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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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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:	270th 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
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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

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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.

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NOTICE OF RULE MAKING PROCEEDINGS AND PUBLIC HEARING

NORTH CAROLINA BUILDING CODE COUNCIL

Notice of Rule-making Proceedings *is hereby given by NC Building Code Council in accordance with G.S. 150B-21.5(d).*

Citation to Existing Rule Affected by this Rule-Making: *North Carolina Building, Electrical, Energy Conservation, Fire, Fuel Gas, Mechanical, Plumbing, and Residential Codes.*

Authority for Rule-making: *G.S. 143-136; 143-138.*

Reason for Proposed Action: *To incorporate changes in the NC State Building Codes as a result of rulemaking petitions filed with the NC Building Code Council and to incorporate changes proposed by the Council.*

Public Hearing: Tuesday, *December 10, 2013, 9:00AM, NCSU McKimmon Center, 1101 Gorman Street, Raleigh, NC 27606. Comments on both the proposed rule and any fiscal impact will be accepted.*

Comment Procedures: *Written comments may be sent to Chris Noles, Secretary, NC Building Code Council, NC Department of Insurance, 322 Chapanoke Road, Suite 200, Raleigh, NC 27603. Comments on both the proposed rule and any fiscal impact will be accepted. Comment period expires on January 14, 2014.*

Statement of Subject Matter:

1. Request by John Hitch, Raleigh, NC, to amend the 2012 NC Building Code, Table 1004.1.1. The proposed amendment is as follows:

Reference: Table 1004.1.1 Minimum Floor Area Allowances per Occupant. Add the following footnote to "Assembly – unconcentrated (tables and chairs)" and to "Business areas":
a. An assembly occupancy conference room that is accessory to a Group B office occupancy and meeting the requirements of Section 303.1, exception 2, shall be calculated at 100 square feet per occupant for determining the overall occupant load of the associated floor. The Assembly occupancy will be calculated at 15 square feet per occupant for the purpose of determining egress from the room containing the assembly occupancy.

Motion – Kim Reitterer/**Second** – Lon McSwain/**Approved** – The request was granted unanimously and sent to the Building Committee for review. The proposed effective date of this rule is January 1, 2015.
Reason Given – The use of 15-sf/occupant in assembly spaces that are accessory to office areas inflates the occupant count because these spaces are typically occupied by the same persons that occupy the office space. As a consequence the egress requirements and toilet fixture quantities for a floor may be inflated also.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with a small decrease in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

2. Request by Steve Knight, representing the NCBCC Structural Committee, to amend the 2012 NC Building Code, Chapter 23. The proposed amendment is as follows:

Change the following tables in Chapter 23 as indicated in the link below:
2308.8.8(1), 2308.8(2), 2308.9.5, 2308.9.6, 2308.10.2(1), 2308.10.2(2), 2308.10.3(1), 2308.10.3(2), 2308.10.3(3), 2308.10.3(4), 2308.10.3(5), 2308.10.3(6)

http://www.ncdoi.com/OSFM/Engineering_and_Codes/Default.aspx?field1=BCC_-_Agendas&user=Building_Code_Council&sub=BCC_Meeting (September Agenda Item B-2)

Motion – John Hitch/**Second** – Lon McSwain/**Approved** – The request was granted unanimously. The proposed effective date of this rule is January 1, 2015.
Reason Given – Ongoing testing conducted by the Southern Pine Inspection Bureau indicates that visually graded Southern Pine dimension lumber currently harvested has a bending strength of 10% to 30% less than the values on which the Tables in Chapter 23 of the NC Building Code are based. As a result, the American Standard Lumber Committee has approved changes to the design values published by the American Wood Council for all visually graded Southern Pine and Mixed Southern Pine. These new design values

became effective June 1, 2013. On a national basis, engineers and component suppliers are now using the new design values. In addition, the AWC has submitted the same amendment to the International Code Council. This change is necessary to address reductions in structural safety factors perpetrated by use of old design values and to maintain a fair competitive market for manufacturers of wood components who conduct business in multiple states.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with an increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

3. Request by Steve Knight, representing the NCBCC Structural Committee, to amend the 2012 NC Residential Code, Chapters 5 and 8. The proposed amendment is as follows:

Change the following tables in Chapter 5 as indicated in the link below:
R502.3.1(1), R502.3.1(2), R502.3.3(1), R502.3.3(2), R502.5(1), R502.5(2)

Change the following tables in Chapter 8 as indicated in the link below:
R802.4(1), R802.4(2), R802.5.1(1), R802.5.1(2), R802.5.1(3), R802.5.1(4), R802.5.1(5), R802.5.1(6)

http://www.ncdoi.com/OSFM/Engineering_and_Codes/Default.aspx?field1=BCC_-_Agendas&user=Building_Code_Council&sub=BCC_Meeting (September Agenda Item B-3)

Motion – David Smith/**Second** – Lon McSwain/**Approved** – The request was granted unanimously. The proposed effective date of this rule is January 1, 2015.
Reason Given – Ongoing testing conducted by the Southern Pine Inspection Bureau indicates that visually graded Southern Pine dimension lumber currently harvested has a bending strength of 10% to 30% less than the values on which the Tables in Chapters 5 and 8 of the NC Residential Code are based. As a result, the American Standard Lumber Committee has approved changes to the design values published by the American Wood Council for all visually graded Southern Pine and Mixed Southern Pine. These new design values became effective June 1, 2013. On a national basis, engineers and component suppliers are now using the new design values. In addition, the AWC has submitted the same amendment to the International Code Council. This change is necessary to address reductions in structural safety factors perpetrated by use of old design values and to maintain a fair competitive market for manufacturers of wood components who conduct business in multiple states. Consistency from state to state is important to maintain the recovery of the housing market.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with an increase in the cost of a dwelling by $80 or more. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

4. Request by Stuart Laney, representing New Hanover Division – NC Association of Electrical Contractors, to amend the 2011 NEC, Section 250-50 & Code Council Amendment. The proposed amendment is as follows:

Exception: Supplemental Ground Electrodes shall not be required for a temporary service installed on a construction site. Supplemental Ground Electrode shall be provided by the Grounded service-entrance conductor specified in 250-53(A)(2)(3).

Motion – Bob Ruffner/**Second** – David Smith/**Approved** – The request was granted unanimously with modifications to remove the word "residential" from the submittal and sent to the Electrical Committee for review. The proposed effective date of this rule is January 1, 2015.
Reason Given – The supplemental ground rods are creating a safety hazard in that they are continually pulled from the ground and left hanging as a trip hazard. The electrical contractor is required to make extra trips to the jobsite sometimes involving many miles and hours just to reinstall the supplemental ground. The original rod installation is protected by the pole. The power supplier' neutral conductor is grounded at its source thereby supplying a supplemental ground. These same temporary services have been working for many years with one rod without excessive incidences.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

5. Request by Gerry Mancuso, Wilmington, NC, to amend the 2012 NC Plumbing Code, Section 412.5. The proposed amendment is as follows:

412.5 Location. Floor drains shall be located to drain the entire floor area and installed flush with the finished floor surface as to prevent a trip hazard.

Motion – Al Bass/**Second** – Paula Strickland/**Approved** – The request was granted unanimously and sent to the Plumbing Committee for review. The proposed effective date of this rule is January 1, 2015.
Reason Given – This proposal is to assure that floor drains are adjusted flush with the finished floor after modifications in public showers. The goal is to prevent unnecessary falls and injury. This request is based on the need to improve safety in public showers.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

6. Request by Leah C. Faile, representing NCBCC Building Committee, to amend the 2012 NC Building Code, Section 3404.6. The proposed amendment is as follows:

3404.6 Means of egress capacity factors. Alterations to any existing building or structure shall not be affected by the egress width factors in Section 1005.1 for new construction in determining the minimum egress widths or the minimum number of exits in an existing building or structure. The minimum egress widths for the components of the *means of egress* shall be based on the *means of egress* width factors in the building code under which the building was constructed, and shall be considered as complying *means of egress* for any *alteration* if, ~~in the opinion of the *building official,*~~ that do not constitute a distinct hazard to life.

Motion – Mack Nixon/**Second** – Bob Ruffner/**Approved** – The request was granted unanimously and sent to the Building Committee for review. The proposed effective date of this rule is January 1, 2015.
Reason Given – Certain jurisdictions are using this section as a means to require existing buildings to meet the new minimum egress widths. This interpretation prevents the use of Chapter 34 for existing buildings whose building occupancy classification has not altered. This in turn is causing the building owners to incur unnecessary cost during construction to widen, add doors to existing stairways, or replace existing fire alarm systems with a voice alarm system.
Fiscal Statement – The cost incurred by clients because of this interpretation has been anywhere from $10,000/door to $250,000 for a new fire alarm system. In other jurisdictions, this rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

7. Public Comment is Solicited from Interested Stakeholders on Proposed 6-Year Code Cycle
A motion was made by Bob Ruffner, seconded by Mack Nixon as follows:
In addition to the periodic revisions or amendments made by the Council, the Council shall revise the NC Building Code, the NC Energy Code, the NC Fire Code, the NC Electrical Code, the NC Fuel Gas Code, the NC Plumbing Code, and the NC Mechanical Code every six years that would become active the first day of January of the following year, so that leaves six months between the adoption and the effective date. The first six-year revision shall be adopted and become effective January 1, 2019 and every six years thereafter.

Alan Perdue proposed a substitute motion to place the consideration of the six-year code cycle on the Public Hearing section of the Agenda (C-Items) for December 2013, in order to allow interested stakeholders the ability to be involved in the process and provide valuable information to the Council in order that the Council makes an informed decision. The motion was seconded by Kim Reitterer and passed with an eight to seven vote.

8. Request by Wayne Hamilton, representing the NC Fire Service Code Revision Committee, to amend the 2012 NC Fire Code, Sections 908.7 and 908.7.1. The proposed amendment is as follows:

908.7 Carbon monoxide alarms. Group I-1, I-2, I-4 or R occupancies located in a building containing a fuel-burning heater, appliance, or fireplace or in a building which has an attached garage shall be equipped with single-station carbon monoxide alarms. The carbon monoxide alarms shall be listed as complying with UL 2034 and be installed and maintained in accordance with NFPA 720 and the manufacturer's instructions. An open parking garage, as defined in Chapter 2 of the International Building Code, or an enclosed parking garage ventilated in accordance with Section 404 of the International Mechanical Code shall not be considered an attached garage.
Exception: *Sleeping units* or *dwelling units* which do not themselves contain a fuel-burning heater, appliance, fireplace or have an attached garage, but which are located in a building with a fuel-burning heater, appliance, fireplace or an attached garage, need not be equipped with single-station carbon monoxide alarms provided that:
1. The *sleeping unit* or *dwelling unit* is located more than one story above or below any story which contains a fuel-burning heater, appliance, fireplace or attached garage.

2. The *sleeping unit* or *dwelling unit* is not connected by duct work or ventilation shafts to any room containing a fuel-burning heater, appliance, fireplace or to an attached garage; and
3. The building is equipped with a common area carbon monoxide alarm system.

908.7.1 Carbon monoxide detection systems. Carbon monoxide detection systems, which include carbon monoxide detectors and audible notification appliances installed and maintained in accordance with NFPA 720 shall be permitted. The carbon monoxide detectors shall be listed as complying with UL 2075.

Amend Chapter 47 as follows:

Add NFPA Standard:
720-09 Standard for the Installation of Carbon Monoxide(CO) Detection……908.7, 908.7.1 and Warning Equipment, 2009 Edition

Motion – Alan Perdue/**Second** – Kim Reitterer/**Approved** – The request was granted unanimously and sent to the Building/Fire Committee for review. The proposed effective date of this rule is October 1, 2014.
Reason Given – SL 2013-413; H74 was adopted to require CO detectors in sleeping locations adjacent to fueled equipment. This law will expire on October 1, 2014. This code change is an offer of replacement language, when the session law expires. The language submitted is taken from the 2012 IFC, except with some NC modifications to mirror the language added to GS 143-138 by the legislature. We also excluded I-3 occupancies after discussing this with NCDOI. We are advised that there most likely will be an ICC code change removing them from the requirements.
Fiscal Statement – There is a cost associated with adding CO detectors; however, since the use of fueled equipment is not required, that total cost is difficult to estimate. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note will be prepared.

9. Request by Wayne Hamilton, representing the NC Fire Service Code Revision Committee, to amend the 2012 NC Fire Code, Section 2206.2.3. The proposed amendment is as follows:

Add Exception # 5 to 2206.2.3:

2206.2.3 Above-ground tanks located outside, above grade. Above-ground tanks shall not be used for the storage of Class I, II, or IIIA liquid motor fuels except as provided by this section.

(no changes to items 1, 2, 3, 4)

5. Fleet service stations. Listed UL 142 above ground storage tanks with spill control, 1,100 gallons (4 164 L) or less in capacity, may be used to store Class I liquids at fleet service stations.

Motion – Alan Perdue/**Second** – Lon McSwain/**Approved** – The request was granted unanimously and sent to the Fire Committee for review. The proposed effective date of this rule is January 1, 2015.
Reason Given – Similar language was present in previous code editions. This would remove the requirements for UL 2085 tanks for small fleet operations.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with a small decrease in cost for small fleet operations. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

10. Request by Tom Brown and Jeff Griffin, representing the NCBIA, to amend the 2012 NC Residential Code, Section R101.2. The proposed amendment is as follows:

R101.2.1 Accessory buildings. Accessory buildings with any dimension greater than 12 feet (3658mm) must meet the provisions of this code. Accessory buildings may be constructed without a masonry or concrete foundation, except in coastal high hazard or ocean hazard areas, provided all of the following conditions are met:
1. The accessory building shall not exceed 400 square feet (37m2) or one story in height; and
2. The building is supported on a wood foundation of minimum 2x6 or 3x4 mudsill of approved wood in accordance with Section R317; and
3. The building is anchored to resist overturning and sliding by installing a minimum of one ground anchor at each corner of the building. The total resisting force of the anchors shall be equal to 20 psf (958 Pa) times the plan area of the building.

R101.2.2 Accessory structures. Accessory structures are not required to meet the provisions of this code except decks, gazebos, retaining walls as required by Section R404.4, detached masonry chimneys built less than 10' from other buildings, pools or spas per appendix G, detached carports.
Exception: Portable lightweight aluminum or canvas type carports not exceeding 400 sq ft or 12' mean roof height and tree houses supported solely by a tree are exempt from the provisions of this code.

Motion – David Smith/**Second** – Lon McSwain/**Approved** – The request was granted unanimously. The proposed effective date of this rule is January 1, 2015.
Reason Given – This proposal will better define application of the technical codes for accessory buildings or structures. This is also done by creating separate subsections under scope for accessory buildings and structures.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

11. Request by Tom Brown and Jeff Griffin, representing the NCBIA, to amend the 2012 NC Residential Code, Chapter 2 DEFINITIONS. The proposed amendment is as follows:

ACCESSORY BUILDING. In one- and two-family dwellings not more than three stories high with separate means of egress, a building, the use of which is incidental to that of the main building and which is detached and located on the same lot. An accessory building is a building that is roofed over and more than 50% of its exterior walls are enclosed. Examples of accessory buildings are garages, storage buildings, workshops, boat houses, etc…

ACCESSORY STRUCTURE. Accessory structure is any structure not roofed over and enclosed more than 50% of its perimeter walls, ~~that is not considered an accessory building~~ located on one- and two-family dwelling sites which is incidental to that of the main building. Examples of accessory structures are, but not limited to; fencing, decks, gazebos, arbors, retaining walls, barbecue pits, detached chimneys, tree houses (supported by tree only), playground equipment, yard art, etc. Accessory structures are not required to meet the provisions of this code except; decks, gazebos, retaining walls as required by Section R404.4, detached masonry chimneys built less than 10' from other buildings, pools or spas per appendix G, detached carports. ~~are not required to meet the provisions of this code.~~

Motion – David Smith/**Second** – Mack Nixon/**Approved** – The request was granted unanimously. The proposed effective date of this rule is January 1, 2015.
Reason Given – This proposal is to better define when something should be considered an accessory building versus an accessory structure. The proposal is for clarity on when to apply the technical codes based on defining as either an accessory building or a structure (different rules apply based upon classification).
Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

12. Request by Tom Brown and Jeff Griffin, representing the NCBIA, to amend the 2012 NC Residential Code, TABLE R302.1. The proposed amendment is as follows:

TABLE R302.1
EXTERIOR WALLS

EXTERIOR WALL ELEMENT		**MINIMUM FIRE-RESISTANCE RATING**	**MINIMUM FIRE SEPARATION DISTANCE**
Walls	(Fire-resistance rated)	1 hour-tested in accordance with ASTM E 119 or UL 263 with exposure to both sides	< 3 feet
	(Not fire-resistance rated)	0-Hours	≥ 3 feet
Projections	(Fire-resistance rated)	1-Hour on the underside	~~< 2 feet~~ < 3 feet
	(Not fire-resistance rated)	0-Hours	~~≥ 2 feet~~ ≥ 3 feet

Openings	Not Allowed	N/A	< 3 feet
	Unlimited	0-Hours	≥ 3 feet
Penetrations	All	Comply with Section R302.4	< 3 feet
		None Required	≥ 3 feet

For SI: 1 foot=304.8 mm.

Motion – David Smith/**Second** – Lon McSwain/**Approved** – The request was granted unanimously. The proposed effective date of this rule is January 1, 2015.
Reason Given – This proposal is to correct a safety concern in the table related to a recent change the reduced the fire separation distance from 5-feet to 3-feet. A soffit protection requirement, that may have been an error, makes an unsafe condition. The intent of this proposal is to reinstate the 2009 Code requirement.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with a small decrease in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

13. Request by David Smith, representing the NC BCC Residential Ad-Hoc Committee, to amend the 2012 NC Residential Code, Section R308.4. The proposed amendment is as follows:

R308.4 Hazardous locations. The following shall be considered specific hazardous locations for the purposes of glazing:

(no changes to items 1, 3, 4, 6, 7, 8)

2. Glazing in an individual fixed or operable panel ~~adjacent to a~~ in the same plane as the door where the nearest vertical edge is within 24-inches (610 mm) of the door in a closed position and whose bottom edge is less than 60 inches (1524 mm) above the floor or walking surface.
Exceptions: (no changes to exceptions)

5. Glazing in doors and enclosures for ~~or walls facing~~ hot tubs, whirlpools, saunas, steam rooms, bathtubs and showers. Glazing enclosing these compartments where the bottom exposed edge of the glazing is less than 60 inches (1524 mm) measured vertically above any standing or walking surface.
~~**Exception:** Glazing that is more than 60 inches (1524 mm), measured horizontally and in a straight line, from the water's edge of a hot tub, whirlpool or bathtub.~~

Motion – David Smith/**Second** – Al Bass/**Approved** – The request was granted unanimously and was sent to the Residential Committee for review. The proposed effective date of this rule is January 1, 2015.
Reason Given – The purpose of this amendment is to retain the hazardous location glazing requirements used in previous NC one-and two-family dwelling codes that have historically provided adequate protection.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

14. Request by David Smith, representing the NC BCC Residential Ad-Hoc Committee, to amend the 2012 NC Residential Code, Section R310.1.1. The proposed amendment is as follows:

R310.1.1 Minimum opening area. All emergency escape and rescue openings shall have a minimum net clear openable area of 4 square feet (0.372 m^2) The minimum net clear opening height shall be 22 inches (558 mm). The minimum net clear opening width shall be 20 inches (508 mm). Emergency escape and rescue openings must have a minimum total glazing area of not less than 5 square feet (0.465 m^2) in the case of a ground floor level window and not less than 5.7 square feet (0.530 $m^{2)}$ in the case of an upper story window.

~~**Exception:** *Grade* floor openings shall have a minimum net clear opening of 5 square feet (0.465 m^2).~~

Motion – David Smith/**Second** – Lon McSwain/**Approved** – The request was granted unanimously. The proposed effective date of this rule is January 1, 2015.
Reason Given – This proposal is to eliminate redundant language from the exception that is in the section above.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

15. Request by Al Bass, representing the NC BCC Mechanical Committee, to amend the 2012 NC Plumbing Code, Sections 202 & 605.2. The proposed amendment is as follows:

SECTION 202
GENERAL DEFINITIONS
LEAD-FREE PIPE AND FITTINGS. Containing not more than ~~8.0~~ 0.25-percent lead.

605.2 Lead content of water supply pipe and fittings. Pipe and pipe fittings, including valves and faucets, utilized in the water supply system shall have a maximum of ~~8~~ 0.25-percent lead content.

Motion – Al Bass/**Second** – Ralph Euchner/**Approved** – The request was granted unanimously. The proposed effective date of this rule is January 1, 2015.
Reason Given – This proposal brings the NC Plumbing Code into compliance with the Federal "Reduction of Lead in Drinking Water" Act that becomes Federal Law on January 4, 2014.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with a small increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

NOTICE:
Commentary and Interpretations *of the North Carolina State Building Codes are published online at the following link.*
http://www.ncdoi.com/OSFM/Engineering_and_Codes/Default.aspx?field1=Code_Interpretations&user=Code_Enforcement_Resources

NOTICE:
Objections and Legislative Review *requests may be made to the NC Office of Administrative Hearings in accordance with G.S. 150B-21.3(b2) after Rules are adopted by the Building Code Council.*
http://www.ncoah.com/rules/

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

TITLE 12 – DEPARTMENT OF JUSTICE

Notice *is hereby given in accordance with G.S. 150B-21.2 that Department of Justice Division of Criminal Information intends to adopt the rules cited as 12 NCAC 04H .0101-.0103, .0201-.0203, .0301-.0304, .0401-.0403; 04I .0101-.0104, .0201-0204, .0301-.0303, .0401-.0410, .0501, .0601-.0603, .0701, .0801; 04J .0101-.0103, .0201, and .0301.*

Agency obtained G.S. 150B-19.1 certification:
☐ **OSBM certified on:**
☒ **RRC certified on:** *October 17, 2013*
☐ **Not Required**

Link to agency website pursuant to G.S. 150B-19.1(c): *http://www.ncdoj.gov/DCIRules*

Proposed Effective Date: *March 1, 2014*

Public Hearing:
Date: *December 10, 2013*
Time: *10:00 a.m. – 12:00 p.m.*
Location: *SBI Headquarters Auditorium, 3320 Garner Road, Raleigh, NC 27610*

Reason for Proposed Action: *These rules are being proposed due to technological advancements and federal requirements. Existing rules are obsolete and will be repealed.*

Comments may be submitted to: *Joshua Hickman, P.O. Box 29500, Raleigh, NC 27626-0500 or 3320 Garner Road, Raleigh, NC 27610; email jhickman@ncdoj.gov*

Comment period ends: *January 15, 2014*

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 04 - DIVISION OF CRIMINAL INFORMATION

SUBCHAPTER 04H – ORGANIZATIONAL FUNCTIONS AND DEFINITIONS

SECTION .0100 – GENERAL PROVISIONS

12 NCAC 04H .0101 SCOPE
(a) The rules in this Chapter are the rules of the North Carolina State Bureau of Investigation, Division of Criminal Information (DCI).
(b) The FBI Criminal Justice Information Services (CJIS) Security Policy is incorporated by reference herein and shall automatically include any later amendments or editions that may be published by the FBI. The policy is available at no charge on the FBI website: http://www.fbi.gov.

Authority G.S. 114-10; 114-10.1.

12 NCAC 04H .0102 DEFINITIONS
As used in this Chapter:
(1) "ACIIS" means Canada's Automated Criminal Intelligence and Information System.
(2) "Administration of Criminal Justice" means the:
(a) detection of accused persons or criminal offenders;
(b) apprehension of accused persons or criminal offenders;
(c) detention of accused persons or criminal offenders;
(d) pretrial release of accused persons or criminal offenders;
(e) post-trial release of accused persons or criminal offenders;
(f) prosecution of accused persons or criminal offenders;
(g) adjudication of accused persons or criminal offenders;

(h) correctional supervision of accused persons or criminal offenders;
(i) rehabilitation of accused persons or criminal offenders;
(j) collection of criminal history record information;
(k) storage of criminal history record information;
(l) dissemination of criminal history record information;
(m) screening of persons for the purpose of criminal justice employment; or
(n) administration of crime prevention programs to the extent access to criminal history record information is limited to law enforcement agencies for law enforcement programs (e.g. record checks of individuals who participate in Neighborhood Watch or safe house programs) and the result of such checks will not be disseminated outside the law enforcement agency.

(3) "Advanced Authentication" means an alternative method of verifying the identity of a computer system user. Examples include software tokens, hardware tokens, and biometric systems. These alternative methods are used in conjunction with traditional methods of verifying identity such as user names and passwords.

(4) "AOC" means the North Carolina Administrative Office of the Courts.

(5) "Authorized Recipient" means any person or organization who is authorized to receive state and national criminal justice information by virtue of being:
(a) a member of a law enforcement/criminal justice agency approved pursuant to Rule .0201 of this Subchapter; or
(b) a non-criminal justice agency authorized pursuant to local ordinance or a state or federal law.

(6) "CCH" means computerized criminal history record information. CCH can be obtained through DCIN or through N-DEx.

(7) "Certification" means documentation provided by CIIS showing that a person has been trained in the abilities of DCIN devices, and has knowledge for accessing those programs that are developed and administered by CIIS for local law enforcement and criminal justice agencies.

(8) "CHRI" means Criminal History Record Information. CHRI is information collected by and maintained in the files of criminal justice agencies concerning individuals, consisting of identifiable descriptions, notations of arrest, detentions, indictments or other formal criminal charges. This includes any disposition, sentencing, correctional supervision, and release information. This term does not include identification information such as fingerprint records or other biometric data to the extent that such information does not indicate formal involvement of the individual in the criminal justice system.

(9) "CIIS" means Criminal Information and Identification Section. CIIS is a section of DCI that manages all CJIS programs within North Carolina, including DCIN.

(10) "CJI" means Criminal Justice Information. CJI is all of the FBI CJIS provided data necessary for law enforcement agencies to perform their mission and enforce laws, including biometric information, identity history person, organization, property, and case or incident history data. In addition, CJI refers to FBI CJIS provided data necessary for civil agencies to perform their mission including data used to make hiring decisions.

(11) "CJIS" means Criminal Justice Information Services. CJIS is the FBI division responsible for the collection, warehousing, and dissemination of relevant criminal justice information to the FBI and law enforcement, criminal justice, civilian, academic, employment, and licensing agencies.

(12) "CJIS Security Policy" means a document published by the FBI CJIS Information Security Officer that provides criminal justice and non-criminal justice agencies with a minimum set of security requirements for the access to FBI CJIS systems to protect and safeguard criminal justice information whether in transit or at rest.

(13) "Class B Misdemeanor" includes any act committed or omitted in violation of any common law, duly enacted ordinance, criminal statute, or criminal traffic code of any jurisdiction other than North Carolina, either civil or military, for which the maximum punishment allowable for the designated offense under the laws, statutes, or ordinances of the jurisdiction in which the offense occurred includes imprisonment for a term of more than six months but not more than two years. Specifically excluded are motor vehicle or traffic offenses designated as being misdemeanors under the laws of jurisdictions other than the State of North Carolina with the following exceptions: either first or subsequent offenses of driving while impaired if the maximum allowable punishment is for a term of more than six months but not more than two years, and driving while license permanently revoked or permanently

suspended. "Class B Misdemeanor" shall also include acts committed or omitted in North Carolina prior to October 1, 1994 in violation of any common law, duly enacted ordinance, criminal statute, or criminal traffic code of this state for which the maximum punishment allowable for the designated offense included imprisonment for a term of more than six months but not more than two years.

(14) "Convicted" or "conviction" means, for purposes of DCIN user certification, the entry of:
  (a) a plea of guilty;
  (b) a verdict or finding of guilt by a jury, judge, magistrate, or other adjudicating body, tribunal, or official, either civilian or military; or
  (c) a plea of no contest, nolo contendere, or the equivalent.

(15) "Criminal Justice Agency" means the courts, a government agency, or any subunit thereof which performs the administration of criminal justice pursuant to statute or executive order and which allocates more than 50 percent of its annual budget to the administration of criminal justice. State and federal Inspector General Offices are included in this definition.

(16) "Criminal Justice Board" means a board composed of heads of law enforcement or criminal justice agencies that have management control over a communications center.

(17) "CSA" means CJIS System Agency. The CSA is a state, federal, international, tribal, or territorial criminal justice agency on the CJIS network providing statewide (or equivalent) service to its criminal justice agency users with respect to the CJIS data from various systems managed by the FBI. In North Carolina, the CSA is the SBI.

(18) "CSO" means CJIS System Officer. The CSO an individual located within the CSA responsible for the administration of the CJIS network on behalf of the CSA. In North Carolina, the CSO is employed by the SBI.

(19) "DCI" means the Division of Criminal Information. DCI is the agency established by the Attorney General of North Carolina in accordance with Article 3 of Chapter 114 of the North Carolina General Statutes. The North Carolina State Bureau of Investigation's Criminal Information and Identification Section is a part of DCI.

(20) "DCIN" means the Division of Criminal Information Network. DCIN is the computer network used to collect, maintain, correlate, and disseminate information collected by CIIS under Article 3 of Chapter 114 of the North Carolina General Statutes. DCIN also provides access to information collected by other Federal, State, and local entities necessary for the administration of criminal justice.

(21) "DCIN User" means a person who has been certified through the DCIN certification process.

(22) "Device" means an electronic instrument used by a DCIN user to accomplish message switching, DMV inquiries, functional messages, or DCIN, NCIC, Nlets on-line file transactions.

(23) "Direct Access" means having the authority to:
  (a) access systems managed by the FBI CJIS Division, whether by manual or automated means, not requiring the assistance of, or intervention by, any other party; or
  (b) query or update national databases maintained by the FBI CJIS Division including national queries and updates automatically or manually generated by the CSA.

(24) "Disposition" means information on any action that results in termination or indeterminate suspension of the prosecution of a criminal charge.

(25) "Dissemination" means any transfer of information, whether orally, in writing, or by electronic means.

(26) "DMV" means the North Carolina Division of Motor Vehicles.

(27) "DMV Information" includes vehicle description and registration information, and information maintained on individuals to include name, address, date of birth, license number, license issuance and expiration, control number issuance, and moving vehicle violation or convictions.

(28) "DOC" means North Carolina Department of Adult Correction.

(29) "End User Interface" means software that is utilized by a certified user to connect to DCIN and perform message or file transactions.

(30) "Expunge" means to remove criminal history record information from the DCIN and FBI computerized criminal history and identification files pursuant to state statute.

(31) "FBI" means the Federal Bureau of Investigation.

(32) "FFL" means Federal Firearm Licensee. A FFL is any individual, corporation, company, association, firm, partnership, society, or joint stock company that has been licensed by the federal government to engage in the business of importing, manufacturing, or dealing in firearms or ammunition in accordance with 18 USC 923.

(33) "III" means Interstate Identification Index. III is the FBI CJIS service that manages automated submission and requests for criminal history record information that is warehoused subsequent to the submission of fingerprint information.

(34) "Inappropriate Message" means any message that is not related to the administration of criminal justice.

(35) "Incident Based Reporting" or "I-Base" is a system used to collect criminal offense and arrest information for each criminal offense reported.

(36) "INTERPOL" means International Criminal Police Organization.

(37) "N-DEx" means Law Enforcement National Data Exchange. N-DEx is the repository of criminal justice records, available in a secure online environment, managed by the FBI Criminal Justice Information Services (CJIS) Division. N-DEx is available to criminal justice agencies throughout North Carolina, and its use is governed by federal regulations.

(38) "NCIC" means National Crime Information Center. NCIC is an information system maintained by the FBI that stores criminal justice information which can be queried by Federal, state, and local law enforcement and other criminal justice agencies.

(39) "NFF" means the National Fingerprint File. NFF is an FBI maintained enhancement to the Interstate Identification Index whereby only a single fingerprint card is submitted per state to the FBI for each offender at the national level.

(40) "Need-to-know" means for purposes of the administration of criminal justice, for purposes of criminal justice agency employment, or for some other purpose permitted by local ordinance, state statute, or federal regulation.

(41) "NICS" means the National Instant Criminal Background Check System. NICS is the system mandated by the Brady Handgun Violence Protection Act of 1993 that is used by Federal Firearms Licensees (FFLs) to instantly determine via telephone or other electronic means whether the transfer of a firearm would be in violation of Section 922(g) or (n) of Title 18, United States Code, or state law, by evaluating the prospective buyer's criminal history. In North Carolina, NICS is used by sheriff's offices throughout the state to assist in determining an individual's eligibility for either a permit to purchase a firearm or a concealed handgun permit.

(42) "Nlets" means the International Justice and Public Safety Network.

(43) "Non-Criminal Justice Agency" or "NCJA" means any agency or sub-unit thereof whose charter does not include the responsibility to administer criminal justice, but may need to process criminal justice information. A NCJA may be public or private. An example is a 911 communications center that performs dispatching functions for a criminal justice agency (government), a bank needing access to criminal justice information for hiring purposes (private), or a county school board that uses criminal history record information to assist in employee hiring decisions (public).

(44) "Non-Criminal Justice Information" means any information or message that does not directly pertain to the necessary operation of a law enforcement or criminal justice agency. Examples of messages that are non-criminal justice include, but are not limited to:

(a) accessing any DMV file for:
  (i) political purposes;
  (ii) vehicle repossession purposes; and
  (iii) to obtain information on an estranged spouse or romantic interest;
(b) a message to confirm meal plans;
(c) a message to have a conversation; and
(d) a message to send well wishes during a holiday or birthday.

(45) "Official Record Holder" means the agency that maintains the master documentation and all investigative supplements of a restricted file entry or unrestricted file entry.

(46) "Ordinance" means a rule or law promulgated by a governmental authority including one adopted and enforced by a municipality or other local authority.

(47) "ORI" means Originating Agency Identifier, which is a unique alpha numeric identifier assigned by NCIC to each authorized criminal justice and non-criminal justice agency, identifying that agency in all computer transactions.

(48) "Private Contractor" means any non-governmental non-criminal justice agency that has contracted with a government agency to provide services necessary to the administration of criminal justice.

(49) "Re-certification" means renewal of a user's initial certification every two years.

(50) "Restricted Files" means those files maintained by NCIC that are protected as criminal history record information (CHRI), which is consistent with Title 28, Part 20 of the United States Code of Federal Regulations (CFR). Restricted files consist of:

(a) Gang Files;
(b) Known or Appropriately Suspected Terrorist (KST) Files;
(c) Supervised Release File;

(d) Immigration Violator Files;
(e) National Sex Offender Registry Files;
(f) Historical Protection Order Files of the NCIC;
(g) Identity Theft Files;
(i) Protective Interest File; and
(j) Person With Information (PWI) data within the Missing Person File.

(51) "Right-to-review" means the right of an individual to inspect his or her own criminal history record information.

(52) "SAFIS" means Statewide Automated Fingerprint Identification System.

(53) "SBI" means the North Carolina State Bureau of Investigation.

(54) "Secondary Dissemination" means the transfer of CCH/CHRI information to anyone legally entitled to receive such information that is outside the initial user agency.

(55) "SEND message" means messages that may be used by DCIN certified users to exchange official information of an administrative nature between in-state law enforcement/criminal justice agencies and out-of-state agencies by means of Nlets.

(56) "Servicing Agreement" means an agreement between a terminal agency and a non-terminal agency to provide DCIN terminal services.

(57) "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico and any territory or possession of the United States.

(58) "State Automated Fingerprint Identification System" or "SAFIS" means a computer-based system for reading, encoding, matching, storage and retrieval of fingerprint minutiae and images.

(59) "Statute" means a law enacted by a state's legislative branch of government.

(60) "TAC" means Terminal Agency Coordinator. A TAC is an individual who serves as a point of contact at a local agency in matters relating to DCIN or CJIS information systems. A TAC administers CJIS and CIIS system programs within the local agency and oversees the agency's compliance with both CIIS rules and CJIS system policies.

(61) "Terminal Agency" means any agency that has a device under its management and control that is capable of communicating with DCIN.

(62) "Training Module" means a manual containing guidelines for users on the operation of DCIN and providing explanations as to what information may be accessed through DCIN.

(63) "UCR" means the Uniform Crime Reporting program whose purpose it is to collect a summary of criminal offense and arrest information.

(64) "Unrestricted Files" means those files that are maintained by NCIC that are not considered "Restricted Files."

(65) "User Agreement" means an agreement between a terminal agency and CIIS whereby the agency agrees to comply with all CIIS rules.

(66) "User Identifier" means a unique identifier assigned by an agency's Terminal Agency Coordinator to all certified DCIN users that is used for gaining access to DCIN and for the identification of certified users.

Authority G.S. 114-10; 114-10.1.

12 NCAC 04H .0103 FUNCTION OF DCIN

(a) DCIN provides linkage with the following computer systems:

(1) National Crime Information Center (NCIC);
(2) International Justice and Public Safety Network (Nlets);
(3) North Carolina Division of Motor Vehicles (DMV);
(4) North Carolina Department of Adult Correction (DOC);
(5) North Carolina Administrative Office of the Courts (AOC);
(6) National Instant Criminal Background Check Service (NICS);
(7) Canada's Automated Criminal Intelligence and Information System (ACIIS); and
(8) International Criminal Police Organization (INTERPOL)

(b) Users of DCIN may:

(1) transmit or receive any criminal justice related message to any device connected to DCIN;
(2) enter into or retrieve information from North Carolina's:
(A) recovered vehicle file;
(B) sex offender registry; and
(C) concealed handgun permit file
(3) enter into or retrieve information from DCIN user certification and class enrollment files;
(4) enter into or retrieve information from NCIC's restricted and unrestricted files;
(5) access NCIC's criminal history data referred to as the Interstate Identification Index (III);
(6) obtain, on a need-to-know basis, the criminal record of an individual by inquiring into the state Computerized Criminal History (CCH) file maintained by CIIS, or CCH files maintained by other states and the Federal Bureau of Investigation (FBI) through III;
(7) communicate with devices in other states through Nlets with the capability to exchange automobile registration information, driver's license information, criminal history record information, corrections information, and other law enforcement related information;

(8) obtain information on North Carolina automobile registration, driver's license information and driver's history by accessing DMV maintained files;
(9) obtain registration information on all North Carolina registered boats, and inquire about aircraft registration and aircraft tracking;
(10) obtain information on those individuals under the custody or supervision of DOC; and
(11) access, enter, and modify information contained within the National Instant Criminal Background Check System (NICS).

Authority G.S. 114-10; 114-10.1.

SECTION .0200 – REQUIREMENTS FOR ACCESS

12 NCAC 04H .0201 ELIGIBILITY FOR ACCESS TO DCIN

(a) Only agencies that have obtained an ORI and have complied with Rule .0202 of this Section may access DCIN.
(b) Any agency in North Carolina desiring an ORI shall make a written request to DCI. DCI shall obtain an ORI from NCIC. If the request is denied by NCIC, DCI shall provide written findings to the requesting agency outlining the necessary elements to obtain an ORI.

Authority G.S. 114-10; 114-10.1.

12 NCAC 04H .0202 MANAGEMENT CONTROL REQUIREMENTS

Each device with access to DCIN and those personnel who operate devices with DCIN access must be under the direct and immediate management control of a criminal justice agency, criminal justice board or a FBI approved non-criminal justice agency. The degree of management control shall be such that the agency head, board or approved agency has the authority to:
(1) set policies and priorities concerning the use and operation, configuration, or maintenance of devices or computer networks accessing DCIN;
(2) hire, supervise, suspend or dismiss those personnel who will be connected with the operation, configuration, maintenance, or use of devices or computer networks accessing DCIN;
(3) restrict unauthorized personnel from access or use of devices accessing DCIN; and
(4) assure compliance with all rules and regulations of the FBI and SBI in the operation of devices with access to DCIN or use of all information received through DCIN.

Authority G.S. 114-10; 114-10.1.

12 NCAC 04H .0203 NON-TERMINAL ACCESS

(a) A non-terminal criminal justice agency may gain access to DCIN through a criminal justice agency which has direct access to the network. The servicing agency (agency providing access) shall enter into a servicing agreement with the non-terminal agency (agency receiving service) as described in Rule .0303 of this Subchapter.
(b) Any servicing agency which fails to enforce penalties that are placed upon the non-terminal agency is in violation of this Rule and subject to the provisions of 12 NCAC 04J .0102(e).
(c) The agreement shall:
(1) authorize access to specific data;
(2) limit the use of data to purposes for which given;
(3) insure the security and confidentiality of the data consistent with these procedures; and
(4) provide sanctions for violation thereof.
(d) Access shall be granted only if the terminal agency agrees.

Authority G.S. 114-10; 114-10.1.

SECTION .0300 - AGREEMENTS

12 NCAC 04H .0301 USER AGREEMENT

(a) Each agency receiving access to any data provided by FBI CJIS through DCIN shall sign a user agreement certifying that the agency head has read and understands DCIN, NCIC, CJIS, and other applicable rules and regulations, and that the agency head will uphold the agreement and abide by the rules and regulations. This agreement shall be signed by the agency head and by the North Carolina CJIS System Officer (CSO).
(b) When a new agency head is installed at an agency, a new user agreement shall be signed by the new agency head and the CSO.

Authority G.S. 114-10; 114-10.1.

12 NCAC 04H .0302 SERVICING AGREEMENT

(a) Any agency authorized pursuant to Rule .0201 of this Subchapter with a DCIN device which provides access to a non-terminal agency shall enter into a written servicing agreement with the serviced agency. The agreement shall include the following information:
(1) the necessity for valid and accurate information being submitted for entry into DCIN;
(2) the necessity for documentation to substantiate data entered into DCIN;
(3) the necessity of adopting timely measures for entering, correcting or canceling data in DCIN;
(4) validation requirements pursuant to 12 NCAC 04I .0203;
(5) the importance of confidentiality of information provided via DCIN;
(6) liabilities;
(7) the ability to confirm a hit 24 hours a day;
(8) the necessity of using the ORI of the official record holder in record entries and updates; and
(9) the necessity of using the ORI of the initial user when making inquiries.

(b) The servicing agreement must be signed by the head of the servicing agency and the head of the non-terminal agency, notarized, and a copy must be forwarded to CIIS by the non-terminal agency.
(c) DCI shall be notified of any cancellations or changes made in servicing agreements by the party making the cancellation or changes.

Authority G.S. 114-10; 114-10.1.

12 NCAC 04H .0303 CONTROL AGREEMENTS
(a) A non-criminal justice agency designated to perform criminal justice functions for a criminal justice agency is eligible for access to DCIN.
(b) A written management control agreement shall be entered into between a law enforcement agency and a 911 communications center when management control of the 911communications center will be under an entity other than the law enforcement agency. The agreement shall state that requirements of Rule .0202 of this Subchapter are in effect, and shall stipulate the management control of the criminal justice function remains solely with the law enforcement agency.
(c) A written management control agreement shall be entered into between a law enforcement agency and their governmental information technology (IT) division when the information technology role will be under an entity other than the law enforcement agency. The agreement shall state that the requirements pursuant to Rule .0202 of this Subchapter are in effect, and shall stipulate that the management control of the criminal justice function remains solely with the law enforcement agency.
(d) A written agreement shall be entered into between a law enforcement agency and a private contractor when the private contractor configures or supports any device or computer network that stores, processes, or transmits criminal justice information. The written agreement must incorporate the most current version of the CJIS Security Addendum. The CJIS Security Addendum may be found in the current CJIS Security Policy.

Authority G.S. 114-10; 114-10.1.

12 NCAC 04H .0304 DISCLOSURE AGREEMENT
(a) A written disclosure agreement shall be entered into between the SBI and any individual or agency seeking access to DCI-maintained criminal justice information for purposes of research.
(b) The disclosure agreement shall state that each participant and employee of every program of research with authorized access to computerized information is aware of the issues of privacy, the limitations regarding the use of accessed information, and that they agree to abide by CIIS rules concerning these issues pursuant to 12 NCAC 04I .0407.

Authority G.S. 114-10; 114-10.1.

SECTION .0400 – STANDARDS AND CERITIFICATION AS A DCIN USER

12 NCAC 04H .0401 DCIN USERS
(a) Prior to receiving certification as a DCIN user, and as a condition for maintaining certification as a DCIN user, each applicant or user shall be a citizen of the United States.
(b) The applicant or certified user shall be at least 18 years of age.
(c) An individual is eligible to attend certification class and become a DCIN user only if employed by and under the management control of an agency as described in Rule .0201 of this Subchapter and only after the individual has had a fingerprint-based criminal records search completed by the employing agency indicating that the individual has not been convicted of a criminal offense described in Paragraph (d) or (e) of this Rule.
(d) A conviction of a felony renders an applicant or certified DCIN user permanently ineligible to hold such certification.
(e) A conviction of a crime or unlawful act defined as a Class B Misdemeanor renders an applicant ineligible to become certified as a DCIN user when such conviction is within 10 years of the applicant's date of request for DCIN certification. Existing DCIN users convicted of a crime or unlawful act defined as a Class B Misdemeanor while holding certification are ineligible to maintain such certification for a period of 10 years following such conviction. An applicant or certified DCIN user is permanently ineligible to hold such certification upon conviction of two or more Class B misdemeanors regardless of the date of conviction.
(f) No applicant for certification as a DCIN user is eligible for certification while the applicant is subject to pending or outstanding criminal charges, which, if adjudicated, would disqualify the applicant from holding such certification.
(g) No DCIN user is eligible to access DCIN while the user is subject to pending or outstanding criminal charges, which, if adjudicated, would disqualify the user from access.
(h) An employee assigned as a DCIN user and who currently holds valid certification as a sworn law enforcement officer with the powers of arrest through either the North Carolina Criminal Justice Education and Training Standards Commission or the North Carolina Sheriff's Education and Training Standards Commission is not subject to the criminal history record and background search provisions of this Rule.

Authority G.S. 114-10; 114-10.1.

12 NCAC 04H .0402 CERTIFICATION AND RECERTIFICATION OF DCIN USERS
(a) Personnel who are assigned the duty of using a DCIN device shall be certified within 120 days from employment or assignment to user duties. Certification shall be awarded based on achieving a test score of 80 percent or greater in each training module for which the user is seeking certification.
(b) All DCIN users shall be certified by DCI. The initial certification of a user shall be awarded upon attending the "DCIN/NCIC General Inquiries" module class, and achieving a passing score on the accompanying test offered through the DCIN end user interface. A student may also take one or more additional module training classes offered by DCI, which teach the specific functions of DCIN applicable to their job duties. A

user may perform only those functions in which they have been trained and certified.
(c) Tests for modules in which a student is seeking initial certification shall be taken within 15 days of the end of the class, and may be open-book. If a student fails the initial certification test they shall have until the 15th day to pass the test, but shall wait at least 24 hours between the failed test and the next attempt. A student shall have a maximum of three attempts to pass the test. If the student fails to achieve a passing score after the third attempt the user shall re-take the module training class.
(d) Recertification requires achieving a test score of 80 percent or higher on the test corresponding to the module for which the user is seeking recertification, and may be accomplished by taking the test through the DCIN end user interface. Recertification is required every two years for each module in which the user is certified and may be obtained any time 30 days prior to or 90 days after expiration.
(e) Tests for modules in which the user is seeking recertification shall be taken within 30 days prior to expiration or within 90 days after expiration, and may be open-book. If the user fails the recertification test the user shall have up to the 90th day after expiration to pass the test, but shall wait at least 24 hours between the failed test and the next attempt. A user shall have a maximum of three attempts to pass the test. If the user fails to achieve a passing score after the third attempt the user shall re-take the training module class. If a user fails to recertify in any module after the 90th day the user must attend the module training class for the module in which the user seeks recertification and achieve a passing score on the test.
(f) New personnel hired or personnel newly assigned to duties of a terminal user shall receive an indoctrination and hands-on training on the basic functions and terminology of DCIN by their own agency prior to attending an initial certification class. Such personnel may operate a terminal accessing DCIN while obtaining training if such personnel are directly supervised by a certified user and are within the 120-day training period. After receiving hands on training new personnel shall take a test provided by the SBI to confirm indoctrination, and must achieve a score of 80 percent or higher.
(g) Any user whose Module 1 certification has expired may recertify up to 90 days after the user's expiration. The individual shall not use any device connected to DCIN during the time between expiration and passing the recertification test(s). Any user whose Module 1 certification has expired more than 90 days shall attend and successfully complete the "DCIN/NCIC General Inquiries" class.
(h) When a DCIN certified user leaves the employment of an agency, the TAC shall notify DCI within 24 hours, and disable the user's user identifier. DCI shall move user's user identifier to an inactive status until such time the user is employed by another agency.

Authority G.S. 114-10; 114-10.1.

12 NCAC 04H .0403 ENROLLMENT
(a) Enrollment is necessary for student attendance at any training for DCIN users. Enrollment shall be requested and approved by the agency Terminal Agency Coordinator (TAC) and personnel must meet the management control requirements outlined in Section .0200 of this Subchapter.
(b) DCI shall maintain enrollment for all certification classes.
(c) Enrollment shall be done in an automated method provided by DCI.

Authority G.S. 114-10; 114-10.1.

SUBCHAPTER 04I – SECURITY AND PRIVACY

SECTION .0100 – SECURITY AT DCIN DEVICE SITES

12 NCAC 04I .0101 SECURITY OF DCIN DEVICES
Agencies who have management control of a DCIN device shall institute controls for maintaining the sensitivity and confidentiality of all criminal justice information (CJI) provided through DCIN. These controls include the following:

(1) a DCIN device and any peripheral or network-connected printer shall be within a physically secure location, as defined by the FBI CJIS Security Policy, accessible only to authorized personnel. Any DCIN device not located within a physically secured location shall have advanced authentication measures installed and enabled; and
(2) DCIN training module documents shall be located in a physically secure location accessible only by authorized personnel.

Authority G.S. 114-10; 114-10.1.

12 NCAC 04I .0102 OFFICIAL USE OF DCIN
(a) DCIN shall be used for appropriate criminal justice and law enforcement purposes only. All traffic generated over the network shall be made in the performance of an employee's or agency's official duties as they relate to the administration of criminal justice.
(b) Transmission of non-criminal justice information through DCIN is prohibited.

Authority G.S. 114-10; 114-10.1.

12 NCAC 04I .0103 PERSONNEL SECURITY
(a) Agencies that have management control of DCIN devices shall institute procedures to ensure those non-DCIN certified individuals with direct access to their DCIN devices or any network that stores, processes, or transmits criminal justice information have been properly screened.
(b) This Rule includes:

(1) individuals employed by a municipality or county government who configure or support devices that:
(A) store criminal justice information;
(B) process criminal justice information; or
(C) transmit criminal justice information; and

(2) individuals employed by private vendors or private contractors who configure or support devices that:
(A) store criminal justice information;
(B) process criminal justice information; or
(C) transmit criminal justice information.

(c) To ensure proper background screening an agency shall conduct both state of residence and national fingerprint-based background checks for personnel described in Paragraphs (a) and (b) of this Rule.

(d) Applicant fingerprint cards shall be submitted by an agency to the SBI to conduct the check. Once the check has been completed the SBI shall send notice to the submitting agency as to the findings of the check.

(e) Personnel described in Paragraphs (a) and (b) of this Rule must meet the same requirements as those described in 12 NCAC 04H .0401(c).

Authority G.S. 114-10; 114-10.1.

12 NCAC 04I .0104 SECURITY AWARENESS TRAINING

(a) Security awareness training is required within six months of initial assignment and every two years thereafter, for any personnel who have access to DCIN devices or any network that stores, processes, or transmits criminal justice information.

(b) This Rule also applies to any individual who is responsible for the configuration or support of devices or computer networks that store, process, or transmit criminal justice information as described in Rule .0103 of this Subchapter.

(c) Security awareness training shall be facilitated by CIIS.

(d) Records of security awareness training shall be documented, kept current, and maintained by the criminal justice agency.

Authority G.S. 114-10; 114-10.1.

SECTION .0200 – NCIC RESTRICTED AND RESTRICTED FILES

12 NCAC 04I .0201 DOCUMENTATION AND ACCURACY

(a) Law enforcement and criminal justice agencies may enter stolen property, recovered property, wanted persons, missing persons, protection orders, or convicted sex offenders into NCIC restricted and unrestricted files. Any record entered into NCIC files must be documented. The documentation required is:

(1) a theft report of items of stolen property;
(2) an active warrant for arrest or order for arrest for the entry of wanted persons;
(3) a missing person report and, if a juvenile, a written statement from a parent, spouse, family member, or legal guardian verifying the date of birth and confirming that a person is missing;
(4) a medical examiner's report for an unidentified dead person entry;
(5) a protection order or ex parte order (for "temporary orders") issued by a court of competent jurisdiction for a protection order entry; or
(6) a judgment from a court of competent jurisdiction ordering an individual to register as a sex offender.

(b) All NCIC file entries must be complete and accurately reflect the information contained in the agency's investigative documentation at the point of initial entry or modification. NCIC file entries must be checked by a second party who shall initial and date a copy of the record indicating accuracy has been confirmed.

(c) The following key searchable fields shall be entered for person-based NCIC file entries, if available, and shall accurately reflect the information contained in the entering agency's investigative documentation:

(1) Name (NAM);
(2) Date of Birth (DOB);
(3) Sex (SEX);
(4) Race (RAC);
(5) Social Security Number (SOC), for any person-based NCIC file entry other than sex offenders;
(6) Aliases (AKA);
(7) FBI Number (FBI);
(8) State Identification Number (SID); and
(9) Agency's file number (OCA).

Other data elements may be required for entry in to the NCIC. Those additional data elements shall accurately reflect an agency's investigative file.

(d) Searchable fields that are required by the DCIN end user interface shall be entered for property-based NCIC file entries, and shall accurately reflect the information contained in the entering agency's investigative documentation.

(e) An agency must enter any additional information that becomes available later.

Authority G.S. 114-10; 114-10.1.

12 NCAC 04I .0202 TIMELINESS

(a) Law enforcement and criminal justice agencies shall enter records within three days when conditions for entry are met except when a federal law, state statute, or documentation exists to support a delayed entry. Any decision to delay entry under this exception shall be documented.

(b) Timeliness can be defined based on the type of record entry being made:

(1) Wanted Person - entry of a wanted person shall be made immediately after the decision to arrest or to authorize arrest has been made, and the decision to extradite has been made. "Immediately" is defined as within three days.
(2) Missing Person - entry of a missing person shall be made as soon as possible once the minimum data required for entry (i.e., all mandatory fields) and the appropriate record documentation are available. For missing persons under age 21, a NCIC Missing Person File record shall be entered within two hours

of receiving the minimum data required for entry.

(3) Article, Boat, Gun, License Plate, Securities, Vehicle Part, Boat Part, Vehicle, Protection Order, and Sex Offender Registry files - entry is made as soon as possible once the minimum data required for entry (i.e., all mandatory fields) and the record documentation are available. Information about stolen license plates and vehicles shall be verified through the motor vehicle registration files prior to record entry if possible. However, if motor vehicle registration files are not accessible, the record shall be entered into NCIC and verification shall be completed when the registration files become available.

Authority G.S. 114-10; 114-10.1.

12 NCAC 04I .0203 VALIDATIONS

(a) Law enforcement and criminal justice agencies shall validate all record entries, with the exception of articles, made into the NCIC restricted and unrestricted files.

(b) Validation shall be accomplished by reviewing the original entry and current supporting documents. Stolen vehicle, stolen boat, wanted person, missing person, protection order, and sex offender file entries require consultation with any appropriate complainant, victim, prosecutor, court, motor vehicle registry files or other appropriate source or individual in addition to the review of the original file entry and supporting documents.

(c) Validations shall be conducted through the CIIS automated method.

(d) Any records containing inaccurate data shall be modified and records which are no longer current or cannot be substantiated by a source document shall be removed from the NCIC.

(e) Any agency which does not properly validate its records shall have their records purged for that month by NCIC. An agency shall be notified of the record purge through an NCIC-generated message sent to the agency's main DCIN device. An agency may re-enter the cancelled records once the records have been validated.

Authority G.S. 114-10; 114-10.1.

12 NCAC 04I .0204 HIT CONFIRMATION

(a) Any agency entering record information into the NCIC restricted and unrestricted files, or which has a servicing agency enter record information for its agency, shall provide hit confirmation 24 hours a day. Hit confirmation of NCIC records means that an agency receiving a positive NCIC response from an inquiry must communicate with the official record holder to confirm the following before taking a person or property into custody:

(1) the person or property inquired upon is the same as the person or property identified in the record;

(2) the warrant, missing person report, theft report, or protection order is still outstanding; or

(3) a decision regarding the extradition of a wanted person has been made; the return of a missing person to the appropriate authorities is still desired; the return of stolen property to its rightful owner is still desired; or the terms, conditions, or service of a protection order.

