

NORTH CAROLINA REGISTER

VOLUME 28 • ISSUE 08 • Pages 728 - 800

October 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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Raleigh, North Carolina 27609 (919) 431-3104 FAX

contact: Joe DeLuca Jr., Commission Counsel joe.deluca@oah.nc.gov (919) 431-3081
Amanda Reeder, Commission Counsel amanda.reeder@oah.nc.gov (919) 431-3079

Fiscal Notes & Economic Analysis and Governor's Review

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

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

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

Legislative Process Concerning Rule-making

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

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

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 th 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.

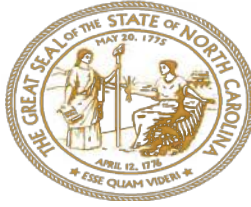
NOTICE OF TEXT

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.



State of North Carolina

PAT McCrORY
GOVERNOR

September 12, 2013

EXECUTIVE ORDER NO. 27

DECLARATION OF A STATE OF EMERGENCY BY THE GOVERNOR OF THE STATE OF NORTH CAROLINA

WHEREAS, due to a combination of various weather conditions abundant moisture has remained in place across North Carolina for several months starting in May 2013. The influence of these passing fronts, has enabled cool and wet conditions to impact this State resulting in above normal precipitation; and

WHEREAS, starting in May 2013, storms tracked primarily to the west and brought substantial rainfall to western North Carolina while leaving the east generally dry. The passage of Tropical Storm Andrea on June 7th brought light consistent rain and intermittent downpours to the entire state, after the system had passed, several storms continued to bring widespread showers and storms for the remainder of the month of June; and

WHEREAS, the combination of consistent frontal passages and atmospheric moisture resulted in a particularly wet pattern throughout July, many communities in North Carolina, particularly those in the western counties, continued to experience torrential rains and storms. Several western locations in the State reported more than 20 inches of rainfall, and many achieved the wettest July on record; and

WHEREAS, these locally heavy rains caused damaging floods and landslides due to the short duration of the event; and

WHEREAS, as a result of severe flooding in July the Governor declared a Type I State disaster declaration for Catawba and surrounding counties for storm damage that impacted those areas; and

WHEREAS, as a result of severe flooding in early July, the Governor declared a Type I State disaster declaration for the Town of Bakersville, in Mitchell County for storm damage that impacted that area; and

WHEREAS, due to the abnormally wet conditions which resulted in agricultural losses since May 2013, the Governor has requested from the United States Department of Agriculture a Secretarial Disaster Designation for several impacted counties; and

WHEREAS, due to the flooding and landslides, the damage to the public infrastructure has been so great that the response is beyond the capabilities of the State and as such now requires that a State of Emergency be declared in the impacted areas.

NOW, THEREFORE, pursuant to the authority vested in me as Governor by the Constitution of the State of North Carolina and N.C.G.S. §166A-19.20, **IT IS ORDERED:**

Section 1.

I hereby declare that a state of emergency as defined in N.C.G.S. §§ 166A-19.3(6) and 166A-19.3(18) existed in the State of North Carolina as a result of the severe storms, landslides, and flooding during the month of July 2013.

Section 2.

The emergency area as defined in N.C.G.S. §§ 166A-19.3(7) and N.C.G.S. 166A-19.20(b) includes the following area: Alleghany, Ashe, Avery, Buncombe, Burke, Caldwell, Catawba, Cleveland, Jackson, Lincoln, Macon, Madison, Mitchell, Polk, Rutherford, Transylvania, Watauga, Wilkes, Yancey counties and also the Qualla Boundary of the Eastern Band of Cherokee.

Section 3.

I order all state and local government entities and agencies to cooperate in the implementation of the provisions of this declaration and the provisions of the North Carolina Emergency Operations Plan.

Section 4.

I delegate to Frank L. Perry, the Secretary of the Department Public Safety, or his designee, all power and authority granted to me and required of me by Article 1A of Chapter 166A of the General Statutes for the purpose of implementing the State's Emergency Operations Plan and deploying the State Emergency Response Team to take the appropriate actions as is necessary to promote and secure the safety and protection of the populace in North Carolina.

Section 5.

Further, Secretary Perry, as chief coordinating officer for the State of North Carolina, shall exercise the powers prescribed in G. S. § 143B-602.

Section 6.

I further direct Secretary Perry or his designee, to seek assistance from any and all agencies of the United States Government as may be needed to meet the emergency and seek reimbursement for costs incurred by the State in responding to this emergency.

Section 7.

I hereby order this declaration: (a) to be distributed to the news media and other organizations calculated to bring its contents to the attention of the general public; (b) unless the circumstances of the state of emergency prevent or impede, to be promptly filed with the Secretary of the Department of Public Safety, the Secretary of State, and the clerks of superior court in the counties to which it applies; and (c) to be distributed to others as necessary to assure proper implementation of this declaration.

Section 8.

This declaration does not prohibit or restrict lawfully possessed firearms or ammunition or impose any limitation on the consumption, transportation, sale or purchase of alcoholic beverages as provided in N.C.G.S. § 166A-19.30(c).

Section 9.

This declaration will not trigger the prohibitions against excessive pricing in the emergency area, notwithstanding the provisions of N.C.G.S. § 166A-19.23.

Section 10.

This declaration is effective immediately and shall remain in effect until rescinded.

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


Pat McCrory
Governor

ATTEST:


Elaine F. Marshall
Secretary of State
Chief Deputy





STATE BOARD OF ELECTIONS

KIM WESTBROOK STRACH
Executive Director

Mailing Address:
P.O. BOX 27255
RALEIGH, NC 27611-7255

September 23, 2013

Heather Logan Whillier, Finance Director
Committee to Elect Dan Forest
P.O. Box 471845
Charlotte, NC 28247

Re: Request for Advisory Opinion pursuant to N.C.G.S. §163-278.23

Dear Ms. Whillier:

I am in receipt of your August 13, 2013 request for an opinion in which you seek guidance as to whether it would be permissible for the Committee to Elect Dan Forest (hereinafter "the committee") to pay for an insurance policy which will cover the cost of the prize or prizes for a golf tournament fundraiser. In responding to your request we must determine whether the committee receives any prohibited contributions or makes any prohibited expenditures as part of the proposed transaction.

Your letter describes a process whereby the committee purchases an insurance policy from Tournament Promotions and, in exchange, Tournament Promotions provides the prizes to golfers making a hole-in-one on a specified hole on the course. You have stated that all prizes will be awarded directly from Tournament Promotions to the winner(s) and will not pass through the committee's account. We received confirmation from Tournament Promotions that the insurance policy rate quoted to the committee is comparable to the rates paid by other customers with similar prize values. Under these conditions the committee does not appear to receive a contribution from Tournament Promotions which would be prohibited under N.C.G.S. §163-278.15.

N.C.G.S. §163-278.16B defines the permissible purposes for which candidates or candidate campaign committees may make expenditures. N.C.G.S. §163-278.16B(a)(1) allows for "expenditures resulting from the campaign for public office by the candidate or candidate's campaign committee." Payment to Tournament Promotions for a prize insurance policy for a golf fundraiser would be permissible as an expenditure resulting from the campaign for public office.

As the purchase of the insurance policy does not appear to involve either a prohibited contribution or a prohibited expenditure, the transactions described in your letter are permissible under Chapter 163 of the North Carolina General Statutes.

This opinion is based upon the information provided in your August 13, 2013 letter and subsequent telephone conversations with our office. If any information should change, you should consult with our office to ensure that this opinion would still be binding. Finally, this opinion will be filed with the Codifier of Rules to be published unedited in the North Carolina Register and the North Carolina Administrative Code. If you should have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in dark ink, reading "Kim Westbrook Strach".

Kim Westbrook Strach

cc: Julian Mann III, Codifier of Rules

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



RECEIVED
AUG 16 2013
N.C. BOARD OF ELECTIONS

August 13, 2013

Ms. Kim Strach
NC Board of Elections
PO Box 27255
Raleigh, NC 27611-7255

Ms. Strach,

The Committee to Elect Dan Forest will be holding a golf tournament fundraiser on Wednesday, September 25th. As part of the tournament, we are planning a hole-in-one competition using Tournament Promotions. The hole-in-one competition would consist of the Committee to Elect Dan Forest paying between \$400-\$1,200 (depending on the prize) to Tournament Promotions for an insurance policy for them to cover the cost of the prize in the case of a golfer making a hole-in-one on a previously chosen hole on the course. Prizes range from a \$10,000 cash prize to a \$70,000 car. There are a series of rules we would follow in the course of the contest – we have to choose a suitable course and hole, have enough players and have a witness at the hole at all times.

The Committee to Elect Dan Forest will not benefit directly from Tournament Promotions. If we do have a winner of the hole-in-one competition, one of our tournament players will benefit from the prize. The benefit to the Committee is a draw (among others) to the tournament and it will likely be another opportunity for us to collect sponsorship dollars.

I would like to request a Written Advisory from the NC Board of Elections to make sure that we are not breaking any rules in using Tournament Promotions. Tournament Promotions has been in business for over 20 years. Our contact there is Mike Stalls and he can be reached at 919-231-1919.

As our tournament is quickly approaching, we would be appreciative if we could have an answer to our inquiry in the next two weeks. Please call me with any questions.

Sincerely,

Heather Logan Whillier
Finance Director
Committee to Elect Dan Forest
828-284-2858 cell

Paid for by the Committee to Elect Dan Forest.
This letter is not intended for any registered lobbyist in the state of North Carolina.

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

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

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Commission for Mental Health, Developmental Disabilities and Substance Abuse Services intends to amend the rule cited as 10A NCAC 28C .0201.

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

- ☒ **OSBM certified on:** August 13, 2013
- ☐ **RRC certified on:**
- ☐ **Not Required**

Link to agency website pursuant to G.S.150B-19.1(c):

<http://www.ncdhhs.gov/mhddsas/MHDDSAScommission/proposdrules.htm>

Proposed Effective Date: April 1, 2014

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

Reason for Proposed Action: Currently the buildings at all State operated facilities are smoke-free. Although there are limitations on the locations where smoking can take place on campus, tobacco smoking remains prevalent among patients/resident and staff. As such, smoking continues to impose health risks to those who smoke and those who do not. Smoking interferes with patient recovery/habilitation and factors into aggressive behavior. In order to eliminate these negative factors smoking will no longer have a role in the treatment/habilitative setting and open the door to improved patient/resident and staff health.

Comments may be submitted to: W. Denise Baker, 3018 Mail Service Center, Raleigh, NC 27699-3018; email denise.baker@dhhs.nc.gov

Comment period ends: December 16, 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**
- ☐ **Substantial economic impact (≥\$1,000,000)**
- ☐ **No fiscal note required by G.S. 150B-21.4**

CHAPTER 28 – MENTAL HEALTH: STATE OPERATED FACILITIES AND SERVICES

SUBCHAPTER 28C – DIGNITY AND RESPECT

SECTION .0200 – ESTHETIC AND HUMANE ENVIRONMENT

10A NCAC 28C .0201 STATE FACILITY ENVIRONMENT

(a) The State Facility Director shall assure the provision of an esthetic and humane environment which enhances the positive self-image of the client and preserves human dignity. This includes:

- (1) providing warm and cheerful furnishings;
- (2) providing flexible and humane schedules; and
- (3) directing state facility employees to address clients in a respectful ~~manner; and manner.~~
- (4) ~~providing adequate areas accessible to clients who wish to smoke tobacco and areas for non-smokers as requested.~~

(b) The State Facility Director shall also, to the extent possible, make every effort to:

- (1) provide a quiet atmosphere for uninterrupted sleep during scheduled sleeping hours; and
- (2) provide areas accessible to the client for personal privacy, for at least limited periods of time, unless determined inappropriate by the treatment team.

Authority G.S. 122C-51; 131E-67; 143B-147(a)(1).

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 16 – BOARD OF DENTAL EXAMINERS

Notice is hereby given in accordance with G.S. 150B-21.2 that NC State Board of Dental Examiners intends to amend the rules cited as 21 NCAC 16N .0302 and 16T .0102; and repeal the rules cited as 21 NCAC 16N .0301 and .0303.

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

Proposed Effective Date: February 1, 2014

Public Hearing:

Date: November 14, 2013

Time: 6:30 p.m.

Location: 507 Airport Blvd., Ste. 105, Morrisville, NC 27560

Reason for Proposed Action:

21 NCAC 16N .0301, .0302, .0303 – The amendments to the 21 NCAC 16N rules are proposed to conform the rules to the requirements of G.S. 150B-12.

21 NCAC 16T .0102 – The amendment to this rule is proposed to conform the rule to the federal Health Information Portability and Accountability Act (HIPAA).

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

Comment period ends: December 16, 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
- ☐ Substantial economic impact (≥\$1,000,000)
- ☒ No fiscal note required by G.S. 150B-21.4

SUBCHAPTER 16N – RULEMAKING AND ADMINISTRATIVE HEARING PROCEDURES

SECTION .0300 – RULEMAKING HEARINGS

21 NCAC 16N .0301 REQUEST TO PARTICIPATE

~~Any person desiring to present oral data, views, or arguments on the proposed rule must, at least ten days prior to the proposed hearing, file a notice with the Board. Notice of such request to appear or a failure to give timely notice may be waived by the Board in its discretion. Any person permitted to make an oral presentation is directed to submit a written statement of such presentation to the Board prior to or at the time of such hearing.~~

Authority G.S. 90-48; 150B-12(a).

21 NCAC 16N .0302 CONTENT OF REQUEST: GENERAL TIME LIMITATIONS

~~A request to make an oral presentation should contain a clear reference to the proposed rule, a brief summary of the individual's views in respect thereto, and how long the individual desires to speak. Presentations at Board rule making hearings shall be limited to 15 minutes unless the Board prescribes some other time limit.~~

Authority G.S. 90-48; 90-223(b); 150B-12(a).

21 NCAC 16N .0303 RECEIPT OF REQUEST: SPECIFIC TIME LIMITS

~~Upon receipt of notice of a request for the presentation of oral data, views or arguments on a proposed rule, the Board will acknowledge the receipt of the request and inform such prospective participant of the 15 minute limitation to the end that a full, effective public hearing may be held upon the proposed rule.~~

Authority G.S. 90-48; 90-223(b); 150B-12(a).

SUBCHAPTER 16T – PATIENT RECORDS

SECTION .0100 – PATIENT RECORDS

21 NCAC 16T .0102 TRANSFER OF RECORDS UPON REQUEST

A dentist shall, upon request by the patient of record, provide all information required by the Health Information Portability and Accountability Act (HIPAA) and other applicable law, including original or copies of radiographs and a summary of the treatment record to the patient or to a licensed dentist identified by the patient. A fee may be charged for duplication of radiographs and diagnostic materials. The treatment summary and radiographs shall be provided within 30 days of the request and

shall not be contingent upon current, past or future dental treatment or payment of services.

