NORTH CAROLINA REGISTER

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January 2, 2014

Contact List for Rulemaking Questions or Concerns

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

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

Office of Administrative Hearings
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Rules Review Commission
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Fiscal Notes & Economic Analysis and Governor's Review

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

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

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

Legislative Process Concerning Rule-making

Joint Legislative Administrative Procedure Oversight Committee
545 Legislative Office Building
300 North Salisbury Street (919) 733-2578
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NORTH CAROLINA REGISTER

Publication Schedule for January 2014 – December 2014

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
28:13	01/02/14	12/06/13	01/17/14	03/03/14	03/20/14	05/01/14	05/2014	09/29/14
28:14	01/15/14	12/19/13	01/30/14	03/17/14	03/20/14	05/01/14	05/2014	10/12/14
28:15	02/03/14	01/10/14	02/18/14	04/04/14	04/21/14	06/01/14	01/2015	10/31/14
28:16	02/17/14	01/27/14	03/04/14	04/21/14	05/20/14	07/01/14	01/2015	11/14/14
28:17	03/03/14	02/10/14	03/18/14	05/02/14	05/20/14	07/01/14	01/2015	11/28/14
28:18	03/17/14	02/24/14	04/01/14	05/16/14	05/20/14	07/01/14	01/2015	12/12/14
28:19	04/01/14	03/11/14	04/16/14	06/02/14	06/20/14	08/01/14	01/2015	12/27/14
28:20	04/15/14	03/25/14	04/30/14	06/16/14	06/20/14	08/01/14	01/2015	01/10/15
28:21	05/01/14	04/09/14	05/16/14	06/30/14	07/21/14	09/01/14	01/2015	01/26/15
28:22	05/15/14	04/24/14	05/30/14	07/14/14	07/21/14	09/01/14	01/2015	02/09/15
28:23	06/02/14	05/09/14	06/17/14	08/01/14	08/20/14	10/01/14	01/2015	02/27/15
28:24	06/16/14	05/23/14	07/01/14	08/15/14	08/20/14	10/01/14	01/2015	03/13/15
29:01	07/01/14	06/10/14	07/16/14	09/02/14	09/22/14	11/01/14	01/2015	03/28/15
29:02	07/15/14	06/23/14	07/30/14	09/15/14	09/22/14	11/01/14	01/2015	04/11/15
29:03	08/01/14	07/11/14	08/16/14	09/30/14	10/20/14	12/01/14	01/2015	04/28/15
29:04	08/15/14	07/25/14	08/30/14	10/14/14	10/20/14	12/01/14	01/2015	05/12/15
29:05	09/02/14	08/11/14	09/17/14	11/03/14	11/20/14	01/01/15	01/2015	05/30/15
29:06	09/15/14	08/22/14	09/30/14	11/14/14	11/20/14	01/01/15	01/2015	06/12/15
29:07	10/01/14	09/10/14	10/16/14	12/01/14	12/22/14	02/01/15	05/2016	06/28/15
29:08	10/15/14	09/24/14	10/30/14	12/15/14	12/22/14	02/01/15	05/2016	07/12/15
29:09	11/03/14	10/13/14	11/18/14	01/02/15	01/20/15	03/01/15	05/2016	07/31/15
29:10	11/17/14	10/24/14	12/02/14	01/16/15	01/20/15	03/01/15	05/2016	08/14/15
29:11	12/01/14	11/05/14	12/16/14	01/30/15	02/20/15	04/01/15	05/2016	08/28/15
29:12	12/15/14	11/20/14	12/30/14	02/13/15	02/20/15	04/01/15	05/2016	09/11/15

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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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State of North Carolina

PAT McCRORY
GOVERNOR

November 22, 2013

EXECUTIVE ORDER NO. 31

EXTENDING THE FOOD SAFETY AND DEFENSE TASK FORCE

By the power vested in me as Governor by the Constitution and laws of the State of North Carolina, **IT IS ORDERED**:

Executive Order Number 38, *Reestablishing the Food Safety and Defense Task Force*, signed by Governor Perdue on December 15, 2009, is hereby extended until December 31, 2015.

This order is effective immediately.

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

Pat McCrory
Governor

ATTEST:

Elaine F. Marshall
Secretary of State

State of North Carolina

PAT McCRORY
GOVERNOR

November 22, 2013

EXECUTIVE ORDER NO. 32

REESTABLISHING THE NORTH CAROLINA COMMISSION ON VOLUNTEERISM AND COMMUNITY SERVICE

WHEREAS, the increasing realization of the importance of volunteerism and civic engagement; the growing recognition of community service as a means of community and state problem-solving; and the revival of national service as an avenue for addressing many of the country's unmet social, environmental, educational, public safety, and homeland security needs have revealed new options for enhancing the quality of life for North Carolinians; and

WHEREAS, promoting the capacity of North Carolina's people, communities, and enterprises to work collaboratively is vital to the long-term prosperity of this State; and

WHEREAS, building and encouraging community services as an integral component of the formula to our growth as a State and as a national requires cooperative efforts by the public sector, the private sector, the nonprofit sector, and partnerships among these sectors; and

WHEREAS, a State Commission is necessary to assist in the development and implementation of a comprehensive, statewide service plan for promoting and recognizing volunteer involvement and citizen participation in North Carolina.

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

Section 1. Establishment

The North Carolina Commission on Volunteerism and Community Service ("Commission') is hereby established to encourage and recognize community service and volunteer participation as a means of community and state problem-solving; to promote and support voluntary citizen engagement in government and non-governmental programs throughout the state; to develop a long-term, comprehensive vision and plan of action for community service initiatives in North Carolina; and to serve as the State's liaison to national and state organizations that support its mission.

Section 2. Membership

a. All members of the Commission shall be appointed by the Governor and shall serve at the pleasure of the Governor. The Commission shall consist of no fewer than 15, and no more than 25, voting members.

b. Commission members shall serve terms of three years. Terms shall be staggered for one, two, or three years to that approximately one-third of the terms expire each year.

Vacancies among the members shall be filled by the Governor to serve for the remainder of the unexpired term. All members appointed to the Commission prior to the effective date of this executive order shall continue to serve at the pleasure of the Governor for the remainder of their appointed terms.

c. To the extent practicable, the members of the Commission shall be diverse with respect to ethnicity, age, disability, gender and race.

d. Not more than 50 percent of the members of the Commission, plus one member, may be from the same political party.

e. The number of voting members of the Commission who are officers or employees of the State may not exceed 25 percent (reduced to the nearest whole number) of the total membership of Commission members; although, additional state agency representatives may sit on the Commission as non-voting members.

f. The Commission shall include the following voting members:

1. An individual with expertise in the educational, training, and developmental needs of youth, particularly disadvantaged youth.

2. An individual with experience in promoting the involvement of older adults in service and volunteerism.

3. A representative of a community-based, nonprofit agency or organization with the State.

4. The Superintendent of the Department of Public Instruction, or their designee.

5. A representative of the volunteer sector.

6. A representative of the military or veterans.

7. A representative of the faith community.

8. A representative of local governments in the State.

9. A representative of local labor organizations in the State.

10. A representative of business.

11. An individual between the ages of 16 and 25 who is a supervisor or recipient in a volunteer or service program.

12. A representative of a national service program described in Section 122(a) of the United States Public Law (P.L.) 103-82, such as a youth corps program described in Section 122(a)(2).

g. The Commission also may include the following voting members:

1. Members selected from among local educators.

2. Members selected from among experts in the delivery of human, educational, environmental, homeland security, or public safety services to communities and persons.

3. Representatives of Native American tribes.

4. Members selected from among out-of-school youth or other "at-risk" youth.

5. Representatives of entities that receive assistance under the Domestic Volunteer Service Act of 1973 (42 U.S.C. 4950 et seq.).

h. The Commission shall include the following non-voting members:

1. A representative of the Corporation for National and Community Service.

2. A designee from the Governor's Office.

3. A designee from the Director of the Department of Public Instruction's Learn and Service School-Based Program.

Section 3. Officers

The Officers of the Commission shall be the Chair and Vice-Chair. All officers shall be elected by the voting Commission members from among their ranks. Officers shall serve for a term of one year. Vacancies in any offices shall be filled with an election by the Commission for the remainder of the unexpired term.

a. Chair. It shall be the responsibility of the Chair to preside at all meetings of the Commission, to appoint all committee chairs, to assist all committee chairs in the planning of committee plans, to authorize and execute the wishes of the Commission, and to be an ex-officio member of all committees, unless other specific committee responsibilities are assigned to the Chair.

b. Vice-Chair. The Vice-Chair shall assist the Chair and, in the absence of the Chair, shall perform the duties of the Chair. The Vice-Chair shall accept special assignments from the Chair and shall perform other duties as delegated by the Commission.

Section 4. Committees

a. Standing Committees. Standing committees of the Commission shall include the Executive Committee, the Program Management Committee, and the Nominating Committee. The standing committees shall advise and assist the Commission in carrying out its duties and responsibilities. Committee chairs shall be appointed by the Commission Chair from among Commission members; however, the committee members need not be limited to Commission members. The Commission Chair, in consultation with the committee chairs, shall name committee members.

1. Executive Committee. The Executive Committee shall be comprised of the Chair and Vice-Chair of the Commission, along with the chair (or co-chairs) of all standing committees, ad hoc committees, and task forces. The Chair of the Commission shall serve as the Chair of the Executive Committee.

2. Program Management Committee. The Program Management Committee shall be comprised of a chair and a minimum of two voting members of the Commission. The Committee shall review all grant applications submitted to the Commission for funding by the Corporation for National and Community Service. Committee members shall participate in the peer review process, make national service grant funding recommendations to the full Commission and participate in pre-award site visits.

3. Nominating Committee. The Nominating Committee shall be comprised of a chair and a minimum of two voting members of the Commission. The Commission Chair shall appoint nominating committee members at the third quarterly meeting of the Commission. The Nominating Committee shall provide a nominating report at the fourth quarterly meeting of the Commission.

b. Ad Hoc Committees. The Commission may establish ad hoc committees or task forces, as necessary, to carry out the duties of the Commission.

Section 5. Meetings

a. The Commission shall meet at least quarterly. Failure to attend 75 percent of called meetings in any calendar year may result in a recommendation to the Governor to remove the member from the Commission. For the purpose of transacting the business of the Commission, a quorum shall consist of a simple majority of voting members.

b. A voting member of the Commission shall not participate in the administration of a grant program described below in Section 6.j. (including any discussion or decision regarding the provision of assistance or approved national service positions, or the continuation, suspension, or termination of such assistance or such positions, to any program entity) if (1) a grant application related to the program is pending before the Commission, and (2) the application was submitted by a program or entity of which such Commission member is, or in the one-year period before submission of such application was, an officer, director, trustee, full-time volunteer, or employee.

Section 6. Duties

The Commission shall perform the following tasks and functions.

a. Ensure funding decisions meet all federal and state statutory requirements.

b. Promote strong interagency collaboration as an avenue for maximizing resources and provide that model on the state level.

c. Prepare a three-year plan for the State, in accordance with state and federal guidelines, that is developed through an open and public process (such as regional forums, hearings, web-based surveys, and other means that provide maximum participation and input). Update the plan annually.

d. Prepare the financial assistance applications of the State under Sections 117B and 130 of P.L. 103-82.

e. Assist in the preparation of the application of the North Carolina Department of Public Instruction for assistance under Section 113 of P.L. 103-82.

f. Prepare the State's application under Section 130 of P.L. 103-82 for the approval of service positions, such as the national service educational award described in Subtitle D of P.L. 103-82.

g. Make technical assistance available to enable applicants for assistance under Section 121 of P.L. 103-82 to plan and implement service programs and to apply for assistance under the federal service laws.

h. Assist in the provision of health care and child care benefits under Section 140 of P.L. 103-82 to participate in national service programs that receive assistance under Section 121 of P.L. 103-82.

i. Develop a state system for the recruitment and placement of participants in programs that receive assistance under the national service laws and disseminate information concerning national service programs that receive such assistance or approved national service positions.

j. Administer the State's grant program in support of national service programs (using assistance provided to the State under Section 121 of P.L. 103-82) including selection, oversight, and evaluation of grant recipients.

k. Make recommendations to the Corporation for National and Community Service with respect to priorities for programs receiving assistance under the Domestic Volunteer Service Act of 1973 (42 U.S.C. § 4950 *et seq.*).

l. Develop projects, training methods, curriculum materials, and other materials and activities related to national service programs that receive assistance directly from the Corporation for National and Community Service or from the State using assistance provided under Section 121 of P.L. 103-82, for use by programs that request such projects, methods, materials, and activities.

m. The Commission shall perform other duties as directed by the Governor.

Section 7. Administration and Expenses

The Governor's Office shall provide necessary administrative and staff support services to the Commission. The Commission is authorized to accept funds and in-kind services from other state and federal entities, as authorized by the North Carolina State Budget Act. No per diem allowance shall be paid to members of the Commission. Members of the Commission and staff may receive necessary travel and subsistence expenses in accordance with State law. These expenses shall be paid from federal funds where possible. If federal funds are not available, these expenses may be paid only if the Commission has sufficient funds.

Section 8. Duration

This Executive Order is effective immediately. It supersedes and replaces all other Executive Orders on this subject and specifically rescinds Executive Order No. 41 issued on December 17, 2009. This Executive Order shall remain in effect until December 31, 2016, pursuant to N.C. Gen. Stat. §147-16.2, or until rescinded.

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

Pat McCrory
Governor

ATTEST:

Elaine F. Marshall
Secretary of State

State of North Carolina

PAT McCRORY
GOVERNOR

November 22, 2013

EXECUTIVE ORDER NO. 33

NORTH CAROLINA EMERGENCY RESPONSE COMMISSION

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

Section 1. Establishment

There is hereby established the North Carolina Emergency Response Commission, hereinafter referred to as the "Commission." The Commission shall consist of not less than 12 members and shall be composed of at least the following persons, or their designee as approved by the Commission Chairperson:

a. Secretary of the North Carolina Department of Public Safety, who shall serve as the Chairperson;

b. Director of Emergency Management, North Carolina Department of Public Safety, who shall serve as the Vice-Chairperson;

c. Commander of the State Highway Patrol, North Carolina Department of Public Safety;

d. Deputy Secretary of the North Carolina Department of Environment and Natural Resources;

e. Director of Safety and Risk Management, North Carolina Department of Transportation;

f. Chief of the Office of Emergency Medical Services, Division of Health Service Regulation, North Carolina Department of Health and Human Services;

g. Deputy Director of the Fire and Rescue Training Division, Office of State Fire Marshal, North Carolina Department of Insurance;

h. Director of the State Bureau of Investigation, North Carolina Department of Justice;

i. Director, Division of Public Health, North Carolina Department of Health and Human Services;

j. Assistant Deputy Commissioner of Labor for Occupational Safety and Health, North Carolina Department of Labor;

k. President of the North Carolina Community College System; and

l. Director of the Emergency Programs Division, North Carolina Department of Agriculture and Consumer Services.

In addition to the foregoing, seven (7) at-large members from local government and private industry may be appointed by the Governor and serve terms of two (2) years at the pleasure of the Governor.

All members appointed to the Commission prior to the effective date of this executive order shall continue to serve at the pleasure of the Governor for the remainder of their appointed terms.

Section 2. Duties

The Commission is designated as the State Emergency Response Commission as defined in the Emergency Planning and Community Right-to-Know Act of 1986 enacted by the United States Congress and hereinafter referred to as the "Act." The Commission serves in three roles:

a. The Commission will perform all of the duties required under the Act and other advisory, administrative, regulatory, or legislative actions.

   1. Designate emergency planning districts to facilitate preparation and implementation of emergency plans as required under Section 301(b) of the Act.

   2. Appoint local emergency planning committees described under Section 301(c) of the Act and supervise and coordinate the activities of such committees for each planning district.

   3. Establish procedures for reviewing and processing requests from the public for information under Section 324 of the Act.

   4. Designate additional facilities that may be subject to the Act under Section 302 of the Act and notify the Administrator of the Environmental Protection Agency of any such additional facilities.

   5. Review the emergency plans submitted by the local emergency planning committees and recommend revisions of the plans that may be necessary to ensure their coordination with emergency response plans of adjacent districts and state plans.

b. The Commission will act in an advisory capacity to the Homeland Security Advisor, as designated by the Governor, to provide input regarding the activities of the North Carolina State Homeland Security Program and the Domestic Preparedness Regions. Specifically, the Commission will:

   1. Review the State Homeland Security Strategy to ensure it is aligned with local, state, and federal priorities as required by the United States Department of Homeland Security (DHS), and that its goals and objectives are being met in accordance with program intent.