(b) The official record holder must respond after receiving a hit confirmation request with the desired information or a notice of the amount of time necessary to confirm or reject the record.

(c) An agency that is the official record holder shall have 10 minutes to respond to a hit confirmation request with a priority level of "urgent." If the agency fails to respond after the initial request, the requesting agency shall send a second hit confirmation request to the official record holder. Any subsequent hit confirmation requests shall also be at 10-minute intervals.

(d) An agency shall have one hour to respond to a hit confirmation request with a priority level of "routine." If the agency fails to respond after the initial request, the requesting agency shall send a second hit confirmation request to the official record holder. Any subsequent hit confirmation requests shall also be at one-hour intervals.

Authority G.S. 114-10; 114-10.1.

SECTION .0300 – SUBMISSION OF DATA FOR CRIMINAL HISTORY RECORDS

12 NCAC 04I .0301 ARREST FINGERPRINT CARD

(a) Fingerprint cards submitted in accordance with G.S. 15A-502 must contain the following information on the arrestee in order to be processed by the SBI and FBI:

(1) ORI number and address of arresting agency;
(2) complete name;
(3) date of birth;
(4) race;
(5) sex;
(6) date of arrest;
(7) criminal charges; and
(8) a set of fingerprint impressions and palm prints if the agency is capable of capturing palm prints.

Any fingerprint cards physically received by the SBI that do not meet these requirements shall be returned to the submitting agency to be corrected and resubmitted. Any fingerprint cards that have been submitted electronically to the SBI that do not meet these standards shall not be accepted. The submitting agency shall receive electronic notification that the prints did not meet minimum standards through the agency's LiveScan device.

(b) The arrest and fingerprint information contained on the arrest fingerprint card shall be added to the North Carolina's CCH files, and electronically forwarded to the FBI's Interstate Identification Index (III) for processing.

(c) Criminal fingerprint cards shall be submitted in the following ways:

(1) electronically through the agency's LiveScan device to North Carolina's Statewide Automated Fingerprint Identification System (SAFIS); or

(2) mail addressed to:

North Carolina State Bureau of Investigation
Criminal Information and Identification Section
3320 Garner Road
Raleigh, North Carolina 27610
Attention: AFIS & Technical Search Unit

Authority G.S. 15A-502; 15A-1383.

12 NCAC 04I .0302 FINAL DISPOSITION INFORMATION

(a) Final disposition information shall be submitted electronically to DCI by the Administrative Office of the Courts (AOC).

(b) The final disposition information shall be added to North Carolina's CCH files, and shall be electronically transmitted to the FBI's Interstate Identification Index (III).

(c) Any final disposition rejected by DCI shall be returned to the Clerk of Court in the county of the arresting agency for correction and resubmission.

Authority G.S. 15A-1381; 15A-1382; 15A-1383; 114-10; 114-10.1.

12 NCAC 04I .0303 INCARCERATION INFORMATION

(a) Incarceration information shall be electronically submitted to DCI by the North Carolina Department of Public Safety (DPS) on all subjects admitted to prison.

(b) The incarceration information shall be added to the North Carolina CCH files, and shall be electronically transmitted to the FBI's Interstate Identification Index (III).

Authority G.S. 15A-502; 15A-1383; 114-10; 114-10.1.

SECTION .0400 – USE AND ACCESS REQUIREMENTS FOR CRIMINAL HISTORY RECORD INFORMATION, NICS INFORMATION, AND N-DEX INFORMATION

12 NCAC 04I .0401 DISSEMINATION AND LOGGING OF CHRI AND NICS RECORDS

(a) Criminal history record information (CHRI) obtained from or through DCIN, NCIC, N-DEx, or Nlets shall not be disseminated to anyone outside of those agencies eligible under 12 NCAC 04H .0201(a) except as provided by Rules .0402, .0404, .0406, and .0409 of this Section. Any agency assigned a limited access ORI shall not obtain CHRI. Any agency requesting CHRI that has not received an ORI pursuant to 12 NCAC 04H .0201(a) shall be denied access and referred to the North Carolina CJIS System Officer (CSO).

(b) CHRI is available to eligible agency personnel only on a "need-to-know" basis as defined in 12 NCAC 04H .0104.

(c) The use or dissemination of CHRI obtained through DCIN or N-DEx for unauthorized purposes is a violation of this Rule and subject to the provisions of 12 NCAC 04J .0102(c) and (d).

(d) CIIS shall maintain an automated log of CCH/CHRI/National Instant Criminal Background Check System (NICS) inquiries for a period of not less than one year from the date of inquiry. The automated log shall contain the following information as supplied by the user on the inquiry screen and shall be made available on-line to the inquiring agency;

(1) date of inquiry;
(2) name of record subject;
(3) state identification number (SID) or FBI number of the record subject;
(4) message key used to obtain information;
(5) purpose code;
(6) user's initials;
(7) (Attention field) name of person and agency requesting information who is the initial user of the record;
(8) (Attention 2 field) name of person and agency requesting information who is outside of the initial user agency. If there is not a second individual receiving the information, information indicating why the information is requested may be placed in this field; and
(9) if applicable, NICS Transaction Number (NTN) for NICS logs only.

(e) Criminal justice agencies making secondary disseminations of CCH, CHRI, N-DEx, or NICS information obtained through DCIN shall maintain a log of the dissemination in a case. This log must identify the name of the recipient and their agency.

(f) Each criminal justice agency obtaining CHRI through a DCIN device shall conduct an audit of their automated CCH log as provided by DCIN once every month for the previous month. The audit shall take place within 15 business days of the end of the month being reviewed. This audit shall include a review for unauthorized inquiries and disseminations, improper use of agency ORI's, agency names, and purpose codes. These logs must be maintained on file for one year from the date of the inquiry, and may be maintained electronically by the criminal justice agency. Any violation of CIIS rules must be reported by an agency representative to CIIS within 20 business days of the end of the month being reviewed. On those months that do not contain 20 business days, any violations of CIIS rules must be reported by an agency representative to CIIS by the first business day of the following month, at the latest. If an agency does not have a device connected to DCIN that can receive CHRI, this audit is not required.

(g) Each criminal justice agency obtaining information from NICS or N-DEx shall conduct the same monthly audit as those for CHRI logs. The audit shall take place within 15 business days of the end of the month being reviewed. This audit shall include a review for unauthorized inquiries or disseminations and improper use of purpose codes. These logs must be maintained on file for one year from the date of inquiry, and may be maintained electronically by the criminal justice agency. Any violation of CIIS rules must be reported by an agency representative to CIIS within 20 business days of the end of the month being reviewed. On those months that do not contain 20 business days, any violations of CIIS rules must be reported by

an agency representative to CIIS by the first business day of the following month, at the latest.
(h) DCIN automated CCH logs, automated NICS logs, and any secondary dissemination logs shall be available for audit or inspection by the CSO or his designee as provided in Rule .0801 of this Subchapter.
(i) Out of state agencies requesting a statewide criminal record check shall utilize NCIC.

Authority G.S. 114-10; 114-10.1.

12 NCAC 04I .0402 ACCESSING OF CCH RECORDS
Any accessing of or inquiry into CCH records must be made with an applicable purpose code. An "applicable purpose code" is defined as a code that conveys the reason for which an inquiry is made.

Authority G.S. 114-10; 114-10.1.

12 NCAC 04I .0403 USE OF CHRI FOR CRIMINAL JUSTICE EMPLOYMENT
(a) Agencies must submit an applicant fingerprint card on each individual seeking criminal justice employment, and the card must contain the following information in order to be processed by DCI and FBI:

(1) complete name;
(2) date of birth;
(3) race;
(4) sex;
(5) position applied for;
(6) hiring agency; and
(7) a set of legible fingerprint impressions.

Any fingerprint cards that do not meet these requirements shall be returned by DCI to the submitting agency for correction and resubmitted.
(b) For sworn and telecommunicator positions the response and the fingerprint card will be forwarded to the appropriate training and standards agency. For non-sworn positions, the response shall be returned to the submitting agency. DCI shall not maintain the cards or responses.
(c) Agencies may submit the information in Paragraph (a) of this Rule in an electronic method to CIIS for processing. Any fingerprints and associated information not meeting the requirements in Paragraph (a) of this Rule shall not be accepted. An electronic notification shall be sent by DCI to the submitting agency indicating the submitted information did not meet minimum requirements.

Authority G.S. 114-10; 114-10.1; 114-16; 114-19.

12 NCAC 04I .0404 RIGHT TO REVIEW
(a) An individual may obtain a copy of his or her own criminal history record by submitting a written request to the North Carolina State Bureau of Investigation Criminal Information and Identification Section, Attention: Applicant Unit – Right to Review, 3320 Garner Road, Raleigh, North Carolina 27610. The written request must be accompanied by a certified check or money order in the amount of fourteen dollars ($14.00) payable to the North Carolina State Bureau of Investigation, and must contain proof of identity to include:

(1) complete name and address;
(2) race;
(3) sex;
(4) date of birth;
(5) social security number; and
(6) a legible set of fingerprint impressions.

(b) The response will be submitted only to the individual. Copies of the response cannot be provided by DCI to a third party.
(c) The accuracy or completeness of an individual's record may be challenged by submitting the "Right to Review Request Criminal History Written Exception" form available from DCI.
(d) Upon receipt of the "Right to Review Request Criminal History Written Exception", the CIIS shall initiate an internal record audit of the challenger's record to determine its accuracy. If any potential inaccuracies or omissions are discovered, DCI shall coordinate with the arresting agency to review the charge information previously submitted by that agency. Appropriate action shall be taken based on, in part, information provided by the arresting agency. DCI shall inform the challenger in writing of the results of the audit.
(e) If the audit fails to disclose any inaccuracies, or if the challenger wishes to contest the results of the audit, he is entitled to an administrative hearing pursuant to G.S. 150B-23.

Authority G.S. 114-10; 114-10.1; 114-19.1.

12 NCAC 04I .0405 CCH USE IN LICENSING AND NON-CRIMINAL JUSTICE EMPLOYMENT PURPOSES
(a) Criminal justice agencies authorized under 12 NCAC 04H .0201 which issue licenses or approve non-criminal justice employment and want to use computerized criminal history information maintained by DCI for licensing, permit, and non-criminal justice employment purposes shall submit to CIIS a written request listing the types of licenses, permits, and employment for which they desire to use computerized criminal history information. A copy of the local ordinance or a reference to the North Carolina General Statute giving authority to issue a particular permit or license must be included in the written request.
(b) Authorization to use computerized criminal history information for licensing, permit, or employment purposes may be given only after the DCI and the North Carolina Attorney General's Office have evaluated and granted authorization based upon the authority of the North Carolina General Statutes or local ordinance pertaining to the issuance of that particular license or permit for employment.
(c) Once authorization has been given, DCI shall provide the agency an access agreement, which outlines the guidelines for information usage. The access agreement shall also include information on billing mechanisms. DCI shall bill the agency fourteen dollars ($14.00) for a check of North Carolina computerized criminal history files, and thirty-eight dollars ($38.00) for a search of both the North Carolina computerized criminal history files and a search of the FBI's Interstate Identification Index (III) files. DCI shall send an invoice to the requesting agency to collect these fees.

(d) The access agreement shall be signed by the requesting agency's head, and returned to DCI.

(e) The agency's terminal, if applicable, shall receive the capability to use the purpose code "E" in the purpose field of the North Carolina CCH inquiry screens for employment or licensing once the agency head has signed the access agreement and returned it to DCI. Once an agency has received this capability, it shall use the purpose code "E", the proper two character code, and recipient of the record's name. A log of all primary and any secondary dissemination must also be kept for one year on all responses received from this type of inquiry.

(f) Criminal justice agencies may also gain access by submission of non-criminal justice applicant fingerprint cards. Approval must be obtained pursuant to the procedure in Paragraph (a) of this Rule. One applicant fingerprint card must be submitted on each individual. The fingerprint card must contain the following information on the applicant in order to be processed by DCI and the FBI:

(1) complete name;
(2) date of birth;
(3) race;
(4) sex;
(5) reason fingerprinted to include the N.C.G.S. or local ordinance number;
(6) position applied for;
(7) the licensing or employing agency; and
(8) a set of legible fingerprint impressions.

DCI shall return the letter of fulfillment to the submitting agency indicating the existence or absence of a criminal record.

(g) Requests from non-criminal justice agencies or individuals to use criminal history information maintained by DCI for licensing and employment purposes shall be treated as a fee for service request pursuant to G.S. 114-19.1 or any other applicable statute. The process for approval for non-criminal justice agencies or individuals shall be the same process as in Paragraph (a) of this Rule.

(h) Upon being approved, the requesting agency shall submit its requests to the North Carolina State Bureau of Investigation, Criminal Information and Identification Section, Special Processing Unit, 3320 Garner Road, Raleigh, North Carolina 27610. Each request shall include a fee of ten dollars ($10.00) for a name-only check, fourteen dollars ($14.00) for a state-only fingerprint based check, or thirty-eight dollars ($38.00) for a state and national fingerprint based check (if applicable) in the form of a certified cashier's check, money order, or direct billing.

(i) Criminal history record information accessible pursuant to this Rule shall be North Carolina criminal history record information, and FBI III information if permitted by statute.

Authority G.S. 114-10; 114-10.1; 114-19.1.

12 NCAC 04I .0406 RESTRICTIVE USE OF CCH FOR EMPLOYMENT PURPOSES

(a) Use of computerized criminal history information maintained by the CIIS for licensing permits or non-criminal justice employment purposes shall be authorized only for those criminal justice and non-criminal justice agencies who have complied with Rule .0405 of this Section.

(b) The following requirements and restrictions are applicable to all agencies who have received approval to use computerized criminal history information for licensing, permits, or non-criminal justice employment purposes. Each such agency is responsible for their implementation:

(1) computerized criminal history information obtained shall not be used or disseminated for any other purpose;
(2) computerized criminal history information obtained shall not be released to or reviewed by anyone other than the agencies authorized by CIIS;
(3) the only data in the computerized criminal history files which may be used in an agency's determination of issuing or denying a license, permit or employment are those crimes stipulated in the referenced ordinance or statutory authority as grounds for disqualification. All criminal history arrest information held by CIIS shall be released regardless of disposition status. Each agency is responsible for reviewing each statutory authority and knowing what data may be used and what data shall not be used for grounds in denying or issuing a particular license or permit for employment;
(4) prior to denial of a license, permit, or employment due to data contained in a computerized criminal history record, a fingerprint card of the applicant shall be submitted to CIIS for verification that the record belongs to the applicant;
(5) if the information in the record is used to disqualify an applicant, the official making the determination of suitability for licensing or employment shall provide the applicant the opportunity to correct, complete, or challenge the accuracy of the information contained in the record. The applicant must be afforded a reasonable time to correct, complete or to decline to correct or complete the information. An applicant shall not be presumed to be guilty of any charge/arrest for which there is no final disposition stated on the record or otherwise determined. Applicants wishing to correct, complete or otherwise challenge a record must avail themselves of the procedure set forth in Rule .0404(c) of this Section.

(c) A "no-record" response on a computerized criminal history inquiry does not necessarily mean that the individual does not have a record. If the requesting agency desires a more complete check on an applicant, a fingerprint card of the applicant shall be submitted to DCI.

Authority G.S. 114-10; 114-10.1; 114-19.1.

12 NCAC 04I .0407 RESEARCH USE AND ACCESS OF CCH RECORDS

(a) Researchers who wish to use criminal justice information maintained by CIIS shall first submit to the North Carolina CJIS System Officer (CSO) a completed research design that guarantees protection of security and privacy. Authorization to use computerized criminal history records shall be given after the CSO has approved the research design.

(b) In making a determination to approve the submitted research design, the CSO must ensure that:

(1) an individual's right to privacy will not be violated by the research program;

(2) the program is calculated to prevent injury or embarrassment to any individual;

(3) the results outweigh any disadvantages that are created for the North Carolina criminal justice system if the research information is provided;

(4) the criminal justice community will benefit from the research and use; and

(5) the requestor is responsible for cost.

(c) For purposes of this Rule, a researcher is defined as a non-criminal justice or private agency or a criminal justice agency wishing to access criminal history data for a statistical purpose.

Authority G.S. 114-10; 114-10.1; 114-19.1.

12 NCAC 04I .0408 LIMITATION REQUIREMENTS

Research designs must preserve the anonymity of all subjects. The following requirements are applicable to all such programs of research and each criminal justice agency or researcher is responsible for their implementation:

(1) Computerized criminal history records furnished for purposes of any program of research shall not be used to the detriment of the person(s) to whom such information relates.

(2) Criminal history records furnished for purposes of any program of research shall not be used for any other purpose; nor may such information be used for any program of research other than that authorized by the North Carolina CJIS System Officer (CSO).

(3) Each researcher or anyone having access to the computerized criminal history shall, prior to having such access, sign a Disclosure Agreement with the CSO incorporating the requirements of 12 NCAC 04H .0305.

(4) The authorization for access to computerized criminal history records shall assure that the criminal justice agency and CIIS have rights to monitor the program of research to assure compliance with this Rule. Such monitoring rights include the right of CIIS staff to audit and review such monitoring activities and also to pursue their own monitoring activities.

(5) CIIS and the criminal justice agency involved may examine and verify the data generated as a result of the program, and, if a material error or omission is found to have occurred, may order the data not be released for any purpose unless corrected to the satisfaction of the agency and CIIS.

Authority G.S. 114-10; 114-10.1; 114-19.1.

12 NCAC 04I .0409 ACCESS TO CHRI BY ATTORNEYS

(a) An attorney must have entered in to a proceeding in accordance with G.S. 15A-141 in order to access CHRI. The attorney may have access to the CHRI of only the defendant he or she is representing.

(b) If, during a proceeding, an attorney desires CHRI of an individual involved in the proceeding other than the attorney's client, the attorney shall make a motion before the court indicating the desire for the CHRI.

(c) In order to maintain compliance with state and federal requirements an attorney shall disclose the purpose for any request of CHRI.

(d) CIIS shall provide a form to be utilized by any DCIN user when fulfilling a request for CHRI by an attorney. This form shall help ensure compliance with state and federal rules regarding access to and dissemination of CHRI.

(e) The attorney must fill out all applicable fields of the form and return it to the DCIN user to process the request. The attorney shall provide:

(1) the client's name;

(2) docket number for the matter;

(3) prosecutorial district in which the matter is being tried; and

(4) the next date on which the matter is being heard.

(f) The attorney may submit requests for CHRI only within the prosecutorial district of the District Attorney that is prosecuting the defendant(s). If a change of venue has been granted during a proceeding, this rule still applies, and the attorney must still seek the CHRI from the prosecutorial district within which the proceeding originated.

(g) Records of requests and dissemination to attorneys must be kept by the disseminating agency for a period of one year.

(h) Requests for North Carolina-only CHRI may be notarized in lieu of approval from the DA or ADA.

Authority G.S. 114-10; 114-10.1; 15A-141.

12 NCAC 04I .0410 ACCESS TO CHRI IN CIVIL PROCEEDINGS

(a) Access to CHRI is permitted in civil domestic violence and civil stalking proceedings.

(b) Access to and dissemination of CHRI for civil proceedings in this Rule shall be done in accordance with Rules .0401 and .0402 of this Section.

(c) Access to and dissemination of CHRI for any other type of civil proceeding is prohibited.

(d) Civil courts may be issued an Originating Agency Identifier (ORI) for the purposes of this Rule. The ORI issuance must be approved by the FBI and North Carolina's CJIS System Officer (CSO).

Authority G.S. 114-10; 114-10.1.

SECTION .0500 – REMOVAL OF CRIMINAL HISTORY RECORD INFORMATION

12 NCAC 04I .0501 EXPUNGEMENTS

Upon the receipt of a valid court ordered expungement, CIIS shall expunge the appropriate CHRI as directed by the court order. An electronic notification regarding the expungement shall be sent to the FBI for processing and all agencies that have inquired on the record within the past 90 days shall be advised of the court order.

Authority G.S. 15A-145; 15A-146; 90-96; 90-113.14; 114.10; 114-10.1; 150B-19(5)b., e.

SECTION .0600 – STATEWIDE AUTOMATED FINGERPRINT IDENTIFICATION SYSTEM

12 NCAC 04I .0601 STATEWIDE AUTOMATED FINGERPRINT IDENTIFICATION SYSTEM

(a) Agencies which meet the requirements of 12 NCAC 04H .0201(a) may access the North Carolina Statewide Automated Fingerprint Identification System for criminal justice purposes.

(b) The acronym used for the Statewide Automated Fingerprint Identification System shall be the SAFIS.

Authority G.S. 15A-502; 114-10; 114-10.1; 114-16.

12 NCAC 04I .0602 AVAILABLE DATA

(a) The following data is available through SAFIS and may be used to make comparisons and obtain CCH data:

(1) fingerprint images; and

(2) state identification number.

(b) When the state identification number is used to obtain CCH data, dissemination requirements outlined in Rule .0401(c) and (d) of this Subchapter must be followed.

Authority G.S. 15A-502; 114-10; 114-10.1; 114-16.

12 NCAC 04I .0603 FINGERPRINTING OF CONVICTED SEX OFFENDERS

(a) Fingerprints submitted in accordance with G.S. 14-208.7 must contain the following information on the convicted sex offender in order to be processed by the SBI:

(1) ORI number;

(2) complete name;

(3) date of birth;

(4) race;

(5) sex;

(6) sex offender registration number (SRN); and

(8) a set of fingerprint impressions and palm prints if the agency is capable of capturing palm prints.

Submissions shall be made through the registering agency's LiveScan device.

(b) Fingerprints submitted to CIIS that do not contain all of the items in Paragraph (a) of this Rule shall not be accepted.

(c) The submitted fingerprint information shall be added to the North Carolina Sex Offender Registry and to SAFIS.

Authority G.S. 114-10.

SECTION .0700 – DIVISION OF MOTOR VEHICLE INFORMATION

12 NCAC 04I .0701 DISSEMINATION OF DIVISION OF MOTOR VEHCILES INFORMATION

(a) DMV information obtained from or through DCIN shall not be disseminated to anyone outside those agencies eligible under 12 NCAC 04H .0201(a) unless obtained for the following purposes:

(1) in the decision of issuing permits or licenses if statutory authority stipulates the non-issuance or denial of a permit or license to an individual who is a habitual violator of traffic laws or who has committed certain traffic offenses and those licensing purposes have been authorized by CIIS and the Attorney General's Office;

(2) by governmental agencies to evaluate prospective or current employees for positions involving the operation of publicly owned vehicles; or

(3) by a defendant's attorney of record in accordance with G.S. 15A-141.

(b) Each agency disseminating driver history information to a non-criminal justice agency for any of the purposes listed in Paragraph (a) shall maintain a log of dissemination for one year containing the following information:

(1) date of inquiry for obtaining driver's history;

(2) name of terminal operator;

(3) name of record subject;

(4) driver's license number;

(5) name of individual and agency requesting or receiving information; and

(6) purpose of inquiry.

(c) Driver history information obtained from or through DCIN shall not be released to the individual of the record.

(d) DMV information obtained for any purpose listed in Paragraph (a) of this Rule shall be used for only that official internal purpose and shall not be redisseminated or released for any other purpose.

Authority G.S. 114-10; 114-10.1.

SECTION .0800 – AUDITS

12 NCAC 04I .0801 AUDITS

(a) CIIS shall biennially audit criminal justice information entered, modified, cancelled, cleared and disseminated by DCIN users. Agencies subject to audit include all agencies that have direct or indirect access to information obtained through DCIN.

(b) CIIS shall send designated representatives to selected law enforcement and criminal justice agency sites to audit:

(1) criminal history usage and dissemination logs;

(2) NICS usage and dissemination logs;

(3) driver history dissemination logs;

(4) security safeguards and procedures adopted for the filing, storage, dissemination, or destruction of criminal history records;
(5) physical security of DCIN devices in accordance with the current FBI CJIS Security Policy;
(6) documentation establishing the accuracy, validity, and timeliness of the entry of records entered into NCIC wanted person, missing person, property, protection order, and DCIN and NCIC sex offender files;
(7) the technical security of devices and computer networks connected to DCIN in accordance with the current FBI CJIS Security Policy;
(8) user certification, status, and background screening;
(9) user agreements between the agency and North Carolina's CJIS System Agency (CSA);
(10) servicing agreements between agencies with DCIN devices and agencies without DCIN devices (when applicable);
(11) use of private contractors or governmental information technology professionals for information technology support along with the proper training and screening of those personnel; and
(12) control agreements between agencies and entities providing information technology support (when applicable).

(c) The audits shall be conducted to ensure that the agencies are complying with state and federal regulations, as well as federal and state statutes on security and privacy of criminal history record information.

(d) CIIS shall provide notice to the audited agency as to the findings of the audit. If discrepancies or deficiencies are discovered during the audit they shall be noted in the findings along with possible sanctions for any deficiencies or rule violations.

(e) If applicable, CIIS shall also biennially audit agencies' N-DEx access and usage. CIIS shall audit:
(1) network security;
(2) N-DEx transactions performed by agency personnel; and
(3) user certification and status

(f) Audits of N-DEx usage will occur concurrently with an agency's DCIN audit, and shall ensure compliance with state and federal regulations on security and privacy of criminal justice information contained within N-DEx.

Authority G.S. 114-10; 114-10.1.

SUBCHAPTER 04J - PENALTIES AND ADMINISTRATIVE HEARINGS

SECTION .0100 - DEFINITIONS AND PENALTY PROVISIONS

12 NCAC 04J .0101 DEFINITIONS

As used in this Subchapter:

(1) "Revocation of Certification" means a DCIN user's certification is canceled for a period not to exceed one year. At the end of the revocation period the user must attend the DCIN Module 1 certification class. Notification of the revocation shall be sent by DCI via certified mail to the DCIN user and the user's agency head.
(2) "Suspension of Certification" means a DCIN user is prohibited from operating a DCIN device for a period not to exceed 90 days. Notification of the suspension shall be sent by DCI via certified mail to the DCIN user's agency head and to the DCIN user. The agency shall be audited within 90 days of reinstatement of a user's certification.
(3) "Suspension of Services" means an agency's direct access to DCIN is suspended for a period not to exceed two weeks after the North Carolina CJIS System Officer's (CSO) finding of fault, and the agency head must then appear before the CSO to respond to the cited violation. This suspension may be limited to certain files or may include a complete suspension of services, depending on the administrative procedure violated. The agency is subject to a re-audit after 90 days of reinstatement. Further violations of the same regulation, within two years from the date of the suspension, or failure to appear before the CSO to respond to the cited violation is grounds to cancel the user agreement with the agency.

Authority G.S. 114-10; 114-10.1.

12 NCAC 04J .0102 SANCTIONS FOR VIOLATIONS BY INDIVIDUALS

When any certified DCIN user is found to have knowingly and willfully violated any provision of these Rules, DCI may take action to correct the violation and to ensure the violation does not re-occur, to include, but not limited to, the following:
(1) issuing an oral warning and a request for compliance;
(2) issuing a written warning and a request for compliance;
(3) suspending the DCIN user's certification; or
(4) revoking the DCIN user's certification.

Authority G.S. 114-10; 114-10.1.

12 NCAC 04J .0103 SANCTIONS FOR VIOLATIONS BY AGENCIES

When any agency who has entered in to an agreement in accordance with 12 NCAC 04H .0301 is found to have knowingly and willfully violated any provision of these Rules, DCI may take action to correct the violation and to ensure the violation does not re-occur, to include, but not limited to, the following:

(1) issuing an oral warning and a request for compliance;
(2) issuing a written warning and a request for compliance; or
(3) suspending services to the violating agency.

Authority G.S. 114-10; 114-10.1.

SECTION .0200 - APPEALS

12 NCAC 04J .0201 NOTICE OF VIOLATION
DCI shall send a written notice via certified mail to the offending agency or employee when DCI has determined that a violation of a DCI rule has occurred. The notice shall inform the party of appeal rights and shall also contain the citation of the rule alleged to have been violated.

Authority G.S. 114-10; 114-10.1; 150B-3(b); 150B-23(f).

SECTION .0300 - INFORMAL HEARINGS

12 NCAC 04J .0301 INFORMAL HEARING PROCEDURE
(a) Any agency or DCIN user may request an informal hearing within 30 days after receipt of written notification from DCI of an adverse action. A request for an informal hearing shall be made by certified mail to the North Carolina State Bureau of Investigation Division of Criminal Information, Post Office Box 29500, Raleigh, North Carolina 27626-0500.
(b) Upon receipt of a request for an informal hearing, the North Carolina CJIS System Officer (CSO) shall conduct a hearing and consider the positions of the parties. The CSO shall notify the parties of his decision within two weeks following the informal hearing and provide information to the parties of their further appeal rights in accordance with G.S. 150B-23.

Authority G.S. 114-10; 114-10.1; 150B-3(b); 150B-23(f).

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 39 – ON-SITE WASTEWATER CONTRACTORS AND INSPECTORS CERTIFICATION BOARD

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the NC On-Site Wastewater Contractors and Inspectors Certification Board intends to adopt the rule cited as 21 NCAC 39 .0405 and amend the rule cited as 21 NCAC 39 .1006.*

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.ncowcicb.info*

Proposed Effective Date: *April 1, 2014*

Public Hearing:
Date: *December 9, 2013*
Time: *10:00 a.m.*
Location: *Emerald's View Event Center, 1426 Peter Mabe Road, Danbury, NC 27016*

Reason for Proposed Action:
21 NCAC 39 .0405 – *This rule is proposed for adoption in order to comply with G.S. 93B-15.1 in setting out the procedure and requirements for application for licensure by a military trained applicant or military spouse.*
21 NCAC 39 .1006 – *This rule is proposed to be amended to clarify the components of a pump tank to be inspected by the contractor.*

Comments may be submitted to: *Connie S. Stephens, P.O. Box 132, Lawsonville, NC 27022; phone (336) 202-3126*

Comment period ends: *January 14, 2014*

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 .0400 - CERTIFICATION BY EXAMINATION

21 NCAC 39 .0405 LICENSURE FOR MILITARY-TRAINED APPLICANT; LICENSURE FOR MILITARY SPOUSE
(a) Licensure for a military-trained applicant. Upon receipt of a request for licensure pursuant to G.S. 93B-15.1 from a military-trained applicant, the Board shall issue a license upon the applicant satisfying the following conditions:
(1) Submit a complete Application for Certification;

(2) Submit a license fee in accordance with G.S. 90A-27;

(3) Submit written evidence demonstrating that the applicant is currently serving as an active member of the U.S. military;

(4) Provide evidence to satisfy conditions set out in G.S. 93B-15.1(a)(1) and (2); and

(5) Demonstrate that the applicant has not committed any act in any jurisdiction that would constitute grounds for refusal, suspension, or revocation of a license in North Carolina at the time the act was committed,

(b) Licensure for a military spouse. Upon receipt of a request for licensure pursuant to G.S. 93B-15.1 from a military spouse, the Board shall issue a license upon the applicant satisfying the following conditions:

(1) Submit a complete Application for Certification;

(2) Submit a license fee in accordance with G.S. 90A-27;

(3) Submit written evidence demonstrating that the applicant is married to an active member of the U.S. military;

(4) Provide evidence to satisfy conditions set out in G.S. 93B-15.1(b)(1) and (2); and

(5) Demonstrate that the applicant has not committed any act in any jurisdiction that would constitute grounds for refusal, suspension, or revocation of a license in North Carolina at the time the act was committed.

Authority G.S. 90A-74; 93B-15.1.

SECTION .1000 - NC ON-SITE WASTEWATER INSPECTOR STANDARDS OF PRACTICE

21 NCAC 39 .1006 MINIMUM ON-SITE WASTEWATER SYSTEM INSPECTION

(a) The inspector shall attempt to obtain, evaluate, describe, or determine the following during the inspection:

(1) Advertised number of bedrooms as stated in the realtor Multiple Listing Service information or by a sworn statement of owner or owner's representative;

(2) Designed system size (gallons per day or number of bedrooms) as stated in available local health department information, such as the current operation permit or the current repair permit;

(3) Requirement for a certified subsurface water pollution control system operator pursuant to G.S. 90A-44, current certified operator's name, and most recent performance, operation and maintenance reports (if applicable and available);

(4) Type of water supply, such as well, spring, public water, or community water;

(5) Location of septic tank and septic tank details:

(A) Distance from house or other structure;

(B) Distance from well, if applicable;

(C) Distance from water line, if applicable and readily visible;

(D) Distance from property line, if said property lines are known or marked;

(E) Distance from finished grade to top of tank or access riser;

(F) Presence and type of access risers;

(G) Condition of tank lids;

(H) Condition of tank baffle wall;

(I) Water level in tank relative to tank outlet;

(J) Condition of outlet tee;

(K) Presence and condition of outlet filter, if applicable;

(L) Presence and extent of roots in the tank;

(M) Evidence of tank leakage;

(N) Evidence of inflow non-permitted connections, such as from downspouts or sump pumps;

(O) Connection present from house to tank;

(P) Connection present from tank to next component;

(Q) Date tank was last pumped, if known; and

(R) Percentage of solids (sludge and scum) in tank;

(6) Location of pump tank and pump tank details:

(A) Distance from house or other structure;

(B) Distance from well or spring, if applicable;

(C) Distance from water line, if applicable;

(D) Distance from property line, if said property lines are known or marked;

(E) Distance from finished grade to top of tank or access riser;

(F) Distance from septic tank;

(G) Presence and type of access risers;

(H) Condition of tank lids;

(I) Location of control panel;

(J) ~~Electrical connections in place and properly grounded;~~ Condition of control panel;

(K) Audible and visible alarms (as applicable) work;

(L) Pump turns on, and effluent is delivered to next component; and

(M) Lack of electricity at time of inspection prevented complete evaluation;

(7) Location of dispersal field and dispersal field details:

(A) Type of dispersal field;

(B) Distance from property line, if said property lines are known and/or marked;
(C) Distance from septic tank and/or pump tank;
(D) Number of lines;
(E) Length of lines;
(F) Evidence of past or current surfacing at time of inspection;
(G) Evidence of traffic over the dispersal field;
(H) Vegetation, grading, and drainage with respect only to their effect on the condition of the system or system components; and
(I) Confirmation that system effluent is reaching the drainfield; and

(8) Conditions that prevented or hindered the inspection.

(b) The inspector is not required to:
(1) Insert any tool, probe, or testing device inside control panels; or
(2) Dismantle any electrical device or control other than to remove the covers of the main and auxiliary control panels.

Authority G.S. 90A-72; 90A-74.

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CHAPTER 46 – BOARD OF PHARMACY

***Notice** is hereby given in accordance with G.S. 150B-21.2 that NC Board of Pharmacy intends to adopt the rule cited as 21 NCAC 46 .3501.*

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.ncbop.org/lawandrules.htm*

Proposed Effective Date: *March 1, 2014*

Public Hearing:
Date: *January 21, 2014*
Time: *9:00 a.m.*
Location: *NC Board of Pharmacy, 6015 Farrington Road, Suite 201, Chapel Hill, NC 27517*

Reason for Proposed Action: *Rulemaking required by Session Law 2013-152, Section 3, in order to receive reports from the Department of Health and Human Services of data from the controlled substances reporting system.*

Comments may be submitted to: *Jay Campbell, 6015 Farrington Road, Suite 201, Chapel Hill, NC 27517; fax (919) 246-1056; email jcampbell@ncbop.org*

Comment period ends: *January 21, 2014 at 9:00 a.m.*

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 .3500 – CONTROLLED SUBSTANCES REPORTING SYSTEM

21 NCAC 46 .3501 REPORTS FROM THE CONTROLLED SUBSTANCES REPORTING SYSTEM

The Department of Health and Human Services may submit a report to the Board of Pharmacy if it receives information providing a reasonable basis to investigate whether a dispenser has dispensed prescriptions for controlled substances in a manner that may violate laws governing the dispensing of controlled substances or otherwise may pose an unreasonable risk of harm to patients.

Authority G.S. 90-85.6; 90-85.12; 90-113.74.

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CHAPTER 50 – BOARD OF EXAMINERS OF PLUMBING, HEATING AND FIRE SPRINKLER CONTRACTORS

***Notice** is hereby given in accordance with G.S. 150B-21.2 that State Board of Examiners of Plumbing, Heating and Fire Sprinkler Contractors intends to adopt the rule cited as 21 NCAC 50 .0518 and amend the rules cited as 21 NCAC 50 .0301, .0306 and .1102.*

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.nclicensing.org*

Proposed Effective Date: *March 1, 2014*

Public Hearing:
Date: *December 9, 2013*
Time: *2:00 p.m.*
Location: *State Board of Examiners of Plumbing, Heating and Fire Sprinkler Contractors, 1109 Dresser Court, Raleigh, NC 27609*

Reason for Proposed Action: *The General Assembly amended G.S. 87-21 in July 2013 to require creation of a limited license allowing irrigation contractors to demonstrate knowledge of backflow prevention devices and safe interconnection to the drinking water. Backflow devices prevent siphoning of pesticides or contamination into the drinking water. The limited license also allows replacement of water service lines and building sewer pipe. The combined effect of the changes will be reduced cost and increased efficiency in commerce.*

Comments may be submitted to: *Dale Dawson, 1109 Dresser Court, Raleigh, NC 27609; phone (919) 875-3612*

Comment period ends: *January 14, 2014*

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 .0300 – EXAMINATIONS

21 NCAC 50 .0301 QUALIFICATIONS DETERMINED BY EXAMINATION

(a) In order to determine the qualifications of an applicant, the Board shall provide an examination in writing or by computer in the following categories:

Plumbing Contracting, Class I
Plumbing Contracting, Class II
Heating, Group No. l - Contracting, Class I
Heating, Group No. 1 - Contracting, Class II
Heating, Group No. 2 - Contracting, Class I
Heating, Group No. 3 - Contracting, Class I
Heating, Group No. 3 - Contracting, Class II
Fuel Piping Contractor
Fire Sprinkler Inspection Technician
Fire Sprinkler Installation Contractor
Fire Sprinkler Inspection Contractor
Limited Fire Sprinkler Maintenance Technician
Residential Fire Sprinkler Installation Contractor
Plumbing Technician
Heating Group No. 1 Technician
Heating Group No. 2 Technician
Heating Group No. 3 Technician
Fuel Piping Technician
Limited Plumbing Contractor

(b) Each person being examined by the Board for a contractor license other than a Fire Sprinkler Installation or Inspection Contractor license shall be required to read, interpret and provide answers to both the business and law part and the technical part of the examination required by G.S. 87-21(b).

(c) Applicants for licensure as a fire sprinkler installation contractor, must submit evidence of current certification by the National Institute for Certification and Engineering Technology (NICET) for Water-based Fire Protection System Layout as the prerequisite for licensure. Current certification by NICET is in lieu of separate technical examination conducted by the Board. Applicants for licensure as a fire sprinkler installation contractor must take and pass the business and law part of the exam administered by the Board. Persons licensed based upon NICET certification must maintain such certification as a condition of license renewal.

(d) Applicants for licensure in the Fire Sprinkler Inspection Technician classification must pass the technical examination offered by the Board. The Board will accept the results of NICET examination resulting in Level II Certification in "Inspection and Testing of Water-based Systems" by NICET in lieu of the Board administered examination. Persons who obtain license as a Fire Sprinkler Inspection Technician based on NICET certification must maintain such certification as a condition of license renewal.

(e) Applicants for the Fire Sprinkler Inspection Contractor classification must submit evidence of Level III certification in "Inspection and Testing of Water-based Fire Systems" by NICET in lieu of technical examination. Contractors who obtain license by NICET certification must maintain such certification thereafter as a condition of license renewal. Applicants for licensure as a fire sprinkler inspection contractor must take and pass the business and law part of the examination administered by the Board in addition to demonstrating NICET certification as set out herein.

(f) Applicants for a license in the Limited Fire Sprinkler Maintenance Technician classification must obtain a license based on maintenance experience, education and job classification set forth in Rule .0306 and passage of a test administered by the Board.
(g) Applicants for a license as a Residential Fire Sprinkler Installation Contractor must obtain a license based on experience set forth in Rule .0306 and must take and pass the technical part of the Residential Fire Sprinkler Installation Contractor examination.
(h) Applicants for license as a Plumbing, Heating or Fuel Piping Technician must obtain a license based on experience set forth in Rule .0306 and must take and pass the Class I technical and Board laws and rules examination related to the category for which a technician license is sought.
(i) Applicants for plumbing, heating or fuel piping technician license who present a current plumbing or heating journeyman certificate obtained after examination from a local inspection department as defined in G.S. 143-151.8 in the same classification for which technician license is sought are not required to take the technical portion of the Board administered exam if application is made on or before December 31, 2012.
(j) Applicants who hold active Plumbing, Heating or Fuel Piping Technician license obtained by examination may obtain the Plumbing, Heating or Fuel Piping Contractor license in the same category by meeting the experience requirement listed in 21 NCAC 50 .0306(a) for the specific contractor license sought and passage of the business portion of the examination only.
(k) Applicants for license as a Limited Plumbing Contractor shall obtain a license based on experience set forth in Rule .0306 and shall be required to read, interpret and provide answers to both the business and law part and the technical part of the Limited Plumbing Contractor examination.
(l) If application is made on or before 120 days from the effective date of Paragraph (l) of this Rule, Applicants for Limited Plumbing Contractor license who present a current active License from the North Carolina Irrigation Contractor Licensing Board are not required to take the Board administered examination, provided the Applicant:

(1) Presents evidence of certification as a Backflow Inspector by one of the municipalities in North Carolina, or evidence to establish 1,000 hours of experience in the maintenance, service or repair of components of plumbing systems, and
(2) Completes a plumbing code and Board Laws and Rules course offered by the Board.

Authority G.S. 87-18; 87-21(a); 87-21(b).

21 NCAC 50 .0306 APPLICATIONS: ISSUANCE OF LICENSE

(a) All applicants for licensure or examination shall file an application in the Board office on a form provided by the Board.
(b) Applicants for plumbing or heating examination shall present evidence at the time of application to establish two years of full-time experience in the installation, maintenance, service or repair of plumbing or heating systems related to the category for which a license is sought, whether or not a license was required for the work performed. Applicants for fuel piping examination shall present evidence at the time of application to establish one year of experience in the installation, maintenance, service or repair of fuel piping, whether or not a license was required for the work performed. Up to one-half the experience may be in academic or technical training related to the field of endeavor for which examination is requested. The Board shall prorate part-time work of less than 40 hours per week or part-time academic work of less than 15 semester or quarter hours.
(c) The Board shall issue a license certificate bearing the license number assigned to the qualifying individual.
(d) Fire Sprinkler Installation Contractors shall meet experience requirements in accordance with NICET examination criteria.
(e) Applicants for examination or licensure in the Limited Fire Sprinkler Inspection Technician classification shall submit evidence adequate to establish that the applicant has either:

(1) 4000 hours experience involved in inspection and testing of previously installed fire sprinkler systems, consistent with NFPA-25, as a full-time employee of a Fire Sprinkler Inspection Contractor or fire insurance underwriting organization;
(2) 4000 hours experience involved in inspection and testing of previously installed fire sprinkler systems, consistent with NFPA-25 as a full time employee of a hospital, manufacturing, government or university facility and under direct supervision of a Fire Sprinkler Inspection Contractor or a Fire Sprinkler Inspection Technician;
(3) 4000 hours experience involved in installation of fire sprinkler systems as a full-time employee of a Fire Sprinkler Installation Contractor; or
(4) a combination of 4000 hours experience in any of the categories listed in this Paragraph.

(f) Applicants for licensure in the Fire Sprinkler Inspection Contractor classification shall meet experience requirements in accordance with NICET certification criteria.
(g) Applicants for initial licensure in the Fire Sprinkler Maintenance Technician classification must submit evidence of ~~4000~~ 2000 hours experience at the place for which license is sought as a full-time maintenance employee in facility maintenance with exposure to periodic maintenance of fire protection systems as described in 21 NCAC 50. 0515 of this ~~Chapter or 2000 hours of such experience, together with six hours classroom instruction in courses approved by the Board consisting entirely of training in fire system maintenance, repair and restoration to service.~~ Chapter. Applicants who have held Fire Sprinkler Maintenance Technician license previously at a different facility are not required to demonstrate experience in addition to the experience at the time of initial licensure but shall submit a new application for the new location at which they wish to be licensed.
(h) Applicants for licensure in the Residential Fire Sprinkler Installation Contractor classification must hold an active Plumbing Class I or Class II Contractor license issued by this Board for a minimum of two years and must document attendance at a 16 hour course approved by the Board pursuant

to the Rules in this Chapter covering NFPA 13D Multipurpose Residential Plumbing and Residential Fire Sprinkler Systems. Residential Fire sprinkler Installation Contractors must maintain Plumbing Contractor license as a condition of renewal of the Residential Fire sprinkler Installation Contractor license.

(i) Applicants for license as a plumbing or heating technician shall present evidence adequate to establish 3,000 hours of full-time experience in the installation, maintenance, service or repair of plumbing or heating systems related to the category for which a technician license is sought, whether or not a license was required for the work performed. Applicants for license as a fuel piping technician shall present evidence adequate to establish 1,500 hours of experience in the installation, maintenance, service or repair of fuel piping, whether or not a license was required for the work performed. Up to one-half the experience may be in academic or technical training related to the field of endeavor for which examination is requested.

(j) Applicants for Limited Plumbing Contractor license shall present evidence at the time of application to establish 1500 hours of full-time experience in the installation, maintenance, service or repair of plumbing systems, whether or not a license was required for the work performed. Up to one-half the experience may be in academic or technical training related to the field of endeavor for which examination is requested. The Board shall prorate part-time work of less than 40 hours per week or part-time academic work of less than 15 semester or quarter hours.

(k) In lieu of the requirements of Paragraph (j) of this Rule, Applicants for Limited Plumbing Contractor License who present a current active License from the North Carolina Irrigation Contractor Licensing Board, may take the examination, provided the Applicant demonstrates that they hold certification as a Backflow Inspector from one of the municipalities in North Carolina, or demonstrate 500 hours of experience in the maintenance, service or repair of components of plumbing systems.

Authority G.S. 87-18; 87-21(b).

SECTION .0500 – POLICY STATEMENTS AND INTERPRETATIVE RULES

21 NCAC 50 .0518 LIMITED PLUMBING CONTRACTOR LICENSE

License in the Limited Plumbing Contractor classification, is required of persons who do not possess license as a plumbing contractor, but seek to install, repair or replace:

(1) Exterior building sewer piping as defined in the North Carolina Plumbing Code;
(2) Exterior water service piping two inch diameter or less, as defined in the North Carolina Plumbing Code;
(3) Exterior backflow preventers connected to water service piping two inches in diameter or less or,
(4) Water purification systems or components of water purification systems.

Authority G.S. 87-21; 87-18.

SECTION .1100 – FEES

21 NCAC 50 .1102 LICENSE FEES

(a) Except as set out in this Rule, the annual license fee for plumbing, heating and fuel piping contractor licenses by this Board is one hundred thirty dollars ($130.00).

(b) The annual license fee for a licensed individual who holds qualifications from the Code Officials Qualification Board, is employed full-time as a local government plumbing, heating or mechanical inspector and who is not actively employed or engaged in business requiring license from this Board is twenty-five dollars ($25.00).

(c) The initial application fee for license without examination conducted by the Board is thirty dollars ($30.00).

(d) The annual license fee for a contractor or fire sprinkler inspection technician whose qualifications are listed as the second or subsequent individual on the license of a corporation, partnership, or business with a trade name under Paragraphs (a) or (c) of this Rule is thirty dollars ($30.00).

(e) The annual license fee for fire sprinkler installation contractor and fire sprinkler inspection contractor licenses by this Board is one hundred thirty dollars ($130.00).

(f) The annual license fee for Fire Sprinkler Maintenance Technician is one hundred thirty dollars ($130.00).

(g) The annual license fee for Residential Fire Sprinkler Installation Contractor is one hundred thirty dollars ($130.00).

(h) The annual license fee for Fire Sprinkler Inspection Technician is one hundred thirty dollars ($130.00).

(i) The annual license fee for all Fuel Piping Technician license listed with a Class A Gas Dealer is one hundred thirty dollars ($130.00).

(j) The annual license fee for Plumbing, Heating or Fuel Piping Technician licensees listed under a licensed Plumbing, Heating or Fuel Piping Contractor is sixty five dollars ($65.00).

(k) The annual license fee for a Limited Plumbing Contractor is one hundred thirty dollars ($130.00).

Authority G.S. 87-18; 87-21; 87-22.

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CHAPTER 53 – BOARD OF LICENSED PROFESSIONAL COUNSELORS

***Notice** is hereby given in accordance with G.S. 150B-21.2 that NC Board of Licensed Professional Counselors intends to adopt the rules cited as 21 NCAC 53 .0310-.0311 and .0901-.0902; and amend the rules cited as 21 NCAC 53 .0102, .0204-.0206, .0208-.0212, .0301-.0302, .0304-.0305, .0307-.0308, .0403, .0501, .0503, .0601-.0604, .0701-.0702, and .0801.*

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.ncbplc.org*

Proposed Effective Date: *March 1, 2014*
Public Hearing:
Date: *December 6, 2013*
Time: *10:00 a.m.*
Location: *Wingate Inn, 1542 Mechanical Blvd., Garner, NC 27529*

Reason for Proposed Action: *To update and clarify rules based on October 1, 2009 statute changes.*

Comments may be submitted to: *Beth Holder, NCBLPC, P.O. Box 1369, Garner, NC 27529*

Comment period ends: *January 14, 2014*

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 .0100 – GENERAL INFORMATION

21 NCAC 53 .0102 PROFESSIONAL ETHICS
The Board of Licensed Professional Counselors has adopted the Code of Ethics ~~and Standards of Practice~~ promulgated by the American Counseling ~~Association, effective 2005,~~ Association including the guidelines for the practice of online counseling ~~adopted in October 1999~~ and any subsequent revisions of or amendments to the Code of Ethics ~~and Standards~~ published by the American Counseling Association and they are hereby incorporated by reference. Copies of the Code of Ethics ~~and Standards~~ are available free of charge from the American Counseling Association, online at www.counseling.org. In addition, the Board has adopted the Approved Clinical Supervisor (ACS) Code of Ethics promulgated by the Center for Credentialing and ~~Education, effective 2008,~~ Education and any subsequent revisions of or amendments to the Code of Ethics by the Center for Credentialing and Education and they are hereby incorporated by reference. Copies of the Approved Clinical Supervisor (ACS) Code of Ethics are available free of charge from the Center for Credentialing and Education online at www.cce-global.org.

Authority G.S. 90-334(h).

SECTION .0200 – DEFINITIONS AND CLARIFICATION OF TERMS

21 NCAC 53 .0204 PROFESSIONAL DISCLOSURE STATEMENT REQUIREMENTS FOR LPCA AND LPC
A professional disclosure statement is a printed document that includes the following information:

(1) name of ~~licensee;~~ licensee or applicant;
(2) the ~~licensee's~~ licensee's/applicant's highest relevant degree, year degree received, discipline of degree (e.g., counseling, school counseling) and name of institution granting the degree;
(3) names and numbers of all relevant credentials (licenses, certificates, registrations);
(4) number of years of counseling experience;
(5) description of services offered and clientele (populations) served;
(6) length of sessions, specific fee or range of fees charged per session (if no fee is charged, a statement to that effect), and methods of payments for services, including information about billing/insurance reimbursement;
(7) an explanation of confidentiality, including responsibilities and ~~exceptions;~~ exceptions. (Examples of exceptions include child or elder abuse, court order);
(8) a statement of procedure for registering complaints, including the ~~full name and~~ full name, address and telephone number of the Board; ~~and~~
(9) signature and date spaces for both the client and ~~licensee.~~ licensee; and
(10) level of licensure and whether the licensee is under supervision. If under supervision, include name of supervisor.

A current copy of this statement shall be provided to each client prior to the performance of professional counseling services. An updated professional disclosure statement shall be submitted to the Board office at the time of renewal. The counselor shall retain a file copy of the disclosure statement signed by each client.

Authority G.S. 90-334; 90-343.

21 NCAC 53 .0205 COUNSELING EXPERIENCE
Counseling [counseling services as defined in G.S. 90-330(a)(3)] experience applicable to the experience requirement for licensure consists of a minimum of 3000 hours of supervised professional practice after the graduate degree in counseling or counseling related field has been conferred. At least 2000 hours of the supervised professional practice hours must consist of direct counseling experience. Direct counseling experience

consists of live contact with individuals, groups, and families through counseling as defined in G.S. 90-330(a)(3)a through b. To be applicable, experience shall be gained at a rate of ~~not less than eight hours per week but~~ no more than 40 hours per week. At least 100 hours of clinical supervision, as defined in Rule .0210 and Rule .0211 of this Section, shall be documented during the minimum of 3000 hours of supervised professional practice, as defined in Rule .0208 of this Section. No less than three-quarters of the hours of clinical supervision shall be individual clinical supervision.

Authority G.S. 90-334(i); 90-336(c).

21 NCAC 53 .0206 GRADUATE COUNSELING EXPERIENCE

A practicum and an internship must be completed as two separate courses (three semester or five quarter hours each) as part of the graduate course of study with at least 17 hours of graduate counseling supervision, as defined in Rule .0210 and Rule .0211 of this Section. The supervision shall be verified by a university faculty member on forms provided by the Board and shall consist of a minimum of 300 hours of supervised graduate counseling experience at a rate of not less than one hour of clinical supervision per 40 hours of graduate counseling experience, as defined by Rule .0701(a)(2)(b) of this Chapter. At least 60 percent of this counseling experience shall be direct graduate counseling experience as defined in Rule .0205 of this Section.

Authority G.S. 90-332.1(a)(3); 90-334(i); 90-336(b)(1).

21 NCAC 53 .0208 SUPERVISED PROFESSIONAL PRACTICE

Supervised professional practice consists of counseling experience under the supervision of a qualified clinical supervisor, as defined in Rule .0209 of this Section, including a minimum of one hour of individual or two hours of group clinical supervision per 40 hours of counseling practice. At least three-quarters of the hours of clinical supervision shall be individual. Persons who have met all licensure requirements except the supervised professional practice who wish to counsel as supervised counselors in supervised professional settings, as defined in Rule .0207 of the Section, shall apply to become a Licensed Professional Counselor Associate as defined in Section ~~.0700.~~ .0700 of this Chapter. The focus of a supervision session shall be on raw data from clinical work which is made available to the supervisor through such means as direct (live) observation, co-therapy, audio and video recordings, and live supervision. Written materials and self-reports by the supervised counselor may supplement the supervision process but shall not be the sole basis of any supervision session.

Authority G.S. 90-334(i); 90-336(c)(2).

21 NCAC 53 .0209 QUALIFIED CLINICAL SUPERVISOR

(a) A qualified clinical supervisor is:

(1) A licensed professional counselor with at least a master's degree as defined in G.S. 90-336(b)(1) who has an active and unrestricted license, the equivalent of three semester graduate credits in clinical supervision from a regionally accredited institution of higher education as documented by an official transcript or 45 contact hours of continuing education in clinical supervision as defined by Rule .0603(c) in this Chapter, ~~in clinical supervision,~~ and a minimum of five years of post-graduate counseling experience with a minimum of two years post licensure experience, or

(2) Other equivalently licensed and experienced mental health ~~professional~~ professionals as defined in Paragraph (b) of this Rule.

(b) As of July 1, ~~2014,~~ 2017, all qualified clinical supervisors must hold the credential of Licensed Professional Counselor Supervisor or be another equivalently licensed and experienced mental health professional. ~~All supervision arrangements for which a Verification of Arrangement for Clinical Supervision were approved by the Board prior to October 1, 2009 shall be honored by the Board.~~

~~(c) Supervisors who received Board approval to provide clinical supervision for any applicant prior to October 1, 2009 have until the following deadlines to complete the educational requirements listed:~~

~~(1) December 31, 2010 to acquire the equivalent of one semester graduate credit in clinical supervision from a regionally accredited institution of higher education as documented by an official transcript or 15 contact hours of continuing education, as defined by Rule .0603(c) in this Chapter, in clinical supervision;~~

~~(2) December 31, 2011 to acquire the equivalent of two semester graduate credits in clinical supervision from a regionally accredited institution of higher education as documented by an official transcript or 30 contact hours of continuing education, as defined by Rule .0603(c) in this Chapter, in clinical supervision;~~

~~(3) December 31, 2012 to acquire the equivalent of three semester graduate credits in clinical supervision from a regionally accredited institution of higher education as documented by an official transcript or 45 contact hours of continuing education, as defined by Rule .0603(c) in this Chapter, in clinical supervision;~~

~~(d) Equivalently licensed and experienced means that the mental health professional has:~~

(c) Equivalently licensed and experienced means that the mental health professional shall have:

(1) at least a master's degree as defined in G.S. 90-336(b)(1);

(2) an active and unrestricted license;

(3) the equivalent of three semester graduate credits in clinical supervision from a

regionally accredited institution of higher education as documented by an official transcript or 45 contact hours of continuing education in clinical supervision, as defined by Rule .0603(c) in ~~this Section, in clinical supervision~~; ~~and~~ this Chapter;

(4) a minimum of five years post-graduate counseling experience, with a minimum of two years post licensure ~~experience.~~ experience; and

(5) A minimum of 10 contact hours of continuing education in professional knowledge and competency in the field of counseling supervision completed every two years.