Authority G.S. 90-28; 90-48.

CHAPTER 64 - BOARD OF EXAMINERS FOR SPEECH AND LANGUAGE PATHOLOGISTS AND AUDIOLOGISTS

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Examiners for Speech and Language Pathologists and Audiologists intends to adopt the rule cited as 21 NCAC 64 .0307 and amend the rules cited as 21 NCAC 64 .0206 and .0219.

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.ncboeslpa.org

Proposed Effective Date: February 1, 2014

Public Hearing:

Date: December 12, 2013

Time: 4:00 p.m.

Location: Hampton Inn Hickory, 1956 13th Avenue Dr. SE,
Hickory, NC 28602

Reason for Proposed Action:

21 NCAC 64 .0206 – Supervision of Professional Experience (amendment). To further define and clarify conformance with Board's supervision of professional experience year rule and policy by delineating a monthly timetable for hour completion.

21 NCAC 64 .0219 – Telepractice (amendment). To further define and clarify conformance with Board's telepractice rule and policy and standards of practice.

21 NCAC 64 .0307 – Good Moral Conduct (adoption). To further define good moral conduct as recently enacted in statute/practice act at G.S. 90-295(a)(6) and G.S. 90-295(b)(6) and in order to conform practice of licensees to that practice already required and imposed by their professional organization.

Comments may be submitted to: Sandra Capps, Administrator; NC Board of Examiners for Speech and Language Pathologists and Audiologists, P.O. Box 5545, Greensboro, NC 27435-0545; email scapps@ncboeslpa.org

Comment period ends: December 16, 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
- ☐ Substantial economic impact (≥\$1,000,000)
- ☒ No fiscal note required by G.S. 150B-21.4

SECTION .0200 - INTERPRETATIVE RULES

21 NCAC 64 .0206 SUPERVISION OF PROFESSIONAL EXPERIENCE

(a) The Board interprets G.S. 90-298(c) to mean that supervision satisfactory to the Board ~~includes, monthly supervision totaling a minimum of 12 hours per 3 month segment of the supervised experience year~~ requires four hours each month of direct, on-site observation of the applicant's work with patients, in addition to other methods of supervision such as review of tape recordings, review of records, and review of staff meetings.

(b) A temporary license issued pursuant to G.S. 90-298 shall be suspended upon the termination of approved supervision, and any period of practice without approved supervision shall not be deemed to comply with the practical experience requirements of G.S. 90-295(4).

Authority G.S. 90-295; 90-298; 90-304(a)(3).

21 NCAC 64 .0219 TELEPRACTICE

~~(a) Licensees may evaluate and treat patients receiving clinical services in North Carolina by utilizing telepractice. Telepractice means the use of telecommunications and information technologies for the exchange of encrypted patient data, obtained through real time interaction, from one site to another for the provision of speech and language pathology and audiology services to patients through hardware or internet connection.~~

(a) For purposes of this Rule, the following words shall have the following meanings:

- (1) "Patient site" means the patient's physical location at the time of the receipt of the telepractice services.
- (2) "Provider" means a licensed speech and language pathologist or audiologist who provides telepractice services.

(3) "Provider site" means the licensee's physical location at the time of the provision of the telepractice services.

(4) "Telepractice" means the use of telecommunications and information technologies for the exchange of encrypted patient data, obtained through real-time interaction, from patient site to provider site for the provision of speech and language pathology and audiology services to patients through hardwire or internet connection. Telepractice also includes the interpretation of patient information provided to the licensee via store and forward techniques.

(b) Telepractice shall be obtained in real time and in a manner sufficient to ensure patient confidentiality.

(c) Telepractice is subject to the same standard of practice stated in 21 NCAC 64 .0205 and 21 NCAC 64 .0216 as if the person being treated were physically present with the licensee. Telepractice is the responsibility of the licensee and shall not be delegated.

(d) Providers must hold a license in the state of the provider site and be in compliance with the requirements of the patient site.

~~(d)(e)~~ Licensees and staff involved in telepractice must be trained in the use of telepractice equipment.

(f) Notification of telepractice services shall be provided to the patient or guardian if the patient is a minor. The notification shall include, but not be limited to: the right to refuse telepractice services and options for alternate service delivery.

(g) Telepractice constitutes the practice of Speech and Language Pathology and Audiology whether in the patient site or provider site.

Authority G.S. 90-304-(a)(3).

SECTION .0300 - CODE OF ETHICS

21 NCAC 64 .0307 GOOD MORAL CONDUCT

In addition to the Principles of Ethics and Ethical Proscriptions enumerated above, Licensees shall engage in good moral conduct under all conditions of professional activity. Good moral conduct shall be defined as conduct in keeping with the then-current Code of Ethics of American Speech-Language-Hearing Association, except as the provisions of such code of ethics may be inconsistent and in conflict with the provisions of this Article, in which case, the provisions of this Article shall control.

Authority G.S. 90-295(a)(6); 90-295(b)(6); 90-301(3); 90-304(a)(3).

This Section contains information for the meeting of the Rules Review Commission on September 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 2nd business day before the meeting. Please refer to RRC rules codified in 26 NCAC 05.

RULES REVIEW COMMISSION MEMBERS

Appointed by Senate

Jeff Hyde
Margaret Currin
Jay Hemphill
Thomas Taylor
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

October 17, 2013 November 21, 2013
December 19, 2013 January 16, 2014

RULES REVIEW COMMISSION MEETING MINUTES

September 19, 2013

The Rules Review Commission met on Thursday, September 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, Jay Hemphill, Jeff Hyde, Stephanie Simpson, Ralph Walker and Faylene Whitaker.

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

The meeting was called to order at 9:05 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).

Chairman Walker welcomed and introduced new Commissioner Jay Hemphill. He then administered the oath of office to the new Commissioner.

Vice-Chairman Currin noted that there is no Ethics Commission evaluation of Commissioner Hemphill's Statement of Economic Interest to be read into the record because one already exists from the Ethics Commission for a different board on which he served this year. Mr. DeLuca noted that the attorney for the Ethics Commission agreed with him that the determination concerning the previous board does not necessarily apply to the RRC. She added that it was still their interpretation that no statement was required before Mr. Hemphill could serve on the RRC and that no evaluation would be given by the Ethics Commission.

Vice-Chairman Currin introduced Cabell Barrow, an extern with OAH.

APPROVAL OF MINUTES

Vice-Chairman Currin asked for any discussion, comments, or corrections concerning the minutes of the August 15, 2013 meeting. There were none and the minutes were approved as distributed.

FOLLOW-UP MATTERS

Private Protective Services Board

12 NCAC 07D .0104, .0115, .0203, .0301, .0302, .0401, .0501, .0601, .0807, .0901, .0909 – The Commission approved the re-written rules.

LOG OF FILINGS

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

Radiation Protection Commission

All rules were unanimously approved.

Department of Transportation

19A NCAC 01B .0502 was unanimously approved.

Hearing Aid Dealers and Fitters Board

21 NCAC 22F .0108 was unanimously approved.

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

Sheriffs' 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 10B .0301, .0502, .0601, .0603, .0605, .1004, .1005, .1204, .1205, .1604, .1605, .1901, .2005.

COMMISSION BUSINESS

The Commission discussed H.B. 74. The discussion included the number of rules to be reviewed, Commission review of and comment on the draft report the agencies will use to report to the Commission, and rules that the Commission needed to adopt and amend to implement the review.

The meeting adjourned at 10:43 a.m.

The next scheduled meeting of the Commission is Thursday, October 17th 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,

Julie Brincefield
Editorial Assistant

Minutes approved by the Rules Review Commission:

Margaret Currin, Vice-Chair

Rules Review Commission

Meeting

Please **Print** Legibly

SEPTEMBER 19, 2013

Name	Agency
CARMINE PLOTT	NC RPS
Wesley Shelley	Observer
ROS PATCHETT	OBSERVER
Mary Mallon Ashill	SELC
Nadia Lühr	NCCN
Anca Groavu	OSBM
Lee Cox	RPS / DHSR
James Albright	RPS / DHSR
Colbell Barrow	Extern
Brooks Reiny Pearson	SELC
GEORGE MCCUE	NC STATE BOARD OF ELECTIONS
Jeff Gray	WASVS
Megan Lamphere	NC DHHS DHR
Tara McGrath	Duke Law School
Chris Evans	BCBSNC
Jonathan C. Jordan	NC House
Sarah Rothrock	Brulaker & A SSK
JOSEPHINE TETEH	NC RPS/DOJ
Suan Vii	FSP

LIST OF APPROVED PERMANENT RULES
September 19, 2013 Meeting

PRIVATE PROTECTIVE SERVICES BOARD

<u>Definitions</u>	12	NCAC 07D .0104
<u>Involvement in Administrative Hearing</u>	12	NCAC 07D .0115
<u>Renewal or Re-issue of Licenses and Trainee Permits</u>	12	NCAC 07D .0203
<u>Experience Requirements/Security Guard and Patrol License</u>	12	NCAC 07D .0301
<u>Experience Requirements for Guard Dog Service License</u>	12	NCAC 07D .0302
<u>Experience Requirements for a Private Investigator License</u>	12	NCAC 07D .0401
<u>Experience Requirements for a Polygraph License</u>	12	NCAC 07D .0501
<u>Experience Requirements for a Psychological Stress Evalua...</u>	12	NCAC 07D .0601
<u>Training Requirements for Armed Security Guards</u>	12	NCAC 07D .0807
<u>Requirements for a Firearms Trainer Certificate</u>	12	NCAC 07D .0901
<u>Unarmed Guard Trainer Certificate</u>	12	NCAC 07D .0909

RADIATION PROTECTION COMMISSION

<u>Definitions</u>	15A	NCAC 11 .0104
<u>Other Definitions</u>	15A	NCAC 11 .0105
<u>Incorporation By Reference</u>	15A	NCAC 11 .0117
<u>Purpose and Scope</u>	15A	NCAC 11 .0301
<u>Exempt Concentrations: Other Than Source</u>	15A	NCAC 11 .0303
<u>Exempt Quantities: Other Than Source Material</u>	15A	NCAC 11 .0304
<u>Exempt Item Containing Other Than Source</u>	15A	NCAC 11 .0305
<u>General Licenses: Measuring Gauging: Controlling Devices</u>	15A	NCAC 11 .0309
<u>Specific Licenses: Filing Application and General Require...</u>	15A	NCAC 11 .0317
<u>Specific Licenses: General Requirements for Human Use</u>	15A	NCAC 11 .0318
<u>Specific Licenses: General Requirements for Human Use of ...</u>	15A	NCAC 11 .0321
<u>Specific Licenses: Human Use of Sealed Sources</u>	15A	NCAC 11 .0322
<u>Specific Licenses: Products with Exempt Concentrations</u>	15A	NCAC 11 .0325
<u>Specific Licenses: Exempt Distribution</u>	15A	NCAC 11 .0326
<u>Specific Licenses: Manufacture Devices to Persons Licensed</u>	15A	NCAC 11 .0328
<u>Specific Licenses-Manufacture of In Vitro Test Kits</u>	15A	NCAC 11 .0331
<u>Specific Licenses: Manufacture of Radiopharmaceuticals</u>	15A	NCAC 11 .0333
<u>Specific Licenses: Generators and Reagent Kits</u>	15A	NCAC 11 .0334
<u>Specific Terms and Conditions of Licenses</u>	15A	NCAC 11 .0338
<u>Emergency Plans</u>	15A	NCAC 11 .0352
<u>Release of Patients Containing Radiopharmaceuticals or Pe...</u>	15A	NCAC 11 .0358
<u>Medical Use of Unsealed Radioactive Material</u>	15A	NCAC 11 .0361
<u>Decay in Storage</u>	15A	NCAC 11 .0362
<u>Notifications and Reports to Individuals</u>	15A	NCAC 11 .1004
<u>Occupational Dose Limits for Adults</u>	15A	NCAC 11 .1604
<u>Labeling Requirements and Exemptions</u>	15A	NCAC 11 .1626
<u>Transfer for Disposal and Manifests</u>	15A	NCAC 11 .1633
<u>Reports of Planned Special Exposures</u>	15A	NCAC 11 .1648

TRANSPORTATION, DEPARTMENT OFInspection of Traffic Ordinances

19A NCAC 01B .0502

HEARING AID DEALERS AND FITTERS BOARDReview of Examination21 NCAC 22F .0108

**LIST OF CERTIFIED RULES
September 19, 2013 Meeting****SHERIFFS EDUCATION AND TRAINING STANDARDS COMMISSION**

<u>Minimum Standards for Justice Officers</u>	12 NCAC 10B .0301
<u>Basic Law Enforcement Training Course for Deputies</u>	12 NCAC 10B .0502
<u>Detention Officer Certification Course</u>	12 NCAC 10B .0601
<u>Evaluation for Training Waiver</u>	12 NCAC 10B .0603
<u>Completion of Detention Officer Certification Course</u>	12 NCAC 10B .0605
<u>Intermediate Law Enforcement Certificate</u>	12 NCAC 10B .1004
<u>Advanced Law Enforcement Certificate</u>	12 NCAC 10B .1005
<u>Intermediate Detention Officer Professional Certificate</u>	12 NCAC 10B .1204
<u>Advanced Detention Officer Professional Certificate</u>	12 NCAC 10B .1205
<u>Intermediate Telecommunicator Certificate</u>	12 NCAC 10B .1604
<u>Advanced Telecommunicator Certificate</u>	12 NCAC 10B .1605
<u>Military and Military Spouse Transferees</u>	12 NCAC 10B .1901
<u>Minimum Training Requirements</u>	12 NCAC 10B .2005

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

OFFICE OF ADMINISTRATIVE HEARINGS

Chief Administrative Law Judge
JULIAN MANN, III

Senior Administrative Law Judge
FRED G. MORRISON JR.