   2. Review applications and subsequent allocations for state and regional homeland security projects funded by DHS grant programs.

   3. Review plans for preventing, preparing for, responding to, and recovering from acts of terrorism and all hazards – man-made or natural.

c. The Commission will act in an advisory capacity to provide coordinated stakeholder input to the Secretary of the Department of Public Safety/Emergency Management in the preparation, implementation, evaluation, and revision of the North Carolina emergency management program. To this purpose, the Commission will work to:

1. Increase state and local disaster/emergency response capabilities; and
2. Coordinate training, education, technical assistance, and outreach activities.

Section 3. Administration

a. The Department of Public Safety shall provide administrative support and staff to the Commission as may be required.

b. Members of the Commission shall serve without compensation but may receive reimbursement for travel and subsistence expenses in accordance with state guidelines and procedures and contingent on the availability of funds.

Section 4. Effect and Duration

This Executive Order is effective immediately. It supersedes and replaces all other executive orders on this subject. It shall remain in effect until December 31, 2016, pursuant to N.C. Gen Stat. § 147-16.2 or until rescinded.

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

Pat McCrory
Governor

ATTEST:

Elaine F. Marshall
Secretary of State

State of North Carolina

PAT McCRORY
GOVERNOR

November 22, 2013

EXECUTIVE ORDER NO. 34

COMMITMENT TO PROTECTING NORTH CAROLINA MILITARY INSTALLATIONS

WHEREAS, the General Assembly passed and I have signed 2013 N.C. Sess. Laws 227, creating the Military Affairs Commission within the Office of the Governor which shall advise the Governor, the General Assembly and State agencies on initiatives, programs, and legislation that will continue and increase the role that North Carolina's military installations, the National Guard, and the Reserve play in America's defense strategy and the economic health and vitality of the State; and

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

WHEREAS, the U.S. military is the second largest sector of North Carolina's economy, accounting for 10% of North Carolina's gross state product, worth $48 billion, and more than 540,000 individuals are either directly employed by the military or working in jobs providing goods or services that support the military's presence in North Carolina; and

WHEREAS, defense procurement contracts in North Carolina exceeded $2.4 billion in fiscal year 2012, and businesses with defense related contracts operate in 87 of North Carolina's 100 counties; and

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

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

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

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

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

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

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

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

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

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

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

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

Section 1.

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

a. Staying informed of the workings and activities of the North Carolina Military Affairs Commission and maintaining regular and effective communications with its administrative head, the Governor's Military Advisor;

b. Staying informed of the workings and activities of the North Carolina Commanders' Council and maintaining regular and effective communications with its North Carolina communications portal, the Department of Environment and Natural Resources ("DENR") Military Liaison and the Governor's Military Advisor;

c. Becoming familiar with the North Carolina Working Lands Group and its implementation of the Governor's Land Compatibility Task Force Report;

d. Becoming familiar with the operations of his/her own agency as it could impact military readiness and training;

e. Regularly informing his/her Secretary of any military readiness or training concerns which could impact, or be impacted by, any of his/her Agency's activities or plans;

f. Regularly informing the Governor's Military Advisor of any military readiness or training concerns which could impact, or be impacted by, any of his/her Agency's activities or plans;

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

h. Regularly informing any other state or local agency of any military readiness or training concerns which could impact, or be impacted by, that agency's activities or plans.

Section 2.

All Cabinet Agencies shall:

a. Cooperate with military installations and missions to encourage compatible land use, help prevent incompatible encroachment, and facilitate the continued presence of major military installations in this state;

b. Notify the commanding military officer of a military installation and the governing body in affected counties and municipalities of any economic development or other projects that may impact military installations;

c. Obtain knowledge of military requirements within local communities and throughout the State;

d. Ensure that appropriate training on the requirements of military installations, missions, and communities is provided for staff members and others who work in the areas of land use planning, infrastructure siting, permitting, or economic development;

e. Ensure that land use planning activities take into account the compatibility of land near military installations;

f. Adopt processes to ensure that all agency planning, policy formulation, and actions are conducted with timely consideration having been given to relevant military readiness or training concerns, and with appropriate communications with all potentially affected military entities, including the entities listed in Section 1 (a) and 1(b);

g. Collaborate with applicants for grants, site selection, permits or other agency actions to avoid adverse impacts on military readiness or authority and incompatible land uses; and

h. Share information and coordinate efforts with the North Carolina congressional delegation and other federal agencies, as appropriate, to fulfill the objectives of this Executive Order.

Section 3.

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

Section 4.

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

Section 5.

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

Section 6.

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

Section 7.

Pursuant to N.C.G.S. § 127C-3, the Governor's Military Advisor shall serve as the administrative head of the North Carolina Military Affairs Commission and be responsible for the operations and normal business activities of the Commission, with oversight by the Commission. Within existing resources, the Office of the Governor shall provide additional technical and administrative assistance, including staff, to the Commission as needed.

Section 8.

This Executive Order is effective immediately. It supersedes and replaces all other executive orders on this subject and specifically rescinds Executive Order No. 124 issued on August 18, 2012. This Executive Order shall remain in effect until rescinded.

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

Pat McCrory
Governor

ATTEST:

Elaine F. Marshall
Secretary of State

State of North Carolina

PAT McCRORY
GOVERNOR

November 22, 2013

EXECUTIVE ORDER NO. 35

NORTH CAROLINA GOVERNOR'S COUNCIL ON HOMELESSNESS

WHEREAS, homelessness has adverse consequences for communities, taxpayers, and the individuals and families who lack adequate housing; and

WHEREAS, while several State agencies offer programs and services for homeless persons, the problem of homelessness is addressed most effectively when these agencies coordinate development and delivery of services; and

WHEREAS, North Carolina must be committed to the goal of combatting homelessness.

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

Section 1. Establishment

The North Carolina Governor's Council on Homelessness (hereinafter the "Council") is hereby established.

Section 2. Membership

The Council shall consist of eighteen (18) members who shall be appointed by the Governor and shall serve at the pleasure of the Governor. The Governor shall appoint a Chair of the Council. The Governor shall appoint members from the following public and private agencies and categories of qualifications:

a. One member from the North Carolina Department of Administration, Division of Veterans Affairs.
b. One member from the North Carolina Housing Finance Agency.
c. One member from the North Carolina Community College System.
d. One member from the North Carolina Department of Public Safety.
e. One member from the North Carolina Department of Commerce.
f. Two members from the North Carolina Department of Health and Human Services.
g. Two local government officials.
h. One member from the faith-based community.
i. Four members from non-profit agencies concerned with housing issues and other services for homeless people.
j. One homeless or formerly homeless person.
k. One member representing Public Housing Authorities
l. One member of the North Carolina State Senate nominated by the President Pro Tempore.

m. One member of the North Carolina State House of Representatives nominated by the Speaker.

Section 3. Term of Membership and Vacancies

All members shall be appointed for a term of two (2) years and shall serve at the pleasure of the Governor. A vacancy occurring during a term of appointment shall be filled by the Governor for the balance of the unexpired term.

Section 4. Meetings

The Council shall meet twice a year and at other times at the call of the Chair or the Governor.

Section 5. Duties

a. The Council shall advise the Governor and the Secretary of the Department of Health and Human Services on issues related to the problems of persons who are homeless or at risk of becoming homeless; identify and help secure available resources throughout the State and nation; and provide recommendations for joint and cooperative efforts and policy initiatives in carrying out programs to meet the needs of the homeless.

b. The Council shall set short-term and long-term goals and determine yearly priorities.

c. The Council shall submit an annual statement to the Governor and the Secretary of the Department of Health and Human Services, by November 1, on its recommendations.

d. The Council shall communicate the information on its accomplishments, initiatives, and the status of homelessness to communities and appropriate others on an as-needed basis.

Section 6. Administration

The Department of Health and Human Services shall provide administrative and staff support services required by the Council. Member costs will be borne by the participating individuals and/or their sponsoring agencies.

Section 7. Effect and Duration

This Executive Order is effective immediately. It supersedes and replaces all other executive orders on this subject and specifically rescinds Executive Order No. 57, dated April 13, 2010. This Executive Order shall remain in effect until December 31, 2015, pursuant to N.C. Gen. Stat. § 147-16.2(b), or until earlier rescinded.

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

Pat McCrory
Governor

ATTEST:

Elaine F. Marshall
Secretary of State

State of North Carolina

PAT McCRORY
GOVERNOR

December 5, 2013

EXECUTIVE ORDER NO. 36

DECLARATION OF A STATE OF EMERGENCY

BY THE GOVERNOR OF THE STATE OF NORTH CAROLINA

WHEREAS, the Herbert C. Bonner Bridge ("Bonner Bridge") over the Oregon Inlet on NC Highway 12 serves as the main highway connection for the communities on Hatteras Island and the mainland of North Carolina. Island residents depend on the bridge for off-island community services, such as hospitals, emergency response and other services; and

WHEREAS, due to public safety concerns the North Carolina Department of Transportation closed the Bonner Bridge on December 3, 2013 as a result of routine sonar scans of the bridge substructure. Scans identified scouring concerns at Bent 166 where sand levels around nine of ten piles have exceeded scour-critical levels; and

WHEREAS, North Carolina Department of Transportation Secretary Anthony J. Tata issued a Secretarial emergency designation pursuant to his authority under N.C.G.S. § 136-28.1, in order to waive any bidding requirements for contracts to hasten any construction, maintenance, or repair of the Bridge; and

WHEREAS, the State has requested assistance from the Federal Highway Administration, the U.S. Army Corps of Engineers, and the Divisions of Coastal Management, and Water Resources of the North Carolina Department of Environment and Natural Resources to help facilitate the immediate repair and reinforcement of the areas of concern on and around the Bonner Bridge; and

WHEREAS, it is important to repair and eventually replace the Bonner Bridge as it is vital to the security, well-being, and health of the citizens of the State of North Carolina.

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

Section 1.

I hereby declare that a state of emergency as defined in N.C.G.S. §§ 166A-19.3(6) and 166A-19.3(18) exists in Dare County in the State of North Carolina due to closing of the Bonner Bridge.

Section 2.

The emergency area as defined in N.C.G.S. §§ 166A-19.3(7) and N.C.G.S. 166A-19.20(b) includes the following: the areas in and around the Bonner Bridge along NC Highway 12 in Dare County and emergency ferry terminals at Stumpy Point and Rodanthe.

Section 3.

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

Section 4.

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

Section 5.

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

Section 6.

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

Section 7.

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

Section 8.

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

Section 9.

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

Section 10.

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

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this 5th day of December in the year of our Lord two thousand and thirteen, and of the Independence of the United States of America the two hundred and thirty-eighth.

Pat McCrory
Governor

ATTEST:

Elaine F. Marshall
Secretary of State

NARROW THERAPEUTIC INDEX DRUGS DESIGNATED BY THE NORTH CAROLINA SECRETARY OF HUMAN RESOURCES

Pursuant to N.C.G.S. §90-85.27(4a), this is a revised publication from the North Carolina Board of Pharmacy of narrow therapeutic index drugs designated by the North Carolina Secretary of Human Resources upon the advice of the State Health Director, North Carolina Board of Pharmacy, and North Carolina Medical Board.

Carbamazepine: all oral dosage forms

Cyclosporine: all oral dosage forms

Digoxin: all oral dosage forms

Ethosuximide

Levothyroxine sodium tablets

Lithium (including all salts): all oral dosage forms

Phenytoin (including all salts): all oral dosage forms

Procainamide

Theophylline (including all salts): all oral dosage forms

Warfarin sodium tablets

Tacrolimus: all oral dosage forms

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

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 42 - BOARD OF EXAMINERS IN OPTOMETRY

Notice *is hereby given in accordance with G.S. 150B-21.2 that the Board of Examiners in Optometry intends to adopt the rule cited as 21 NCAC 42B .0114 and amend the rule cited as 21 NCAC 42B .0107.*

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): *http://web.1.ncoptometry.org/news.aspx*

Proposed Effective Date: *May 1, 2014*

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice)*: *A public hearing may be requested by contacting: John D. Robinson, O.D., Executive Director, North Carolina State Board of Examiners in Optometry, 109 North Graham Street, Wallace, NC 28466, phone (910)285-3160, (800)426-4457, email exdir@ncoptometry.org.*

Reason for Proposed Action:
21 NCAC 42B .0107 *– Must be amended to reflect changes in the National Board examinations.*
21 NCAC 42B .0114 *– This rule is adopted pursuant to G.S. 93B-15.1, which allows for special licensure requirements for military personnel.*

Comments may be submitted to: *John D. Robinson, O.D, 109 North Graham Street, Wallace, NC 28466, phone (910)285-3160, fax (910)285-4546, email exdir@ncoptometry.org*

Comment period ends: *March 3, 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**

SUBCHAPTER 42B - LICENSE TO PRACTICE OPTOMETRY

SECTION .0100 - LICENSE BY EXAMINATION

21 NCAC 42B .0107 NATIONAL BOARD EXAMINATIONS

(a) Each applicant must submit evidence of having reached the recommended levels of acceptable performance on the National Board examinations given by the National Board of Examiners in Optometry on or after the ~~April,~~April 1978 administration in one of the following formats and under the following conditions prior to Board approval of his application to take the clinical practicum examination administered by the ~~Board~~Board, and shall authorize the release of his official score report by the National Board to the Board prior to the approval by the Board of his application to take the clinical practicum examination.

(1) ~~April,~~April 1978 through ~~August,~~August 1986 administrations: passing scores on Parts I, IIA, and IIB, with scores of not less than 75 in Section 7 (Pathology) and Section 9 (Pharmacology) on the Part IIB examination, and a score of not less than 75 on the National Board's Treatment and Management of Ocular Disease ("TMOD") examination.

(2) ~~April,~~April 1987 through ~~August,~~August 1992 administrations: passing scores on the Part I Basic Science (BS) examination and Part II Clinical Science (CS) examination of the National Board, with scores of not less than 75 on the Ocular Disease/Trauma and Clinical Pharmacology sections of the PART II Clinical Science (CS) examination, and a score

of not less than 75 on the National Board's Treatment and Management of Ocular Disease (TMOD) examination.

(3) ~~April,~~April 1993 through ~~December,2008:~~December 2008 administrations: passing score on the Part I Basic Science Examination of the National Board.

(4) ~~April,~~ 1993 through ~~April, 2009:~~April 2009 administrations: passing score on the Part II Clinical Science Examination of the National Board, with a score of not less than 75 on the Ocular Disease/Trauma component within the Clinical Science examination, and a score of not less than 75 on either the TMOD component within the Clinical Science examination, or on the equivalent stand-alone TMOD examination.

(5) ~~March,~~March 2009 administrations and thereafter: passing score on Part I Applied Basic Science (ABS) examination of the National Board.

(6) ~~December,~~December 2009 administrations and thereafter: passing score on Part II Patient Assessment and Management (PAM) examination of the National Board, with a score of not less than 75 on the Disease/Trauma component within the Patient Assessment and Management (PAM) examination, and a score of not less than 75 on the TMOD component within the Patient Assessment and Management (PAM).

(7) ~~March,~~March 2010 administrations and thereafter: passing score on the Part III Clinical Skills Examination (CSE) of the National Board.

(8) March 1, 2014 administrations and thereafter: passing score on Part III Injection Skills Examination (ISE) of the National Board.

(9) March 2015 administrations and thereafter: all applicants must have passed Part III Clinical Skills Examination (CSE) with a score of not less than 75 percent on the Skills of gonioscopy, binocular indirect ophthalmoscopy and slit lamp biomicroscopy; and a passing score on Part III Injection Skills Examination (ISE) of the National Board.

(b) For candidates with passing scores on at least one National Board examination part under different formats and time periods described in Subparagraphs (a)(1), (a)(2), (a)(3), (a)(4), and (a)(5) of this Rule, the following equivalences shall apply:

(1) Part I and IIA is the equivalent of Basic Science.

(2) Part IIB is the equivalent of Clinical Science without the inclusion of TMOD.

(3) Part I Applied Basic Science (ABS) is the equivalent of Part I Basic Science.

(4) Part II Patient Assessment and Management (PAM) is the equivalent of Part II Clinical Science.

~~(c) For those candidates taking the National Board examinations under any of the examination formats dating back to April 1978 and prior to March 2009, old Part III (Patient Care) will not be required.~~

Authority G.S. 90-117.5; 90-118.