Authority G.S. 90-330(a)(4); 90-334(i); 90-336(d).

21 NCAC 53 .0210 INDIVIDUAL CLINICAL SUPERVISION

Individual clinical supervision consists of face-to-face supervision, as defined in Rule .0212 of this Section, of one or two supervisees with a qualified clinical supervisor, as defined ~~as~~ in Rule .0209 of this Section, at a rate of not less than one hour of clinical supervision, as defined in Rule .0208 of this Section, per 40 hours of supervised professional practice, as defined in Rule .0205 of this Section. Individual clinical supervision hours do not count towards the 40 hours of supervised professional practice.

Authority G.S. 90-334(i); 90-336(c)(2).

21 NCAC 53 .0211 GROUP CLINICAL SUPERVISION

Group clinical supervision consists of face-to-face scheduled supervision between groups of supervisees, not to exceed 12 supervisees per group, and a qualified clinical supervisor as defined in Rule .0209 of this Section for a period of not less than ~~one-and-one-half hours~~ two hours of clinical supervision per session as defined in Rule .0208 of this ~~Section per session.~~ Section.

Authority G.S. 90-334(i); 90-336(c)(2).

21 NCAC 53 .0212 FACE TO FACE SUPERVISON DEFINED

For the purposes of this Chapter, face-to-face clinical supervision means supervision that is live, interactive, and visual. Video supervision is permitted as long as the session is synchronous (real time) and involves verbal and visual interaction during the supervision as defined in Rule .0209 of this Section. All supervision, whether live or video/audio, must be done in a confidential manner in accordance with the ACA Code of Ethics.

Authority G.S. 90-334(h).

SECTION .0300 – HOW TO OBTAIN LICENSURE

21 NCAC 53 .0301 APPLICATIONS

Applications and forms shall be obtained from and returned to the Administrator of the Board. Applications shall be submitted only on forms obtained from the Board office or website, www.ncblpc.org. Applications may be submitted electronically or in paper format mailed to the Board office.

Authority G.S. 90-334; 90-336(a).

21 NCAC 53 .0302 TRANSCRIPTS

The applicant must have official transcripts sent from ~~institutions~~ institutions, either electronically or in paper format, where graduate credit was earned. If the transcript course titles are ambiguous or do not convey the pertinent content of the courses, the board shall require additional documentation from the ~~applicant.~~ applicant (i.e. course descriptions and/or syllabi, from the same time period that the applicant was enrolled).

Authority G.S. 90-334; 90-336.

21 NCAC 53 .0304 APPLICANTS LICENSED IN OTHER STATES, MILITARY PERSONNEL AND MILITARY SPOUSES

~~If a candidate is licensed to practice counseling by a Board in another state, the applicant must apply for licensure with the North Carolina Board. The Board shall consider the application in accordance with the provisions of G.S. 90-336 and G.S. 90-337.~~

(a) Applicants Licensed in Other States: If an applicant is licensed to practice counseling by a Board in another state, the applicant must apply for licensure with the North Board and shall meet all requirements in G.S. 90-336 and shall meet the following requirements:

(1) shall have a minimum of five years full time counseling experience, or eight years part time counseling experience, or a combination of full time and part time counseling experience equivalent to five years full time counseling experience, within 10 years directly prior to application;

(2) shall have a minimum of 2500 hours of direct client contact;

(3) shall have an active, unrestricted license in good standing as a Licensed Professional Counselor in another state for a minimum of two years directly prior to application; and

(4) shall comply with all other applicable rules for licensure as an LPC.

(b) Military Personnel and Military Spouses: If an applicant is licensed to practice counseling by a Board in another state and is an active member of the military or a military spouse, the applicant must apply for licensure with the North Carolina Board and shall meet all requirements in G.S. 90-336 and shall:

(1) have full time counseling experience for at least two of the five years preceding the date of the application under this Section;

(2) shall have a minimum of 1000 hours of direct client contact; and

(3) shall comply with all other applicable Rules for licensure as an LPC.

Authority G.S. 90-334; 90-337; 1993 S.L. c. 514, s. 5.

21 NCAC 53 .0305 EXAMINATION

The National ~~Counseling~~ Counselor Examination (NCE), the National Clinical Mental Health Counselor Examination (NCMHCE), or the ~~Counselor~~ Certified Rehabilitation ~~Certification~~ Counselor Examination (CRC) may be taken to complete the examination requirement for Licensed Professional Counselor Associate (LPCA) and Licensed Professional Counselor (LPC) licensure. The Board shall accept examinations administered by other state counselor licensing boards and professional counselor credentialing associations if the Board determines that such examinations are equivalent to the NCE, NCMHCE, or CRC relative to content and minimum satisfactory performance levels for counselors. ~~Beginning July 1, 2011~~ The completion of a no fail jurisprudence exam, as selected by the Board, is required for ~~LPC~~ licensure application at each level (LPCA, LPC, LPCS) and for each consecutive renewal period. Applicants and renewing ~~LPCs~~ licensees shall submit documentation of completion of the jurisprudence exam, taken within six months prior to application for ~~licensure.~~ licensure or within six months prior to the date of expiration of the license.

Authority G.S. 90-334(g); 90-336(b)(3); 90-337.

21 NCAC 53 .0307 RETAKING OF EXAMINATION

Applicants who do not pass the examination may retake it at the next regularly scheduled examination date upon registering and paying the required examination ~~fee.~~ fee to the National Board of Certified Counselors or to the Commission on Rehabilitation Counselor Certification. Applicants who fail the examination a second time during an application period shall ~~be denied licensure;~~ have their application denied and such applicants may reapply for ~~licensure.~~ licensure and all current requirements apply to the new application.

Authority G.S. 90-334(g)(j).

21 NCAC 53 .0308 RECEIPT OF APPLICATION

(a) The active application period of applications received by the Board is no more than two years from date of receipt. If all requirements for an application have not been met by this date, the application shall be denied by the Board. The applicant may reapply for ~~licensure.~~ licensure and all current requirements apply to the new application.

(b) Change of Address. It shall be the responsibility of the applicant to inform the Board of any change in his/her mailing address. Updated address information should be forwarded to the Board office in writing within 30 days after any such change.

(c) Change of Name. It shall be the responsibility of the applicant to inform the Board of any change in his/her name. A name change form shall be completed and include any required legal documentation, such as a marriage certificate, divorce decree or court order. This information should be forwarded to the Board office in writing within 30 days after any such change.

Authority G.S. 90-336(a).

21 NCAC 53 .0310 FOREIGN DEGREE APPLICANTS

(a) Applicants applying for licensure on the basis of a foreign degree shall provide documentation, in addition to all other documents required for licensure, which establishes the following:

(1) The existence of the degree granting institution;

(2) The authenticity of the degree, transcripts, and any supporting documents;

(3) The equivalence of the degree in terms of level of training, content of curriculum, and course credits; and

(4) The equivalence of any supervised experience obtained in the foreign country.

(b) Documentation shall be in the form of a course-by-course evaluation of credentials submitted directly to the Board from an evaluation service that is a member of the National Association of Credentials Evaluation Services, Inc.

(c) Except as described in Paragraph (b) of this Rule, only official documents shall be submitted in support of the application and shall be received directly from the institution(s) or individual(s) involved,

(d) When an official document cannot be provided directly by the institution or individual involved, an original document possessed by the applicant may be reviewed and copied by a Board member or designee,

(e) Any document which is in a language other than English shall be accompanied by a translation with notarized verification of the translation's accuracy and completeness. This translation shall be completed by an individual, other than the applicant, who is approved by the Board and demonstrates no conflict of interest. Such individuals include college or university language faculty, a translation service, or an American consul.

(f) An applicant's references shall include individuals familiar with the applicant's professional practice of counseling.

Authority G.S. 90-334.

21 NCAC 53 .0311 REQUIREMENTS FOR CANDIDATE FOR LICENSURE PENDING STATUS

(a) Applicants for licensure may be listed as a "Candidate for Licensure Pending" (CFL-P) if the application is missing one or more of the following requirements:

(1) Official exam score from the examining board;

(2) Official transcript from an accredited higher education institution; and/or

(3) Professional disclosure statement for the level of license for which they are applying.

(b) In order to obtain the Candidate for Licensure Pending status, the applicant must provide the following documentation:

(1) A receipt showing the request and payment to the examining board for an exam score to be sent to the NCBLPC; and/or

(2) A receipt showing the request and payment to the educational institution for an official transcript to be sent to the NCBLPC.

(c) The CFL-Pending status allows the applicant's file to be reviewed at the next regularly scheduled board meeting for approval so that a license can be issued upon receipt of the missing item(s). The CFL-Pending status is in effect for a maximum of 60 days from the date of approval and then reverts back to the "Application in Review" status and must be presented at the next scheduled board meeting upon receipt of missing items.

Authority G.S. 90-334.

SECTION .0400 – DISCIPLINARY PROCEDURES

21 NCAC 53 .0403 ALLEGED VIOLATIONS

All complaints of alleged violations shall be ~~in writing~~ submitted electronically or in paper format to the Board office and shall be signed by the ~~complainant(s).~~ complainant(s), unless submitted anonymously. Complaints of violations of G.S. 90, Article 24, the American Counseling Association Code of Ethics, or the Center for Credentialing and Education's Approved Clinical Supervisor (ACS) Code of Ethics shall bear:

(1) the complainant's ~~signature;~~ signature, unless submitted anonymously;
(2) include the complainant's address and telephone ~~number; date and location of the alleged violation(s);~~ number, unless submitted anonymously;
(3) date and location of the alleged violation(s);
~~(3)~~(4) a description of the incident(s); and
~~(4)~~(5) signed ~~releases.~~releases, unless submitted anonymously.

Complaints shall be submitted either in electronic or paper format on forms provided by the Board.

Authority G.S. 90-334.

SECTION .0500 – FEES

21 NCAC 53 .0501 APPLICATION FEE

Each applicant shall pay a fee for processing each application as follows:

(1) Licensed Professional Counselor Associate Application ~~$100.00;~~ two hundred dollars ($200.00);
(2) Licensed Professional Counselor Application ~~$100.00;~~ two hundred dollars ($200.00); and
(3) Licensed Professional Counselor Supervisor Application ~~$100.00.~~ two hundred dollars ($200.00).

Authority G.S. 90-334.

21 NCAC 53 .0503 RENEWAL AND OTHER FEES

(a) The biennial renewal fee of ~~one~~ two hundred dollars ~~($100.00)~~ ($200.00) is due and payable by June 20 of the renewal year. Checks shall be made payable to the North Carolina Board of Licensed Professional Counselors. Failure to pay the biennial renewal fee within the time stated shall automatically suspend the right of any licensee to practice while ~~delinquent.~~ expired. Such ~~lapsed~~ expired licensure may be renewed within a period of one year after expiration upon payment of the renewal fee plus a late renewal fee of ~~twenty five~~ seventy-five dollars ~~($25.00),~~ ($75.00), provided all other requirements are met.

(b) The cost of a returned check is thirty-five dollars ($35.00).

(c) The registration fee for a Certificate of Registration for a professional corporation or limited liability company is fifty dollars ($50.00);

(d) The renewal fee for a professional corporation or limited liability company is twenty-five dollars ($25.00); and

(e) The late renewal fee for a professional corporation or limited liability company is ten dollars ($10.00).

(f) The cost of copies of public records shall be the "actual cost," as defined in G.S. 132.6(b), provided on the Board website, and mailing cost, if applicable. There shall be no charge if the request is for 10 pages or less.

Authority G.S. 90-334; 90-339; 132.6(b).

SECTION .0600 – RENEWAL OF LICENSE

21 NCAC 53 .0601 RENEWAL PERIOD

Newly issued licenses shall be effective upon the date of issuance by the Board and shall expire on the second June 30 thereafter. The renewal period for a newly issued license, therefore, may be less than two years. Following the first renewal of a newly issued license, the renewal period shall be two years and shall run from July 1 in the first year through June 30 in the second year. A licensee whose license has expired shall not practice until the license is renewed.

Authority G.S. 90-339.

21 NCAC 53 .0602 RENEWAL FOR LICENSURE FORM; ADDRESS CHANGE; NAME CHANGE

~~Requests for license renewal shall be submitted on the original Request for Continuing Education Activities Approval forms provided by the Board. All requested information and supporting documentation shall be provided and the forms shall be signed and dated.~~

(a) License renewal information shall be submitted either electronically or in paper format on the Renewal for Licensure form available on the Board's website. Continuing Education Activities must be listed on the form. All requested information and supporting documentation shall be provided and the forms shall be signed and dated and submitted either electronically or in paper format. Supporting documentation includes, but may not be limited to: Certificate of Completion of the jurisprudence examination (for the level of license that is being renewed); the ethics attestation statement; an updated professional disclosure statement and payment of renewal fee.

(b) Change of Address. It shall be the responsibility of the applicant to inform the Board of any change in his/her mailing address. Updated address information should be forwarded to the Board office in writing within 30 days after any such change.

(c) Change of Name. It shall be the responsibility of the applicant to inform the Board of any change in his/her name. A name change form shall be completed and include any legal

documentation, such as a marriage certificate, divorce decree or court order. This information should be forwarded to the Board office in writing within 30 days after any such change.

Authority G.S. 90-334(g); 90-336(a); 90-339(b).

21 NCAC 53 .0603 CONTINUING EDUCATION

(a) Continuing education is required for the renewal of licenses to ensure that Licensed Professional Counselor Associates, Licensed Professional Counselors, and Licensed Professional Counselor Supervisors maintain their professional knowledge and competency in the field of counseling. Continuing education activities appropriate for the purpose of license renewal are those that are directed toward professionals in the mental health field and that focus on increasing knowledge and skills in the practice of counseling in one or more of the following content areas:

(1) counseling theory;
(2) human growth and development;
(3) social and cultural foundations;
(4) the helping relationship;
(5) group dynamics;
(6) lifestyle and career development;
(7) appraisal of individuals;
(8) diagnosis and treatment planning;
(9) research and evaluation;
(10) professional counseling orientation; and
(11) Ethics.

(b) Forty contact hours of continuing education, including a minimum of three contact hours of ethics, are required within the two-year license renewal period. However, in the cases of newly issued licenses in which the initial renewal periods are less than two full years, 30 contact hours, including a minimum of three contact hours of ethics, are required. Contact hours are defined as the number of actual clock hours spent in direct participation in a structured education format as a learner. Typically, one Continuing Education Unit (CEU) is equivalent to 10 contact hours. In a college or university graduate course, one semester hour of credit is equivalent to 15 contact hours and one quarter hour of credit is equivalent to 10 contact hours.

(c) Continuing education training provided by one of the following national organizations, their affiliates or by a vendor approved by one of the following organizations shall be approved:

(1) ~~American Counseling Association;~~ American Association of State Counseling Boards (aascb.org);
(2) ~~American Association of State Boards of Counseling;~~ American Counseling Association (counseling.org);
(3) ~~National Board for Certified Counselors;~~ Commission on Rehabilitation Counselor Certification (crccertification.com); and
(4) ~~Commission on Rehabilitation Counselor Certification.~~ National Board for Certified Counselors (nbcc.org).

(d) Continuing education training provided by one of the following national organizations, their affiliate or by a vendor approved by one of the following organizations shall be approved for no more than 15 contact hours for any given renewal period as defined in Rule .0601 of this same Chapter.

(1) American Association of Christian ~~Counselors;~~ Counselors (aacc.net);
(2) ~~National Association of Pastoral Counselors;~~ American Association of Marriage and Family Therapy (aamft.org);
(3) ~~National Rehabilitation Association;~~ American Psychological Association (apa.org);
(4) ~~National Association of Alcoholism & Drug Abuse Counselors;~~ Employee Assistance Certification Commission (attcnetwork.org);
(5) ~~National Association of Social Workers;~~ International Employee Assistance Professional Association (iaeape.org);
(6) ~~American Association Marriage and Family Therapy;~~ National Area Health Education Center Organization (nationalahec.org);
(7) ~~National Area Health Education Center Organization;~~ National Association of Alcoholism & Drug Abuse Counselors (naadac.org);
(8) ~~American Psychological Association;~~ National Association of Pastoral Counselors (pastoral-counseling-center.org);
(9) ~~International Employee Assistance Professional Association; and~~ National Association of Social Workers (socialworkers.org); and
(10) ~~Employee Assistance Certification Commission.~~ National Rehabilitation Association (nationalrehab.org).

(e) Evidence of completion of continuing education training shall consist of a certificate of attendance and completion signed by the responsible officer of a continuing education provider, and shall include date(s) of attendance, number of contact hours, name of attendee, ~~and~~ name of ~~course.~~ course, and approved provider name/number. Licensees are required to maintain such information for a period of seven years following course completion, however, a licensee is only required to submit such information if audited by the Board. On the Renewal for Licensure Form a licensee shall attest to having completed the required continuing education within the current renewal cycle.

(f) The Board shall conduct a random audit of a percentage of its licensees' continuing education documentation for each renewal cycle and licensees shall submit the requested information upon request of the Board. Failure to submit the required documentation may result in disciplinary action by the Board.

~~(f)~~(g) Continuing education activities also acceptable for renewal of licensure are as follows:

(1) Contact hours shall be awarded for academic credit granted during a renewal period from a regionally accredited institution of higher education for work done in a counseling or counseling related subject. A copy of a transcript or grade report is the required documentation. Documentation must contain the following information:

(A) date(s) of attendance;
(B) number of ~~semester~~ semester/quarter hours earned;
(C) name of attendee; and
(D) ~~name~~ name/number of course.

Contact hours are as defined in Paragraph (b) of this Rule. Completion dates must fall within the renewal period, as defined in G.S. 90-339.

(2) Publication activities used for contact hours are limited to articles written by the licensee and published in peer reviewed journals, editing of a chapter in a book based on counseling or counseling related material, or authoring or co-authoring a published book on counseling or counseling related material. Publication dates must fall within the renewal period, as defined in G.S. 90-339. Required documentation is a copy of the cover page of the article(s) or book, copy of the copyright page denoting date of publication; for a chapter in an edited book, a copy of the table of contents listing the chapter is also required. Ten contact hours shall be approved for each publication activity. The maximum contact hours allowed per any given renewal period as defined in G.S. 90-339, is 10. Contact hours awarded for publication activities shall not be applied to the three contact hour requirement for ethics.

(3) Contact hours shall be awarded for academic credit granted during a renewal period from a regionally accredited institution of higher education for work done toward the completion of a dissertation. Required documentation is a copy of a transcript or grade report showing credit earned during the renewal period. The maximum contact hours allowed per any given renewal period, as defined in G.S. 90-339, is 10. Contact hours are as defined in Paragraph (b) of this Rule. Completion dates must fall within the renewal period, as defined in G.S. 90-339. Contact hours awarded for dissertation shall not be applied to the three contact hour requirement for ethics.

(4) Contact hours shall be awarded for clinical supervision, as defined by Rule .0208 of this Chapter, which was received by the licensee during the renewal period. Contact hours shall not be granted for clinical supervision provided by the licensee to others. The maximum contact hours awarded for clinical supervision is 10. Contact hours are defined as the number of actual clock hours spent in direct, clinical supervision. Required documentation is a letter from the qualified clinical supervisor, as defined by Rule .0209 of this Chapter, who provided the clinical supervision received, verifying a licensee's participation in the activity. The letter shall confirm the dates of the activity, the number of participation hours, and the position or title and credential of the provider. Dates of activity must fall within the renewal period, as defined in G.S. 90-339. Contact hours awarded for clinical supervision shall not be applied to the three contact hour requirement for ethics. Supervision quarterly reports may be submitted as supporting documentation.

(5) Contact hours shall be awarded for the following leadership positions:
(A) Officer of state, regional, or national counseling organization;
(B) editor or editorial board member of a professional counseling journal;
(C) member of a state, regional, or national counseling committee producing a written product; and
(D) chair of a major state, regional or national counseling conference or convention.

The leadership position must be occupied for a minimum of six months and dates must fall within the renewal period, as defined in G.S. 90-339. The required documentation is a letter of confirmation of the leadership position, the nature of the position or service rendered, and the signature of an officer of the organization. Ten contact hours shall be approved ~~fro~~ for each leadership position held. The maximum contact hours allowed per any given renewal period, as defined in G.S. 90-339, is 10. Contact hours awarded for leadership shall not be applied to the three contact hour requirement for ethics.

(6) Contact hours shall be awarded for hours obtained in activities or workshops for which the licensee was a presenter. The dates of activities presented must fall within the renewal period, as defined in G.S. 90-339, and focus on one or more of the approved content areas. The maximum contact hours awarded for presenting professional activities/workshops is five. The required documentation is ~~a~~ an official letter of confirmation from the organization for which the licensee presented and shall contain the following information:
(A) date(s) of presentation;
(B) name of presentation; and
(C) ~~and~~ length of presentation.

Contact hours are defined as the number of actual clock hours spent in presenting. Contact hours awarded for presenting shall not be applied to the three contact hour requirement for ethics.

~~(g)~~(h) If documentation for continuing education is not identifiable as dealing with counseling, the Board shall request a

written description of the continuing education and how it applies to the professional practice of counseling. If the Board determines that the training is not appropriate, the individual shall be given ~~90~~ 45 days from the date of notification to replace the hours not approved. Those hours shall be considered replacement hours and shall not be applied to the next renewal period.

~~(h)~~(i) Licensed Professional Counselor Supervisors must meet all the continuing education requirements outlined in ~~Paragraph~~ Paragraphs (a) through (g) of this Rule and in addition as part of those requirements must provide documentation of a minimum of 10 contact hours of continuing education training related to professional knowledge and competency in the field of counseling supervision. Continuing education trainings appropriate for the purpose of supervision credential renewal are those that are directed toward professionals in the mental health field, which focus on increasing knowledge and skills in the practice of counseling supervision, and are completed during the renewal period as defined in G.S. 90-339.

Authority G.S. 90-334(g); 90-339(b).

21 NCAC 53 .0604 FAILURE TO SECURE SUFFICIENT CONTINUING EDUCATION/RENEWAL OF LICENSE

Licensed Professional Counselor Associates, Licensed Professional Counselors, and Licensed Professional Counselor Supervisors who fail to document sufficient continuing education activities to renew their licenses by the expiration date shall be notified in writing by the Board Office of the ~~deficiencies.~~ deficiencies and that their license is expired and they cannot practice until it is renewed. Licensed Professional Counselor Associates, Licensed Professional Counselors, and Licensed Professional Counselor Supervisors who are unable to provide documentation of sufficient continuing education activities to renew their licenses have the following options:

(1) Within one year of expiration the ~~LPCAs,~~ LPCA, LPC or LPCS must complete the required hours of continuing education and an additional 20 hours of continuing education for the purpose of renewal of ~~their lapsed~~ the expired license. ~~All continuing~~ Continuing education acquired during this additional time period for the purpose of renewal of ~~a lapsed~~ an expired license shall not be utilized for future renewal purposes. Once these requirements have been met, the license shall be ~~reinstated.~~ renewed and the licensee may resume practice.

(2) Request an extension in writing to the Board. Requests shall be received by the board no later than ~~June~~ May 1st of the year of expiration. An extension shall be granted for:
   (a) military deployment;
   (b) major illness lasting longer than three months of self, partner or child; or
   (c) death of partner or child.

   Extensions shall be granted for a period of up to one year. If the extension is approved, ~~all~~ continuing education acquired during the extension shall not be utilized for future renewal purposes. Once these requirements have been met, the license shall be ~~reinstated.~~ renewed.

Failure to complete one of the above listed options ~~within one year after the license's expiration date~~ means that a license shall be reissued only upon a new application ~~as~~ for licensure an original license and all current licensure requirements ~~applied~~ shall apply to the new application.

Authority G.S. 90-334(g); 90-339.

SECTION .0700 – LICENSED PROFESSIONAL COUNSELOR ASSOCIATE

21 NCAC 53 .0701 LICENSED PROFESSIONAL COUNSELOR ASSOCIATE

(a) A license as a Licensed Professional Counselor Associate (LPCA) shall be granted by the Board to persons preparing for the practice of counseling ~~who:~~ who have:

(1) ~~has~~ completed graduate training as defined in G.S. 90-336(b)(1)

(2) ~~has~~ completed a minimum of three semester hours or five quarter hours in each of the required coursework areas of study as follows:

~~(A) Coursework in the counseling process in a multicultural society including the study of basic counseling theories and providing a general knowledge of theories, their principles, and techniques for application in counseling relationships. In addition, this coursework shall provide a broad understanding of philosophic bases of counseling processes, an orientation to wellness and prevention as desired counseling goals, essential interviewing and counseling skills, and consultation theories and their application in various professional settings. The course shall also provide a systems perspective that provides an understanding of family and other systems theories and major models of family and related interventions. Finally, this coursework shall include crisis intervention and suicide prevention models, including the use of psychological first aid strategies.~~

(A) Coursework in Helping Relationships in Counseling. Studies in this area provide an understanding of counseling and consultation processes, including but not limited to the following:

(i) Counseling and consultation theories, including both

individual and systems perspectives as well as coverage of relevant research and factors considered in applications;

(ii) Basic interviewing, assessment and counseling skills;

(iii) Counselor or consultant characteristics and behaviors that influence professional counseling relationships, including age, gender and ethnic differences; verbal and nonverbal behaviors; and personal characteristics, orientations and skills;

(iv) Client or consultee characteristics and behaviors that influence professional counseling relationships, including age, gender, ethnic differences; verbal and nonverbal behaviors; and personal characteristics, orientations and skills; and

(v) Ethical considerations.

~~(B) Practicum and Internship experience provided in supervised graduate counseling experience in an university approved counseling setting for at minimum one semester duration and for academic credit in a regionally accredited program of study. This graduate counseling experience shall be completed as defined in Rule .0206 of this Chapter.~~

(B) Coursework in Practicum and Internship. Practicum and post-practicum internship experience should be provided in a supervised graduate counseling experience in a university approved counseling setting for at minimum one semester duration (three semester hours or five quarter hours) for each (practicum and internship) and for academic credit in a regionally accredited program of study. This graduate counseling experience shall be completed as defined in Rule .0206 of this Chapter.

~~(C) Coursework in professional orientation and identity to the counseling profession providing an understanding of all aspects of functioning as a professional counselor, including a history of the counseling profession, various roles contemporary counselors have in our society, membership in professional counseling associations, self care strategies appropriate to the counselor role, ethical conduct, standards of preparation, credentialing processes, and counseling supervision models, practices, and processes. This coursework shall increase knowledge of the evolution of the counseling profession and the role it has played in setting standards, advocating for a professional identity, and promoting licensure and accreditation for the profession. Finally, this course shall include the counselors' roles and responsibilities as members of an interdisciplinary emergency management response team during a local, regional, or national crisis, disaster or other trauma causing event.~~

(C) Coursework in Professional Orientation to Counseling. Studies in this area provide an understanding of all aspects of professional functioning, including history, roles, organizational structures, ethics, standards and credentialing, including but not limited to the following:

(i) History of the counseling profession, including significant factors and events;

(ii) Professional roles and functions of counselors, including similarities and differences with other types of professionals;

(iii) Professional organizations (primarily ACA, its divisions, branches and affiliates), including membership benefits, activities, services to members and current emphases;

(iv) Ethical standards of NBCC or ACA and related ethical and legal issues, and their applications to various professional activities (e.g., appraisal, group work);

(v) Professional counselor preparation standards, their evolution and current applications;

(vi) Professional counselor credentialing, including

counselor certification, licensure and accreditation practices and standards, and the effects of public policy on these issues; and

(vii) Public policy processes, including the role of the professional counselor in advocating on behalf of the profession and its clientele.

~~(D) Coursework in human growth and development providing a broad understanding of human behavior, including an understanding of developmental crises, disability, psychopathology, and situational and environmental theories of individual and family development and transitions across the life span; theories of learning and of individual, cultural, couple, family, and community resilience; theories and etiology of addictions and addictive behaviors, including strategies for prevention, intervention, and treatment; and theories for facilitating optimal development and wellness over the life span. In addition, the coursework shall highlight the effects of crises, disasters, and other trauma-causing events on persons of all ages. Finally, the coursework shall include a general framework for understanding exceptional abilities and strategies for differentiated interventions.~~

(D) Coursework in Human Growth and Development Theories in Counseling. Studies in this area provide an understanding of the nature and needs of individuals at all developmental levels, relevant to counseling practice. These include but are not limited to the following:

(i) Theories of individual and family development and transitions across the life span;

(ii) Theories of learning and personality development;

(iii) Human behavior, including an understanding of developmental crises, disability, addictive behavior, psychopathology and environmental factors as they affect both normal and abnormal behavior;

(iv) Counseling strategies for facilitating development over the life span; and

(v) Ethical considerations.

~~(E) Coursework in social and cultural foundations in counseling providing an understanding of theories of multicultural counseling, identity development, and social justice while examining multicultural and pluralistic trends, including characteristics and concerns within and among diverse groups nationally and internationally. In addition, the coursework shall emphasize the counselors' roles in developing cultural self-awareness; promoting cultural social justice; advocating and promoting conflict resolution; appreciating other culturally supported behaviors that promote optimal wellness and growth of the human spirit, mind, or body; and eliminating biases, prejudices, and processes of intentional and unintentional oppression and discrimination. This coursework shall include study of attitudes, beliefs, understandings, and acculturative experiences, including specific experiential learning activities designed to foster students' understanding of self and culturally diverse clients.~~

(E) Coursework in Social and Cultural Foundations in Counseling. Studies in this area provide an understanding of issues and trends in a multicultural and diverse society that impact professional counselors and the counseling profession, including but not limited to the following:

(i) Multicultural and pluralistic trends, including characteristics and concerns of counseling individuals from diverse groups;

(ii) Attitudes and behavior based on factors such as age, race, religious preferences, physical disability, sexual orientation, ethnicity and culture, family patterns, gender, socioeconomic status and intellectual ability;

(iii) Individual, family and group counseling strategies with diverse populations; and

(iv) Ethical considerations.

~~(F) Coursework in group work including studies that provide a broad understanding of group development, dynamics, methods, and counseling theories. This coursework shall help students understand group leadership styles, basic and advanced group skills, and other aspects of group counseling and group consultation.~~

(F) Coursework in Group Counseling Theories and Processes. Studies in this area provide an understanding of group development, dynamics and counseling theories; group counseling methods and skills; and other group work approaches, including but not limited to the following:

(i) Principals of group dynamics, including group counseling components, developmental stage theories, and group members' roles and behaviors;

(ii) Group leadership styles and approaches, including characteristics of various types of group leaders and leadership styles;

(iii) Theories of group counseling, including commonalities, distinguishing characteristics, and pertinent research and literature.

(iv) Group counseling methods, including group counselor orientations and behaviors, ethical standards, appropriate selection criteria and methods of evaluation of effectiveness;

(v) Approaches used for other types of group work in counseling, including task groups, prevention groups, support groups and therapy groups; and

(vi) Ethical considerations.

~~(G) Coursework in career and vocational development and information including studies that provide a broad understanding of career development theories and decision making models as well as career and educational occupational and labor market information resources. The coursework shall enhance student awareness of techniques, and resources, including those applicable to specific populations in a global economy. The coursework shall prepare students for career development program planning, organization, implementation, administration, and evaluation. The coursework shall increase the knowledge of the interrelationships among and between work, family, and other life roles and factors, including the role of multicultural issues in career development.~~

(G) Coursework in Career Counseling and Lifestyle Development. Studies in this area provide an understanding of career counseling, development and related life factors, including but not limited to the following:

(i) Career-counseling theories and decision-making process;

(ii) Career, a vocational, educational and labor market information resources; visual and print media; and computer-based career information systems;

(iii) Career-counseling program planning, organization, implementation, administration and evaluation;

(iv) Interrelationships among work, family, and other life roles and factors, including multicultural and gender issues as related to career counseling;

(v) Career and educational placement counseling, follow-up and evaluation;

(vi) Assessment instruments and techniques relevant to career counseling;

(vii) Computer-based career-development applications and strategies, including computer-assisted career-counseling systems;

(viii) Career-counseling processes, techniques and resources, including those applicable to specific populations; and

(ix) Ethical considerations.

~~(H) Coursework in appraisal including studies that provide a broad understanding of historical~~

~~perspectives concerning the nature and meaning of assessment as well as basic concepts of standardized and non-standardized testing and other assessment techniques. This coursework shall develop a knowledge of statistical concepts, an understanding of validity and reliability; social and cultural factors related to the assessment and evaluation; and ethical strategies for selecting, administering, and interpreting assessment, evaluation instruments and techniques in counseling.~~

(H) Coursework in Assessment in Counseling. Studies in this area provide an understanding of individual and group approaches to assessment and evaluation in counseling practice, including but not limited to the following:

(i) Theoretical and historical bases for assessment techniques in counseling;

(ii) Validity, including evidence for establishing content, construct and empirical validity;

(iii) Reliability, including methods of establishing stability, internal and equivalence reliability;

(iv) Appraisal methods, including environmental assessment, performance assessment, individual and group test and inventory methods, behavioral observations, and computer-managed and computer-assisted methods;

(v) Psychometric statistics, including types of assessment scores, measures of central tendency, indices of variability, standard errors, and correlations;

(vi) Age, gender, ethnicity, language, disability and cultural factors related to the use of assessment and evaluation in counseling services;

(vii) Strategies for selecting, administering, interpreting and using assessment and evaluation instruments and techniques in counseling; and

(viii) Ethical considerations.

~~(I) Coursework in research including studies that provide a broad understanding of the importance of research in advancing the counseling profession. Included in this coursework shall be study of research methodology, statistical methods, the use of research to inform evidence-based practice; and ethical and culturally relevant strategies for interpreting and reporting the results of research and program evaluation studies. In addition, the coursework shall provide principles, models, and applications of needs assessment, program evaluation, and the use of findings to effect program modification;~~

(I) Coursework in Research and Program Evaluation. Studies in this area provide an understanding of types of research methods, basic statistics, and ethical and legal consideration in research, including but not limited to the following:

(i) Basic types of research methods to include qualitative and quantitative research designs;

(ii) Basic parametric and nonparametric statistics;

(iii) Principles, practices and applications of needs assessment and program evaluation;

(iv) Uses of computers for data management and analysis; and

(v) Ethical and legal considerations.

(3) ~~has~~ passed an examination as defined in Rule .0305; and

(4) ~~has~~ submitted a complete application for LPCA.

(b) To prevent a lapse in licensure, Licensed Professional Counselor Associates who desire to become Licensed Professional Counselors (LPC) shall complete the application process for the LPC licensure no later than 60 days prior to expiration of their Licensed Professional Counselor Associate license or completion of the supervised professional practice hours to allow for administrative processing and Board action.

Authority G.S. 90-334(h); 90-336(a); 90-336(b).

21 NCAC 53 .0702 SUPERVISED PRACTICE FOR LICENSED PROFESSIONAL COUNSELOR ASSOCIATE

A Licensed Professional Counselor Associate may not practice unless the following requirements have been met:

(1) The Licensed Professional Counselor Associate shall submit a completed supervision contract, on forms provided by the Board. A supervision contract form shall document:
   (a) the name of the qualified clinical supervisor;
   (b) contact information for the qualified clinical supervisor;
   (c) the modality of supervision to be provided, such as direct (live) observation, co-therapy, audio and video recordings, and live supervision, as defined by Rule .0208;
   (d) the frequency of supervision; and
   (e) the name and physical location of the site where the proposed ~~supervision.~~ supervision will take place.

   A separate supervision contract form shall be filed for each separate work setting.

(2) If receiving supervision from more than one supervisor, a separate supervision contract form shall be filed for each individual qualified clinical supervisor.

(3) A supervisor shall document, on forms provided by the Board, each quarter that supervision has occurred and shall file a final report upon termination of supervision.

(4) If not receiving supervision, the Licensed Professional Counselor Associate shall report such to the Board. A report shall be submitted to the Board within two weeks of termination of supervision and within two weeks of a change in the conditions specified in the supervision contract form on file with the Board.

(5) An LPCA shall only provide counseling while under the supervision of a qualified clinical supervisor.

(6) An LPCA shall renew his/her license as an LPCA if the supervision requirements to become an LPC have not been completed within the application period.

Authority G.S. 90-334(h); 90-336(c).

SECTION .0800 – LICENSED PROFESSIONAL COUNSELOR - SUPERVISOR

21 NCAC 53 .0801 LICENSED PROFESSIONAL COUNSELOR SUPERVISOR

(a) The credential of Licensed Professional Counselor Supervisor (LPCS) shall be granted by the Board to a Licensed Professional Counselor who has:

(1) an active and unrestricted LPC license from the NC Board of Licensed Professional Counselors;

(2) the equivalent of three semester graduate credits in clinical supervision training from a regionally accredited institution of higher education as documented by an official ~~transcript;~~ transcript or 45 contact hours of continuing education in clinical supervision;

(3) documented required licensed professional counseling experience as defined in G.S. 90-336(d)(2)a, b, or c on forms provided by the Board; and

(4) a completed application for Licensed Professional Counselor Supervisor.

(b) The LPCS shall provide supervisees with a copy of a Professional Disclosure Statement specific to supervision that includes the following:

(1) business address and telephone number of the LPCS;

(2) the listing of degrees, credentials, and licenses held by the LPCS;

(3) general areas of competence in mental health practice for which the LPCS can provide supervision (e.g. addictions counseling, school counseling, career counseling);

(4) a statement documenting training in supervision and experience in providing supervision;

(5) a general statement addressing the model of or approach to supervision, including role of the supervisor, objectives and goals of supervision, and modalities (e.g., tape review, live observation);

(6) a description of the evaluation procedures used in the supervisory relationship;

(7) a statement defining the limits and scope of confidentiality and privileged communication within the supervisory relationship;

(8) a fee schedule, if applicable;

(9) the emergency contact information for the LPCS; and

(10) a statement indicating that the LPCS follows the American Counseling Association's Code of Ethics and the Center for Credentialing and Education's Approved Clinical Supervisor (ACS) Code of Ethics.

(c) The supervisor shall provide written or electronically submitted reports, on forms provided by the Board, each quarter that supervision has occurred and shall file a final report upon termination of supervision, and shall be available for consultation with the Board or its committees regarding the supervisee's competence for licensure.

(d) A supervision contract form, as provided by the Board, shall document:

(1) the name of the qualified clinical supervisor;

(2) contact information for the qualified clinical supervisor;

(3) the modality of supervision to be provided, such as direct (live) observation, co-therapy, audio and video recordings, and live supervision, as defined by Rule .0208;
(4) the frequency of supervision; and
(5) the name and physical location of the site where the proposed ~~supervision.~~ supervision will take place.

A separate supervision contract form shall be filed for each supervisee.

(e) The LPCS, in collaboration with the supervisee, shall maintain a log of clinical supervision hours that includes:

(1) the date;
(2) supervision start and stop times;
(3) the modality of supervision to be provided, such as direct (live) observation, co-therapy, audio and video recordings, and live supervision, as defined by Rule .0208; and
(4) notes on recommendations or interventions used during the supervision.

The LPCS will maintain copies of these logs for a minimum of seven years beyond termination of supervision and will provide copies to the Board for inspection upon request.

Authority G.S. 90-334(h); 90-336(a); 90-336(d).

SECTION .0900 – REGISTRATION FOR A PROFESSIONAL ENTITY

21 NCAC 53 .0901 CERTIFICATE OF REGISTRATION FOR A PROFESSIONAL ENTITY

(a) The information required for an applicant to obtain a Certificate of Registration for a professional corporation or professional limited liability company organized to render professional counseling services shall consist of:

(1) Typed, or legibly printed, notarized application form;
(2) Proof of licensure as an LPC or LPCS;
(3) Registration fee; and
(4) A copy of the Articles of Incorporation or Articles of Organization.

(b) This Certificate of Registration shall remain effective until December 31 following the date of such registration.

Authority G.S. 55B-10; 57C-2-01(c).

21 NCAC 53 .0902 RENEWAL OF CERTIFICATE OF REGISTRATION FOR A PROFESSIONAL ENTITY

A notification for renewal shall be sent to each registered professional corporation and professional limited liability company a minimum of 60 days prior to the December 31 expiration date. The Board shall renew the certificate of registration upon receipt of the completed written renewal application of the holder and the renewal fee. Failure to renew by the due date shall result in notification to the Secretary of State's Office to suspend the Articles of Incorporation or Articles of Organization.

Authority G.S. 55B-11; 57C-2-01(c).

Note from the Codifier: *The rules published in this Section of the NC Register are temporary rules reviewed and approved by the Rules Review Commission (RRC) and have been delivered to the Codifier of Rules for entry into the North Carolina Administrative Code. A temporary rule expires on the 270th day from publication in the Register unless the agency submits the permanent rule to the Rules Review Commission by the 270th day.*
This section of the Register may also include, from time to time, a listing of temporary rules that have expired. See G.S. 150B-21.1 and 26 NCAC 02C .0500 for adoption and filing requirements.

TITLE 04 – DEPARTMENT OF COMMERCE

Rule-making Agency: *Alcoholic Beverage Control Commission*

Rule Citation: *04 NCAC 02S .0102; 02T .0302, .0303, .0308, .0309*

Effective Date: *October 25, 2013*

Date Approved by the Rules Review Commission: *October 17, 2013*

Reason for Action:
21 NCAC 02S .0102 – *Cite: Session Law 2013-83. Effective Date: June 12, 2013. Section 2 of the Session Law requires the NC Alcoholic Beverage Control Commission to adopt rules for the suspension of alcohol sales in the latter portion of professional sporting events in order to protect public safety at these events. The NC Alcoholic Beverage Control Commission's position has been that until these rules have been adopted and are effective, malt beverage sales in seating areas of stadiums, ballparks and other similar public places with a seating capacity of 3,000 or more during professional sporting events cannot occur. There are many permittees that await this rule so they can begin sales.*
21 NCAC 02T .0302, .0303, .0308, .0309 – *Cite: Session Law 2013-76. Effective Date: June 12, 2013. Section 2 of the Session Law requires the NC Alcoholic Beverage Control Commission to adopt rules dealing with sanitation of growlers by January 1, 2014. The NC Alcoholic Beverage Control Commission's position has been that until these rules have been adopted and are effective, the filling and refilling of growlers cannot occur. There are many permittees that await this rule so they can begin sales.*

CHAPTER 02 – ALCOHOLIC BEVERAGE CONTROL COMMISSION

SUBCHAPTER 02S – RETAIL BEER: WINE: MIXED BEVERAGES: BROWNBAGGING: ADVERTISING: SPECIAL PERMITS

SECTION .0100 – DEFINITIONS: PERMIT APPLICATION PROCEDURES

04 NCAC 02S .0102 APPLICATIONS FOR PERMITS: GENERAL PROVISIONS

(a) Forms. Application forms for all ABC permits may be obtained from the North Carolina Alcoholic Beverage Control Commission.

(b) Statutory Requirements. Before the issuance of any ABC permit, an applicant shall comply with the statutory requirements of Articles 9 and 10 of Chapter 18B of the General Statutes and with the rules of the Commission.

(c) Separate Permits Required. An applicant operating separate buildings or structures not connected directly with each other or businesses with separate trade names shall obtain and hold separate permits for each building or business for which he or she wants permits, and ~~he~~ shall pay the appropriate application fees as provided in G.S. 18B-902(d). Where there are multiple buildings, and the Commission determines that the business is operated as one entity, the Commission may, in its discretion, issue one permit.

(d) Information Required on Application. An applicant for an ABC permit shall file a written application with the Commission and in the application shall state, under oath, the following information:

(1) name and address of applicant;
(2) corporate, limited liability company or partnership name;
(3) mailing address and location address of business for which permit is desired, and county in which business is located;
(4) trade name of business;
(5) name and address of owner of premises;
(6) applicant's date and place of birth;
(7) if a corporation or limited liability company, the name and address of agent or employee authorized to serve as process agent (person upon whom legal service of Commission notices or orders can be made);
(8) if a non-resident, name and address of person appointed as attorney-in-fact by a power of attorney;
(9) a diagram of the premises showing:
  (A) entrances and exits;
  (B) storage area for alcoholic beverages; and
  (C) locations where alcoholic beverages will be served or consumed;
(10) that the applicant is the actual and bona fide owner or lessee of the premises for which a permit is sought and shall submit a copy or memorandum of the lease showing the applicant as tenant, or a copy of the deed showing the applicant as the grantee or owner;
(11) that the applicant intends to carry on the business authorized by the permit himself or under his immediate supervision and direction; and

(12) that the applicant is an actual and bona fide resident of the State of North Carolina or, as a non-resident, has appointed, by a power of attorney, a resident manager to serve as attorney-in-fact who will manage the business and accept service of process and official Commission notices or orders.

(e) General Restriction; Living Quarters. No permit for the possession, sale or consumption of alcoholic beverages shall be issued to any establishment when there are living quarters connected directly thereto, and no permittee shall establish or maintain living quarters in or connected to his licensed premises.

(f) General Restriction; Restrooms. No permit for the on-premises possession, sale, or consumption of alcoholic beverages shall be issued to any establishment unless there are two restrooms in working order on the premises. ~~This requirement shall be waived upon a showing that the permittee~~ The Commission will waive this requirement upon a showing by the permittee that he or she will suffer financial hardship or the safety of the employees will be jeopardized.

(g) Areas for Sales and Consumption. In determining the areas in which alcoholic beverages will be sold and consumed, the Commission shall consider the convenience of the permittee and his patrons, allowing the fullest use of the premises consistent with the control of the sale and consumption of alcoholic beverages, but will attempt to avoid consumption in areas open to the general public other than patrons.

(h) Temporary Permits for Continuation of Business. The Commission may issue temporary permits to an applicant for the continuation of a business operation that holds current ABC permits when a change in ownership or location of a business has occurred. To obtain a temporary permit an applicant shall submit the appropriate ABC permit application form, all required fees, a lease or other proof of legal ownership or possession of the property on which the business is to be operated, and a written statement from the ALE agent in that area stating that there are no pending ABC violations against the business. An applicant for a temporary permit shall also submit the permits of the prior permittee for cancellation prior to the issuance of any temporary permit. No temporary permit shall be issued to any applicant unless all prior ABC permits issued for the premises have been cancelled by the Commission.

(i) Retail Sales at Public Places Restricted. The sale and delivery of alcoholic beverages by permitted retail outlets located on fair grounds, golf courses, ball parks, race tracks, and other similar public places are restricted to an enclosed establishment in a designated place. No alcoholic ~~beverages,~~ beverages shall be sold, ~~served,~~ served or delivered by these outlets outside the enclosed establishment, nor in grandstands, stadiums or bleachers at public gatherings.

As used in this ~~Rule,~~ Paragraph, the term "enclosed establishment" includes a temporary structure or structures constructed and used for the purpose of dispensing food and beverages at events to be held on fairgrounds, golf courses, ball parks, race tracks, and other similar places.

Sales of alcoholic beverages may be made in box seats only under the following conditions:

(1) table service of food and non-alcoholic beverages are available to patrons in box seats;

(2) no alcoholic beverages are delivered to the box seats area until after orders have been taken; and

(3) box seat areas have been designated as part of the permittee's premises on a diagram submitted by the permittee, and the Commission has granted written approval of alcoholic beverage sales in these seating areas.

(j) Separate Locations at Airport. If one permittee has more than one location within a single terminal of an airport boarding at least 150,000 passengers annually and that permittee leases space from the airport authority, the permittee in such a situation may:

(1) obtain a single permit for all its locations in the terminal;

(2) use one central facility for storing the alcoholic beverages it sells at its locations; and

(3) pool the gross receipts from all its locations for determining whether it meets the requirements of G.S. 18B-1000(6) and 04 NCAC 02S .0519.

(k) Food Businesses. Unless the business otherwise qualifies as a wine shop primarily engaged in selling wines for off-premise consumption, a food business qualifies for an off-premise fortified wine permit only if it has and maintains an inventory of staple foods worth at least one thousand five hundred dollars ($1,500) at retail value. Staple foods include meat, poultry, fish, bread, cereals, vegetables, fruits, vegetable and fruit juices and dairy products. Staple foods do not include coffee, tea, cocoa, soft drinks, candy, condiments and spices.

(l) Professional Sporting Events. Notwithstanding Paragraph (i) of this Rule, holders of a retail permit pursuant to G.S. 18B-1001(1) may sell malt beverages for consumption in the seating areas of stadiums, ball parks and similar public places with a seating capacity of 3,000 or more during professional sporting events pursuant to G.S. 18B-1009, provided that:

(1) the permittee or the permittee's employee shall not wear or display alcoholic beverage branded advertising;

(2) the permittee or the permittee's employee shall not use branded carrying trays, coolers or other equipment to transport malt beverage products;

(3) the permittee or the permittee's employee may display the malt beverage product names and prices provided that all of the product names are displayed with the same font size and font style; and

(4) in-stand sales shall cease, whichever is earlier, upon the cessation of other malt beverage sales or upon the commencement of:

(A) the eighth inning during baseball games, provided that if a single ticket allows entry to more than one baseball game, then the eighth inning of the final game;

(B) the fourth quarter during football and basketball games;

(C) the sixtieth minute during soccer games;

(D) the third period during hockey games;
(E) the final 25 percent of the distance scheduled for automotive races; and
(F) the final hour of the anticipated conclusion of a contest or event for all other events.

History Note: Authority 18B-100; 18B-206(a);18B-207; 18B-900; 18B-901(d); 18B-902; 18B-903; 18B-905; 18B-1000(3); 18B-1008; 18B-1009;
Eff. January 1, 1982;
Amended Eff. January 1, 2011; July 1, 1992; May 1, 1984;
Temporary Amendment Eff. October 25, 2013.

SUBCHAPTER 02T – INDUSTRY MEMBERS: RETAIL/INDUSTRY MEMBER RELATIONSHIPS: SHIP CHANDLERS: AIR CARRIERS: FUEL ALCOHOL

SECTION .0300 – PACKAGING AND LABELING OF MALT BEVERAGES AND WINE

04 NCAC 02T .0302 LABELS TO BE SUBMITTED TO COMMISSION

(a) All labels for malt beverage and wine products shall be submitted in duplicate to the Commission on an "Application for Label Approval Form."

(b) Each person requesting label approval shall furnish, in the application for label approval, the names and addresses of the manufacturer, bottler and importer of the product.

(c) Notwithstanding [~~Paragraph~~] Paragraphs (a) and (b), holders of retail permits pursuant to G.S. 18B-1001(1), (2) or (16) that fill or refill growlers on demand are not required to submit the labels required by Rule .0303(b) of this Section.

History Note: Authority G.S. 18B-100; 18B-206(a); 18B-207; 18B-1001(1), (2) and (16);
Eff. January 1, 1982;
Temporary Amendment Eff. October 25, 2013.

04 NCAC 02T .0303 LABEL CONTENTS: MALT BEVERAGES

(a) Containers that are prefilled by the manufacturer shall be affixed with ~~Malt~~ malt beverage labels that shall contain the following information in a legible form:

(1) brand name of product;
(2) name and address of brewer or bottler;
(3) class of product (e.g., beer, ale, porter, lager, bock, stout, or other brewed or fermented beverage);
(4) net contents; ~~and~~
(5) if the malt beverage is fortified with any stimulants, the amount of each (milligrams) per ~~container.~~ container; and
(6) the alcoholic beverage health warning statement as required by the Federal Alcohol Administration Act, 27 C.F.R. Sections 16.20 through 16.22.

(b) Growlers that are filled or refilled on demand pursuant to Rule .0309 of this Subchapter shall be affixed with a label or a tag that shall contain the following information in type not smaller than 3 millimeters in height and not more than 12 characters per inch:

(1) brand name of the product dispensed;
(2) name of brewer or bottler;
(3) class of product [~~(e.g.,~~] (*e.g.*, beer, ale, porter, lager, bock, stout, or other brewed or fermented beverage);
(4) net contents;
(5) if the malt beverage is fortified with any stimulants from the original manufacturer, the amount of each (milligrams) per container;
(6) name and address of business that filled or refilled the growler;
(7) date of fill or refill;
(8) if the malt beverage is more than six percent alcohol by volume, the amount of alcohol by volume pursuant to G.S. 18B-101(9); and
(9) the following [~~statement,~~] statement: "This product may be unfiltered and unpasteurized. Keep refrigerated at all times."

(c) Growlers that are filled or refilled on demand pursuant to Rule .0309 of this Section shall be affixed with the alcoholic beverage health warning statement as required by the Federal Alcohol Administration Act, 27 C.F.R. Sections 16.20 through 16.22.

History Note: Authority G.S. 18B-100; 18B-101(9); 18B-206(a); 18B-207; 18B-1001(1), (2) and (16); 27 C.F.R. 16.20 through 16.22;
Eff. January 1, 1982;
Amended Eff. April 1, 2011;
Temporary Amendment Eff. October 25, 2013.

04 NCAC 02T .0308 GROWLERS

(a) As used in this Rule, a growler is a refillable rigid glass, plastic, aluminum or stainless steel container with a flip-top or screw-on lid that is no larger than 2 liters (0.5283 gallons) into which a malt beverage is ~~poured~~ prefilled, filled or refilled for off-premises consumption.

[~~(b) Holders of only a brewery permit~~] (b) Holders of only a brewery permit ~~that have retail permits pursuant to G.S. 18B-1001(2), may sell growlers filled~~ may sell, deliver and ship growlers prefilled with the brewery's malt beverage for off-premises consumption provided a label is affixed to the growler that accurately provides the information as required by ~~04 NCAC 02T .0303~~ Rules .0303(a) and ~~.0305.~~ .0305 of this Section.

(c) Holders of retail permits pursuant to G.S. 18B-1001(1), (2) or (16), who do not hold a brewery permit, shall not prefill growlers with malt beverage.

(d) Holders of a brewery permit that also have retail permits pursuant to G.S. 18B-1001(1), may fill or refill growlers on demand with the brewery's malt beverage for off-premises consumption provided the label as required by Rules .0303(b) and .0305 of this Section is affixed to the growler.

(e) Holders of retail permits pursuant to G.S. 18B-1001(1), (2) or (16), may fill or refill growlers on demand with draft malt beverage for off-premises consumption provided the label as

required by Rules .0303(b) and .0305 of this Section is affixed to the growler.

~~(c) Holders of a brewery permit that have retail permits pursuant to G.S. 18B-1001(2), may refill customer's growlers provided a label is affixed to the growler that accurately provides the information as required by 04 NCAC 02T .0303 and .0305.~~

~~(d) Breweries that refill growlers sold by other breweries shall relabel the growler prior to filling it with malt beverage.~~

~~(e) Breweries that refill growlers sold by other breweries shall remove, deface or cover any permanent or non-permanent labels prior to affixing a new label.~~

(f) Holders of retail permits pursuant to G.S. 18B-1001(1), (2) or (16), shall affix a label as required by Rules .0303(b) and .0305 of this Section to the growler when filling or refilling a growler.

(g) Holders of retail permits pursuant to G.S. 18B-1001(1), (2) or (16), may, in their discretion, refuse to fill or refill a growler, except in matters of discrimination pursuant to G.S. 18B-305(c).

History Note: Authority G.S. 18B-100; 18B-206(a); 18B-207; 18B-305; 18B-1001(1), (2) and (16);
Eff. April 1, 2011;
Temporary Amendment Eff. October 25, 2013.

04 NCAC 02T .0309 GROWLERS: CLEANING, SANITIZING, FILLING AND SEALING

(a) Filling and refilling growlers will only occur on demand by a customer.

(b) Growlers shall only be filled or refilled by a permittee or the permittee's employee.

