proved that Director Burston retaliated against Petitioner based on her race and sex, and created a hostile work environment for Petitioner. Burston did so by (1) requiring Petitioner to perform work against her medical restrictions, such as cleaning floors on her knees, and vacuuming leaves outside the SOG building, (2) instructing her that she could not take her two 15 minute breaks during work, (3) assigning her heavier workloads after she visited the EEO office, and (4) transferring her to work in the dorms without notice.

120. The preponderance of the evidence also showed that Burston retaliated against Petitioner, because she filed a sexual harassment claim against her immediate supervisor, Dallas Burnette. Burston's retaliation against Petitioner included attending Petitioner's workplace and yelling at her, having her transferred to work in the residence halls without notice, making her supervisors assign her more work after she complained to OHR and EEO offices, and assigning her to work against her medical restrictions.

121. Burston claimed that he transferred Petitioner to clean the residence halls to accommodate her medical restrictions, and due to the SOG complaints about Petitioner's job performance. However, Burston's explanations were unreasonable and unbelievable.

a. There was some evidence that after Jackie Jones was moved to night shift in January 2010, Petitioner struggled with the amount of workload at the SOG as the only day porter, and was unable to perform her job satisfactorily at the SOG. As a result, there were complaints from the SOG about Petitioner's performance. Sean Downing acknowledged to Ann Penn that "things got worse when they went to one person." Pet. Ex 23.

b. A preponderance of the evidence established that many of the complaints about the cleanliness of SOG was directly related to tasks, such as mopping, and vacuuming, that Petitioner was prohibited from performing because she was injured, and had subsequent medical restrictions.

c. The preponderance of the evidence also demonstrated that the SOG complaints about cleanliness involved the night shift employees. Sean Downing had issues with both day and night shifts. Pet Ex 23 (UNC 442). Brad Volk complained that, "both the day and night shift housekeepers assigned to Knapp-Sanders Building are unproductive." Resp Ex 19 (UNC-CH 508)). Both Jackie Jones and Faith Thompson advised Ms. Penn that most of the complaints about cleaning at SOG was about the night shift not performing their jobs. Thompson's email to Sean Downing confirmed that the night shift employees, not Petitioner, left trash by the mural. Pet Ex. 24

d. While other evidence suggested that Petitioner frequently refused to perform cleaning tasks requested by SOG employees, such as replacing paper towels in the bathroom, that evidence was not corroborated at hearing by any witness with direct personal knowledge.

122. In October of 2010, Director Burston transferred Petitioner to work in the Kenan Flagler School of Business ("Kenan Center"), and moved the Kenan Center's regular housekeeper, Mabel Edwards, to the SOG. This transfer lasted either one day or one week, depending on the witness asked. T. pp. 795-796; Resp Exs 22, 23. Petitioner reported that she only worked there for three days.

123. Contrary to Respondent's assertion that Petitioner was transferred back to the SOG because her work at the Kenan Center was unsatisfactory, the evidence at hearing showed that the Kenan Center simply wanted their regular housekeeper back. During Ms. Penn's investigation, Corey Parker advised Ms. Penn that the Kenan Center "wanted Mabel back [sic], weren't complaining about Isabel." Resp Ex 22. Sean Downing advised Ms. Penn that he heard the [Kenan Center] housekeeper say, 'I have to go back, they don't like Isabel.'" (Resp Ex 23, p 443)

124. Evidence at hearing established that Burston prohibited Petitioner's supervisor from taking Petitioner to a February 15, 2011 introductory session to an upcoming computer class as part of his retaliation against Petitioner. However, Petitioner failed to prove that Respondent actually prevented Petitioner from taking the Personal Computer class for which the interest session was held. Other evidence

indicated the University paid for other computer training that Petitioner attended during work hours.

125. The preponderance of the evidence demonstrated that Petitioner suffered a tremendous amount of emotional distress because of the harassment and retaliatory actions of both Dallas Burnette and Bill Burston. She took leave from work to deal with the stress of her hostile workplace, and received psychotherapy for treatment of her emotional pain and distress. At the time of this hearing, Petitioner remained employed by Respondent as a housekeeper in the campus dorms.

### **CONCLUSIONS OF LAW**

1. Petitioner is a career state employee under N.C. Gen. Stat. § 150B-2, and thus, is subject to the State Personnel Act in N.C. Gen. Stat. § 126-1 *et seq.*

2. N.C. Gen. Stat. § 126-34.1 provides the grounds upon which a state employee or former state employee may file a contested case in the Office of Administrative Hearings. N.C. Gen. Stat. § 126-34.1(e) provides that:

Any issue for which appeal to the State Personnel Commission through the filing of a contested case under Article 3 of Chapter 150B of the General Statutes has not been specifically authorized by this section shall not be grounds for a contested case under Chapter 126.

3. Pursuant to N.C. Gen. Stat. § 126-34, a career State employee must follow the employing agency's grievance procedure as a prerequisite to filing a contested case petition, except for claims of harassment or discrimination. *See Lee v. North Carolina Dep't of Transp.*, 175 N.C. App. 698, 702-03, 625 S.E.2d 567, 570-71 (2006).

4. Pursuant to N.C. Gen. Stat. § 126-34, any career State employee:

having a grievance arising out of or due to the employee's employment and who does not allege unlawful harassment or discrimination because of the employee's age, sex, race, color, national origin, religion, creed, handicapping condition as defined by G.S. 168A-3, or political affiliation shall first discuss the problem or grievance with the employee's supervisor and follow the grievance procedure established by the employee's department or agency. Any State employee having a grievance arising out of or due to the employee's employment who alleges unlawful harassment because of the employee's age, sex, race, color, national origin, religion, creed, or handicapping condition as defined by G.S. 168A-3 shall submit a written complaint to the employee's department or agency. The department or agency shall have 60 days within which to take appropriate remedial action. If the employee is not satisfied with the



department or agency's response to the complaint, the employee shall have the right to appeal directly to the Office of Administrative Hearings.

5. Any employee who alleges discrimination must file either a grievance with the employing agency or a petition with the Office of Administrative Hearings within 30 calendar days of receipt of notice of the alleged discriminatory act. N.C. Gen. Stat. § 126-38; 25 N.C.A.C. 1B.0350; 25 N.C.A.C. 1J.1204.

6. N.C. Gen. Stat. § 126-38 requires that an employee appealing any decision or action must file a petition for a contested case with the Office of Administrative Hearings "no later than 30 days after receipt of notice of the decision or action which triggers the right of appeal."