ADMINISTRATIVE LAW JUDGES

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

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>DATE</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<u>ALCOHOLIC BEVERAGE CONTROL COMMISSION</u>			
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	
ABC Commission v. Soledad Lopez de Avilez T/A Tienda Avilez	13 ABC 00002	06/06/13	
ABC Commission v. Two Brothers Food Market, Inc., T/A Circle Mart	13 ABC 10356	07/11/13	
ABC Commission v. Grandmas Pizza LLC T/A Grandmas Pizza	13 ABC 11401	08/13/13	
<u>DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY</u>			
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. Jaggers, 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. NC 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	
Teresa F. Williams v. Crime Victims Compensation Commission	13 CPS 09790	07/11/13	

CONTESTED CASE DECISIONS

Angela Clendenin King v. Office of Administrative Hearings NC Crime Victims Comp Commission	13 CPS 11239	08/02/13	
Matthew B. McGee v. NC Victims Compensation Commission	13 CPS 12133	08/26/13	
<u>DEPARTMENT OF HEALTH AND HUMAN SERVICES</u>			
Stonesthrow Group Home Medicaid Provider #6603018 Owned by Alberta Professional Services Inc v. DHHS, Division of Mental Health/Development Disabilities/ Substance Abuse, and DMA	09 DHR 05790	01/11/13	
Bright Haven Residential and Community Care d/b/a New Directions Group Home v. Division of Medical Assistance, DHHS	10 DHR 00232	04/27/12	
Warren W Gold, Gold Care Inc. d/b/a Hill Forest Rest Home, v. DHHS/Division of Health Service Regulation, Adult Care Licensure Section	10 DHR 01666	05/18/12	
Warren W Gold, Gold Care Inc. d/b/a Hill Forest Rest Home v. DHHS, Division of Health Service Regulation, Adult Care Licensure and Certification Section	10 DHR 05801	05/18/12	
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	

CONTESTED CASE DECISIONS

Jerri Long v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	12 DHR 00361	07/06/12	
Renal Advantage, Inc., v. DHHS, Division of Health Service Regulation, CON Section and DVA Healthcare Renal Care, Inc	12 DHR 00518	08/28/12	27:15 NCR 1553
Angela Moye v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	12 DHR 00642	08/23/12	27:12 NCR 1218
Jessica Lynn Ward v. DHHS	12 DHR 00643	05/17/12	
Trinity Child Care II & I v. DHHS, Division of Public Health, Child and Adult Care Food Program	12 DHR 00861	04/20/12	27:04 NCR 518
Dr. Karen J. Williams, LPC v. DHHS, Division of Medical Assistance	12 DHR 00926	09/18/12	
Faith Home Care of NC, Bonita Wright v. DHHS, DMA	12 DHR 00928	07/25/12	
Olar Underwood v. Division of Child Development and Early Education	12 DHR 00990	10/22/12	
Angela C Jackson v. DHHS	12 DHR 01097	06/19/12	
Paula N Umstead v. DHHS	12 DHR 01098	05/11/12	
Daniel W. Harris, Jr., v. DHHS, Division of Health Service Regulation	12 DHR 01138	10/19/12	
ACI Support Specialists Inc. Case #2009-4249 v. DHHS	12 DHR 01141	06/06/12	
AriLand Healthcare Service, LLC, NCMHL #018-092, Shawn Kuhl Director of Operations v. DHHS, Emery E. Milliken, General Counsel	12 DHR 01165	05/25/12	
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	
Anthony Moore d/b/a Hearts of Gold II v. DHHS, Division of Health Service Regulation, Adult Care Licensure Section	12 DHR 01346	04/12/13	28:03 NCR 256
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
American Mobility LLC, Norman Mazer v. DHHS	12 DHR 01733	03/6/13	28:03 NCR 266
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	
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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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FILED

STATE OF NORTH CAROLINA

COUNTY OF WAKE

KAREEN JESAAD TAYLOR,

Petitioner,

v.

NORTH CAROLINA SHERIFFS'
EDUCATION AND TRAINING
STANDARDS COMMISSION,

Respondent.

2013 APR -2 AM 12:44

OFFICE OF
ADMINISTRATIVE HEARINGS

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 DOJ 08018

PROPOSED DECISION

THIS MATTER was commenced by a request filed on September 4, 2012, in the Office of Administrative Hearings. Notice of Contested Case and Assignment and Order for Prehearing Statements were filed on September 19, 2012. The parties received proper notice of hearing, and the administrative hearing was held on January 31, 2013 before the Honorable Selina M. Brooks, Administrative Law Judge.

APPEARANCES

Petitioner: *Pro Se*

Respondent: Matthew L. Boyatt, Assistant Attorney General

ISSUE

Is the proposed denial of Petitioner's certification supported by substantial evidence?

EXHIBITS

Petitioner did not offer any documents for consideration.

Respondent's Exhibits 1 through 10 were admitted into evidence.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but

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not limited to the demeanor of the witness, any interest, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. Wherefore, the undersigned makes the following Findings of Fact, Conclusions of Law and Decision. In the absence of a transcript, the Undersigned has relied upon her notes, her memory and the documentary record herein.

FINDINGS OF FACT

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received notice of hearing, and that the Petitioner received by certified mail the proposed Denial of Justice Officer's Certification letter, mailed by Respondent The North Carolina Sheriffs' Education and Training Standards Commission (hereinafter the "Commission") on June 12, 2012.

2. The Petitioner applied for certification as a Detention Officer with the Commission through the Wake County Sheriff's Office on or about July 29, 2009. R. Ex. 1.

3. During the processing of Petitioner's application for certification, the Commission learned that Petitioner was charged with the felony offense of distributing cocaine, a schedule II controlled substance, in Hopewell, Virginia, on August 12, 1998.

4. In furtherance of Petitioner's application for certification, the Commission's investigator, Andy Stone, interviewed Petitioner to discuss the above-referenced felony charge in Hopewell, Virginia. During that conversation, Petitioner admitted to investigator Stone that he sold two (2) crack cocaine rocks to an undercover officer on August 12, 1998. Petitioner advised investigator Stone that he had been selling crack cocaine for approximately one (1) month and that he was selling the crack cocaine in order to support himself and his brother. Petitioner admitted to investigator Stone that during that one (1) month period, Petitioner made somewhere between \$200.00 and \$300.00 selling crack cocaine when he was sixteen years old. *See also* R. Ex. 3 att. 3 & R. Ex. 7. Petitioner was not arrested immediately after the sale. Rather, Petitioner learned later that day that there was an order for his arrest and Petitioner voluntarily surrendered himself to the police. R. Ex. 7.

5. The Record of Proceedings from the District Court in Hopewell, Virginia indicates that the charges were reduced to "simple possession - 1st offender status with probation" on January 27, 1999. Petitioner remained in compliance with the Virginia Court's orders which resulted in the charge being dismissed on March 8, 2000. R. Ex. 3 att. 2.

6. Following its investigation, the Commission notified Petitioner that his eligibility for certification would be addressed by the Commission's Probable Cause Committee (hereinafter "PC Committee") on June 5, 2012. R. Ex. 2.

7. Petitioner appeared before the PC Committee and was provided the opportunity to

dispute and/or explain to the PC Committee the circumstances surrounding his felony charge. At the probable cause meeting, Petitioner repeated the information he had given to investigator Stone.

8. On or about June 12, 2012, the PC Committee found probable cause existed to believe Petitioner had committed the felony offense of distributing cocaine, a schedule II controlled substance, in Hopewell, Virginia, on August 12, 1998. Based on this finding of probable cause, the Commission notified Petitioner in writing on June 12, 2012, of the proposed denial of his certification and Petitioner was advised of his right to request an administrative hearing in order to contest the proposed denial of Petitioner's certification. R. Ex. 4, 5 & 6.

9. Petitioner timely requested an administrative hearing by letter in which he stated, in part:

I would first like to submit to the Commission that I truly value my certification and I completely understand the tremendous responsibilities that it holds. As a young teenager, I whole heartedly regret making the poor choice of getting involved with illegal drugs, and allowing myself to fall prey to the poverty stricken environment that I grew up in. I'm so thankful that I was given a second chance to do something positive with my life and my future.

I submit to the commission that I took advantage of the second chance opportunity and went to the University of North Carolina on a Football Scholarship and graduated with a 4 year degree. Also for the past three years, I have chosen to work at the Wake County Sheriff's Office Detention Center as a Detention Officer. My passion is to help make a positive influence and difference in the lives of the young men and women that enter the Detention facility know firsthand about making poor choices and the consequences that come along with them. Life experience has taught me a great lesson about having integrity, creditability, honesty, and trustworthiness. The aforementioned attributes has helped me become a better person and a positive role model on how to learn from your mistakes and make the best of a second chance opportunity.

R. Ex. 6

10. At the administrative hearing, Petitioner was honest and forthright regarding his criminal behavior as a juvenile in 1998. His testimony repeated the statements he made to investigator Stone and to the PC Committee.

11. Petitioner testified that he stopped selling drugs immediately after his arrest and the Undersigned finds Petitioner's testimony credible.

12. Testimonial evidence was received concerning the various requirements made by Petitioner's probation officer and how Petitioner accepted and complied with each and every requirement, including submitting to drug screens and transferring between high schools on at least two occasions.

13. Since 1998, Petitioner has made significant progress in his personal life and has remained trouble-free. Petitioner was able to earn a high school diploma, despite the legal issues he faced. Petitioner has been gainfully employed since college and been consistent in volunteer work and ministries where he could work with disadvantaged youth.

14. Petitioner testified that he wants to work with at risk youth and teach them not to make the mistakes he has made in life.

15. The Undersigned had the opportunity to observe Petitioner's demeanor and finds that Petitioner is remorseful for his past actions as a teenager. Petitioner's desire to use his past mistakes as a way to help others is laudable.

16. In reviewing the documentary and testimonial evidence, the Undersigned finds that on each and every occasion, the Petitioner has been forthright, honest and consistent in reporting the facts concerning the felony charge and his testimony at the administrative hearing to be credible.

17. The Undersigned finds as fact that Petitioner is committed to remaining a productive member of society, and to use the mistakes of his youth to help him be an effective law enforcement officer.

CONCLUSIONS OF LAW

1. The parties are properly before the undersigned Administrative Law Judge and jurisdiction and venue are proper.

2. Pursuant to Section 18.2-248 (1998) of the Virginia Code, it is a felony for an individual to intentionally sell or distribute a controlled substance in the State of Virginia. Section 18.2-248 (c) of the Virginia Code provides that intentionally selling a schedule II controlled substance shall result in confinement for a period not less than five (5) years, with a maximum term of confinement of 40 years. R. 8 & 10.

3. Pursuant to Section 54.1-3448 (1998) of the Virginia Code, cocaine is classified as a Schedule II controlled substance. Section 18.2-250 (1998) of the Virginia Code makes the mere possession of cocaine a class 5 felony offense in the State of Virginia. R. 9 & 10.

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

5. 12 NCAC .0301 (a) (10) states:

Every Justice Officer employed or certified in North Carolina shall not have committed or been convicted of a crime or crimes

as specified in 12 NCAC 10B .0307.

6. 12 NCAC 10B .0307 (a) (1) states:

Every Justice Officer employed in North Carolina shall not have committed or been convicted by a local, state, federal or military court of a felony.

7. 12 NCAC 10B .0204(a)(1) states that the Commission shall deny the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer has committed a felony.

8. Pursuant to 12 NCAC 10B .0103(11), "Felony" means any offense designated a felony by the laws, statutes, or ordinances of the jurisdiction in which the offense occurred.

9. 12 NCAC 10B .0204(b)(2) states that the Commission shall deny certification of a justice officer when the Commission finds that the applicant for certification fails to meet any of the certification standards required by 12 NCAC 10B .0300.

10. The powers of Administrative Law Judge are set forth in N.C.G.S. § 150B-33 which states in pertinent part:

(b) An administrative law judge may:

...

- (9) Determine that a rule as applied in a particular case is void because ... (3) is not reasonably necessary to enable the agency to fulfill a duty delegated to it by the General Assembly.

11. Based upon the facts of this particular case, the Undersigned determines that the application of the Commission's rules would defeat the purpose of the rules, to wit, to ensure that only persons of high moral character, honesty and integrity are commissioned as law enforcement officers and, therefore, the rules as applied are void.

PROPOSAL FOR DECISION

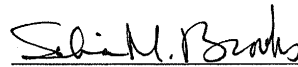
Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the Undersigned determines that Petitioner's application for justice officer certification should be granted.

NOTICE

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

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

This the 25th day of March, 2013.



Selina M. Brooks
ADMINISTRATIVE LAW JUDGE

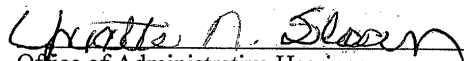
CERTIFICATE OF SERVICE

The foregoing was sent to:

Kareen Jesaad Taylor
1100 Mayruth Drive, Apt. 9
Durham, North Carolina 27713
PETITIONER

Matthew L. Boyatt
Assistant Attorney General
North Carolina Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602-0629
ATTORNEY FOR RESPONDENT

This, the 2nd day of April, 2013.


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

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FILED
OFFICE OF ADMINISTRATIVE HEARINGS
5/7/2013 10:33 AM

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12DOJ10182

<p>CHRISTOPHER ROBELL HUNTER Petitioner,</p> <p>V.</p> <p>NC SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION Respondent.</p>	<p align="center">PROPOSAL FOR DECISION</p>
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On March 4, 2013, Administrative Law Judge J. Randall May heard this contested case in the Haywood County Courthouse, Waynesville, North Carolina.

APPEARANCES

Petitioner: Sarah Patterson ("Patsy") Brison
Roberts & Stevens P.A.
Attorneys at Law

Respondent: William P. Hart, Jr.
Assistant Attorney General
N. C. Department of Justice

ISSUES

Petitioner and Respondent stipulated the issues to be the following:

- (a) Whether the Petitioner committed the Class B misdemeanor offense of assault on a female in violation of N.C. Gen. Stat. § 14-33(c)(2) on or about the date of October 25, 2008 and/or on or about the date of April 26, 2009, such that the offense(s) would have been committed within the five-year period of his date of appointment by the Sheriff of Buncombe County?
- (b) If the Petitioner's application for justice officer certification is subject to denial by the Respondent, do any extenuating circumstances exist to warrant a reduction or suspension of this sanction?
- (c) What sanction, if any, should the Respondent impose against the Petitioner's application for justice officer certification?

Based upon a greater weight of the admissible evidence, the undersigned makes the following:

FINDINGS OF FACT

1. The petitioner, Christopher Robell Hunter (hereinafter "Petitioner"), is a resident of Buncombe County, North Carolina, and is presently employed by the Buncombe County Sheriff's Office as a detention officer in the Buncombe County detention facility.

2. The respondent is the North Carolina Sheriffs' Education and Training Standards Commission (hereinafter "Commission").

3. Petitioner is an applicant for justice officer certification with the Commission, by virtue of his appointment as a detention officer by the Sheriff of Buncombe County on December 5, 2011. Petitioner has not previously held justice officer certification.