21 NCAC 42B .0114 MILITARY LICENSE

(a) Permanent Unrestricted License Military Optometrist: The Board shall issue a permanent license to a military-trained applicant to allow the applicant to lawfully practice optometry in North Carolina if, upon application to the Board, the applicant satisfies the following conditions:

(1) Has been awarded a military occupational specialty in optometry and has done all of the following at a level that the Board, in its discretion and through such inquiries or methods as it deems to be appropriate, determines to be substantially equivalent to or exceeds the requirements for licensure in this State:

(A) completed a military program of optometry training that includes additional clinical experience;

(B) completed testing or equivalent training and experience; and

(C) is performing at a satisfactory level of competency in the occupational specialty;

(2) Has engaged in the practice of optometry for at least two of the five years (which may include clinical residency) preceding the date of the application under this Paragraph;

(3) Has not committed any act in any jurisdiction that would have constituted grounds for refusal, suspension, or revocation of a license to practice optometry in this State at the time the act was committed; and

(4) Pays the application, examination, and licensing fees required by the Board.

(b) Permanent Unrestricted License-Optometrist Spouse of Military Personnel: The Board shall issue to a military spouse a license to practice optometry in this State if, upon application to the board, the military spouse satisfies the following conditions:

(1) Holds a current license, certification, or registration from another jurisdiction, and that jurisdiction's requirements for licensure, certification, or registration are substantially equivalent to or exceed the requirements for licensure in this State;

(2) Can demonstrate competency in optometry through passing the Board's clinical practicum examination or through such other inquiries or methods as determined to be appropriate by the Board in its discretion;

(3) Has not committed any act in any jurisdiction that would have constituted grounds for refusal, suspension, or revocation of a license to practice optometry in this State at the time the act was committed;

(4) Submits written evidence demonstrating that the applicant is married to an active member of the U.S. military:

(5) Is in good standing and has not been disciplined by the agency that had jurisdiction to issue the license, certification, or permit; and

(6) Pays the application, examination, and licensing fees required by the Board.

(c) All relevant optometric medical experience of a military service member in the discharge of official duties or, for a military spouse, all relevant optometric medical experience, including full-time and part-time experience, regardless of whether in a paid or volunteer capacity, shall be credited in the calculation of years of practice as required under Paragraphs (b) and (c) of this Rule.

(d) A nonresident licensed under this Rule shall be entitled to the same rights and subject to the same obligations as required of a resident licensed by the Board in this State.

Authority G.S. 93B-15.1; 90-118.5.

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

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

					REGISTER CITATION TO THE NOTICE OF TEXT
TRANSPORTATION, DEPARTMENT OF					
Wheel Chair Ramps	19A	NCAC	02C	.0208	28:04 NCR
HEARING AID DEALERS AND FITTERS BOARD					
Committee on Investigations	21	NCAC	22L	.0101*	27:24 NCR
Request for Hearing	21	NCAC	22L	.0103*	27:24 NCR
Granting or Denying Hearing Requests	21	NCAC	22L	.0104	27:24 NCR
Notice of Hearing	21	NCAC	22L	.0105*	27:24 NCR
Presiding Officer	21	NCAC	22L	.0106	27:24 NCR
Informal Procedures	21	NCAC	22L	.0109*	27:24 NCR
Disqualification of Board Members	21	NCAC	22L	.0110*	27:24 NCR
Failure to Appear	21	NCAC	22L	.0111	27:24 NCR
Subpoenas	21	NCAC	22L	.0113*	27:24 NCR
Proposals for Decisions and Final Decision	21	NCAC	22L	.0115*	27:24 NCR
Publication of Disciplinary Actions	21	NCAC	22L	.0116*	27:24 NCR
MEDICAL BOARD					
Application for Physician License	21	NCAC	32B	.1303*	28:01 NCR
PHARMACY, BOARD OF					
Definitions	21	NCAC	46	.3401*	27:22 NCR
General Requirements for the Use of Automated...	21	NCAC	46	.3402	27:22 NCR
Multidisciplinary Committee for Decentralized...	21	NCAC	46	.3403	27:22 NCR
Stocking or Restocking of an Automated Medication…	21	NCAC	46	.3404	27:22 NCR
Centralized Automated Medication Systems	21	NCAC	46	.3405	27:22 NCR
Quality Assurance Program	21	NCAC	46	.3406	27:22 NCR
Record Keeping	21	NCAC	46	.3407	27:22 NCR
Compliance	21	NCAC	46	.3408	27:22 NCR
SPEECH AND LANGUAGE PATHOLOGISTS AND AUDIOLOGISTS, BOARD OF EXAMINERS FOR					
Name and Address of Agency	21	NCAC	64	.0101*	n/a 150B-21.5(a)(4)
Examinations	21	NCAC	64	.0103*	n/a 150B-21.5(a)(5)
Notice Mailing List	21	NCAC	64	.0502*	n/a 150B-21.5(a)(4)
Additional Information	21	NCAC	64	.0503*	n/a 150B-21.5(a)(4)
Written Submissions	21	NCAC	64	.0604*	n/a 150B-21.5(a)(4)
Submission of Request for Ruling	21	NCAC	64	.0702*	n/a 150B-21.5(a)(4)
Request for Hearing	21	NCAC	64	.0802*	n/a 150B-21.5(a)(4)
Licensee Requirements	21	NCAC	64	.1003*	n/a 150B-21.5(a)(4)

SUBSTANCE ABUSE PROFESSIONAL PRACTICE BOARD

Definitions	21	NCAC	68	.0101*	27:22 NCR
Process for Prevention Consultant	21	NCAC	68	.0206*	27:22 NCR
Reciprocity	21	NCAC	68	.0209*	27:22 NCR
Scope	21	NCAC	68	.0301	27:22 NCR
Application for Deemed Status by Professional…	21	NCAC	68	.0303*	27:22 NCR
Three-Year Standards Review of Deemed Status…	21	NCAC	68	.0304*	27:22 NCR
Licensure Requirements for Individual Applicant	21	NCAC	68	.0305*	27:22 NCR
Renewal of Individual Licensure as Clinical Addictions...	21	NCAC	68	.0306*	27:22 NCR
Responsibilities of Supervisor to Supervisee	21	NCAC	68	.0512*	27:22 NCR

TITLE 19A – DEPARTMENT OF TRANSPORTATION

19A NCAC 02C .0208 WHEEL CHAIR RAMPS

History Note: Authority G.S. 136-18(1); 136-44.1;
Eff. April 3, 1981;
Amended Eff. December 29, 1993;
Repealed Eff. December 1, 2013.

CHAPTER 22 - HEARING AID DEALERS AND FITTERS BOARD

SUBCHAPTER 22L – ADMINISTRATIVE HEARINGS AND DISCIPLINE

21 NCAC 22L .0101 COMMITTEE ON INVESTIGATIONS

(a) The Committee on Investigations shall review all complaints submitted to the Board. The Committee on Investigations may:

(1) hire an investigator or such persons as it deems necessary to determine whether it believes that probable cause exists to support formal disciplinary action against a licensee, apprentice, or registered sponsor;
(2) subpoena persons to provide the Committee with sworn testimony or documents, provided that the subpoena is signed by the President or Secretary-Treasurer of the Board;
(3) make inquiries designed to assist the Committee in its review of matters under investigation; or
(4) initiate charges against a licensee, apprentice or registered sponsor if violations are suggested by the evidence considered by the Committee during an investigation of a complaint.

(b) The complainant shall submit a signed complaint on the Board provided complaint form which is available on the Board website (www.nchalb.org) or by contacting the Board office.

(c) The Board shall not respond to or investigate anonymous complaints or inquiries.

(d) The Committee on Investigations shall administratively close:

(1) any complaint anonymously submitted;
(2) a complaint that alleges an advertising violation which occurred more than one year prior to notifying the Board of the alleged violation; or
(3) a complaint withdrawn by the complainant at any stage of the investigation.

(e) After a preliminary review of a complaint, the Committee on Investigations shall:

(1) recommend to the Board a finding that there is no probable cause to believe a violation of the law or rules exists; or
(2) serve the respondent with a written explanation of the charges being investigated by the Committee.

(f) The respondent shall answer in writing within 20 days of receipt of the notification of charges.

(g) The Committee shall offer the complainant a summary of the respondent's answer.

(h) The Committee shall offer the parties an opportunity to present oral statements to the Committee after the written answer is received from the respondent. Neither party is compelled to attend.

(i) With assistance from the Board's legal counsel, the Committee shall determine the validity and merit of the charges, and whether the accused party has violated any standard of conduct which would justify a disciplinary action based upon the grounds as specified in G.S. 93D-13 or this Chapter.

(j) The Committee on Investigations shall present its findings and recommendation to the Board, including proposed discipline, if any, but shall not identify the parties to the complaint to the full Board except by descriptive titles, such as licensee, apprentice, sponsor, and consumer.

(k) The Board may find no probable cause for disciplinary action and dismiss the charges. The Committee on Investigations shall notify the parties of the Board action. The Board shall not release the letter of notification to any member of the public pursuant to G.S. 93D-13(c).

(l) The Board may find no probable cause for disciplinary action but issue a letter of caution to the respondent. The Board does not consider this letter a public record and shall not release the

letter of caution to any member of the public pursuant to G.S. 93D-13(c).

(m) The Board may find probable cause for disciplinary action and serve the respondent with a private reprimand. The Board does not consider the content of the private reprimand a public record pursuant to G.S. 93D-13(c). The Board shall deem the private reprimand accepted as formal discipline in the matter unless the respondent submits a refusal to accept the private reprimand which shall:

(1) be in writing, addressed to the Committee on Investigations;
(2) be filed with the executive secretary for the Board within 20 days after service of the private reprimand; and
(3) include a request for a contested case hearing in accordance with 21 NCAC 22L .0103.

(n) The Board may find probable cause of a violation of the Board's statute or rules and authorize the Committee on Investigations, by and through the Board's legal counsel, to undertake negotiations with the respondent to settle the matter without a hearing when such settlement accomplishes the Board's duty to protect the consuming public.

(o) The Board may find probable cause for disciplinary action beyond a private reprimand due to the circumstances and nature of the violation. In such cases, the Board shall:

(1) serve a notice of hearing on the accused party as required by G.S. 150B, Article 3A., which may also be released to any requesting member of the public pursuant to G.S. 93D-13(c);
(2) designate a presiding officer for the contested case; and
(3) conduct a hearing in accordance with the rules of this Subchapter.

History Note: Authority G.S. 93D-3; 93D-13; 150B-38;
Eff. January 1, 1992;
Amended Eff. December 1, 2013; February 1, 2010; April 1, 1996.

21 NCAC 22L .0103 REQUEST FOR HEARING

(a) An individual who cannot resolve a matter with the Board related to rights, duties, or privileges that have been affected by the Board's administrative action may file a formal request for a hearing.

(b) The request shall bear the notation: REQUEST FOR ADMINISTRATIVE HEARING and contain the following:

(1) Name and address of the petitioner;
(2) A statement of the action taken by the Board which is challenged;
(3) A statement of the way in which the petitioner has been aggrieved; and
(4) A specific statement of request for a hearing.

History Note: Authority G.S. 93D-3; 150B-38;
Eff. January 1, 1992;
Amended Eff. December 1, 2013.

21 NCAC 22L .0104 GRANTING OR DENYING HEARING REQUESTS

(a) The Board shall grant a request for a hearing if it determines that the party requesting the hearing is a "person aggrieved" within the meaning of G.S. 150B-2(6).

(b) Approval of a request for a hearing will be signified by the issuing of a notice as required by G.S. 150B-38(b) and explained in Rule .0105 of this Subchapter.

(c) The denial of request for a hearing shall be issued no later than 60 days after the submission of the request. The denial shall contain a statement of the reasons for the denial of the request.

History Note: Authority G.S. 93D-3; 150B-38;
Eff. January 1, 1992;
Amended Eff. December 1, 2013.

21 NCAC 22L .0105 NOTICE OF HEARING

(a) The Board shall serve the party or parties in a contested case a notice of hearing not less than 30 days before the hearing. The notice shall include:

(1) A statement of the date, hour, place, and nature of the hearing;
(2) A reference to the particular sections of the statutes and rules involved;
(3) A short and plain statement of the facts alleged; and
(4) the name, position, address and telephone number of a person at the office of the Board to contact for further information on the hearing process.

(b) The Board shall serve the notice of hearing on all parties in accordance with G.S. 1A-1, Rule 4(j) or G.S.93D-10.

(c) If the Board determines that the public health, safety or welfare requires such action, it may issue an order summarily suspending a license or registration. Upon service of the order, the licensee or registrant to whom the order is directed shall immediately cease fitting and selling hearing aids in North Carolina. The Board shall serve a notice of hearing following service of the order. The suspension shall remain in effect until the Board issues a final agency decision in accordance with Rule .0115 of this Subchapter.

History Note: Authority G.S. 93D-3; 93D-13; 150B-3(c); 150B-38; 150B-42;
Eff. January 1, 1992;
Amended Eff. December 1, 2013; March 1, 1996.

21 NCAC 22L .0106 PRESIDING OFFICER

For each contested case, the Board shall designate one or more of its members as the presiding officer, unless the majority of the Board elects to apply to the Office of Administrative Hearings for the designation of an administrative law judge to hear a case pursuant to G.S. 150B-40(e).

History Note: Authority G.S. 93D-3; 150B-38; 150B-40;
Eff. January 1, 1992;
Amended Eff. December 1, 2013; March 1, 1996.

21 NCAC 22L .0109 INFORMAL PROCEDURES

(a) The presiding officer may direct the parties to conduct an informal pre-hearing conference, or the parties may request such a conference, which shall be scheduled at a time and place agreed upon by the parties. If the parties do not agree on the time and place of the pre-hearing conference, the presiding officer may set the time and place of the pre-hearing conference, giving reasonable written notice to all parties in the proceedings.

(b) At the discretion of the presiding officer, all or part of the pre-hearing conference may be conducted by telephone or other electronic means, if each party has an opportunity to participate while the conference is taking place.

(c) The parties shall conduct the pre-hearing conference to deal with, where applicable:

(1) exploring settlement possibilities;
(2) formulating, clarifying, and simplifying the issues to be contested at the hearing;
(3) preparing stipulations of facts or findings;
(4) ruling on the identity and number of witnesses;
(5) determining the extent to which direct evidence, rebuttal evidence, or cross-examination will be presented in written form and the extent to which telephone, video tape, or other electronic means will be used as a substitute for proceedings in person;
(6) determining what depositions, discovery orders, or subpoenas will be needed;
(7) determining the need for consolidation of cases or joint hearing;
(8) determining the order of presentation of evidence and cross-examination; and
(9) considering any other matters which may promote the prompt, orderly, and efficient disposition of the case.

History Note: Authority G.S. 93D-3; 150B-38;
Eff. January 1, 1992;
Amended Eff. December 1, 2013; March 1, 1996.

21 NCAC 22L .0110 DISQUALIFICATION OF BOARD MEMBERS

(a) Self-disqualification. If for any reason a board member determines that personal bias or other factors render that member unable to perform all duties in an impartial manner, that Board member shall voluntarily decline to participate in the final decision.

(b) Request for Disqualification. If for any reason any party in a contested case believes that a Board member is personally biased or otherwise unable to perform all duties in an impartial manner, the party shall make a written request that the Board member be disqualified. The request shall be accompanied by a sworn, notarized affidavit. The title of such affidavit shall bear the notation: AFFIDAVIT IN SUPPORT OF DISQUALIFICATION OF BOARD MEMBER IN THE CASE OF (Name of Case).

(c) Contents of Affidavit. The affidavit shall state all facts the party deems to be relevant to the disqualification of the Board member.

(d) Timeliness of Affidavit. The affidavit shall be considered timely if it is filed at least 10 days before commencement of the hearing or if it is filed at the first opportunity after the party becomes aware of facts which give rise to a reasonable belief that a Board member may be disqualified under this Rule.

(e) The Board shall determine the matter as a part of the record in the case in accordance with G.S. 150B-40.

(f) In the event of disqualification, the disqualified member shall not participate in the hearing, deliberations, or decision.

History Note: Authority G.S. 93D-3; 150B-38; 150B-40;
Eff. January 1, 1992;
Amended Eff. December 1, 2013; March 1, 1996.

21 NCAC 22L .0111 FAILURE TO APPEAR

(a) Continuances and adjournments shall be granted at the discretion of the presiding officer.