#### Jurisdiction

7. In this case, Respondent asserts that the Office of Administrative Hearings lacks jurisdiction over Petitioner's claims because Petitioner failed to file a grievance under Respondent's internal Grievance Policy, and because she failed to file a contested case petition in a timely manner.

a. Respondent asserts what is commonly called a *Faragher* defense. In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the U.S. Supreme Court required employers to act promptly and effectively in responding to a woman's complaint of sexual harassment if they wanted to limit their liability for damages under Title VII. The Court held that if the City of Boca Raton were to act quickly and effectively on her complaints, then the City would limit its liability to pay damages to her for her emotional damages. On the other hand, if the City dawdled, or its remedies did not effectively provide Ms. Faragher's right to a discrimination-free workplace, then the City and its deeper pockets were available to pay proven damages.

b. On the same day, the Supreme Court reiterated this approach in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), holding that by providing monetary disincentives, the Court could effectuate the purposes of anti-sex harassment law and eliminate gender discrimination in the workplace.

8. The principles of law in these federal decisions give important guidance to the undersigned here, in that employers must do more than promulgate written policies prohibiting sexual harassment; they must also effectively and promptly investigate and remedy any allegations of such harassment.

9. Respondent promulgated two written policies outlining what an employee can do when she feels harassed or discriminated against. An employee may either file a formal "grievance" with Office of Human Resources, or request an "administrative review" by Respondent's EEO office and its PPHD policy. Pet Exh 15, Appendix D, pp D-1-5. Respondent's PPHD policy states that an employee with a sex harassment and

retaliation complaint "is responsible for conveying her complaint to the appropriate administrator or supervisor, either orally or in writing; however, a written statement is not required. The administrator is responsible for documenting the complaint and having the individual review and indicate that it is correct." Pet Exh 15, D-3

10. Respondent argued that both Ann Penn of the EEO office, and Martha Fowler of OHR explained those options to Petitioner, but that ultimately, Petitioner chose to pursue her complaint against Director Burston through the administrative review process with Ann Penn's office. Respondent also asserted that after it opened its formal investigation into Petitioner's allegations on March 17, 2011, Petitioner failed to make clear that she wanted to file a grievance, so Respondent assumed she was merely asking for an "Administrative Review."

a. However, a preponderance of the evidence showed that neither Ms. Penn nor Ms. Fowler spoke Spanish, but relied upon an interpreter to talk with, and advise Petitioner of her option to choose the "grievance" process or the administrative review process.

b. Neither the EEO office nor the OHR provided Petitioner with a copy of the Grievance Policy or the EEO office's harassment policy (PPHD) in Spanish. Ms. Penn acknowledged at hearing that she did not advise Petitioner that she was waiving her rights as a "grievant" if she pursued her complaint against Bill Burston through the administrative review process.

c. Based on the foregoing evidence, Respondent failed to inform Petitioner that she would not be considered a "Grievant," and thus was waiving her rights to a hearing, and to appeal to the OAH, if she pursued her complaint against Bill Burston through Respondent's administrative review process with the EEO office. As such, Respondent's argument that the Office of Administrative Hearings lacks jurisdiction over Petitioner's claims because Petitioner failed to file a grievance, is without merit.

11. Respondent also asserted that Petitioner failed to appeal her claims in a timely manner after experiencing harassment and retaliation. However, the preponderance of the evidence showed otherwise.

a. A preponderance of the evidence established that Petitioner made complaints to the OHR and the EEO office within 30 days of Bill Burston taking retaliatory actions against her. Beginning from October 2010 through March 2011, Petitioner made informal complaints with Respondent's OHR and EEO office, sometimes with interpreters present. When Dallas Burnette's grievance was ongoing, Burston intimidated Petitioner by offering her a ride to the grievance hearing, and with verbal intimidation. Burston retaliated against Petitioner by issuing counseling memos to Petitioner, by transferring her to clean the residence halls with notice, and by having more work assigned to Petitioner every time Petitioner would complain to Ms. Penn.

b. As of November 4, 2010, Petitioner put Ann Penn of Respondent's EEO office, and Respondent's OHR office on formal notice that she was being retaliated against by Housekeeping Director Burston. Given Penn's twenty-five years of experience, and her awareness of the ongoing harassment and discrimination complaints in the housekeeping department, Penn knew, or should have known, as of November 4, 2010, that she had probable cause to investigate Director Burston for retaliating against Petitioner, and for creating adverse and hostile working conditions for Petitioner.

c. Yet, Respondent failed to properly exercise its duty under its policies as it failed to begin an investigation into Petitioner's allegations until March 2011. Respondent's EEO office failed to fulfill its duty under its PPHD policy when Ann Penn simply accepted Burston's explanations for his actions toward Petitioner without any further investigation.

12. Respondent contends that Petitioner failed to file her contested case petition in a timely manner. N.C. Gen. Stat. § 126-38 requires that an employee appealing any decision or action must file a petition for a contested case with the Office of Administrative Hearings "no later than 30 days after receipt of notice of the decision or action which triggers the right of appeal." 25 NCAC IJ.1207 states that:

In every employee grievance in which the grievant has the right of appeal to the State Personnel Commission (SPC), the final decision of the agency head must inform the grievant in writing that any appeal from the final agency decision must be made to the SPC within 30 days after receipt of notice of the decision or action which triggers the right of appeal. Further, the agency shall inform the grievant in writing that an appeal to the SPC shall be made by filing a petition for contested case hearing with the Office of Administrative Hearings.

13. In this case, Respondent's May 6, 2011 Administrative Review Report failed to provide Petitioner with a final agency decision with requisite appeal rights, as required by 25 NCAC IJ.1207, and failed to provide Petitioner an adequate response from which she could determine whether she was satisfied with it. As a result, Respondent's "Administrative Review" process, administered through its PPHD, was inconsistent with the statutory rights of Petitioner as provided in N.C. Gen. Stat. §§ 126-34, 34.1, 36 and 84 and 25 NCAC IJ.1207. Therefore, Respondent acted arbitrarily and capriciously, and violated Petitioner's constitutional due process rights when Respondent investigated Petitioner's allegations of harassment, sexual harassment, discrimination, and retaliation under the PPHD, and failed to notify Petitioner of her proper appeal rights. Without notifying Petitioner of her appeal rights, the time line by which Petitioner was required to file her appeal with the Office of Administrative had not begun, and Petitioner timely filed her appeal with the Office of Administrative Hearings.