4. Petitioner graduated from Western Carolina University in May of 2011, with a B.S. in Criminal Justice. He received training as a detention officer through classes at Asheville-Buncombe Technical Community College. Major Glen Matayabas of the Buncombe County Sheriff's Office was an instructor in those classes and is currently head of the Buncombe County Detention Center operations, where Petitioner is currently employed. Major Matayabas appeared and testified at the hearing of this matter and stated that Petitioner was a good student, having received his degree in Criminal Justice.

5. On November 20, 2011, Petitioner completed a Form F-3 Personal History Statement of the Commission, which included disclosures about arrests or criminal charges and their disposition.

6. On September 11 or 12, 2012, Petitioner and his supervisor, Lt. Christopher Barber, appeared in Wake County, N.C. before the Probable Cause Committee of the Commission. On or about September 27, 2012, the Commission sent a letter to Petitioner notifying him that the Commission, through its Probable Cause Committee, had found probable cause to believe that his application for justice officer certification should be denied on the basis that he had "committed" the Class B misdemeanor offense of assault on a female in violation of N.C. Gen. Stat. § 14-33(c)(2) on October 25, 2008 and on April 26, 2009.

7. After receipt of the September 27, 2012 notification letter, Petitioner timely requested an administrative hearing, and the Commission thereafter submitted a request to the Office of Administrative Hearings for designation of an administrative law judge to hear the matter.

The October 25, 2008 Charge

8. The alleged assaults on a female on October 25, 2008 and April 26, 2009, occurred while Petitioner was a student at Western Carolina University. October 25, 2008 was

nearly four and one-half years prior to the hearing of this matter and April 26, 2009 was nearly four years prior to the hearing of this matter.

9. On or about October 25, 2008, Petitioner alleged he was assaulted by J.R. Redmon and Russell Robertson, requested that they be charged with assault, and they were so charged. On December 9, 2008, these charges were voluntarily dismissed without leave by the Assistant District Attorney for Jackson County at the request of the alleged victim, the petitioner.

10. On or about October 25, 2008, Deputy Timothy J. Rice, then serving as a deputy with the Sheriff of Jackson County, N.C., appeared before a magistrate and swore out a criminal summons against Petitioner, charging him with having committed the misdemeanor offense of assault on a female in Jackson County, N.C., in violation of N.C. Gen. Stat. § 14-33(c)(2) (Jackson County District Court, file number 08 CR 052607). The alleged victim was identified as a female person named "KIERITH ISENHOUER [sic]" and the alleged assault was "PUSHING HER."

11. A summons for the charge against Petitioner in 08 CR 052607 was thereafter served upon Petitioner. On or about December 9, 2008, this charge was voluntarily dismissed without leave by the Assistant District Attorney.

12. Ms. Isenhour did not appear and testify at the hearing of this matter. In addition, the arresting officer, Deputy Timothy J. Rice, Jackson County Sheriff's Office, did not appear and testify at the hearing of this matter. Petitioner testified about the events on October 25, 2008, which resulted in criminal charges against J.R. Redmon and Russell Robertson for assault on Petitioner, and a criminal charge against Petitioner by Ms. Isenhour, all of which were dismissed by the District Attorney's Office. Petitioner was not convicted of the charge of assault on a female. Petitioner lives with his girlfriend, Chandler Elliot, who is the best friend of Ms. Isenhour. The three of them have stayed at each other's residences and at the beach house of Ms. Elliot, after the events of the evening of October 25, 2008, indicating that the relationship between Petitioner and Ms. Isenhour was not impaired by whatever happened on the evening of October 25, 2008. The Commission provided no other evidence, other than the statement and testimony of Petitioner, in support of its contention that Petitioner "committed" the assault on a female under N.C. Gen. Stat. § 14-33 (c)(2). Pursuant to the definition of "commission" in 12 NCAC 10B.0204 (d)(2), the Commission has failed to provide evidence to show that Petitioner performed the acts and with the intent necessary to satisfy the elements of the criminal offense.

13. The Petitioner testified that he did not assault Ms. Isenhour. There was no other independent evidence to show that this alleged crime had occurred.

14. The paucity of admissible non-hearsay evidence for Respondent in the October 25, 2008 event does not merit consideration and therefore will not be further discussed.

The April 26, 2009 Charge

15. On or about April 30, 2009, Gioia Holland (hereafter "Holland") appeared before a magistrate and swore out a criminal summons against Petitioner charging him with having

committed the misdemeanor offense of assault on a female in Jackson County, N.C. on or about April 26, 2009, in violation of N.C. Gen. Stat. § 14-33(c)(2) (Jackson County District Court, file number 09 CR 051046). The alleged victim was identified as Gioia Holland, a female person, and the alleged assault was "THROWING A BEER CAN AND HITTING HER IN THE CHEST" with the beer can. This allegation was approximately four years prior to the instant case.

16. Holland testified that she was a student at Western Carolina University; that she was employed at the apartment complex (Catamount Peak Apartments) as a Community Assistant; and that she also assisted the manager, and with security.

17. The evidence would indicate that on this occasion Holland had gone to the area of the apartments where Petitioner resided to attempt to persuade the residents and others to quieten down their party, as this was her job with the apartment complex. While there her testimony was that she had become involved in a verbal altercation with another woman. This altercation was broken up by others who were present, and the other woman was taken into her apartment. (Hearing Tape 1, Holland's Direct Examination).

18. Later, while still at the party, Holland was in the presence of a crowd; one of the closer individuals to her was Petitioner, whom she apparently knew. At this time Petitioner asked that she not break up the party, and in doing so he apparently moved his hand, in which he was holding a can of beer, toward her.

19. There is a discrepancy as to the manner in which the alleged assault occurred, in that differing allegations by Holland have charged as follows:

- a. "Throwing a beer can and hitting her in the chest" was alleged in the warrant of August 30, 2009.
- b. At the party, he (Petitioner) was drinking a can of beer and that is what he hit me with or pushed into my chest. It moved me and beer did slosh onto me. (Hearing Tape 1, Holland's Direct Examination).
- c. At the party words were passed. "Chris then threw his beer can on me and Jaered and I both called county." (Petitioner's Exhibit 1, [Statement of Gioia L. Holland to N.C. Sheriffs' Education Standards Commission investigator on 25 April 2009]).
- d. She later stated that Hunter shoved the beer at her. (Hearing Tape 1, Holland's Cross Examination).

20. Either because Petitioner touched her, threw a can of beer on her, or that she was attempting to avoid having beer splashed on her when she stepped back, seems to suggest what some of the evidence showed. Her testimony was that it was a push, although the credible evidence would have suggested that this was a non-violent touching by Petitioner's hand, which at the time had a can of beer in it.

21. Holland testified that she was not harmed by the incident and was not afraid of Petitioner.

22. A summons for the charge against Petitioner in 09 CR 051046 was thereafter served upon Petitioner. On or about June 9, 2009, this charge was voluntarily dismissed without leave by the Assistant District Attorney. Although a different burden is carried in this proceeding, the Undersigned must recognize the disposition of the criminal case by the State's attorney before going to trial. In fact, Holland testified that she did not go forward with the prosecution because she saw Petitioner all the time; was not afraid of him; and did not want to go through a trial because the incident "wasn't that serious". (Hearing Tape 1, Holland's Direct Examination).

23. It does not escape notice of the Undersigned that a warrant was not immediately sworn out by Holland. She waited until after the weekend had passed when her supervisor had returned to work, and she had an opportunity to confer with the supervisor, as well as with her parents. Her supervisor recommended that she take out a warrant and she did secure a warrant. Some of Holland's testimony had been that, even though it appeared that law enforcement personnel were at the scene on the night of April 26, and that she would have had an opportunity to report the alleged assault, she did not.

24. Both Petitioner and Holland appeared and testified at the hearing of this matter concerning the events of the evening of April 26, 2009. Petitioner and Holland disputed the factual accounting of the events of that evening. Holland was in class with Petitioner and sitting at the same classroom table with him, after the events of the evening of April 26, 2009, indicating that the relationship between Petitioner and Holland was not impaired by whatever happened on the evening of April 26, 2009. Holland did not appear in the district court on the day of the hearing on the assault charge, but Petitioner was present. The charge was dismissed by the District Attorney's Office and Petitioner was not convicted of the charge of assault. The Commission provided no other evidence in support of its contention that Petitioner "committed" the assault under N.C. Gen. Stat. § 14-33(c)(2). Pursuant to the definition of "commission" in 12 NCAC 10B.0204 (d)(2), the Commission has failed to provide credible evidence to show that Petitioner performed the acts and with the intent necessary to satisfy the elements of the criminal offense.

25. Petitioner testified that he did not assault Ms. Holland, and although an interested witness, he appeared credible.

26. Petitioner timely disclosed both of the aforementioned misdemeanor assault on a female charges to the Commission through his November 20, 2011 Form F-3 Personal History Statement.

27. Major Matayabas and Sergeant Cynthia Heaton of the Buncombe County Sheriff's Office both appeared and testified in support of Petitioner at the hearing of this matter. Sergeant Heaton is one of the direct supervisors of Petitioner, and stated that he has performed his duties well, without any complaints about behavior or performance. Major Matayabas testified that Petitioner had received recognition recently for perfect attendance in his position as a detention officer.

28. Pursuant to the Commission's administrative rules: "The Commission may . . . deny the certification of a justice officer when the Commission finds that the applicant for certification . . . has committed . . . a crime or unlawful act defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor within the five-year period prior to the date of appointment." 12 NCAC 10B .0204(d)(2). Under those rules, "[c]ommission . . . means . . . that a person performed the acts necessary to satisfy the elements of a specified criminal offense." If the Commission denies justice officer certification on the basis of a deficiency under 12 NCAC 10B .0204(d)(2), then the denial shall be "for an indefinite period, but continuing so long as the stated deficiency, infraction, or impairment continues to exist." 12 NCAC 10B .0205(3)(d).

29. "The Commission may either reduce or suspend the periods of sanction where revocation, denial or suspension of certification is based upon the Subparagraphs set out in 12 NCAC 10B .0204(d) or substitute a period of probation in lieu of revocation, suspension or denial following an administrative hearing. This authority to reduce or suspend the period of sanction may be utilized by the Commission when extenuating circumstances brought out at the administrative hearing warrant such a reduction or suspension." 12 NCAC 10B .0205(3).

Based upon the foregoing Findings of Fact, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. The parties properly are before the undersigned Administrative Law Judge and jurisdiction and venue are proper.

2. As previously stated, the October 25th (Isenhour) charge fails for lack of non-hearsay admissible evidence, in addition to the absence of the *corpus delicti*.

3. In considering the relevant law applicable to the April 29th (Holland) charge, it is instructive to consider the North Carolina Pattern Jury charge concerning the charge of Assault on a Female. NCGS § 14-33(c)(2). In pertinent part this instruction reads as follows:

*The defendant, a male person, has been charged with assault on a female. (An assault is an overt act or an attempt, or the unequivocal appearance of an attempt, **with force and violence** (emphasis added), to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable fear of immediate bodily harm.)*

For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:

First, that the defendant intentionally assaulted the victim . . .
N.C.P.I. - - Crim. 208.70 ASSAULT ON A FEMALE PERSON BY A MALE PERSON.

4. An attempt to show the manifestation of an **intentional act with force and violence**, based on the credible evidence in this case, falls short of even the standard of proof of

"by the greater weight of the evidence". This later act, even though it may have been a touching, simply does not rise to the level of a criminal offense. The finder of facts is confused as to what set of facts was to have satisfied the elements of the crime charged against Petitioner . . . simply put, the *allegata et probata* does not equate.

5. Whatever happened in Cullowhee, North Carolina on April 26, 2009 did not rise to the degree of an act which should prevent Petitioner from becoming a law enforcement officer. In the words of Ms. Holland, "It wasn't that serious", and therefore, should not be used as an obstacle to certification for Petitioner.

6. The Commission has failed to carry its burden of proof by the greater weight of the evidence by concluding that Petitioner has committed the misdemeanor offense of assault on a female pursuant to N.C. Gen. Stat. § 14-33(c)(2), on either Ms. Isenhour or Ms. Holland, in order to deny the application of Petitioner for justice officer certification.

PROPOSAL FOR DECISION

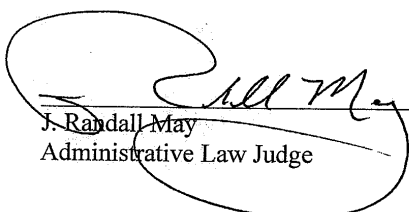
Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned proposes that the Commission certify the Petitioner as a justice officer by virtue of his appointment as a detention officer by the Sheriff of Buncombe County, North Carolina.

NOTICE AND ORDER

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

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714. N.C. Gen. Stat. § 150B-40(e).

This the 7th day of May, 2013.


J. Randall May
Administrative Law Judge

A copy of the foregoing was mailed to:

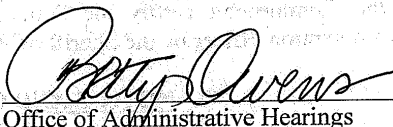
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ATTORNEY FOR PETITIONER

William P. Hart, Jr.
Assistant Attorney General
North Carolina Department of Justice
9001 Mail Service Center
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ATTORNEY FOR RESPONDENT

This the 7th day of May, 2013.



Office of Administrative Hearings
6714 Mail Service Center
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Fax: 919/431-3100



Filed

STATE OF NORTH CAROLINA 2013 MAY 17 AM 9:45

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 OSP 00519

COUNTY OF WAKE

Office of
Administrative Hearings

RHONDA WHITAKER,

Petitioner,

v.

NORTH CAROLINA DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Respondent.

FINAL DECISION

On January 22-23, 2013, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Raleigh, North Carolina. On April 5, 2013, Petitioner filed a proposed Decision with the Office of Administrative Hearings. On April 29, 2013, the Office of Administrative Hearings received the official transcript of the contested case hearing.

APPEARANCES

For Petitioner: Michael C. Byrne
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Attorney for Petitioner

For Respondent: Adam Shestak
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ISSUE

Whether Respondent had just cause to demote Petitioner, a career state employee subject to the State Personnel Act, for unsatisfactory job performance?