(b) If a party fails to appear at a hearing after proper notice, the presiding officer shall determine whether to continue the hearing or proceed with the hearing and allow the agency to make its decision in the absence of the party.

History Note: Authority G.S. 150B-38; 150B-40;
Eff. January 1, 1992;
Amended Eff. December 1, 2013; March 1, 1996.

21 NCAC 22L .0113 SUBPOENAS

(a) A party in a contested case may request a subpoena. The request shall:

(1) be made in writing to the Board;
(2) include a particularized description of any books, papers, records or objects the recipient shall produce pursuant to the subpoena;
(3) include the full name and home or business address of the person to be subpoenaed; and
(4) include the date, time, and place for responding to the subpoena.

(b) The Board-designated presiding officer for the contested case shall issue the requested subpoena in duplicate within five days of receipt of the request. A subpoena shall include:

(1) the caption of the case;
(2) the name and address of the person subpoenaed;
(3) the date, hour and location to appear;
(4) a particularized description of any books, papers, records or objects the recipient shall produce pursuant to the subpoena;
(5) the identity of the party requesting the subpoena;
(6) the date of issuance of the subpoena;
(7) the signature of the presiding officer;
(8) a return of service form; and
(9) instructions for objecting to the subpoena.

(c) The party requesting the subpoena shall provide a copy of the issued subpoena to all parties in the contested case at the time the subpoena is served on the recipient.

(d) A subpoena shall be served in accordance with G.S. 1A-1, Rule 45. The person serving the subpoena shall return one copy

of the subpoena with a completed return of service form to the Board.

(e) The completed return of service form shall provide:

(1) the name and capacity of the person serving the subpoena;
(2) the date on which service was made;
(3) the person on whom service was made;
(4) the manner in which service was made; and
(5) the signature of the person effectuating service.

(f) A recipient of a subpoena issued by the Board may file a written objection to the subpoena with the presiding officer. The recipient shall serve a copy of the objection on the party requesting the subpoena. The objection may be made on any of the following grounds:

(1) the subpoena requests evidence not related to a matter at issue;
(2) the subpoena does not describe with sufficient particularity the evidence to produce;
(3) the subpoena fails to allow reasonable time for compliance;
(4) the subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection;
(5) the subpoena subjects a person to an undue burden or expense;
(6) the subpoena is otherwise unreasonable or oppressive; or
(7) the subpoena is procedurally defective.

(g) The party requesting the subpoena, in such time as may be granted by the Board, may file a written response to the objection with the presiding officer, and shall serve the objecting recipient and all parties with a copy of the written response.

(h) The presiding officer shall issue a written notice to all parties of an open hearing, scheduled as soon as practicable, during which evidence regarding the objection and response may be presented,

(i) The presiding officer shall issue a written decision based upon the factors required by G.S. 150B-39(c). A copy of the decision shall be issued to all parties and made a part of the record.

History Note: Authority G.S. 1A-2; 93D-3; 150B-38; 150B-39; 150B-40;
Eff. January 1, 1992;
Amended Eff. December 1, 2013; March 1, 1996.

21 NCAC 22L .0115 PROPOSALS FOR DECISIONS AND FINAL DECISION

(a) When the Board conducts the contested case hearing, the Board shall render a final agency decision within 60 days after the hearing if no transcript is requested by the Board or either party, or within 45 days after receipt of a transcript of the hearing. The parties may submit proposed decisions within 20 days after the hearing or receipt of the transcript, whichever is later.

(b) When an administrative law judge conducts the hearing, a proposal for decision shall be rendered in accordance with G.S. 150B-40(e). The parties may file written exceptions to the proposal for decision and submit their own proposed findings of fact and conclusions of law. The exceptions and alternative proposals shall be filed within 10 days after the party has received the proposal for decision as drafted by the administrative law judge.

(c) Any exceptions to the procedure during the hearing, the handling of the hearing by the administrative law judge, rulings on evidence, or any other matter shall be written and refer specifically to pages of the record or otherwise identify the occurrence to which exception is taken. The exceptions shall be filed with the Board within 10 days of the receipt of the proposal for decision. The written exceptions shall bear the notation: EXCEPTIONS TO THE PROCEEDINGS IN THE CASE OF (Name of Case).

(d) Any party may present oral argument on written exceptions to the Board upon request. The request shall be included with the written exceptions.

(e) Upon receipt of request for oral argument on written exceptions, notice shall be issued by the Board to all parties designating the time and place for such oral argument.

(f) The Board may adopt the administrative law judge's proposal for decision or may modify it as the Board deems necessary. The Board shall render the final agency decision within 60 days after the next regularly scheduled Board meeting following the deadline for receipt of the written exceptions or the hearing of oral arguments on written exceptions, whichever is later. The final agency decision rendered shall be part of the record and a copy thereof given to all parties.

History Note: Authority G.S. 93D-3; 150B-38; 150B-40;
Eff. January 1, 1992;
Amended Eff. December 1, 2013; March 1, 1996.

21 NCAC 22L .0116 PUBLICATION OF DISCIPLINARY ACTIONS

(a) Formal disciplinary actions imposed by the Board shall be published on the Board's website (www.nchalb.org) within 60 days of the final agency decision as follows:

(1) Notice of a suspension of license or registration shall be posted on the website during the suspension period, including a link to a copy of the final agency decision;
(2) Notice of the reinstatement of a suspended license or registration shall be posted on the website for 90 days, including a link to the final agency decision for reinstatement;
(3) Notice of revocation of a license or registration shall be posted on the website for three years from the date of revocation, including a link to a copy of the final agency decision;
(4) The number of private reprimands issued by the Board and the nature of the violations shall be posted on the website for the current and previous fiscal year without identifying associated individual(s); and
(5) The number of suspensions and revocations shall be posted on the website for the current

and previous fiscal year without reference to individuals receiving the discipline.

(b) The content of a private reprimand shall not be released to any member of the public pursuant to G.S. 93D-13(c), but the existence of a private reprimand shall be reported in accordance with this Rule.

(c) When responding to public information requests about disciplinary actions against a specific licensee, the Board shall issue a written response which shall identify:

(1) any revocation of license since original license issued

(2) other disciplinary actions for the five year period preceeding the request

(3) current status of license (active or expired).

History Note: Authority G.S. 93D-3; 93D-13; Eff. December 1, 2013.

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CHAPTER 32 – MEDICAL BOARD

21 NCAC 32B .1303 APPLICATION FOR PHYSICIAN LICENSE

(a) In order to obtain a Physician License, an applicant shall:

(1) submit a completed application, attesting under oath or affirmation that the information on the application is true and complete and authorizing the release to the Board of all information pertaining to the application;

(2) submit a photograph, two inches by two inches, affixed to the oath or affirmation which has been attested to by a notary public;

(3) submit documentation of a legal name change, if applicable;

(4) supply a certified copy of applicant's birth certificate if the applicant was born in the United States or a certified copy of a valid and unexpired US passport. If the applicant does not possess proof of U.S. citizenship, the applicant must provide information about applicant's immigration and work status which the Board will use to verify applicant's ability to work lawfully in the United States;

(5) submit proof on the Board's Medical Education Certification form that the applicant has completed at least 130 weeks of medical education and received a medical degree. However, the Board shall waive the 130 week requirement if the applicant has been certified or recertified by an ABMS, CCFP, FRCP, FRCS or AOA approved specialty board within the past 10 years;

(6) for an applicant who has graduated from a medical or osteopathic school approved by the LCME, the CACMS or COCA, meet the requirements set forth in G.S. 90-9.1;

(7) for an applicant graduating from a medical school not approved by the LCME, meet the requirements set forth in G.S. 90-9.2;

(8) provide proof of passage of an examination testing general medical knowledge. In addition to the examinations set forth in G.S. 90-10.1 (a state board licensing examination; NBME; USMLE; FLEX, or their successors), the Board accepts the following examinations (or their successors) for licensure:

(A) COMLEX,

(B) NBOME, and

(C) MCCQE;

(9) submit proof that the applicant has completed graduate medical education as required by G.S. 90-9.1 or 90-9.2, as follows:

(A) A graduate of a medical school approved by LCME, CACMS or COCA shall have satisfactorily completed at least one year of graduate medical education approved by ACGME, CFPC, RCPSC or AOA.

(B) A graduate of a medical school not approved by LCME shall have satisfactorily completed three years of graduate medical education approved by ACGME, CFPC, RCPSC or AOA.

(C) An applicant may satisfy the graduate medical education requirements of Parts (A) or (B) of this Subparagraph by showing proof of current certification by a specialty board recognized by the ABMS, CCFP, FRCP, FRCS or AOA;

(10) submit a FCVS profile:

(A) If the applicant is a graduate of a medical school approved by LCME, CACMS or COCA, and the applicant previously has completed a FCVS profile; or

(B) If the applicant is a graduate of a medical school other than those approved by LCME, COCA or CACMS;

(11) if a graduate of a medical school other than those approved by LCME, AOA, COCA or CACMS, furnish an original ECFMG certification status report of a currently valid certification of the ECFMG. The ECFMG certification status report requirement shall be waived if:

(A) the applicant has passed the ECFMG examination and successfully completed an approved Fifth Pathway program (original ECFMG score transcript from the ECFMG required); or

(B) the applicant has been licensed in another state on the basis of a written

examination before the establishment of the ECFMG in 1958;

(12) submit an AMA Physician Profile and, if applicant is an osteopathic physician, also submit an AOA Physician Profile;

(13) if applying on the basis of the USMLE, submit:

(A) a transcript from the FSMB showing a score on USMLE Step 1, both portions of Step 2 (clinical knowledge and clinical skills) and Step 3; and

(B) proof that the applicant has passed each step within three attempts. However, the Board shall waive the three attempt requirement if the applicant has been certified or recertified by an ABMS, CCFP, FRCP, FRCS or AOA approved specialty board within the past 10 years;

(14) if applying on the basis of COMLEX, submit:

(A) a transcript from the NBOME showing a score on COMLEX Level 1, both portions of Level 2 (cognitive evaluation and performance evaluation) and Level 3; and

(B) proof that the applicant has passed COMLEX within three attempts. However, the Board shall waive the three attempt requirement if the applicant has been certified or recertified by an ABMS, CCFP, FRCP, FRCS or AOA approved specialty board within the past 10 years;

(15) if applying on the basis of any other board-approved examination, submit a transcript showing a passing score;

(16) submit a NPDB / HIPDB report, dated within 60 days of submission of the application;

(17) submit a FSMB Board Action Data Report;

(18) submit two completed fingerprint record cards supplied by the Board;

(19) submit a signed consent form allowing a search of local, state, and national files for any criminal record;

(20) provide two original references from persons with no family or marital relationship to the applicant. These references must be:

(A) from physicians who have observed the applicant's work in a clinical environment within the past three years;

(B) on forms supplied by the Board;

(C) dated within six months of the submission of the application; and

(D) bearing the original signature of the writer;

(21) pay to the Board a non-refundable fee pursuant to G.S. 90-13.1(a), plus the cost of a criminal background check; and

(22) upon request, supply any additional information the Board deems necessary to evaluate the applicant's competence and character.

(b) In addition to the requirements of Paragraph (a) of this Rule, the applicant shall submit proof that the applicant has:

(1) within the past 10 years taken and passed either:

(A) an exam listed in G.S. 90-10.1 (a state board licensing examination; NBOME; USMLE; COMLEX; or MCCQE or their successors);

(B) SPEX (with a score of 75 or higher); or

(C) COMVEX (with a score of 75 or higher);

(2) within the past 10 years:

(A) obtained certification or recertification or CAQ by a specialty board recognized by the ABMS, CCFP, FRCP, FRCS or AOA; or

(B) met requirements for ABMS MOC (maintenance of certification) or AOA OCC (Osteopathic continuous certification);

(3) within the past 10 years completed GME approved by ACGME, CFPC, RCPSC or AOA; or

(4) within the past three years completed CME as required by 21 NCAC 32R .0101(a), .0101(b), and .0102.

(c) All reports must be submitted directly to the Board from the primary source, when possible.

(d) An applicant shall appear in person for an interview with the Board or its agent, if the Board needs more information to complete the application.

(e) An application must be completed within one year of submission. If not, the applicant shall be charged another application fee, plus the cost of another criminal background check.

History note: Authority G.S. 90-8.1; 90-9.1; 90-9.2; 90-13.1;
Eff. August 1, 2010;
Amended Eff. December 1, 2013; January 1, 2012; November 1, 2011; October 1, 2011.

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CHAPTER 46 - BOARD OF PHARMACY

21 NCAC 46 .3401 DEFINITIONS

For purposes of this Section, the following terms are defined as follows:

(1) "Automated medication system" means a robotic, mechanical, or computerized device

that is not used for drug compounding and is designed to:

(a) Distribute drugs in a licensed health care facility that holds a pharmacy permit; or

(b) Package drugs for final distribution by a pharmacist.

(2) "Distribution" means the process of providing a drug to an individual authorized to administer drugs and licensed as a health care provider in the state of North Carolina pursuant to an order issued by an authorized prescriber.

(3) "Override medication" means:

(a) A drug that may be removed from an automated medication system prior to pharmacist review because the Multidisciplinary Committee has determined that the clinical status of the patient would be compromised by delay; or

(b) A drug determined by the Multidisciplinary Committee to have a low risk of drug allergy, drug interaction, dosing error, or adverse patient outcome, which may be removed from an automated medication system independent of a pharmacist's review of the medication order or clinical status of the patient.

(4) "Physician controlled medication" is a drug ordered, prepared and administered by a physician or under the physician's direct supervision.

History Note: Authority G.S. 90-85.6; 90-85.32; 90-85.33; Eff. April 1, 1999;
Amended Eff. February 1, 2005; August 1, 2002;
Recodified from 21 NCAC 46 .1814 Eff. February 1, 2005;
Amended Eff. December 1, 2013.

21 NCAC 46 .3402 GENERAL REQUIREMENTS FOR THE USE OF AUTOMATED MEDICATION SYSTEMS

(a) The pharmacist-manager shall assure compliance with all requirements of the Pharmacy Practice Act and this Section.

(b) The pharmacist-manager shall be responsible for:

(1) Maintaining a record of each transaction or operation;

(2) Controlling access to the automated medication system;

(3) Maintaining policies and procedures for:

(A) Operating the automated medication system;

(B) Training personnel who use the automated medication system;

(C) Maintaining patient services whenever the automated medication system is not operating; and

(D) Defining a procedure for a pharmacist to grant access to the drugs in the automated medication system or to deny access to the drugs in the automated medication system.

(4) Securing the automated medication system;

(5) Assuring that a patient receives the pharmacy services necessary for appropriate pharmaceutical care;

(6) Assuring that the automated medication system maintains the integrity of the information in the system and protects patient confidentiality;

(7) Establishing a procedure for stocking or restocking the automated medication system; and

(8) Insuring compliance with all requirements for packaging and labeling.

(c) A pharmacist shall perform prospective drug use review and approve each medication order prior to administration of a drug except an override medication or a physician controlled medication.

(d) A pharmacist shall perform retrospective drug use review for an override medication.

(e) The pharmacist-manager shall convene or identify a Multidisciplinary Committee, which is charged with oversight of the automated medication system. The Multidisciplinary Committee shall:

(1) Include the pharmacist-manager or the pharmacist-manager's designee;

(2) Establish the criteria and process for determining which drug qualifies as an override medication; and

(3) Develop policies and procedures regarding the operation of the automated medication system.

(f) A pharmacy utilizing an automated medication system may distribute patient-specific drugs within the health care facility without verifying each individual drug selected or packaged by the system, if:

(1) The initial medication order has been reviewed and approved by a pharmacist; and

(2) The drug is distributed for subsequent administration by a health care professional permitted by North Carolina law to administer drugs.

(g) The pharmacist-manager shall be responsible for establishing a quality assurance program for the automated medication system. The program shall provide for:

(1) Review of override medication utilization;

(2) Investigation of any medication error related to drugs distributed or packaged by the automated medication system;

(3) Review of any discrepancy or transaction reports and identification of patterns of inappropriate use or access of the automated medication system;

(4) Review of the operation of the automated medication system;

(5) Integration of the automated medication system quality assurance program with the overall continuous quality improvement program of the pharmacy; and

(6) Assurance that individuals working with the automated medication system receive appropriate training on operation of the system and procedures for maintaining pharmacy services when the system is not in operation.