~~(b)~~(c) Prior to filling or refilling a growler, the growler and its cap shall be cleaned and sanitized by the permittee or the permittee's employee ~~as follows:~~ using one of the following methods:

(1) Manual washing in a three compartment ~~sink;~~ sink:
   (A) Prior to starting, clean sinks and work area to remove any chemicals, oils or grease from other cleaning activities;
   (B) Empty residual liquid from the growler to a drain. Growlers shall not be emptied into the cleaning water;
   (C) Clean the growler and cap in water and detergent. Water temperature shall be at a minimum 110ºF or the temperature specified on the cleaning agent manufacturer's label instructions. Detergent shall not be fat or oil based.
   (D) Remove any residues on the interior and exterior of the growler and cap;
   (E) Rinse the growler and cap in the middle compartment with water. Rinsing may be from the spigot with a spray arm, from a spigot or from the tub as long as the water for rinsing shall not be stagnant but shall be continually refreshed;
   (F) Sanitize the growler and cap in the third compartment. Chemical sanitizer shall be used in accordance with the EPA-registered label use instructions and shall meet the minimum water temperature requirements of that chemical; and
   (G) A test kit or other device that accurately measures the concentration in mg/L of chemical sanitizing solutions shall be provided and be readily accessible for use; or
(2) Mechanical washing and sanitizing ~~machine;~~ machine:
   (A) Mechanical washing and sanitizing machines shall be provided with an easily accessible and readable data plate affixed to the machine by the manufacturer and shall be used according to the machine's design and operation specifications;
   (B) Mechanical washing and sanitizing machines shall be equipped with chemical or hot water sanitization;
   (C) Concentration of the sanitizing solution or the water temperature shall be accurately determined by using a test kit or other device; and
   (D) The machine shall be regularly serviced based upon the manufacturer's or installer's guidelines;

~~(c)~~(d) Notwithstanding Paragraph (b), a growler may be filled or refilled without cleaning and sanitizing the growler as follows:

(1) Filling or refilling a growler with a tube as referenced by Paragraph ~~(e);~~ (e):
   (A) Food grade sanitizer shall be used in accordance with the EPA-registered label use instructions;
   (B) A container of liquid food grade sanitizer shall be maintained for no more than 10 malt beverage taps that will be used for filling and refilling growlers;
   (C) Each container shall contain no less than five tubes that will be used only for filling and refilling growlers;
   (D) The growler is inspected visually for contamination;
   (E) The growler is filled or refilled with a tube as described in Paragraph (e);
   (F) After each filling or refilling of a growler, the tube shall be immersed in the container with the liquid food grade sanitizer; and
   (G) A different tube from the container shall be used for each fill or refill of a growler; ~~and~~ or

(2) Filling a growler with a contamination-free ~~process;~~ process:
(A) The growler is inspected visually for contamination;
(B) The growler shall only be filled or refilled by a permittee or the permittee's employee; and
(C) Is otherwise in compliance with the FDA Food Code 2009, Section 3-304.17(c).

~~(d) Growlers shall only be filled or refilled by a permittee or the permittee's employee.~~

(e) Growlers shall be filled or refilled from the bottom of the growler to the top with a tube that is attached to the malt beverage faucet and extends to the bottom of the growler or with a commercial filling machine.

(f) When not in use, tubes to fill or refill growlers shall be immersed and stored in a container with liquid food grade sanitizer.

(g) After filling or refilling a growler, the growler shall be sealed with a cap.

History Note: Authority G.S. 18B-100; 18B-206(a); 18B-207; 18B-1001(1), (2) and (16); FDA Food Code 2009, Section 3-304.17(c) and Section 4-204.13(a), (b) and (d);
Temporary Adoption Eff. October 25, 2013.

TITLE 08 – STATE BOARD OF ELECTIONS

Rule-making Agency: *State Board of Elections*

Rule Citation: *08 NCAC 13 .0201, .0202, .0203, .0204, .0205*

Effective Date: *January 1, 2014*

Date Approved by the Rules Review Commission: *October 17, 2013*

Reason for Action: *Cite: Session Law 2013-381, Section 4.6(b). Effective date: October 1, 2013. Session Law 2013-381, Section 4.6(b) mandates rulemaking, with agency adoption of temporary rules before October 1, 2013. The section specifies: "Such rules shall be initially established as temporary rules in accordance with Chapter 150B of the General Statutes."*

CHAPTER 13 – INTERIM RULES

SECTION .0200 - MULTIPARTISAN ASSISTANCE TEAMS

08 NCAC 13 .0201 MULTIPARTISAN ASSISTANCE TEAMS

(a) Each County Board of Elections shall assemble and provide training to a Multipartisan Assistance Team ("Team") to respond to requests for voter assistance for any primary, general election, referendum, or special election.

(b) For every primary or election listed in Subparagraph (a), the Team shall be made available in each county to assist patients and residents in every hospital, clinic, nursing home, or rest home ("covered facility") in that county in requesting or casting absentee ballots as provided by Subchapter VII of Chapter 163 of the General Statutes. For the purposes of this Rule, a covered facility is any facility that provides residential healthcare in the State that is licensed or operated pursuant to Chapter 122C, Chapter 131D, or Chapter 131E of the General Statutes, or by the federal government or an Indian tribe.

(c) The Team may assist voters in requesting mail-in absentee ballots, serve as witnesses to mail-in absentee voting, and otherwise assist in the process of mail-in absentee voting as provided by Subchapter VII of Chapter 163 of the General Statutes. Upon the voter's request, the Team shall assist voters who have communicated either verbally or nonverbally that they do not have a near relative, as defined in G.S. 163-230.1(f), or legal guardian available to provide assistance.

History Note: Authority G.S. 163-226.3(a)(4); S.L. 2013-381, Sec. 4.6(b);
Temporary Adoption Eff. January 1, 2014.

08 NCAC 13 .0202 TEAM MEMBERS

(a) The Team shall be composed as follows:
(1) At least two registered voters shall be on each Team. The two political parties having the highest number of affiliated voters in the state, as reflected by the registration statistics published by the State Board of Elections on January 1 of the most recent year, shall each be represented by at least one Team member of the party's affiliation. If the Team consists of more than two members, voters who are unaffiliated or affiliated with other political parties recognized by the State of North Carolina may be Team members.
(2) If a County Board of Elections finds an insufficient number of voters available to comply with Subparagraph (a)(1) of this Rule, the County Board, upon a unanimous vote of all of its sworn members, may appoint an unaffiliated voter to serve in lieu of the Team member representing one of the two political parties as set out in Subparagraph (a)(1) of this Rule.

(b) Team members may not be paid or provided travel reimbursement by any political party or candidate for work as Team members.

History Note: Authority G.S. 163-226.3(a)(4); S.L. 2013-381, Sec. 4.6(b);
Temporary Adoption Eff. January 1, 2014.

08 NCAC 13 .0203 TRAINING AND CERTIFICATION OF TEAM MEMBERS

(a) The State Board of Elections shall provide uniform training materials to each County Board of Elections. Each County

Board of Elections shall administer training for every Team member as directed by the State Board of Elections.

(b) Every Team member shall sign a declaration provided by the County Board of Elections that includes the following:

(1) A statement that the Team member will carry out the duties of the Team objectively, will not attempt to influence any decision of a voter being provided any type of assistance, and will not wear any clothing or pins with political messages while assisting voters;

(2) A statement that the Team member is familiar with absentee voting election laws and will act within the law, and the Team member will refer to County Board of Elections staff in the event the Team member is unable to answer any question;

(3) A statement that the Team member will not use, reproduce, or communicate to unauthorized persons any confidential information or document handled by the Team member, including the voting choices of a voter and confidential voter registration information;

(4) A statement that the Team member will not accept payment or travel reimbursement by any political party or candidate for work as a Team member;

(5) A statement that the Team member does not hold any elective office under the United States, this State, or any political subdivision of this State;

(6) A statement that the Team member is not a candidate for nomination or election, as defined in G.S. 163-278.6(4), for any office listed in Subparagraph (b)(5) of this Rule.

(7) A statement that the Team member does not hold any office in a State, congressional district, or county political party or organization, and is not a manager or treasurer for any candidate or political party. For the purposes of this Subparagraph, a delegate to a convention shall not be considered a party office;

(8) A statement that the Team member is not an owner, manager, director, or employee of a covered facility where a resident requests assistance;

(9) A statement that the Team member is not a registered sex offender in North Carolina or any other state; and

(10) A statement that the Team member understands that submitting fraudulent or falsely completed declarations and documents associated with absentee voting is a Class I felony under Chapter 163 of the General Statutes, and that submitting or assisting in preparing a fraudulent or falsely completed document associated with absentee voting may constitute other criminal violations.

(c) Upon completion of required training and the declaration, the County Board of Elections shall certify the Team member. Only certified Team members may provide assistance to voters. The certification shall be good for two years, or until the State Board of Elections requires additional training, whichever occurs first.

History Note: *Authority G.S. 163-226.3(a)(4); S.L. 2013-381, Sec. 4.6(b);*
Temporary Adoption Eff. January 1, 2014.

08 NCAC 13 .0204 VISITS BY MULTIPARTISAN ASSISTANCE TEAMS

(a) The State Board of Elections shall provide annual notice regarding availability of Teams in each county. The notice will provide information for covered facilities to contact the County Board of Elections to arrange a Team visit.

(b) If a facility, or a patient or resident of a facility, requests a visit by the Team, the County Board of Elections shall notify the Team and schedule a visit within seven calendar days if it is able to do so.

(c) On a facility visit, the composition of the visiting Team members shall comply with the requirements of Rule .0202(a)(1) or (a)(2) of this Section.

(d) All Team members shall remain within the immediate presence of each other while visiting or assisting patients or residents.

(e) At each facility visit, the Team shall provide the following assistance to patients or residents who request it. Before providing assistance, the voter must have communicated, either verbally or nonverbally, that he or she requests assistance by the Team:

(1) Assistance in requesting a mail-in absentee ballot: The Team shall collect any completed request forms and promptly deliver those request forms to the County Board of Elections office.

(2) Assistance in casting a mail-in absentee ballot: Before providing assistance in voting by mail-in absentee ballot, a Team member shall be in the immediate presence of another Team member whose registration is not affiliated with the same political party. If the Team members provide assistance in marking the mail-in absentee ballot, the Team members shall sign the voter's container-return envelope to indicate that they provided assistance as allowed by law. Team members may also sign the container-return envelope as a witness to the marking of the mail-in absentee ballot.

(f) The Team shall keep a record containing the names of all voters who received assistance or cast an absentee ballot during a visit, and submit that record to the County Board of Elections.

History Note: *Authority G.S. 163-226.3(a)(4); S.L. 2013-381, Sec. 4.6(b);*
Temporary Adoption Eff. January 1, 2014.

08 NCAC 13 .0205 REMOVAL OF TEAM MEMBERS

(a) The County Board of Elections shall revoke a Team member's certification, granted under Rule .0203 of this Section, for the following reasons:

(1) Violation of Chapter 163 of the General Statutes or one of the Rules contained in this Section;

(2) Political partisan activity in performing Team duties;

(3) Failure to respond to directives from the County Board of Elections; or

(4) Failure to maintain certification.

(b) If the County Board of Elections revokes a Team member's certification, the person may not participate on the Team.

History Note: *Authority G.S. 163-226.3(a)(4); S.L. 2013-381, Sec. 4.6(b);*
Temporary Adoption Eff. January 1, 2014.

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	Craig Croom

AGENCY	CASE NUMBER	DATE	PUBLISHED DECISION REGISTER CITATION
ALCOHOLIC BEVERAGE CONTROL COMMISSION			
James Ivery Smith, Ivy Lee Armstrong v. ABC Commission	11 ABC 08266	04/12/12	
Trawick Enterprises LLC v. ABC Commission	11 ABC 08901	05/11/12	27:01 NCR 39
Dawson Street Mini Mart Lovell Glover v. ABC Commission	11 ABC 12597	05/23/12	
ABC Commission v. Christian Broome Hunt T/A Ricky's Sports Bar and Grill	11 ABC 13161	05/03/12	
Alabarati Brothers, LLC T/A Day N Nite Food Mart, v. ABC Commission	11 ABC 13545	05/01/12	
Playground LLC, T/A Playground v. ABC Commission	11 ABC 14031	05/16/12	27:01 NCR 64
ABC Commission v. Quick Quality, Inc., T/A Rock Star Grill and Bar	11 ABC 14036	07/05/12	
ABC Commission v. D's Drive Thru Inc. T/A D's Drive Thru	12 ABC 00060	05/29/12	
ABC Commission v. Choudhary, LLC T/A Speedway	12 ABC 00721	05/01/12	
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	
ABC Commission v. Ola Celestine Morris T/A Nitty Gritty Soul Cafe	13 ABC 14197	10/09/13	
Two Brothers Food Market Inc., Circle Mart, Kenneth Kirkman v. ABC Commission	13 ABC 16233	09/30/13	
DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY			
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	
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	
DEPARTMENT OF HEALTH AND HUMAN SERVICES			
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, DMH, Developmental Disabilities, Substance Abuse Services, and agency of the State of NC	11 DHR 15098	11/13/12	

Althea L. Flythe v. Durham County Health Department	12 DHR 00242	05/17/12	
Jerri Long v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	12 DHR 00361	07/06/12	
Renal Advantage, Inc., v. DHHS, Division of Health Service Regulation, CON Section and DVA Healthcare Renal Care, Inc	12 DHR 00518	08/28/12	27:15 NCR 1553
Angela Moye v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	12 DHR 00642	08/23/12	27:12 NCR 1218
Jessica Lynn Ward v. DHHS	12 DHR 00643	05/17/12	
Trinity Child Care II & I v. DHHS, Division of Public Health, Child and Adult Care Food Program	12 DHR 00861	04/20/12	27:04 NCR 518
Dr. Karen J. Williams, LPC v. DHHS, Division of Medical Assistance	12 DHR 00926	09/18/12	
Faith Home Care of NC, Bonita Wright v. DHHS, DMA	12 DHR 00928	07/25/12	
Olar Underwood v. Division of Child Development and Early Education	12 DHR 00990	10/22/12	
Angela C Jackson v. DHHS	12 DHR 01097	06/19/12	
Paula N Umstead v. DHHS	12 DHR 01098	05/11/12	
Daniel W. Harris, Jr., v. DHHS, Division of Health Service Regulation	12 DHR 01138	10/19/12	
ACI Support Specialists Inc. Case #2009-4249 v. DHHS	12 DHR 01141	06/06/12	
AriLand Healthcare Service, LLC, NCMHL #018-092, Shawn Kuhl Director of Operations v. DHHS, Emery E. Milliken, General Counsel	12 DHR 01165	05/25/12	
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	
Nicole Lynn Hudson v. DHHS, Division of Health Service Regulation	12 DHR 01732	03/11/13	28:09 NCR 921
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	
Team Daniel, LLC v. DHHS, DMA	12 DHR 02162	09/11/13	27:16 NCR 1696
Leslie Taylor, Octavia Carlton, Paula Carlton	12 DHR 02217	08/31/12	
Madeline Brown v. DHHS, Division of Health Service Regulation	12 DHR 02257	06/01/12	
Evelyn Evans v. DHHS, Division of Health Service Regulation	12 DHR 02258	07/02/12	
Shannon Santimore v. DHHS, Division of Public Health, Epidemiology Section	12 DHR 02348	12/20/12	
Precious Haven Inc. Melissa McAllister v. DHHS, Program Integrity	12 DHR 02430	05/18/12	
Michael and Jamie Hart v. Davidson County, Department of Social Services	12 DHR 02542	07/03/12	
Annamae R. Smith v. DHHS, Division of Medical Assistance	12 DHR 02657	11/05/12	
Our Daily Living, Christopher OnWuka, Director v. DHHS	12 DHR 02777	10/17/12	
Right Trax Inc., Maria Lewis v. DHHS, Division of Health Service Regulation, Mental Health Licensure & Certification	12 DHR 02779	05/06/13	
Jessica L Thomas v. Randolph County DSS	12 DHR 02955	07/24/12	
Moses E Shoffner v. DHHS, Division of Child Development	12 DHR 03459	08/15/12	
Marco Evans v. DHHS, Division of Health Service Regulation	12 DHR 04110	07/30/12	
James C. Bartley v. DHHS, DMA	12 DHR 04116	07/25/12	
Estate of Mary P Lipe Medicaid ID #901463645S Alvena C Heggins v. DHHS, DMS (DHHS Medicaid)	12 DHR 04260	01/16/13	
Emelda Bih Che v. Health Care Personnel Registry	12 DHR 04834	01/24/13	
Daycare for all the Nations, Abura B. Jackson v. DHHS, Division of Child Development	12 DHR 04944	01/03/13	28:03 NCR 275
LaBrenda Jane Elliot v. DHHS, Division of Medical Assistance	12 DHR 04993	09/24/12	
Esther H Beal v. Office of Chief Medical Examiner	12 DHR 05094	11/14/12	27:21 NCR 1987
James Johnson v. DHHS, Division of Health Service Regulation	12 DHR 05148	09/11/12	
Youth Opportunities v. DHHS, Division of Medical Assistance	12 DHR 05227	07/11/13	
Tammy Isley v. Division of Child Development and Early Education	12 DHR 05405	05/15/13	
Cathy Crosland v. DHHS, Division of Health Service Regulation	12 DHR 05610	08/06/12	

Dwight William Osborne v. Glana M Surles, DHHS (Medicaid)	12 DHR 05693	09/14/12	
Brenda Triplett Andrews v. DHHS, Division of Health Service Regulation	12 DHR 05745	12/10/12	
Southern Living Home Care Agency Inc., v. DHHS	12 DHR 05864	11/06/12	
Symakla Home Healthcare v. DHHS-Hearing Office	12 DHR 05918	08/02/13	
Beverly Coleman v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry Section	12 DHR 05961	09/05/12	
Gregory Howard v. Health Care Personnel Registry	12 DHR 06157	09/07/12	
Joshua Goss v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	12 DHR 06158	03/04/13	
Harrison E Shell Jr v. Wake County Human Services	12 DHR 06203	08/28/12	
A Unique Solution Bertha M. Darden v. Division of Child Development & Early Education	12 DHR 06314	05/20/13	
Valtina Bronson v. DHHS, Division of Health Service Regulation	12 DHR 06365	08/29/12	
Danny Skipper AKA Danny Skipper v. DHHS, Division of Health Services Regulation	12 DHR 06403	10/22/12	
Stalin Bailon v. Department of Social Services	12 DHR 06528	10/17/12	
Tonya Diane Warfield v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry Section	12 DHR 06682	01/07/13	
Our Daily Living, Christopher OnWuka, Director v. DHHS	12 DHR 06683	10/17/12	
Latricia N. Yelton, OT v. DHHS, Division of Medical Assistance	12 DHR 06686	04/10/13	28:03 NCR 282
Brittney Nicole Brabham v. DHHS, Division Health Service Regulation, Healthcare Personnel Registry	12 DHR 06786	03/27/13	
Darina Renee Ford v. DHHS	12 DHR 07166	11/19/12	
Marquis Gerade Harrell v. DHHS, Health Care Personnel Registry, Leslie Chabet	12 DHR 07170	10/23/12	
Future Innovations, LLC and David F. Curtis v. DHHS, Division of Health Service Regulation, Mental Health Licensure Section	12 DHR 07215	04/16/13	28:05 NCR 443
Future Innovations, LLC and David F. Curtis v. DHHS, Division of Health Service Regulation, Mental Health Licensure Section	12 DHR 07216	04/16/13	28:05 NCR 443
Future Innovations, LLC and David F. Curtis v. DHHS, Division of Health Service Regulation, Mental Health Licensure Section	12 DHR 07217	04/16/13	28:05 NCR 443
KMG Holdings Inc. – The Lighthouse II of Clayton MHL #051-138 v. DHHS, Division of Health Licensure and Certification	12 DHR 07292	11/08/12	
Curtain Climbers, Rhonda Corn v. Division of Child Development, DHHS	12 DHR 07295	01/16/13	
Speakeasy Therapy, LLC v. DHHS, Division of Medical Assistance	12 DHR 07296	04/25/13	28:05 NCR 462
Faline Dial v. DHHS, Division of Medical Assistance	12 DHR 07440	02/07/13	28:05 NCR 488
PRN Medical Resources, PLLC v. DHHS, Division of Medical Assistance	12 DHR 07441	03/19/13	28:05 NCR 500
Denise Marie Shear v. DHHS, Division of Health Service Regulation	12 DHR 07547	11/07/12	
Irene Renee McGhee v. DHHS	12 DHR 07589	08/29/13	
Terique Epps, Family Legacy Mental Health Services DBA Task Inc v. DHHS and PBH	12 DHR 07616	11/09/12	
Angela Mackey v. DHHS, Division of Health Service Regulation	12 DHR 07619	10/05/12	
Eloise Dowtin v. The Emmanuel Home IV v. Division of Health Service Regulation	12 DHR 07620	11/06/12	
Orlando Stephen Murphy v. DHHS, DHSR, Health Care Personnel	12 DHR 07640	02/05/13	
Irene Wortham Center, Inc., v. DHHS, DMA	12 DHR 07699	04/12/13	
Yolanda McKinnon v. DHHS	12 DHR 07711	01/11/13	
Koffi Paul Aboagye v. DHHS, Division of Health Service Regulation	12 DHR 07731	11/20/12	
Mark Thomas v. DHHS, Division of Health Service Regulation	12 DHR 07853	01/04/13	
Annie Garner Ham v. DHHS, Division Health Service Regulation	12 DHR 08103	03/04/13	
Daniel Saft, A+ Residential Care (MHL #092-811) v. DHHS, DHSR, Mental Health Licensure and Certification Section	12 DHR 08197	01/16/13	
Jannett E. Myers v. DHHS, Division of Health Service Regulation	12 DHR 08257	08/07/13	
Gloria Mitchell v. DHHS, Division of Medical Assistance	12 DHR 08258	02/14/13	28:05 NCR 511
Katherine Free v. DHHS, Division of Medical Assistance	12 DHR 08395	04/12/13	
Ronald Dixon v. Division of Child Development, DHHS	12 DHR 08446	11/14/12	
Hillcrest Convalescent Center, Inc. v. DHHS, Division of Health Service Regulation, Certificate of Need Section, and E.N.W., LLC and Bellarose Nursing and Rehab Center, Inc.; Liberty Healthcare Properties of West Wake County, LLC, Liberty Commons Nursing and Rehabilitation Center of West Wake County, LLC, Liberty Healthcare Properties of Wake County LLC, and Liberty Commons Nursing and Rehabilitation Center of Wake County, LLC; Britthaven, Inc. and Spruce LTC Group, LLC; and AH North Carolina Owner LLC d/b/a The Heritage of Raleigh	12 DHR 08666	06/20/13	28:09 NCR 928
Liberty Healthcare Properties of West Wake County, LLC, Liberty Commons Nursing and Rehabilitation Center of West Wake County, LLC, Liberty Healthcare Properties of Wake County LLC, and Liberty Commons Nursing and Rehabilitation Center of Wake County, LLC v. DHHS, Division of Health Service Regulation, Certificate of Need Section, and Hillcrest Convalescent Center, Inc.; E.N.W., LLC and Bellarose Nursing and Rehab Center, Inc.; Britthaven, Inc. and Spruce LTC Group, LLC; and AH North Carolina Owner LLC d/b/a The Heritage of Raleigh	12 DHR 08669	06/20/13	28:09 NCR 928

Jah Mary Weese v. DHHS, Division of Health Service Regulation	12 DHR 08672	01/09/13	
AH North Carolina Owner LLC d/b/a The Heritage of Raleigh v. DHHS, Division of Health Service Regulation, Certificate of Need Section, and Hillcrest Convalescent Center, Inc.; E.N.W., LLC and Bellarose Nursing and Rehab Center, Inc.; Liberty Healthcare Properties of West Wake County, LLC, Liberty Commons Nursing and Rehabilitation Center of West Wake County, LLC, Liberty Healthcare Properties of Wake County LLC, and Liberty Commons Nursing and Rehabilitation Center of Wake County, LLC; and Britthaven, Inc. and Spruce LTC Group, LLC	12 DHR 08691	06/20/13	28:09 NCR 928
Mission Hospital, Inc. v. DHHS Division of Health Service Regulation Certificate of Need Section, and Fletcher Hospital, Inc. d/b/a Park Ridge Health and Carolina Gastroenterology Endoscopy Center, LLC	12 DHR 08733	06/18/13	28:10 NCR 1095
Clifford Lee Druml v. DHHS, Division of Medical Assistance	12 DHR 08776	04/25/13	
Natasha Dionne Howell v. DHHS, Division of Health Service Regulation	12 DHR 08814	03/07/13	
White Oak Homes II Inc., Lisa Atkinson v. DHHS, Mental Health Licensure and Certification Section, Division of Health Service	12 DHR 08994	02/08/13	
Erica Eileen Thomas v. DHHS, Division of Health Service Regulation	12 DHR 09139	04/17/13	
Tammy Isley v. Division of Child Development and Early Education	12 DHR 09350	05/15/13	
Eddie Cannon v. DHHS, Division of Health Service Regulation, Personnel Registry	12 DHR 09352	05/21/13	
Carolyn Ragin v. DHHS, Division of Health Services Regulation	12 DHR 09373	12/18/12	
Omar Vickers v. Office of Administrative Hearings	12 DHR 09475	04/16/13	
April Hood-Baker v. DHHS, DMA Glana M Surles	12 DHR 09489	01/15/13	
Heritage Home Care Agency Inc., Rico Akvia Wagner v. Department of Human Services Hearing Office	12 DHR 09511	07/05/13	
Surgical Care Affiliates, LLC and Blue Ridge Day Surgery Center, L.P. v. DHHS, Division of Health Service Regulation, Certificate of Need Section, and WakeMed	12 DHR 09678	07/23/13	
Tyshon & Shannetta Barfield v. DHHS	12 DHR 09692	02/08/13	
Vicki Lucas-Crowder v. Division of Medical Assistance	12 DHR 09832	04/26/13	
Cynthia M Rose v. Division of Child Development, DHHS	12 DHR 09846	01/23/13	
Gina Lynne Gilmore Lipscomb v. Health Care Personnel Registry	12 DHR 09953	09/17/13	
Asheville Speech Associates v. DHHS, Division of Medical Assistance	12 DHR 10367	06/21/13	
Our Daily Living MHL 032-481 Christopher Onwuka v. DHHS, DHSR, Mental Health Licensure and Certification	12 DHR 10402	05/06/13	
Glenda Lee Hansley v. DHHS	12 DHR 10430	08/01/13	
Sonia Coles Bowers v. DHHS, Division of Social Services	12 DHR 10511	08/26/13	
Carolina Solution, Inc v DHHS	12 DHR 10668	02/08/13	
A Unique Solution Bertha M. Darden v. Division of Child Development & Early Education	12 DHR 10926	05/20/13	
Angels Home Health, Charlotte Robinson, and LaShonda Wofford v. DHHS	12 DHR 11035	04/22/13	
David Keith Trayford v. Division of Medical Assistance via Administrative Hearing Office	12 DHR 11180	07/01/13	
Speech and Therapy Solutions v. DHHS	12 DHR 12402	03/27/13	
Treasure Dominique Corry v. State of NC Nurse Aide Registry	12 DHR 12408	03/15/13	
Bio-Medical Applications of North Carolina, Inc., D/B/A FMC Anderson Creek	12 DHR 19650	12/17/12	27:22 NCR 2101
Linda Johnson v. Caswell Center	13 DHR 01926	03/06/13	
Carolina Family Alliance, c/o Sabrian Mack Exec Director v. DHHS	13 DHR 02679	03/28/13	
Inder P Singh v. DHHS, WIC	13 DHR 05263	03/27/13	
Natasha Howell v. DHHS, Division of Health Service Regulation	13 DHR 07602	08/02/13	
Loretta Tinnin v. Division of Medical Assistance	13 DHR 08954	10/03/13	
Family Choice Home Care v. DHHS	13 DHR 08987	08/14/13	
Leenorta Cooper v. DHHS, Division of Health Service Regulation	13 DHR 09097	10/03/13	
Larry Ratliff, Jr., Alena Ratliff, Larry Ratliff, Sr. v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 09144	07/15/13	
Larry Ratliff, Jr., Alena Ratliff, Larry Ratliff, Sr. v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 09145	07/15/13	
Larry Ratliff, Jr., Alena Ratliff, Larry Ratliff, Sr. v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 09146	07/15/13	
Nikko & Shannon Scott v. DHHS	13 DHR 09422	06/26/13	
Clarice Johnson v. DHHS, Division of Health Service Regulation	13 DHR 09736	10/28/13	
Doris Wilson v. DHHS, Division of Health Service Regulation	13 DHR 09742	07/15/13	
Teresa Anne Davis v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 10037	09/20/13	
Marcella Marsh v. Forsyth County Department of Social Services	13 DHR 10124	06/21/13	
Wanda Jones v. DHHS	13 DHR 10289	08/15/13	
Berta M. Spencer v. DHHS, Office of the Controller	13 DHR 10335	07/05/13	
Benjamin Headen and Pamela Headen v. DHHS	13 DHR 10488	08/02/13	
Lelia Knox v. DHHS, Division of Child Development	13 DHR 10556	08/28/13	

Lashondrea Nixon v. DHHS, Division of Health Service Regulation	13 DHR 10594	08/30/13	
Edward E. Speaks, Jr. v. Central Regional Hospital	13 DHR 10749	09/10/13	
Scott Hollifield v. McDowell County DSS	13 DHR 10793	07/25/13	
Holly L. Crowell v. DHHS, Division of Health Service Regulation	13 DHR 11091	07/05/13	
Christopher H. Brown DDS PA v. Department of Medical Assistance	13 DHR 11610	07/01/13	
Lawson Support Services LLC v. DHHS, Division of Medical Assistance	13 DHR 11836	10/04/13	
Juan M. Noble v. DHHS, Division of Health Service Regulation	13 DHR 11965	07/12/13	
Monalisa Victoria Freeman v. DHHS, Division of Health Service Regulation	13 DHR 12328	07/31/13	
Johnathan Bradley v. DHHS, Division of Health Service Regulation	13 DHR 12685	08/02/13	
Melissa Stephen Ingle v. DHHS, Division of Child Development	13 DHR 12700	08/30/13	
E. W. Stone Adult Care Center, Evelyn W. Stone v. DHHS	13 DHR 12814	07/29/13	
Matthew Bradshaw v. DHHS, Division of Health Service Regulation	13 DHR 13381	09/03/13	
Countryside Villa Hal 026-046 John A. Weeks v. DHHS, Division of Health Service Regulation	13 DHR 13545	09/19/13	
Betty S. Mintz v. DHHS, Division of Health Service Regulation	13 DHR 13547	09/10/13	
Lashawn R. Holland v. DHHS, Division of Health Service Regulation	13 DHR 13858	09/03/13	
Thomas and Elberta Hudson v. DHHS, Division of Social Services	13 DHR 13957	08/02/13	
Victoria S. Hargrave v. DHHS, Division of Health Service Regulation	13 DHR 15147	08/07/13	
Paul A. Fredette v. DHHS, Division of Health Service Regulation	13 DHR 14025	09/30/13	
A Angel's Touch In Home Care v. DHHS	13 DHR 14303	09/24/13	
Candace Richardson v. Health Care Personnel Registry	13 DHR 15028	09/30/13	
Estate of Ross Lewis; Ronald B. Lewis v. Office of Administrative Hearings	13 DHR 16694	10/23/13	
DEPARTMENT OF ADMINISTRATION			
Meherrin Indian Tribe v. Commission of Indian Affairs	12 DOA 00986	01/18/13	
DEPARTMENT OF CORRECTIONS			
Myron Roderick Nunn v. Jennifer O'Neal, Accountant DOC	12 DOC 01022	07/12/12	
Moses Leon Faison v. Department of Correction	13 DOC 10227	04/08/13	
Clarence E. Williams, Jr. v. State of NC, D.H.O. Austin	13 DOC 12137	09/30/13	
Clarence E. Williams, Jr. v. State of NC, D.H.O. Linwood M. Best	13 DOC 14201	09/30/13	
DEPARTMENT OF JUSTICE			
Tommy Keith Lymon v. Criminal Justice Education and Training Standards Commission	09 DOJ 03751	07/30/12	27:06 NCR 649
Greary Michael Chlebus v. Criminal Justice Education and Training Standards Commission	11 DOJ 4829	04/27/12	
Steven Davis Boone v. Sheriffs' Education and Training Standards Commission	11 DOJ 06781	06/18/13	28:10 NCR 1062
Dillan Nathanuel Hymes v. Criminal Justice Education and Training Standards Commission	11 DOJ 10315	07/23/12	27:06 NCR 661
Barbara Renay Whaley v. Criminal Justice Education and Training Standards Commission	11 DOJ 10316	04/25/12	
Robert Kendrick Mewborn v. Criminal Justice Education and Training Standards Commission	11 DOJ 10318	04/23/12	
Athena Lynn Prevatte v. Sheriffs' Education and Training Standards Commission	11 DOJ 13148	05/25/12	27:04 NCR 529
Shatel Nate Coates v. Sheriffs' Education and Training Standards	11 DOJ 13151	07/05/12	
James Lee Ray v. Sheriffs' Education Training Standards	11 DOJ 13152	08/27/12	
Ko Yang v. Sheriff's Education and Training Standards Commission	11 DOJ 13153	06/14/12	
Dustin Edward Wright v. Sheriffs' Education and Training Standards Commission	11 DOJ 13154	08/08/12	
Walter Scott Thomas v. Sheriff's Education and Training Standards Commission	11 DOJ 13155	05/10/12	
Darryl Howard v. Criminal Justice Education and Training Standards Commission	11 DOJ 13157	04/12/12	
John Jay O'Neal v. Criminal Justice Education and Training Standards Commission	11 DOJ 13158	07/06/12	27:07 NCR 749
Charlesene Cotton v. Criminal Justice Education and Training Standards Commission	11 DOJ 13159	06/05/12	27:04 NCR 538
William James Becker v. Criminal Justice Education and Training Standards Commission	11 DOJ 13160	08/16/12	
Steve Michael Galloway, Jr, Private Protective Services Board	11 DOJ 14434	04/23/12	
Justin Thomas Medlin v. Alarm Systems Licensing Board	11 DOJ 14493	04/23/12	
Argentina Rojas v. Department of Justice, Campus Police Officer Commission	12 DOJ 00394	11/02/12	
Bruce Clyde Shoe v. Private Protective Services Board	12 DOJ 00556	09/26/12	
Angela Louise Giles v. Private Protective Services Board	12 DOJ 00557	04/18/12	
Marshall Todd Martin v. Sheriffs' Education	12 DOJ 00650	07/13/12	
Frances Gentry Denton v. Sheriffs' Education and Training Standards Commission	12 DOJ 00651	08/30/12	
James Philip Davenport v. Criminal Justice Education and Training Standards Commission	12 DOJ 00653	11/21/12	
Alvin Louis Daniels v. Criminal Justice Education and Training Standards Commission	12 DOJ 00654	08/17/12	
Michael Wayne McFalling v. Private Protective Services Board	12 DOJ 00814	05/21/12	
Robert John Farmer v. Alarm Systems Licensing Board	12 DOJ 00887	05/04/12	
Ricky Lee Ruhlman v. Private Protective Services Board	12 DOJ 01211	04/18/12	

Leroy Wilson Jr., Private Protective Services Board	12 DOJ 01293	04/18/12	
Clyde Eric Lovette v. Alarm Systems Licensing Board	12 DOJ 01498	05/02/12	
Vincent Tyron Griffin v. Alarm Systems Licensing Board	12 DOJ 01663	09/27/12	
Andre Carl Banks Jr., v. Alarm Systems Licensing Board	12 DOJ 01695	06/22/12	
Ryan Patrick Brooks v. Private Protective Services Board	12 DOJ 01696	06/05/12	
Dustin Lee Chavis v. Private Protective Services Board	12 DOJ 01697	06/01/12	
Jeffrey Adam Hopson v. Sheriffs' Education and Training Standards Commission	12 DOJ 01761	06/07/12	
John Henry Ceaser v. Sheriffs' Education and Training Standards Commission	12 DOJ 01762	06/18/12	
Jerome Douglas Mayfield v. Private Protective Services Board	12 DOJ 02381	06/15/12	
Elijah K. Vogel v. Private Protective Services Board	12 DOJ 02619	06/05/12	
Timmy Dean Adams v. Department of Justice, Company Police Program	12 DOJ 02778	12/21/12	
Carlito Soler v. Alarm Systems Licensing Board	12 DOJ 03457	09/26/12	
Danielle Marie Taylor v. Criminal Justice Education and Training Standards Commission	12 DOJ 03838	01/24/13	28:06 NCR 554
Rodney Lyndolph Bland v. Criminal Justice Education and Training Standards Commission	12 DOJ 03839	01/11/13	
Sherman Montrell Devon McQueen v. Criminal Justice Education and Training and Standards Commission	12 DOJ 03842	12/21/12	
Matthew Brian Hayes v. Criminal Justice Education and Training Standards Commission	12 DOJ 03843	11/27/12	27:22 NCR 2139
Antonio Cornelius Hardy v. Criminal Justice Education and Training Standards Commission	12 DOJ 03844	11/19/12	27:21 NCR 1994
Jonathan Dryden Dunn v. Sheriffs' Education and Training Standards	12 DOJ 03845	03/28/13	
Barry Louis Christopher, Jr v. Private Protective Services Board	12 DOJ 05041	08/27/12	27:15 NCR 1570
Bettina Hedwig Vredenburg v. Sheriffs' Education and Training Standards Commission	12 DOJ 05140	11/09/12	27:21 NCR 2002
Wallace Connell Ranson v. Sheriffs' Education and Training Standards Commission	12 DOJ 05141	05/07/13	28:07 NCR 676
Raymond Louis Soulet v. Sheriffs' Education and Training Standards Commission	12 DOJ 05142	08/27/12	
Graham Avon Hager v. Sheriffs' Education and Training Standards Commission	12 DOJ 05143	12/19/12	28:07 NCR 686
Dustin Wilson Grant v. Sheriffs' Education and Training Standards Commission	12 DOJ 05145	10/25/12	
Glenn Alvin Brand v. Sheriffs' Education and Training Standards Commission	12 DOJ 05146	10/08/12	
Shannon Wallace v. DHHS	12 DOJ 05355	02/26/13	
Lawrence W. Sitgraves v. Private Protective Services	12 DOJ 06059	09/13/12	
Collin Michael Berry v. Private Protective Services Board	12 DOJ 06590	10/22/12	
Tiffany Ann Misel v. Private Protective Services Board	12 DOJ 06817	10/17/12	
John Machouis v. Alarm Systems Licensing Board	12 DOJ 07161	12/19/12	
Christopher A. Field v. Private Protective Services Board	12 DOJ 07548	12/19/12	
Porschea Renee Williams v. Private Protective Services Board	12 DOJ 07549	01/09/13	
Ralph R. Hines v. Criminal Justice Education and Training Standards	12 DOJ 07812	11/07/12	
William Franklin Dietz v. Criminal Justice Education and Training Standards	12 DOJ 08010	02/19/13	
Elizabeth Crooks Goode v. Criminal Justice Education and Training Standards Commission	12 DOJ 08014	12/14/12	
Kareen Jesaad Taylor v. Sheriffs' Education and Training Standards Commission	12 DOJ 08018	04/02/13	28:08 NCR 751
Sabrina Richelle Wright v. Sheriffs' Education and Training Standards Commission	12 DOJ 08048	01/16/13	
Phillip Eugene Dendy v. Sheriffs' Education and Training Standards Commission	12 DOJ 08049	01/18/13	
Reginald E. James v. Private Protective Services Board	12 DOJ 08195	12/20/12	
Omega Young v. Private Protective Services Board	12 DOJ 08261	12/17/12	
Joseph T. Ferrara v. Private Protective Services Board	12 DOJ 08309	01/11/13	
Jovan Lamont Sears v. Private Protective Services Board	12 DOJ 08447	12/20/12	
Christopher Robell Hunter v. Sheriffs' Education and Training Standards Commission	12 DOJ 10182	05/07/13	28:08 NCR 758
Marilyn Cash Smalls v. Sheriffs' Education and Training Standards Commission	12 DOJ 10188	04/29/13	
Timothy Allen Bruton v. Criminal Justice Education and Training Standards Commission	12 DOJ 10199	05/29/13	
Bilal Abdus-Salaam v. Ciminal Justice Education and Training Standards Commission	12 DOJ 10200	08/16/13	
Lee Daniel Wilkerson v. Criminal Justice Education and Training Standards Commission	12 DOJ 10201	10/10/13	
Brad Tisdale v. Criminal Justice Education Training Standards Commission	12 DOJ 10203	05/06/13	
Clinton Weatherbee Jr v. Criminal Justice Education and Training Standards Commission	12 DOJ 10206	03/25/13	
JonPaul D. Wallace v. Private Protective Services Board	13 DOJ 02422	04/26/13	
Andrew George Anderson v. Sheriffs' Education and Training Standards Commission	13 DOJ 03417	08/29/13	
Frank John Fontana, Jr. v. NC Alarm Systems Licensing Board	13 DOJ 03740	09/12/13	
Jerome Douglas Mayfield v. Private Protective Services Board	13 DOJ 04393	04/26/13	
Cameron Imhotep Clinkscale v. Private Protective Services Board	13 DOJ 05095	04/26/13	
Eddie Hugh Hardison v. Private Protective Services Board	13 DOJ 08765	04/02/13	
Tony Lynn Cannon v. Sheriffs' Education and Training Standards Commission	13 DOJ 09567	10/22/13	
Marcus Teer Benson v. Private Protective Services Board	13 DOJ 09974	05/15/13	28:10 NCR 1155
LaMarcus Jarrel Outing v. Criminal Justice Education and Training Standards Commission	13 DOJ 11932	08/07/13	
Jeffrey D. Angell v. NC Alarm Systems Licensing Board	13 DOJ 12333	10/09/13	
Myron Troy Davidson v. Private Protective Services Board	13 DOJ 13379	09/13/13	
Marcus L. Fuller v. Private Protective Services Board	13 DOJ 13653	09/03/13	

DEPARTMENT OF LABOR			
United Quest Care Services v. Department of Labor	13 DOL 12224	09/17/13	
DEPARTMENT OF TRANSPORTATION			
Lorie Cramer v. NC Quick Pass Customer Service Center and DOT	13 DOT 08753	07/19/13	28:06 NCR 589
DEPARTMENT OF STATE TREASURER			
Dwaine C. Coley v. Department of State Treasurer	10 DST 00233	04/05/13	28:02 NCR 81
Ella Joyner v. Department of State Treasurer Retirement System Division	11 DST 02437	07/12/12	27:07 NCR 758
William R. Tate v. Department of Treasurer, Retirement System Division	11 DST 04675	09/07/12	27:15 NCR 1574
Brenda C. Hemphill v. Department of Treasurer, Retirement System Division	11 DST 10252	09/26/12	
Russell E. Greene v. Department of State Treasurer Retirement Systems Division	11 DST 10875	06/14/12	27:04 NCR 543
James A Layton v. Department of State Treasurer	11 DST 12958	11/30/12	
Marsha W Lilly, Robert L Hinton v. Retirement System	12 DST 01108	05/22/12	
STATE BOARD OF EDUCATION			
Louis A. Hrebar v. State Board of Education	11 EDC 01445	07/27/12	
Delene Huggins v. Department of Public Instruction	11 EDC 08899	06/28/12	
Myra F. Moore v. NC Board of Education	11 EDC 11927	05/01/12	
Dwayne White v. Department of Public Instruction, NC State Board of Education	11 EDC 11864	07/18/12	27:07 NCR 769
Jeffery Sloan v. NCDPI	11 EDC 14077	11/09/12	27:21 NCR 1974
Lia C Long v. DPI	12 EDC 00805	10/18/13	27:16 NCR 1716
North Carolina Learns Inc. d/b/a North Carolina Virtual Academy	12 EDC 01801	05/18/12	
Katherine Kwesell Harris v. Public Schools, Board of Education	12 EDC 06520	09/05/12	
Bonnie Aleman v. State Board of Education, Department of Public Instruction	12 EDC 07293	06/14/13	
Emma Seward v. Department of Public Instruction	12 EDC 07438	07/17/13	
Jodi Esper v. Department of Public Instruction	12 EDC 10259	06/04/13	
Wanda McLaughlin v. State Board of Education	12 EDC 12410	03/27/13	
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES			
Pamlico-Tar River Foundation, NC Coastal Federation, Environmental Defense Fund, and Sierra Club v. DENR, Division of Water Quality and PCS Phosphate Company, Inc	09 EHR 1839	04/26/12	27:01 NCR 87
ALCHEM Inc., v. NCDENR	10 EHR 00296	02/05/13	
Don Hillebrand v. County of Watauga County Health Dept	10 EHR 00933	05/10/12	
ALCHEM Inc., v. NCDENR	10 EHR 05463	02/05/13	
House of Raeford Farms, Inc., v. DENR	10 EHR 05508	05/31/12	27:01 NCR 99
Lacy H Caple DDS v. Division of Radiation Protection Bennifer Pate	11 EHR 11454	05/09/12	
Friends of the Green Swamp and Blue Ridge Environmental Defense League, Inc v. DENR Division of Waste Management and Waste Management of the Carolinas, Inc., d/b/a Waste Management of Wilmington	11 EHR 12185	08/08/12	27:12 NCR 1224
Holmes Development & Realty, LLC, and H.L. Homes v. DENR – Land Quality Section (Re: LQS 11-018)	11 EHR 13208	06/29/12	27:07 NCR 774
Ik Kim IT and K Enterprise v. DENR	11 EHR 13910	11/06/12	
Edward Dale Parker v. DENR	11 EHR 14390	02/22/13	
Janezic Building Group LLC v. Orange County	12 EHR 01104	12/03/12	27:21 NCR 2008
Save Mart of Duplin LLC v. DENR	12 EHR 02328	07/25/12	
NC Coastal Federation, Cape Fear River Watch, PenderWatch, and Conservancy Sierra Club v. DENR, Division of Air Quality and Carolina Cement Company, LLC	12 HER 02850	09/23/13	
James D. Halsey v. DENR, Division of Environmental Health	13 HER 10216	06/05/13	
DIVISION OF EMPLOYMENT SECURITY			
Dwight Marvin Wright v. Department of Commerce, Division of Employment Security	12 ESC 05042	07/27/12	
DEPARTMENT OF INSURANCE			
Megan L. Hartzog v. NC State Health Plan	12 INS 00364	05/06/13	28:07 NCR 691
Jan Fjelsted v. NC State Health Plan	12 INS 04763	01/16/13	28:07 NCR 706

Susan E. Montgomery Lee v. State Health Plan; Blue Cross Blue Shield	12 INS 10145	03/25/13	
Lori Matney v. Blue Cross Blue Shield of NC, State Health Plan	12 INS 10790	08/20/13	
Jean Kirkland and John Ritchie v. State Health Plan	12 INS 11957	04/11/13	

MISCELLANEOUS

Richard Lee Taylor v. City of Charlotte	11 MIS 14140	05/15/12	
Lloyd M Anthony v. New Hanover County Sheriff Office	12 MIS 01803	06/07/12	
Jackie Poole, Jamyan Brooks v. Orange County	12 MIS 02379	11/09/12	27:21 NCR 2016
David L. Smith v. NC Innocence Inquiry Commission	13 MIS 12404	06/19/13	28:10 NCR 1160
Thomas Franklin Cross, Jr. v. NC Innocence Inquiry Commission	13 MIS 12642	06/19/13	28:10 NCR 1160
Moses Leon Faison v. NC Parole Commission, Paul G. Butler, Jr.	13 MIS 13004	09/05/13	
Jabar Ballard v. NC Innocence Inquiry Commission	13 MIS 13005	06/19/13	28:10 NCR 1160

OFFICE OF STATE PERSONNEL

Amanda Thaxton v. State Ethics Commission	09 OSP 03754	09/20/12	
Dorothy H. Williams v. DHHS, Central Regional Hospital	10 OSP 5424	03/28/12	27:01 NCR 119
Stephen R. West v. The University of North Carolina at Chapel Hill	10 OSP 01567	11/26/12	27:21 NCR 1959
Larry F. Murphy v. Employment Security Commission of North Carolina	10 OSP 03213	06/04/12	
Walter Bruce Williams v. Dept. of Crime Control and Public Safety Butner Public Safety Division	10 OSP 03551	04/23/12	27:01 NCR 148
Teresa J. Barrett v. DENR	10 OSP 04754	10/22/12	27:16 NCR 1726
Daniel Chase Parrott v. Crime Control and Public Safety, Butner Public Safety Division	10 OSP 04792	05/30/12	
Steven M Mukumgu v. DAG	10 OSP 05199	08/07/12	
Beatrice T. Jackson v. Durham County Health Department	11 OSP 3835	06/08/12	
Brenda D. Triplett v. DOC	11 OSP 4605	03/20/12	27:06 NCR 669
Tommie J. Porter v. DOC	11 OSP 5352	06/05/12	27:06 NCR 678
Fortae McWilliams v. DOC	11 OSP 06236	05/30/12	27:06 NCR 684
Kimberly F. Loflin v. DOT, DMV	11 OSP 06762	07/10/12	
John Hardin Swain v. DOC, Hyde Correctional Inst.	11 OSP 07956	04/23/12	27:06 NCR 693
John Fargher v. DOT	11 OSP 08111	04/18/12	
Maria Isabel Prudencio-Arias v. UNC at Chapel Hill	11 OSP 09374	03/28/13	28:02 NCR 99
Gerald Price v. Department of Agriculture & Consumer Services, Standards Division	11 OSP 09588	02/27/13	28:02 NCR 139
Tammy Cagle v. Swain County, Department of Social Services	11 OSP 10307	09/26/12	27:16 NCR 1747
Doris Wearing v. Polk Correctional Inst. Mr. Soloman Superintendent	11 OSP 11023	10/19/12	
Fredericka Florentina Demmings v. County of Durham	11 OSP 11498	06/12/12	
Derick A Proctor v. Crime Control and Public Safety, State Capital Police Division	11 OSP 11499	12/06/12	
David B. Stone v. Department of Cultural Resources	11 OSP 11926	08/10/12	27:12 NCR 1245
Pattie Hollingsworth v. Fayetteville State University	11 OSP 12152	02/27/13	
William C. Spender v. Dept. of Agriculture & Consumer Services, Veterinary Division	11 OSP 12479	04/27/12	
Terrence McDonald v. NCSU	11 OSP 12682	05/21/12	
Terrence McDonald v. DHHS, Emery Milliken	11 OSP 12683	05/18/12	
Phyllis Campbell v. DOC	11 OSP 13381	08/27/12	27:15 NCR 1579
Raeford Quick v. DOC	11 OSP 14436	05/22/12	
Tawana McLaurin v. DOC	12 OSP 00116	08/21/12	
Vera Ricks v. NC Department of Public Safety	12 OSP 00246	03/28/13	28:07 NCR 714
Marva G. Scott v. Edgecombe County Social Services Board (Larry Woodley, Fate Taylor, Ernest Taylor, Viola Harris and Evelyn Johnson), Edgecombe County Commissioners and Edgecombe county manager, Lorenzo Carmon	12 OSP 00430	12/20/12	27:22 NCR 2152
Ladeana Z. Farmer v. Department of Public Safety	12 OSP 00460	04/10/13	28:06 NCR 564
Rhonda Whitaker v. DHHS	12 OSP 00519	05/17/13	28:08 NCR 766
Thomas B. Warren v. DAG, Forest Services Division	12 OSP 00615	11/27/12	
Bon-Jerald Jacobs v. Pitt County Department of Social Services	12 OSP 00634	06/12/12	
Sherry Baker v. Department of Public Safety	12 OSP 00841	10/09/12	
Diane Farrington v. Chapel Hill-Carrboro City Schools	12 OSP 01300	07/12/12	
Cynthia Moats v. Harnett County Health Dept	12 OSP 01536	08/10/12	
Natalie Wallace-Gomes v. Winston-Salem State University	12 OSP 01627	05/15/12	
Clark D. Whitlow v. UNC-Chapel Hill	12 OSP 01740	06/12/12	
John Medina v. Department of Public Safety	12 OSP 01940	01/30/13	28:08 NCR 783
Jeffrey L Wardick, v. Employment Securities Commission of NC	12 OSP 02027	07/17/12	
Ricco Donnell Boyd v. NC A&T University	12 OSP 02219	01/31/13	

Larry C. Goldston v. UNC-Chapel Hill	12 OSP 02222	09/26/12	27:16 NCR 1754
Larry Batton v. Dept of Public Safety	12 OSP 02320	02/18/13	
Sandra Kay Tillman v. County of Moore Department of Social Services, John L. Benton, Director	12 OSP 02433	07/29/13	
Sheila Bradley v. Community College System Sandhills Community College	12 OSP 02473	06/06/12	
Brenda S. Sessoms v. Department of Public Safety	12 OSP 02507	07/25/12	
Donnette J Amaro v. Onslow County Department of Social Services	12 OSP 02578	11/21/12	
Ronald Gilliard v. N.C. Alcoholic Law Enforcement	12 OSP 02618	09/26/12	
Kimberly Hinton v. DOT	12 OSP 02848	10/05/12	
James B. Bushardt III v. DENR, Division of Water Quality	12 OSP 02872	02/19/13	
Natalie Wallace-Gomes v. Winston Salem State University	12 OSP 02950	08/01/12	
Katie F. Walker v. Rutherford County/Department of Social Services	12 OSP 03041	03/15/13	28:08 NCR 791
Norlishia Y. Pridgeon v. Department of Public Safety, Division of Adult Correction and Department of Corrections	12 OSP 03150	08/02/13	
Jaymar v. Department of Corrections, Central Prison	12 OSP 03381	07/20/12	
Ronald Wayne Crabtree Jr., v. Butner Public Safety	12 OSP 03846	10/09/12	
Natalie Wallace-Gomes v. Winston Salem State University	12 OSP 03910	10/22/12	
Natalie Wallace-Gomes v. Winston Salem State University	12 OSP 04107	10/22/12	
Michelle Houser v. Department of Public Safety, Division of Prisons	12 OSP 04826	09/26/12	
Audrey Melissa Tate v. Department of Public Safety, Division of Juvenile Justice	12 OSP 05182	08/03/12	
Jonathan Ashley Stephenson v. UNC-Chapel Hill	12 OSP 05223	01/15/13	
Charles E. Rouse v. DMV, Dist Sup Stacey Wooten	12 OSP 05315	09/05/12	
Edwards Robert Esslinger v. DPI	12 OSP 05459	09/12/12	
Barry L. Pruett v. DMV, Driver and Vehicle Services	12 OSP 05785	09/11/12	
Joseph Sandy v. UNC Chapel Hill	12 OSP 06152	09/05/12	
Natalie Wallace-Gomes v. Winston Salem State University	12 OSP 06309	10/22/12	
Paul Jeffrey Treadway v. Department of Public Safety, Division of Adult Supervision	12 OSP 06634	12/18/12	
Phillip W Smith v. Department of Commerce, Division of Employment Security	12 OSP 06821	09/20/12	
Asia T. Bush v. DOT	12 OSP 06980	04/23/13	28:03 NCR 293
Bonnie S. Rardin v. Craven Correctional Institution, Department of Public Safety	12 OSP 07443	04/19/13	
Shirley M. Parker v. Department of Public Safety Caledonia Correctional Institution	12 OSP 07617	04/04/13	
Christopher Rashad Pippins v. PCS BOE PCS Facility Services	12 OSP 07744	10/18/12	
Wanda Edwards v. UNC School of Dentistry	12 OSP 07851	01/09/13	
Gary C. Clement v. DHHS	12 OSP 08105	11/14/12	
Oswald Woode v. DHHS, Central Regional Hospital	12 OSP 08664	01/09/13	
Gary C. Clement v. DHHS	12 OSP 09581	01/04/13	
Daniel J. Dugan, Jr. v. UNCW	12 OSP 10620	10/15/13	
Judy Knox v. UNC at Charlotte	12 OSP 10856	07/11/13	
Sherry Young v. DHHS, Division of Child Development and Early Education	12 OSP 11078	10/07/13	
David Ryan Brown v. Department of Public Safety, Division of Community Corrections	12 OSP 12179	10/08/13	
David A. Tuno v. Lincoln Correctional Center	13 OSP 00031	09/10/13	
Jeffrey Wayne Ellis v. North Carolina A & T University	13 OSP 09564	08/08/13	
Kimberly D. Hinton v. Department of Transportation	13 OSP 09565	09/06/13	
Wiley Daniel Thomas v. Department of Transportation, Division of Motor Vehicles	13 OSP 10577	10/07/13	
Helen Karen Radford v. Buncombe County Department of Health	13 OSP 10629	09/27/13	
Alphonsus U. Nwadike v. DHHS, Central Regional Hospital (Butner)	13 OSP 10977	07/15/13	
Kevin D. Terry v. State of NC Office of State Controller	13 OSP 11088	07/15/13	
Lionel James Randolph v. NC Office of State Personnel	13 OSP 11170	07/15/13	
Cynthia C. Goodwin v. Department of Revenue	13 OSP 11232	08/02/13	
Robert E. Hines v. Department of Transportation	12 OSP 11278	09/13/13	
Natalie Wallace-Gomes v. Winston-Salem State University	13 OSP 11293	08/13/13	
Joann C. Pearson v. UNC-Charlotte	13 OSP 11562	09/17/13	
Rotisha Hawthorne v. Department of Safety (Polk)	13 OSP 12639	09/05/13	
Stephanie K. Willis v. Montgomery County Board of Education	13 OSP 13012	08/07/13	
David M. Andrews v. Department of Transportation, Technical Services-Client Support	13 OSP 15144	10/03/13	
Luchana A. Woodland v. Fayetteville State University	13 OSP 15499	09/11/13	
Mary E. Wilson v. Mecklenburg County, NC	13 OSP 15512	10/03/13	

DEPARTMENT OF REVENUE

Jerry Lamont Lindsey v. Department of Revenue	11 REV 1914	07/25/12	
Thomas E Gust v. Department of Revenue	11 REV 13557	08/15/12	
James Cooper III Sui Juris v. Department of Revenue	11 REV 13792	11/14/12	
Brian Daniel Reeves v. Department of Revenue	12 REV 01539	06/04/12	

David Roser v. Department of Revenue	12 REV 01694	09/10/12	
Ronnie Lee Nixon v. Department of Revenue	12 REV 01881	10/03/12	
James M. Slowin, REFS LLC v. Department of Revenue	12 REV 02218	02/11/13	28:06 NCR 583
William S. Hall v. Department of Revenue	12 REV 04115	08/27/12	
Noah D. Sheffield v. Department of Revenue	12 REV 07074	11/14/12	
Jenny M. Sheffield v. Department of Revenue	12 REV 07075	11/14/12	
Jesus A. Cabrera v. Department of Revenue	12 REV 08968	01/03/13	
Sybil Hyman Bunn v. Department of Revenue	12 REV 08973	05/06/13	
William Scott v. Department of Revenue	13 REV 06646	04/29/13	28:06 NCR 593
Chase Auto Finance Corporation v. Department of Revenue	13 REV 10115	06/19/13	28:10 NCR 1164

OFFICE OF SECRETARY OF STATE

Michael Anthony Farrow-Bey v. Department of Secretary of State	12 SOS 07865	12/14/12	
Jennifer Lynn Pierce-Founder Share Our Shoes v. Secretary of State's Office	12 SOS 01653	07/11/12	
Bethany Thompson v. Department of the Secretary of State	12 SOS 11648	05/02/13	
Holley Shumate Knapp v. Ann Wall, General Counsel Department of the Secretary	13 SOS 09039	05/23/13	
Trvuun B. Alston v. Department of the Secretary of State	13 SOS 10113	07/08/13	
John Claude Barden v. Department of the Secretary of State	13 SOS 12528	10/03/13	

UNC HOSPITALS

Onyedika C Nwaebube v. UNC Hospitals	12 UNC 01110	06/25/12	
Nephatiya Wade v. UNC Hospitals Chapel Hill NC	12 UNC 01209	07/17/12	
Fredia R Wall v. UNC Physicians & Associates	12 UNC 02256	10/04/12	
Carolyn A. Green v. UNC Hospitals	12 UNC 02259	09/19/12	
Annie E. Jarrett v. UNC Hospitals	12 UNC 03716	10/09/12	
Vikki J Goings v. UNC Hospital	12 UNC 04109	09/18/12	
Elonnie Alston v. UNC Hospitals	12 UNC 04551	09/11/12	
Diara Z Andrews v. UNC Hospitals	12 UNC 04827	08/15/12	
David Ryan Pierce v. UNC Hospitals, Patient Account Services, SODCA	12 UNC 05306	03/20/13	
Shonte Hayes v. UNC P&A	12 UNC 05746	09/10/12	
Tracy A. Spaine (Currier) v. UNC Hospitals	12 UNC 06822	11/06/12	
Candis Miller v. UNC Hospitals	13 UNC 10374	08/19/13	
Chiduzie Oriaku v. UNC Hospitals	13 UNC 11434	10/07/13	
Jason Paylor v. UNC Hospitals Patient Accounts	13 UNC 12636	07/26/13	

WILDLIFE RESOURCES COMMISSION

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

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STATE OF NORTH CAROLINA

COUNTY OF SURRY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11DOJ06781

Steven Davis Boone Petitioner, v. North Carolina Sheriffs' Education and Training Standards Commission Respondent.	**PROPOSAL FOR DECISION**

This contested case was heard on December 3 through December 7, 2012 by Administrative Law Judge J. Randall May in High Point, North Carolina.