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 1 - 12

For Respondent: 1 – 9, 11- 22, 24

WITNESSES

For Petitioner: Rhonda Whitaker, Linda Latona

For Respondent: Amanda Dorgan, Diana Younger, Kimberly Jackson,
Debbie Thomas, Rhonda Whitaker

FINDINGS OF FACT

Procedural Background

1. On October 6, 2011, Respondent's Associate Chief Nursing Officer, Diana Younger, demoted Petitioner from the position of Unit Nurse Director at Central Regional Hospital to the position of Professional Nurse for engaging in unsatisfactory job performance. Specifically, Ms. Younger alleged that Petitioner's "Unit Nurse Director (UND) level performance goals were not consistently met" as (1) Petitioner failed to ensure unit collection system of employees' timesheets and (2) Petitioner failed to ensure that employees' performance management plans, competencies, and job descriptions were submitted in compliance with the Human Resources' deadline. Younger also wrote that Petitioner failed to meet the UND level performance goal for the July 2011 work schedule when Petitioner posted the July 2011 work schedule which:

[S]howed 23 uncovered staffing needs for the days of July 1st and 2nd (all three shifts). This presented a critical stage in trying to procure staff leading into the holiday (July 4th). It also created an unsafe patient care situation.

(See Document Constituting Agency Action) Because of this demotion, Petitioner's annual salary was reduced from \$74,305 to \$65,297.

2. On November 16, 2011, Respondent's Hearing Officer heard Petitioner's internal appeal of her demotion, and recommended that Petitioner's demotion be upheld. On January 10, 2012, Respondent's Secretary issued a Final Agency Decision upholding Petitioner's demotion to the position of Professional Nurse.

3. On January 20, 2012, Petitioner appealed her demotion by filing a contested case petition with the Office of Administrative Hearings, alleging that

Respondent had demoted her without just cause, and "falsely accused Petitioner of unsatisfactory job performance." (Petition)

Adjudicated Facts

4. Petitioner is a career state employee of the Respondent in a position subject to the State Personnel Act. From 1996 to 1997, Petitioner was employed as a registered nurse at Respondent's John Umstead Hospital. In 1997, Petitioner worked as a registered nurse at Respondent's Dorothea Dix Hospital in the Child and Adolescent Unit.

5. Effective August 2, 2004, Respondent promoted Petitioner to Nurse Manager in the Forensics unit in the Spruill Building at Dorothea Dix Hospital.

6. The Forensics unit consisted of four subunits: (1) F Medium unit (also called "B0"), (2) F Maximum unit (also called "A0"), (3) F Minimum unit, and (4) the pretrial unit. There was approximately 180 nursing staff employed in the Forensics units.

7. Each Forensics subunit was managed by a Unit Nurse Manager, who was assisted by an Assistant Nurse Manager. Unit Nurse Managers directly managed their individual units, and reported to the Forensics Unit Nurse Director. Unit Nurse Managers were responsible:

for the direct supervision of the actual PCU, making sure scheduling was done, making sure they had adequate staffing, directly see what is going on with the patients, and actively involved with treatment planning to make sure that they have nurses in treatment team.

(T. p. 24) The Unit Nurse Manager was directly responsible for supervising the nursing staff who directly reported to her, including completing the employees' performance management evaluations (PMPs), job descriptions, and competency forms for the employees in his/her subunit under her direct supervision.

8. In November of 2010, Respondent hired Sylvia Lesnick as the Unit Nurse Manager for the Forensics Maximum (A0) subunit.

9. Effective November 1, 2010, Petitioner was promoted to Unit Nurse Director over the entire Forensics unit.

10. Unit Nurse Directors do not manage the individual subunits, but manage the Forensics unit as a whole. As the Forensics Unit Nurse Director, Petitioner was directly responsible for time sheets, PMPs, and job descriptions for employees under her direct supervision. Petitioner directly supervised the unit (or clinical) nurse managers, the health care tech preceptor, the nurse aide coordinator, and the clinical nurse specialists.

11. In December of 2010, the Forensics Medium (or "B0") and Forensics Maximum (or "A0") units relocated to Central Regional Hospital in Butner, North Carolina, while the Forensics Minimum unit remained at the Dix Hospital location. Both Petitioner and Sylvia Lesnick's positions moved to Central Regional Hospital.

12. As Unit Nurse Director, Petitioner reported to Diana Younger, Assistant Chief Nursing Officer at Central Regional. Ms Younger reported to Amanda Dorgan, Chief Nursing Officer for Central Regional Hospital.

13. Around December 2010 or January 2011, Ms. Lesnick stepped down from her A0 Unit Nurse Manager position, and asked to work as a regular nurse. Lesnick was willing to assist with some of the "acting" Unit Nurse Manager duties until a new Unit Nurse Manager for the A0/Forensic Maximum subunit could be hired.

14. There was one Nursing Education Coordinator assigned to the Forensics unit. That coordinator was responsible for educating and training the nursing staff in all four Forensics subunits, delivering any new training directives, and keeping up with the job competencies for all staff in the entire Forensics unit, including nurses and health care technicians.

15. In early 2011, the nursing staff, including Petitioner, interviewed and selected a candidate for the vacant A0 Unit Nurse Manager position. After Human Resources advised nursing management that the selected candidate for that position could not be hired, nursing management had to select another applicant to fill the A0 Unit Nurse Manager. Ultimately, the Unit Nurse Manager position for the A0 subunit remained vacant until September or October of 2011.

16. From approximately January 2011 until July 2011, Petitioner had to perform the work of both her position, and the A0 Unit Nurse Manager since the A0 Unit Nurse Manager position remained vacant. Petitioner received no additional salary or other compensation for performing these additional duties. During this time, there also was no one employed in the Forensics unit's Nursing Education Coordinator position. Ms. Lesnick assisted with some of the A0 Unit Nurse Manager duties.

17. Nursing management at Central Regional understood that Petitioner's assumption of these unpaid additional duties was intended as a temporary measure until those vacant positions could be filled.

18. During Petitioner's management of the Forensics Maximum (A0) subunit, from January 2011 through July 2011, she directly supervised approximately 60 employees. Submission of these timesheets ordinarily would be the direct responsibility of the Unit Nurse Manager, rather than the Unit Nurse Director. Petitioner's system required the A0 submit employees to submit their timesheets to Petitioner, Petitioner would sign the sheets, and submit them to Human Resources. That system worked for 99% of the employees. However, several of the same employees failed to submit their timesheets in a timely manner. Petitioner talked with these employees who had not

submitted their timesheets in a timely manner, and explained to them what they needed to do to correct the timesheet problem. (T. pp. 38-39)

19. According to Respondent's payroll or timekeeping personnel, difficulties with employees submitting their time sheets in a timely manner was not restricted to the A0 subunit managed by Petitioner. However, the Forensics Maximum (A0) subunit appeared to have more trouble than most. The problems with submission of timesheets from the Forensics Maximum subunit involved the same group of employees, rather than the unit as a whole. Documentation indicated that 8 of the 60 A0 subunit employees failed to turn in their timesheets.

20. The preponderance of the evidence showed that Respondent did not discipline any of these employees, in any fashion, for failing to turn in their timesheets in a reasonable fashion, as required by regulations at Central Regional Hospital.

21. On May 27, 2011, Diana Younger issued Petitioner a "documented counseling," because several employees "had already received pay but their timesheets had not been submitted." Younger advised Petitioner that she needed to see improvement in the:

[T]imeliness of your reports to auxiliary departments. And as a managerial level employee it is expected. It is considered unacceptable and unsatisfactory. I will be monitoring you for improvement in this area.

(Resp Exh 1) While a "documented counseling" is not intended to be formal disciplinary action, Ms. Younger advised Petitioner in this documented counseling that "your failure to meet this expectation of improvement will lead to further disciplinary action." (Resp Exh 1)

22. On the same date, May 27, 2011, Ms. Younger issued a second documented counseling to Petitioner for failing to correct or address the fact that a patient, who was in restraints, was located behind a closed door. (Resp Exh 2) Testimony at hearing established that a charge nurse on a Forensics subunit directed that a patient be restrained following an attack on a staff member. The nurse and a health care technician placed the patient in the restraint room, but left the door between the health technician and the patient closed. Leaving the door between the technician and the patient violated Central Regional Hospital's restraint policy. All personnel had been regularly trained on the restraint policy.

23. Petitioner's sole role in this matter was assisting the attacked staff member with getting medical attention, and then returning to the unit briefly. Petitioner walked into the restraint room where the technician and restrained patient were located, and where the door between the technician and the patient was closed. It did not register with Petitioner that the violation of the restraint policy had been committed by the charge nurse and/or health care technician. During the documented counseling with

Ms. Younger about this matter, Petitioner acknowledged that it was a mistake on her part not to address the closed-door violation.

24. Respondent did not counsel or formally discipline the charge nurse who ordered and enacted the restraint. Respondent counsel did not issue a documented counseling or take formal disciplinary action against the health care technician who was involved in the restraint. Petitioner was the only employee given a "documented counseling" or any disciplinary action regarding the event. In addition, Ms. Younger only reviewed the portion of the patient restraint video that showed Petitioner's involvement in the matter.

25. Similar to the documented counseling regarding the time sheet issue, Ms. Younger noted in this documented counseling that "further disciplinary action" would result in the event of a failure to improve.

26. On June 7, 2011, Chief Nursing Officer, Amanda Dorgan, directed Ms. Younger to issue a written warning to Petitioner regarding the same restraint issue on which Younger had issued a documented counseling to Petitioner ten days earlier. Respondent did not remove or cancel the May 27, 2011 documented counseling from Petitioner's file.

27. On June 21, 2011, Petitioner advised Amanda Dorgan and Diana Younger that she needed more staff to work in the A0/ Forensics Maximum subunit as the patient acuity on A0 was very high. Specifically, Petitioner requested permission to work staff more overtime than the standard allowance, due to the high acuity, in order to fill shift or staff needs. The standard practice required that no staff could work over 24 hours without Dorgan's permission. Petitioner made such request so she would not have to ask Dorgan's permission for each individual staff willing to work that overtime amount.

28. Dorgan approved Petitioner's request to allow staff to work 32 hours of overtime temporarily to cover staff needs for the A0 subunit. Dorgan approved Petitioner's request from June 21st through July 6th. (T. p. 109) Younger notified Petitioner of that approval. (T. pp. 108-110; Resp Exh 9) Younger advised Petitioner that they would re-evaluate the situation on July 6, 2011.

29. Petitioner contacted staffing coordinator, Becky Collins, and advised Collins of her staffing needs for July 1st and 2nd, 2011.

30. On July 1, 2011, there remained 23 unfilled shift positions, specifically health care technician, for the A0/Forensics Maximum unit for July 1st and 2nd.

31. That same day, Ms. Younger and Petitioner were talking in Younger's office, regarding a staff member who had been hurt on the job, when Ms. Dorgan walked in. Ms. Dorgan told Petitioner that she had not been doing her job, and summarily removed Petitioner from her duties as Unit Nurse Director. (T. pp. 49, 182-83, 389) Petitioner became upset about being demoted by Dorgan, and requested time

off from Ms. Younger, beginning that day. (T. p. 47) Petitioner took vacation leave for a few days as she was upset that Dorgan had removed her from her duties.

32. At 2:43 p.m. on July 1, 2011, Ms. Younger advised Collins, via email, to proceed in trying to staff the unfilled shift positions, and to notify another Unit Nurse Manager, Ms. Oby Onuorah, about the matter since Petitioner was on vacation.

33. There is no dispute that Ms. Dorgan removed Petitioner from her management duties as a Unit Nurse Director on July 1, 2011, and that Petitioner never reassumed them. It is likewise undisputed that Respondent did not issue a notice of pre-disciplinary conference to Petitioner, and did not hold a pre-disciplinary conference with Petitioner on or before July 1, 2011. Petitioner's pay was not reduced on that date either.

34. While there is no dispute that Dorgan removed Petitioner from her managerial duties on July 1, 2011, there is disputed evidence regarding the significance of Petitioner being relieved of her duties that day.

a. At hearing, Dorgan testified that as of July 1st, 2011, no final decision had been made about Petitioner's status. However, a preponderance of the evidence showed otherwise. At hearing, Ms. Younger admitted that on July 1, 2011, Ms. Dorgan instructed Younger to look for another job for Petitioner. Ms. Younger did not do that, because Petitioner went on vacation that day. (T. p. 428)

b. Shortly before or on July 1, 2011, Ms. Dorgan also talked to Respondent's Human Resources Manager, Debra Thomas, about removing Petitioner from her position as Unit Nurse Director. During that conversation, Dorgan:

Outlined her concerns [to Thomas] about the issues in the letter of demotion and said that she needed to remove her [Petitioner] from her job. . . . the same issues . . . of time sheets and documentation and competencies and job descriptions and scheduling issues.

(T. pp. 298-301) At hearing, Thomas noted that however, Ms. Dorgan did not do that, i.e. remove Petitioner from her job, because Petitioner went on vacation.

35. Staff job descriptions, PMPs, and competencies were due to Human Resources for all staff by June 8, 2011. On July 8, 2011, Human Resources notified Ms. Younger that it was missing competencies, PMPs, and job descriptions for a list of nurses and health care technicians from the Forensics Maximum/A0 unit. (See Resp Exh 11) As Unit Nurse Director, Petitioner was directly responsible for only three of those employees whose job descriptions/competency/PMPs were missing. The Unit Nurse Manager position, which Petitioner was also performing, was responsible for all remaining employees' missing documentation.

36. After taking vacation leave, Petitioner took Family Medical Leave, and did not return to work until October 2011.

37. On October 3, 2011, Ms. Younger issued Petitioner a notice for pre-disciplinary conference. That notice directed Petitioner to attend a pre-disciplinary conference on October 4, 2011 regarding a proposed disciplinary action for engaging in unsatisfactory job performance. (Resp Exh 4)

38. Effective October 10, 2011, Ms. Younger demoted Petitioner from Unit Nurse Director to Professional Nurse for engaging in unsatisfactory job performance. (Resp Exhs 4, 5) By letter dated October 12, 2011, Younger advised Petitioner that she was demoting Petitioner for:

(1) Not consistently meeting an Unit Nurse Director performance goal by failing to ensure collection of staff timesheets. Younger recounted timekeeper Kimberly Jackson's emails how numerous A0 subunit employees had failed to submit their timesheets from February through July 2011. (See list of employees in Resp Exh 11)

(2) Not meeting an Unit Nurse Director performance goal by failing to assure submission of validated staff competencies, PMPs and job descriptions for A0 subunit employees in compliance with Human Resources guidelines. Specifically, several employees' PMPs, job descriptions, and competencies from the A0 subunit had not been submitted to Human Resources by July 8, 2011.

(3) Not meeting the Unit Nurse Director performance goal of having adequate staffing and scheduling personnel by posting a July 2011 work schedule with 23 uncovered staff shifts for July 1st and 2nd. Younger noted that "[t]his presented a critical stage in trying to procure staff leading into the holiday (July 4th)." "It also created an unsafe patient care situation." (Resp Exh 5) She also referenced the June 7, 2011 written warning regarding the restraint issue, and the May 27, 2011 documented counseling.