14. Based on the foregoing reasons, the Office of Administrative Hearings has jurisdiction over Petitioner's claims.

Harassment, Sexual Harassment and Retaliation Claims

15. N.C. Gen. Stat. § 126-34.1(10) provides that a State employee may file an action directly with OAH when the allegations involve harassment in the workplace based on age, sex, race, color, national origin, religion, creed or handicapping condition whether the harassment is based on the creation of a hostile work environment or upon a quid pro quo.

16. N.C. Gen. Stat. § 126-36(b) provides in relevant part that:

Subject to the requirements of G.S. 126-34, any State employee . . . who has reason to believe that the employee has been subjected to any of the following shall have the right to appeal directly to the State Personnel Commission:

(1) Harassment in the workplace based upon . . . sex, . . . whether the harassment is based upon the creation of a hostile work environment or upon a quid pro quo.

(2) Retaliation for opposition to harassment in the workplace based upon . . . sex, race, color, national origin, . . . or handicapping condition, whether the harassment is based upon the creation of a hostile work environment or upon a quid pro quo.

17. The United States Supreme Court has recognized that sexual harassment that creates a hostile or abusive atmosphere in the workplace may give rise to a claim of sex discrimination under Title VII. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986).

18. A hostile work environment based upon harassment is present when "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367 (1993).

19. To establish a hostile work environment claim, Petitioner must prove that: (1) the conduct in question was unwelcome; (2) the harassment was based on race and sex; (3) the harassment was sufficiently severe or pervasive to create an abusive working environment; and (4) there is some basis for imposing liability on the employer. *White v. Federal Exp. Corp.*, 939 F.2d 157, 159- 60 (4th Cir. 1991).

20. In determining whether a workplace environment is sufficiently "hostile" or "abusive" one looks to the totality of the circumstances including the frequency of the

discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Harris*, 510 U.S. 17 (1993).

21. The State Personnel Commission defines "unlawful workplace harassment" as "unsolicited and unwelcome speech or conduct based upon . . . sex that creates a hostile work environment or circumstances involving quid pro quo." 25 N.C.A.C. 1J.1101(b)(1). A "hostile work environment" is defined as "one that both a reasonable person would find hostile or abusive and one that the particular person who is the object of the harassment perceives to be hostile or abusive." 25 N.C.A.C. 1J.1101(b)(2). A hostile work environment is determined "by looking at all of the circumstances, including the frequency of the allegedly harassing conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance." *Id.*

22. Petitioner proved by a preponderance of the evidence from October 2010 through at least March 2011, Burston sexually harassed Petitioner, in an on-again off-again manner, and created a hostile work environment for Petitioner.

a. Burston made frequent visits to locations where Petitioner was working, constantly hugged or attempted to hug Petitioner, sat close enough to touch her, made sexual comments and gestures towards her, and forced Petitioner to meet with him alone in his office with a closed door and blinds. Burston told Petitioner she was special, and not to talk to anyone.

b. In its Administrative Review Report, Respondent admitted that some witnesses corroborated Petitioner's statements that Director Burston repeatedly made comments about Petitioner's figure, stuck his tongue out and wiggled it at Petitioner in a suggestive manner, hugged Petitioner tightly and excessively, repeatedly followed Petitioner to the isolated area where she clocked out, and implied that he was available after she clocked off. Burston straddled his legs around Petitioner's legs, after closing the door and blinds, to meet with Petitioner in his office. Collectively, these actions demonstrate pervasive sexual harassment in violation of N.C. Gen. Stat. § 126-36(b)(1).

23. Petitioner proved by a preponderance of the evidence that Respondent's Bill Burston retaliated against Petitioner for filing a sexual harassment claim against Dallas Burnette in violation of N.C. Gen. Stat. § 126-36(b)(2). The uncontroverted evidence is that Mr. Burnette expressed a strong and continuing interest in Petitioner prevailing in a grievance against her supervisor. During the grievance process of Dallas Burnette, Director Burston urged and cajoled Petitioner to tell him about the information she gathered against Dallas Burnette. He wanted to drive her to a meeting on the Burnette case, because she was "special" to him. In addition, Burston was not happy about Ms. Jones, a seasoned employee, advising her Latino friend, Petitioner, not to meet with Burston alone when Petitioner she clocked out. Burston advised Petitioner

that coworkers Jones and Ramirez were not her friends, in an attempt to remove Petitioner's support system.

24. Burston's retaliation against Petitioner included transferring Petitioner to work in the residence halls without notice, making her supervisors assign her more work after she complained to OHR and EEO offices, and individually demanding that she perform work against her medical restrictions.

25. Respondent initially presented legitimate, non-discriminatory reasons for Burston issuing counseling memos to Petitioner, and transferring Petitioner from the SOG to work in the residence halls. Respondent, under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) burden-shifting proof structure, proffered evidence that the SOG employees were unhappy with the cleanliness of the building after Ms. Jones was transferred to the night shift, leaving Petitioner as the only Day Porter. Taken separately and out of the context, some of the proffered reasons for issuing counseling memos to Petitioner and transferring Petitioner to clean the dorms, seem to be legitimate business reasons that provide some rebuttal to Petitioner's allegations of retaliatory and sexual motivation.

26. However, Respondent failed to meet its burden of proof to persuade the undersigned that the real reason for these adverse employment actions toward Petitioner were legitimate business reasons, devoid of retaliatory or discriminatory animus. At hearing, Respondent gave no first hand rebuttal of any of the allegations made about Burston's behavior toward Petitioner. Instead, a preponderance of the evidence established that Burston's harassing behavior towards Petitioner was a part of the overall pervasive problems in Respondent's housekeeping department. The results of the PRM study, and statements by other employees during the administrative review corroborated Petitioner's allegations that Burston was sexually harassing, and retaliating Petitioner. Burston's stated reasons for his counseling Petitioner, and for transferring her to another location to clean, were pretextual in nature, and were motivated by a sexual and retaliatory animus.

27. Burston's harassment was unwelcome, hostile, and sufficiently severe or pervasive to create an abusive working environment for Petitioner. Petitioner was not only uncomfortable receiving Burston's attention, but was terrified of him. Petitioner suffered severe emotional distress, became clinically depressed, and contemplated suicide as result of Burston's harassment. She took leave from work, and received professional therapy to deal with her emotional pain and distress. While Respondent reassigned Burston to another position, they only issued the minimal disciplinary action of a written warning to Burston for his actions.