APPEARANCES OF COUNSEL

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ISSUES

1. Whether Petitioner's justice officer certification should be denied based upon the allegation that Petitioner lacks sufficient good moral character to serve as a justice officer?

A) Whether Petitioner has good moral character?

2. Whether Petitioner's justice officer certification should be denied based upon the allegation that Petitioner committed larceny?

A) Whether all elements of larceny were established with substantial evidence?

CHARGES/RULES IN ISSUE

1. Good moral character, 12 NCAE 10B.030(a)(8).

2. Larceny, N.C.G.S. 14-72.

FINDINGS OF FACT

Based upon careful consideration of the sworn testimony of the witnesses who testified at the hearing, the exhibits admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following findings of fact. In making these findings of fact, the undersigned has weighed all of the evidence, or the lack thereof, and has assessed the credibility and believability of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witnesses, any interests, biases or prejudices the witness may have, the opportunity of the witnesses to see, hear, know or remember the facts or occurrences about which the witnesses testified, and whether the testimony of the witnesses are reasonable and consistent with other believable evidence in the case.

Testimony of District Attorney Ricky Bowman

1. The first witness called by Petitioner was Clifford Ricky Bowman, the elected District Attorney for Judicial District 17B, which includes Surry and Stokes Counties. T26 Mr. Bowman has been a licensed attorney since 1984. He practiced law from 1984 to 1995. T27 Bowman became District Attorney in 1995. T27

2. Bowman estimated that he has known Boone for at least 20 years. T27 Bowman explained how he worked with Boone prosecuting cases, and how he could count on Boone and depended on him to tell the truth. T28-29

3. Bowman explained that Boone was "a good resource." T29 He explained that Boone was "someone who would always volunteer to go out and go the extra mile." T29 Bowman explained that "in all my years of prosecuting cases with him in District Court or being involved with him in investigations, he had always been honest and truthful with me as far as I could tell." T30

4. Bowman gave examples of Boone's work while he was off-duty, including on weekends when he was off work with his family "and still went and done what he needed to do. He was just someone we could always count on." T31 Bowman explained that he or any of his Assistant District Attorneys could call "Steve at eleven o'clock at night or early morning, and we could get a response because he knew his law, and we could count on him ... he was just always very helpful." T31

5. Bowman further explained: "I can say in all my years of working with Steve Boone I never had a defense attorney ever question Steve Boone's honesty ... I never heard a defense attorney criticize Steve Boone or question his honesty." T32 Bowman never had one of his

Assistant District Attorneys ever question Boone's honesty. T32 Bowman explained that Boone had a reputation for being honest and that he had never heard anyone question his honesty. T33

6. Bowman further explained that Boone also had a reputation for being a good father and a good husband. T33 He explained how Boone was involved in his community and that Boone "was a great public relations representative for ALE." T33 Bowman explained that Boone was "someone in our small community that everyone could always call for assistance..." T34

7. Bowman testified that Boone's moral character "is as good as any I've ever seen." T35 He explained that Boone "goes to church, and he really goes to church ... he appears to be a man who generally cares about his community." T35

8. Bowman was familiar with the working space provided to Boone at the Sheriff's Department. T37 It was a cubicle. T37 He described it as being a "little cubicle, it was full of supplies. The man had nowhere to sit ... you couldn't work there comfortably." T37 Whenever Bowman or an Assistant District Attorney had a question or needed assistance, they did not go to Boone's office because "everyone could hear your conversation, and everyone's coming through the door." T38 In summary Bowman opined that the space provided by the Sheriff was too small and inadequate to conduct business

9. Bowman explained that it did not surprise him at all that Boone resulted to working at home in order to get his job done. T38 It also did not surprise Mr. Bowman that Boone would need to work at home. T39

10. Bowman explained how Boone "wasn't afraid of hard work. If he was on his time off, he would go to work." T45

11. A magistrate informed Bowman if he had a question at three o'clock in the morning, he would call Boone and ask him about the statutes. "Steve Boone was not one to leave his phone unhooked or have an answering machine. He would answer that phone every time, even on vacation." T45 Bowman explained that if he called Boone, "he was there for me and my office when - - any time I needed him." T46

12. Bowman explained how he was not social friends with Boone, they did not go to church together, they did not eat out together, and their children did not play together. T46 Bowman explained that "in my work experience with him, he was - - he was one of the best. He was someone I could always count on and depend on." T46

13. Bowman explained that "when Steve Boone was removed from his job it was a bad thing for my community." T49

14. District Attorney Bowman was a credible and believable witness.

Testimony of Magistrate Donnie Marion

15. The second witness called by Petitioner was Donnie Marion, who is a retired Magistrate from Surry County who served for twenty eight years as a Magistrate and worked with Boone. T53 Marion has known Boone approximately twenty years. T53 Boone would appear before Marion, including presenting evidence to him. T54 Marion has had opportunities to observe Boone in his professional capacity as a law enforcement officer. T54 Marion knew Boone through his work and through civic and social activities and they attended the same church. T54-55

16. Marion described Boone as "very intelligent." T55 He explained how he would call Boone at all hours of the night, at two, three and four o'clock in the morning to ask his opinion on different things that related to the statutes within 18B. T55 Marion explained that when he called Boone at two, three or four o'clock in the morning, Boone "always answered the phone." T55 Marion explained how Boone worked beyond the tour of his assigned duty and that he did his job seven days a week, twenty four hours a day. T56

17. Marion testified that Boone had a "very good reputation throughout the community, throughout law enforcement and throughout our church, throughout the little league, throughout the county." T56 Marion testified as to Boone's reputation within the court system as being "very good, never heard of any of Steve's testimonies questioned..." T56 Marion observed that Boone's "morals were impeccable." T57

18. Marion explained that any time he called or referred someone to Boone, that Boone was always available. T61

19. Magistrate Marion was a credible and believable witness.

Testimony of Dr. Moira Artigues

20. The next witness called by the Petitioner was Dr. Moira Artigues, a Forensic Psychiatrist. T73

21. Dr. Artigues is engaged in the private practice of psychiatry, where she sees patients and does forensic psychiatric evaluations. T84 Dr. Artigues treats patients with various types of psychiatric illnesses and disorders. T85

22. Dr. Artigues is familiar with Adult Attention Deficit Disorder (ADD) and has diagnosed patients with that condition numerous times. T85

23. Dr. Artigues completed a residency in psychiatry at Duke University and then completed an extra year in forensic psychiatry training. T85

24. Dr. Artigues is Board Certified in both general and forensic psychiatry. T89 Dr. Artigues' resume, which appears in Exhibit 12, fairly and accurately shows the primary areas of

her qualifications, experience and training. T89 Dr. Artigues earned her general Board Certification in 2002 and her Forensic Board Certification in 2003. T90

25. Dr. Artigues has provided expert testimony between 90 and 100 times. T90 She has testified in various hearings where medical and mental health issues were involved. T90 Dr. Artigues has active patients who she treats for ADD and is familiar with the medication known as Strattera. T91

26. Dr. Artigues is a qualified forensic psychiatrist based on her credentials and experience. Dr. Artigues' report and testimony are credible and believable.

27. As a part of Dr. Artigues' analysis, she reviewed the medical records, notes and reports of Dr. Charlotte Evans. T91-92 Dr. Artigues considered and used those documents as a part of her professional opinion set forth in her expert report. T92

28. Dr. Artigues diagnosed Boone with ADD and her diagnosis was consistent with the diagnosis of Dr. Evans. T92

29. Dr. Artigues determined that Boone had ADD since childhood, which was undiagnosed until 2009. T95-96 Dr. Artigues explained that it was very common for someone to have ADD for a number of years when it was undiagnosed. T96

30. Dr. Artigues explained that Boone "needed a quiet, distraction-free workplace in which to complete his paperwork due to having ADD." T96 Dr. Artigues observed in her evaluation that Boone seemed to be a very conscientious person who resorted to working at home as a last desperate act to get his work done on time. T97 Working at home is something that Boone had been doing for fifteen years, so it wasn't out of line with what he had done in the past. T97

31. Boone offered supervisors alternatives that would assist him in getting his work done in a timely way and in an organized way, which had not been adequately addressed, and he resorted to working at home with the feeling that was the only way he could get his work done in a timely way. T97 Boone's working from home was a form of compensating for his condition. T97

32. Dr. Artigues observed that Boone had tried a lot of other things; he had tried to offer alternative office spaces and he had worked in his car for a certain amount of time and it was not working for him. T98 Boone resorted again to working at home to compensate for his ADD. T98

33. Dr. Artigues explained that ADD is considered a disabling or impairing condition. T98

34. Dr. Artigues observed that working from home, under the circumstances confronting Boone, was very reasonable. T99

35. ADD has recognized symptoms including symptoms that relate to frontal lobe dysfunction. T99-100 The frontal lobe is considered to be the command and control center of the brain. T100

36. Dr. Artigues explained that someone with ADD cannot concentrate and focus when there are minor distractions around; they are often forgetful and lose things. T100 Attention, concentration and not staying on task are symptoms of ADD. T100

37. Dr. Artigues explained that the job duties and functions of Boone that relate to administrative matters are matters that adults with ADD will avoid doing. T101 She explained how it was not easy for a person with ADD to stay on task, to pay attention, and to track tasks all the way through. T101

38. Dr. Artigues explained that had Boone been provided a quiet, distraction-free workplace environment for purposes of his job duties and functions, he could have performed his job duties and responsibilities. T102

39. Dr. Artigues considered and relied upon the medical records of Dr. Evans, which appear in Exhibit 11, as a part of her professional analysis and opinions in her report and in her testimony in Court. T104

40. Dr. Artigues' expert report, Exhibit 12, was admitted into evidence. T112 Dr. Artigues' resume was also admitted. T113

41. Dr. Artigues testified that Exhibit 11, the medical records of Dr. Evans, were the types of medical records that she and other forensic psychiatrists use and rely upon as a part of their expert analysis. T124

42. Dr. Artigues observed that Dr. Evans' medical notes and statements are "really good. The traditional ones I see aren't this good." T114 Dr. Artigues observed that Dr. Evans' records are very thorough. T114 Dr. Artigues observed that Dr. Evans' records were genuinely helpful to her as a part of her forensic work in the case. T114

43. Boone did not know that he was dealing with ADD, and had been struggling for many years with getting reports in on time. T117 Boone realized that he needed a quiet, distraction-free work environment, which is why he built the addition to his home, the office with special insulation so it was very quiet. T117

44. When Boone was told that he could no longer use that special home office, he made attempts to get an accommodation at work for a distraction-free workplace. T117 Boone was not known to be rebellious or insubordinate. T117

45. Boone was very conscientious and that he was returning to work at his home in a somewhat reluctant last ditch way, having made many efforts to compensate to get the work done in the environments that were provided. T118

46. Dr. Artigues did not believe that Boone stole from the State, and that what he did was not an act of rebellion or insubordination, but in an act of being very conscientious, he began to work from home to get his work done in a timely way. T118

47. Boone was not trying to be intentionally insubordinate, but rather appeared that he was trying to compensate for his condition and get his job done. T118-119

48. ADD is a condition that impacts one's ability to read. T119 ADD patients may need to read something repeatedly. T119

49. ADD can result in one being disorganized. T120 Concentration can be a problem for people with ADD in many different settings. T121 Concentration is one of the symptoms that medications help the most. T121

50. Some of the job skills that would have been greatly impacted by Boone's ADD would have been thinking things through, applying policy to real life, being able to express in a report, and being able to sit down and organize thoughts in order to prepare the report. T121

51. People with ADD are notoriously late for deadlines because of difficulties organizing themselves, getting started and not being able to get back onto the task. T122

52. If Boone had been provided a relatively quiet, relatively distraction-free work environment and continued on his Stratterra, Dr. Artigues did not have any reason to believe he would be unable to continue to perform his job duties and responsibilities. T123

53. Boone had a very good track record for his work with ALE. T125

Testimony of Sheriff Graham Atkinson

54. The next witness called by Petitioner was Sheriff Graham Atkinson, Sheriff of Surry County. T134 Sheriff Atkinson first met Boone when he worked for the Surry County EMS back in the mid 1980's. T134 Sheriff Atkinson worked with Boone when he was employed with the U.S. Marshall Service. T134 Sheriff Atkinson jointly worked together with Boone numerous times over the years when Boone was with ALE. T135

55. Sheriff Atkinson explained that when Boone was assigned to Surry County, they had someone they could call twenty four hours a day, seven days a week and Boone would be there to help. T136 Sheriff Atkinson explained that he called Boone many times early in the morning and after midnight and Boone never failed to answer his phone. T136

56. Sheriff Atkinson explained how he once contacted Boone while Boone was on a family vacation in Myrtle Beach, and Boone responded and helped solve the problem. T136 Sheriff Atkinson explained how Boone was always available to assist and was a pleasure to work with. T136-137 Sheriff Atkinson explained that Boone was very motivated and a hard worker. T138

57. Boone was effective and successful in his investigations and in working his cases. T139

58. Sheriff Atkinson explained that Boone is very active with the PTO at his children's school. T139 Boone was very effective with public relations. T140

59. Sheriff Atkinson explained how at least two judges were glad that Boone was serving as a part-time bailiff in the courtroom, and how efficient he was in his work and in his demeanor in the courtroom. T141

60. Before hiring Boone, Sheriff Atkinson talked to persons in the court system and community leaders about Boone, and everybody that the Sheriff talked to said that it would be a mistake to not hire Boone. T143

61. Boone served as a Detention Officer and later as the person responsible for keeping the Court records. T144

62. Sheriff Atkinson described the cubicle space given to Boone for an office as being "about eight feet by eight feet maybe." T147

63. Sheriff Atkinson explained "I've got one position, and I would hire him back today if he wanted to come back to work." T148 Boone has been continuing to work part-time on a limited as needed basis for the Sheriff since Boone retired from full-time status. T150

Testimony of Assistant Chief of Police Shon Tally

64. The next witness called by Petitioner was Assistant Chief of Police Shon Tally. T187 Tally served with ALE from 1989 until 2011. T188

65. Tally has known Boone since 1992 or 1993. T188 Tally got to know Boone "pretty well." T188 From 1989 to 2011, Tally became generally familiar with Agency practices and customs. T190

66. Tally described Boone as "a good agent ... he took care of his people in Surry County, on a very good relationship with the sheriff, the district attorneys, the attorneys ... Steve was an instructor. He taught a lot of in-service classes. He - - he was just a - - he was a good agent, a good guy to work with." T190

67. Boone had a good professional reputation amongst his colleagues in ALE. T190-91 Boone's "honesty and integrity were above approach..." T191

68. Tally explained that "it was common for an agent to - - to work out of his home, to check emails, to do a report, fax it or email it down to Raleigh..." T191 Working from home as an ALE agent "was a common practice ... it was kind of an unwritten rule..." T192

69. When he served with ALE, Tally was from time to time on some special operations assignments, including in 2008 and 2009. T194

70. Tally explained that within ALE, if you needed to stop and pick up something, you could. T195 He further explained that "in ALE you had a lot of freedom." T195 Tally explained that "if you needed to stop and pick something up, you could, and generally everyone - - everyone knew that." T196

71. An ALE weekly report was an explanation of activities for the prior week and to document time. T197

72. Mostly the ALE supervisors would put down a straight 8:00 a.m. to 5:00 p.m. T197 Assistant Supervisor Beckom was observed coming in late and leaving early. T199

73. Tally explained how service as an ALE agent would frequently involve calls during all hours of the day and night and an agent would later compensate for that by leaving a few minutes early one day. T202

74. Tally explained that agents were allowed one fifteen-minute break in the morning and one fifteen-minute break in the afternoon. T221 Agents had the ability to take their meal break at whatever time during the day that they desired. T221

75. Assistant Chief Tally was a credible and believable witness.

Testimony of Spencer Gray King, Jr.

76. The next witness called was Spencer Gray King, Jr. T229 King serves as the church organist for the First Presbyterian Church in Mocksville, where he has served for two and a half years. T262-63 King was employed with ALE from 1998 until 2010, as an Office Assistant IV. T230

77. King's position was an administrative type support position in the Agency. T230-31 Among other administrative duties, King "handled time entry and data entry for personnel time keeping duties." T231 King was the resident person regarding personnel issues and work time issues. T232

78. King worked with Boone for probably six years. T232 King described Boone as being "very well-liked by the public. He always did his job ... He met objectives." T233

79. Reviewing and working with the processing of weekly reports at ALE was a part of King's work. T233 King has observed the weekly reports of about every agent in ALE. T233

80. King explained that assistant supervisors direct some sort of modification to weekly reports on a "pretty frequently" basis." T233-34 King observed a supervisor direct a change to a weekly report with the change resulting in a result that was not accurate. T234

81. King testified that there were agents who from time to time would work from their home as opposed to their assigned work offices. T234

82. King gave an example of an agent named Allan Roberts, who had listed in his weekly report that he had worked from home, and Supervisor Fields instructed King to make a change to something that was not true, to have the report changed and have Roberts sign it. T236 This resulted in an inaccurate and untruthful weekly report. T236-237

83. The changing of weekly reports occurred with some frequency. T237

84. King explained that Supervisor Fields made changes in weekly reports every two to three weeks. T238 Directions were given to change weekly reports providing untruthful information. T239-240

85. King explained that the weekly report was not intended to be a specific, precise time sheet. T240 Rather, the weekly report "was intended to primarily track what agents were doing as - - by way of inspections and how many tickets they had written of a certain kind, sell to underage, sale of tobacco … and that primarily was what - - what that was intended for." T241

86. King had discussions with colleagues that other supervisors in other areas were also making changes to weekly reports resulting in inaccurate information. T242

87. King testified regarding the practice within ALE where agents from time to time would conduct personal errands during their work day. T242

88. King testified that there were a lot of written ALE policies that were not enforced, or selectively enforced. T244 Those practices varied from supervisor to supervisor and from headquarters to headquarters. T244

89. King explained that the weekly report form, AL4, was not used to determine how much time an agent has worked so that they could get paid. T250 The AL4 weekly report form "does not generate payroll for the state." T251 "Payroll was generated by an assumption that one hundred sixty-three hours ... would be worked in a pay cycle." T251

90. Mr. King was a credible and believable witness.

Testimony of Steve Boone

91. Steve Boone is 52 years old, resides in Mt. Airy and graduated from high school in 1978. T286 Boone attended Surry Community College and later Gardner Webb University and graduated there with a Bachelor of Science Degree in Criminal Justice Administration. T287 He is currently working on a Master's Degree. T287 Boone was employed as an Emergency Medical Technician in Surry County and began in 1979. T287 He attended paramedic school and worked as a paramedic in Surry County for 12 years. T287 Following that, he served as a Deputy United States Marshall. T287

92. Boone has been married for twenty five years to Marion Boone; they have three children, ages 15, 13 and 11. Boone's wife is an attorney, in private practice and has been an attorney for about 26 years. T288 Boone has lived in Surry County since 1979. T288

93. Two of Boone's three children have ADHD. T288-89

94. Boone began service with the North Carolina Alcohol Law Enforcement Agency in 1994. T289 He completed the ALE specialized training academy. T289

95. Boone received his law enforcement certification in 1994. T289 There has never before been any adverse action taken against Boone's law enforcement certification. T290

96. Exhibit 1 is a job description for an alcohol law enforcement agent. T291 Boone explained that ALE agents are assigned a geographical area and their responsibilities were to handle the alcohol, drugs, prostitution, gambling and those types of activities. T293 ALE agents investigate all of the administrative work for the ABC Commission. T293 ALE agents are involved in permitting and investigating applicants for alcohol permits, and also investigate locations. T293 ALE agents handle complaints in the alcohol establishments and work closely with police departments and sheriff departments to provide them assistance. T293 ALE agents write violation reports, prepare felony reports for the District Attorney's offices and testify. T294

97. Boone was involved in providing training for the western part of the state, from Greensboro west. T295 Boone traveled all over the state teaching, along with the basic ALE school. T295

98. Boone's geographical area of assignment included Agent Shon Tally's area when he was out on special assignment for five months. T295 There were nine counties in Boone's district, and when Tally was away on special assignment, Boone had to work those counties as well, which were Wilkes County and Allegheny County. T295-296

99. Tally's special assignment for five months began in January, 2008. T296

100. In the year 2008, the counties that Boone was expected to regularly cover were Surry and Yadkin. T296 In January 2008, Boone picked up Wilkes and Allegheny because of Tally's special assignment, which therefore doubled Boone's work load. T297

101. Of Boone's total duties and responsibilities, he estimated that approximately 30 percent of his duties involved administrative work. T299 A study had been done indicating that 37 or 38 percent of ALE agent duties were administrative in nature. T299

102. The headquarters of the District to which Boone was assigned was in Hickory. T300 The approximate distance from Dobson to Hickory was more than 70 miles. T300-301

103. Up until November 2007, ALE agents worked in their homes. T301 Additionally, the State Bureau of Investigation and Wildlife always worked out of their homes. T301

104. In 2004, Boone remodeled his home and made a decision to create a special office in his home for purposes of doing his job for ALE. T301 Boone equipped his home office with the traditional things that would be in an office. T302 ALE had a printer and fax machine that was at Boone's home office. T302

105. When Boone was constructing his home office, he did several things with respect to the insulation factor in his home office. T302 Boone had the new home office "double-insulated"

and he put in a solid core door to reduce the sound. T302 Boone needed a quiet place to do his work. T302

106. Boone had difficulty concentrating and doing certain types of administrative work historically in his life. T303 Historically, Boone had to do things by seeking a quiet area for work, studying and concentration. T303 After finding a quiet place to work, that enhanced Boone's ability to perform his tasks. T303

107. As a part of his duties and responsibilities with ALE, Boone made himself available to the law enforcement community in Surry and Yadkin Counties on an as needed basis. T303 Boone made concerted efforts to communicate with alcohol permittees including providing them with his personal cell phone number. T304

108. Every law enforcement officer in the rural counties where Boone served and in the communication centers all had Boone's telephone number. T305 Boone received phone calls all the time at ten or eleven o'clock at night. T305 He got calls inquiring about statute numbers for alcohol violations and other matters. T305

109. Boone was frequently contacted by phone and otherwise on a "24-7" basis from other police officers and others in the Criminal Justice system. T306 Boone has been contacted while he was on vacation for requested assistance regarding ALE work and he responded and accomplished the work. T306

110. Boone was available to ALE when he was on scheduled days off and in situations when he was in travel elsewhere. T306-307 Boone described the work setting in the rural counties of his service as consisting of law enforcement officers who were "family" and that he would help other officers out. T307

111. In 2008, the number of alcohol outlets assigned to Boone was 200. T307

112. When Boone constructed his specially developed home office, both of his supervisors saw it. T308

113. Previously, it was common for ALE agents to work out of their homes because most other ALE agents did not have anywhere else to work from. T308 Internet service became an essential tool to be able to effectively perform his job. T308-309

114. In connection with work performed on vacation or days off, Boone never kept up with those hours. T309 Boone explained how he was called and stopped by people and asked various alcohol related questions. T309 Boone did not count that time and "there was a tremendous amount of it." T309

115. Some other ALE agents took calls beyond their assigned time of duty and others "were 8-to-5 agents." T310

116. In November, 2007, ALE agents were told that they could no longer work at their residence. T310 Therefore, Boone had to find a place to work because there was no way he could work out of his car with all of the volume of work that he was doing. T310 Boone contacted the Sheriff and inquired about an office at the Sheriff's Office. T310 The Sheriff indicated that "there was a cubicle downstairs" that Boone could use. T310-311

117. In considering his office space needs, Boone conferred with his supervisor, Mark Senter, about the office that Boone had in his building in Dobson. T311 Boone offered to his supervisor this office that had its own egress and where persons could come and go as they please with its own entrance. T311 The office available for Boone to use was at the other end of the building from his wife's law practice and was not connected to his wife's law office. T311

118. This office option offered to the ALE by Boone would not have cost the State any money and would have afforded Boone an opportunity to have a place to interview people and do his work. T312 Boone's supervisor would not permit Boone to use that office. T312 Therefore, Boone conferred with the Sheriff and he was ultimately afforded one of the cubicles to work out of. T312

119. Boone identified numerous administrative duties that he could successfully perform at home, which included making a work plan for the day, review emails, follow up on previous contacts with permittees and witnesses, read case files, review interviews, prepare reports of interviews, clean and maintain weapons. T315 Other administrative duties that he performed at home were preparing for court, preparing testimony, notifying witnesses of court dates, prepare for compliance checks, recruiting individuals for the compliance check program, research ABC laws, prepare weekly reports, purge files, clean his vehicle, prepare and edit lesson plans for the BLET program, prepare for the training classes, prepare other documents, prepare safety reports (because Boone was the safety officer for the district) and other duties. T317-318

120. It is generally expected that law enforcement officers need to keep their various analytical and investigative work confidential. T319

121. At some point, ALE agents were told not to work from home. T319 Rather, they were told to go to Wal-Mart or if you had computer work to do then do it at the public library. T319 Boone did not go to Wal-Mart or the public library for purposes of carrying out any of his confidential law enforcement work. T319

122. The travel from Dobson to Hickory ordinarily takes about three hours to travel round trip, depending on traffic. T320

123. Initially after Senter gave a verbal directive in November to not work from home, Boone stopped working from home. T321 In May, 2008, Boone received counseling for guidance, which is not a disciplinary action, as a way to address a problem. T321 Boone's problem was that he was not getting his complaints in the complaint tracking system; he was not getting that completed and updated like he should and Boone took that very seriously. T321 Boone was

able to use his home office to perform duties which enabled him to alleviate the problem that was identified at counseling. T323

124. Boone believed that it was necessary for him to work from home in order to meet the expectation in his official job description. T323

125. Boone's supervisors had a meeting on August 22, 2008, and an investigation began of him then and the investigation concluded on January 12, 2009, therefore consisting of 169 days of investigation. T326

126. On August 18, 2008, Boone became aware of information relating to activities going on at the ALE training program at the Justice Academy in Salemburg. T327 As a result of what he learned, he reported his concerns to both of his supervisors, Mark Senter and Rodney Beckom. T327 Boone had received communication from a trainee's father, who had indicated that his son had a broken leg and ALE was threatening to fire him if he did not quit and that his son wanted to file a worker's compensation claim but ALE would not let him. T328

127. Boone informed Beckom that he had information that hazing instances had occurred at the basic school. T328 Hazing included putting pacifiers in the trainees' mouths and telling them to suck it, making the trainees carry sippy cups into the chow hall, and that trainees were required to do some PT activities that were not helpful. T328 After reporting that to Senter and Beckom, Boone was never interviewed by anybody on behalf of ALE or the Commission regarding an inquiry. T329-330

128. Boone conferred with his family doctor, Dr. Charlotte Evans. T332 He had a conference with Dr. Evans, which was more focused on the needs of one of his children. T332 That led to a discussion about an examination of Boone regarding some of his behaviors. T333 Dr. Evans prepared documents which were communicated to Boone's employer. T333

129. Boone informed Roger Hutchings that he had been diagnosed with Adult Attention Deficit Disorder and that he had been placed on medication and was being treated for that. T333 The medication prescribed was Strattera. T333

130. Boone's employer was going to have him evaluated by a forensic psychologist at UNC, but ALE cancelled that because Boone was going to go to a pre-dismissal hearing. T341

131. Petitioner's Exhibit 2 was admitted into evidence, which was a performance rating document for Boone. T243

132. Petitioner's Exhibit 3 was admitted into evidence, which was a summary of email communications. T345

133. Petitioner's Exhibit 4 was admitted into evidence, which were Boone's discovery responses. T346

134. Petitioner's Exhibit 5 was admitted into evidence, which was the Respondent Commission's discovery answers. T346

135. Petitioner's Exhibit 8 was admitted into evidence, which were emails without commentary. T348

136. Petitioner's Exhibit 9 was admitted into evidence, which was a letter from Director Chandler dated November 3, 2008 thanking Boone for teaching at the Alcohol Law Enforcement Basic School. T349

137. Petitioner's Exhibit 10 was admitted into evidence, which was Boone's F-5B Form. T349

138. Petitioner's Exhibit 11 consisted of documents prepared by and executed by Boone's physician, Dr. Charlotte Evans. T350 Dr. Evans was Boone's treating physician during that period of time. T350 Dr. Evans' documents in Exhibit 11 were provided to Dr. Artigues for purposes of her forensic analysis. T350

139. Petitioner's Exhibit13 consisted of letters that were sent to Respondent Commission. T361

140. Petitioner's Exhibit 16 is a memorandum from Mark Senter dated June 9, 2008 regarding gas. Exhibit 16 was admitted. T364

141. Petitioner's Exhibit 17 is an agency document summarizing accomplishments for 2008. T364 Exhibit 17 was admitted. T365

142. Petitioner's Exhibit 20 reflected Boone's promotion to ALE Agent III, which was admitted. T368

143. Petitioner's Exhibit 21 was admitted into evidence, which was an email sent by Kelton Brown to all ALE personnel. T369

144. Petitioner's Exhibit 23 is an email from Roger Hutchings to Director Chandler and Deputy Director Kaylor, which was admitted. This email informed Hutchings that Boone had been diagnosed with ADD. T371

145. Petitioner's Exhibit 25 was admitted, which is a document demonstrating that Boone received a passing score for the position of Assistant Supervisor; the document was dated October 4, 2008. T371

146. Petitioner's Exhibit 30 was admitted, which was a memorandum from ALE Director Mike Robertson involving transportation. T374-375

147. Similarly, many exhibits were admitted by Respondent, and all of those admitted exhibits have been considered.

148. Boone testified regarding the ALE weekly reports. T376-378 A weekly report was not meant to be a timesheet. T377 The weekly report was primarily so the supervisor would have an idea of what an Agent was doing. T377 Further, there was information put on the weekly reports so that the legislature could track certain information. T377

149. A weekly report is a one page document where information is prepared and provided in the available space. T378 The information being included in the weekly report is a very abbreviated summary. T378

150. Boone prepared his weekly reports honestly and accurately to the best of his ability. T378 Boone did not attempt to deceive the agency in his weekly reports. T378 Boone intended the information used in his weekly reports in this case to be accurate. T379 An ALE Agent has discretion regarding how to deal with the meal breaks and 15 minute morning and afternoon breaks and how that is dealt with on a weekly report. T379 ALE Agents have discretion as to when they take their hour meal break. T379 The two 15 minute breaks can be taken any time. T379

151. Conducting personal errands during work time at ALE was permitted. T381 Work related calls would start before assigned shift of duty and calls would continue after conclusion of work duty. T381

152. It was permissible to conduct personal errands on-duty including when not on a lunch break or a morning or afternoon break. T381-382

153. Agent Boone and other colleague agents have run personal errands while on-duty. T382

154. Boone provided accounts of various allegations within the charge sheets. T385-406 Boone explained how he worked various times at home. He visited his wife's law office on occasion, where he made copies because ALE did not provide him with a copier and she allowed ALE to use the copier in her office. T392

155. Boone explained the activity on November 21, 2008, regarding shopping when he visited Wal-Mart, Lowes and Game Stop. He obtained some paint for an item in use in his ALE vehicle and he picked up a gift on the same trip. T403-404 This was a joint business and personal errand, within what he understood to be agency custom and practice where others have made trips for similar purposes. T404-405

156. On November 14, 2008, Boone expended substantial time returning an ALE vehicle to the District office. T405 Boone returned the official car to ALE, and had his wife follow to pick him up, which was a three hour trip. T406 He referenced returning the car on his weekly report, but did not claim the time, which was the time that he was using on the 21st. T406

157. Boone was familiar with the concept known "give an hour, take an hour" within ALE. T408

158. The goal and expectation was for agents to work 40 hours per week. T409 Boone consistently put in at least 40 hours of labor every week throughout the period of time in the Fall of 2008. T409 There were times when Boone may have considerably exceeded the 40 hours per week and didn't attempt to keep up with the time. T409 The return of the vehicle is an example of this. T410

159. Boone never intended to improperly take anything from his employer that he was not entitled to. T410 There was a lack of any criminal intent or any intent to wrongfully take anything from ALE.

160. Weekly reports are not specific time sheets. T415 The weekly report is a general outline of what an employee did. T416 There was not enough room for writing down everything that was done. T416

161. ALE agents do not get paid for comp time. T422

162. Boone explained how the weekly report was used and that it is "not a time clock" and that it was "looser..." T430-431 Boone explained how the ALE agent position was not an "eight-to-five job" and that agents were an agent "24/7." T434

163. Boone could not write down every time somebody called and calculate every call on every occasion that law enforcement was calling him. T434 Boone's returning of the car was an example of when he made reference to that on his weekly report that he brought the car back but did not record the time for. T437

164. With regard to the office at the building owned by Boone and his wife, Probation and Parole had been in that building for years. T439 Boone's wife's law office is located in the other side of the building but would not have been next to the office for ALE. T439 He would have been at the office at the opposite at the end of the building. T439

165. Boone was diagnosed with ADD on December 9, 2008. T440 Boone's daughter had been diagnosed with ADD in July, 2008. T440

166. Boone explained how he began his day, which would involve preparing for the day. T531

167. Boone was questioned about his activities for November 20, 2008. T531-533 His weekly report indicated that he had been doing administrative work. T532 Administrative work encompasses making a work plan for the day, reading emails, following up on previous contacts for permittees and witnesses, reading case files, review interviews and writing reports. T532-533 Boone also cleaned and maintained his weapons at his residence, worked on special assignments, prepared for court testimony, prepared for compliance checks, recruited qualified individuals to participate in the compliance check program, research ABC laws for permittees and others, prepared for training classes, completed reports for training classes. T534 Boone provided additional details regarding other administrative duties. T536-537 Administrative matters did not appear in weekly reports a lot of times. T539

168. Boone's case files were with him all the time, even at his house. T634

169. Boone explained how he and other agents could be at home during working hours as Supervisor Senter and others were at home all the time during working hours. T652

170. Boone had worked at home for 12 years the same way. T652 However, Senter told him that Ronnie Keylor didn't like Boone and that Boone should not get run over by the "bipolar express." T652

171. Boone further described the office building owned by he and his wife that was offered to ALE for use as Boone's local office. T664-668 Boone's wife's law office is under lock and key limited to her and staff. T666 The office that Boone had in mind for proposed ALE use would have been under separate lock and key. T666 The offices were totally separate. T666 There was no issue of joint or mixed use between the offices. T667 All of this information was made clear to Senter. T667

172. Boone had a conference with Roger Hutchings on December 3, 2008. T668 Boone made a request to Hutchings to be able to confer with the ALE agency doctor, Dr. Griggs. T668 Hutchings told Boone that he needed to go see his own family doctor. T668

173. Boone understood that documents that were created as a part of any criminal investigation were statutorily protected. T669

174. Boone's work computer was seized from him when he was terminated. T669 ALE turned Boone's email off so that he could not access any emails. T669

175. When Boone was working out of the Sheriff's Department, there was a dedicated telephone line for Boone's use. T675-676 Hutchings was made aware that there was a business line dedicated for Boone there. T676

176. Boone was never asked to take a polygraph examination regarding any of the alleged issues. T680

177. No representative of ALE ever asked Boone to pay any type of reimbursement to the Agency. T682

178. Boone did not have any financial deficiency or financial problem causing him to have a need to engage in any form of larceny. T682

179. Petitioner Boone was a credible and believable witness.

Testimony of Diane Konopka

180. The first witness called by the Respondent was Diane Konopka, Deputy Director of the Commission. T713 Respondent's Exhibit 3 is a Commission document setting forth the

certification history of Boone. T717 Respondent's Exhibit 4, Boone's Report of Separation, was admitted. T721

181. The Respondent Commission, through Konopka, contacted ALE to inquire about reviewing their file regarding Boone. T722 Respondent's Exhibit 1 is a summary memorandum that was prepared for the Probable Cause Committee for their review where the alleged issues were outlined. T723

182. Boone was fully cooperative with Konopka and her inquiry. T734 Boone called Konopka and inquired if there was anything that was needed from him. T735 Boone provided Konopka all the different types of information that she needed to properly complete her investigation. T735

Testimony of Deputy Director Mark Senter

183. Respondent's second witness was Mark Senter, Deputy Director with ALE. T741 Senter was District Supervisor for the Hickory office in 2007 and 2008. T742

184. Senter testified that there was an instance in 2007 or 2008 where Boone's reports were not being submitted on time and were incorrect. T750

185. There was a complaint received regarding Boone on September 18, 2008. T751 The complaint was forwarded to ALE headquarters and ended up with Deputy Director Roger Hutchings. T751

186. Senter testified that when he sent the personnel complaint regarding Boone, he was already aware of an ongoing investigation involving Boone, in which Boone had been under surveillance. T753 Senter explained that he had been summoned to headquarters to speak with the Deputy Director for Operations at the time. T754 The Deputy Director for Operations indicated to Senter that "Agent Boone was home when he was supposed to be working." T754 The Deputy Director for Operations at the time was Ronald Kaylor. T757

187. Senter referenced the minutes involving comments by Deputy Director Kaylor indicating: "Agents cannot work from home. Go to Wal-Mart, library, et cetera." T758

188. Senter testified that on January 15, 2008 and March 5, 2008 he told Boone that "couldn't do anything from home, couldn't do any work from home unless he had approval from myself or Assistant Supervisor Rodney Beckom . . ." T763

189. Senter explained that in a supervisors' meeting, which Boone attended on July 14, 2008, that he again reminded the attendees that working from home was prohibited. Senter also testified that he had previously reminded Boone of this. T765

190. Senter testified that Boone brought some concerns to him about the Training Academy at Salemburg, which involved concerns about treatment of the trainees; Senter did *not* do anything with that information provided by Boone. T804

191. Sentor acknowledged that he did not know how the term "good moral character" is defined by the Sheriff's Education and Training Standards Commission. T949

192. Senter offered a conclusory opinion that he did not believe that Boone has good moral character. T807 However, Senter acknowledged that he "really never got to know Steve real well on a - - on personal basis." T841 Senter did not get to know Boone's life history. T842 Senter was not aware of Boone's church related activities. T842 Senter acknowledged that he was "not aware of extra-curricular activities" that Boone engaged in. T842 Senter was not aware of Boone's medical history. T844 Senter acknowledged that he never got really close to Boone. T844 Senter did not have a valid or sufficient basis to properly assess all of the factors required for consideration in properly assessing moral character.

193. Ronnie Kaylor was the person that communicated to Senter and provided him the information that was included in the complaint and told Senter to fill out the AL-29 form. T854 Kaylor had the authority to fill out an AL-29 on his own. T858

194. Kaylor alleged that Boone was at home when he was supposed to be working. T857 Senter testified that Kaylor did not provide him with any evidence or documentation against Boone. T858 Senter did not ask his superior for the evidence that his superior may have. T858

195. Kaylor had the authority, on his own volition, to have conferred with Roger Hutchings, who is in charge of internal investigations, and he could have done that but did not. T859-860 Boone's matter was the only occasion when Kaylor used the mechanism that he did to start a formal complaint with Senter's assistance. T862

196. Senter described how he was summonsed to Raleigh by Kaylor to meet with him, and the two of them met. T863 Roger Hutchings was not in that meeting. T863 Senter met with Kaylor for thirty minutes to an hour and Senter did not make any notes. T865

197. Senter testified: "I told Steve Boone one time that every time I saw Ronald Kaylor, he asked about him [Boone], and I asked him if he ever did anything to piss him off." T866 This evidence raises serious concerns about Kaylor's objectivity and bias.

198. When Senter was asked if Kaylor wanted the tool of surveillance used on Boone, Kaylor responded "it would be tough to watch him." T868

199. When Senter was asked did he essentially start the investigation of Boone or did Hutchings start the investigation, Senter responded "I don't know." T869

200. When Kaylor met with Senter, when Senter was summonsed to Raleigh, Senter was not told that surveillance had already been conducted on Boone. T870 Senter explained that Mr. Hales and Mr. Pace had already been on the job investigating Boone prior to his involvement conducting surveillance on Boone. T872 Thus, overlapping surveillance was conducted on Boone.

201. Kaylor had started a second surveillance with Pace and Hales that was unbeknownst to Senter. T872-873 Prior to Senter's involvement, he was not aware of what the other two investigators were doing. T873 Senter did not know when Roger Hutchings had become involved the investigation. T873 Senter acknowledged that the thirty minute to one hour meeting in Raleigh that he was summonsed to attend could have simply been done over the telephone. T876

202. Senter and Beckom coordinated what they were doing regarding surveillance, but Senter did not receive any notes from Pace or Hales or any updates from Hutchings. T880

203. Agents were allowed to have a local field office in the counties where they were assigned. T888 Senter acknowledged that agents were "typically" allowed to have a field office if it was free. T888

204. The building owned by Boone and his wife that was proposed as Boone's local field office for free had two entrances. T890 Senter never went in that building. T890 Senter did not inspect it. T890 Senter never asked Boone for an opportunity to look at the building to see if met Senter's standard and suitability. T891

205. Senter acknowledged that any criminal cases would be maintained as confidential. T894

206. Senter acknowledged that the supervisory meeting minutes indicated that agents could go to the parking lot in Wal-Mart and sit there in their car and connect with their computer or go to the public library. T894 Senter acknowledged that there was various risks associated with an unsecured Wi-Fi and compromising the integrity of investigations. T895

207. The ALE policy that agents could no longer work from home was not a written policy. T898 ALE has policies and procedures to guide the behavior of its agents. T900

208. When Boone reported to Senter his concerns about the basic school in Salemburg on August 18, 2008, that got Senter's attention enough that he checked it out to see if there could be some criminal problem there and he looked up the statue. T902-903 Boone was concerned that someone had been hurt at the basic school. T903-904

209. In Boone's last evaluation, Senter gave him an overall good evaluation. T911

210. Boone was not identified or referred for the Agency's policy called PEWS, Personnel Early Warning System. T915

211. Senter acknowledged that Boone actively working to take corrective action to address the problem conflicting in his evaluation regarding being late on supporting documents. T921, 913

212. In connection with Boone's performance evaluations, Senter received counsel and advice from Kaylor about how Boone ought to be rated and evaluated on the final evaluation for 2008. T923 Senter had communications with Kaylor about that evaluation. T923 Senter was asked whether he recalled asking Kaylor if there was enough for the unsatisfactory evaluation of Boone

in all areas. T923 Senter admitted that he asked Kaylor, is there enough for this unsatisfactory evaluation on all areas. T925

213. Senter further admitted that he also said to Kaylor, should I down grade Boone in the "competencies?" T924-925 Senter admitted asking Kaylor before Senter had come up with all of his ratings is to whether there is enough for the unsatisfactory evaluation of Boone on all areas. T928

214. When Senter was asked was the mission of coming up with unsatisfactory in all areas accomplished, Senter responded by saying "I wouldn't say it was a mission. Would that have been a result, probably so." T937

215. Senter's communications with Kaylor regarding the potential changing and down grading of Boone's evaluation is suspect and suggests bias and unfairness to Boone. Kaylor was not Boone's supervisor.

216. Senter testified that some chiefs and sheriffs had told him that Boone was doing a good job. T949 To earn a promotion in ALE, the employee has got to be doing a good job. T950

217. Boone had been promoted to ALE Agent III, and Senter made the recommendation for Boone in that regard. T950

218. In discussions with Boone, Senter has used the term "bipolar express" before. T951

219. Senter acknowledged that trainees at the basic school in 2008 were actually injured as result of having to crawl down on the asphalt. T955

Testimony of Roger Hutchings

220. The next witness called by the Respondent was Roger Hutchings, who was employed with ALE as the Deputy Director of Administration for Alcohol Law Enforcement. T974 When he was Deputy Director of Administration, he supervised the regulation of bingo, boxing, personnel matters and the budget. T974-975 Conducting internal investigations was a part of his duties. T975

221. The complaint regarding Boone was around the end of September, 2008. T976 The nature of the complaint or allegations was that he was not working the required hours and insubordination. T976 The personnel complaint, Exhibit 6, was received on September 22, 2008. T1026

222. Hutchings contended that the Agency's IT section determined that there were only four or five emails during the relevant period that actually pertained to Boone's work. T983

223. Hutchings explained that the Deputy Director of Operations was in a separate area and did not duplicate the areas of his coverage. T1022-1023 The Deputy Director of Operations would not be involved unless they asked for his assistance. T1023

224. ALE had another employee, Ken Pike, who was involved in internal investigations and worked for Hutchings. T1025

225. Hutchings testified that the overall goal of an internal investigation is to discover all of the facts whether they might be facts that might incriminate the employee or facts that might exonerate the employee. T1028 There were no limitations placed upon the scope of the investigation to be conducted by Hutchings involving Boone. T1028

226. Hutchings indicated that Senter was not an investigative agent for him in this Boone matter. T1035

227. Hutchings testified that Boone fully cooperated with him in providing Boone's phone records and that Boone cooperated fully throughout the investigation. T1039-1040

228. Hutchings did not obtain the phone records retrieved from the phone number at the Sheriff's office when Boone was there. T1041

229. Hutchings's testimony revealed numerous investigative failures, omissions and lack of completeness. In examining work performance, work conduct and credibility, an internal investigation would examine those issues. T1044 One of the things that would be done in the investigation would be to get some idea as to what the assigned work load is for the agent. T1044 Hutchings indicated that he did not learn in the investigation that Shon Tally had been given an assignment in Special Operations and that his area of coverage was assigned over to Boone. T1044

230. Hutchings acknowledged that Boone told him that on some occasions when he was at home, he would in fact use his home phone. T1046 Hutchings acknowledged that they did not make any effort to retrieve Boone's home phone records. T1046 The home phone records were not retrieved and the investigation did not produce any evidence as to the quantity of those calls. T1047

231. Hutchings acknowledged that no one ever interviewed Mrs. Boone to ask her what her observations were that Boone was doing during any of the times when he was at home. T1050 No one at ALE ever interviewed Mrs. Boone about anything. T1050

232. One of the investigative tools that is available to ALE is the polygraph. T1050 ALE had qualified polygraph examiners that had been used in other investigations, but ALE made no request for Boone to be polygraphed. T1051

233. Hutchings never asked Boone what he was specifically doing at his wife's law office when he was there on occasion under surveillance. T1053

234. With regard to emails in the relevant time period for Boone, ALE created a summary for a 21 day period. T1053-1054 There were 18 emails in a 21 day period. T1054 Kelton Brown was the agency IT person and they requested him to obtain the information regarding the emails. T1058

235. When Hutchings was reviewing the email summary document, he was asked about the indication in the emails as "GMT" as to whether that means Greenwich Mean Time and he responded "probably" but further indicated that he did not know what Greenwich Mean Time is. T1059 Hutchings further testified that he did not know if the emails were broken down not by Eastern Standard Time or by Greenwich Mean Time. T1059-1060 He acknowledged that there was an indication on each of the email references as being "GMT." T1060

236. Hutchings acknowledged that all of the email times are in Greenwich Mean Time according to the list, and that was the list that he used for purposes of his email analysis. T1060 Hutchings indicated that he was sure that he would have asked Kelton Brown, the IT person, what GMT meant. T1065 Thus, the ALE email analysis was palpably erroneous because it was six hours off of Eastern Standard Time.

237. ALE did not have Brown or anyone else with IT expertise conduct an analysis of Boone's hard drive on his work computer to see if there were any reflections there of activities associated with work. T1066

238. Hutchings recalled Boone presenting a letter from Dr. Evans and her diagnosis of him was Adult Attention Deficit Disorder. T1071 However, Hutchings did not make any inquiry to Dr. Evans regarding her diagnosis or how she thought the prognosis was going to be. T1072

239. Hutchings had a general understanding of ADD as being that the person has a hard time concentrating or applying themselves. T1073 ADD could affect one's ability to concentrate and do their work. T1073 Hutchings acknowledged that ALE could have maintained Boone on suspension without pay until a medical condition could have been fully explored. T1076

240. Hutchings referenced the alleged instances involving the reporting time that Boone left Hillybilly Bar. T1087-1088 There was a contention that Boone had inaccurately stated when he had left there. T1087 Boone said it was around midnight and the surveillance showed that he was back home at eleven o'clock. T1087 That charge against Boone was withdrawn by ALE because they did not have a substantiated basis for it. T1087

241. The underlying investigation of Boone was not thorough or complete. The investigation did not provide all necessary evidence.

Testimony of Rodney Beckom

242. The next witness called by the Respondent was Rodney Beckom, who served in the Hickory District office in 2008 and 2009. T1095 Beckom was an Assistant Supervisor. T1095

243. Respondent's Exhibit 22 is a counseling for guidance that Beckom issued to Boone, which is a non-disciplinary counseling for guidance in a particular area. T1096 The counseling was in regards to meeting deadlines for paperwork. T1096

244. On December 13, 2007 Beckom drove to Dobson and contacted Boone who was at home. On this occasion Beckom advised Boone that, "He could not work out of his house or telecommunicate without approval". T1104

245. Beckom acknowledged that Boone told him that he had to work out of his house because of computer access and it was the easiest place to have quiet to concentrate. T1124

246. Beckom acknowledged that on occasions when Boone's vehicle was at this house, that it was not known what he was doing in his house. T1130

247. Beckom further stated that, after seeing what he had seen regarding Boone continuing to work at home after being ordered not to, that he could not trust him. T1114

248. Beckom conceded that he did not doubt that other ALE agents, including supervisors, did not go home from time to time throughout the work day. T1131 Beckom and Senter have gone home during the work day. T1132 Beckom acknowledged that it was really not unusual for an agent to be at home. T1132

249. Beckom acknowledged that an agent was given complete flexibility as to when they could take their lunch break. T1132

250. Beckom acknowledged that conducting personal errands during the official work schedule "happens" within ALE. T1134 Beckom explained that *"the policy says as long as it doesn't interfere with your duties."* (emphasis added) T1135 There was no evidence that Boone's personal errands interfered with his duties. T1135

251. Beckom had discussions with Kaylor regarding Boone. T1136 Kaylor was wanting feedback to know what was going on with the surveillance. T1136

252. In summary, the Respondent's evidence showed that Petitioner was at home during the time he recorded he was working. Those dates were as follows:

26 August 2008
27 August 2008
9 September 2008
11 September 2008
29 September 2008
30 September 2008
3 October 2008
13 October 2008
17 October 2008
20 October 2008
7 November 2008
8 November 2008
20 November 2008
21 November 2008

25

EVIDENCE/FINDINGS FROM KEY EXHIBITS

Respondent's Exhibits

253. Respondent's Exhibit 4 is the "Report of Separation" for Boone executed by the ALE Director on March 27, 2009. The form indicated that Boone was dismissed from ALE but in the area designated on the first page with numerous lines where the "reasons" for termination was listed, ALE stated "Steven Boone was terminated on March 20, 2009." Therefore no reasons, facts or allegations were set forth. On the second page of the form, ALE had the opportunity to not recommend Boone's employment elsewhere as a criminal justice officer. However, ALE *did not* check the box associated with that type of negative recommendation and therefore did not make any negative recommendation. Further, ALE did not include any comments in the specially designated area for agency's comments.

254. Respondent's Exhibit 7 is a memorandum dated September 30, 2008 from Ronald Kaylor to "file" whereby Kaylor alleged that "it has come to the attention of Supervisor Senter that Agent Boone does not work the required 40 hours per week. Supervisor Sentor conducted an inquiry into this matter and confirmed in reports and notified his findings to the headquarters staff." Senter testified that Kaylor summonsed him all the way to Raleigh for a meeting that lasted some thirty minutes to an hour whereby it was Kaylor who alleged that Boone was not working the required hours.

255. All of Respondent's admitted exhibits have been considered.

Petitioner's Exhibits

256. Petitioner's Exhibit 1 identifies the official job duties and responsibilities for an ALE agent. The job description identifies numerous and broad duties and responsibilities including extensive administrative duties and written communication duties.

257. Petitioner's Exhibit 2 is the performance appraisal of Boone for February, 2008, these official performance ratings indicated that Boone either met or exceeded performance expectations in every area except one which was "administrative reporting" where Boone was observed as having been late on reports but also that "Boone had no reports containing significant error."