Analysis

39. Between 1996 and May 27, 2011, Petitioner received no prior disciplinary actions from Respondent based on unsatisfactory job performance. The only formal disciplinary action Petitioner received from Respondent was the May 27, 2011 written warning for unacceptable personal conduct. (T. p. 119)

40. A preponderance of the evidence at hearing proved that before July 1, 2011, Diana Younger never documented, cited, or disciplined Petitioner for being deficient in her job performance in maintaining employee PMPs, competencies, or job descriptions, or in submitting employee timesheets to Human Resources. (T. pp. 424-426)

41. A preponderance of the evidence established that before July 1, 2011, Diana Younger did not document, or cite, or discipline Petitioner for any performance deficiencies in scheduling adequate staff on the Forensics units. (T. pp. 423-428) On June 11, 2011, Ms. Younger rated Petitioner's job performance on "supervision and evaluation of staff performance as "90%-100%. No deficiency reports in PMP compliance." (T. pp. 424-426; Resp Exh 7, p 3)

42. At hearing, Ms. Dorgan acknowledged that at no time before July 1, 2011, did Ms. Dorgan discuss issues surrounding the July 2011 work schedule, employee PMPs, competencies, or job description with Petitioner in a "negative or fault-finding fashion." (T. pp. 165, 195)

43. In the demotion letter, Younger reasoned that some employees were not being paid for time they had worked, because their timesheets had not been submitted to Human Resources. Yet, in the May 27, 2011 documented counseling letter to Petitioner, Younger advised Petitioner that employees had already been paid, but their timesheets had not been submitted. (Resp Exh 1)

44. In the demotion letter, Younger criticized Petitioner for failing to meet her Unit Nurse Director goals. Nowhere in the demotion letter did Younger cite that the majority of employees whose timesheets were missing were employees who directly reported to the vacant Unit Nurse Manager position. (T. p. 154) Nowhere in the demotion letter did Younger reference that Petitioner had been performing the duties of her job and the duties of the A0 Unit Nurse Manager for approximately 6-7 months. Only 3 of the 32 employees whose documents had not submitted to Human Resources, reported directly to Petitioner.

45. At hearing, Ms. Dorgan explained that if staff competencies and job descriptions were not completed, then the hospital could face possible consequences from regulatory agencies. Yet, she acknowledged on cross-examination that no regulatory agency had taken any action against Central Regional Hospital because of any act or omission by Petitioner regarding the missing competencies, and job descriptions.

46. In the demotion letter, Respondent did not indicate that none of the missing competencies for the A0 staff would have expired as of July 8, 2011. (T. p. 163) In fact, a preponderance of the evidence proved that the employees in the Forensics units had completed annual job descriptions and competencies the year before, and that staff job descriptions and competencies had not changed from the year. (T. p. 303) Evidence at hearing also proved that the employees' personnel files containing these documents would have moved along with the Forensics units when they moved to Central Regional Hospital from Dix Hospital.

47. Dorgan conceded at hearing that before she demoted Petitioner, she made no effort to investigate whether the A0 employees' existing job descriptions or competencies were in their personnel files at Central Regional. (T. pp. 164, 165)

48. In the demotion letter, Younger also demoted Petitioner for posting the July 2011 schedule with 23 uncovered shifts in the A0 Forensics Maximum subunit before going out on vacation. However, the demotion letter failed to reflect, accurately, the actual situation concerning Petitioner and the July 2011 work schedule.

a. The July 2011 work schedule was required to be completed by June 15, 2011. The preponderance of the evidence established that Petitioner actively attempted to remedy the staff shortage in the A0 unit, and staff the July 2011 schedule during the month of June. On June 21, 2011, Petitioner acquired permission to work staff more than the standard overtime due to the "very high" patient acuity. Dorgan approved that request through July 6, 2011.

b. On July 1, 2011, Petitioner asked staffing coordinator Collins, "I need 23 health care technicians to work this weekend. Please provide them." (T. pp. 46-47; Resp Exh 9) Petitioner was also prepared to work July 1, 2, 3, and 4th, 2011 to fill any uncovered shifts.

c. Respondent failed to present any other evidence, either in the demotion letter or at hearing, that any shifts during the remainder of the July 2011 schedule were uncovered.

49. The preponderance of the evidence also established that neither Younger nor Dorgan had previously disciplined Petitioner for failing to provide adequate staffing.

50. At hearing, both Younger and Dorgan emphasized how they allowed Petitioner to handle the A0 Unit Nurse Manager vacancy in her own way. Dorgan and Younger implied that Petitioner had assumed the duties of the A0 Unit Nurse Manager by her own choosing, and that Petitioner refused their alternative ways to handle that vacant position. Ms. Younger explained that she suggested Petitioner place another employee, Veronica McClain, in the A0 Unit Nurse Manager position, but that Petitioner did not want McClain in the job.

a. However, evidence showed that Petitioner rejected Younger's suggestion as she did not think that McClain was qualified for the A0 Unit Nurse Manager position.

b. Petitioner further explained that Ms. Younger could have overruled her and placed someone in the A0 Unit Nurse Manager position. For example, on another occasion, Ms. Younger had advised Petitioner to issue a warning to another employee regarding that employee's performance.

c. Similarly, Dorgan acknowledged at hearing that she was authorized to appoint a new Unit Nurse Manager for the A0 unit, but she did not. (T. pp. 151-152)

51. Given the testimony of Ms. Dorgan and Ms. Younger, and the preponderance of evidence at hearing, the undersigned finds that Dorgan and Younger were not credible witnesses.

a. First, Ms. Dorgan told Younger to issue the June 7, 2011 written warning to Petitioner regarding the same patient restraint issue for which Younger had already issued a May 27, 2011 document counseling to Petitioner. At hearing, Dorgan reasoned that Petitioner should have been disciplined for the patient restraint incident, although she was not directly involved in the incident, because Petitioner should be held to a higher level of responsibility as a manager. However, at hearing, Respondent's Human Resources representative, Debra Thomas, opined that it was not proper to issue a disciplinary action to someone merely because she was a manager, as opposed to being [employed as regular] nurse. (T. p. 286)

b. Second, Petitioner asserted that Ms. Dorgan told another employee that she wished to have Petitioner removed from her position, because Petitioner was not a "cheerleader" for Dorgan. While Ms. Dorgan denied making this statement, Linda Latona corroborated Petitioner's assertion. Linda Latona is a former Unit Nurse Director and Associate Chief Nursing Director at Central Regional. In June or July 2011, Ms. Latona overheard Ms. Dorgan state that if Petitioner was not a cheerleader for her, then she did not need to be on her team. (T. p. 445)

c. On or about July 1, 2011, after Dorgan removed Petitioner from her job, Dorgan walked into Latona's office, slammed her hands very loudly on Latona's desk, and stated, "Now I need you to do your job." Latona was puzzled and alarmed, because she thought she had not done her own job correctly. Dorgan then told Latona, "I just demoted Rhonda, and you need to go next door to Ms. Younger's office and give . . . tell Rhonda what her options are on the units that you run."

d. At hearing, Ms. Younger frequently provided general, vague and inconsistent answers to questions by Petitioner's counsel and the Court. Younger often would answer questions before Petitioner's counsel or the Court had finished asking a question. Younger also had difficulty recalling specific dates, details, and reasons for demoting Petitioner. During Younger's testimony, the Court asked Ms. Dorgan to leave the courtroom, after the undersigned observed Ms. Dorgan nodding her head "yes" or "no" to questions asked of Ms. Younger. After Dorgan nodded her head, Younger answered a question in the manner Dorgan had indicated.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over this case pursuant to Chapters 126 and 150B of the North Carolina General Statutes and all parties had notice of the hearing. The Office of Administrative Hearings has personal

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

2. Petitioner is a career State employee subject to the State Personnel Act, N.C. Gen. Stat. § 126-1 et seq.

3. 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).

4. 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.

5. In *NC Dept’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:

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

‘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)

6. Further, in *Carroll*, the NC Supreme Court held:

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.

7. In 2012, our Supreme Court amended the just cause determination in *Carroll* 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).

8. In this case, Respondent demoted Petitioner for engaging in unsatisfactory job performance. Pursuant to 25 NCAC 01J .0612, "an employee may be demoted for unsatisfactory job performance after the employee has received at least one prior disciplinary action." 25 NCAC 01J .0614(9) defines "unsatisfactory job performance" as:

work-related performance that fails to satisfactorily meet job requirements as specified in the relevant job description, work plan, or as directed by the management of the work unit or agency.

9. In *Walker v. North Carolina Dep't of Human Resources*, 100 N.C. App. 498, 397 S.E.2d 350 (1990), *review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991), the Court described the standard by which an agency employer is bound in disciplining a state employee. The Court specifically held that:

The standard of employee conduct implied in every contract of employment is one of reasonable care, diligence and attention. *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964); *McKnight v. Simpson's Beauty Supply, Inc.*, 86 N.C.App. 451, 358 S.E.2d 107 (1987). We cannot say that a state employee undertakes any greater duty. In attempting to establish that it had just cause to terminate an employee, then, an agency is bound to make a showing that the employee has not performed with reasonable care, diligence and attention. Failure to fulfill certain quotas and complete certain tasks to the complete satisfaction of a supervisor is not enough. The agency must show that these quotas and job requirements were reasonable, and if so, that the employee made no reasonable effort to meet them.

10. Applying the just cause principles enunciated in the above cases to this case, the undersigned concludes that Respondent failed to prove it had just cause to demote Petitioner from her Unit Nurse Director position.

11. Respondent proved the first prong of the just cause analysis. There was no dispute that employees in the Forensics Maximum/A0 subunit failed to submit their timesheets to Human Resources in a timely manner. There was no dispute that PMPs, staff competencies, and job descriptions for 32 employees in the Forensics Maximum/A0 subunit were not submitted to Human Resources by Human Resources' deadline. Since there was no one employed as the Unit Nurse Manager for the Forensics Maximum/A0 unit from January to July 2011, Petitioner assumed and performed the duties of that position, while also performing her own job duties as Unit Nurse Director for that time. As the acting A0 Unit Nurse Manager, and ultimately as the Unit Nurse Director, Petitioner was responsible for ensuring all A0 employees submitted their timesheets, and for ensuring employees' PMPS, job descriptions, and competencies were submitted in compliance with Human Resources' deadline. Based on the evidence, Petitioner engaged in the conduct Respondent alleged by failing to ensure these documents were submitted in compliance with Human Resources' deadline.

12. Respondent failed to prove the second prong of the just cause analysis that Petitioner's job performance failed to satisfactorily meet the job requirements in her job description, or as directed by the management of the agency.

a. Respondent failed to present sufficient evidence that any employee's failure to submit timesheets had any effect on that employee being paid. The May 27, 2011 documented counseling indicated that employees had been paid even though they hadn't submitted their timesheets, but Petitioner's demotion letter indicated that employees weren't paid, because their timesheets weren't submitted. Respondent failed to present any other evidence clarifying this dispute.

b. Respondent failed to prove that the nonsubmission of employees' PMPs, job descriptions, and competencies adversely affected the operation of the Forensics Maximum/A0 subunit or the provision of care in that subunit. Ms. Dorgan did not examine any employees' personnel files before demoting Petitioner to determine if those files were missing any job descriptions, PMPs, or competencies from the year before. Annual job descriptions, PMPS, and job competencies were completed the year before, and included in employees' personnel files, which were relocated from Dix to Central Regional.

c. In addition, there was no evidence that employees' competencies had expired before July 2011, or that Petitioner's failure to submit competencies endangered Central Regional Hospital's accreditation or any nursing staff's licenses.

d. Before July 2011, neither Ms. Dorgan nor Ms. Younger counseled, cited, or formally disciplined Petitioner for failing to ensure employees' timesheets were issued, or for failing to ensure employees' PMPs, competencies, and job descriptions were submitted to Human Resources.

13. A preponderance of the evidence established that before July 1, 2011, Diana Younger did not document, or cite, or discipline Petitioner for any performance deficiencies in scheduling adequate staff to work on the Forensics units. A preponderance of the evidence showed that Petitioner made reasonable efforts, and used due diligence to complete the July 2011 schedule for the A0 submit during the month of June until July 1, 2011. She received approval to work staff overtime, requested extra staff from the staffing coordinator, and was willing to work to cover unfilled shifts for July 1 and 2, 2011. Respondent failed to establish there were any other uncovered shifts for the remaining July 2011 schedule. In addition, Respondent failed to prove that Petitioner intentionally left on vacation without filling 23 uncovered shifts. Instead, evidence showed that Petitioner took vacation because Dorgan removed Petitioner from her duties on July 1, 2011.

14. Respondent failed to present any evidence that Petitioner's inability to fill 23 shifts on July 1 and 2, 2011 adversely affected the Forensics Maximum/A0 subunit in any way.

15. The preponderance of the evidence proved that while Ms. Dorgan and Ms. Younger had the authority, they did not issue a documented counseling or take any formal disciplinary action against any of the employees who failed to submit their timesheets. By disciplining Petitioner because she was the Unit Nurse Director, but not disciplining the employees who failed to submit the timesheets, Respondent acted "whimsical" in that it demonstrated "a lack of fair and careful consideration or reasoning." *Rector v. North Carolina Sheriff's Education and Training Standards Commission*, 103 N.C. App. 527, 406 S.E.2d 613 (1991).

16. The undersigned concludes that Respondent's issuance of the June 7, 2011 written warning to Petitioner was also arbitrary and capricious. By issuing a written warning and a documented counseling to Petitioner for the same restraint issue, Respondent effectively punished Petitioner twice for same matter. Respondent did so, while taking no disciplinary action against the employees whom actually committed the violation of having a closed door between a health care technician and a restrained patient. (See, e.g., *Bulloch v. N.C. Dep't of Crime Control & Pub. Safety*, 05 O.S.P. 1178, 2010 WL 690232 (N.C.O.A.H. Jan. 15, 2010))

17. The manner in which Ms. Dorgan summarily removed Petitioner from her job on July 1, 2011, without first allowing Petitioner an opportunity to correct the reasons for the demotion, further showed that Respondent lacked just cause to demote Petitioner for the reasons stated in the demotion letter.

18. Assuming Petitioner's actions constituted "unsatisfactory job performance," Respondent failed to prove the third prong of the just cause analysis.