#### Whistleblower Claim

28. In 1989, the North Carolina legislature passed Article 14 of the State Personnel Act, titled the Whistleblower Act. The Act's express purpose and policy is to "encourage" state employees to report what they believe in good faith are illegal or

improper acts by their managers or other state employees. The Whistleblower Act provides comprehensive protections to those who risk their livelihoods by reporting wrongdoing. N.C. Gen. Stat. § 126-84. In 2002, the Whistleblower Act was found to cover reports of sexual harassment by state employees. *Wells v. N.C. Dept. of Correction*, 152 NC App 307, 2002. In other words, a “state employee may choose to pursue a [w]histleblower claim in either [a judicial or an administrative] forum, but not both.” *Swain v. Efland*, 145 N.C.App. at 389, 550 S.E.2d at 535.

29. “[The] Whistleblower Act ... requires a Petitioner to prove evidence in order to establish a prima facie case: ‘(1) that the Petitioner engaged in a protected activity, (2) that the Respondent took adverse action against the Petitioner in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken against the Petitioner.’ ” *Holt v. Albemarle Reg'l Health Servs. Bd.*, 188 N.C.App. 111, 115, 655 S.E.2d 729, 732 (quoting *Newberne v. Department of Crime Control & Pub. Safety*, 359 N.C. 782, 788, 618 S.E.2d 201, 206 (2005)), *disc. review denied*.

30. Petitioner established the first prong of a Whistleblower claim under N.C. Gen. Stat. § 126-84 and -85 by showing that she reported to Respondent that her immediate supervisor was sexually harassing her. However, Petitioner failed to establish the second prong of a Whistleblower Claim that Respondent took an “adverse action” against Petitioner “in her employment.”

#### Discrimination Claim

31. N.C. Gen. Stat. § 126-34.1(a)(2) gives the Office of Administrative Hearings jurisdiction over the following:

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

b. Demotion, reduction in force, or termination of an employee in retaliation for the employee's opposition to alleged discrimination on account of the employee's age, sex, race, color, national origin, religion, creed, political affiliation, or handicapping condition as defined by Chapter 168A of the General Statutes.

32. Petitioner failed to prove by preponderance of the evidence that Respondent discriminated against her by denying her training. There was no evidence that Petitioner was denied or prohibited from taking the actual computer class that was discussed during the February 15, 2011 interest session. In addition, other evidence indicated the University paid for other computer training that Petitioner attended during work hours.

33. While Petitioner proved that Respondent failed to respond to her sexual harassment, retaliation, and discrimination complaints against Bill Burston in a timely manner, she failed to prove that Respondent's failure was based on a sexual discrimination motive against Petitioner.

34. Since Petitioner remains employed by Respondent, Petitioner failed to prove that Respondent constructively discharged her from employment.

### **DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that:

1. Petitioner proved by a preponderance of the evidence that Respondent violated her right to a discrimination-free and retaliation-free workplace, as provided for in N.C.G.S. §§ 126-34, 34.1, and 36. Respondent's Director of Housekeeping harassed Petitioner, based on her race, and sex, and created a hostile work environment for Petitioner in violation of N.C. Gen. Stat. § 126-36(b)(1), and 126-34.1(a)(1).

2. Petitioner proved by a preponderance of the evidence that Respondent violated her right to be protected from retaliation for reporting illegal acts, namely sex harassment by her supervisor and her Department Director. Respondent's Director of Housekeeping retaliated against Petitioner, based on her race, and sex, because Petitioner reported sexual harassment and discrimination by her immediate supervisor in violation of N.C. Gen. Stat. § 126-36(b)(2).

3. Respondent acted arbitrarily and capriciously in applying its Policy on Prohibited Harassment and Discrimination (PPHD) in investigating Petitioner's claims of harassment, sexual harassment, discrimination, and retaliation, and as such, violated Petitioner's due process rights under Chapter 126 of NC General Statutes.

4. Given the above determination of discrimination and harassment, and pursuant to N.C. Gen. Stat. § 150B-33(11), and § 126-4, the undersigned determines the Respondent should reimburse Petitioner for her reasonable attorney's fees. Given the undersigned's above determination, Respondent should place Petitioner in a housekeeping position where Petitioner is free from retaliation and harassment by any supervisors, and free from being forced to work beyond any ongoing medical restrictions.

5. Pursuant to N.C. Gen. Stat. § 126-4, the State Personnel Commission should direct Respondent to amend and simplify its policies regarding the reporting of harassment, retaliation and discrimination to comport with state and federal statutory requirements, particularly NC General Statute 126, and applicable state administrative codes.

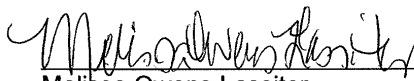


**ORDER AND NOTICE**

Pursuant to N.C. Gen. Stat. 150B-36(a), the agency making the final decision in this case, the State Personnel Commission, is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to it. The agency making the final decision is required to serve a copy of the final decision on all parties and to furnish a copy of the final decision to the parties or their attorneys of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C. Gen. Stat. 150B-36(b).

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

This the 28th day of March, 2013.

  
Melissa Owens Lassiter  
Administrative Law Judge

On this date mailed to:

Alan McSurely  
Attorney at Law  
109 North Graham St - Suite 100  
Chapel Hill, NC 27516  
Attorney - Petitioner

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

This the 28th day of March, 2013.



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



**WITNESSES**

For Petitioner: Gerald Price

For Respondent: Stephen Benjamin, Sharon Woodard

**FINDINGS OF FACT**

**Procedural Background**

1. Petitioner is a career status employee of the Respondent in a position subject to the State Personnel Act.

2. On June 7, 2011, Respondent dismissed Petitioner from employment for engaging in unacceptable personal conduct. In the dismissal letter, Respondent stated:

The specific conduct issue for which you are being disciplined is plagiarism. Specifically, you submitted to your supervisor and NIST your Intermediate LAP problems package which included work that was not your own. LAP problem #2 included some identical phrasing as found in Mr. Van Hyder's submission. LAP problem #3 was partially copied from Mr. Cliff Murray's submission, with all of your 'observed' environmental conditions and balance results being identical to his while using a different balance 5 years later.

(Resp Exh 4)

3. Petitioner appealed his dismissal through the Respondent's internal grievance process. On June 16, 2011, Asst. Commissioner Isley met with Petitioner. During this meeting, Petitioner admitted that he used another employee's measurements in his work in answer his LAP problems. (Respondent's Exhibit No. 5) Based on his meeting with Petitioner and the documents he received from Ms. Woodard and Mr. Benjamin, Isley concluded that Petitioner's actions constituted plagiarism, were fraudulent, and represent a serious issue of unacceptable personal conduct. (Respondent's Exhibit No. 5) Isley upheld Petitioner's dismissal.