258. Petitioner's Exhibit 3 is a listing of various emails where Boone subsequently explained background and facts relating to those emails.

259. Petitioner's Exhibit 4 is Petitioner's responses to Respondent's discovery requests whereby Petitioner answered various questions relating to the facts and circumstances of the allegations.

260. Petitioner's Exhibit 5 is Respondent's answers to Petitioner's discovery requests.

261. Petitioner's Exhibit 7 is Boone's weekly reports that were disclosed to Boone.

262. Petitioner's Exhibit 8 is pertinent 2008 emails regarding working at home that were not supplemented with explanations by Boone.

263. Petitioner's Exhibit 9 is a memorandum from ALE Director Chandler to Boone dated November 3, 2008, commending him for his performance at the 25th ALE School.

264. Petitioner's Exhibit 10 is Boone's Report of Separation executed by ALE, where ALE did not check the box indicating a negative reference elsewhere for Boone.

265. Petitioner's Exhibit 11 is medical records provided by Dr. Charlotte Evans of the Foot Hills Family Medicine Office in Elkin regarding Boone. Dr. Evans' records demonstrate the course of actions as she treated Boone in 2008 and 2009 and her diagnosis of Boone as having Adult ADD. Dr. Evans diagnosed Boone with ADD on December 9, 2008.

266. Dr. Evans explained that "people with ADD try to compensate with the disability in many ways at work, and when those attempts fail, I do see that many of them try to find themselves quiet, distraction free environments to work in, using techniques that have worked for them for many years outside the workplace." Dr. Evans further explained that "I do not always think people with ADD understand what is wrong, and they often do not ask for accommodation; they simply come up with ways to compensate on their own, this does often get people in trouble in the workplace." Dr. Evans further explained that "many people do not know what is wrong and do not seek help."

267. Petitioner's Exhibit 12 is the forensic psychiatric evaluation report of Boone by Dr. Moria Artigues, M.D. Dr. Artigues observed that Boone was suffering with untreated ADD during the relevant time, that his ability to perform the program management portion of his work was impaired. See report at 8. Dr. Artigues further explained that it is essential for an individual with ADD to have a distraction - free quiet environment in order to carry out computer related and paper work task to completion. A person with ADD is unable to complete such task in any other type of environment. This is an accommodation that Agent Boone made for himself by working from home. Dr. Artigues further explained how ADHD/ADD is a disabling condition as described under the Americans with Disabilities Act.

268. Petitioner's Exhibit 26 is an email of December 31, 2008 from Director Chandler to Roger Hutchings and Ronnie Kaylor stating that "lets get together early Monday and make a decision about Boone."

269. Petitioner's Exhibit 31 is a copy of the official "Investigative Report" conduct on the Division of Alcohol Law Enforcement by the Office of the State Auditor, issued June, 2012.

Additional Findings of Fact

270. There is insufficient evidence to substantiate any larceny by Petitioner. Petitioner did not commit any larceny. The **trespassory** taking of the personal property of another person, a required element of this crime, was not proven.

CONCLUSIONS OF LAW

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

2. The North Carolina Sheriffs' Education and Training Standards Commission (hereafter the Commission) has certain authority 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 suspend, revoke or deny certification under appropriate circumstances with valid substantial proof of a rule violation.

3. 12 NCAC 10B.0301(a)(8) requires that justice officers certified in North Carolina shall be of good moral character.

4. The totality of the evidence demonstrates that Petitioner has been a person of good moral character and a dedicated professional law enforcement officer in North Carolina for many years.

5. Moral character is a vague and broad concept. E.g. *Jeffrey Royall v. N.C. Sheriffs' Education and Training Standards Commission,* 09 DOJ 5859; *Jonathan Mims v. North Carolina Sheriff's Education and Training Standards Commission*, 02 DOJ 1263, 2003 WL 22146102 at page 11-12 (Gray, ALJ) and cases cited therein. See *Mims* at page 11.

6. The United States Supreme Court has described the term "good moral character" as being "unusually ambiguous." In *Konigsberg v. State*, 353 U.S. 252, 262-63 (1957), the Court explained:

> The term good moral character ... is by itself ... *unusually ambiguous*. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, *can be a dangerous instrument* for arbitrary and discriminatory denial ... (emphasis added).

7. Police administrators, officers and others have considerable differences of opinion as to what constitutes good moral character. *Royall* at page 13; *Mims*, *supra.* at page 12, Conclusion of Law 12. In *Mims*, the Respondent Commission offered the testimony of someone who claimed to be knowledgeable regarding moral character; he testified that there are six components to good moral character of law enforcement officers: trustworthiness, respect, responsibility, fairness, citizenship and being a caring individual. *Mims*, page 7 at Finding of Fact 48.

8. Because of these concerns about the flexibility and vagueness of the good moral character rule, any suspension or revocation of an officer's law enforcement certification based on an allegation of a lack of good moral character should be reserved for clear and severe cases of misconduct. *Royall, supra* at 14, *Mims, supra.* at page 12 and 13.

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

10. Under *In Re Rogers*, an instance of conduct amounting to poor judgment, especially where there is no malice or bad faith, would not ordinarily rise to the high level required to reflect a lack of good moral character. However, in this case, there were numerous direct orders of superior officers for the Petitioner not to work at home without approval; and fourteen (14) instances, as determined by the surveillance conducted by ALE, of failing to comply with these orders.

11. When there are this many instances of insubordination, it goes beyond the level of job performance, and questions the level of trust and responsibility that an individual may be afforded by fellow officers. For this reason, if for no other, the Petitioner's good moral character is challenged.

12. In *Daniel Brannon Gray v. N.C. Sheriffs Education and Training Standards Commission*, 09 DOJ 4364 (March 15, 2010; May, ALJ), the good moral character rule was interpreted. "Good moral character has been defined as 'honesty, fairness and respect for the rights of others and for the laws of state and nation.' " *Gray*, at page 18, Conclusion of Law 5, citing *In Re Willis*, 299 N.C. 1, 10 (1975). *Gray* further explained that "[g]enerally, isolated instances of conduct are insufficient to properly conclude that someone lacks good moral character. However, if especially egregious, even a single incident could suffice to find that an individual lacks good moral character in places [sic] of clear and especially severe misconduct," citing *In Re Rogers*, 297 N.C. 48, 59 (1979). Here, there were multiple instances of misconduct.

13. Police officers and others make occasional honest mistakes and sometimes exercise poor judgment. *Royall supra* at 15; *Andreas Dietrich v. N.C. Highway Patrol*, 2001 WL 34055881, 00 OSP 1039 (August 13, 2001, Gray, ALJ), ("Ideally, it is desired that law enforcement officers be near perfect; however, that is not a realistic standard").

14. In reviewing the evidence where character is "a direct issue in the case", 1 Brandis on North Carolina § 102, opinion testimony is much more freely admitted, both, to show good character and bad. In this case it is uncontroverted that Petitioner's reputation in his community was good; and there were many knowledgeable and respected members of the community who gave direct opinion testimony of his good reputation. However, none of these witnesses was aware of Petitioner's total disregard for the orders of his superior officers requiring him not to work at home. These specific instances of misconduct contradict the otherwise good reputation of the Petitioner. Our Supreme Court has concluded:

> "In such cases, character may be proved, not only by reputation, but also by the opinions of witnesses who have first hand knowledge of it and by specific good or bad acts of the person whose character is in question." *State v. Taylor,* 309 NC 570, 576 (1983).

15. The elements of larceny are set out in Jessica Smith, *North Carolina Crimes*, at 324 (2012 7th ed.):

(1) takes
(2) personal property
(3) in the possession of another *and*
(4) carries it away
(5) without the consent of the possessor *and*
(6) with the intent to deprive the possessor of its use permanently
(7) knowing that he or she was not entitled to it.

16. In *State v. Bowers*, 273 N.C. 652, 654, 161 S.E.2d 11 (1968), our Supreme Court defined felony larceny under N.C. G.S. 14-72:

> "to constitute larceny there must be a wrongful taking and carrying away of the personal property of another without his consent, and this must be done with felonious intent; that is, with intent to deprive the owner of his property and to appropriate it to the taker's use fraudulently. It involves a **trespass** (emphasis added) either actual or constructive. The taker must have had the intent to steal at the time he unlawfully takes the property from the owner's possession by an act of trespass."

17. The following cases review the elements of misdemeanor larceny, which are virtually the same except for the level of loss. See *State v. Perry,* 305 N.C. 225, 232, 287 S.E.2d 810, 815 (1982), overruled in part on other grounds, *State v. Mumford,* 364 N.C. 394, 699 S.E.2d 911 (2010); *State v. Kelly,* 75 N.C. App. 461, 464, 331 S.E.2d 227 (1985); *State v. Barbour,* 153 N.C. App. 500, 502, 570 S.E.2d 126 (2002).

18. No specific amount of money was ever identified or alleged in Respondent's evidence. Nothing was wrongfully taken. Nothing was carried away.

19. There was implied consent of the possessor, ALE, when ALE continuously paid Boone's salary and never requested reimbursement.

20. Boone had good faith beliefs that he was entitled to his salary based on the agency practices that he had seen for years. Further, compensating for a disability is good faith conduct that many resort to, according to Dr. Moira Artigues, to accomplish their jobs. T101

21. "A person who honestly believes he or she is entitled to taken property is not guilty of larceny, even if this belief is wrong." See Smith, *North Carolina Crimes,* citing *State v. Booker,* 250 N.C. 272, 108 S.E. 2d 426 (1959), overruled in part on other grounds, *State v. Barnes,* 324 N.C. 539, 540, 380 S.E. 2d 118 (1989). Boone had a good faith belief that he was entitled to his salary, and therefore did not commit larceny.

22. In *State v. Kelly*, 75 N.C. App. 461, 464, 331 2d 227 (1985), overruled in part on other grounds, *State v. Mumford*, 364 N.C. 394, 699 S.E.2d 911 (2010), the Court of Appeals explained that "a key element of larceny is that the property be wrongfully taken without the

owner's consent. If the property was initially obtained with the consent of the owner, then there can be no larceny." Here, there was no evidence of wrongful intent. Here, the owner, ALE, impliedly consented for Boone to possess his salary - and indeed *kept paying him* while investigating him working from home. Thus, ALE impliedly consented for Boone to receive the salary. This evidence further defeats Respondent's larceny charge.

23. In *Lisa Michelle Thomas v. N.C. Sheriff's Education and Training Standards Commission,* 11 DOJ 6784, the petitioner was accused of submitting falsified time sheets, thus obtaining salary that she had not earned. Administrative Law Judge Augustus B. Elkins, II found that the petitioner did not knowingly take the property of her employer with intent to steal at the time she signed the incorrect time sheet or received pay stemming from that time sheet. The same is true here.

24. Judge Elkins in *Thomas* relied upon appellate case law that "the taker must have had the intent to steal at the time he unlawfully takes the property from the owner's possession." *Thomas* at page 4. There was no evidence that Boone intended to steal anything as he served his employer on a literal 24/7 basis, as explained by District Attorney Bowman, Magistrate Marion, Sheriff Atkinson, and others.

25. The larceny charges against Boone fail for numerous reasons. There was no evidence of any criminal intent. Boone acted in good faith and in reliance upon his legitimate medical needs to engage in some limited work from home in order to meet his job duties and responsibilities.

26. Boone also acted pursuant to long-time agency history and custom of looseness in completing the necessary work hours, in an environment of elastic verbal policies. However, it cannot be ignored that Petitioner repeatedly failed to obey orders not to work at home.

27. Boone did not deprive ALE of any compensation that he did not have a good faith basis that he was entitled to.

28. Boone's actions in resorting to a home office to properly complete his work tasks and compensate for his disability is not a form of larceny or a means to commit larceny. Boone frequently worked off the clock and for extensive times that were not counted.

29. Public employees frequently act in accordance with agency practices and customs because employees can literally see those practices and customs at work every day. Vague and ill-defined policies, particularly vague verbal policies as in this case, may create various problems. See *Michael Faison v. N.C. Department of Crime Control*, 11 OSP 08850, where Judge Lassiter issued a decision including extensive analysis of vague agency policies. There, the same employer's undefined cell phone usage policy was the source of the agency's arbitrary termination decision.

30. The evidence does not establish that Petitioner committed any larceny. The evidence does not demonstrate that there was substantial evidence of each of the required elements of larceny. Petitioner did not have any criminal intent to steal anything and did not steal anything. Petitioner had an honest and good faith belief that he was entitled to the salary that he was paid.

31. The conundrum created by the evidence is not whether the Petitioner had the intent to steal from the state by reporting that he was working when in fact he was not working, because the majority of the instances of misconduct shown by the surveillance do not attempt to show what he was doing within the confines of his home. Petitioner testified that he was "working". However, even if, *arguendo,* he were working, he was still defiant of the direct orders prohibiting him from working at home. In a quasi para-military organization such as ALE, this is contrary to the trust and responsibility that individuals within these agencies require.

PROPOSAL FOR DECISION

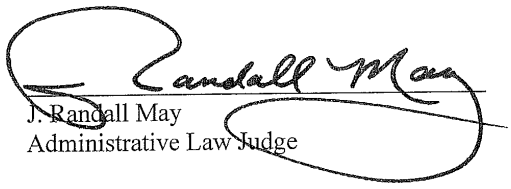
BASED UPON the foregoing findings of fact and conclusions of law, it is hereby proposed that the North Carolina Sheriffs Training and Standards Commission find that there has been no rule violation concerning the allegations of larceny. However, because of Petitioner's years of credible service, and his otherwise good reputation, *vis-à-vis* his failure to obey orders that he refrain from working at home, it is the recommendation of the undersigned that Petitioner's certification be suspended, and that the Commission consider suspending this suspension under supervision of a period of probation.

NOTICE AND ORDER

The 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.

This the 18th day of June, 2013.



J. Randall May
Administrative Law Judge

A copy of the foregoing was mailed to:

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Lauren Tally Earnhardt
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P.O. Box 629
Raleigh, N.C. 27602
Counsel for Respondent

This the 18th day of June, 2013.

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

STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF BUNCOMBE	12 DHR 08733
MISSION HOSPITAL, INC., Petitioner, v. N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, CERTIFICATE OF NEED SECTION, Respondent, and FLETCHER HOSPITAL, INCORPORATED d/b/a PARK RIDGE HEALTH and CAROLINA MOUNTAIN GASTROENTEROLOGY ENDOSCOPY CENTER, LLC, Respondent-Intervenors.	**FINAL DECISION**

This matter came for hearing before the Honorable Donald W. Overby, Administrative Law Judge, on March 11-12, 2013 at the Buncombe County Courthouse and March 13-15, 25, and 26, 2013 at the Office of Administrative Hearings ("OAH") in Raleigh, North Carolina. Having heard all the evidence presented in the case and hearing, considered the admitted exhibits, the arguments of the parties, and the relevant law, the Undersigned finds by the greater weight of the evidence the following findings of fact and makes the following Conclusions of Law based upon those facts, and issues this Final Decision.

APPEARANCES

For Petitioner Mission Hospital, Inc. ("Mission"):

Maureen Demarest Murray
Terrill Johnson Harris
Smith Moore Leatherwood LLP
300 N. Greene Street, Suite 1400
Greensboro, North Carolina 27401

For Respondent North Carolina Department of Health and Human Services, Division of Heath Service Regulation, Certificate of Need Section (the "CON Section" or the "Agency"):

Joel L. Johnson
Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602

For Respondent-Intervenors Fletcher Hospital, Inc. d/b/a Park Ridge Health ("Park Ridge") and Carolina Mountain Gastroenterology Endoscopy Center, LLC ("Carolina Mountain"):

Denise M. Gunter
Candace S. Friel
Nelson Mullins Riley & Scarborough LLP
380 Knollwood Street, Suite 530
Winston-Salem, NC 27103

ISSUE PRESENTED

Whether the Agency: substantially prejudiced Mission's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule, in denying the Mission Certificate of Need Application to relocate one gastrointestinal endoscopy room from Mission Hospital in Asheville, Buncombe County, North Carolina, Project I.D. No. B-8790-12.

PARTIES

1. Petitioner Mission is a North Carolina corporation with its principal place of business at 509 Biltmore Avenue, Asheville, North Carolina 28801. Mission is licensed to provide acute care hospital services pursuant to Chapter 131E, Article 5 of the North Carolina General Statutes.

2. Respondent CON Section is the agency of the State of North Carolina that administers the Certificate of Need Act (the "CON Act"), codified at Article 9 of Chapter 131E of the North Carolina General Statutes.

3. Respondent-Intervenor Park Ridge is a North Carolina corporation with its principal place of business at 100 Hospital Drive, Hendersonville, North Carolina 28792.

4. Respondent-Intervenor Carolina Mountain is a North Carolina limited liability company with its principal place of business at 1032 Fleming Street, Hendersonville, North Carolina 28791.

APPLICABLE LAW

1. The procedural law applicable to this contested case hearing is the North Carolina Administrative Procedure Act, N.C. General Statutes § 150B-1, *et seq.*, to the extent not inconsistent with the CON Act, N.C. General Statutes § 131E-175, *et seq.*

2. The substantive law applicable to this contested case hearing is the North Carolina CON Act, N.C. General Statutes § 131E-175, *et seq.*

3. The administrative rules applicable to this contested case hearing are the North Carolina Certificate of Need Program Administrative Rules, 10A N.C.A.C. 14C.0100, *et seq.*, and the Office of Administrative Hearings Rules, 26 N.C.A.C. 03.0100, *et seq.*

PROCEDURE

No party objected to jurisdiction, designation of the Administrative Law Judge, notice of hearing, or the dates and location of hearing. Certain exhibits and testimony were designated as confidential. None of the parties objected to the confidential designation. Exhibits and testimony designated as confidential will be so marked in the official record with exhibits placed in sealed envelopes marked as confidential.

MOTION IN LIMINE

The CON Section found Mission's Application conforming to Criteria 3a, 8, 13, 14, and 20 and found Criteria 1, 9, 10 and the regulatory criteria not applicable to Mission's Application. (Joint Ex. 2, pp. 1462, 1488, 1506-1511, 1513-1514) Mission did not challenge these Findings in its petition for contested case hearing. At the beginning of the contested case hearing, Mission moved in limine to prohibit Park Ridge and Carolina Mountain from presenting any evidence or soliciting any testimony that challenged the Agency's decision in any way or attempted to add new reasons for disapproving Mission's Application, and the Administrative Law Judge granted Mission's motion. (T. Vol. I, pp. 64-67)

BURDEN OF PROOF

Mission bears the burden of showing by the greater weight of the evidence that the Agency substantially prejudiced its rights, and that the Agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule when the Agency disapproved Mission's Application. N.C. Gen. Stat. § 150B-23(a); *Britthaven, Inc. v. N.C. Dep't of Human Resources,* 118 N.C. App. 379, 455 S.E.2d 455, 459 (1995), *disc. rev. denied*, 341 N.C. 418, 461 S.E.2d 754 (1995). *Also see generally*, Jt. Ex. 1 at 950-1023.

EXHIBITS ADMITTED INTO EVIDENCE

1. The following joint exhibits were offered and admitted into evidence:

Joint Exhibit 1	Mission's Application
Joint Exhibit 2	Agency File

2. The following documents were offered by Mission and admitted into evidence:

Exhibit 104	Department of Health and Human Services ("HHS"), CMS Manual System, Pub. 100-04 *Medicare Claims Processing Manual*, Transmittal 1324, Anesthesia Services Furnished by the Same Physician Providing the Medical and Surgical Service (August 27, 2007)
Exhibit 105	NC Division of Medical Assistance, Medicaid and Health Choice, Clinical Coverage Policy No: 1L-2, Moderate (Conscious) Sedation (Revised Date: March 12, 2012)
Exhibit 120	Map of Mission Hospital Memorial Campus and Elevator Guide (Mission-0008262 to 0008269)
Exhibit 121	Map of Mission Hospital St. Joseph Campus and Elevator Guide (Mission-0008270 to -0008279)
Exhibit 126	Website printout: Mission Health, Make an Appointment
Exhibit 148	Carolina Mountain GI Endoscopy License Renewal Application 2012 (Mission-0001542-1559)
Exhibit 151	Construction Section website excerpts
Exhibit 154	Brian David Moore Resume (Mission-0000336) (Depo Ex. 14)
Exhibit 155	Kristi Sink Resume (Depo Ex. 38)
Exhibit 156	True Morse Resume
Exhibit 157	Nancy Bres Martin CV (Depo Ex. 29)
Exhibit 164	Henderson County Residents to Buncombe Facilities Chart

3. The CON Section did not offer any exhibits into evidence.

4. The following documents were offered by Park Ridge and Carolina Mountain and admitted into evidence:

Exhibit 402	2011 Mission GI South Application, Project I.D. No. B-8638-11 (Depo Ex. 4)
Exhibit 411	Excerpts from documents produced by Mission (Depo Ex. 22) (CONFIDENTIAL)
Exhibit 422	Emails dated 3/12/2012 between Nancy Bres Martin and Laurann Adams regarding Mission GI South-Question for CON Application (Depo Ex. 34) (CONFIDENTIAL)
Exhibit 439	C.V. of David French (Depo Ex. 52)
Exhibit 440	Outline of Opinions, David J. French (Depo Ex. 53)
Exhibit 443	Analysis prepared by David French (Depo Ex. 56)
Exhibit 447	Comments in Opposition from Angel Medical Center, Inc. Regarding Western Carolina Endoscopy Center, LLC October 14 2009 Certificate of Need Application for the Relocation of a GI Endoscopy Room to a New Facility (Project I.D. #A-8430-09) Comments Submitted on November 30, 2009 (Depo Ex. 60)
Exhibit 461	Affidavit of Carl P. Stamm, M.D., File No. 12 DHR 08733
Exhibit 462	Affidavit of Jimm Bunch, File No. 12 DHR 08733

STIPULATED FACTS

In the Prehearing Order, the parties agreed and stipulated to the following undisputed facts:

1. On or about March 15, 2012, Mission filed an application with the CON Section proposing to relocate one gastrointestinal ("GI") endoscopy room from Mission Hospital in Asheville to leased space in a medical office building in Fletcher. The relocated GI endoscopy room was proposed to be licensed as part of the Hospital and not as a new health service facility.

2. The Agency determined that Mission's Application was complete for review and began review of the Application on April 1, 2012. Mission's project was assigned Project I.D. No. B-8790-12.

3. By letter dated August 28, 2012, the CON Section notified Mission of its decision to deny Mission's Application. The CON Section issued the required State Agency Findings on September 5, 2012.

4. On September 27, 2012, Mission timely filed a petition for contested case hearing with the Office of Administrative Hearings ("OAH"), 12 DHR 08733, appealing the Agency's denial of Mission's Application.

5. On October 9, 2012, Park Ridge filed a motion to intervene in the contested case filed by Mission.

6. Park Ridge's motion to intervene was granted on October 23, 2012.

7. On November 1, 2012, Carolina Mountain filed a motion to intervene in the contested case filed by Mission.

8. Carolina Mountain's motion to intervene was granted on November 19, 2012.

WITNESSES

Witnesses for Mission:

1. Kristi Sink. Ms. Sink is the Vice President of Ambulatory and Ancillary Services for Mission. (Sink, Vol. 1 at 99) Ms. Sink was qualified as an expert in healthcare operations and in the development of new ambulatory services from an operational perspective. (Sink, Vol. 1 at 104)

2. True Morse. Mr. Morse is Vice President of Facilities for Mission. (Morse, Vol. 1 at 227) Mr. Morse has responsibility for maintenance of all Mission facilities and design and construction of new and renovated facilities. Mr. Morse was qualified as an expert in healthcare facility planning and construction. (Morse, Vol. 1 at 230)

3. Dr. William Harlan. Dr. Harlan is a gastroenterologist with Asheville Gastroenterology Associates, P.A. (Harlan, Vol. 2 at 321). Dr. Harlan performs GI endoscopy procedures at Mission and The Endoscopy Center, an outpatient licensed endoscopy center owned and operated by Asheville Gastroenterology Associates. (Harlan, T. Vol. II, pp. 321-322, 336)

4. Brian Moore. Mr. Moore is Administrative Director for Public Policy and Strategic Planning for Mission. (Moore, Vol. 2 at 353) He has worked at Mission since July 6, 1985 and is currently responsible for public policy, dealing with local, state and federal governments, and matters of legislation and corporate planning, including CON preparation and supervision of CON matters. Mr. Moore was qualified as an expert in health planning and analysis of CON applications.

5. Marjorie Acker (adverse). Ms. Acker is a registered architect and the Assistant Chief of the Construction Section. She has worked with the Construction Section for 17 years and has been the Assistant Chief since February 2012. (Acker, Vol. 3 at 652)

6. Nancy Bres Martin. Ms. Bres Martin is a health planning consultant with NBM Health Planning who works on certificate of need projects for hospitals, nursing homes, and other health care providers throughout North Carolina. (Bres Martin, Vol. 4 at 850) She has prepared applications relating to GI endoscopy services for Mission and other providers. Ms. Bres Martin was qualified as an expert in health planning, preparation, review, and analysis of certificate of need applications, need and utilization projections, and cost and feasibility analysis for health services. (Bres Martin, Vol. 4 at 854)

Witnesses for the Agency:

1. Lisa Pittman. Ms. Pittman is a Team Leader for the CON Section. Ms. Pittman was the Project Analyst for the review of the Mission Application. (Pittman, Vol. 6 at 1217, 1219) Ms. Pittman has worked for the CON Section for over two and one half years and currently supervises six project analysts in the western part of North Carolina. (Pittman, Vol. 6 at 1217, 1219)

2. Martha Frisone. Ms. Frisone is currently employed as the Assistant Chief of the CON Section. She has held this position since March 2010. (Frisone, Vol. 7 at 1341) Ms. Frisone has worked for the CON Section since 1994. In her more than 18 years with the CON Section, Ms. Frisone has served as both a Project Analyst and Team Leader prior to being named Assistant Chief. (Frisone, Vol. 7 at 1341) Ms. Frisone directly supervises six project analysts and one of her major responsibilities is to review and co-sign the findings and decisions prepared by project analysts. (Frisone, Vol. 7 at 1340-41) Ms. Frisone co-signed the decision and Required State Agency Findings regarding the Mission Application that is the subject of this contested case hearing. (Frisone, Vol. 7 at 1348-49)

3. Azzie Conley. Ms. Conley is Chief of the Acute and Home Care Licensure and Certification Section, Division of Health Service Regulation. (Conley, Vol. 3 at 680) She was named as branch manager of the Acute and Home Care Licensure and Certification Section, a position which was renamed as Section Chief around 2006-2007. (Conley, Vol. 3 at 680-81) Ms. Conley has worked with the Division since November, 1985. She served as a CON project analyst prior to joining the Licensure and Certification Section. (Conley, Vol. 3 at 684)

Witnesses for Park Ridge and Carolina Mountain:

1. Dr. Carl P. Stamm. Dr. Stamm is a gastroenterologist and an owner of Carolina Mountain, a physician practice and endoscopy center located in Hendersonville, Henderson County, North Carolina. (Stamm, Vol. 2 at 427-28) Carolina Mountain has two licensed endoscopy rooms. (Stamm, Vol. 2 at 428)

2. James A. (Jimm) Bunch. Mr. Bunch is the President and Chief Executive Officer of Park Ridge, a full-service community hospital located in Fletcher, Henderson County, North Carolina, which is part of the Adventist Health System based in Florida. Park Ridge has one licensed endoscopy room. (Bunch, Vol. 5 at 1044)

3. David J. French. Mr. French is a healthcare consultant at Strategic Healthcare Consultants in Reidsville, North Carolina, a consulting firm that he has owned and operated since 1998. (French, Vol. 5 at 1098) Mr. French regularly prepares CON applications for a variety of health care providers. (French, Vol. 5 at 1100; Respondent-Intervenors' Ex. 439) Mr. French was qualified and admitted as an expert witness in the areas of certificate of need preparation and analysis and healthcare planning. (French, Vol. 5 at 1101; Respondent-Intervenors' Ex. 439)

The Court, having heard all of the evidence in the case, and having considered the testimony, exhibits, arguments, and relevant law, the undersigned makes the Findings of Fact, by a preponderance of the evidence, enters his Conclusions of Law thereon, and makes the following Final Decision. N.C. Gen. Stat. § 150B-34.

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 the credibility, including but not limited to, the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. The Certificate of Need Section ("CON Section" or the "Agency") is the agency within the N.C. Department of Health and Human Services (the "Department"), the Division of Health Service Regulation (the "Division") that carries out the Department's responsibility to review and approve the development of new institutional health services under the Certificate of Need ("CON") Law, codified at N.C. Gen. Stat. Chapter 131E, Article 9.

2. The CON Act establishes a regulatory framework under which proposals to develop new health care facilities or services or purchase of certain regulated equipment must be reviewed and approved by the Agency prior to development. The CON Act has multiple purposes including providing access to services and meeting the increasing demand for gastrointestinal endoscopy services. *See* N.C. Gen. Stat. § 131E-175.

3. On an annual basis, the North Carolina State Health Coordinating Council publishes the State Medical Facilities Plan ("SMFP"). The SMFP contains an inventory of regulated facilities, services, and equipment, as well as determinations of need for the regulated facilities, services, and equipment.

4. By statute, the SMFP does not contain any limitations on the number of GI endoscopy rooms that can be developed. *See* N.C. Gen. Stat. §§ 131E-175, 176-(17), 177(4). There is no methodology in the State Medical Facilities Plan for establishing the need for additional endoscopy services.

5. Pursuant to N.C. Gen. Stat. § 131E-176(16)(u), a CON is required for the proposed project because it proposes to relocate a GI endoscopy room that is not in the same building or on the same grounds and is separated by more than a public right-of-way adjacent to the grounds where the room is currently located.

6. N.C. Gen. Stat. § 131E-183 provides that the Agency "shall review all applications utilizing the criteria outlined in this subsection and shall determine that an application is either consistent with or not in conflict with these criteria before a certificate of need for the proposed project shall be issued."

7. To receive a CON for a proposed project, an applicant's proposal must satisfy all applicable statutory review criteria specified in N.C. Gen. Stat. § 131E-183(a) as well as all applicable regulatory review criteria established pursuant to N.C. Gen. Stat. § 131E-183(b). N.C. Gen. Stat. § 131E-183; *Bio-Medical Applications of N.C., Inc. v. N.C. Dep't of Human Res.*, 136 N.C. App. 103, 523 S.E.2d 677 (1999); *Presbyterian-Orthopaedic Hosp. v. N.C. Dep't of Human Res.*, 122 N.C. App. 529, 534-35, 470 S.E.2d 831, 834 (1996).

8. Mission Hospital, Inc. ("Mission") is a large tertiary hospital located in Asheville, Buncombe County, North Carolina. Mission is a North Carolina non-profit corporation with its principal place of business at 509 Biltmore Avenue, Asheville, North Carolina 28801. (Pet. at 1) Mission currently operates six endoscopy rooms under its hospital license; four rooms are located on the Memorial campus and two rooms are located on the St. Joseph's campus. (Sink, Vol. 1 at 109)

9. On March 15, 2012, Mission submitted a CON application to relocate one of its six existing gastrointestinal ("GI") endoscopy rooms to a medical office building ("MOB") in Fletcher, North Carolina, identified as Project I.D. No. B-8790-12. (Jt. Ex. 1) Mission's proposed project is referred to herein as "Mission GI South" or the "Mission Application."

10. The MOB in which the proposed Mission GI South endoscopy facility would be housed is located on the Buncombe/Henderson County line. The MOB sits astride the Buncombe/Henderson County line and is the result of a "collaboration" between Mission and Pardee Hospital ("Pardee"). The MOB is planned to house more services than just endoscopy; however, Mission would not operate any other health care services within the MOB. (Jt. Ex. 1 at 189-90; Jt. Ex. 2 at 1462, 1486; Sink, Vol. 1 at 118)

11. The endoscopy center is proposed to be solely owned and operated by Mission. Pardee will have no role with respect to the endoscopy center and was not an applicant in this review. (Sink, Vol. 1 at 173)

12. The relocated endoscopy services would be operated under Mission's hospital license. (Sink, T. Vol. I, p. 109) Mission GI South will be subject to all applicable hospital policies and procedures. (Joint Ex. 1, p. 14)

13. Mission had previously submitted the 2011 Mission Application seeking to relocate one of its six existing and licensed endoscopy rooms from either the Memorial or St. Joseph's campus in Asheville to the same MOB in Fletcher, North Carolina. (Respondent-

Intervenors' Ex. 402) The 2011 Mission Application was denied due to non-conformities with multiple review criteria. (Jt. Ex. 2 at 1226-74)

14. Mission appealed the 2011 decision and both Park Ridge and Carolina Mountain were permitted to intervene in the contested case to support the Agency's decision. On February 27, 2012, Mission dismissed its contested case concerning the 2011 Mission Application without prejudice prior to any contested case hearing. The 2011 Mission Application made essentially the same proposal as the 2012 Mission Application. (Moore, Vol. 2 at 491)

15. Ms. Pittman, the Project Analyst for the 2012 Mission GI South Application, did not have any involvement in the 2011 Mission Application. (Pittman, Vol. 6 at 1225) Although Ms. Pittman read the Findings on the 2011 Mission Application, she did not rely upon the 2011 Findings to any degree. (Pittman, Vol. 6 at 1287)

16. Ms. Pittman was not instructed to review the 2011 Mission Application because the agency's position is that "each application must stand on its own and be reviewed on its own independent of other applications." (Frisone, Vol. 7 at 1394-95) Prior Findings may serve as a guide for consistency but each application stands alone.

17. Even if Mission had corrected all of the deficiencies found in the 2011 Application, Mission was not guaranteed approval of its 2012 Application. (Bres Martin, Vol. 4 at 941)

18. During the Agency's review of the Mission Application, Park Ridge and Carolina Mountain filed written comments asserting that the Mission Application should not be approved. (Jt. Ex. 2 at 309-953; 134-308)

19. A public hearing was held on May 16, 2012. Representatives of Mission presented information at the public hearing regarding its application. (Jt. Ex. 2 at 980-1061) Mr. Moore testified that the public hearing was very active and that Mission provided him with the resources necessary to actively participate in the hearing. (Moore, Vol. 4 at 784)

20. Representatives from Park Ridge and other members of the public also appeared at the public hearing and voiced their concerns about the proposed project. (*Id.*)

21. In addition to information presented in the CON application, written comments and public hearing presentations, the Agency considers and relies upon publicly-available data in its review and analysis of CON applications. The publicly-available data which the Agency may access and consider includes, but is not limited to, census or demographic data, population data, and data reported on providers' licensure renewal applications. The Agency may access resources which are publicly available through the internet. (Jt. Ex. 2 at 133-1460; Frisone, Vol. 7 at 1346)

22. The applicant has the burden to demonstrate conformity with the applicable statutory review criteria. (Frisone, Vol. 7 at 1346) *See also Presbyterian-Orthopaedic Hosp.*, 122 N.C. App. at 534, 470 S.E.2d at 834. On occasion, the Agency may conduct research to verify the representations made in the application and determine whether the representations are reasonable, credible, and supported. (Frisone, Vol. 7 at 1346)

23. By decision letter dated August 28, 2012, the Agency informed Mission that its application had been disapproved. (Jt. Ex. 1 at 78-80)

24. On September 27, 2012, Mission filed a petition for contested case hearing with the Office of Administrative Hearings ("OAH"), in which it appealed the disapproval of its Application.

25. On October 9, 2012, Park Ridge filed a motion to intervene in the contested case, which motion was granted by the Undersigned on October 23, 2012.

26. On November 1, 2012, Carolina Mountain filed a motion to intervene in the contested case, which motion was granted by the Undersigned on November 19, 2012.

CON Section's Decision to Deny the Mission Application

27. In analyzing the Mission Application, Ms. Pittman read the entire application and exhibits provided by the applicant. She also attended and moderated the public hearing for the Mission Application and reviewed the comments received regarding the project. (Pittman, Vol. 6 at 1221-23)

28. Ms. Pittman acted as Project Analyst and Ms. Frisone was the cosigner of the decision. They exchanged drafts and discussed various issues throughout the review of the Mission Application and preparation of the Agency Findings. (Pittman, Vol. 6 at 1222; Frisone, Vol. 7 at 1349) Ms. Frisone also reviewed portions of the Mission Application. (Frisone, Vol. 7 at 1340)

29. There is no requirement of a project analyst or cosigner to conduct any additional research to aid in finding a project conforming with the mandatory review criteria. (Frisone, Vol. 7 at 1346) The burden is on the applicant to demonstrate conformity with each review criteria within the application itself as submitted. (Frisone, Vol. 7 at 1358) The Agency may do some research using publicly-available data or information to verify representations made in an application. (Frisone, Vol. 7 at 1346)

30. Upon request, the Agency may expedite the review of a CON Application although once a request for a public hearing has been received, an expedited review cannot be granted. (Frisone, Vol. 7 at 1359) The Mission Application was not granted expedited review status. The Agency anticipated there would be a request for a public hearing given concerns expressed by various providers and the litigation following the Mission 2011 Application which proposed the same relocation. (Frisone, Vol. 7 at 1359)

31. Unless the review of an application is expedited, the Agency is not required to seek clarity. The Agency may but rarely asks the applicant to clarify representations made in the application. (Frisone, Vol. 7 at 1391) An applicant is not permitted to amend its application. 10A N.C.A.C. 14C.0204.

32. There is no requirement in the CON Law that the Agency must conduct a site visit when reviewing an application. The burden of demonstrating conformity with each review

criteria within the application itself as submitted rests with the applicant. (Moore, Vol. 4 at 789; Frisone, Vol. 7 at 1358)

33. Mission contends that its application was not missing any information and contained sufficient information, standing alone, to provide the Agency with an understanding of the proposed project area. (Moore, Vol. 4 at 791)

34. The Agency found Mission non-conforming with the following statutory review criteria: 3, 4, 5, 6, 7, 12 and 18a. (Jt. Ex. 2 at 1462-1514) The Mission Application was found conforming with review criteria 1, 3a, 8, 13, 14 and 20. The Criteria and Standards for Gastroenterology Endoscopy Procedure Rooms in Licensed Health Service Facilities, promulgated in 10A N.C.A.C. 14C.3900, were not applicable to the Mission GI South proposed project. (*Id.*)

Criterion 3

35. N.C. Gen. Stat. § 131E-183(a)(3) ("Criterion 3") requires the following:

> The applicant shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.

(Jt. Ex. 2 at 1463)

36. Criterion 3 has two components: (1) the applicant must identify the population that it proposes to serve; and (2) the applicant must demonstrate the need that population has for the services it proposes. (Pittman, Vol. 6 at 1229; Frisone, Vol. 7 at 1349)

Identification of Population Proposed to be Served

37. Mission identified the population it proposed to serve as a subset of its existing GI endoscopy population, which included three zip codes in Buncombe County and the entirety of Henderson County. (Pittman, Vol. 6 at 1229)

38. Mission intends to serve the same population from Henderson County who are already traveling from Henderson County to the main hospital campus for endoscopy services. (Jt. Ex. 1, 10)

39. Mission also expects an increase in business from the area surrounding the proposed location. Mission's application acknowledges that population growth in the proposed service area influenced the decision-making for this proposed site. (Jt. Ex. 1, 20)

40. Mission expects to heavily market their services in the proposed service area in an effort to increase awareness of the need for colonoscopy screening in that area. (Sink, Vol. 1, pp. 169, 177, 223-225)

41. The Agency found that the Mission Application adequately identified the population proposed to be served and reasonably identified a subset of its existing population. (Jt. Ex. 2 at 1465; Pittman, Vol. 6 at 1230)

Demonstration of Need

42. The "need" in Criterion 3 deals with the need that the specifically defined *population* has for that particular service, and does not deal with the need a *provider* has to undertake a particular service. (French, Vol. 5 at 1107-08)

43. Even if Mission demonstrates a need for all six of its existing endoscopy rooms, it is still required to show the need for the particular population to be served by its proposed relocated room in Fletcher. (Bres Martin, Vol. 4 at 912)

44. The Mission Application addressed seven topics in response to the application's request to describe the unmet need for the proposed services: 1) prevalence of gastrointestinal disorder; 2) importance of early detection of colorectal cancer; 3) the Patient Protection and Affordable Care Act of 2010; 4) Mission GI South proposed service area; 5) rationale for site location; 6) utilization of existing GI endoscopy resources; and 7) population growth in Buncombe and surrounding counties. (Jt. Ex. 1 at 17-31)

45. Mission's discussion of the prevalence of gastrointestinal disorder notes that more than 85,000 residents in the proposed service area may suffer from some form of gastro-intestinal disorder; however, this includes heartburn, nausea and vomiting and other such maladies which may or may not be indicative of the need for endoscopy screening. It cannot be gleaned from this information how many endoscopies would be anticipated in the proposed service area.

46. Mission acknowledged that it is currently utilizing all six of its endoscopy rooms, which aid in the detection of colon cancer. (Sink, Vol. 1 at 172; Moore, Vol. 2 at 492) Mission acknowledged that existing facilities in Henderson County like Carolina Mountain, Pardee, Park Ridge and The Endoscopy Center in Buncombe County also provide endoscopy services that aid in the early detection of colon cancer. (Moore, Vol. 2 at 499, 508, 512; Vol. 3 at 531)

47. There was no specific information included in the Mission Application concerning the incidence of colon cancer rates in Buncombe or Henderson Counties. (French, Vol. 5 at 1115-16)

48. The Mission Application also purported to rely upon the Patient Protection and Affordable Care Act ("PPACA" or "ACA") as a justification for need for its proposed relocation. In its Application, Mission stated: "Under the PPACA, all new health insurance policies must cover preventative exams, including colonoscopies, without charging out-of-pocket fees such as copayments or deductibles. As of January 1, 2011 colorectal cancer screening colonoscopies are fully covered for all Medicare beneficiaries with no out-of-pocket fees." (Jt. Ex. 1 at 20)

49. However, there was no evidence in the Mission Application of the effect the ACA has had or will have on Buncombe or Henderson Counties. There was no evidence in the

Mission Application that utilization of endoscopy procedures in Buncombe or Henderson Counties has increased as a result of the ACA. (French, Vol. 5 at 1111-12)

50. Further, the Mission Application fails to identify the number or percentage of projected procedures that will be screening colonoscopies. (French, Vol. 5 at 1113, 1123)

51. A procedure that is anticipated to be a screening colonoscopy oftentimes will require additional procedures such as the removal of polyps. This is not always something that a physician can anticipate prior to the procedure. Removal of polyps would not be covered in the same manner as a screening colonoscopy. (Stamm, Vol. 2 at 447)

52. Mission defined its scope of services by specifically listing nine procedures as examples of outpatient services that would be provided at Mission GI South. (Jt. Ex. 1 at 6)

53. Some of those procedures listed would only be performed in a hospital setting due to either increased risk or need of other equipment. (Harlan, Vol. 2 at 338) Tenckhoff Catheter Placement and Thoracentesis are listed as potential services to be rendered but are not procedures that would not be performed in an endoscopy center as is proposed. (Harlan, Vol. 2 at 339)

54. Tenckhoff Catheter Placement for dialysis and Thoracentesis, a tapping of the chest are not endoscopic procedures. (Stamm, Vol. 2 at 450; *see also* French, Vol. 5 at 1129)

55. Mission admits that it was an error to include these procedures in the Application; however, there is no way the Agency would be able to discern this error in reviewing the application. (Moore, Vol. 3 at 603-04)

56. The Mission Application provided utilization projections via an 11-step methodology. (Jt. Ex. 1 at 31-49) Mission projected that, for Project Year 3, the number of procedures performed at Mission GI South would total 1,339. (Jt. Ex. 1 at 48)

57. Mission argued that its proposed relocated endoscopy room needed to be on the county line and could not be located in other areas of Buncombe County. Mission contends that the only possible location that accommodates the Mission-Pardee joint effort to provide medical services is on the Buncombe-Henderson County line. (Emphasis added) (Moore, Vol. 2. Pp. 371-372; Vol. 4 at 812-13)

58. While this location may be a good option, it certainly is not the only option. It must be remembered that Pardee is not a part of this particular project and is not a co-applicant in this CON application. Placing the proposed facility in the MOB which sits astride the county line is an accommodation for the collaboration between the two hospitals.

59. Mission's contention that the endoscopy room needed to be on the county line was at least in part because of the relationship with Pardee. That relationship made the location desirable, but does not elevate that location to the status of "need"; i.e., there was no necessity that this was the site as opposed to any other. That location was a matter of convenience, not necessity.

60. Mr. Moore acknowledged that Mission owned other property in Buncombe County and that there were theoretically other sites that could have been proposed. (Moore, Vol. 3 at 547) The Fletcher site was the site chosen by Mission. (*Id.*)

61. The Mission Application described the reasons for ultimately choosing the location in response to the Application's request for documentation that the facility is needed at the proposed site as opposed to another area of the service area,. (Jt. Ex. 1 at 49-52)

62. The Mission Application described the necessity for relocation of the endoscopy room as follows: decreasing patient frustration in terms of travel time; a need for locating services off of the hospital's main campus due to limited hospital campus space; and increase in services that can be offered on an outpatient basis. (Jt. Ex. 1 at 53)

63. The Agency found that the Mission Application as written and as submitted did not adequately demonstrate the need for the proposed service by this population for the relocation of a GI endoscopy room to the proposed location. (Jt. Ex. 2 at 1488; Pittman, Vol. 6 at 1231; Frisone, Vol. 7 at 1350, 1352; French, Vol. 5 at 1106)

64. Although Mission contends and its witnesses stated at the hearing that patient complaints about time spent navigating the Mission campus and confusion in "way finding" on the Mission campus were factors demonstrating need for the project, there is no documentation in the Mission Application of any such complaints. (Sink, Vol. 1 at 171, 179; Moore, Vol. 4 at 809)

65. Mission's application states that it has undertaken a comprehensive study, which is still in progress. The application states that the recommendations have not yet been developed; however, there is overwhelming support for relocation "due to issues of parking, convenience, way finding and cost structure." There is no documentation of these contentions.

66. Ms. Sink, who would be responsible for operations at the proposed Mission GI South, admitted that no formal surveys or written communications from patients of any kind had been conducted concerning any purported accessibility issues related to endoscopy. (Sink, Vol. 1 at 106) No letters of support for the proposed relocation from patients were included with the Application. (Sink, Vol. 1 at 171)

67. Even if taken as true, the difficulty in finding parking and the difficulty in navigating and negotiating around the main campus hospital relates to the convenience for the patients and for the hospital. It may readily help justify a real desire to move the endoscopy out of the main hospital campus, but that does not translate into a need at the proposed site. Even if taken as justifying a move, it is not indicative of where to move. Need must be shown at the proposed site. Convenience is not equivalent to need.

68. The only letter from non-Mission physicians included in the application was a letter from Asheville Gastroenterology Associates ("AGA") signed by Dr. John W. Garrett which stated the letter was an "expression of interest" in performing procedures at the proposed new location. (Sink, Vol. 1 at 171; Jt. Ex. 1 at Ex. 10) The letter does not obligate AGA to use Mission GI South. The letter does not indicate the number of procedures AGA would perform at Mission GI South. (Jt. Ex. 1 at Ex. 10)

69. AGA is responsible for the Endoscopy Center, a GI endoscopy ambulatory surgery center, which currently operates five endoscopy rooms. The physicians with AGA receive both a professional fee and a facility fee for endoscopy procedures performed at The Endoscopy Center. (Jt. Ex. 1 at Ex. 10; Harlan, Vol. 2 at 334) Dr. Harlan and his partners would not receive a facility fee for procedures performed at the proposed Mission GI South and would therefore potentially make less money by using Mission GI South. (Moore, Vol. 3 at 529) However, physicians at AGA currently perform services on Mission's main campus.

70. Although the Mission Application included multiple pages devoted to discussing traffic patterns, local businesses such as Ingles and Wal-Mart and other roads near the proposed Mission GI South location, Mission did not explain in its application how the real estate development, traffic counts and health utilization statistics cited as support for its proposal to relocate a GI endoscopy room to Fletcher correlates to a need for an additional GI endoscopy room in the proposed service area. (Jt. Ex. 1 at 20-24; French, Vol. 5 at 1115-16)

71. To the contrary, part of Missions' argument about the necessity for specifically designated registration and "sign-in" areas is that such would not be needed because of the type of service being provided. Endoscopy services are generally not walk-in services and typically are through doctor referral. Therefore, a busy, high traffic corridor does not necessarily correlate into a need for services.

72. Mission included a "time study" in its Application which purports to show the time savings patients located in the various zip codes of the proposed service area would experience by utilizing the proposed Mission GI South instead of the existing Asheville campus. However, the documentation provided by Mission actually demonstrates that there is longer travel time to Mission Hospital from nine of the ten locations listed, and the tenth was the same amount of time. The only time savings would be in the form of reduced time to park, enter the building and arrive at check-in, and not in the form of driving fewer miles (Jt. Ex. 1 at 21; Jt. Ex. 2 at 1468; Moore, Vol. 4 at 800; Pittman, Vol. 6 at 1231; Frisone, Vol. 7 at 1353-54)

73. The locations reflected in the time study chart are from various locations within Buncombe County and are not from within Henderson County. Because of the proposed location, the travel distance for Henderson County residents would be shorter than traveling to the hospital's main campus.

74. In as much as Mission contends that it is offering this cite as a convenience to those patients from Henderson County who are already being served at Mission's main campus, a closer location would obviously be more convenient. Mission contends that there is sufficient volume by relying solely on those already being served; however, Mission expects to heavily market and attempt to educate people in the proposed service area in order to gain more patients and thereby not limit itself solely to those already being served.

75. In the study, five minutes is used as the amount of time in the parking lot walking to check-in for all locations using Mission GI South, whereas twenty and a half minutes are used as the amount of time in the parking lot walking to check-in for Mission Hospital. (Jt. Ex. 1 at 21)

76. The time study was conducted by Mr. Moore, a Mission employee who does not consider himself to be an expert in the performance of time studies. (Moore, Vol. 3 at 609) Mr. Moore served as both the researcher and subject for this study in that he did the actual walking and driving. (Moore, Vol. 3 at 611)

77. The study was definitely not done to any "scientific" standards. There apparently was no repetition to verify results. Very little information was provided regarding the details or circumstances of the conduct of its time study and no backup data for the study. (French, Vol. 5 at 1107; Frisone, Vol. 7 at 1351)

78. Mr. Moore stated that the idea was to get a flavor of what the patients were encountering at the hospital. (Moore, Vol. 3 at 613) He was unable to recall with specificity which route he drove each day of this study, but testified that it was conducted over an unspecified week in February, 2012. (Moore, Vol. 3 at 612, 614) He stated that he conducted his walking study in the morning and afternoon but could not give specific times for the study, nor could he recall any weather conditions. (Moore, Vol. 3 at 616-17)

79. Even though the Mission Application did not specify from which campus the endoscopy room was proposed to be relocated, Mr. Moore acknowledged that the time study was only conducted at the Mission campus and not the St. Joseph's campus. (Moore, Vol. 4 at 801)

80. Although the time study was presented as a justification for the alleged unmet need to be alleviated by the proposed project, Mr. Moore admitted that Mission's decision to relocate the endoscopy room had already been made, and that this study was an "additional piece of information that was provided." (Moore, Vol. 4 at 797)

81. Mission admitted that it did not conduct a study or include any information in the Application to determine patient preference for spending more on gasoline to travel farther versus spending less time walking. (Moore, Vol. 4 at 800)

82. The Agency found that Mission did not adequately explain why patients who live in the northern part of zip code 28806 would travel through Asheville to Fletcher to utilize another hospital-based GI endoscopy room. (Jt. Ex. 2 at 1486; Pittman, Vol. 6 at 1237; Frisone, Vol. 7 at 1355)

Endoscopy Providers in Proposed Service Area

Park Ridge

83. Park Ridge is a 103-bed not-for-profit hospital providing both inpatient and outpatient services in Henderson County. Forty-one of its beds are behavioral health beds. (Bunch, Vol. 5 at 1041) Park Ridge has one GI endoscopy room that provides the full range of inpatient and outpatient endoscopy services. It is available 24 hours per day for emergencies but generally operates from 7:30 a.m. until 3:00 or 3:30 p.m. for non-emergent cases. (Bunch, Vol. 5 at 1044-45) Park Ridge is located 4.2 miles from the proposed Mission GI South location. (Bunch, Vol. 5 at 1046)

84. In 2009, Park Ridge completed a $26 million expansion project which included the enhancement of its GI endoscopy services. (Bunch, Vol. 5 at 1044)

85. Park Ridge offers free valet parking, convenient and easy to traverse free surface parking and a waiting area for patients and their families. (Bunch, Vol. 5 at 1045)

86. Mission acknowledged in its Application and at the hearing that Park Ridge's case and procedure volume has been decreasing every year between fiscal years 2008 and 2011. (Jt. Ex. 1 at 339; Sink, Vol. 1 at 173; Moore, Vol. 2 at 507; Bres Martin, Vol. 4 at 913)

Carolina Mountain

87. Carolina Mountain, located in Hendersonville, Henderson County, is an outpatient, non-hospital based freestanding ambulatory endoscopy center located approximately nine miles or twelve minutes from the proposed Mission GI South. (Stamm, Vol. 2 at 436, 438) It is a physician-owned and operated practice with four physicians and five physician extenders. Carolina Mountain employees 47 individuals. (Stamm, Vol. 2 at 429-30)

88. Carolina Mountain has two endoscopy rooms that operate from 7:00 a.m. until 3:00 p.m., Monday through Friday. Its clinical offices operate from 7:45 a.m. until 5:30 p.m., Monday through Friday. (Stamm, Vol. 2 at 428, 430) Carolina Mountain provides colonoscopies and other endoscopy related procedures at its facility. (Stamm, Vol. 2 at 450)

89. Carolina Mountain treats patients primarily from Henderson, Buncombe and Transylvania Counties. It offers a large surface parking lot at no charge to patients, as well as a large reception desk and separate waiting rooms for its endoscopy patients and clinical patients. (Stamm, Vol. 2 at 430-32)

90. Carolina Mountain provides pro bono work for patients who cannot afford their care and will work with self-pay patients to negotiate fees where needed. (Stamm, Vol. 2 at 468)

Pardee Hospital

91. Pardee, also located in Henderson County, has three GI endoscopy rooms located approximately 11.6 miles from Mission's proposed site. (Pittman, Vol. 6 at 1241) Pardee offers free parking to its patients. (Moore, Vol. 2 at 500)

92. Mission acknowledged in its Application and at the hearing that Pardee's case and procedure volume has been decreasing every year between fiscal years 2008 and 2011. (Jt. Ex. 1 at 339; Sink, Vol. 1 at 172-73; Moore, Vol. 2 at 497; Bres Martin, Vol. 4 at 913)

The Endoscopy Center

93. AGA owns and operates the freestanding ambulatory surgery center called The Endoscopy Center that provides outpatient endoscopy procedures. It is located in Asheville, about one third of a mile from the Mission campus in Buncombe County. (Harlan, Vol. 2 at 332) The Endoscopy Center has 5 licensed endoscopy rooms, a waiting room and registration area for

patients. (Harlan, Vol. 2 at 332-33) It provides free surface parking and convenient access for its endoscopy patients. (Harlan, Vol. 2 at 335-36)

94. Dr. Harlan, a partner with AGA, testified that AGA receives both a professional fee and a facility fee for endoscopy procedures performed at The Endoscopy Center. (Harlan, Vol. 2 at 334) Dr. Harlan and his partners would not receive a facility fee for procedures performed at the proposed Mission GI South. (Moore, Vol. 3 at 529)

95. Dr. Harlan also testified that the charges to his patients for procedures performed at The Endoscopy Center are lower than the charges for procedures performed at a hospital. (Harlan, Vol. 2 at 335)

96. The Mission Application makes clear that more of the Henderson County patients choosing endoscopy services in Asheville are choosing The Endoscopy Center than are choosing Mission. (Jt. Ex. 2 at 1481; Frisone, Vol. 7 at 1403)

Utilization of Existing Endoscopy Providers in Buncombe and Henderson Counties

97. Utilizing the information provided by Mission, the Agency found that the total number of procedures (inpatient and outpatient) performed in the six existing licensed GI endoscopy rooms at Mission decreased over the three-year period from Calendar Year ("CY") 2008 to CY 2010, and increased only in CY 2011. (Jt. Ex. 2 at 1486; Pittman, Vol. 6 at 1238; Frisone, Vol. 7 at 1357)

98. The Agency found that the total number of GI endoscopy procedures has either remained flat or declined from CY 2008 to CY 2011 at the five existing GI endoscopy providers in Buncombe and Henderson counties; i.e., Mission Hospital, Carolina Mountain, Pardee Hospital, the Endoscopy Center, and Park Ridge. In addition, the rate of decline in procedures in Henderson County is greater than the rate of increase in Buncombe County. This is despite the fact that the population of Buncombe County has increased. (Jt. Ex. 2 at 1487; Bres Martin, Vol. 4 at 946; Pittman, Vol. 6 at 1238-39; Frisone, Vol. 7 at 1357)

99. The Mission Application demonstrates that the number of endoscopy cases for Buncombe County residents decreased between 2007 and 2011. In addition, the endoscopy use rate for Buncombe County residents also decreased during this same time period. (Jt. Ex. 1 at 41; Moore, Vol. 3 at 632; Bres Martin, Vol. 4 at 915)

100. As shown in the Mission Application, the population of Henderson County increased between 2007 and 2011; however, the number of endoscopy cases in Henderson County decreased between 2008 and 2011 (Jt. Ex. 1 at 41; Moore, Vol. 3 at 633) There has been a significant increase in the number of cases in 2008 due to the opening of Carolina Mountain. In addition, the use rate of endoscopy services in Henderson County also decreased in those same years. (Jt. Ex. 1 at 41; Moore, Vol. 3 at 633)

101. Mission's proposed service area includes three zip codes in Buncombe County and all of Henderson County. (Jt. Ex. 1 at 29) The proposed service area is not equivalent to the service area for Mission. (French, Vol. 5 at 1131)

102. The Agency found that Mission failed to demonstrate that there was a need for another hospital-based GI endoscopy room in the proposed location because there are already two other hospitals located within the proposed service area and very close to the proposed site (both Park Ridge and Pardee) that have underutilized endoscopy rooms, as well as an ambulatory surgical facility (Carolina Mountain). (Pittman, Vol. 6 at 1232)

103. There are eleven existing endoscopy rooms in Buncombe County, six at Mission and five at The Endoscopy Center. None of the eleven existing rooms are physically located in the proposed service area. Mission's project would increase the number of GI endoscopy rooms in that proposed service area and the CON Law requires that an applicant demonstrate the need for the room *in the proposed service area.* (Frisone, Vol. 7 at 1355-56)

104. The existing facilities in Henderson County, in the proposed service area, have unutilized capacity. In addition, utilization in Henderson County is decreasing more rapidly than utilization is increasing in Buncombe County. (Jt. Ex. 2 at 1488; Stamm, Vol. 2 at 451-52; Pittman, Vol. 6 at 1240)

105. This is true even though the population of Buncombe County increased each year between 2007 and 2011. (Jt. Ex. 1 at 41; Moore, Vol. 3 at 632)

106. The Mission Application showed that the total number of endoscopy procedures in Buncombe and Henderson Counties decreased between FY 2008 and FY 2011. (Jt. Ex. 1 at 26; Bres Martin, Vol. 4 at 914)

107. The number of GI endoscopy procedures performed at Park Ridge and at Pardee decreased each year between FY 2008 and FY 2011. The total Henderson County GI endoscopy procedure volume also decreased during this time period by 853 procedures. (Jt. Ex. 1 at 26; Bres Martin, Vol. 4 at 913) The combined total number of GI endoscopy procedures in Henderson and Buncombe Counties also decreased between FY 2008 and FY 2011. (Jt. Ex. 1 at 26; Bres Martin, Vol. 4 at 914)

108. Ms. Bres Martin admitted in her testimony that based upon the historical data, there was little or no growth in GI endoscopy at the time the application was filed. (Respondent-Intervenors' Ex. 437; Bres Martin, Vol. 4 at 919-20)

109. The Agency found that, based on the numbers of procedures performed at Carolina Mountain, Pardee Hospital, and Park Ridge Hospital, there is existing capacity for additional GI endoscopy procedures in the Mission GI South service area. (Jt. Ex. 2 at 1488; Pittman, Vol. 6 at 1240) In other words, none of the three endoscopy providers in Henderson County are operating at capacity.