(h) The pharmacist-manager shall maintain, for at least three years, the following records related to the automated medication system in a readily retrievable manner:

(1) Transaction records for all non-controlled drugs or devices distributed by the automated medication system;

(2) Transaction records from the automated medication system for all controlled substances dispensed or distributed; and

(3) Any report or analysis generated as part of the quality assurance program required by Paragraph (g) of this Rule.

History Note: Authority G.S. 90-85.6; 90-85.32; 90-85.33;
Eff. February 1, 2005;
Amended Eff. December 1, 2013.

21 NCAC 46 .3403 MULTIDISCIPLINARY COMMITTEE FOR DECENTRALIZED AUTOMATED MEDICATION SYSTEMS

History Note: Authority G.S. 90-85.6; 90-85.32; 90-85.33;
Eff. February 1, 2005;
Repealed Eff. December 1, 2013.

21 NCAC 46 .3404 STOCKING OR RESTOCKING OF AN AUTOMATED MEDICATION SYSTEM

(a) Responsibility for accurate stocking and restocking of an automated medication system lies with the pharmacist-manager and with any pharmacist tasked with supervising such functions as specified in Subparagraph (b)(2) of this Rule.

(b) The stocking or restocking of an automated medication system, where performed by someone other than a pharmacist, shall follow one of the following procedures to ensure correct drug selection:

(1) A pharmacist shall conduct and document a daily audit of drugs placed or to be placed into an automated medication system by a pharmacy technician, which audit may include random sampling.

(2) A bar code verification, electronic verification, or similar verification process shall be utilized to assure correct selection of drugs placed or to be placed into an automated medication system. The utilization of a bar code, electronic, or similar verification process shall require an initial quality assurance validation, followed by a quarterly quality assurance review by a pharmacist. When a bar code verification, electronic verification, or similar verification process is utilized as specified in this section, stocking and restocking functions may be performed by a pharmacy technician or by a registered nurse trained and authorized by the pharmacist-manager.

(c) The pharmacist performing the quality assurance review shall maintain a record of the quality assurance process that occurred and the pharmacist approval of the drug stocking, restocking or verification process.

(d) Medication Reuse. Any drug that has been removed from the automated medication system shall not be replaced into the system unless:

(1) the drug's purity, packaging, and labeling have been examined according to policies and procedures established by the pharmacist-manager to determine that reuse of the drug is appropriate; or

(2) specific drugs, such as multi-dose vials, have been exempted by the Multidisciplinary Committee.

History Note: Authority G.S. 90-85.6; 90-85.32; 90-85.33;
Eff. February 1, 2005;
Amended Eff. December 1, 2013.

21 NCAC 46 .3405 CENTRALIZED AUTOMATED MEDICATION SYSTEMS
21 NCAC 46 .3406 QUALITY ASSURANCE PROGRAM
21 NCAC 46 .3407 RECORD KEEPING
21 NCAC 46 .3408 COMPLIANCE

History Note: Authority G.S. 90-85.6; 90-85.32; 90-85.33;
Eff. February 1, 2005;
Repealed Eff. December 1, 2013.

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

21 NCAC 64 .0101 NAME AND ADDRESS OF AGENCY

The name of the agency shall be the Board of Examiners for Speech and Language Pathologists and Audiologists. The address of this agency is P.O. Box 16885, Greensboro, North Carolina 27416-0885. The purpose of this Board is to administer the provisions of the North Carolina General Statues contained in Chapter 90, Article 22. The office hours of this agency shall be by appointment only. Appointments shall be made upon written request to the Board at the agency address.

History Note: Authority G.S. 90-304(a)(3); 150B-21.5(a)(5);
Eff. February 9, 1976;
Amended Eff. December 1, 2013; May 1, 1989; December 7, 1978.

21 NCAC 64 .0103 EXAMINATIONS

The special examinations in speech and language pathology and audiology, which are part of the National Teacher's Examination, administered by the Educational Testing Service, will constitute the written examination required.

History Note: Authority G.S. 90-295(5); 90-296(a); 90-304(a)(3);
Eff. February 9, 1976;
Amended Eff. December 1, 2013.

21 NCAC 64 .0502 NOTICE MAILING LIST

Any individual or agency desiring to be placed on the mailing list of the Board for rulemaking notices may file such request in writing, furnishing his, her or its name and mailing address to: Board of Examiners for Speech and Language Pathologists and Audiologists, P.O. Box 16885, Greensboro, North Carolina 27426-0885. The letter of request shall state those subject areas within the authority of the Board for which notice is requested. The Board may charge actual postage and stationery costs to be paid by persons receiving such notices.

History Note: Authority G.S. 90-304(a)(3); 150B-21.2(b);
Eff. February 15, 1977;
Amended Eff. December 1, 2013; May 1, 1989; December 7, 1978.

21 NCAC 64 .0503 ADDITIONAL INFORMATION

Individuals or agencies desiring information in addition to that provided in an individual rulemaking notice may contact: Board of Examiners for Speech and Language Pathologists and Audiologists, P.O. Box 16885, Greensboro, North Carolina 27416-0885. Any written communication shall indicate the rulemaking proceeding that is the subject of the inquiry.

History Notes: Authority G.S. 90-304(3); 150B-12;
Eff. February 15, 1977;
Amended Eff. December 1, 2013; May 1, 1989; December 7, 1978.

21 NCAC 64 .0604 WRITTEN SUBMISSIONS

(a) The first page of any written submission shall identify the rulemaking proceeding or proposed rule to which the comments are addressed and a statement of the position of the person making the submission (for example, "in support of adopting proposed Rule .0000," "in opposition to adopting proposed Rule .0000").

(b) Upon receipt of written comments, acknowledgement shall be made with an assurance that the comments therein shall be fully considered by the Board.

History Note: Authority G.S. 90-304(a)(3); 150B-12;
Eff. February 15, 1977;
Amended Eff. December 1, 2013; May 1, 1989; December 7, 1979.

21 NCAC 64 .0702 SUBMISSION OF REQUEST FOR RULING

All requests for declaratory rulings shall be written and mailed to the Board of Examiners for Speech and Language Pathologists and Audiologists, P.O. Box 16885, Greensboro, North Carolina, 27416-0885. The request must include the following information:

(1) name and address of the petitioner;
(2) statute or rule to which petition relates;
(3) statement of the manner in which petitioner is substantially affected by the rule or statute or its potential application to him;
(4) a statement of whether an oral hearing is desired, and if so, the reason therefor.

History Note: Authority G.S. 90-304(a)(3); 150B-12;
Eff. February 15, 1977;
Amended Eff. December 1, 2013; May 1, 1989; December 7, 1978.

21 NCAC 64 .0802 REQUEST FOR HEARING

(a) Whenever an individual or agency believes any right, duty or privilege of a licensee, individual or agency has been affected by the Board's administrative action, but has not received notice of a right to an administrative hearing, that individual or agency may file a request for a hearing.

(b) Such request shall be submitted to: Board of Examiners for Speech and Language Pathologists and Audiologists, P.O. Box 16885, Greensboro, North Carolina, 27416-0885. The request shall contain the following information:

(1) Name and address of the petitioner;
(2) A statement of the action taken by the Board that is challenged;
(3) A statement of the way in which the petitioner has been affected; and
(4) A statement of request for a hearing.

(c) Such request will be acknowledged promptly and a hearing will be scheduled, unless the Board determines that the request does not describe or state a contested case.

History Note: Authority G.S. 90-304(a)(3); 150B-38(b),(h);
Eff. February 15, 1977;
Amended Eff. December 1, 2013; May 1, 1989; December 7, 1978.

21 NCAC 64 .1003 LICENSEE REQUIREMENTS

(a) Licensees who register an Assistant must have held a current, permanent license in North Carolina for two years or equivalent qualifications from another state. Temporary license holders shall not register Assistants.

(b) Licensees who register an Assistant must demonstrate understanding of the basic elements of the registration and supervision process (scope of practice, ethics, written protocols, record keeping), and satisfactorily complete a knowledge demonstration on the registration/supervision process.

(c) Licensees must submit the application and annual fee for registration of the Assistant to the Board.

(d) Licensees must assure that patients are informed when services are being provided by an Assistant.

(1) The Assistant must wear a badge that includes the job title: "SLP-Assistant."

(2) When services are to be rendered by an Assistant, the patient or family must be informed in writing. This notification form must be kept on file in the patient's chart, indicating the patient's name and date notified.

(e) Tasks that are within the scope of responsibilities for an Assistant are listed in Rules .1004 and .1005 of this Section. The standards for all patient services provided by the Assistant are the full responsibility of the Supervising Licensee and cannot be delegated. Therefore, the assignment of tasks and the amount and type of supervision must be determined by the Supervising Licensee to ensure quality of care considering: the skills of the Assistant, needs of the patient, the service-setting, the tasks assigned, and any other relevant factors.

(1) Before assigning a treatment tasks to an Assistant, the Licensee must have first evaluated the patient, written a general treatment plan, and provided the Assistant with a written session protocol specifying the following for patient behaviors:
(A) eliciting conditions;
(B) target behavior; and
(C) contingent response.

(2) The Supervising Licensee must document the Assistant's reliable and effective application of the treatment protocol with each patient. Each time a new protocol is introduced, the Supervising Licensee must assure and document that the Assistant is utilizing all three protocol elements (A, B, C) effectively.

(3) For every patient encounter (screening or treatment) in which an Assistant provides service, there must be legible signatures of the Assistant and one Supervising Licensee.

(4) These signed and dated patient encounter records must be retained as part of the patient's file for the time period specified in Rule .0209 of this Chapter and may be requested by the Board.

(5) The Board may do random audits of records to determine compliance with its rules.

(6) When patient services are being rendered by an Assistant, the Supervising Licensee must be accessible to the Assistant in order to assure that direct observation and supervision can occur when necessary.

(f) The Primary Supervising Licensee shall assess the Assistant's competencies during the initial 60 days of employment using the performance-based competency assessment and orientation checklist provided by the Board on the Board's website. The completed checklist shall be submitted to the Board within 90 days of registration. A new competency checklist must be completed and filed within 90 days each time the primary supervising Licensee changes.

(g) Any attempt to engage in those activities and responsibilities reserved solely for the Supervising Licensee shall be regarded as the unlicensed practice of speech-language pathology.

History Note: *Authority G.S. 90-298.1; 90-304(a)(3); Eff. July 1, 1998; Amended Eff. December 1, 2013.*

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CHAPTER 68 - SUBSTANCE ABUSE PROFESSIONAL PRACTICE BOARD

21 NCAC 68 .0101 DEFINITIONS

As used in the General Statutes or this Chapter, the following terms have the following meaning:

(1) "Applicant" means a person who submits documentation seeking Board status for registration or certification.

(2) "Application packet" means a set of instructions and forms required by the Board for registration.

(3) "Approved supervisor " means a person who watches and directs the activities of a substance abuse professional in the role of an applicant supervisor or a practice supervisor as set out in G.S. 90-113.31A. This is a person who fulfills or is in the process of fulfilling the requirements for this Board designation of approved supervisor pursuant to Rule .0211 of this Chapter by completing its academic, didactic and experiential requirements.

(4) "Assessment" means identifying and evaluating an individual's strengths, weaknesses, problems, and needs for the development of a treatment or service plan for a substance use disorder.

(5) "Clinical supervison" means clinical oversight required for all credentials with a minimum of 50 percent clinical supervision that shall accrue in person and face-to-face while in the same room whereas the balance of this requirement may be fulfilled electronically via video, face-to-face, if performed in real time.

(6) "Clinical supervision specific education" means training that covers the aspects of clinical supervision of a substance abuse professional or any of the 12 core functions in their clinical application.

(7) "Client" means an individual who is in receipt of substance abuse counseling.

(8) "Complainant" means a person who has filed a complaint pursuant to these Rules.

(9) "Consultation" means a meeting for discussion, decision-making, and planning with other service providers for the purpose of providing substance abuse services.

(10) "Crisis" means a decisive event in the course of treatment related to alcohol or drug use that threatens to compromise or destroy the rehabilitation effort.

(11) "Deemed status group" means those persons who are credentialed as clinical addictions

specialists because of their membership in a deemed status discipline.

(12) "Education" means a service that is designed to inform and teach various groups including clients, families, schools, businesses, churches, industries, civic, and other community groups about the nature of substance abuse disorders and about available community resources. It also serves to improve the social functioning of recipients by increasing awareness of human behavior and providing alternative cognitive or behavioral responses to life's problems.

(13) "Full time" means 2,000 hours per year.

(14) "General professional skill building" means education provided to enhance the general skills of a substance abuse professional.

(15) "Hearing panel" means members of a committee designated by the chairperson of the committee to conduct an informal hearing to determine that the applicant meets the standards required to be maintained for or awarded a credential.

(16) "Impairment" means a mental illness, substance abuse or chemical dependency, physical illness, or aging problem.

(17) "Letter of reference" means a letter that recommends a person for certification.

(18) "Membership in good standing" means a member's certification is not in a state of revocation, lapse, or suspension. However, an individual whose certification is suspended and the suspension is stayed is a member in good standing during the period of the stay.

(19) "Passing score" means the score set by the entity administering the exam.

(20) "Person served" means an individual who is not a client but is in receipt of substance abuse prevention counseling.

(21) "Personal service" means the actual delivery of a document into the hands of the person to whom it is addressed.

(22) "President" means the President of the Board.

(23) "Prevention consultation " means a service provided to other mental health, human service, and community planning/development organizations or to individual practitioners in other organizations to assist in the development of insights and skills of the practitioner necessary for prevention.

(24) "Prevention performance domains" means areas of professional activities to include:

(a) planning and evaluations;

(b) education and skill development;

(c) community organization;

(d) public and organizational policy; and

(e) professional growth and responsibility.

(25) "Referral" means identifying the needs of an individual that cannot be met by the counselor or agency and assisting the individual in utilizing the support systems and community resources available.

(26) "Rehabilitation" means re-establishing the functioning needed for professional competency.

(27) "Reinstatement" means an action where the Board restores certification or registration to an applicant after the applicant completes the requirements imposed by the Board.

(28) "Relapse" means a return to the pattern of substance abuse as well as the process during which indicators appear prior to the person's return to the pattern of substance abuse or a re-appearance or exacerbation of physical, psychological, or emotional symptoms of impairment.

(29) "Renewal" means an action by the Board granting a substance abuse professional a consecutive certification or registration based upon the completion of requirements for renewal as prescribed by statute and the rules of the Board.

(30) "Revival" means an action by the Board granting a substance abuse professional a certification or registration following a lapse of certification or registration wherein the professional must also meet the requirements for renewal.

(31) "Reprimand" means a written warning from the Board to a person making application for certification by the Board or certified by the Board.

(32) "Respondent" means a person who is making application for certification by the Board or is certified by the Board against whom a complaint has been filed.

(33) "Sexual activity" or "sexual contact" means:

(a) Contact between the penis and the vulva or the penis and the anus;

(b) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

(c) The penetration, however slight, of the anal or genital opening of another by a hand, finger, or any object with an intent to abuse, humiliate, harass, degrade, arouse, or gratify the sexual desire of any person.

(d) Vaginal intercourse, cunnilingus, fellatio, or anal intercourse, if initiated, agreed to, or not resisted by the substance abuse professional; or

(e) Kissing or the intentional touching of the other's lips, genital area, groin, inner thigh, buttocks, breasts, or any other body parts, as well as the

clothing covering any of these body parts for the purpose of sexual stimulation or gratification of either the substance abuse professional or the client if initiated or agreed to or not resisted by the substance abuse professional.

(34) "Substance abuse counseling experience " means approved supervised experience that may be full-time, part-time, paid or voluntary, and must include all of the 12 core functions (Rule .0204 of this Chapter) as documented by a job description and supervisors evaluation.

(35) "Substance abuse prevention consultant experience" means approved supervised experience that may be full-time, part-time, paid or voluntary, and must include all of the prevention domains referenced by Rule .0206 of this Chapter and as documented by a job description and supervisor's evaluation.

(36) "Substance abuse specific" means education focused upon alcohol and other drugs and the substance abusing population and is provided for a substance abuse professional by one whose education and experience is in the field of alcohol and other drugs.

(37) "Supervised practice" means supervision of the applicant in the knowledge and skills related to substance abuse professionals.

(38) "Supervisor of record" means the substance abuse professional primarily responsible for providing applicant or practice supervision to a supervisee.

(39) "Suspension" means a loss of certification or the privilege of making application for certification.