4. The Employee Relations Committee ("ERC") upheld Mr. Benjamin's decision to dismiss Petitioner for unacceptable personal conduct. (Respondent's Exhibit No. 6) The ERC found that Petitioner admitted that he did not follow the written directions for completing the LAP problems. While there is no policy against plagiarism, Respondent's plagiarism constituted unacceptable personal conduct. (Respondent's Exhibit No. 6) The ERC found that Petitioner failed to demonstrate his ability complete the LAP problems by knowingly submitting the work of others as his own. (Respondent's Exhibit No. 6)

5. On July 19, 2011, Respondent's Secretary Steve Troxler issued a Final Agency Decision upholding Respondent's dismissal of Petitioner from employment. (Respondent's Exhibits 5, 6) Troxler advised, "The severity of your actions could have potentially jeopardized the accreditation of the Standards Lab and the integrity of the department." Petitioner "knowingly submitted to management and to NIST your intermediate LAP problems package which included work that was not your own." The LAP problems were designed to evaluate your analytical skills and not the analytical skills of your former colleagues." (Respondent's Exhibit 1)

6. On July 26, 2011, Petitioner filed a contested case petition with the Office of Administrative Hearings appealing his dismissal from employment. In his petition, Petitioner stated:

Petitioner, a career state employee, was dismissed by the employer without just cause for disciplinary reasons in violation of G.S. 126-35 on the grounds of alleged 'plagiarism' that violated neither Respondent's policy nor the law. By taking these actions, Respondent deprived Petitioner of property, and substantially prejudiced Petitioner's rights, and additionally (1) exceeded its authority or jurisdiction, (2) acted erroneously, (3) failed to use proper procedure, (4) acted in violation of constitutional provisions, (5) failed to act as required by law or rule, and/or (6) was arbitrary, and capricious and/or abused its discretion. Petitioner exhausted all administrative remedies prior to filing this petition.

(Petition)

Adjudicated Facts

7. At the time of his dismissal from employment, Petitioner was employed as a "Metrologist I" in Respondent's Standards laboratory under Sharon Woodard's management.

8. Respondent's Standard's Division (hereinafter the "Division") is a regulatory agency responsible for enforcing the NC Weights and Measures Act (N.C. Gen. Stat. Ch. 81A), the Gasoline and Oil Inspection Law (N.C. Gen. Stat. Ch. 119), and the LP-Gas Inspection Law (N.C. Gen. Stat. § 119, Art. 5).

9. The Division's Standards Laboratory provides measurement standards for various operations of the Respondent around the state. The Standards Laboratory "performs mass, length, volume, and temperature measurement calibrations that are traceable to national standards." The National Voluntary Laboratory Accreditation Program (NVLAP), a program administered by the National Institute of Standards and Technology (NIST) of the U.S. Department of Commerce, accredited the Standards Laboratory. (Respondent's Exhibit 2)

10. The Standards Laboratory employs metrologists to certify and calibrate weight and measurement instruments that the Division's field staff uses to determine whether private equipment used in commerce, such as scales and gasoline pumps, are accurate and comply with the NC Weights and Measures Act, and the Gasoline and Oil Inspection Law. The Standards Laboratory also tests and calibrates measurement equipment of private businesses to enable those businesses to operate scales and measurement equipment that is traceable to the NIST's industry standards.

11. Proper calibration of the Division's equipment is important, because the Division's Director is authorized to either issue civil penalties for violations of the NC Weights and Measures Act, and the Gasoline and Oil Inspection Law, or refer violations of such Acts for criminal prosecution.

12. Continued NVLAP accreditation of the Standards Laboratory requires the Standards Laboratory conduct formal training to qualify its metrologists to perform mass, volume and other calibrations. Having sufficient number of qualified metrologists to perform specific calibrations is one requirement for maintaining NVLAP accreditation with NIST.

13. The Standards Laboratory manager, Sharon Woodard, is responsible for its formal training program, and reports directly to the Division's Director, Stephen Benjamin.

14. From April 16 to April 20, 2007, Petitioner attended and successfully completed training at the Southeast Measurement Assurance Program, conducted by the U.S. Department of Commerce, and NIST. (Respondent's Exhibit No. 8)

15. Part of the Southeast Measurement Assurance Program required Petitioner to demonstrate proficiency by completing a set of ten (10) Intermediate Laboratory Audit Problems ("LAP problems"). The Standards Laboratory also required Petitioner to complete these LAP problems. (Respondent's Exhibit No. 9) Petitioner did not get any additional pay for completing the LAP problems nor did he receive an enhancement of position.

16. As the laboratory manager, Woodard can assign work based on the signatory status of echelon 1, echelon 2, or echelon 3. An employee cannot be scheduled for certain assignments until he or she completes a certain echelon rating or level. A Metrologist I can have signatory status of some, but not all mass, at all weights. In 2011, there were other laboratory employees performing echelon 1 and 2 level procedures. However, Petitioner was restricted to echelon 3, or basic metrology testing.

17. On January 7, 2011, Ms. Woodard issued a written warning to Petitioner for the unacceptable job performance of failing to complete the Intermediate LAP problems by a given deadline of December 30, 2010. (Respondent's Exhibit No. 11)

18. In the particular LAP problems at issue, Petitioner (or other problem solver) would obtain measurements from a weight or weights found in the Standards Lab, and then conduct certain analyses of them.

19. However, Petitioner used measurements taken by co-workers, instead of obtaining his own measurements, and used those coworkers' measurements to complete LAP problems 2 and 3. Petitioner explained that the weights used to obtain the required measurements, were being used for another project. Petitioner felt under pressure to complete the problems.

20. While Respondent has policies regarding Standards in its Standards Manual, none of these policies addresses, or prohibits, by their terms the actions for which Petitioner was dismissed. Respondent had no other underlying policy, which expressly addressed or prohibited plagiarism.

21. At hearing, Ms. Woodard explained that Metrologist I employees are expected to work on the LAP problems during regular work hours, and to use any and all equipment and reference materials available to them in the workplace to complete the problems.

22. The directions for the LAP problems state, in part, that the problems:

Have been revised to develop your interpretation of training materials and assess your ability to evaluate and integrate procedures and measurement control processes in the laboratory. Most of the problems will not have a right or wrong answer but will evaluate your thinking process in addition to your measurement skills. Provide a calibration report for each problem as appropriate: 3, 4, 5, 9.