110. Mission acknowledged in its Application that "decreasing utilization at hospital based GI endoscopy services in Henderson County is a result of shifting volumes from hospital based facilities to the freestanding GI provider in the County. Total volume has remained essentially flat, while volumes at Pardee Hospital and Park Ridge Hospital have decreased." (Jt. Ex. 1 at 26-27)

111. Both Mr. Bunch on behalf of Park Ridge and Dr. Stamm on behalf of Carolina Mountain testified that their facilities have existing capacity to serve additional patients. (Bunch, Vol. 5 at 1051; Stamm, Vol. 2 at 446-47, 460)

112. Mission acknowledged in its Application and at the hearing that Park Ridge's case and procedure volume has been decreasing every year between fiscal years 2008 and 2011. (Jt. Ex. 1 at 339; Sink, Vol. 1 at 173; Moore, Vol. 2 at 507; Bres Martin, Vol. 4 at 913)

113. Mission's assertion in the hearing that it was being blamed for decreasing utilization of endoscopy services at Park Ridge, is without merit, but as the Agency noted the problem was Mission's failure to document and support why it has a need to move another room into a proposed service area with decreasing utilization. (Frisone, Vol. 7 at 1404)

114. The data provided in the Mission Application demonstrates that the majority of Henderson County residents are choosing Henderson County locations for their endoscopy procedures, although admittedly many are going to Mission for their procedures. (Frisone, Vol. 7 at 1403; Jt. Ex. 2 at 1483)

115. Ms. Bres Martin asserts that there is a need for additional endoscopy rooms in Buncombe County based upon the 1500 procedures per room performance standard in the endoscopy rules for new endoscopy rooms. 10A N.C.A.C. 14C.3903. The 1500 procedures per room performance standard is a minimum standard for the proposal of new rooms but in actuality has nothing to do with a facility's practical capacity for procedures that can be performed. (Bres Martin, Vol. 4 at 833, 938)

116. Assuming *arguendo* that the numbers justify adding an endoscopy room in Buncombe County, Buncombe County is not equivalent to the proposed service area. The application does not seek approval for an endoscopy room in Buncombe County alone, and Buncombe County alone is not equivalent to the proposed service area.

117. The Agency considered the utilization at Park Ridge, Pardee and Carolina Mountain to illustrate in part that although Mission asserts the population growth and density of this area justifies relocating an endoscopy room to that area, the utilization of existing providers is decreasing, which is inconsistent with an alleged need for additional endoscopy capacity in that area. (Frisone, Vol. 7 at 1356-57) Mission failed to explain to the Agency or provide any justification why, in light of this historical volume and excess capacity, there is still a perceived need to relocate its room to the proposed location. (Frisone, Vol. 7 at 1357)

118. The Agency concluded that the historical utilization of endoscopy services in the proposed service area does not support adding additional capacity in the form of an additional room to that service area. (Frisone, Vol. 6 at 1357)

119. Based upon these findings, the Agency concluded that Mission had not adequately demonstrated the need to move one of its six existing GI endoscopy rooms to the Buncombe/Henderson County line. (Jt. Ex. 2 at 1488; Pittman, Vol. 6 at 1241)

120. The Agency properly concluded that Mission was non-conforming to Criterion 3.

Criterion 4

121. N.C. Gen. Stat. § 131E-183(a)(4) ("Criterion 4") requires the Agency to determine that "where alternative methods of meeting the needs for the proposed project exist, the applicant shall demonstrate that the least costly or most effective alternative has been proposed."

122. The Agency's analysis under Criterion 4 includes review of the alternatives to the proposed project that were considered by the applicant, whether obvious alternatives were considered, and the reasons why the applicant ultimately chose to forego any alternatives. (Pittman, Vol. 6 at 1243)

123. There is no minimum number of alternatives the applicant is required to offer; however, the applicant must demonstrate that its ultimate proposal is the least costly or most effective as compared to other possibilities. (Frisone, Vol. 7 at 1373)

124. The Mission Application concludes that two alternatives were considered by Mission: 1) relocate two GI endoscopy rooms instead of one; and 2) relocate endoscopy services to other areas of Buncombe County, most specifically the southern part of Buncombe County. (Jt. Ex. 1 at 62; Pittman, Vol. 6 at 1243) The Mission Application did not discuss any other alternatives. (Pittman, Vol. 6 at 1244)

125. The Mission application recites that it undertook a "detailed planning process from which it determined that Mission GI South is needed at the proposed site as opposed to another area in Buncombe County." There is no evidence of the detailed planning process. There is no evidence that any site other than southern Buncombe County was considered. There is no evidence of any sites being considered other than the MOB on the county line.

126. The first alternative was rejected because the volume of cases would support moving only one endoscopy room to the southern part of Buncombe County.

127. The second alternative centers on the zip codes for southern Buncombe and for northern Henderson Counties. It very specifically states that locating anywhere else would not improve accessibility to the growing population in that area; i.e., southern Buncombe and northern Henderson. (Jt. Ex. 1 at 62) Obviously, if you are looking at serving a specific population for a specific area, then locating anywhere else does not make sense.

128. The Mission Application does not speak to having considered any other area in Buncombe County, including the northern part of that county which was also one of the fastest growing parts of the county. Mission is focused on serving those patients coming from southern Buncombe and northern Henderson County that are already being served by Mission, and therefore, do not consider any other site.

129. Mr. Moore contends that the second alternative listed in the Application was a statement of multiple other potential locations bundled together. (Moore, Vol. 4 at 807) The only hint of any other area is in the statement "Locating elsewhere would not improve

accessibility to the growing population bases in southern Buncombe County and Henderson County currently served by Mission Hospital's outpatient services." (Jt. Ex. 1 at 62)

130. That statement does not infer that other areas are being considered but rather that it is more of a futile effort to even consider other areas because of the focus on that one population base. The inferences Mr. Moore suggests should be drawn from the second alternative are not persuasive in that the plain language of the second "alternative" in the application does not indicate that any other sites were considered.

131. It does not seem that any other area was considered because of being focused on a particular population. No other site was considered even within proximity to the proposed site. Because of that focus and tunnel vision for the particular MOB on the county line, there was no effort to even consider any other dynamic, including the northern area of Buncombe County and other counties adjacent to that area.

132. If, as Mission contends, a prime moving consideration is the inconvenience of the facility on the main campus, with "way-finding" and parking a major consideration, then rhetorically why is the only focus on the single area. Why not at least consider other parts of Buncombe County.

133. There was no analysis by Mission in the Application of the cost associated with relocating to a different part of the county, nor was any such analysis ever performed by Mission. (Moore, Vol. 4 at 807-808) The Mission Application contains no substantive or meaningful discussion of how any other potential location was more costly or less effective than the site actually chosen.

134. Mr. Moore acknowledges that there are a number of cities or towns in Buncombe County, which do not currently have endoscopy rooms. Mr. Moore acknowledges that the population in the Black Mountain area is actually higher than the population in Fletcher in Henderson County. He further acknowledged that the population of Weaverville is greater than that of Fletcher and that industries are located there such as a firm providing sewn goods for the United States military and one of the largest manufacturers of CDs and DVDs. (Moore, Vol. 3 at 560-63)

135. Mr. Moore was unable to identify any specific locations other than the one proposed that Mission had actually considered for its proposed project. (Moore, Vol. 4 at 807, 811)

136. The Agency found fault with the Mission Application for not addressing the alternative of licensing a relocated GI endoscopy room as an ambulatory surgical facility. (Jt. Ex. 2 at 1490; Pittman, Vol. 6 at 1246; Frisone, Vol. 7 at 1375) The Agency concluded that, based on the data provided in the Mission Application, patients in the area were clearly migrating towards ambulatory surgical facilities for endoscopy services and trending away from hospitals. (Pittman, Vol. 6 at 1246)

137. Based upon the findings of the agency as gleaned from the Mission Application, an ambulatory surgical facility could have been considered as an alternative. There are substantial findings by the Agency that would justify considering an ambulatory surgical facility;

however, it is found as fact that Mission's error was not in having failed to consider an ambulatory surgical facility. Mission's error was not considering any other location and not discussing any other site considered.

138. The Agency further questioned Mission's failure to consider locating the endoscopy room closer to Asheville since Mission had indicated that parking and navigating the Mission campus was one of its concerns. (Frisone, Vol. 7 at 1374)

139. Mr. Moore testified that the proposed location in southern Buncombe County was more cost effective than a location near the Mission main hospital campus because current pricing for property in or around the hospital campus runs about $1,000,000 per acre. (Moore, T. Vol. II, pp. 485-486) That information was not included in the application.

140. In the Application, Mission presented its drive time study as discussed in Criterion 3 above that showed the drive time to Mission was actually shorter than the drive time to Fletcher for patients living in many zip codes of the proposed service area. Yet Mission did not consider relocating the room closer to the hospital in Asheville. (Pittman, Vol. 6 at 1249)

141. The Agency also found problematic that the Buncombe/Henderson County line dissects the MOB in which Mission is proposing to relocate its endoscopy room. The Agency concluded that this was problematic for licensure rules because services on a hospital license must be physically located in the same county. (Jt. Ex. 2 at 1490; Pittman, Vol. 6 at 1247)

142. Standing alone, the fact that the MOB sits astride the Buncombe/Henderson County line is not problematic. This issue is discussed under Criterion 12.

143. Mission's choice of leasing space in the MOB on the county may have been the least costly alternative, but the application merely makes that as a statement of fact without any demonstration of facts to substantiate the claim. There is no question that this project as proposed is less costly than any other "major expansion and renovation" projects listed by Mission in the application, but it cannot be discerned if that is an "apples to apples" comparison. (Jt. Ex. 1, pp. 4, 89)

144. The Mission Application seems fixated on the MOB on the county line as being the only location that will work for this project, but that is based upon the desirability of making this project work as part of the collaborative effort with Pardee Hospital. Pardee is not part of this application; it is not a co-applicant. Pardee has not joined this application in any manner. The collaborative effort between the two hospitals may be and probably is a very worth-while and perhaps even much needed effort; however, it is not driving this application. This application must stand on its own two feet without regard to any agreement or collaboration between Pardee and Mission.

145. The Agency concluded that Mission had failed to demonstrate that its proposal was the least costly or most effective. The Agency properly found the Mission Application non-conforming to Criterion 4.

Criterion 5

146. N.C. Gen. Stat. § 131E-183(a)(5) ("Criterion 5") requires the Agency to determine that financial and operational projections for the project "demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of the costs of and charges for providing health services by the person proposing the service."

147. The CON Section found under Criterion 5 that Mission accurately demonstrated the availability of sufficient funds for the capital and working capital needs of the project. This finding was not challenged at the contested case hearing. (Joint Ex. 2, pp. 1494-1495)

148. The Agency found the Mission Application non-conforming to Criterion 5 because the projections of costs and charges were not reliable due to a number of inconsistencies in the pro formas provided by Mission. (Jt. Ex. 2 at 1498; Pittman, Vol. 6 at 1251)

149. Sometimes the Agency finds typographical errors that it can otherwise reconcile in an application, which it does not hold against an applicant. However, in the case of the Mission Application, the Agency was unable to reconcile the errors in the pro formas. (Frisone, Vol. 7 at 1377)

150. The Agency determined that there were errors related to the revenues for all three project years included in the pro formas. Specifically, Forms C, D and E were inconsistent as the Net Revenue Totals in Form E and Gross Revenue Total in Form D did not equal the Deductions from Gross Patient Revenue reported by the applicant in Form C. (Pittman, Vol. 6 at 1251-53; Jt. Ex. 2 at 1495)

151. Mission does not dispute these errors, but contends that the inconsistency is immaterial because it is in pro formas that relate to the endoscopy department as a whole and to the projected case volume of over 8,000 cases per year . (Moore, Vol. 2 at 411-13; Bres Martin, Vol. 4 at 966)

152. The inconsistency in the total number of cases in project year 3 is only 13 cases. (Bres Martin, T. Vol. IV, p. 883; Joint Ex. 2, p. 1498) The inconsistency results in an understatement of revenue and projected net profit, with the result that the financial feasibility of the project would be equal to or better than stated in the application. (Moore, T. Vol. II, pp. 413)

153. With respect to the pro formas for Mission Hospital's entire endoscopy department, including Mission GI South, the unaccounted for difference between these values was $1,646,744.63. (Pittman, Vol. 6 at 1254; Jt. Ex. 2 at 1496)

154. This inconsistency carried through all three of the Mission GI South project years and into the pro formas that were specific only to the Mission GI South Project. There, the unaccounted for difference was $148,155.38. (Pittman, Vol. 6 at 1255; Jt. Ex. 2 at 1498-99)

155. The Agency determined that in Form D for the entire Mission Endoscopy Department, Mission utilized the same number of projected cases for project years 2 and 3 (7,126). The Application reported the number of projected cases in project year 3 at 7,139.

Form C of the pro formas references 7,139 as the number of cases for project year 3. (Jt. Ex. 2 at 1498) Thus, the inconsistency of the 13 cases in the total number of cases.

156. The Mission Application made the same errors with respect to Mission GI South's pro formas. (Jt. Ex. 2 at 1501)

157. The difference between the Net Revenue on Form C and the Net Revenue on Form E is less than 1%. The effect of the difference is to understate rather than overstate revenue. If the error were corrected, Mission would actually project greater net income. The error is not material and does not impact the financial feasibility of Mission's Application. (Moore, T. Vol. II, pp. 411-413) The inconsistencies identified in the Agency's findings under Criterion 5, although calling into question the reliability of the projections to some degree, do not have a negative impact on the feasibility of the project. (Bres Martin, T. Vol. IV, p. 884)

158. In the Criterion 5 review, the Agency also determined that Mission had failed to account for necessary staffing. Specifically, Mission had not projected the expense of employing one or more certified registered nurse anesthetists ("CRNA(s)"). (Jt. Ex. 2 at 1501; Pittman, Vol. 6 at 1256)

159. Mission's contention that it clearly stated that only conscious sedation would be provided is not true. In fact, the application specifically states "Anesthesia/Conscious Sedation." (Jt. Ex. 1 at 7) Those are not synonymous concepts; i.e., anesthesia and conscious sedation are not the same thing.

160. In response to the question in the Application asking applicants to describe the service components of its proposed project, including whether those components will be provided by facility staff, consultants or contract billed directly to patients, Mission noted that it would provide "Anesthesia/Conscious Sedation" by its "Facility Staff." (Jt. Ex. 1 at 7)

161. The Agency thus determined that a CRNA was necessary for the facility because Mission represented in its Application that it would be providing both "conscious sedation" (also known as moderate sedation) in addition to "anesthesia." (Jt. Ex. 1 at 7; Pittman, Vol. 6 at 1257)

162. Mission's sedation policy for endoscopy included in the Application identifies three levels of sedation offered by the endoscopy department at Mission: "Moderate Sedation, MAC Anesthesia (Monitored Anesthesia Care) and General Anesthesia." (Jt. Ex. 1 at 513) There is a distinct difference between moderate or conscious sedation and MAC Anesthesia.

163. Because Mission had not included space for or identified a post-anesthesia care unit (PACU) for recovery on its line drawing, the Agency assumed that Mission's reference to anesthesia was a reference to MAC Anesthesia, rather than general anesthesia. (Jt. Ex. 2 at 1501; Pittman, Vol. 1257-58)

164. Although Moderate Sedation can be administered by a competent Registered Nurse ("RN"), Mission's own policy requires the presence of a CRNA for the use of monitored anesthesia care (MAC Anesthesia). (Jt. Ex. 1 at 513)

165. Mission's contention that the phrase "anesthesia/conscious sedation" should be construed to mean that that Mission would be providing only conscious sedation as opposed to either MAC anesthesia or general anesthesia is without merit and contrary to the plain meaning of the phrases and to the other credible evidence.

166. Mr. Moore's contention that the phrase "anesthesia/conscious sedation" was meant to demonstrate that conscious sedation is a "level of anesthesia" is contrary to the other credible evidence. (Moore, Vol. 4 at 818) DMA's Clinical Coverage Policy, Exhibit 105, regarding moderate (conscious) sedation, identifies four levels of sedation: minimal sedation, moderate (conscious) sedation, deep sedation, and general anesthesia. (Ex. 105 at 1)

167. Ms. Sink states in her letter of support included in the Application that "the Mission Hospital Pathology Services, Radiology Services and Anesthesiology Services will be available to support the expanded GI Endoscopy Services." (Emphasis added.) (Jt. Ex. 1 at 281)

168. Ms. Sink's letter notes that "Ancillary services such as conscious sedation services will be provided on site." The phrase "such as" is not a limiting phrase; in fact, to the contrary the phrase indicates that it is not the only service to be provided. (Jt. Ex. 1 at 281) In this context it would indicate that other ancillary services would be rendered, but it also does not limit the possibility that other forms of anesthesia may be used.

169. The Agency reasonably concluded that Mission's use of terms describing two distinct levels of sedation and the policy for sedation included with the Application indicated that Mission was proposing to offer both moderate sedation and the higher level of sedation that is known as MAC anesthesia.

170. The idea that Mission would offer both levels of sedation in the course of its treatment at Mission GI South is consistent with the listing of services proposed to be offered there. In defining its scope of services, Mission listed nine different types of services that would be offered at Mission GI South. (Jt. Ex. 1 at 6)

171. Two of the nine listed, Tenckhoff Catheter and Thoracentesis, are not really endoscopy procedures. Some of those procedures listed would be better performed only in a hospital setting as opposed to a free standing endoscopy center such as proposed at Mission GI South. (Harlan, Vol. 2 at 338, 339, Stamm, Vol. 2 at 450; *see also* French, Vol. 5 at 1129)

172. While Mission admitted that the inclusion of some of these procedures was an error in the Application, there is nothing about the application that would have caused the Agency to know they were included in error or that some should not have been included at all. (Moore, Vol. 3 at 603-04) The inclusion of that list of proposed services is more justification for the Agency to conclude that more than just conscious sedation would be offered at Mission GI South.

173. The Agency correctly determined that Mission had failed to demonstrate that it had properly budgeted for required staffing. (Jt. Ex. 2 at 1501) The Agency was justified in concluding from the application that Mission proposed to use anesthesia, that Mission would not only use conscious sedation and that Mission's own policy requires a CRNA for use of MAC Anesthesia.

174. The Agency properly concluded that Mission failed to adequately demonstrate that the financial feasibility of the proposal to offer GI endoscopy services in Fletcher was based upon reasonable projections of costs and charges. (Jt. Ex. 2 at 1502)

175. The Agency properly found Mission to be non-conforming with Criterion 5.

Criterion 6

176. N.C. Gen. Stat. § 131E-183(a)(6) ("Criterion 6") requires the applicant to demonstrate "that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities."

177. Criterion 6 is a mandatory criterion that is always applied, regardless of whether an applicant is proposing a new or relocated service. (French, Vol. 5 at 1145)

178. Criterion 6 prohibits the unnecessary duplication of existing or approved health services. Reviewing applicants under Criterion 6 necessarily involves an analysis of other services being provided in the service area defined by the applicant. (Pittman, Vol. 6 at 1259-60; Frisone, Vol. 7 at 1361)

179. Mission's contention that relocating the endoscopy room cannot be duplication in that the room already exists misses the point. The test under Criterion 6 is whether or not there is duplication of the already existing services of other providers of the same services in the proposed service area—not a duplication of the applicants proposed facility.

180. For purposes of the Mission review, the Agency looked to the Application to find sufficient information to demonstrate that moving an endoscopy room from Asheville to Fletcher would not unnecessarily duplicate existing services in proposed service area. (Frisone, Vol. 7 at 1361-62)

181. In finding the 2011 Mission Application non-conforming with Criterion 6, the Agency found fault with Mission for not addressing the underutilization at existing hospitals in Henderson County. (Bres Martin, Vol. 4 at 954)

182. Relocating an endoscopy room from Asheville to Fletcher does not alter the number of existing endoscopy rooms in the totality of Buncombe and Henderson Counties, but it does increase the number of endoscopy rooms in the service area proposed by Mission. (Frisone, Vol. 7 at 1362)

183. Mission's contention that Buncombe County's use rate shows a need for five more endoscopy rooms is not significant. The entirety of Buncombe is not equivalent to the particular service area defined in the application, which is defined as the totality of Henderson County and three zip codes in Buncombe.

184. Mission's contention that it will only serve those clients that are already being served on the Mission main hospital campus is disingenuous with the remainder of the application which looks to this specific location with an eye toward increasing the market share

within the service area. If Mission was looking only at serving the existing patient base, then the demographics cited as reasons for this particular location would be almost insignificant.

185. An applicant cannot be conforming with Criterion 6 without demonstrating that the proposed project will not unnecessarily duplicate services that already exist in the proposed service area. (Pittman, Vol. 6 at 1260) The applicant is not required to demonstrate that the existing providers are operating at or above any minimum performance standard, but the applicant must provide sufficient information to show that an additional service would not result in unnecessary duplication. (Frisone, Vol. 7 at 1362)

186. The Agency found that Mission had failed to demonstrate that the proposal would not result in the unnecessary duplication of existing or approved GI endoscopy services in the service area defined by Mission.

187. The Agency determined that GI endoscopy providers located in Buncombe County have experienced very little growth in recent years in the number of GI endoscopy procedures performed, while GI endoscopy providers in Henderson County declined over the same period of time. (Jt. Ex. 2 at 1502)

188. The existing GI endoscopy providers in the proposed service area are Park Ridge, Carolina Mountain and Pardee. (Jt. Ex. 2 at 1503)

189. Park Ridge has one endoscopy room and is located 4.2 miles from the proposed Mission GI South location. It would be the closest facility to the proposed Mission GI South. (Bunch, Vol. 5 at 1046)

190. Park Ridge performed the fewest number of GI endoscopy cases and procedures of the three Henderson County GI endoscopy providers. (Jt. Ex. 2 at 1504)

191. Based on the information provided by Mission, the Agency determined that Park Ridge's endoscopy services were operating at 52% of capacity. (Jt. Ex. 2 at 1503)

192. Park Ridge had experienced a significant decline in procedure volume and case volume between fiscal years 2006 and 2011. (Bunch, Vol. 5 at 1049) Mr. Bunch testified that Park Ridge could handle a major increase in endoscopy volume and that Park Ridge has capacity to take on more cases and procedures. (Bunch, Vol. 5 at 1051)

193. A number of reasons may explain why the Park Ridge use rate has declined; such as the fact that four of the six physicians who do endoscopy procedures at Park Ridge are associated with Carolina Mountain and do the bulk of their outpatient endoscopy procedures at their own center. (Bunch, T. Vol. V, p. 1093) Further, Jimm Bunch confirmed that Park Ridge did not do any specific marketing of its endoscopy program in the 2011-2012 time-frame. (Bunch, T. Vol. V, p. 1074)

194. Pardee has three GI endoscopy rooms and is located approximately 11.6 miles from Mission's proposed site. (Pittman, Vol. 6 at 1241)

195. Based on the information provided by Mission, the Agency determined that Pardee's endoscopy services were operating at 61% of capacity. (Jt. Ex. 2 at 1503)

196. The case and procedure volumes at Pardee had also decreased sharply between fiscal years 2008 and 2011 from 3,891 cases in FY 2008 to only 2,395 cases in FY 2011, based on information provided in the Mission Application. (Bunch, Vol. 5 at 1050; Jt. Ex. 1 at 339) Given the fact that Pardee's volumes in 2011 were lower than in 2008, one may surmise that Pardee has sufficient capacity to handle at least as many endoscopy cases as it once handled in 2008.

197. Pardee is in a "cooperative venture" with Mission for the MOB in which the Mission GI South project is proposed to be located. (Moore, Vol. 2 at 493-94) Pardee did not comment against the Mission Application or intervene in Mission's appeal.

198. Mr. Moore acknowledges that Pardee is Mission's business partner and that he would have expected that Pardee would have addressed any concerns or objections to the Mission GI South project directly to Mission. (Moore, Vol. 2 at 494)

199. Carolina Mountain has two endoscopy rooms and is located approximately nine miles or twelve minutes from the proposed Mission GI South. (Stamm, Vol. 2 at 428, 438)

200. Carolina Mountain serves patients from Henderson, Buncombe, and Transylvania Counties. (Stamm, T. Vol. II, p. 430)

201. Carolina Mountain opened the endoscopy center in August 2006 with one room. In December 2007, Carolina Mountain opened a new two room center. (Stamm, T. Vol. II, p. 429)

202. At the time Carolina Mountain opened its two room endoscopy center, Park Ridge and Transylvania Hospital were not operating at capacity for their endoscopy rooms. (Stamm, T. Vol. II, p. 465)

203. Park Ridge did not oppose the development of Carolina Mountain's endoscopy center. (Bunch, T. Vol. V, p. 1072)

204. The volume of endoscopy procedures at Pardee Hospital and Park Ridge declined after Carolina Mountain opened its two room endoscopy center. (Stamm, T. Vol. II, p. 469; Bunch, T. Vol. V, pp. 1073-1074)

205. Both Park Ridge and Carolina Mountain opposed the Mission GI South project in 2011 and in 2012 by filing written comments and participating in the respective contested case hearings. (Stamm, Vol. 2 at 440; Bunch, Vol. 5 at 1048)

206. The endoscopy volume at Carolina Mountain has increased every year since 2009. The volumes increased by more than 1,000 procedures between 2010 and 2011. Pardee Hospital's volume decreased by approximately the same number of procedures during the same time frame. (Stamm, T. Vol. II, pp. 446, 470; Joint Ex. 2, p. 1462)

207. Although the number of cases performed at Carolina Mountain had increased slightly between 2011 and 2012, Dr. Stamm testified that there is additional capacity for endoscopy procedures at his facility but that there is currently not sufficient demand. (Stamm, Vol. 2 at 446, 451-52)

208. According to Dr. Stamm, his patients were not experiencing problems accessing endoscopy services or having lengthy waits to obtain an endoscopy service. (Stamm, Vol. 2 at 49)

209. The question arises as to the applicability of the Macon County CON in this instant case. The Agency strives to be consistent in its Findings. Such consistency allows applicants to be able to forecast to a degree how the Agency may look upon and rule on a certain set of facts. There are sufficient distinctions between the Macon County case and the instant case for the Agency to rightfully draw distinctions and come to different conclusions on what superficially seems to be similar facts.

210. In addition, the Macon County decision was issued prior to the *Parkway Urology* Court of Appeals decision which resulted in a change in the way the Agency's analysis of Criterion 6 is reflected in its findings. (Frisone, Vol. 7 at 1412) *See Parkway Urology, P.A. v. N.C. Dep't of Health and Human Servs.*, 205 N.C. App. 529, 696 S.E.2d 198 (2010).

211. Similarly, there are sufficient factual distinctions between the recent Wake County decision involving endoscopy rooms and the instant case for the Agency to rightfully draw distinctions and come to different conclusions on what superficially seems to be similar facts.

212. The Mission Application states the proposed project involves a relocation of one endoscopy room from Asheville to Fletcher "to improve access to patients from southern Buncombe County and Henderson County who are currently served by Mission Hospital GI services." (Jt. Ex. 1 at 10)

213. The Application also states that the proposed site will provide improved access for the significant number of residents from south Buncombe County and Henderson County who currently choose to seek care at Mission as well as The Endoscopy Center in Buncombe County. (Emphasis added.) (Jt. Ex. 1 at 25)

214. The Agency noted that the statement concerning the Endoscopy Center patients was "curious" and inconsistent with the other representations in the application that only current Mission endoscopy patients would shift to the proposed Mission GI South. (Jt. Ex. 2 at 1486)

215. There is nothing nefarious nor dastardly that should be inferred from the use of the word "curious." The word choice may even be indicative of a colloquialism. The word choice is merely indicative of the inconsistency within the confines of the application—nothing more.

216. Mission admits that it would not restrict itself to serving only those patients that it "currently serves," but would serve any patients that presented for a procedure. (Sink, Vol. 1 at

177; Moore, Vol. 3 at 731-32) Mission admits that the pro forma projections were based "on population growth and folks who aren't choosing to receive that care today." (Sink, Vol. 1 at 177) Mission expects to attract new patients not currently receiving endoscopy services through Mission's campus.

217. Mission further admits that it would market and advertise its new services just as it has for other new facilities, and would like to capture more patient volume from Henderson County. (Sink, Vol. 1 at 177, 179-80; Moore, Vol. 3 at 733-40; Vol. 4 at 752)

218. The Agency is concerned with excess capacity because when services are underutilized, it is not a good use of health care resources. (Pittman, Vol. 6 at 1261-62)

219. Due to the underutilization of hospital-based endoscopy services in the proposed service area, the Agency determined that relocating an additional hospital-based endoscopy room to the area would be an unnecessary duplication of existing services. (Jt. Ex. 2 at 1504; Pittman, Vol. 6 at 1261) There is already sufficient endoscopy capacity in the proposed service area. (Pittman, Vol. 6 at 1261)

220. Mission did not demonstrate, either in the form of data or narrative description, how its relocation would not result in unnecessary duplication given the extent to which hospital-based endoscopy providers are underutilized in the proposed service area.

221. In addition, the Agency was further concerned with the close proximity of the two underutilized hospital-based facilities to the proposed location of Mission's hospital-based facility. Therefore, the Agency concluded that relocating an additional endoscopy room to that specific location where there is already sufficient endoscopy capacity and declining utilization would result in an unnecessary duplication of existing services in that geographic location. (Pittman, Vol. 6 at 1261)

222. The Agency reasonably concluded that Mission had failed to demonstrate that relocating an existing GI endoscopy room to the county line area would not unnecessarily duplicate existing and approved GI endoscopy facilities in the proposed service area. (Jt. Ex. 2 at 1504)

223. The Agency properly found Mission to be non-conforming with Criterion 6.

Criterion 7

224. N.C. Gen. Stat. § 131E-183(a)(7) ("Criterion 7") requires the Agency to determine that the applicant presented "evidence of the availability of resources, including health manpower and management personnel, for the provision of the services proposed to be provided."

225. The Agency reviews applications for a demonstration that the manpower and personnel needed for such projects is available. (Pittman, Vol. 6 at 1262)

226. The Agency determined that Mission failed to demonstrate the availability of sufficient manpower and management personnel to provide the proposed services due to Mission's failure to provide for a CRNA position. (Jt. Ex. 2 at 1505; Pittman, Vol. 6 at 1263)

227. The Agency determined that a CRNA was necessary for the facility because Mission represented in its Application that it would be providing both "conscious sedation" (also known as moderate sedation) in addition to "anesthesia." (Jt. Ex. 1 at 7; Pittman, Vol. 6 at 1257) The necessity for a CRNA position is also discussed in Criterion 5.

228. Mission's contention that it clearly stated that only conscious sedation would be provided is not true. In fact, the application specifically states "Anesthesia/Conscious Sedation." (Jt. Ex. 1 at 7) Those are not synonymous concepts; i.e., anesthesia and conscious sedation are not the same thing.

229. In response to the question in the Application asking applicants to describe the service components of its proposed project, including whether those components will be provided by facility staff, consultants or contract billed directly to patients, Mission noted that it would provide "Anesthesia/Conscious Sedation" by its "Facility Staff." (Jt. Ex. 1 at 7)

230. The Agency thus determined that a CRNA was necessary for the facility because Mission represented in its Application that it would be providing both "conscious sedation" (also known as moderate sedation) in addition to "anesthesia." (Jt. Ex. 1 at 7; Pittman, Vol. 6 at 1257)

231. Mission's sedation policy for endoscopy included in the Application identifies three levels of sedation offered by the endoscopy department at Mission: "Moderate Sedation, MAC Anesthesia (Monitored Anesthesia Care) and General Anesthesia." (Jt. Ex. 1 at 513) There is a distinct difference between moderate or conscious sedation and MAC Anesthesia.

232. Because Mission had not included space for or identified a post-anesthesia care unit (PACU) for recovery on its line drawing, the Agency assumed that Mission's reference to anesthesia was a reference to MAC Anesthesia, rather than general anesthesia. (Jt. Ex. 2 at 1501; Pittman, Vol. 1257-58)

233. Although Moderate Sedation can be administered by a competent Registered Nurse ("RN"), Mission's own policy requires the presence of a CRNA for the use of monitored anesthesia care (MAC Anesthesia). (Jt. Ex. 1 at 513)

234. Mission's contention that the phrase "anesthesia/conscious sedation" should be construed to mean that that Mission would be providing only conscious sedation as opposed either MAC anesthesia or general anesthesia is without merit and contrary to the plain meaning of the phrases and to the other credible evidence.

235. Mr. Moore's contention that the phrase "anesthesia/conscious sedation" was meant to demonstrate that conscious sedation is a "level of anesthesia" is contrary to the other credible evidence. (Moore, Vol. 4 at 818) DMA's Clinical Coverage Policy, Exhibit 105, regarding moderate (conscious) sedation, identifies four levels of sedation: minimal sedation, moderate (conscious) sedation, deep sedation, and general anesthesia. (Ex. 105 at 1)

236. Ms. Sink states in her letter of support included in the Application that "the Mission Hospital Pathology Services, Radiology Services and Anesthesiology Services will be available to support the expanded GI Endoscopy Services." (Emphasis added.) (Jt. Ex. 1 at 281)

237. Ms. Sink's letter notes that "Ancillary services such as conscious sedation services will be provided on site." The phrase "such as" is not a limiting phrase; in fact, to the contrary the phrase indicates that it is not the only service to be provided. (Jt. Ex. 1 at 281) In this context it would indicate that other ancillary services would be rendered, but it also does not limit the possibility that other forms of anesthesia may be used.

238. The Agency reasonably concluded that Mission's use of terms describing two distinct levels of sedation and the policy for sedation included with the Application indicated that Mission was proposing to offer both moderate sedation and the higher level of sedation that is known as MAC anesthesia.

239. The idea that Mission would offer both levels of sedation in the course of its treatment at Mission GI South is consistent with the listing of services proposed to be offered there. In defining its scope of services, Mission listed nine different types of services that would be offered at Mission GI South. (Jt. Ex. 1 at 6)

240. Two of the nine listed, Tenckhoff Catheter and Thoracentesis, are not really endoscopy procedures. Some of those procedures listed would be better performed only in a hospital setting as opposed to a free standing endoscopy center such as proposed at Mission GI South. (Harlan, Vol. 2 at 338, 339, Stamm, Vol. 2 at 450; *see also* French, Vol. 5 at 1129)

241. While Mission admitted that the inclusion of some of these procedures was an error in the Application, there is nothing about the application that would have caused the Agency to know they were included in error or that some should not have been included at all. (Moore, Vol. 3 at 603-04) In fact, the inclusion of that list is more justification for the Agency to conclude that more than just conscious sedation would be offered at Mission GI South.

242. The Agency correctly determined that Mission had failed to demonstrate that it had properly budgeted for required staffing. (Jt. Ex. 2 at 1501) The Agency was justified in concluding from the application that Mission proposed to use anesthesia, that Mission would not only use conscious sedation and that Mission's own policy requires a CRNA for use of MAC Anesthesia.

243. The Agency properly determined that Mission had failed to demonstrate the availability of health manpower and management personnel for the provision of services proposed because the Mission Application indicated the use anesthesia and its own policy requires a CRNA for use of MAC Anesthesia, (Jt. Ex. 2 at 1505-06)

244. Other freestanding endoscopy facilities provide sedation through the use of CRNAs. For example, Carolina Mountain contracts with an anesthesia group to provide sedation through either CRNAs or anesthesiologists. (Stamm, Vol. 2 at 434) Dr. Stamm's experience has been that patients prefer monitored anesthesia care because they will not wake up during a

procedure but will wake up more quickly and are more alert and coherent following the procedure. (Stamm, Vol. 2 at 436-37)

245. AGA uses a CRNA daily in one of its procedure rooms for procedures including routine endoscopic procedures, upper GI endoscopies and colonoscopies. (Harlan, Vol. 2 at 340-41)

246. Mission continuously and consistently states that the chart on Page 7 of its application shows that Mission will offer only conscious sedation and that simply is not true. The chart very plainly says "Anesthesia/Conscious Sedation" which as previously stated are not synonymous terms. This same chart is in both the 2011 and 2012 Mission applications.

247. The fact that Mission's 2011 Application was found to be conforming to Criterion 7 is of no consequence, even if they contained the same information. While the Agency strives for continuity and consistency, each application must stand on its own merit. There is no requirement for Ms. Pittman to have compared the two applications.

248. The Agency reasonably concluded that the Mission Application was non-conforming to Criterion 7.

Criterion 12

249. N.C. Gen. Stat. § 131E-183(a)(12) ("Criterion 12") requires the Agency to determine, for projects involving construction, that the applicant demonstrated "that the cost, design, and means of construction proposed represent the most reasonable alternative, and that the construction project will not unduly increase the costs of providing health care services by the person proposing the construction project or the costs and charges to the public" and that the project incorporates "applicable energy savings features."

Registration and Waiting Space

250. The issue for the Agency is whether the design proposed by the applicant is reasonable. (Frisone, Vol. 7 at 1384) The Agency concluded that Mission's design was not reasonable due to the lack of registration and waiting space in Buncombe County. (Jt. Ex. 2 at 1508)

251. The licensure rules applicable to hospitals and licensed portions of hospitals are found in 10A N.C.A.C. Chapter 13B. (Conley, Vol. 3 at 690-91)

252. The hospital licensure rules prohibit the Licensure Section from issuing a license to a hospital to operate across county lines. (Conley, Vol. 3 at 689) 10A N.C.A.C. 13B.3101(f) provides: "A license shall include only facilities or premises within a single county."

253. Because the relocated endoscopy room is proposed to be under the Mission hospital license, the endoscopy room cannot be licensed in both Buncombe and Henderson Counties and must be located entirely within Buncombe County. (Jt. Ex. 1 at 24; Bres Martin, Vol. 4 at 934-35)

254. Mission acknowledges that because it is proposed to be licensed under the Mission hospital license, the proposed endoscopy facility at Mission GI South is required to meet hospital licensure requirements. (Moore, Vol. 3 at 574) Medicare requires facilities to be licensed before they will provide reimbursement for services. (Moore, Vol. 3 at 587)

255. Under the licensure rules, the Licensure Section considers endoscopy to be an invasive procedure, thereby categorizing endoscopy procedures as an "outpatient surgical procedure." (Conley, Vol. 3 at 692) Because endoscopy is categorized as an outpatient surgical procedure, endoscopy rooms are subject to the rules for licensure of ambulatory surgical facilities under 10A N.C.A.C. 13C.1400, due to the express language of 10A N.C.A.C. 13B.6207.

256. The requirements for Outpatient Surgical Facilities in the Hospital Licensure Rules at 10A N.C.A.C. 13B.6207(b) states that "when a facility elects to provide separate, non-sharable outpatient surgical facilities, the operating rooms and support areas *shall meet* the physical plant requirements of Outpatient Surgical Licensure requirements of 10A NCAC 13C .1400." (Emphasis added.) (Ex. 102; Conley, Vol. 3 at 692)

257. All of the rules under 10A N.C.A.C. 13C.1400 are relevant to Mission's proposed project. (Conley, Vol. 3 at 693)

258. In particular, 10A N.C.A.C. 13C.1403 requires certain supporting elements, including an area for the receiving and registration of patients in a private manner, waiting space with public toilets, telephone, drinking fountains, and wheelchair storage, preoperative and postoperative areas for male and females with dressing rooms and toilet facilities, and a storage area for patients' personal effects. (Conley, Vol. 3 at 696)

259. For licensure purposes, all of the items required by 10A N.C.A.C. 13C.1403 would need to be in the same county due to the requirement of 10A N.C.A.C. 13B.310. (Emphasis added) (Conley, Vol. 3 at 698)

260. It is of no consequence that the line drawings submitted with the Mission Application contain no labels of any space located in Henderson County and the parking lot and front door to the building are located in Henderson County. (Sink, Vol. 1 a 201,t 206) It does not matter that one parks a car or enters through an entrance in another county so long as all items that are required by 10A N.C.A.C. 13C.1403 are included in Buncombe County, even though one might have to exit through another county after having completed a procedure.

261. Likewise, it is of no consequence that the Buncombe/Henderson County Line runs through the MOB in which Mission GI South is proposed to be located, so long as all items that are required by 10A N.C.A.C. 13C.1403 are included in Buncombe County . (Jt. Ex. 1 at 190)

262. The Agency's use of the word "literally" to describe the fact that the county line runs through the MOB is of no consequence because the line does indeed literally run through the office building.

263. The CON Application for Gastrointestinal Endoscopy Procedure Room projects requests that applicants "Provide a line drawing of the floor plan of the total facility or renovated areas following completion of the facility that clearly identifies the following areas: receiving/registering area, waiting area, pre-operative area, operating rooms by type, recovery area, and observation area." (Jt. Ex. 1 at 104)

264. Mission does not contend in its Application that it was not required to show receiving or registration or waiting space for its proposed project. (Bres Martin, Vol. 4 at 929) In fact, Mission answered the question by stating "Please see Exhibit 6 for legible line drawings of the floor plan of Mission GI South Location that clearly identifies the areas listed in subsection (e)." (Emphasis added) (Jt. Ex. 1 at 104)

265. The contention that Mission "clearly identifies" the specific areas requested in the application is simply not true. The line drawings submitted with the Mission Application do not contain any space labeled or designated as waiting, receiving or registration space in Buncombe County. Mission admits that the Application did not actually contain labeled space for receiving, registration or waiting areas. (Sink, Vol. 1 at 202; Morse, Vol. 2 at 297-98; Moore, Vol. 3 at 581, 589; Bres Martin, Vol. 4 at 931-32; Jt. Ex. 1 at 189-90)

266.

267. While the drawing provided with the application may not be the final design by which the facility would have been built, and may have been more of a conceptual rendering, at least the minimum requirements should have been shown in the drawing. The Agency has to be given enough to make a determination that at least minimum standards are being met.

268. Although not raised as an issue by the Agency, the other requirements of 10A N.C.A.C. 13C.1403 are not addressed very well in the application. The rule requires the receiving and registration of patients in a private manner for receiving confidential information. It requires the waiting space with public toilets, telephone, drinking fountains, and wheelchair storage. It requires preoperative and postoperative areas separately for male and females with dressing rooms and toilet facilities, and a storage area for patients' personal effects.

269. While many of these supportive elements may be discerned from the drawing and could easily be incorporated within the final design, the application does not address those particular requirements of the rule.

270. The requirements of 10A N.C.A.C. 13C.1403 are mandatory and not waivable.

271. The opinion of Ms. Azzie Conley, Chief of the Acute and Home Care Licensure and Certification Section of the Division of Health Service Regulation is that the project could not be licensed as proposed because of the lack of waiting and registration space in Buncombe County. (Conley, Vol. 3 at 698)

272. Prior to the issuance of the Agency Decision and Required State Agency Findings, on August 28, 2012, Ms. Frisone very briefly met with Ms. Conley in person. Ms.

Conley confirmed to Ms. Frisone that indeed, such spaces would have to be located in Buncombe County and not in Henderson County if Mission's endoscopy room was to remain on Mission's hospital license. (Frisone, Vol. 7 at 1382) Ms. Frisone memorialized this conversation with a memorandum contained in the Agency's working papers. (Jt. Ex. 2 at 1063)

273. The Agency determined that the large open area after entering the doors from outside must be the registration, receiving and waiting space, although not labeled as such. While that may be true and patients using the endoscopy facilities could conceivably wait in that area, that is not the problem with the application. The problem is that the drawing does not show the registration, receiving and waiting space within the confines of the facility within Buncombe County, as required by the Rule. Simply, the drawing does not show those areas at all.

274. The application notes that there is a total of 3,753 square feet of "departmental usable square footage." This square footage is as opposed to the Rentable Square Feet which includes an additional 1,055 square feet for use of common areas within the MOB. There is a discrepancy in that the footnote on Joint exhibit 1, pages 104 and 105 states that the rental square footage is 4,080, whereas the Lease Term Sheet shows the rental square footage to be 4,808. (Jt. Ex. 1, at 586) There is no discussion of the effect of the rental square footage other than to say that it allows access to common areas.

275. Mission's explanations at the hearing that there is enough space in the proposed endoscopy suite in Buncombe County to locate registration, receiving and waiting space, may be true, but that misses the point. The application notes that there will be 2,060 square feet for "support" within the facility. (Jt. Ex. 1 at 104).

276. The 2,060 square feet designated for "support" use may or may not be sufficient to meet the requirements of the Rule, but it cannot be discerned from either the drawing or the application in its entirety. The Agency cannot determine and in essence redraw the line drawing to determine where the various requirements of the Rule would be located.

277. Mission admits that there are no spaces actually labeled on the line drawings as waiting, registration or receiving. (Moore, Vol. 3 at 581) There are no explanations in the narrative portions of the Mission Application identifying any such areas as space usable for waiting, registration or receiving. (Morse, Vol. 2 at 294-96; Moore, Vol. 3 at 581)

278. There are spaces identified as alcoves on the drawing. An alcove is generally perceived as being something of an open extension of a room. There is nothing within the line drawing or the application in general that would indicate what if any purpose such space would serve, much less that it would be used for reception or registration.

279. Mission contends that the alcove just inside the door entering the facility could be used as registration. Mission also contends that the "consult" room could be used for waiting. If so then why not just state that in the application; label those rooms/areas as such. Why leave things open to interpretation, supposition and speculation when plain English would suffice.

280. The Mission Application included a letter from a registered architect, Mark Sweeney, representing that the relocated facility would conform to the requirements of federal, state and local regulatory bodies. (Jt. Ex. 1 at 485) Mr. Sweeney and the firm for whom he works prepared the line drawing submitted with the application.

281. Mr. Sweeney's averment that the project would comply with all federal and state and local regulatory bodies is not exactly correct in that the line drawing is not in compliance with the mandatory requirements of 10A N.C.A.C. 13C.1403. Mr. Sweeney's letter also does not mention waiting, receiving or registration space. (Moore, Vol. 3 at 591)

282. Although prospectively the interior of the facility might have been changed, the Agency reasonably relied upon the drawing included in the application.

283. The fact that Mr. Sweeney's letter was not in affidavit form is of no consequence. (Jt. Ex. 1 at 485; Moore, Vol. 3 at 591)

284. Mr. Sweeney's comment in an email with Mission representatives prior to the submission of the Mission GI South Application that "we could never get all of Endo on the Buncombe County side" is of only marginal value. The fact is that in this application as presented all of the requirements have not been shown to be in Buncombe County. (Respondent-Intervenors' Ex. 411, p. 2556)

285. Any contention that the Agency should have just accepted Mr. Sweeney's letter at face value is without merit. If everything in applications were merely accepted at face value with testing, then there would be no need for review. Any contention within the confines of an application must be able to withstand scrutiny. The same is true with Mr. Sweeney's letter which was inconsistent with the line drawings provided in the Application. (French, Vol. 5 at 1152)

Preregistration

286. Mission contends, at least in part, that the registration process will be obviated because patients for Mission GI South will be primarily pre-registered by telephone before they arrive at the endoscopy suite for their procedure. This means that when they present for their procedure, Mission would provide a welcoming function rather than a registration. (Sink, T. Vol. I, p. 160)

287. During the review of Mission's Application, information was publicly available, and therefore conceivably available to the Agency, on Mission's website concerning One Call Scheduling including a phone number for patients or their physicians to call to get an appointment schedule for an endoscopy procedure. (Ex. 126)

288. In its response to written comments during the application period, Mission stated that the business office services would be provided by the existing staff at Mission Hospital. It then states that "Patient will be pre-registered." (Joint Ex. 2, p. 1056)

289. The reasonable inference to be drawn from these comments is that all patients would be pre-registered, and thus there would be no need for a specified area for reception/registration.

290. Mission contends that at the time that Mission submitted its application that it was engaging in significant efforts to look at process improvements, including value stream mapping, that lead to elimination of waste and waiting, which are not value-added elements to the process. (Morse, T. Vol. II, p. 318)

291. There is no evidence to say what those efforts were. The application states that the efforts were on-going, and thus no finality upon which anyone could make a decision. These efforts were not documented in its application.

292. While streamlining the process makes senses and would conceivable save money, it does not obviate the necessity to address the requirement of the rule for the registration and waiting areas. At the time this application was considered the rule had not been amended and the registration and waiting areas are still required and not waivable.

293. There was no explanation included in the Mission Application concerning on-line or pre-registration or efforts to minimize waiting which would have alerted the Agency and thus such could not have been known by the Agency. (Sink, Vol. 1 at 196; Morse, Vol. 2 at 279-80, 300; Moore, Vol. 3 at 577-78; French, Vol. 5 at 1136)

294. Mission acknowledges that the current endoscopy suites at Mission Memorial and St. Joseph's campuses have receiving and waiting spaces for patients and their families. (Morse, Vol. 2 at 306-08; Moore, Vol. 3 at 575)

Reliance on Construction Section Recommendations

295. The Acute and Home Care Licensure and Certification Section of the Division of Health Service Regulation ("Licensure Section") typically engages in a dialogue with providers, including a walkthrough of the state licensure and/or Medicare certification process. The Licensure Section corresponds with the Construction Section regarding the Construction Section's recommendation as to whether a project can be licensed with respect to the Construction Section's rules. (Conley, Vol. 3 at 687)

296. The Construction Section reviews project plans and makes a recommendation to the Licensure Section concerning the project's compliance with the applicable rules. It is up to the Licensure Section, however to make a final decision and issue a license where appropriate. (Acker, Vol. 3 at 673) The Construction Section does not license facilities. (Acker, Vol. 3 at 673) The Construction Section will not consult on a project, however, until after the project has received approval from the CON Section. (Morse, Vol. 1 at 233)

297. The Construction Section may recommend licensure of a project but the Licensure Section may determine that the project is out of compliance with one or more regulations and/or disagree with the recommendation. (Conley, Vol. 3 at 687, 689)

298. Mission has a collaborative and positive working relationship with the Construction Section, in particular with Marjorie Acker, the Assistant Chief of the Section, who has reviewed many projects at Mission over the years (Morse, T. Vol. I., p. 234)

299. Ms. Acker has spent a significant amount of time in Asheville reviewing construction projects by Mission and has known True Morse, Mission's Vice President of Facilities, the entire time she has been with the Construction Section. (Acker, T. Vol. III, p. 655)

300. Ms. Acker attended a meeting on February 23, 2010 at Mr. Morse's invitation to discuss the concept of Mission's and Pardee Hospital's joint project on the county line. This meeting was prior to Mission's 2011 Application. Mr. Morse, Barbara Platz from Pardee Hospital, Ms. Frisone and Les Brown from the CON Section, Kristi Sink and Brian Moore from Mission, and Nancy Bres Martin all attended the meeting. (Sink, T. Vol. I, pp. 153-154; Morse, T. Vol. I, p. 250; Morse, T. Vol. II, pp. 305; Moore, T. Vol. II, pp. 359-361; Acker, T. Vol. III, pp. 662-663; Frisone, T. Vol. VII, p. 1347)

301. The topics purportedly discussed at the meeting included plans to file applications to relocate services to the medical office building on the Henderson/Buncombe county line as well as how to take into account the location of the building and the support space. (Morse, T. Vol. I, p. 250)

302. Mission contends it relied on the meeting with Ms. Acker in which Ms. Acker allegedly stated that only the endoscopy room itself had to be located in Buncombe County in order for the room to remain on the Mission hospital license. (Sink, Vol. 1 at 155) There are no records or notes made of that meeting. (Sink, Vol. 1 at 196)

303. Ms. Acker was not shown any drawings or documents at that February 2010 meeting. (Sink, Vol. 1 at 209; Morse, Vol. 2 at 284)

304. The Agency historically has encouraged applicants for CONs to seek the advice from Agency resources prior to filing applications, particularly in pre-application conferences. Such meetings are instructive and informative to the applicant so that it might properly prepare the application to meet the Agency's expectations.

305. This type of input was especially desired by Mission so that it could prepare plans even on a conceptual basis that would meet the licensure components for Mission's endoscopy suite in respect to the county line issue. (Morse, T. Vol. I, p. 251)

306. Mission understood from the February 2010 conference that anything in the endoscopy suite other than the endoscopy procedure room itself could be located on the Henderson County side of the line. (Sink, T. Vol. I, p. 222)

307. In a follow-up telephone conversation with Ms. Acker in August 2010, Mr. Morse states that he again asked what support components, such as waiting and registration, pre-op, post-op, and engineering space, were required to be in Buncombe County. He confirmed in this

conversation that only the licensed component, meaning the endoscopy room, was required to be in Buncombe County. (Morse, T. Vol. I, pp. 253, 254; Morse, T. Vol. II, pp. 284-285)

308. Mission's 2011 Application included a floor plan that showed some pre-procedural space located in Henderson County. (Sink, T. Vol. I, p. 156)

309. Although the specific issue regarding the location of the waiting, registration and receiving space was not noted in the 2011 Findings, Mission's proposal was found non-conforming with Criterion 12 because the Buncombe/Henderson County line went through the endoscopy suite so that the entire endoscopy suite was not solely in Buncombe County. (Frisone, Vol. 7 at 1381)

310. After the 2011 Application had been filed and denied and prior to submitting its 2012 Application, Mission participated in a pre-application conference with the CON Section. In the 2012 pre-application conference, the CON Section stated that all of the endoscopy suite would need to be in Buncombe County, not just the endoscopy procedure room as Mission contends Ms. Acker had previously indicated. (Moore, T. Vol. II, p. 365-66)

311. Thus prior to filing the 2012 application, Mission was on notice that the entire endoscopy suite had to be on the Buncombe County side of the line, despite anything Ms. Acker may have told Mission prior to the 2011 application.