History Note: Authority G.S. 90-113.30; 90-113.33; 90-113.40; 90-113.41; 90-113.41A;
Eff. August 1, 1996;
Temporary Amendment Eff. November 15, 1997;
Amended Eff. January 1, 2014; June 1, 2011; April 1, 2011; April 1, 2003; August 1, 2002; April 1, 2001; August 1, 2000; August 1, 1998.

21 NCAC 68 .0206 PROCESS FOR PREVENTION CONSULTANT CERTIFICATION

(a) The Board shall certify an applicant as a substance abuse prevention consultant as set out in Article 5C of Chapter 90 of the North Carolina General Statutes. A prevention consultant's primary responsibilities are to provide substance abuse information and education, environmental approaches, alternative activities, community organization, networking, and referral.

(b) In addition to the requirements set out in G.S. 90-113.40, the requirements for certification include:

(1) Supervised work experience as set out in G.S. 90-113.40(a)(8) in prevention consultation.

(2) 270 hours of academic and didactic training divided in the following manner:

(A) 170 hours primary and secondary prevention and in the prevention performance domains; and

(B) 100 hours in substance abuse specific studies, which includes six hours of HIV/AIDS/STDS/TB/Bloodborne pathogens training and education, six hours professional ethics education, and six hours of education to be selected from the following:

(i) Nicotine Dependence;

(ii) Psychopathology;

(iii) Evidence-Based Treatment Approaches;

(iv) Substance Abuse Issues in Older Adults; and

(v) Substance Abuse Issues Affecting Veterans.

(3) Supervised practical training as set out in G.S. 90-113.40(a)(7);

(4) A minimum of 300 hours of supervised practical training practice hours documented by a certified substance abuse professional;

(5) A form signed by the applicant attesting to the applicant's adherence to the Ethical Standards of the Board;

(6) An application packet fee of twenty-five dollars ($25.00), a certification fee of one hundred twenty-five dollars ($125.00), and an examination fee of one hundred twenty-five dollars ($125.00).

History Note: Authority G.S. 90-113.30; 90-113.31B; 90-113.33; 90-113.34; 90-113.38; 90-113.39; 90-113.40; 90-113.41;
Eff. August 1, 1996;
Amended Eff. January 1, 2014; August 1, 2002; April 1, 2001; August 1, 2000.

21 NCAC 68 .0209 RECIPROCITY

(a) If a counselor, prevention consultant, clinical supervisor, or clinical addictions specialist holds a credential issued by an IC&RC/AODA, Inc. member board or a successor organization as a certified substance abuse counselor (to include alcohol and other drugs), certified prevention consultant, certified clinical supervisor or credentialed clinical addictions specialist, the person may transfer this credential to North Carolina by applying a transfer fee as assessed by the IC&RC/AODA, Inc. or its successor organization.

(b) The reciprocal credential effective date shall remain the same as in the previous state.

(c) At the time when re-credentialing is required, it will be the individual's responsibility to submit an application for re-credentialing. For the period of the first re-credentialing in North Carolina, the Board shall accept the member's former state re-credentialing requirements for the purpose of reciprocal re-credentialing. At the end of this re-credentialing period, it shall

be the individual's responsibility to conform to the re-credentialing requirements of North Carolina in effect at the time of re-credentialing.

History Note: Authority G.S. 90-113.30; 90-113.33; 90-113.36; 90-113.37A;
Eff. August 1, 1996;
Amended Eff. January 1, 2014; August 1, 2000.

21 NCAC 68 .0301 SCOPE
The rules in this Section apply to a person seeking licensure as a clinical addictions specialist and a credentialing body of a professional discipline seeking deemed status.

History Note: Authority G.S. 113.30; 90-113.33; 90-113.36; 90-113.40; 90-113.41A;
Temporary Adoption Eff. November 15, 1997;
Eff. August 1, 1998;
Amended Eff. January 1, 2014.

21 NCAC 68 .0303 APPLICATION FOR DEEMED STATUS BY PROFESSIONAL DISCIPLINE
(a) Any credentialing body of a professional discipline seeking deemed status shall forward to the board a letter of intent with a request for an application to become a deemed status organization.
(b) The credentialing body shall provide the following:
(1) Documentation that it meets the requirements of G.S. 90-113.41A;
(2) A copy of the ethical code and statement, if any, it requires its members to sign indicating that the member will comply with the discipline's code of ethics and any substantiating data that supports the ethical process of the professional discipline;
(3) If an examination is required by the credentialing body, documentation describing the exam process each applicant must pass in order to be awarded the professional group's substance abuse specialty credential. If the examination for the specialty is not administered by the professional group, the applicant shall pass the Board's exam for licensure.
(c) A professional discipline granted deemed status shall provide the name of any member whose credential is revoked, suspended or denied within 60 days from the date of action.
(d) The professional discipline, to the extent allowed by its governing law shall provide any information requested by the Board that has been submitted to the professional discipline regarding the complaint against its member, subsequent to the disposition of the complaint.
(e) If no information has been received by the Board within six months, or the Board is not satisfied with the disposition of the complaint, the Board may initiate its own disciplinary action.

History Note: Authority G.S.; 90-113.33; 90-113.41; 90-113.41A;
Temporary Adoption Eff. November 15, 1997;
Eff. August 1, 1998;
Amended Eff. January 1, 2014.

21 NCAC 68 .0304 THREE-YEAR STANDARDS REVIEW OF DEEMED STATUS STANDING
(a) The Board shall review the standards of each professional discipline every third year as required in G.S. 90-113.41A.
(b) The Board shall send notice to the discipline 90 days in advance of the end of the three-year period following the date deemed status was granted or renewed.
(c) The discipline shall report current standards, including an update of all information originally required.
(d) The Board may require further substantiation and explanation of this data.

History Note: Authority G.S. 90-113.33; 90-113.41A;
Temporary Adoption Eff. November 15, 1997;
Eff. January 1, 2014; August 1, 1998;
Amended Eff. January 1, 2014.

21 NCAC 68 .0305 LICENSURE REQUIREMENTS FOR INDIVIDUAL APPLICANT
In addition to meeting the requirements of G.S. 90-113.40, an applicant seeking licensure as a clinical addictions specialist shall submit the following, if applicable:
(1) Documentation of completion of:
(a) Six hours of HIV/AIDS/STDS/TB/Bloodborne pathogens training and education;
(b) Six hours of professional ethics training; and
(c) Six hours of clinical supervision specific training.
(d) Six hours selected from the following list:
(i) Nicotine Dependence;
(ii) Psychopathology;
(iii) Evidence-Based Treatment Approaches;
(iv) Substance Abuse Issues in Older Adults; and
(v) Substance Abuse Issues Affecting Veterans.
All hours listed in Sub-items (a), (b), (c) and (d) of this Item may be included in the 180 hours completed for licensure in the core competencies by an applicant not in the deemed status.
(2) Copy of a substance abuse specialty certificate or its equivalent;
(3) Copy of his or her masters' or doctorate degree diploma;
(4) Completed registration form; and
(5) Payment of the following fees:
(a) All applicants who are in the deemed status group shall make payment of a non-refundable application fee of ten dollars ($10.00) and payment of a

non-refundable credentialing fee of forty dollars ($40.00).

(b) All other applicants shall make payment of an application packet fee of twenty-five dollars ($25.00) and payment of a non-refundable credentialing fee of one hundred twenty-five dollars ($125.00).

(c) All applicants seeking credentialing pursuant to Criteria A, Criteria B, and Criteria C of G.S. 90-113.40(c) shall make payment of a non-refundable examination fee of one hundred twenty-five dollars ($125.00).

History Note: Authority G.S. 90-113.30; 90-113.33; 90-113.38; 90-113.40; 90-113.41; 90-113.43;
Temporary Adoption Eff. November 15, 1997;
Eff. April 1, 1999;
Amended Eff. January 1, 2014; August 1, 2002.

21 NCAC 68 .0306 RENEWAL OF INDIVIDUAL LICENSURE AS CLINICAL ADDICTIONS SPECIALIST

(a) An applicant who is in the deemed status group shall submit the following every two years:

(1) A completed application form and a copy of the applicant's current substance abuse licensure or its equivalent from the deemed status professional discipline.

(2) A non-refundable re-licensing fee of thirty-five dollars ($35.00).

(b) All other individual applicants shall:

(1) Renew licensure as classified by the criteria for their original licensing every two years.

(2) Document completing 40 hours of education pursuant to Section .0400 of this Chapter, during the current licensing period. A minimum of 30 hours shall be substance abuse specific. This education may include a combination of hours including attending and providing workshops.

(3) Meet re-licensing educational guidelines as a substance abuse professional as follows:

(A) No more than 25 percent may be in-service education, received within the applicant's organization by staff of the same employment.

(B) No more than 25 percent receiving supervision with two hours of supervision translating to one hour of education.

(C) No more than 25 percent of workshop presentation with one hour of presentation translating to one hour of education. Workshop presentation shall be pursuant to Rule .0213 of this Chapter.

(D) All applicants shall include three hours of HIV/AIDS/STDS/TB/Bloodborne pathogens training and education, three hours of professional ethics training and education, and three hours of education to be selected from the list appearing in Rule.0305(1)(d) of this Section.

(4) Submit a completed application form with continuing education documented.

(5) Submit a non-refundable one hundred twenty-five dollar ($125.00) re-licensing fee.

History Note: Authority G.S. 90-113.30; 90-113.33; 90-113.37; 90-113.38; 90-113.39; 90-113.41A; 90-113.43;
Temporary Adoption Eff. November 15, 1997;
Eff. August 1, 1998;
Amended Eff January 1, 2014; April 1, 2003; August 1, 2002.

21 NCAC 68 .0512 RESPONSIBILITIES OF SUPERVISOR AND SUPERVISEE

(a) A professional who has received a credential from the Board and who is serving as a clinical or practice supervisor shall:

(1) Be aware of his or her position with respect to supervisees and therefore not exploit the trust and reliance of such persons.

(2) Avoid dual relationships that could impair professional judgment, increase the risk of exploitation, or cause harm to the supervisee. To implement this standard the supervisor shall not:

(A) Instruct or supervise a person with whom the supervisor has participated in a sexual activity; a person living in the supervisor's household; or a family member who is related to the supervisor as a child, parent, grandchild, sister, brother, grandparent, spouse, mother-in-law, father-in-law, son-in-law, daughter-in-law, stepson, stepdaughter, stepmother, stepfather, brother-in-law, sister-in-law, spouse's grandparent, spouse's grandchild, grandchild's spouse, or spouse of a grandparent. A supervisor is related to an aunt, uncle, great aunt, or great uncle only if that relative is the sibling of the person's parent or grandparent.

(B) Provide therapy or therapeutic counseling services to supervisees; or

(C) Solicit or engage in sexual activity or contact with supervisees during the period of supervision.

(3) Be trained in and knowledgeable about supervision methods and techniques.

(4) Supervise or consult only within his or her knowledge, training, and competency.

(5) Guide his or her supervisee to perform services responsibly, competently, and ethically. As authorized by the supervisee's employer, the supervisor shall assign to his or her supervisees only those tasks or duties that these individuals can be expected to perform competently, based on the supervisee's education, experience, or training, either independently or with the level of supervision being provided.

(6) Not disclose the confidential information provided by a supervisee except:

(A) As mandated by law;

(B) To prevent harm to a client or other person involved with the supervision;

(C) In educational or training settings where there are multiple supervisors, and then only to other supervisors who share responsibility for the performance or training of the supervisee; or

(D) If consent is obtained.

(7) Establish and facilitate a process for providing evaluation of performance and feedback to a supervisee. To implement this process the supervisee shall be informed of the timing of evaluations, methods, and levels of competency expected. Supervision documentation shall be signed by the supervisor and supervisee and include the date, time, duration, method, and topic of the supervision session.

(8) Not endorse supervisees for credentialing, employment, or completion of an academic training program if they believe the supervisees are not qualified for the endorsement. A supervisor shall develop a plan to assist a supervisee who is not qualified for endorsement to become qualified.

(9) Make financial arrangements for any remuneration with supervisees and organizations only if these arrangements are in writing. All fees shall be disclosed to the supervisee prior to the beginning of supervision.

(b) The Supervisor of record shall provide notice to the office of the Board within 30 days from the date of the last session of clinical supervision that supervision has terminated. Upon receipt of this notice, as soon as is practicable, the Board shall mail a certified notice to the supervisee that he or she has 30 days to obtain supervision to retain the current credential. The supervisee shall provide the Board with a Board-approved supervision contract signed and dated by the supervisor and supervisee to maintain the supervisee's credential. This contract shall be postmarked, indicating that it was mailed to the office within the 30-day time period after receipt of the certified notice from the Board.

History Note: Authority G.S. 90-113.30; 90-113.33; 90-113.38; 90-113.39; 90-113.40;
Eff. April 1, 2003;
Amended Eff. January 1, 2014; January 1, 2010.

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

OFFICE OF ADMINISTRATIVE HEARINGS

Chief Administrative Law Judge
JULIAN MANN, III

Senior Administrative Law Judge
FRED G. MORRISON JR.

ADMINISTRATIVE LAW JUDGES

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

AGENCY	CASE NUMBER	DATE	PUBLISHED DECISION REGISTER CITATION
ALCOHOLIC BEVERAGE CONTROL COMMISSION			
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Trawick Enterprises LLC v. ABC Commission	11 ABC 08901	05/11/12	27:01 NCR 39
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ABC Commission v. Alvin Boyd Turner T/A Community Store	13 ABC 15827	11/20/13	
Two Brothers Food Market Inc., Circle Mart, Kenneth Kirkman v. ABC Commission	13 ABC 16233	09/30/13	
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George H. Jaggers, III v. Crime Victims Compensation Commission	12 CPS 01693	11/01/12	

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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	
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9/5/2013 9:33 AM

STATE OF NORTH CAROLINA

COUNTY OF YADKIN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12DHR00888

HOWARD GENE WHITAKER PETITIONER, V. N. C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF EMERGENCY MEDICAL SERVICES RESPONDENT.	**FINAL DECISION**

THIS MATTER came on for hearing before the undersigned, J. Randall May, Administrative Law Judge, on February 28 and May 24, 2013, in the Washington Courtroom of the Guilford County Courthouse in High Point, North Carolina.

APPEARANCES

For Petitioner: Brian Simpson, Esq.
The Dummit Law Firm
213 West Sixth Street
Winston-Salem, NC 27101

For Respondent: June S. Ferrell
Special Deputy Attorney General
North Carolina Department of Justice
PO Box 629
Raleigh, NC 27602

ISSUE

Whether Respondent has substantially prejudiced Petitioner's rights and has exceeded its authority of jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by law or rule when it revoked Petitioner's Emergency Medical Technician-Paramedic Credential pursuant 10A N.C.A.C. 13P.0701 after Petitioner tested positive for alcohol while on duty with Yadkin County EMS?

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. §§ 131E-155.1, -157, -159 and -162
N.C. Gen. Stat. § 150B-38
10A N.C.A.C. 13P.0701

EXHIBITS

The following exhibits were admitted into the record:

Pet. Ex. 2 – Lab Report
Pet. Ex. 3 – Dismissal Letter
Pet. Ex. 4 – Investigation/Interview Packet for Petitioner
Pet. Ex. 5 – Respondent's Objections and Responses to Petitioner's First Set of Requests for Admissions

Resp. Ex. 1 – Letter dated August 10, 20122 from NCOEMS to Petitioner
Resp. Ex. 2 – NCOEMS Investigation/Interview Packet for Petitioner submitted to the Disciplinary Committee
Resp. Ex. 4 – Statement of Rights Form executed by Petitioner
Resp. Ex. 5 – Notice of Intent to Revoke dated December 19, 2012 from NCOEMS to Petitioner
Resp. Ex. 6 – Petitioner's Statement of Compliance dated January 6, 2012 submitted to Regina Godette-Crawford
Resp. Ex. 7 – Revocation Letter dated January 30, 2012 from NCOEMS to Petitioner
Resp. Ex. 8 – Laboratory Report for Petitioner dated August 14, 2012

WITNESSES

Petitioner Howard Gene Whitaker
Aaron Church, Yadkin County Manager
Keith Vestal, Director of Yadkin County Emergency Services
Regina Godette-Crawford, Chief, North Carolina Office of EMS ("NCOEMS")
Edward Jordan, Regional Specialist, NCOEMS
Doug Calhoun, Regional Specialist, NCOEMS
Kimberly Sides, Compliance Manager, NCOEMS
Dr. Jason Edsall, Medical Director, Yadkin County EMS

BURDEN OF PROOF

As Petitioner, Howard Gene Whitaker bears the burden in this contested case. *See* N.C. Gen. Stat. §§ 150B-23(a) and -29(a). The petitioner in a contested case hearing in the Office of Administrative Hearings must establish, by a preponderance of the evidence, that the Office of Emergency Medical Services (the State Agency) has deprived the Petitioner, (hereinafter "Whitaker"), of property; has ordered him to pay a fine or civil penalty; or has otherwise substantially prejudiced Whitaker's rights; and that the State Agency has:

(1) Exceeded its authority of jurisdiction;
(2) Acted erroneously;
(3) Failed to use proper procedure;
(4) Acted arbitrarily or capriciously; or
(5) Failed to act as required by law.