(Respondent's Exhibit No. 9)

23. Ms. Woodard completed and submitted the LAP problems to NIST while she had been employed as a Metrologist I in the Standards Laboratory. It took her about 6 months to complete the Intermediate LAP problems.

24. The LAP problems duplicated routine calibration tasks a Metrologist I performs in the Standards Lab, except that, in an actual calibration, the employee would input his measurements and other required data values into a computer application for the calibration, and the computer application would do the calculations and report the result.

25. The LAP problems required the Metrologist employee to perform the calibration "by hand," following a standard operating procedure (SOP) comprised of taking measurements, using a calculator to perform the mathematical calculations using the measurement data and other values, and then interpreting the results according to what the metrologist employee understands about the specific calibration being performed.

26. Having the metrologist complete the LAP problems was part of a training process in which the metrologist demonstrated that he or she was capable of performing specific mass, volume, and other calibrations independently. The training program's objective was to have as many metrologist employees trained to perform as many calibrations independently as possible. Achieving that objective would allow her to assign each metrologist a greater variety of calibrations, thus leading to greater flexibility and quality in the services being provided to the Standard's Laboratory's customers.

27. If a metrologist provided an incorrect answer to a LAP problem, it would not be a reason for disciplinary action; rather, it would indicate that the metrologist needed additional training.

28. If a metrologist employee failed to complete and turn in his or her LAP problems, it could lead to successively lower grades on his or her Performance Management Work Plan, as had happened with Petitioner.

29. Woodard acknowledged that it was acceptable for the metrologists to help each other with completion of the LAP problems, as far as one employee could answer another's questions, or show his colleagues his answers to problems.

30. Sometime before she reviewed Petitioner's LAP problems, Ms. Woodard saw Petitioner's LAP problems lying on his desk when she was turning off Petitioner's computer before leaving work. She also saw another set of problems with different writing underneath Petitioner's problems. She asked another employee to verify what she saw. She advised her boss of her observation, but did not suspect plagiarism at that point.

31. On or about May 30, 2011, Petitioner completed and submitted his LAP problems to NIST, and gave Woodard a copy of such problems. Woodard reviewed Petitioner's answers to the LAP problems. After reviewing Petitioner's answers to the LAP problems, Woodard checked another employee's problems (Murray), and discovered Petitioner had copied the answers from Murray's LAP problems.

a. Mr. Murray had used a specific balance instrument in his answers, but Petitioner could not have used that instrument because the lab did not have that instrument. Petitioner was supposed to take his own measurements using a different model of balance instrument than Murray. Woodard would expect Petitioner's answers to be different because he would have used a different model of balance instrument.

b. Ms. Woodard opined that Petitioner's written explanation on page 3 of Respondent's Exhibits 12 and 13 were "virtually identical" to Murray's written explanation.. She was familiar with Murray's writing style and Petitioner's writing style. Petitioner's writing style in these specific answers were similar to Mr.



Murray's writing style in his answers.

c. On cross-examination, Woodard acknowledged that there were some differences between the sentences and measurements in Petitioner's answers and Murray's answers. She recognized that it was not a violation to show another employee your LAP problems if that employee was working on his own LAP problems.

32. At hearing, Ms. Woodard acknowledged that this was the first time when copying answers to LAP problems had become an issue with her employees. In fact, this was the first time any employee had submitted his Intermediate LAP problems to her during her job as manager.

33. Woodard acknowledged that Petitioner performed his routine duties well, and there were no issues with him completing work assignments. There were no disagreements with Petitioner over work or implementing lab policies, and he got along fine with her and coworkers.

34. In issuing Petitioner's April 2010-2011 performance management plan, Woodard rated Petitioner as "unsatisfactory," because he had not completed his LAP problems. She did not have the discretion to give Petitioner a higher rating.

35. After Petitioner copied answers to the LAP problems, Woodard was not comfortable trusting Petitioner's work.

36. On June 2, 2011, Division Director Stephen Benjamin issued a letter to Petitioner, directing him to attend a pre-disciplinary conference on June 3, 2011 to discuss a recommendation of disciplinary action due to Petitioner's unacceptable personal conduct (Respondent's Exhibit No. 3). The June 2, 2011 letter informed Petitioner that:

The specific conduct issue giving rise to this conference is that:

You submitted to your supervisor and NIST your Intermediate LAP problems package which included work that was not your own. LAP problem # 2 included some identical phrasing as found in Mr. Van Hyder's LAP submission. LAP problem # 3 was partially copied from Mr. Cliff Murray's LAP submission, with all of your "observed" environmental conditions and balance results being identical to his [Cliff Murray's answer], while using a different balance 5 years later.

(Respondent's Exhibit 3)

37. During the pre-disciplinary conference, Petitioner admitted that copying his fellow employees' work from their LAP problems was wrong, and being under pressure did not make it right for him to have done so.

38. On June 7, 2011, Benjamin notified Petitioner by letter that, effective that date, he was dismissing Petitioner from employment due to Petitioner's unacceptable personal conduct. In such letter, Benjamin recounted what took place during the pre-disciplinary conference. Benjamin also summarized Petitioner's admission that he had used other employees' LAP problem answers, because he was under the impression that there was a deadline for completion of his LAP problems and he had gotten near the end of the time he had to complete them. (Respondent's Exhibit No. 4) Director Benjamin also stated that, by copying other employees' work to his own LAP problem answers, Petitioner had claimed another's work as his own, and falsified a document for personal gain, which was unacceptable personal conduct.

39. At hearing, Director Benjamin opined that the reliability and traceability of the Standards Laboratory's calibrations of Department equipment used in law enforcement was a critical piece of the Division's ability to enforce the NC Weights and Measures Act, and the Gasoline and Oil Inspection Law, since such cases were based primarily on the Division's field inspectors' measurements using instruments that had been calibrated by the metrologists in the Standards Laboratory.

40. The LAP problems make sure employees understand the background, the process, and the basis for their work, so they can catch errors if the calculations from the computer program do not look right. Metrologists should have the capability to do work if the computers are down. They expect a Metrologist 1 to be able to finish the LAP problems during normal working hours, not weekends. There is no right answer to the LAP problems.

41. Director Benjamin acknowledged that it was okay for a metrologist to get help with the LAP problems, but it was not okay to copy someone else's work. It was also okay for the laboratory manager to teach a Metrologist I how to complete the LAP problems.