312. Mr. Moore participated in the telephone pre-application conference concerning Mission's 2012 Application. Mr. Moore had requested that June Ferrell with the Attorney General's office participate in the call. Ms. Sink, Ms. Bres Martin, Craig Smith, the Chief of the CON Section, and Ms. Frisone, the Assistant Chief of the CON Section, also participated in the call. (Moore, T. Vol. II, p. 364)

313. Mission never discussed its proposed project for either the 2011 or the 2012 applications with Ms. Conley or anyone at the Licensure Section. (Morse, Vol. 1 at 235; Vol. 2 at 283, 286; Moore, Vol. 2 at 576; Bres Martin, Vol. 4 at 933)

314. Mission understands that the Licensure Section issues licenses to facilities, not the Construction Section. (Morse, Vol. 2 at 287; Moore, Vol. 2 at 363)

315. Mission admits that Ms. Acker could not and did not make any guarantees that its proposed project would be approved by the CON Section or the Licensure Section or the Construction Section. (Morse, Vol. 2 at 283-84)

316. No State representatives made any promises to Mission regarding the approvability of its proposed project at its pre-application meeting prior to the submission of the 2012 Application. (Moore, Vol. 3 at 593)

317. Ms. Acker herself had no recollection of speaking at the meeting or otherwise giving any information, guidance or advice to Mission or its representatives regarding this

county line project. (Acker, Vol. 3 at 675) However, Ms. Acker acknowledges that she believes Mr. Morse to be truthful and does not doubt his representations.

318. Ms. Acker testified that where a county line falls has no bearing on the Construction Section's role in reviewing projects and thus she would have had no reason to discuss what components of the proposed Mission project had to be located in Buncombe County. (Acker, Vol. 3 at 675, 77)

319. With respect to Mission, the pertinent licensure rules are the hospital licensure rules due to the fact that Mission's proposed GI endoscopy room would be part of the hospital license. The Licensure Section is the authority that would ultimately decide whether Mission's project could be licensed. (Conley, Vol. 3 at 690)

320. The Agency's interpretation of the regulations cited by Ms. Conley is reasonable and the Agency reasonably relied upon the additional expertise of the Licensure Section in determining that the Mission Application was non-conforming to Criterion 12.

321. The Agency reasonably concluded that the Mission Application was non-conforming to Criterion 12.

Criterion 18a

322. N.C. Gen. Stat. § 131E-183(a)(18a) ("Criterion 18a") requires the Agency to determine that the applicant demonstrated "the expected effects of the proposed services on competition in the proposed service area, including how any enhanced competition will have a positive impact upon the cost effectiveness, quality, and access to the services proposed."

323. When reviewing applications with respect to Criterion 18a, the Agency looks at how the applicant addresses the effect the proposal has on competition, on cost effectiveness, and on quality and access to the proposed services. (Pittman, Vol. 6 at 1267)

324. For purposes of Criterion 18a, an applicant needs to explain, document and support its assertions that its project will enhance competition by having a positive impact on cost effectiveness, quality, and access. (Frisone, Vol. 7 at 1387)

325. The Agency determined that Mission had not discussed competition, despite a specific question in the application that asks the applicant to address the effect of competition. (Pittman, Vol. 6 at 1269)

326. The Agency concluded that relocating a hospital-based endoscopy room closer to other underutilized providers does not promote cost effectiveness. (Jt. Ex. 2 at 1512; Pittman, Vol. 6 at 1269)

327. The Agency concluded that the data in the Mission Application clearly shows a patient preference for freestanding non-hospital based facilities rather than hospital-based facilities, which may be due in part to lower co-pays and deductibles at freestanding facilities. (Pittman, Vol. 6 at 1270)

328. Mission contends that it is responding to market pressures to shift more services to an outpatient facility. That contention may be correct as well, even though Mission's proposal is a hospital-based facility; however, Mission further contends that developing a new outpatient facility responds to community needs. That contention is only valid depending on how one defines "community." In this instance, community is defined by the proposed service area.

329. Mission contends that this project is "necessary" to improve the delivery of endoscopy services by Mission to the population identified that it is already serving. The "necessity" is solely Mission's.

330. Mission continues by pointing out that it will be more convenient for both patients and doctors, but the convenience is as opposed to the service those patients and those doctors currently have at Mission's main campus. It has little to do with the "community" that is the proposed service area.

331. Mission does not intend to limit itself only to those patients who are currently being served on the Mission campus. Mission does not address the effect its presence would have on competition by relocating at the proposed site.

332. The cost effectiveness is in terms of monetary savings by Mission and it is not explained how or if those savings will be passed on to consumers other than Mission's current approach to indigent or charity care. There is no showing that the Mission GI South proposal would lower costs to patients. (French, Vol. 5 at 1134, 1154; Pittman, Vol. 6 at 1269)

333. Mission does not address how the quality of care or access to services will be improved as opposed to those already providing services in the area. The quality of care and access to services would be improved as opposed to obtaining services on Mission's main campus.

334. The patients in the proposed service area currently have a choice of providers for endoscopy services. (Frisone, Vol. 7 at 1405)

335. The Mission GI South proposal would not enhance choice for patients because the choice of Mission endoscopy services is already available to those patients. (French, Vol. 5 at 1154)

336. The Agency concluded that Mission had not adequately demonstrated the need to relocate an existing hospital-based GI endoscopy room to the MOB in Fletcher in an area with unutilized capacity. Mission failed to adequately demonstrate that the proposal would result in unnecessary duplication of existing services. Mission failed to demonstrate its proposal was the most effective or least costly alternative. Mission failed to demonstrate enhanced access. (Jt. Ex. 2 at 1513; Pittman, Vol. 6 at 1271)

337. The Agency reasonably concluded that the Mission Application was nonconforming to Criterion 18a.

Other Review Criteria

338. The Agency properly found that N.C. Gen. Stat. § 131E-183(a)(1), Criterion 1, N.C. Gen. Stat. § 131E-183(a)(9), Criterion 9, N.C. Gen. Stat. § 131E-183(a)(10), Criterion 10 and N.C. Gen. Stat. § 131E-183(b) were not applicable to the Mission Application. These findings were not challenged by any party.

339. The Agency therefore properly found that the Mission Application was conforming with that N.C. Gen. Stat. § 131E-183(a)(3a), Criterion 3a, N.C. Gen. Stat. § 131E-183(a)(8), Criterion 8, N.C. Gen. Stat. § 131E-183(a)(13), Criterion 13, N.C. Gen. Stat. § 131E-183(a)(14), Criterion 14 and N.C. Gen. Stat. § 131E-183(a)(20), Criterion 20. These findings were not challenged by any party.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Undersigned Administrative Law Judge enters the following Conclusions of Law.

1. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law. Similarly, to the extent that some of these Conclusions of Law are Findings of Fact, they should be so considered without regard to the given label.

2. The parties are properly before the Office of Administrative Hearings. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder of parties.

3. Mission timely filed its petition for contested case hearing pursuant to N.C. Gen. Stat. § 131E-188(a).

4. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this action. The parties received proper notice of the hearing in this matter as required by N.C. Gen. Stat. § 150B-23.

5. A court need not make findings as to every fact which arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 449, 429 S.E.2d 611, 612, *aff'd*, 335 N.C. 234, 436 S.E.2d 588 (1993).

6. The subject matter of this contested case is the Agency's decision to disapprove the Mission application. *See* N.C. Gen. Stat. § 131E-188(a) (providing for administrative review of an Agency decision to issue, deny or withdraw a certificate of need); *Presbyterian Hosp. v. N.C. Dep't of Health & Human Servs.*, 177 N.C. App. 780, 784, 630 S.E.2d 213, 215 (2006); *Britthaven, Inc. v. N.C. Dep't of Hum. Res.*, 118 N.C. App. at 382, 455 S.E.2d at 459 ("The subject matter of a contested case hearing by the ALJ [administrative law judge] is an agency decision.").

7. "The correctness, adequacy or appropriateness of criteria, plans, and standards shall not be an issue in a contested case hearing." 10A N.C.A.C. 14C.0402.

8. Under N.C. Gen. Stat. § 131E-183(a), the Agency "shall determine that an application is either consistent with or not in conflict with these criteria before a certificate of need for the proposed project shall be issued."

9. The CON Act does not require an application to be found consistent with or not in conflict with the form used for a CON application. N.C. Gen. Stat. § 131E-183(a); *see also* French, T. Vol. VI, p. 1186.

10. To obtain a CON for a proposed project, a CON application must satisfy all of the review criteria set forth in N.C. Gen. Stat. § 131E-183(a). If an applicant fails to conform with any one of these criteria, then the applicant is not entitled to a CON for the proposed project as a matter of law. "[A]n application must comply with *all* review criteria." (emphasis in original); *See Presbyterian-Orthopaedic Hospital v. N.C. Dept. of Human Resources*, 122 N.C. App. 529, 534-35, 470 S.E.2d 831, 834 (1996) "[A]n application must be found consistent with the statutory criteria before a Certificate of Need may be issued." *See Bio-Medical Applications of North Carolina, Inc. v. N.C. Dep't of Human Res.*, 136 N.C. App. 103, 109, 523 S.E.2d 677, 681 (1999)

11. The CON Section determines whether an application is consistent with or not in conflict with the review criteria set forth in N.C. Gen. Stat. § 131E-183 and any applicable standards, plans and criteria promulgated thereunder in effect at the time the review commences. *See* 10A N.C.A.C. 14C.0207.

12. Upon the Agency's decision to issue, deny or withdraw a certificate of need, pursuant to N.C. Gen. Stat. § 131E-188, any affected person is entitled to a contested case hearing. The statute also allows affected persons to intervene in a contested case hearing. *See* N.C. Gen. Stat. § 131E-188(a).

13. Mission asserted that the Agency erred in its application of the statutory review criteria, N.C. Gen. Stat. § 131E-183(a), to the Mission GI South Application. Specifically, Mission asserted that the Agency acted erroneously in finding Mission non-conforming with N.C. Gen. Stat. § 131E-183(a)(3), Criterion 3, § 131E-183(a)(4), Criterion 4, § 131E-183(a)(5), Criterion 5, § 131E-183(a)(6), Criterion 6, § 131E-183(a)(7), Criterion 7, § 131E-183(a)(12), Criterion 12 and § 131E-183(a)(18a), Criterion 18a.

STANDARD OF REVIEW

14. The burden of persuasion placed upon the petitioner is by a "preponderance of the evidence." N.C. Gen. Stat. § 150B-29 ("the party with the burden of proof in a contested case must establish the facts required by N.C. General Statute § 150B-23(a) by a preponderance of the evidence. . . .").

15. The CON Section and the Respondent-Intervenors do not have a burden of proof.

16. In a contested case, "[u]nder N.C. General Statutes § 150B-23(a), the ALJ is to determine whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights, and that the agency acted outside its authority, acted erroneously,

acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule." *Britthaven, Inc. v. N.C. Dep't of Human Res.,* 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995).

17. When considering the Agency decision in a contested CON case, the Court is limited to a review of the information presented or available to the CON Section at the time of the review. *Britthaven, Inc. v. N.C. Dep't of Human Res.,* 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995); *In re Wake Kidney Clinic*, 85 N.C. App. 639, 643, 355 S.E.2d 788, 791 (1987) "The hearing officer (ALJ) is properly limited to consideration of evidence which was before the CON Section when making its initial decision."; *Presbyterian-Orthopaedic Hospital v. N.C. Dep't of Human Res.*, 122 N.C. App. 529, 537-38, 470 S.E.2d 831, 836 (1996) ("[I]n a certificate of need case, the hearing officer may only consider the evidence contained in an applicant's certificate of need application which was before the Certificate of Need Section when it made its initial decision.").

18. When evaluating the Agency decision, the Undersigned considered evidence that was presented or available to the Agency during the review period. *Living Centers-Southeast, Inc. v. N.C. Dep't of Health & Human Servs.*, 138 N.C. App. 572, 581, 532 S.E.2d 192, 194 (2000); *Britthaven*, 118 N.C. App. at 382, 455 S.E.2d at 459 (citing *In re Wake Kidney Clinic*, 85 N.C. App. 639, 355 S.E.2d 788 (1987)).

19. The administrative law judge may only set aside the initial agency decision if the petitioner proves by the greater weight of the evidence one of the stated grounds for overturning an agency decision and not because the judge might have made a different judgment if he or she had been the person making the initial agency decision. N.C. Gen. Stat. § 150B-23(a).

20. An alleged error in the Agency's analysis of an approved application does not require reversal of an agency decision if the error does not affect the outcome of the review. *See, e.g., Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. at 386, 455 S.E.2d at 461.

21. The question arises as to whether or not the agency is entitled to any particular "deference" in how it has addressed the issues in a particular contested case. It is true that North Carolina law gives great weight to the Agency's interpretation of a law it administers. *Frye Regional Med. Center v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999). Further, the Agency's interpretation and application of the statutes and rules it is empowered to enforce are entitled to deference, as long as the Agency's interpretation is reasonable and based on a permissible construction of the statute. *Good Hope Health Sys., LLC v. N.C. Dep't of Health & Human Servs.*, 189 N.C. App. 534, 544, 659 S.E.2d 456, 463 (2008), *aff'd*, 362 N.C. 504, 666 S.E.2d 749 (2008); *Craven Reg. Medical Authority v. N.C. Dep't of Health and Human Servs.*, 176 N.C. App. 46, 58, 625 S.E.2d 837, 844 (2006); *see also Carpenter v. N.C. Dep't of Human Res.*, 107 N.C. App. 278, 279, 419 S.E.2d 582, 584 (1992)

22. Far and away the majority if not all of appellate cases on "agency deference" speak in terms of the reviewing court looking at what the agency did as a "final decision." These decisions were prior to OAH having final decision making authority.

23. Essentially, so long as the agency gives a reasonable interpretation of statute or rule, then the agency may be afforded "deference". The reviewing appellate court does not have to adopt the agency's interpretation, especially if it is clearly erroneous. The reviewing appellate court does not have to adopt the agency's interpretation if the statute or rule is plain, unambiguous and not subject to interpretation; i.e., the agency is not free to interpret what the General Assembly intended unless there is ambiguity. *See for example*: *Rainey v. N.C. Dep't of Pub. Instruction,* 361 N.C. 679, 681, 652 S.E.2d 251, 252–3 (2007); *Cashwell v. Dep't of State Treasurer, Ret. Sys. Div.,* 196 N.C. App. 81, 89, 675 S.E.2d 73, 78-79 (2009)*; Hensley v. N. Carolina Dep't of Env't & Natural Res.,* 201 N.C. App. 1, 34, 685 S.E.2d 570, 593-94 (2009) *rev'd sub nom. Hensley v. N. Carolina Dept. of Env't & Natural Res., Div. of Land Res.,* 364 N.C. 285, 698 S.E.2d 41 (2010). *Britthaven, Inc. v. N.C. Dept. Of Human Resources,* 118 N.C. App. 379, 385, 455 S.E.2d 455, 461; *Total Renal Care Of N. Carolina, LLC v. N. Carolina Dept. of Health & Human Services, Div. of Facility* Services, Certificate of Need Section, 171 N.C. App. 734, 740, 615 S.E.2d 81, 85 (2005)

24. *Wells v. Consol. Judicial Ret. Sys. of N. Carolina*, 354 N.C. 313, 319-20, 553 S.E.2d 877, 881 (2001) states:

> Nevertheless, it is ultimately the duty of courts to construe administrative statutes; courts cannot defer that responsibility to the agency charged with administering those statutes. This does not mean, however, that courts, in construing those statutes, cannot accord great weight to the administrative interpretation, especially when, as here, the agency's position has been long-standing and has been met with legislative acquiescence. (Internal citations omitted).

25. None of the appellate cases impute deference to staff and the day to day operations of any agency. The interpretation of the policies or rules or statutes by the individual person doing the work is not the concern of the appellate courts in "agency deference." In *Canady v. N. Carolina Coastal Res. Comm'n,* 206 N.C. App. 329, 698 S.E.2d 557 (2010*)*, an unpublished opinion, the Court of Appeals acknowledged that typically the deference was to the agency's appellate panel and not the staff. While the unpublished opinion is not cited as legal authority, the Canady case is consistent with the reported cases on agency deference.

26. A standard which is different from the "deference" standard is found in N.C. Gen. Stat. Ann. § 150B-34 which states that "[t]he administrative law judge shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency."

27. In rendering the decision herein, due regard has been given to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency.

28. North Carolina law also presumes that the Agency has properly performed its duties. *In re Broad & Gales Creek Community Assoc.*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980); *Adams v. N.C. State Bd. Of Reg. for Prof. Eng. & Land Surveyors*, 129 N.C. App. 292, 297, 501 S.E.2d 660, 663 (1998) (stating "proper to presume administrative agency has properly

performed its official duties"); *In re Land and Mineral Co.*, 49 N.C. App. 529, 531, 272 S.E.2d 6, 7 (1980) (stating that "the official acts of a public agency . . . are presumed to be made in good faith and in accordance with the law.").

29. The "arbitrary and capricious" standard is a difficult one to meet. *Blalock v. N.C. Dep't of Health & Human Servs.*, 143 N.C. App. 470, 475, 546 S.E.2d 177, 181 (2001). Administrative agency decisions may be reversed as arbitrary and capricious only if they are "patently in bad faith" or "whimsical" in the sense that "they indicate a lack of fair and careful consideration," or "fail to indicate 'any course of reasoning and the exercise of judgment'. . . ." *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997).

30. Although Mission relied to a degree on the representations of Ms. Acker, no issue of estoppel has been raised by Mission.

31. To the extent Mission has argued that the Agency was somehow estopped from disapproving its Application due to any alleged statements made by any representative of the Division at any pre-application meetings or conferences, or by the Findings from the 2011 Mission GI South project, such arguments are contrary to the clearly established law in the State and are rejected as without merit.

32. There was no requirement in the CON Law or rules that the Agency grant Mission's request for expedited review. N.C. Gen. Stat. § 131E-175, *et seq*. The Agency properly acted within its discretion to deny the request for expedited review given the public interest in the proposed project.

33. The Agency properly exercised its discretion in not asking "clarifying" questions to Mission. Even if it had done so, the numerous non-conformities with multiple review criteria could not have been cured with the provision of mere clarifying information and any new or different information would have been considered an impermissible amendment of the Mission Application. An applicant may not amend its application. 10A N.C.A.C. 14C.0204.

34. There is no law or rule obligating the Agency to conduct a site visit. The applicant is required to demonstrate conformity with all applicable review criteria based upon the documentation and information included in its CON application.

35. In order to prevail, a petitioner must satisfy both 1) the independent prima facie requirement of a showing of substantial prejudice under N.C. Gen. Stat. § 150B-23(a); and 2) its burden in showing that "the agency acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule." N.C. Gen. Stat. § 150B-23 (providing that a petitioner in a contested case "shall state facts tending to establish that the agency . . . has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights").

AGENCY FINDINGS

36. Mission failed to prove by a preponderance of the evidence that the Agency exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted

arbitrarily or capriciously, or failed to act as required by law or rule when it disapproved the Mission Application.

37. The Agency acted within its authority and jurisdiction, acted correctly, used proper procedure, did not act arbitrarily or capriciously, did not act erroneously, and acted as required by law and rule in finding that the Mission Application was non-conforming to the following statutory review criteria: N.C. Gen. Stat §§ 131E-183(a)(3), (4), (5), (6), (7), (12) and (18a).

38. The CON Section's analysis of the non-conformities of the Mission Application with the applicable statutory review criteria was consistent with the objectives of the CON Law as set forth in N.C. Gen. Stat. § 131E-175.

39. The Agency Findings were based upon information available to the Agency during the review of the Mission Application, were not arbitrary or capricious, were not based on any improper procedure and did not constitute Agency error.

Criterion 1

40. The CON Section properly found that Criterion 1 does not apply to the Mission GI Application; however is so finding the Agency stated:

> Although the applicant states that the proposed project, Mission GI South, will be wholly located in Buncombe County, the endoscopy suite, as shown on the line drawings in Exhibit 6, does not include space for reception/registration, or a waiting area. The only space for these areas is in a common area in the Henderson County portion of the MOB. Because the applicant proposes to license the relocated GI endoscopy room as part of the hospital, the entire proposed project must be located in Buncombe County, the same county in which Mission Hospital is located.
>
> (Joint Ex. 2, p. 1462)

41. There was no need determination or policy in the 2012 State Medical Facilities Plan applicable to Mission's Application. (Joint Ex. 2, p. 1462) The Agency Findings correctly state that "there is no need determination in the 2012 SMFP applicable to the proposed project.

42. The above quoted statement should not have been included in the Findings concerning Criterion 1, but they are of no consequence in as much as the Agency correctly found that Criterion 1 was not applicable.

Criterion 3

43. N.C. Gen. Stat. § 131E-183(a)(3), Criterion 3, requires that: "The applicant shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area,

and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed." N.C. Gen. Stat. § 131E-183(a)(3).

44. There is no limit on the number of GI endoscopy rooms that may be developed in a particular area. N.C. Gen. Stat. § 131E-178(a) "The annual State Medical Facilities Plan shall not include policies or need determinations that limit the number of gastrointestinal endoscopy rooms that may be approved."

45. Because the relocation of a gastrointestinal endoscopy room in a licensed health service facility, other than within the same building, on the same grounds or to grounds not separated by more than a public right-of-way adjacent to the grounds where the room is currently located, is considered a new institutional health service, a CON must first be obtained before any such relocation. N.C. Gen. Stat. 131E-176(16)u. As such, an applicant is still required by Criterion 3 to demonstrate the need that the population in its chosen service area has for the relocated service proposed.

46. The Agency's obligation is to review whether an applicant's assessment of need is reasonable and supported. The Agency satisfied its obligation by critically evaluating Mission's representations of need and Mission's supporting data.

47. The Agency correctly found that Mission adequately identified the population to be served.

48. The Agency correctly found that the Mission Application was non-conforming with Criterion 3 because it failed to demonstrate a need for its proposed project.

49. Mission failed to explain how certain purported supportive factors such as the real estate market translate into a need for endoscopy services at the proposed Fletcher location.

50. Mission failed to provide any evidence in its Application demonstrating that implementation of the ACA had resulted in an increase in utilization of endoscopy procedures in the proposed service area. Mission further failed to identify the number of screening colonoscopies that it would provide versus other procedures listed in its Application, some of which are not endoscopic procedures.

51. Although Mission included a time study in its Application that purported to demonstrate the time patients who would receive care at the proposed Mission would save over traveling to Mission in Asheville, Mission failed to substantiate this study with any details or documentation. Furthermore, it is undisputed that the study showed that the only savings to patients of the service area would be time spent traversing the Mission campus and not drive time. The study was not a scientific study but rather an informal experiment conducted by a Mission employee.

52. The data provided in the Mission Application and through the testimony of the witnesses at hearing clearly showed that overall utilization of GI endoscopy services at existing Buncombe County providers has been decreasing from 2007 to 2011. Overall utilization at Henderson County providers has been decreasing from 2008 to 2011.

53. Despite the fact that Buncombe County population was growing, the number of endoscopy cases and the endoscopy use rate in Buncombe County decreased between 2007 and 2011.

54. Despite the fact that Henderson County population was growing between 2007 and 2011, the number of endoscopy cases and the endoscopy use rate in Henderson County decreased between 2008 and 2011.

55. The data presented in the Mission Application established that the rate of utilization of endoscopy services in Henderson County is decreasing more rapidly than utilization in Buncombe County is increasing.

56. Although there are 11 existing endoscopy rooms in Buncombe County, none of these is located in Mission's proposed service area. The existing facilities in the applicant's proposed service area, Park Ridge, Carolina Mountain and Pardee, all have unutilized capacity and the ability to serve more patients in their combined 6 endoscopy rooms.

57. Mission has consistently and continuously argued that its proposed relocated endoscopy room needed to be in the MOB situated on the county line and could not be located in other areas of Buncombe County. Mission contends that the only possible location that accommodates the Mission-Pardee joint effort to provide medical services is on the Buncombe-Henderson County line.

58. Any joint effort between Mission and Pardee Hospitals is of no consequence to this CON Application. Pardee is not a part of this particular project and is not a co-applicant in this CON application. Placing the proposed facility in the MOB which sits astride the county line is an accommodation for the collaboration between the two hospitals. It is a convenience, not necessity for that particular location.

59. Denial of the Mission proposal does not prevent Mission from continuing to utilize all six of its existing and licensed endoscopy rooms as it is currently doing and to continue providing screening to aid in the detection of colon cancer.

60. The Agency correctly determined that Mission had failed to demonstrate the need that the population of the proposed service area has for the services proposed.

61. The substantial evidence shows that the Agency correctly and reasonably determined that the Mission Application was non-conforming with Criterion 3. Despite the fact that the Agency found no problem with Mission's identification of the population to be served, the Agency reasonably concluded that Mission had failed to demonstrate the need that particular population has for the relocation of a GI endoscopy room to the MOB on the Buncombe/Henderson County line in Fletcher, North Carolina.

62. Mission failed to meets its burden demonstrating that the Agency erred in finding it non-conforming with Criterion 3.

Criterion 4

63. N.C. Gen. Stat. § 131E-183(a)(4), Criterion 4, requires that: "Where alternative methods of meeting the needs for the proposed project exist, the applicant shall demonstrate that the least costly or most effective alternative has been proposed." N.C. Gen. Stat. § 131E-183(a)(4).

64. The Agency found the Mission Application was non-conforming to Criterion 4.

65. The Mission Application essentially discussed only one alternative to locating the endoscopy room in Fletcher, which was the possibility of relocating two rooms. That alternative was rejected because the volume of cases would not support two endoscopy rooms in the southern part of Buncombe County.

66. There is no minimum number of alternatives that an applicant is required to propose in its application. However, an applicant must demonstrate why it chose the alternative that it did and that the alternative chosen is the least costly or most effective alternative.

67. The Agency did not conclude that Mission should have chosen any particular alternative. The Agency concluded that Mission should have discussed the alternatives of providing its services as an ambulatory surgical facility instead of a hospital based facility and the alternative of relocating the endoscopy room to another location in Asheville but off of the main Mission campus. Mission could have considered that as an alternative.

68. The application was devoid of any discussion of any site other than the proposed site.

69. It was reasonable for the Agency to have expected some alternative to have been considered and discussed given Mission's focus in the Application on the purported cost savings of its project and need for greater accessibility off the Mission Asheville campus.

70. Mission failed to discuss any other alternative site because of Mission's fixation on the MOB situated on the Buncombe-Henderson County line, as being necessitated by the Mission-Pardee collaborative effort.

71. The substantial evidence shows that the Agency correctly and reasonably determined that the Mission Application was non-conforming with Criterion 4 because Mission failed to adequately demonstrate that it had proposed the least costly or most effective alternative.

72. Mission failed to meets its burden demonstrating that the Agency erred in finding it non-conforming with Criterion 4.

Criterion 5

73. Under N.C. Gen. Stat. § 131E-183(a)(5), Criterion 5, "Financial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon

reasonable projections of the costs of and charges for providing health services by the person proposing the service." N.C. Gen. Stat. § 131E-183(a)(5).

74. The Agency found the Mission Application non-conforming to Criterion 5.

75. The Agency properly determined that inaccuracies and errors exist in Mission's pro formas. The effect of the difference is to understate rather than overstate revenue. If the error were corrected, Mission would actually project greater net income. The error is not material and does not impact the financial feasibility of Mission's Application.

76. The inconsistencies identified in the Agency's findings under Criterion 5, although calling into question the reliability of the projections to some degree, do not have a negative impact on the feasibility of the project

77. The Agency also properly found that Mission failed to account for the necessary staffing at Mission GI South because it failed to budget for CRNA(s) to provide the level of anesthesia it proposed to offer.

78. The Agency properly concluded that Mission would use both MAC Anesthesia and conscious sedation, and that the use of MAC anesthesia would necessitate having a CRNA at the facility.

79. The Agency correctly concluded that Mission failed to adequately demonstrate that the financial feasibility of the proposal was based on reasonable projections of costs and charges. The substantial evidence shows that the Agency correctly and reasonably determined that the Mission Application was non-conforming to Criterion 5.

80. Mission failed to meets its burden demonstrating that the Agency erred in finding it non-conforming with Criterion 5.

Criterion 6

81. To satisfy N.C. Gen. Stat. § 131E-183(a)(6), Criterion 6, "[t]he applicant shall demonstrate that the proposed project will not result in unnecessary duplication of existing or approved health service capabilities or facilities." N.C. Gen. Stat. § 131E-183(a)(6).

82. Criterion 6 prohibits the unnecessary duplication of existing or approved health services. Reviewing applicants under Criterion 6 necessarily involves an analysis of other services being provided in the service area defined by the applicant.

83. The test under Criterion 6 is whether or not there is duplication of the already existing services of other providers of the same services in the proposed service area—not a duplication of the applicants proposed facility.

84. While Mission is not required to explain the reasons for the existence of excess capacity of GI endoscopy services in the proposed service area, Mission failed to demonstrate that relocating a GI endoscopy to the proposed service is not an unnecessary duplication of existing health services when excess capacity exists in the area.

85. The evidence in the Mission Application established that existing providers in the service area have excess capacity and therefore adding an additional GI endoscopy room to the service area would only further exacerbate that excess capacity.

86. It was appropriate for the Agency to consider the utilization of existing services in the proposed service area chosen by the applicant.

87. Mission failed to show by a preponderance of the evidence that the Agency erred by finding that Mission's proposal would unnecessarily duplicate existing endoscopy rooms in the proposed service area.

88. The Agency correctly and reasonably concluded that Mission's relocation would result in unnecessary duplication of existing endoscopy rooms in the proposed service area.

89. The substantial evidence shows that the Agency correctly and reasonably concluded that the Mission Application was non-conforming to Criterion 6.

90. Mission failed to meets its burden demonstrating that the Agency erred in finding it non-conforming with Criterion 6.

Criterion 7

91. N.C. Gen. Stat. § 131E-183(a)(7), Criterion 7, requires the applicant present "evidence of the availability of resources, including health manpower and management personnel, for the provision of the services proposed to be provided."

92. The Agency correctly and reasonably concluded that the Mission Application failed to conform with Criterion 7.

93. The statements and policies in the Mission Application indicated Mission would be providing two levels of sedation at Mission GI South: conscious sedation and anesthesia, the latter of which, by Mission's own policies, requires a CRNA to administer. However, Mission failed to demonstrate that it would in fact provide for a CRNA position.

94. The substantial evidence shows that the Agency correctly and reasonably concluded that the Mission Application was non-conforming to Criterion 7.

95. Mission failed to meet its burden demonstrating that the Agency erred in finding it non-conforming with Criterion 7.

Criterion 12

96. N.C. Gen. Stat. § 131E-183(a)(12), Criterion 12, requires: "Applications involving construction shall demonstrate that the cost, design, and means of construction proposed represent the most reasonable alternative, and that the construction project will not unduly increase the costs of providing health services by the person proposing the construction project or the costs and charges to the public of providing health services by other persons, and

that applicable energy saving features have been incorporated into the construction plans." N.C. Gen. Stat. § 131E-183(a)(12).

97. The Agency correctly concluded that the Mission Application failed to demonstrate that the design of the proposed project was reasonable, due to its lack of dedicated waiting room, receiving area, and registration area.

98. Mission GI South is proposed to be licensed under Mission's hospital license and as such is required to adhere to the licensure rules for hospitals found in 10A N.C.A.C. Chapter 13B, including the construction requirements for Outpatient Surgical Facilities at 10A N.C.A.C. 13B.6207(b).

99. The hospital licensure rules provide that a hospital license shall include facilities or premises within a single county, in this case, Buncombe County.

100. Moreover, endoscopy services are considered to be invasive procedures for purposes of licensure and as set forth in 10A N.C.A.C. 13B.6207(b), Mission GI South would be subject to the rules for licensure of ambulatory surgical facilities under 10A N.C.A.C. 13C.1300, *et seq*. These rules include certain physical plant requirements including the provision of waiting space and space for the receiving and registering of patients.

101. The Acute and Home Care Licensure and Certification Section of the Division could not license Mission GI South as proposed because it failed to designate the required spaces for receiving, registration or waiting in Buncombe County in the architectural plans submitted to the Agency.

102. A facility that is not licensed cannot receive reimbursement for services provided to Medicare patients.

103. The substantial evidence shows that the Agency correctly and reasonably determined that the Mission Application was non-conforming to Criterion 12.

104. Mission failed to meet its burden demonstrating that the Agency erred in finding it non-conforming with Criterion 12.

Criterion 18a

105. N.C. Gen. Stat. § 131E-183(a)(18a), Criterion 18a, requires, in pertinent part, that: "The applicant shall demonstrate the expected effects of the proposed services on competition in the proposed service area, including how any enhanced competition will have a positive impact upon the cost effectiveness, quality, and access to the services proposed…." N.C. Gen. Stat. § 131E-183(a)(18a).

106. The Agency concluded that the Mission Application failed to demonstrate the expected effects of the proposed services, specifically related to the fact that the proposed service will not enhance cost effectiveness or access to the services proposed.

107. As the North Carolina Court of Appeals held in *Total Renal Care of N.C. v. N.C. Dep't of Health and Human Serv.*, 171 N.C. App. 734, 741, 615 S.E.2d 81, 85 (2005):

> We find increased competition and consumer choice to be well within the established criteria in N.C. Gen. Stat. § 131E-183 and not inconsistent with the General Assembly's findings in N.C. Gen. Stat. § 131E-175. . . Also, this Court has approved of "competition" as a rational means of comparing competing applications and awarding a certificate of need.

108. Mission failed to show by a preponderance of the evidence that the Agency erred in finding the Mission Application non-conforming to Criterion 18a.

109. The Agency correctly and reasonably determined that Mission failed to demonstrate that its proposal would have a positive effect on the cost effectiveness of the services and access to the proposed services.

110. The substantial evidence shows that the Agency correctly and reasonably determined that the Mission Application was non-conforming to Criterion 18a.

111. Mission failed to meet its burden demonstrating that the Agency erred in finding it non-conforming with Criterion 12.

Conclusions with Respect to Other Review Criteria

112. The Agency properly found that Criteria 1, 9, 10 and N.C. Gen. Stat. § 131E-183(b) were not applicable to the Mission Application.

113. The Agency properly found that the Mission Application was conforming with Criteria 3a, 8, 13, 14, and 20.

Conclusions with Respect to the Non-conformities

114. The Agency correctly found the Mission Application non-conforming with Criteria 3, 4, 5, 6, 7, 12 and 18a.

115. The Agency correctly disapproved the Mission Application.

116. The Agency issued a detailed decision in this case and there is no evidence of bias or improper procedure by the Agency.

117. The Agency's decision in this case is consistent with its prior review of other CON applications. The Agency strives to be consistent in its Findings. Such consistency allows applicants to be able to forecast to a degree how the Agency may look upon and rule on a certain set of facts. Although various prior Required State Agency Findings were discussed during the hearing, those findings are factually distinguishable and do not support a conclusion that the Agency acted either improperly or in an arbitrary or capricious manner in this review.

118. The Court of Appeals has found:

> Each CON application is reviewed individually, and the determination of whether or not an applicant has complied with review criteria is made based upon the evidence presented concerning the specific area where the CON is sought and its needs. No two applications are alike, and no two applications can be assessed in exactly the same way.
>
> Because each application is evaluated separately against review criteria, past Agency decisions on CON applications are generally irrelevant.

The Charlotte-Mecklenburg Hospital Authority d/b/a Carolina Rehabilitation-Mount Holly and d/b/a Carolinas Healthcare System v. N.C. Department of Health and Human Servs., 720 S.E.2d 461, 2011 WL 6359618 (N.C. App. Dec. 20, 2011).

119. The Agency appropriately reviewed the Mission GI South Application independent of any other past applications and determined that the evidence presented in the Application did not support a need for the proposed GI endoscopy room relocation in the specific service area defined by the applicant.

120. Petitioner has failed to meet its burden of demonstrating that the Agency acted outside its authority and jurisdiction, acted erroneously, used improper procedure, acted arbitrarily and capriciously, or failed to act as required by law and rule in disapproving the Mission Application.

121. The Agency's decision was not erroneous, arbitrary, capricious, in excess of statutory authority and jurisdiction, or contrary to law or rule.

122. Substantial evidence appears in the record to support the Agency's decision to disapprove the Mission Application.

123. Mission failed to show by a preponderance of the evidence that the Agency erred in finding the Mission Application non-conforming to Criteria 3, 4, 5, 6, 7, 12 and/or 18a.

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned hereby enters the following FINAL DECISION pursuant to N.C. Gen. Stat. §§ 150B-134 and 131E-188, based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge and expertise of the Agency with respect to facts and inferences within the specialized knowledge of the Agency.

IT IS HEREBY ORDERED as follows:

The decision of the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section in this review is **UPHELD**.

NOTICE

Under the provisions of N.C. Gen. Stat. § 131E-188(b), any party wishing to appeal the final decision of the Administrative Law Judge must file a Notice of Appeal with the Office of Administrative Hearing and serve the Notice on the N.C. Department of Health and Human Services and all other affected persons who were parties to the contested case. The appealing party must file the Notice within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. Pursuant to N.C. Gen. Stat. § 131E-188(b1) before filing an appeal of a final decision granting a certificate of need, the affected person shall deposit a bond with the Clerk of the Court of Appeals. In conformity with the Office of Administrative Hearings' rule 26 N.C.A.C. 03.012 and the Rules of Civil Procedure, N.C. Gen. Stat. 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.

IT IS SO ORDERED.

This the 18th day of June, 2013.

Donald W. Overby
Administrative Law Judge

CERTIFICATE OF SERVICE

A true copy of the foregoing Final Decision has been served on the counsel shown below:

Maureen Demarest Murray
Terrill Johnson Harris
Smith Moore Leatherwood LLP
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Greensboro, NC 27401

Joel L. Johnson
Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629

Denise M. Gunter
Candace S. Friel
Nelson Mullins Riley & Scarborough LLP
380 Knollwood Street, Suite 530
Winston-Salem, NC 27103

This the 18th day of June, 2013.

Vicki Bullock
Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699

STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF WAKE	**13 DOJ 9974**

MARCUS TEER BENSON,	)	
	)	
Petitioner,	)	**PROPOSAL FOR DECISION GRANTING OF SUMMARY JUDGMENT**
	)	
v.	)	
	)	
NORTH CAROLINA PRIVATE PROTECTIVE SERVICES BOARD,	)	
	)	
Respondent.	)	

DECISION GRANTING SUMMARY JUDGMENT IN FAVOR OF PETITIONER

In accordance with N.C. Gen. Stat. § 150B-40(e), Respondent requested the designation of an Administrative Law Judge to preside at the hearing of a contested case on this matter under Article 3A, Chapter 150B of the North Carolina General Statutes. Petitioner filed an Amended Motion to Dismiss as Sanction and the hearing was stayed awaiting ruling on the motion. Due to the substantive nature of the above-cited motion and as matters outside the pleadings have been taken into account, the Undersigned is treating Petitioner's motion as one for summary judgment. The Undersigned makes the following Proposal for Decision finding that in accordance with the applicable law and regulations and the facts specific to this case, Summary Judgment should be granted for Petitioner.

STANDARD OF REVIEW – SUMMARY JUDGMENT

Summary judgment is designed to eliminate formal trials where only questions of law are involved. Summary judgment should be used cautiously, with due regard to its purposes and a cautious observance of its requirements. *See Brown v. Greene*, 98 N.C.App. 377, 390 S.E.2d 695 (1990). To entitle one to summary judgment, the movant must conclusively establish a legal bar to the nonmovant's claim or complete defense to that claim. *See Virginia Elec. and Power Co. v. Tillett,* 80 N.C.App. 383, 385, 343 S.E.2d 188, 190-91, *cert denied*, 317 N.C. 715, 347 S.E.2d 457 (1986).

FINDINGS OF FACT

1. Petitioner is a licensed Private Investigator in the State of North Carolina. When he first applied for licensing with the Respondent in 2004, he was approved for an individual license.

2. In 2008, Petitioner discontinued his contractual employment with Cape Fear Investigative Services and started his own company. Upon discontinuing his dealings with Cape Fear, Petitioner learned that sometime during the prior license renewal period process, his license had been transferred under Cape Fear without his knowledge or authorization. When he learned of this, Petitioner immediately renewed his license and filed for corporation status with the North Carolina Secretary of State's Office.

3. In December of 2008, Respondent sent Petitioner a letter of reprimand "for engaging in a private protective services profession under a name other than the name which the license was obtained under."

4. Per appeal instructions from Respondent, Petitioner requested an administrative hearing on February 10, 2009. Respondent acknowledged receipt by letter dated February 16, 2009.

5. Petitioner received a Notice of Hearing some four (4) years later, on March 14, 2013 setting a hearing regarding his 2008 reprimand for April 23, 2013.

BASED UPON the above Findings of Fact, the undersigned Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of this contested case pursuant to Chapter 150B of the North Carolina General Statutes. N.C.G.S. § 150B-38 requires that "the agency shall give the parties in the case an opportunity for hearing *without undue delay*." (emphasis added)

2. Petitioner's motion effectively challenges Respondent's failure to comply with its statutory appeal process and thus contends that Respondent has now lost jurisdiction to proceed with the present case.

3. Petitioner is a person aggrieved as defined in N.C.G.S. § 150B. Respondent has substantially prejudiced Petitioner's rights by proceeding with this action several years after the request for an administrative hearing. Petitioner has alleged that his rights have been substantially prejudiced by Respondent's decision and that Respondent has violated one or more

of the standards set forth in N.C.G.S. § 150B-38. Petitioner has properly and lawfully stated a claim for relief.

4. Respondent has failed to follow its applicable law which requires that a hearing shall go forward without undue delay. The reasons for this requirement are obvious as they involve the need for accurate and available evidence at or near the time of the action that was proposed by the Respondent. Respondent's delay of some four years conflicts with several comparable three year statutes of limitations. Statutes of limitation serve an important purpose in North Carolina. The purpose of a statute of limitations is to afford security against stale demands. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 574, 174 S.E.2d 870 (1970). The Undersigned does not rely on a statute of limitations specific to this case but uses legislative intent in a statute of limitations as support for the lack of logic and clarity in an agency appeal process that would have no time limitations.

5. To suppose that Respondent is under no time requirement to set a hearing after an appeal has been requested is illogical and a misinterpretation of its responsibilities. If Respondent's appeal process did not impose an obligation to conduct a hearing within a reasonable time of the request, then the result would, in equity be fundamentally unfair, and necessarily be a lack of due process, since it would allow Respondent to postpone indefinitely its obligation to provide a fair and impartial hearing.

6. There are no genuine issues of material fact regarding the issues raised by Petitioner in his Motion and Petitioner is entitled to judgment in his favor as a matter of law. In this case, Respondent has failed to follow its own statutorily mandated process by failing to provide Petitioner with a timely hearing in which Petitioner requested over four years ago. When Respondent failed to provide Petitioner with a timely hearing and now comes forward outside the bounds of any reasonable statute of limitations, it has effectively lost jurisdiction to proceed further. Respondent has acted erroneously, failed to use proper procedure, and failed to act as required by law and rule.

7. Moreover, and/or in the alternative, Respondent has manifested an intention to thwart the progress of this contested case by failing to set an administrative hearing as requested by Petitioner without undue delay. Imposition of sanctions because of the Respondent's failure to prosecute and disposition of this case by default in favor of Petitioner in accordance with N.C. GEN. STAT. § 150B-41 and N.C. GEN. STAT. § 1A-1, Rule 41 of the North Carolina Rules of Civil Procedure is proper and lawful because of the Respondent's failure to notice Petitioner for hearing within a reasonable time as mandated by law.

PROPOSAL FOR DECISION

WHEREFORE, based upon the above stated Findings of Fact and Conclusions of Law, the Undersigned Administrative Law Judge proposes the Private Protective Services Board grant Summary Judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure in favor

of the Petitioner and set aside the Board's 2008 letters of reprimand and expunge the same from the record of the Petitioner.

NOTICE AND ORDER

The North Carolina Private Protective Services Board will make the Final Agency Decision in this contested case. 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).

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to his attorney of record. N.C.G.S. § 150B-42(a). It is requested that the agency furnish a copy to the Office of Administrative Hearings.

This the 15th day of May, 2013.

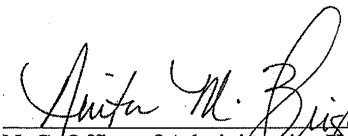
Augustus B. Elkins, II
Administrative Law Judge

On this date mailed to:

MARCUS TEER BENSON
PO BOX 3305
WILMINGTON, NC 28403
Petitioner

JEFFREY P GRAY
BAILEY & DIXON, LLP
PO BOX 1351
RALEIGH, NC 27602
Attorney for Respondent

This the 15th day of May, 2013.



N. C. Office of Administrative Hearings
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STATE OF NORTH CAROLINA IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

COUNTY OF JOHNSTON

David L Smith Petitioner v. N C Innocence Inquiry Commission Respondent	**13MIS12404**
Thomas Franklin Cross, Jr. Petitioner v. N C Innocence Inquiry Commission Respondent	**13MIS12642**
Jabar Ballard Petitioner v. N C Innocence Inquiry Commission Respondent	**13MIS13005**

FINAL DECISION

The above captioned consolidated cases come before the Honorable Donald W. Overby, Administrative Law Judge presiding, for consideration of petitions filed with the Office of Administrative Hearing (OAH). The petitions have been consolidated for disposition in this Order. Petitioner David L. Smith initially filed his petition with OAH on May 7, 2013, and filed a second petition on June 12, 2013. Petitioner Thomas Franklin Cross, Jr. filed his petition with OAH on May 17, 2013. Petitioner Jabar Ballard filed his petition with OAH on May 24, 2013. In response to these petitions, the North Carolina Innocence Inquiry Commission submitted a letter dated June 5, 2013 asking that these petitions be dismissed.

The North Carolina Innocence Inquiry Commission is an independent commission under the Judicial Department. N. C. Gen. Stat. § 15A-1462. One of the duties of the Commission is to conduct inquiries into claims of factual innocence. N. C. Gen. Stat. § 15A-1466. The determination of whether or not to grant a formal inquiry lies in the sole discretion of the Commission. N. C. Gen. Stat. § 15A-1467. "Decisions of the Commission and of the three-judge panel are final and are not subject to further review by appeal, certification, writ, motion or otherwise." N. C. Gen. Stat. § 15A-1470.

The Office of Administrative Hearings is an independent, quasi-judicial agency, created under the Executive branch of government pursuant to Article III, Section 11 of the North Carolina Constitution, entitled "Administrative Departments", and in accord with Article IV, Section 3 of the North Carolina Constitution, entitled "Judicial Powers of Administrative Agencies." N. C. Gen. Stat. § 7A-750. The Office of Administrative Hearings derives its jurisdiction solely by statute, principally from The Administrative Procedures Act (APA), N. C. Gen. Stat. § 150B. The APA establishes "a uniform system of administrative rule making and adjudicatory procedures for agencies." (Emphasis added) N. C. Gen. Stat. § 150B-1. "Agency" is defined as "an agency or an officer in the executive branch of the government of this State. . . ."

In as much as the Innocence Inquiry Commission is an independent commission under the Judicial Department it is not an "agency" for purposes of conferring jurisdiction in OAH.

As a quasi-judicial agency, OAH is controlled procedurally by the Rules of Civil Procedure. The letter from the Commission dated June 5, 2013 is adopted as a Motion to Dismiss as to these three petitions only.

Based upon the foregoing, it is concluded as a matter of law that the Office of Administrative Hearings, lacks subject matter jurisdiction, and that these matters individually and collectively should be and herby are **DISMISSED**.

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 19th day of June, 2013

Donald W. Overby
Administrative Law Judge

CERTIFICATE OF SERVICE

A true copy of the foregoing Final Decision has been served on the parties shown below:

David L Smith
2465 US 70 West
Smithfield, NC 27577
PETITIONER

Thomas Franklin Cross, Jr.
2465 US 70 West
Smithfield, NC 27577
PETITIONER

Jabar Ballard
2465 US 70 West
Smithfield, NC 27577
PETITIONER

Kendra Montgomery-Blinn
Lindsey Guice Smith
NC Innocence Inquiry Commission
PO Box 2448
Raleigh, NC 27602
RESPONDENT

This the 17th day of June, 2013.

Vicky Bullock

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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13REV10115

CHASE AUTO FINANCE CORPORATION Petitioner v. NC DEPARTMENT OF REVENUE Respondent	**FINAL DECISION**

THIS MATTER, came before Administrative Law Judge Beecher R. Gray for determination of the Motion to Strike Petition and Dismiss Contested Case in Lieu of Prehearing Statement ("Motion") filed by Respondent, North Carolina Department of Revenue, in the Office of Administrative Hearings ("OAH") on 6 May 2013. Petitioner, Chase Auto Finance Corporation, did not file a response to the Motion and the time for Petitioner file a response pursuant to 26 N.C.A.C. § 3.0115 has expired. In light of the forgoing, I find that Respondent's Motion and the matters contained therein are ripe for disposition.

Upon consideration of Respondent's Motion and having reviewed the pleadings and other matters of record, I hereby GRANT Respondent's Motion for good cause shown.

FINDINGS OF FACT

1. On 11 March 2013, Petitioner filed a Petition for Contested Case Hearing in the OAH in reference to North Carolina Corporate and Income Franchise Taxes. *See* Petition, ¶ 2.

2. Petitioner is a corporation and held this status at the time of filing the Petition in the OAH. *See* Petition.

3. The Petition is signed by an individual named Carl Schoer. *See id.* at ¶¶ 9 and 10.

4. In the Petition, Carl Schoer does not represent that he is an attorney or a member of the North Carolina State Bar. *See id.* at ¶¶ 1-12.

5. Other than Carl Schoer, no other individual appears on the Petition. *Id.*

CONCLUSIONS OF LAW

1. The qualifications and regulations regarding the practice of law in North Carolina are set forth in Article 1, Chapter 84 of the North Carolina General Statutes ("Article").

2. Except as otherwise permitted by law, the Article:

   a. Makes it unlawful for any person other than "active members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys-at-law to appear as attorney or counselor at law in any action or proceeding before any judicial body . . . except in his own behalf as a party thereto." N.C. Gen. Stat. § 84-4; and

   b. Specifically provides that "[i]t shall be *unlawful for any corporation to practice law*[.]" N.C. Gen. Stat. § 84-5 (emphasis added). The term "practice law" includes "the *preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or quasi-judicial bodies*[.]" N.C. Gen. Stat. § 84-2.1 (emphasis added). Pursuant to N.C. Gen. Stat. § 7A-750, the OAH is considered "an independent, quasi-judicial agency [.]"

3. Finding that "the right to practice law is not a natural one," *Seawell v. Carolina Motor Club, Inc.*, 209 N.C. 624, 631, 184 S.E. 540, 544 (1936), the North Carolina Court of Appeals has recognized that the qualifications and limitations on the practice of law enumerated in the Article fall within the purview of the Legislature. *See id.* (recognizing that, "[s]ubject to constitutional restrictions and limitations, the Legislature has the power to prescribe the qualifications and establish the rules and regulations under which citizens may enter upon and continue in the professional practice of law").

4. As a result, the Court of Appeals has upheld the Legislature's prohibition contained in N.C. Gen. Stat. § 84-5 on corporations engaging in the practice of law, *Seawell*, 209 N.C. at 631, 184 S.E. at 544, and has "expressly adopt[ed] the general rule . . . that in North Carolina a corporation must be represented by a duly admitted and licensed attorney-at-law[.]" *LexisNexis v. Travishan Corporation,* 155 N.C. App. 205, 209, 573 S.E.2d 547, 549 (2002).

5. Although the Court of Appeals later held that "the rule articulated in *LexisNexis* is wholly inapplicable to most appeals arising before the OAH," *Allied Environmental Services, PLLC v. N.C. Department of Environmental & Natural Resources,* 187 N.C. App. 227, 229, 653 S.E.2d 11, 13 (2007), *rev. denied*, 36 N.C. 354, 661 S.E.2d 238 (2008), it did so without confronting the statutory proscription set forth in the Article regarding the unauthorized practice of law. *See id.* at 231-35, 653 S.E.2d 11 at 13-16 (Stroud, J., concurring).

6. Thus, a corporation must be represented by an attorney in the OAH. *See Alden Briscoe v. State of North Carolina, Department of the Secretary of State*, 10 SOS 5697 (OAH January 2011) (Final Decision Order of Dismissal) (dismissing a petition for contested case hearing where a corporation was not represented by an attorney); Office of

Administrative Hearings, Hearing Division - Frequently Asked Questions (Question No. 28), http://www.ncoah.com/ hearings/faq.html ("a corporation must be represented by an attorney").

7. This position is not only consistent with the plain language of the statutory prohibition contained in N.C. Gen. Stat. § 84-5, but also is consistent with that taken by the Authorized Practice Committee ("Committee") of the North Carolina State Bar. The Committee has expressly stated that, notwithstanding *Allied*, "the law still prohibits nonlawyers from acting as 'representatives' in contested hearings before the OAH[.]" *See* Letter from Committee to Mr. Grayson Kelley, Senior Deputy Attorney General re: Unauthorized Practice of Law Inquiry, File No. 08AP0104 (5 March 2009).

8. Upon consideration of the foregoing, I conclude that Petitioner's Petition should be stricken for the following reasons:

   a. Given the statutory proscription set forth in the Article, Petitioner, as a corporation, may not engage in the practice of law. *See* N.C. Gen. Stat. §§ 84-4 and 84-5. This includes preparing and filing of petitions for use in the OAH. *See id.*; *see also* N.C. Gen. Stat. § 84-2.1.

   b. Here, the statutory proscription set forth in the Article has been violated as Petitioner's Petition was filed in the OAH by Carl Schoer – an individual who is neither an attorney licensed or authorized to practice law in North Carolina.

   c. In light of the violation, Respondent's remedy is to move for the Petition to be stricken from the record. *See N.C. National Bank v. Virginia Carolina Builders*, 307 N.C. 563, 568, 299 S.E. 2d 629, 632 (1983) (recognizing the remedy for addressing a pleading filed by an individual engaged in the unauthorized practice of law is moving to strike the pleading from the record); *Allied,* 187 N.C. App. at 235, 653 S.E.2d at 16 (Stroud, J., concurring) (proper procedure for addressing a defective petition is to move to strike the petition from the record). Accordingly, the Court grants Respondent's motion to strike the Petition filed by Mr. Schoer.

9. Because I find that this Petition should be stricken, I further conclude that dismissal of this case is required under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) because:

   a. Respondent's motion to strike the Petition "is in substance, if not in form, a demurrer to the pleading." *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 671, 151 S.E.2d 579, 581 (1966);

   b. The North Carolina Court of Appeals has recognized that a "demurrer to the pleading challenges the sufficiency thereof." *Sutton v. Duke*, 7 N.C. App. 100, 103, 171 S.E.2d 343, 345 (1969); and

   c. "A Rule 12(b)(6) motion to dismiss is the modern equivalent of a demurrer." *Governor's Club, Inc. v. Governors Club Ltd. P'ship*, 152 N.C. App. 240, 253,

567 S.E.2d 781, 790 (2002).

FINAL DECISION

In light of the foregoing, I find that Respondent's Motion, when considered in the light most favorable to the nonmovant Petitioner, should be, and the same hereby is, ALLOWED. Accordingly, Petitioner's Petition is stricken from the record and this contested case is DISMISSED.

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. **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 19th day of June, 2013.

Beecher R. Gray
Administrative Law Judge

On this date mailed to:

CHASE AUTO FINANCE CORPORATION
1 CHASE MANHATTAN PLAZA 59TH FLOOR
NEW YORK, NEW YORK 10005
Petitioner

Tenisha S. Jacobs
9001 Mail Service Center
Raleigh, NC 27699
Attorney For Respondent

This the 19th day of June, 2013.

Anne Hollowell

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