See N.C. Gen. Stat. 150B-23(a).

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

FINDINGS OF FACT

1. The parties received notice of hearing by certified mail more than fifteen (15) days prior to the hearing and each party stipulated on the record that notice was proper.

2. At all times relevant to this matter, Petitioner was an Emergency Medical Technician-Paramedic (EMT-P) for Yadkin County Emergency Medical Services (EMS) in Yadkinville, North Carolina. His duties included using an ambulance to transport patients to hospitals, sometimes providing treatment en route.

3. At all times relevant to this matter Petitioner held a valid North Carolina Emergency Medical Technician-Paramedic credential and as such, was subject to 10A N.C.A.C. 13P.0701. (T Vol I, pp 13-14, 58-59; Vol II, pp 201-202; Resp. Ex. 2)

4. At all times relevant to this matter, Aaron Church served as County Manager for Yadkin County. As such, Mr. Vestal made the decision to terminate Petitioner from Yadkin County EMS.

5. At all times relevant to this matter, Keith Vestal was Interim Director for Yadkin County EMS. As such, Petitioner worked for Mr. Vestal.

6. At all times relevant to this matter, Dr. Jason Edsall was a practicing emergency department physician at Yadkin County Community Hospital. Additionally, Dr. Edsall served as the Medical Director for the Yadkin County EMS System. Dr. Edsall provided medical oversight to the Yadkin County EMS and all credential personnel employed by the same worked under Dr. Edsall's medical license.

7. At all times relevant to this matter, Edward Jordan served as a Regional Specialist for the Central Region of NCOEMS. Yadkin County is located in the Central Region. Mr. Jordan is the person who received the initial complaint from Yadkin County EMS Office regarding Petitioner.

8. At all times relevant to this matter, Doug Calhoun served as the Compliance Specialist and Lead Investigator assigned to the Central Regional EMS Office in Raleigh. He is responsible for all investigations arising in the central 28 counties of North Carolina and coordinates his investigations with Kim Sides, OEMS Compliance Manager.

9. At all times relevant to this matter, Ms. Sides served as the Compliance Manager for the NCOEMS; the co-chair of the OEMS Investigation Committee; Chairperson of the OEMS Case Review Panel; and staff to the EMS Disciplinary Committee. As Compliance Manager, Ms. Sides facilitated the investigation and enforcement process related to Petitioner.

10. At all times relevant to this matter and pursuant to N.C. Gen. Stat. § 143-519, the EMS Disciplinary Committee is charged with the statutory duty of reviewing all substantiated violations of 10A NCAC 13P.0700. *See* N.C. Gen. Stat. § 143-519.

11. At all times relevant to this matter, Regina Godette-Crawford served as the Chief of the NCOEMS. As such, Chief Crawford made the decision to revoke Petitioner's EMS credential.

12. Prior to the July 14, 2011 incident surrounding the revocation of Petitioner's EMT-P credential, the Yadkin County Office of EMS had received complaints against Petitioner. Those complaints were unrelated to this matter. (T Vol. I, pp 32, 50; Resp. Ex. 6)

13. On the morning of July 14, 2011, Petitioner was scheduled to work at the West Yadkin EMS station in Yadkin County. When Petitioner failed to report to work, his shift supervisor called Keith Vestal and explained the situation to him. Mr. Vestal instructed John Matthews, the shift supervisor, to call Petitioner's home and to instruct Petitioner to report to work. After some delay, Petitioner reported to the EMS substation at which time he was instructed to report to the main office of Yadkin County EMS. (T Vol I, p 50)

14. Prior to Petitioner's arrival at the main office, Vestal spoke with Mr. Church about Petitioner. During their conversation, the decision was made to require Petitioner to submit to a drug test. Upon his arrival, Vestal informed Petitioner that he had to submit to a drug test. (T Vol I, p 51)

15. Petitioner, accompanied by his supervisor Mr. Matthews, proceeded to Yadkin County Hospital where Petitioner submitted to a urinalysis test. (T Vol I, p 18)

16. Petitioner testified that he had consumed two alcoholic beverages during the afternoon of the July 13. In addition, prior to going to bed on July 13, Petitioner consumed Nighttime, a generic brand of Nyquil. (T Vol I, pp 21, 34)

17. The Laboratory Report for Petitioner's urine sample showed a positive result for alcohol, ethyl, at .12g/dL. (Resp. Ex. 8)

18. On or about July 25, 2011, Petitioner attended a Pre-dismissal Conference with Mr. Vestal and Lisa Hughes. During the meeting, Petitioner was informed that he would be terminated from his position with Yadkin County EMS due in part to the positive results of his urinalysis test. At the conclusion of the meeting, Petitioner's employment was terminated. (T Vol I, pp 16, 32; Resp. Ex. 6, Notice of: Pre-Dismissal Conference and Dismissal Letter)

19. By letter dated July 28, 2011, Dr. Jason Edsall ("Dr. Edsall"), Medical Director for Yadkin County EMS, indefinitely suspended Petitioner from practicing as an EMT-paramedic in Yadkin County EMS system. (T Vol II, p 212; Resp. Ex. 2)

20. Dr. Edsall has been the Medical Director for Yadkin County EMS since 2010. He testified: "I supervise all levels of medical care that's given by the agency." (T Vol II, p 180) He stated that the most important thing he does is "the quality assurance and quality improvement programs to make sure that the citizens of Yadkin County receive the high level of care I expect my paramedics to provide, and so we participate in that." (T Vol II, pp 179-180)

21. Dr. Edsall had no involvement in the decision of NCOEMS to revoke Petitioner's EMT-P credential. (T Vol II, p 186)

22. Dr. Edsall explained how all credentialed person affiliated with Yadkin County EMS work under his medical license as they provide pre-hospital care to individuals. (T Vol II, p 177)

23. As the medical director for Yadkin County EMS, he is responsible for the quality assurance to the program, approval of local protocols by which medicine is to be practiced and the oversight of the practice of medicine. (*Id.*)

24. During the investigation of Petitioner, Mr. Vestal contacted Dr. Edsall and they discussed the alleged violation of 10A NCAC 13P.0701(e)(3) and (10). (T Vol II, pp 188-190)

25. During NCOEMS' investigation, Mr. Jordan and Mr. Calhoun interviewed Dr. Edsall. With respect to Petitioner, Dr. Edsall expressed his concern as follows: "My standpoint . . . I would feel that any ethanol content could potentially impair EMS personnel. If there was an employee who had any intoxicating substance, I wouldn't let him treat patients." (Resp. Ex. 2, p 10) During the hearing, Dr. Edsall reaffirmed the statements he made to the OEMS investigators. (T Vol II, pp 204-205, ll 7-6) In addition, Dr. Edsall clarified that in his earlier statement to the investigators, when he mentioned intoxicating substance, he was not referring to any specific legal level. Mr. Calhoun showed the UDS results to Dr. Edsall and he stated that the (sic) best of his knowledge, Mr. Whitaker was operating an EMS unit at an impaired level." (Resp. Ex. 2, p 11)

26. Dr. Edsall testified that as the as the medical director for Yadkin County EMS, he spoke with Mr. Vestal "regarding the urine alcohol level and that my concern is that that would represent him potentially being impaired while on duty." (T Vol II, p 193, ll 10-14) Dr. Edsall further testified that as a responsible medical director, he has to consider all persons that practicing medicine under his license and he holds them to the same standard as he holds himself

which he described as: "I do not practice medicine impaired. Now when I say impaired . . . I don't practice with any alcohol in my system at all. (T Vol II, p 195, ll 14-16)

27. When questioned about his concern for protecting the citizens of Yadkin County, Dr. Edsall responded:

> Well, you've got to understand that I've - I'm taking a well-trained but still-less-than-a-physician-level certified person and I'm putting them in a six- or seven-ton moving vehicle that has lights and sirens and the ability to disobey traffic laws and putting the driving public at risk as they race to a call. And then when they get to the home, I'm giving them a box that can - that can shock the heart to stop it, I'm giving them medications that can paralyze an individual so that they stop breathing, and giving them medications that can put someone's blood pressure to zero or someone's blood pressure to 300. And I'm asking them to make a very rapid assessment of what's wrong with that patient, then to stabilize them to the best of their ability, and then to secure them in the back of that truck, and then drive real fast again and bring them to an emergency department. That's dangerous business. It's dangerous business to the best of us on the best of our days, and so if I find that I'm concerned about someone doing that while impaired, it's of paramount importance that I protect the citizens of Yadkin County by not allowing him to practice. (T Vol II, pp 201-202, ll 6-6)

When questioned about what concern he would have, if any, if a person operating under his license had a substance in their body which had the potential to impair, he responded:

> You know, when you're impaired, you don't make decisions in the same way that you would otherwise. You depart from your training and you may depart from what are accepted standards for practice. So when someone is impaired, then I don't know what their decisions will be, and if that's the case, I'm not sure what - you know, if I'm impaired, I'm not sure what decisions I would make. And if that's the case and I can't trust them to make decisions that will, at least to the standards of medical practice, improve a patient's condition, then I have to stop them from doing that. T Vol II, p 202, ll 12-25)

It is noteworthy to remark that not only was Dr. Edsall's testimony professional and credible, but his true concern for the operation of the Yadkin County EMS was most persuasive.

28. When asked to explain his understanding with respect to the test for ethanol on a UDS, Dr. Edsall responded as follows:

> Well, a urine ethanol level is a tricky level to interpret. Urine - alcohol is actually metabolized in the liver, and then byproducts are excreted in the urine that can be measured. So it is clear that when there is urine - when there's alcohol products detected in the urine, that alcohol has been consumed. It is unclear the rate at which that alcohol level dissipates, and so it can be very tricky business. Obviously in my practice as an emergency physician, I tend to rely more on

serum alcohol levels to give me an actual level, *but in this case it's not the actual level that was of concern to me and our concern about the Rule 10A that the complaint was about.* At the time the – *my understanding of the rule is that it stated the presence of any potentially impairing substance.* No specific level was mentioned or necessary, and that being the case, despite the fact that in this case a urine alcohol level was obtained, *it wasn't necessarily the level that concerned me but the presence of a potentially impairing substance.* (T Vol II, pp 203-204, ll 8-4) (Emphasis added)

29. Ethanol at a urine alcohol level of .12 grams/deciliter has the potential to impair a person. (T Vol II, p 210)

30. When NCOEMS receives a complaint against a credentialed individual, NCOEMS completes a Complaint Intake Form, assigns a case number to the complaint and as Compliance Manager, Ms. Sides tracks the investigation. Next the investigative team oversees the investigation of the complaint. Upon completion of the investigation, the investigative report is reviewed by the case review panel. The case review panel decides whether the matter should be forwarded to the NCOEMS Disciplinary Committee. (T Vol I, pp 117-119)

31. Between July 25 and October 14, 2011, the NCOEMS conducted an investigation of the allegations against the Petitioner. This investigation was completed by Mr. Jordan and Mr. Calhoun, Regional Specialists with NCOEMS. The result of the investigation was documented in Respondent's Exhibit 2, Investigation/Interview Packet for Whitaker, Howard E., (EMT-P). The initial findings of the investigation were violations of 10A N.C.A.C. 13P.0701(e)(3) & (10), both based upon the fact that, "Mr. Whitaker tested positive for a substance that would impair the physical or psychological ability of a credentialed EMS personnel while on duty". (T Vol I, pp 80-132; Resp. Ex. 2)

32. On August 10, 2011, Respondent notified Petitioner via certified mail that Respondent had received a complaint alleging Petitioner tested positive for ethanol during a Urine Drug Screen. In the letter, Petitioner was provided contact information in the event he had any questions regarding the investigation. (T Vol I, pp 80-82; Resp. Ex. 1)

34. By letter dated, October 25, 2011, the OEMS Disciplinary Committee requested that Petitioner appear before the Committee to discuss his EMT-P credential. (Resp. Ex 3) Per the request, Petitioner appeared before the Committee on November 8, 2011. (Resp. Ex. 4)

35. In her testimony, Chief Crawford explained how she is removed from the investigative process as well as the review of information that is submitted to the OEMS Disciplinary Committee. Upon receipt of the Disciplinary Committee's recommendation, Chief Crawford and Ms. Sides met to discuss what action, if any, was warranted based upon the evidence before her. (T Vol I, pp 67, 85, 123; Vol II, pp 144-147)

36. Subsequent to her meeting with Ms. Sides, on December 19, 2011, Chief Crawford notified Petitioner, via certified mail that NCOEMS intended to revoke his EMT-P credential based upon having tested positive for ethanol while employed and on duty with Yadkin County

EMS. Petitioner's actions were alleged to be in violation of 10A NCAC 13P.0701(e)(3) and (10). The letter provided Petitioner the opportunity to show compliance with the cited rule within the next 10 business days. (T Vol I, p 132; Resp. Exs. 5 and 7)

37. Within the ten day time period, Counsel for Petitioner submitted Petitioner's Statement of Compliance. (Resp. Ex. 6)

38. Prior to making a final determination, Chief Crawford along with Ms. Sides, reviewed Petitioner's Statement of Compliance. (T Vol. I, pp 149-153; Resp. Ex. 6)

39. Upon completion of her review, on January 30, 2012, Chief Crawford notified Petitioner via certified mail that "the decision to revoke your Emergency Medical Technician-Paramedic credential stands." (Resp. Ex. 7) The basis for the revocation was a substantiated violation of 10A NCAC. 13P.0701(e)(10). (T Vol I, pp 135, 150; Resp. Ex. 7)

40. As required by law, the January 30, 2012 letter advised Petitioner of his right to appeal the Agency Decision. *See* Resp. Ex. 7, p 2.

41. During the contested case hearing, both Mr. Jordan and Mr. Calhoun described the investigative process they followed. They individually interviewed Petitioner, Vestal, Calhoun, and Dr. Edsall. With respect to each interview, a Summary of Interview was prepared. Upon completion of the Investigation/Interview Packet, the matter was submitted to the OEMS Disciplinary Committee. (Resp. Ex. 2)

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

CONCLUSIONS OF LAW

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

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

3. As an Emergency Medical Technician-Paramedic with an EMT-P credential, Petitioner is subject to the provisions of 10A N.C.A.C. 13P.0701(e)(10).

4. The pertinent section of the code in effect at the time in question is 10A N.C.A.C. 13P.0701(e)(10), which states that NCOEMS may revoke a licensee's EMT-P credential for "testing positive for any substance, legal or illegal, that is *likely to impair* the physical or psychological ability of the credentialed EMS personnel to perform all required or expected functions while on duty." (Emphasis added)

5. When Petitioner reported to work on July 14, 2011, he tested positive for alcohol, a substance which is likely to cause impairment.

6. Respondent did not exceed its authority of jurisdiction; did not act erroneously; did not use improper procedure; did not act arbitrarily or capriciously; and did not fail to act as required by law or rule when it revoked Petitioner's Emergency Medical Technician-Paramedic Credential pursuant 10A N.C.A.C. 13P.0701(e)(10) after Petitioner tested positive for alcohol while on duty with Yadkin County EMS.

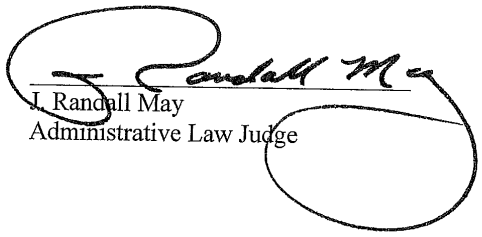
FINAL DECISION

BASED ON the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that Respondent's decision to revoke Petitioner's Emergency Medical Technician-Paramedic credential should be UPHELD.

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 03.0102, 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 5th day of September, 2013.



J. Randall May
Administrative Law Judge

A copy of the foregoing was mailed to:

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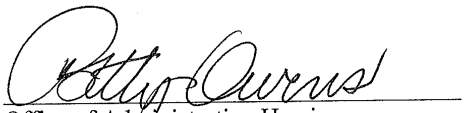
Attorney for Petitioner

June S. Ferrell
Special Deputy Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
Attorney for Respondent

This the 5th day of September, 2013.