42. Benjamin noted that during the pre-disciplinary conference, Petitioner admitted he partially copied the answer to LAP problem no. 2, and copied the entire answer to LAP problem no. 3, from another coworker. Benjamin opined that the decision came down to a matter of trust and integrity. Customers must be able to trust the work that the Laboratory Section performs. You should not copy any of the LAP problems.

43. While Benjamin considered implementing a disciplinary action less than dismissal, such as suspension, against Petitioner, he did not feel comfortable with Petitioner working in the lab, and was not comfortable with Petitioner's work since he copied someone else's work.

44. Before deciding what disciplinary action to take against Petitioner, Benjamin talked with Ben Harwood, Director of Respondent's Human Resources Division. Harwood advised Benjamin that he could not support dismissal of Petitioner solely based on plagiarism without a prior record or prior work plan. Mr. Harwood sent

a suspension letter and a dismissal letter to Benjamin to review. (Petitioner's Exhibit No. 12) Harwood was comfortable with either disciplinary action, as he noted in his email to Benjamin that "I can see merit in each decision." (Petitioner's Exhibit No. 12)

45. Benjamin opined that Petitioner's actions could potentially jeopardize the accreditation of the Standards Lab. However, no evidence was submitted that Petitioner's copy of LAP problem answers actually jeopardized the Laboratory's accreditation, or that any accrediting authority considered any adverse action against the Standards Lab because of Petitioner's actions.

46. There was no evidence offered that the measurements used by Petitioner were unreliable or invalid; rather, the testimony showed that had Petitioner taken the measurements in LAP problems 2 and 3 at the time of the other employees, he would have obtained the same information.

47. Benjamin conceded that the Respondent's Quality Manual (Respondent's Exhibit No. 7) does not address plagiarism specifically, or address disciplinary actions if an employee fails to do what is required in the Manual.

48. Director Benjamin explained that he never told Petitioner he could not receive help from outside sources on LAP problems. Benjamin was made aware that employees had helped other employees in answering LAP problems. He was not aware employees used their own problems to help employees. You can help and assist employees with, or show them how to do problems, but you cannot copy problems. He elaborated that there is no restriction how employee obtained answers to the LAP problems, and there are no specific answers to the LAP problems. It is understanding the process that is important.

49. Director Benjamin acknowledged that the process of obtaining measurements required in the LAP problem are not what Petitioner typically does in his daily work. Employees do not take manual measurements in performing their duties, but rather obtain the measurements from data on a computer program. That is, laboratory employees use all the calculations performed from a computer program that another metrologist entered into the computer program. Employees do not perform calculations themselves by hand. Even if the Respondent's computers were broken down or disabled, Benjamin agreed that the process of obtaining manual measurements was too slow and/or cumbersome to be of practical use.

50. Director Benjamin explained that the continued employment of a metrologist employee who claimed another employee's work to be his own, and falsified a training document for personal gain, could not be tolerated, because it would indicate the metrologist was capable of similar acts in performing his routine calibration work. Yet, there was no evidence presented at hearing that Petitioner had engaged in conduct similar to the actions described in this case, or considered by Respondent to be dishonest, unethical, at any time in performing his job.

51. Respondent never instructed Petitioner that he was barred from obtaining assistance or help from co-workers in completing the LAP problems, particularly with respect to obtaining the base measurements needed to conduct the analysis. (Petitioner's Exhibit 1, Interrogatory No. 7)

52. Benjamin admitted that Respondent has not fired anyone for failing to complete his or her LAP problems. Petitioner was the only employee who had taken intermediate training since Benjamin has been the Division Director.

53. At hearing, Petitioner indicated that coworkers in the lab shared the LAP problems freely. Respondent's witnesses did not dispute this testimony. Other coworkers such as Mr. Anderson, Mr. Murray, and Mr. Hyder gave Petitioner their LAP problems.

54. After receiving the written warning on January 7, 2011, Petitioner was unable to use weights needed to complete his LAP problems, because the weights were being used in the robot on another project. He used some of his own data and analysis, but also used some of coworker Hyder's analysis in LAP problem no. 2. Petitioner's LAP problem no. 2 was the same problem as Hyder's, and involved the same evaluation.

55. Petitioner contended that he knows how to do the work required in the LAP problems, even though he copied the problems' answers. He also followed the standard operating procedure in completing the LAP problems. He enters data into the computer program at work daily, and the computer performs the calculation. He was not told that plagiarism would subject him to dismissal, and Ms. Woodard did not offer any active help with the LAP problems.

#### **CONCLUSIONS OF LAW**

1. The parties are properly before the Office of Administrative Hearings and the Office of Administrative Hearings has jurisdiction. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

2. At the time of his dismissal, Petitioner was a career State employee entitled to the protections of the North Carolina State Personnel Act, specifically the just cause provision of N.C. Gen. Stat. § 126-35. N.C. Gen. Stat. § 126-1 *et. seq.* See, *Bulloch v. NC Dept. of Crime Control and Public Safety, NC Highway Patrol*, 732 S.E. 2d 373 (N.C. App. 2012); *Beatty v. Jones*, 721 S.E.2d 765 (N.C. App. 2012); *Warren v. N.C. Depart. of Crime Control, Highway Patrol*, 726 S.E.2d 920 (N.C. App. 2012).

3. Because Petitioner alleged that Respondent lacked just cause to dismiss him from employment, the Office of Administrative Hearings has jurisdiction to hear his appeal.

4. N.C. Gen. Stat. § 126-35(a) provides, in pertinent part, that “No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.” Although N.C. Gen. Stat. § 126-35 does not define “just cause,” the words are to be accorded their ordinary meaning. *Amanini v. Dep’t of Human Resources*, 114 N.C. App. 668, 443 S.E.2d 114 (1994) (defining “just cause” as, among other things, good or adequate reason).

5. Pursuant to N.C. Gen. Stat. § 126-35(d), in an appeal of a disciplinary action, the employer bears the burden of proving that “just cause” existed for the disciplinary action.

6. In *NC Dep’t. of Env’t & Natural Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004), the Supreme Court explained that the fundamental question in a case brought under N.C.G.S. § 126-35 is whether:

[T]he disciplinary action taken was ‘just.’ Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations.

‘Just cause,’ like justice itself, is not susceptible of precise definition. . . . It is a ‘flexible concept, embodying notions of equity and fairness,’ that can only be determined upon an examination of the facts and circumstances of each individual case. . . . Thus, not every violation of law gives rise to ‘just cause’ for employee discipline.