The preponderance of the evidence showed that Petitioner attempted to perform and satisfy the job requirements of the A0 Unit Nurse Manager and Unit Nurse Director for seven months with reasonable care, diligence and attention.

19. The preponderance of the evidence established that Respondent acted erroneously, failed to act as required by the applicable just cause law of Chapter 126, and acted arbitrarily and capriciously in demoting Petitioner for engaging in unsatisfactory job performance.

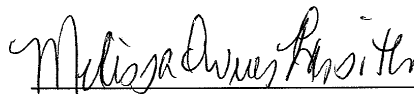
FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **REVERSES** Respondent's decision to demote Petitioner from Unit Nurse Director to Professional Nurse. Respondent is hereby **ORDERED** to reinstate Petitioner to the same or a substantially similar position as Unit Nurse Director, and to pay Petitioner's back pay. Pursuant to 25 N.C.A.C. 1B.0414, Petitioner should be awarded reasonable attorney fees, based upon Petitioner's attorney submitting an itemized statement of the fees and costs incurred in representing the Petitioner.

ORDER AND NOTICE

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

This the 17th day of May, 2013.



Melissa Owens Lassiter
Administrative Law Judge

CERTIFICATE OF SERVICE

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

Michael C. Byrne
Law Office of Michael C. Byrne
150 Fayetteville Street, Suite 1130
Raleigh, NC 27601
ATTORNEY FOR PETITIONER

Adam Shestak
Bethany Burgon
Assistant Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh, NC 27602
ATTORNEY FOR RESPONSENT

This the 17th day of May, 2013.



Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-9001
919-431-3000

Filed

STATE OF NORTH CAROLINA

2013 JAN 30 PM 12:40

IN THE OFFICE OF

COUNTY OF WAKE

Office of
Administrative Hearings

ADMINISTRATIVE HEARINGS
12OSP01940

John Medina, Petitioner, v. North Carolina Department of Public Safety, Respondent.	FINAL DECISION
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THIS MATTER came on for hearing before Beecher R. Gray, Administrative Law Judge, on October 22, 2012, in Raleigh, Wake County, North Carolina. Petitioner filed a Proposed Decision on November 14, 2012. Respondent's Proposal was filed on December 17, 2012.

APPEARANCES

For Petitioner: Jared W. Pierce, Esq.
Pierce Law Offices, P.L.L.C.
2304 S. Miami Blvd
Durham, NC 27703

For Respondent: Yvonne Ricci, Esq.
Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602

ISSUE

Whether Respondent had just cause to terminate Petitioner for unacceptable personal conduct regarding the improper use of force.

EXHIBITS

Petitioner's exhibits ("P. exs.") 1-5 were admitted into the record. Petitioner's exhibit ("P. ex.") 6 was admitted as an offer of proof.

Respondent's exhibits ("R. exs.") 1 and 3-16 were admitted into the record.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 150B
N.C. Gen. Stat. § 126-1.1
N.C. Gen. Stat. § 126-34
N.C. Gen. Stat. § 126-34.1
N.C. Gen. Stat. § 126-35
N.C. Gen. Stat. § 126-36
N.C. Gen. Stat. § 126-37
25 N.C. Admin. Code 1J .0600

WITNESSES

Gerald Branker
John Medina (Petitioner)
Thurman Warren
Christopher Farnsworth
Michael Norris
Daryl Lawrence
Michael Munns
Kenneth Lassiter
Randall Lee
Gregory Yow

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 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 documentary evidence admitted, the undersigned makes the following:

FINDINGS OF FACT

1. The parties received notice of hearing by certified mail more than 15 days prior to the hearing and each stipulated on the record that notice was proper.
2. At all times relevant to this matter, John Medina (hereinafter "Petitioner") was employed as an Correctional Officer with the Department of Corrections at Central Prison ("Central Prison") in Raleigh, North Carolina. Central Prison is a State operated correctional facility.

3. Respondent is a North Carolina State Agency charged with investigating allegations of unacceptable personal conduct and, if the allegations are verified by Respondent, taking appropriate agency action.
4. On August 15, 2011, Petitioner was assigned to Unit One of Central Prison; Correctional Sergeant Timothy Wells was the assigned supervisor. Unit One, a lock-up unit, houses the most difficult inmates who exhibit the worst behavior. Petitioner had been employed in his capacity as a Correctional Officer for approximately five (5) years prior to August 15, 2011.
5. On August 15, 2011, at approximately 12:11 a.m., Correctional Officers Dusty Kelly and Dwayne Green reported to Sergeant Wells that inmate YW, who was in cell AL-213, had his window covered and would not respond for purposes of the inmate count.
6. Inmate YW, a control status inmate, was known as a problem inmate and a gang member. Additionally, Inmate YW had an extensive record of assaults in the prison against other inmates and correctional officers. His disciplinary record includes, among others, assault, class A assault, weapon possession, escape, threatening to harm, and disobeying an order.
7. At the above-mentioned date and time, Sergeant Wells and Officers Kelly, Green, and Fredrick Adams reported to inmate YW's cell. The officers reporting to YW's cell, including Petitioner, were well aware of YW's disciplinary record, reputation, and temperament.
8. Upon their arrival, Sergeant Wells and Officers Kelly, Green, and Adams attempted to communicate with inmate YW in an effort to gain compliance. All attempts were futile.
9. Sergeant Wells assembled numerous Correctional Officers, including Petitioner, in front of inmate YW's cell for a forced entry. Since this was an anticipated use of force, this incident should have been, under standard protocols of Respondent, recorded by video. Only a surveillance video by a fixed camera was recorded of this incident. The surveillance video was of limited probative value as to proof of unacceptable conduct as charged by Respondent against Petitioner because a floor-to-ceiling pillar blocked most of the camera's view of Petitioner's actions with the riot shield he was assigned to use.
10. Sergeant Wells ordered Petitioner to man and use the protective "riot" shield (hereinafter "shield") to assist with entry into the unresponsive inmate's cell. Petitioner, as the shield bearer, was the front or point man in the effort.
11. Sergeant Wells ordered the cell door opened; inmate YW, however, had jammed the cell door and prevented it from opening completely.
12. Sergeant Wells was able to partially clear the obstruction, and the cell door opened initially about twelve inches. Inmate YW charged through the door in an aggressive manner, attempting to stab or strike Petitioner as he emerged.

13. Inmate YW was in possession of an object in his hand when he charged out of his cell.
14. Inmate YW attempted to use the object (hereinafter "weapon") to injure Petitioner and those other Correctional Officers present during the above-described incident.
15. Several of those Correctional Officers present reported the existence of a dangerous weapon or sharpened object in inmate YW's possession and his attempts to attack Petitioner.
16. Petitioner utilized the shield to protect his body from harm and tried to pin YW against the wall with the shield when YW rushed out of his cell and into Petitioner, continuing his attempt to stab Petitioner.
17. As Inmate YW continued to fight and struggle against those Correctional Officers present, Sergeant Wells grabbed YW by his hair and pulled him to the floor.
18. As inmate YW was pulled to the floor, Petitioner utilized the shield to assist in gaining control of the inmate by directing it at his legs to prevent him from getting up.
19. Inmate YW was subdued, placed into handcuffs, and escorted to the Acute Care Emergency Room for medical screening.
20. Inmate YW was diagnosed with a 1.5 cm laceration to his right forehead and abrasions to his right upper extremity and lower back area. No one involved in this incident with inmate YW could or did say that the laceration to YW's right forehead or abrasions were caused by Petitioner's use of the riot shield.
21. Respondent conducted an investigation, relying on security video evidence and several Correctional Officers' statements, and subsequently decided that Petitioner's actions violated Division of Prisons' policy on proper use of force.
22. Respondent declared that Petitioner's actions and use of force were not reasonably necessary for a proper correctional objective. Petitioner was dismissed from employment for unacceptable personal conduct on December 2, 2011.
23. Testamentary evidence at this hearing indicated that Petitioner was justified in using the riot shield to protect himself and other correctional officers present from an aggressive inmate and particularly one thought to be in possession of a shank or weapon. In this case, no shank or other weapon was found outside YW's cell after he was subdued but sharpened pens and pencils were found inside YW's cell and retained by Respondent.
24. The officers present at YW's cell, based on the appearance and actions of inmate YW as he charged out of the cell while attempting to stab Petitioner, had a good faith belief that YW had a shank or weapon of some kind in his hand and represented a dangerous threat of harm to the officers.

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 under Chapter 126 of the North Carolina General Statutes; the parties properly are before the Office of Administrative Hearings.
2. As a Correctional Officer working in a correctional facility in North Carolina, Petitioner is subject to the provisions of the State Personnel Act, N.C. Gen. Stat. Chapter 126.
3. At the time of his discharge, Petitioner was a career State employee subject to the provisions of the State Personnel Act, N.C. Gen. Stat. § 126-1 *et seq.* Petitioner, therefore, could be disciplined only for "just cause" by Respondent's "written warning, disciplinary suspension without pay, demotion, or dismissal." 25 N.C. Admin. Code 01J .0604(a).
4. One of the two bases for "just cause" is "unacceptable personal conduct" 25 N.C. Admin. Code 01J .0604(b)(2), which includes, *inter alia*, "conduct for which no reasonable person should expect to receive prior warning," "the willful violation of known or written work rules," and "conduct unbecoming a state employee that is detrimental to state service." 25 N.C. Admin Code 01J .0614(8)(a), (8)(d), and (8)(e). Respondent afforded Petitioner notice that unacceptable personal conduct is grounds for termination and of the statutory definition of unacceptable conduct. In this case, the termination letter specified that Petitioner was being discharged for unacceptable personal conduct.
5. Respondent complied with the procedural requirements for a dismissal for unacceptable personal conduct under 25 N.C. Admin Code 01J .0608 and .0613.
6. The use of force is considered permissible only to the extent reasonably necessary for a proper correctional objective. Excessive force is prohibited; however, this prohibition shall not be construed to mean that staff must suffer an assault upon their person before taking appropriate defensive action or that the use of force by another must be met with strictly equal force on the part of the staff.
7. Considering all of the evidence presented, including but not limited to the events leading up to the incident, the staff involved, the actions and decisions of the supervisors, the nature of Unit One inmates, the inmate's history of violence, and the manner in which the inmate charged out of his cell, Petitioner was a participant in a dangerous and unpredictable situation. These factors led to and resulted in a use of force incident.
8. While an egregious assault on Petitioner could have resulted, Petitioner took such measures and used such force to the extent reasonably necessary in light of the circumstances, to protect himself and those other Correctional Officers present.

9. Despite there being other Correctional Officers involved, some of whose actions--as recorded on the surveillance video--appear to constitute an improper use of force against the inmate, there exists insufficient evidence to support Respondent's finding of unacceptable personal conduct by Petitioner in this incident.
10. Petitioner's actions were reasonable, in light of the circumstances. Petitioner was authorized to use such degree of force as appeared to him reasonably necessary to defend himself, a fellow officer, or a third party from imminent assault.
11. The greater weight of the evidence produced in this contested case hearing does not support the decision made by Respondent in finding just cause to terminate Petitioner for unacceptable personal conduct regarding improper use of force on August 15, 2011 against inmate YW.

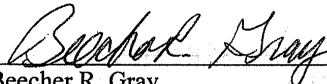
DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, I find that the evidence produced in this contested case hearing is insufficient to support the unacceptable personal conduct charge against Petitioner regarding the improper use of force against Central Prison inmate YW on August 15, 2011 and is REVERSED. Petitioner is entitled to reinstatement to his same or similar position, back pay, front pay until his reinstatement, all the benefits to which he would have been entitled but for his discharge, and reasonable attorney's fees.

NOTICE

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

This the 29 day of January, 2013.



Beecher R. Gray
Administrative Law Judge

On this date mailed to:

Jared W Pierce
2304 S. MIAMI BLVD., STE 123
Durham, NC 27703
Attorney - Petitioner

YVONNE B RICCI
Assistant Attorney General
NC Department of Justice
9001 MAIL SERVICE CENTER
RALEIGH, NC 27699
Attorney - Respondent

This the 30th day of January, 2013.


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

STATE OF NORTH CAROLINA
COUNTY OF RUTHERFORD

KATIE F. WALKER,
Petitioner,

v.

RUTHERFORD COUNTY/DEPARTMENT OF
SOCIAL SERVICES,
Respondent.

FILED OFFICE OF
ADMINISTRATIVE HEARINGS
2013 MAR 15 AM 10:31 12-OSP-03041

OFFICE OF
ADMIN HEARINGS

FINAL DECISION

This matter was heard by the undersigned Administrative Law Judge in a bench trial, from December 12 through December 13, 2012, in Rutherford County. Katie Walker, the Petitioner, was represented by Geraldine Sumter of Ferguson Stein Chambers Gresham & Sumter, P.A. Rutherford County and the Department of Social Services (the "County") were represented by Jackson Price of Womble Carlyle Sandridge & Rice, LLP.

ISSUES

1. Whether the County wrongfully terminated Ms. Walker because of her race.
2. Whether Ms. Walker was subjected to a hostile work environment while working for the County.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interest, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. Wherefore, the undersigned makes the following Findings of Fact, Conclusions of Law and Decision. In the absence of a transcript, the Undersigned has relied upon her notes and documentary record herein.