358 N.C. at 669-669. E.g., *Kelly v. NC Dept. of Env’t & Natural Res*, 664 S.E.2d (N.C. App. 2008)

8. In *Carroll*, the NC Supreme Court also stated that:

Determining whether a public employee had just cause to discipline its employee requires two separate inquiries: First, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for the disciplinary action taken.

358 N.C. at 649,665.

9. In 2012, our Supreme Court amended the determination espoused in *Carroll* regarding whether a State agency had just cause to discipline an employee under N.C. Gen. Stat. § 126-35. That Court stated that:

[T]he proper analytical approach to determine whether ‘just cause’ exists is to first determine whether the employee engaged in conduct the employer alleges; the second inquiry is whether the employee’s conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code; if the employee’s act qualifies as a

type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken, and must base its determination upon an examination of the facts and circumstances of each individual case.

*Warren v. N.C. Dep't of Crime Control & Pub. Safety*, \_\_\_ N.C. App. \_\_\_, 726 S.E.2d 920, 925 (2012).

10. Both *Carroll* and *Warren* require that just cause be determined based upon an examination of the facts and circumstances of each individual case." *Carroll* at 669, 599 S.E.2d at 900; *Warren*, 726 S.E.2d at 925.

11. Pursuant to 25 NCAC J.0604 (b) and (c), an employer may discipline or dismiss a career State Employee for just cause based upon unsatisfactory job performance and/or unacceptable personal conduct. 25 NCAC 01J.0604 defines "unacceptable personal conduct" to include:

- (a) Conduct for which no reasonable person should expect to receive prior warning; ...
- (d) The willful violation of known or written work rules;
- (e) Conduct unbecoming a state employee that is detrimental to state service.

12. One act of unacceptable personal conduct presents "just cause" for any discipline, up to and including dismissal. 25 N.C.A.C. 1J.0604(a), 1J.0608(a), 1J.0612(a)(3), and 1J.0614(i)(2003). No showing of actual harm is required to satisfy 25 NCAC 1J .0614(e), only a potential detrimental impact (whether conduct like the employee's could potentially adversely affect the mission or legitimate interests of the State employer). *Eury v. Employment Sec. Comm'n*, 115 N.C. App. 590, 610-11, 446 S.E.2d 383,395-96, *disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994), *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 620 S.E.2d 14 (2005).

14. Under 25 N.C.A.C. 1J.0614(d), an employer's work rules may be written or "known," and a willful violation occurs when the employee willfully takes action which violates the rule, and does not require that the employee intend his conduct to violate the work rule. *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 620 S.E.2d 14 (2005).

15. In this case, Respondent dismissed Petitioner from employment for the unacceptable personal conduct of plagiarism. The preponderance of evidence proved that Petitioner engaged in the conduct Respondent alleged, the first prong of a just cause determination. Petitioner, by his own admissions, copied measurements and written analysis for two of his ten LAP problem answers from the LAP problem answers submitted by two of his co-workers. Respondent established that Petitioner knew that it was wrong for him to copy co-workers' measurement data and analysis into his LAP problem answers, and submit those answers as his own work.

16. Respondent established that the LAP problems were a part of Respondent's formal training program for its metrologists. Its training program serves to train and qualify its metrologists to perform mass and volume calibrations, and is a requirement for its Standards Laboratory's accreditation under NVLAP by NIST.

17. As to the second prong of a just cause determination, there is no evidence that Petitioner's actions violated any known or written work rules of the Respondent. Respondent had no policy defining, prohibiting, or even addressing "plagiarism" in the workplace. There was no policy prohibiting or addressing the use of measurements obtained by others in completing the LAP problems. Sharon Woodard advised that Petitioner's submittal of an incorrect answer to a LAP problem would result in Petitioner receiving additional training, and would have delayed his qualification for specific calibration.

18. The preponderance of evidence established that employees shared their work on their LAP problems with each other without complaint or restriction from Respondent. Petitioner explained how his coworkers freely gave him their LAP problems to Petitioner to assist him with his LAP problems. Both Ms. Woodard and Director Benjamin were aware of the employees assisting each other with their LAP problems.

19. Given the absence of any known or written work rule by Respondent addressing plagiarism, and the freely given assistance among staff in completing the LAP problems, Respondent failed to clearly define what constituted acceptable conduct by employees who were completing their LAP problems.

20. Nonetheless, without any policy addressing, prohibiting or defining plagiarism in Respondent's workplace, we must use and apply the common, ordinary meaning of such word to this case to determine whether Respondent showed that Petitioner violated 25 NCAC 01J.0604(a) and (e). Oxford Dictionaries (2013 Online Ed.) define plagiarism as, "the practice of taking someone else's work or ideas and passing them off as one's own."

21. Applying the ordinary definition of "plagiarism" to this case, Petitioner plagiarized or copied two coworkers' answers to LAP problems, and presented such work as his own. Petitioner's plagiarism of two LAP problem answers frustrated the purpose of doing the problems, and the purpose of Respondent's training, and gave Petitioner's supervisors reason to doubt his integrity in his work.

22. Honesty, trust, and integrity are attributes any reasonable person, such as Petitioner, should possess. Plagiarizing a coworker's work, regardless of the importance of such work, violates these basic principles of honesty, trust, and integrity. Petitioner's plagiarism was fraudulent, and constituted the unacceptable personal conduct of "conduct for which no reasonable person should expect to receive prior warning" and "conduct unbecoming a state employee that is detrimental to state service" under 25 N.C.A.C. 1J .0614(a) and (e).

23. Respondent proved by a preponderance of the evidence that it had just cause to dismiss from employment under *Carroll* and *Warren*.

**DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Respondent's decision to dismiss Petitioner from employment for unacceptable personal conduct, should be **AFFIRMED**.

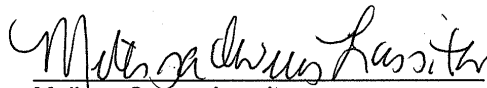
**NOTICE AND ORDER**

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

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

The final decision maker shall serve a copy of the Final Decision on all parties and on the Office of Administrative Hearings in Raleigh in accordance with N.C.G.S. § 150B-36.

This the 27th day of February, 2013.

  
Melissa Owens Lassiter  
Administrative Law Judge



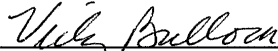
**CERTIFICATE OF SERVICE**

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

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This the 27<sup>th</sup> day of February, 2013.

  
\_\_\_\_\_  
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