FINDINGS OF FACT

A. Ms. Walker's Employment and Termination

1. Ms. Walker was hired by the County on February 27, 2006 to work as a social worker in the Child Protective Services Division.
2. John Carroll, the Director of Social Services, promoted Ms. Walker to the position of Social Worker I/A&T on February 27, 2010. Pet. Ex. 7.
3. While working for the County, Ms. Walker received extensive training for her position as a social worker. See Pet. Ex. 1.
4. Denise Clemmer served as Ms. Walker's Social Work Supervisor from February 27, 2006 until Ms. Clemmer's tragic death in September 2011.
5. Ms. Walker had performance issues as early as 2009, as evidenced by the performance evaluation filed by Ms. Clemmer on January 14, 2010 indicating that Ms. Walker needed improvement in "customer service," "decision making," "job knowledge," and "quality of work." Resp. Ex. 8. In the January 14, 2010 performance review, Ms. Clemmer noted that Ms. Walker "ha[d] errors in her work" and that her performance was "below that of a qualified person." *Id.*
6. Nearly a year later, Ms. Walker continued to have the same performance issues. In another performance evaluation, dated December 14, 2010, Ms. Clemmer indicated that Ms. Walker still needed improvement in her "decision making," "job knowledge," and "quality of work." Resp. Ex. 9. The performance evaluation indicates that Ms. Walker received a warning related to her decision making, job knowledge, and quality of work. *Id.*
7. Following Ms. Clemmer's death, Melanie Hunt was promoted to the position of Social Work Supervisor in November 2011.
8. In November 2011, Ms. Hunt became Ms. Walker's supervisor, and remained in that capacity until Ms. Walker's termination on April 3, 2012.
9. Ms. Hunt testified that she selected those social workers who became members of her team and that she specifically requested that Ms. Walker be assigned to her team because she liked Ms. Walker and thought that they would work well together.
10. Ms. Walker and Ms. Hunt both testified that they were on good terms with each other prior to Ms. Hunt becoming her supervisor.
11. Ms. Hunt filed a performance evaluation of Ms. Walker on December 29, 2011 in which she indicated that Ms. Walker still needed improvement in her "decision making," "job knowledge," and "quality of work." Resp. Ex. 10. In this performance review Ms. Hunt noted that Ms. Walker "continue[d] to struggle with making appropriate decisions in regards to protecting children despite on going training" and that "[d]espite continued training in policy and procedure [Ms. Walker] continue[d] to make decisions that [did] not reflect utilization of the

skills she should have [had] at a SW IA&T level.” *Id.* Ms. Hunt also noted that Ms. Walker “continue[d] to struggle with producing accurate work that [was] reliable for making informed decisions about the welfare of children.” *Id.* These performance issues identified by Ms. Hunt in the December 29, 2011 performance evaluation are the same performance issues identified by Ms. Clemmer in the January 14, 2010 and December 14, 2010 performance evaluations. *See* Resp. Exs. 8, 9 & 10.

12. Ms. Walker received a written warning on March 2, 2012 for unsatisfactory job performance. (“March 2 Warning Letter”) The specific job performance issue was “that after learning on November 29, 2011 that a family in your caseload had relocated to another county on November 28, 2011, you made no contact with this family nor did you request assistance from Cleveland County DSS until February 14, 2012, approximately three months after learning they had relocated. On January 20, 2012, it was reported to you that one of the children had made a statement which indicated that she could be at potential risk. You did not address this issue until February 29, 2012 when you made a home visit.” Resp. Ex. 1.

13. The March 2 Warning Letter informed Ms. Walker that any future issues of unsatisfactory job performance could result in further disciplinary action, including termination. Resp. Ex. 1.

14. On March 30, 2012, a written warning (“March 30 Warning Letter”) was sent to Ms. Walker that stated “[t]he specific job performance issue that is unsatisfactory is that on March 15, 2012, you displayed a severe lack of knowledge while testifying in court in regard [*sic*] to a child protective service case assigned to and assessed by you. ... A District Court Judge expressed serious concern over your inability to relay the facts of your case while testifying and the potential to negatively impact the findings in court.” Resp. Ex. 19.

15. The March 30 Warning Letter informed Ms. Walker that any future issues of unsatisfactory job performance could result in further disciplinary action, including termination. Resp. Ex. 19.

16. Ms. Walker received another written warning on March 30, 2012 for two instances of grossly inefficient job performance and a specific instance of unacceptable personal conduct, and scheduled a pre-dismissal conference (“Pre-Termination Letter”). Resp. Ex. 2.

17. In the first instance of grossly inefficient job performance, Ms. Walker received a report on July 15, 2011 that a young girl in her caseload had been sexually abused by her live-in stepfather, but Ms. Walker “did not address this allegation in any way.” Resp. Ex. 2. Ms. Walker’s failure to address this sexual abuse allegation put the child at risk of serious injury or death.

18. Department of Social Service policy dictates that any sexual abuse allegation be addressed immediately. Ms. Walker did not comply with this policy.

19. In the second instance of grossly inefficient job performance, in November 2011, a child in Ms. Walker’s caseload disclosed that she had become ill after her father shook her by the neck and she stated that her neck was sore as a result. For over three months, Ms. Walker failed to ensure that this child saw a physician even after Ms. Hunt gave her express written and

oral directives to do so. Resp. Ex. 2. Ms. Walker testified that she visually inspected the child and decided that the child was not injured.

20. Ms. Walker's failure to have the child seen by a physician in a timely manner put the child at risk of serious injury or death.

21. It is standard policy at the Department of Social Services that any child complaining of a neck injury should be seen by a physician, even if there is no bruising or physical manifestation of injury.

22. The Pre-Termination Letter also stated that Ms. Walker's failure to follow Ms. Hunt's repeated directives and have the child seen by a physician constituted unacceptable personal conduct. Resp. Ex. 2.

23. Ms. Walker attended a Pre-Dismissal Conference on April 2, 2012 with John Carroll and Lorie Horne. Resp. Ex. 3.

24. At the Pre-Dismissal Conference, Ms. Walker did not present any new evidence for Mr. Carroll and Ms. Horne to consider in making the termination decision.

25. Following her Pre-Dismissal Conference, Ms. Walker was terminated on April 3, 2012 due to grossly inefficient job performance and unacceptable personal conduct related to those instances identified in the Pre-Termination Letter. Resp. Ex. 3. Upon being terminated, Ms. Walker was advised of her right to appeal the termination decision. *Id.*

B. Comparative Disciplinary Actions Taken Against Other Social Workers

26. Andrea Denning is a Caucasian woman who works for the County as a social worker in the Foster Care Division of Child Protective Services.

27. Prior to May 2012, Ms. Denning had always been an exemplary employee and had never had any performance issues. Ms. Denning's annual performance reviews evidence that she was an excellent employee. Resp. Exs. 14-16.

28. In mid-May 2012, Ms. Denning was videotaped sleeping in her car while on a supervised visit between a mother and her children.

29. As a result of this performance issue, Ms. Denning was suspended without pay for ten days. Ms. Denning was also ordered to undergo an immediate medical evaluation.

30. One of the primary reasons that Mr. Carroll did not terminate Ms. Denning for her conduct was because she had not had any prior performance issues.

31. Ms. Denning's medical evaluation also indicated that she had an undiagnosed medical issue that likely contributed to her falling asleep on the job. Ms. Denning has since undergone treatment for that medical issue.

32. Ms. Denning has not had any additional performance issues since May 2012.

33. Elizabeth Baxley, another Caucasian social worker, was terminated because, like Ms. Walker, she displayed a severe lack of job knowledge and had repeated performance issues.

34. Ashley McCraw, yet another Caucasian social worker, was terminated, in part, because she continued to have incomplete assessments, had serious gaps in contact with families and children, displayed a basic lack of knowledge concerning individual family situations, and, like Ms. Walker, had received three written warnings for such conduct. Resp. Ex. 17.

C. Allegations of Racial Discrimination and a Hostile Work Environment

35. Ms. Walker is African American.

36. Ms. Walker testified that Ms. Hunt called her a “spook” two times prior to becoming her supervisor. Yet Ms. Walker did not identify even in the vaguest sense when or where each incident took place, what Ms. Hunt’s exact remarks were, or the context surrounding the alleged remarks.

37. Ms. Hunt ardently denied ever calling Ms. Walker a “spook” or using that word in any context.

38. Ms. Walker also testified that Ms. Hunt called her a “spook” again during a staffing meeting on December 30, 2012 attended by Ms. Walker, Ms. Hunt, and Ms. Horne. Again, Ms. Walker could not identify Ms. Hunt’s exact remark or the context in which she made the alleged statement.

39. Both Ms. Horne and Ms. Hunt deny that Ms. Hunt ever used the word “spook” in this December 30, 2012 staffing meeting.

40. However, during the staffing meeting Ms. Hunt did quote Spanky from the Little Rascals and said, “O’tay Buckwheat, what’s next?” Immediately after the staffing meeting, Ms. Horne told Ms. Hunt that the expression “O’tay Buckwheat” could be construed as racially offensive and informed her that any future use of that expression or similar language would be considered a serious performance issue.

41. Ms. Hunt testified that she didn’t think about the statement being racially offensive because it’s a memorable line from a children’s television show that she often quotes with her husband and her own children.

42. Ms. Hunt has never used the expression “O’tay Buckwheat” in the office since December 30, 2012.

43. Ms. Walker did not complain to her supervisors about Ms. Hunt’s conduct in the December 30, 2012 staffing meeting until after she was terminated.

44. Ms. Walker never complained about any alleged discrimination until after she was terminated.

45. Tiffany Dodd is an African American social worker supervised by Ms. Hunt.

46. Ms. Dodd is a Social Worker I/A&T and works in the same capacity and with the same supervisor as Ms. Walker did while she was employed by the County.

47. Ms. Dodd has never heard Ms. Hunt use a racial slur.

48. Ms. Dodd has never felt like Ms. Hunt created a hostile workplace for African Americans.

49. Ms. Walker's caseload was no higher than that of other social workers. Indeed, some social workers for the County, including Ms. Dodd, carried even higher caseloads than Ms. Walker's caseload.

50. Ms. Walker also alleged that she was subjected to a hostile work environment due to her race when Ms. Hunt called her "stupid" at an out-of-office lunch with several of Ms. Walker's co-workers. In the alleged incident, one of Ms. Walker's co-workers asked the waitress if he could have a side of vegetables instead of the noodles that came with the dish and Ms. Hunt allegedly called Ms. Walker "stupid" when Ms. Walker suggested that the co-worker pay the waitress \$1.00 instead of the \$2.00 substitution price expressly noted on the menu. Ms. Hunt denied that she ever called Ms. Walker "stupid" and Ms. Walker did not present any corroborating witnesses despite the fact that Ms. Hunt allegedly made the comment across a large, round table in front of a number of Ms. Walker's co-workers.

CONCLUSIONS OF LAW

A. Petitioner's Claim For Wrongful Termination

1. Ms. Walker was terminated for just cause pursuant to 25 N.C.A.C. 11.2301(a).
2. The County produced sufficient evidence that Ms. Walker was terminated for grossly inefficient job performance pursuant to 25 N.C.A.C. 11.2303.
3. Ms. Walker's failure to address the sexual abuse allegations of a young girl for nearly nine months constitutes grossly inefficient job performance and constitutes just cause for her termination without reference to any other disciplinary actions. 25 N.C.A.C. 11.2303.
4. Ms. Walker's failure to ensure that a young girl, complaining of a neck injury inflicted by her abusive father, was timely seen by a physician and the three-month delay in arranging the appointment constitutes grossly inefficient job performance and constitutes just cause for her termination without reference to any other disciplinary actions. 25 N.C.A.C. 11.2303.
5. Ms. Walker's failure to comply with the repeated directives of her supervisor and ensure that a young girl complaining of a neck injury was timely seen by a physician constitutes a willful failure to follow directives and insubordination, and constitutes just cause for her termination without reference to any other disciplinary actions. 25 N.C.A.C. 11.2304.
6. Ms. Walker's termination was also justified as a dismissal for unsatisfactory performance of duties because she received two written warnings prior to receiving her Pre-

Termination Letter and both of those previous written warnings notified her that future disciplinary actions could result in her termination. 25 N.C.A.C. 11.2302.

7. The County met all procedural requirements in terminating Ms. Walker. *See* 25 N.C.A.C. 11.2301 – 11.2304.

8. Ms. Walker has not proven by a preponderance of the evidence that the County's justification for her termination was "merely a pretext" for discrimination.

9. Because Mr. Carroll both promoted Ms. Walker in 2010 and subsequently terminated her in 2012, the County is entitled to a strong inference that discrimination was not a factor in Ms. Walker's termination. *See Bartee v. Morris*, 1998 U.S. App. LEXIS 9717, *10 (4th Cir. 1998).

10. Ms. Walker has failed to rebut this strong inference that discrimination was not a factor in her termination.

11. Ms. Baxley and Ms. McCraw were terminated for substantially similar reasons as Ms. Walker.

12. The fact that Ms. Denning had never had a prior performance issue before her May 2012 disciplinary action constituted sufficient justification for imposing differential disciplinary actions on Ms. Denning and Ms. Walker.

13. Ms. Denning's performance issue in falling asleep during a supervised visit is not comparable to Ms. Walker's failure to address the sexual abuse allegation of a young girl for nearly nine months.

14. Ms. Denning's performance issue in falling asleep during a supervised visit is not comparable to Ms. Walker's failure to timely arrange for a young girl complaining of a neck injury to see a physician, a delay for over three months.

15. Ms. Denning was suspended without pay for ten days following her first performance issue while Ms. Walker merely received a written warning.

16. Ms. Walker failed to produce any evidence that Ms. Denning's performance issue justified immediate termination absent prior disciplinary actions or that it rose to the level of grossly inefficient job performance.

17. Ms. Walker has failed to identify any similarly situated Caucasian employees who were disciplined less severely for comparable conduct.

B. Petitioner's Claim for Hostile Work Environment

18. Ms. Walker has failed to produce reliable evidence from which to conclude that Ms. Hunt ever called Ms. Walker a "spook."

19. Ms. Hunt's isolated "Buckwheat" comment is a stray remark and does not imply discrimination or harassment. *See Boyd v. State Farm Ins. Co.*, 158 F. 3d 326, 329 (5th Cir. 1998) (stating that a single use of the term "Buckwheat" from the television show the Little Rascals, generally considered to be a racial slur, during an employee's five-year tenure is properly categorized as a "stray remark from which no reasonable fact-finder could infer race discrimination").

20. No racial connotation can be derived from the context in which Ms. Walker alleges that Ms. Hunt called her "stupid." *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006).

21. Ms. Walker has failed to produce any evidence to support her claim that when Ms. Hunt allegedly called her "stupid," she did so with racial animus. *Ash*, 546 U.S. at 456.

22. Ms. Walker has produced no evidence indicating that Ms. Hunt's inflection or tone of voice in allegedly using the word "stupid" indicated racial animus. *Ash*, 546 U.S. at 456. Nor has Ms. Walker produced any evidence that local custom and historical usage of the word "stupid" indicates racial animus on the part of Ms. Hunt. *Id.*

23. Ms. Walker has failed to prove that she was subjected to severe or pervasive harassment sufficient to support her claim for a hostile work environment. *Cobb v. Potter*, 2006 WL 2457812 (W.D.N.C. 2006).

24. Ms. Walker was not subjected to a hostile work environment because of her race.

DECISION

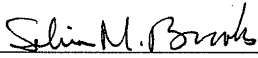
The undersigned Administrative Law Judge hereby finds and holds that judgment shall be entered on behalf of Respondent, Rutherford County Department of Social Services.

NOTICE

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

Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 14th day of March, 2013.


The Honorable Selina M. Brooks
Administrative Law Judge

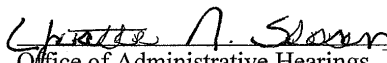
CERTIFICATE OF SERVICE

A copy of the foregoing was sent to:

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This the ~~14th~~ day of March, 2013.


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