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8/23/2013 10:53 AM

STATE OF NORTH CAROLINA

COUNTY OF GUILFORD

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12DOJ10204

RON ALLEN HEDRINGTON PETITIONER, V. NC CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION RESPONDENT.	**PROPOSAL FOR DECISION**

In accordance with North Carolina General Statute § 150B-40(e), Respondent requested the designation of an administrative law judge to preside at an Article 3A, North Carolina General Statute § 150B, contested case hearing of this matter. Based upon the Respondent's request, Administrative Law Judge J. Randall May heard this contested case in High Point, North Carolina on May 31, 2013.

APPEARANCES

Petitioner: Evelyn M. Savage, Attorney at Law
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Respondent: Catherine F. Jordan, Assistant Attorney General
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ISSUE

Did Petitioner knowingly make a material misrepresentation of information required for certification?

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

RULES AT ISSUE

12 NCAC 09A .0204(b)(6)
12 NCAC 09A .0205(b)(4)

FINDINGS OF FACT

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received Notice of Hearing, and Petitioner received the notification of Proposed Denial of Law Enforcement Officer Certification through a letter mailed by Respondent on September 6, 2012. (Respondent's Exhibit 34)

2. The North Carolina Criminal Justice Education and Training Standards Commission has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9A, to certify law enforcement officers and to revoke, suspend, or deny such certification.

3. 12 NCAC 09A .0204(b)(6) provides that the Commission may suspend, revoke, or deny the certification of a criminal justice officer when the Commission finds that the applicant for certification or the certified officer has knowingly made a material misrepresentation of any information required for certification or accreditation.

4. 12 NCAC 09A .0205(b)(4) provides that when the Commission suspends or denies the certification of a criminal justice officer, the period of sanction shall be not less than five years; however, the Commission may either reduce or suspend the period of sanction under Paragraph (b) of this Rule or substitute a period of probation in lieu of suspension of certification following an administrative hearing, where the cause of sanction is material misrepresentation of any information required for certification.

North Carolina State Highway Patrol Application

5. On **June 9, 2005**, Petitioner completed a Form F-3 Personal History Statement to be submitted to the Commission for certification as a law enforcement officer with the North Carolina Statement Highway Patrol. (Respondent's exhibit 2) Petitioner signed, dated, and notarized his Form F-3 Personal History Statement. Directly above Petitioner's signature is a paragraph that states that:

I hereby certify that each and every statement made on this form is true and complete and I understand that any misstatement or omission of information will subject me to disqualification or dismissal. I also acknowledge that I have a continuing duty to update all information contained in this document. I will report to the employing agency and forward to the N.C. Criminal Justice Education and Training Standards Commission any additional information which occurs after the signing of this document.

A. Question 48 of Petitioner's June 9, 2005 Form F-3 Personal History Statement stated: Have you ever had a Domestic Violence Protective Order issued against you? Include both ex-parte Domestic Violence Protective Orders and those entered subsequent to a hearing. Petitioner answered "No." Petitioner failed to answer this question truthfully because he failed to disclose that on December 31, 2002, an ex parte domestic violence protective order was issued against him and that on March 28, 2002, a temporary restraining order was entered against him. The evidence at the hearing showed the following:

1. On December 31, 2002, the trial court entered an Ex Parte Domestic Violence Protective Order against Petitioner in Cumberland County, North Carolina. (Respondent's exhibit 4)

    a. On December 31, 2002, Ms. Chavis filed a complaint and motion for domestic violence protective order in Cumberland County, North Carolina. (Respondent's exhibit 4) The complaint alleged that Ms. Chavis and Petitioner were persons of the opposite sex who are in or have been in a dating relationship. The complaint alleged that "A filed police report for following me and my daughter, many calls to the police because he would not allow me to leave my home, unplug my phones, grabbing me and aroung [sic] my neck and head, twisting my arms, Dec, 24th, Dec 30, on Dec 13th Bruise face." The complaint alleged that "He has started verbally abusing my four year old, by hollering at her and slaming [sic] in her face." The complaint alleged that Ms. Chavis believed that "there is danger of serious and immediate injury to me or my children."

    b. The December 31, 2002 order found that Petitioner and Ms. Chavis were persons of the opposite sex who are not married but who live together or have lived today, and that they are in a dating relationship. The order found that Petitioner placed Ms. Chavis in actual fear of imminent serious bodily injury.

    c. On December 31, 2012, a Civil Summons was issued against Petitioner. (Respondent's exhibit 4)

    d. On January 16, 2002, a Civil Summons for the ex parte domestic violence protective order was served on Petitioner.

e. On January 28, 2002, the trial court entered an order that stated that "this case is dismissed for the plaintiff's failure to prosecute."

2. On March 28, 2002, Ms. Chavis filed a civil summons against Petitioner in Cumberland County, North Carolina. (Respondent's exhibit 5) The complaint alleged that Petitioner □has been engaged in a course of conduct toward [Ms. Chavis] and against [Ms. Chavis] in such a manner that unless immediately restrained will result in irreparable injury and harm as follows."

a. The complaint alleged:

That on or about March 15, 2002, Defendant continuously called Plaintiff on a cell phone verbally harassing her and wanting to know where she was and when she was going home. The Defendant became angry when he found out that she was with a friend, a [sic] was waiting in her house when she arrived home.

On or about March 16, 2002, in the early morning, Plaintiff was trying to get ready for work, when Defendant in the heat of an argument, came into the bathroom, pulled the curling iron out of the wall, and burned himself, wherein he because furious and grabbed Plaintiff's face and started squeezing her, then twisted her arms and began hitting Plaintiff.

On or about March 16, 2002 Defendant was arrested for criminal assault on a female wherein the bond hearing was held on March 18, 2002 and Defendant was ordered to stay away from the Plaintiff, refrain from all contact and be accompanied by Sheriff to pick up any personal belongings from Plaintiff's residence.

On or about March 18, 2002, Defendant called Plaintiff to see if he could pick up his personal belongings from Plaintiff's apartment, and was told to be escorted by the police. When Defendant arrived the police were not with Defendant, and Defendant informed Plaintiff that he was dropped off at the corner. Defendant forced his way into the apartment and began to assault Plaintiff. Plaintiff called the police and the police arrived and asked Defendant to leave the premises.

On or about March 22, 2002, Defendant was parked outside of the apartment complex waiting for Plaintiff to return from work. As Plaintiff got out of her car, Defendant ran towards her shouting obscenities. Plaintiff called the police but was told by the dispatcher that nothing could be done if Defendant was gone by the time they got there. Later that evening, Plaintiff was talking

with a friend on the telephone and heard a loud bang, and found out that Defendant had taken a ladder from a Construction site behind the apartment complex and had leaned up against the apartment building and was trying to get in the window. The police were called and were unable to locate the Defendant, and upon information and belief of the Plaintiff it was the Defendant who tried to break into the window.

b. On March 28, 2002, the trial court entered a temporary restraining order pursuant to Ms. Chavis's complaint granting Ms. Chavis the sole and exclusive use and possession of the residence located at 592#D Lambert Street, Fayetteville, North Carolina, evicting Petitioner and enjoining Petitioner from assaulting, molesting, harassing or interfering with Ms. Chavis in any way or manner or at any time or place.

c. On June 12, 2002, the trial court entered a restraining order against Petitioner based upon Ms. Chavis's complaint. Petitioner had retained an attorney, and his attorney appeared in court in Cumberland County on his behalf. Petitioner signed the restraining order. The order stated that Petitioner would be □enjoined or restrained from assaulting, molesting, harassing, telephone calling, following, stalking or interfering with the other party in any way or manner at any time or place. The order stated that the Sheriff of Cumberland County would have a copy of the order. The order was in effect for one year from the date of June 12, 2002.

Central Carolina Community College Police Department

6. On **December 15, 2006**, Petitioner completed a Form F-3 Personal History Statement to be submitted to the Commission for certification as a law enforcement officer. Petitioner's December 15, 2006 Form F-3 Personal History Statement was completed through Central Carolina Community College. An individual with Central Carolina Community College signed, dated, and notarized his Form F-3 Personal History Statement. Directly above the signature is a paragraph that states that:

I hereby certify that each and every statement made on this form is true and complete and I understand that any misstatement or omission of information will subject me to disqualification or dismissal. I also acknowledge that I have a continuing duty to update all information contained in this document. I will report to the employing agency and forward to the N.C. Criminal Justice Education and Training Standards Commission any additional information which occurs after the signing of this document.

A. Question 48 of Petitioner's June 9, 2005 Form F-3 Personal History Statement stated: Have you ever had a Domestic Violence Protective Order issued against

you? Include both ex-parte Domestic Violence Protective Orders and those entered subsequent to a hearing. Petitioner answered "No."

B. Petitioner failed to answer this question truthfully because he failed to disclose that on December 31, 2001, an ex-parte domestic violence protective order was entered against him, which was served on him on January 16, 2002. Petitioner also failed to answer this question truthfully because he failed to disclose that on March 28, 2002, a temporary restraining order was entered against him, which was served on him on April 2, 2002.

Fayetteville State University Police Department Application

7. On **February 5, 2008**, Petitioner completed a Form F-3 Personal History Statement to be submitted to the Commission for certification as a law enforcement officer with Fayetteville State University Police Department. (Respondent's exhibit 9) Petitioner signed, dated, and notarized his Form F-3 Personal History Statement. Directly above Petitioner's signature is a paragraph that states that:

I hereby certify that each and every statement made on this form is true and complete and understand that any misstatement or omission of information will subject me to disqualification or dismissal.

A. Question 48 of Petitioner's June 9, 2005 Form F-3 Personal History Statement stated: Have you ever had a Domestic Violence Protective Order issued against you? Include both ex-parte Domestic Violence Protective Orders and those entered subsequent to a hearing. Petitioner answered "No."

B. Petitioner failed to answer this question truthfully because he failed to disclose that on December 31, 2001, an ex-parte domestic violence protective order was entered against him, which was served on him on January 16, 2002. Petitioner also failed to answer this question truthfully because he failed to disclose that on March 28, 2002, a temporary restraining order was entered against him, which was served on him on April 2, 2002.

8. On February 5, 2008, Petitioner completed a Mandated Background Investigation and submitted a Form F-8 to Respondent for certification for employment with Fayetteville State University Police Department. (Respondent's exhibit 10)

A. Petitioner was interviewed by Jacqueline Clay and provided answered to questions for his Mandated Background Investigation which were submitted to the Commission for his application for certification. (Respondent's exhibit 10)

B. Petitioner was asked "Have you ever had any type of Domestic Violence Restraining Order issued against you? Petitioner answered "no." (Respondent's exhibit 10)

C. Petitioner failed to answer this question truthfully because he failed to disclose that on December 31, 2001, an ex-parte domestic violence protective order was entered against him, which was served on him on January 16, 2002. Petitioner also failed to answer this question truthfully because he failed to disclose that on March 28, 2002, a temporary restraining order was entered against him, which was served on him on April 2, 2002.

Saint Augustine College Police Department Application

9. On **March 25, 2011**, Petitioner completed a Form F-3 Personal History Statement to be submitted to the Commission for certification as a law enforcement officer with Saint Augustine College Police Department. (Respondent's exhibit 14) Petitioner signed, dated, and notarized his Form F-3 Personal History Statement. Directly above Petitioner's signature is a paragraph that states that:

I hereby certify that each and every statement made on this form is true and complete and I understand that any misstatement or omission of information will subject me to disqualification or dismissal. I also acknowledge that I have a continuing duty to update all information contained in this document. I will report to the employing agency and forward to the N.C. Criminal Justice Education and Training Standards Commission any additional information which occurs after the signing of this document.

A. Question 47 asked: □Have you ever been arrested by a law enforcement officer or otherwise charged with a criminal offense?" Petitioner answered the question "no." (Respondent's exhibit 14) Petitioner failed to answer this question truthfully because he failed to list that on July 4, 2010, while deployed with the U.S. military to Afghanistan, he was detained and advised of his legal rights by the military police regarding an allegation that he had assaulted an individual.

1. Evidence showed that on July 4, 2010, Petitioner was charged with simple assault. (Respondent's exhibit 15) A narrative provided on the military police report stated that Petitioner "locked the door, grabbed [the victim] by the throat and dragged [the victim] on the floor saying never to embarrass him like that, [the victim] also stated he was unable to yell for help because of the hold [Petitioner] had on him. [The victim] stated [Petitioner] said that if he were disrespected again [Petitioner] would kill him and threatened him if he told anyone. [The victim] also stated [Petitioner] had him in a choke hold for 5-8 minutes and slapped him twice for disrespecting him. [Petitioner] was advised of his Article 31 Rights (Via DA Form 3881, rights warning procedure/waiver certificate) waived his rights and agreed to make a statement.

B. Question 39 asked: "Were you ever court-martialed, tried on charges, or were you the subject of a summary court, deck court, or non-judicial punishment (Captain's mast, company punishment, Article 15, etc.) or any other disciplinary action while a member [of the] armed forces?" Petitioner checked the box "no."

(Respondent's exhibit 14) Petitioner failed to answer this question truthfully because he failed to indicate that while a member of the United States Armed Forces, North Carolina National Guard, he had received a Field Grade Article 15, non-judicial punishment, on November 1, 2010 in which he received the punishment of "Reduction to the Grade of Specialist, E-4."

1. Evidence showed that on November 1, 2010, Petitioner received an Article 15, non-judicial punishment. (Respondent's exhibit 17) The grounds for the Article 15, non-judicial punishment were that Petitioner "with intent to deceive" told "First Sergeant Eddie Dean, an official statement, to wit: 'I don't know where Major John A. Vaanho got the information that I couldn't wear my improved outer tactical vest,' or words to that effect, which statement was totally false, and was then known by you to be so false. This is in violation of Article 107, UCMJ." The other grounds for the Article 15, non-judicial punishment were that on July 4, 2010, Petitioner assaulted Sergeant Olukayode A. Alabi by grabbing his hand, that Petitioner pushed Alabi's chest with his hands, and that he grabbed Alabi by the throat, pulling him to the floor and striking. Petitioner's Article 15 showed that he received notice of the Article 15 because he signed the document.

C. Question 40 asked: "List any disciplinary action taken against you in the National Guard or other reserve unit[.]" Petitioner answered "None." (Respondent's exhibit 14) Petitioner failed to answer this question truthfully because he failed to indicate that while a member of the United States Armed Forces, North Carolina National Guard, he had received a Field Grade Article 15, non-judicial punishment, on November 1, 2010 in which he received the punishment of □Reduction to the Grade of Specialist, E-4."

Taylortown Police Department Application

10. On **May 10, 2011**, Petitioner completed a Form F-5A Report of Appointment Form to be submitted to the Commission for certification as a law enforcement officer with Taylortown Police Department.

A. Petitioner signed and dated the Form F-5A and the following paragraph was directly above his signature:

As the applicant for certification, I attest that I am aware of the minimum standards for employment, that I meet or exceed each of those requirements, that information provided above and all other information submitted by me, both oral and written throughout the employment and certification process, is thorough, complete, and accurate to the best of my knowledge. I further understand and agree that any omission, falsification or misrepresentation of any factor portion of such information can be the sole basis for termination of my employment and/or denial, suspension or revocation of my certification as any time, now or later. I

further understand that I have a continuing duty to notify the Commission of all criminal offenses which I am arrested for, charged with, plead no contest to, plead guilty to or am found guilty of. If applicable, I specifically acknowledge that my continued employment and certification are contingent on the results of the fingerprint records check and other criminal history records being consistent with the information provided in a Personal History Statement and as reflected in this application.

B. The Form F-5A states: Each applicant must list any and all criminal charges regardless of the date of offense and the disposition (to include dismissals, not guilty, nol pros, PJC, or any other disposition where you entered a plea of guilty).

C. Petitioner checked the box indicating "no criminal charges." Petitioner initialed the box checked.

D. Petitioner was untruthful when he provided this answer. Petitioner failed to provide information that on June 16, 2006, he was charged with aggravated assault. (Respondent's exhibit 20) Petitioner cannot claim that he did not know about the charge, particularly because he listed the charge on his May 13, 2008 Form F-5A for his application for certification with Fayetteville State University Police Department (Respondent's exhibit 8), and listed the charge on his F-5A with Saint Augustine Collect Police Department on March 27, 2011. (Respondent's exhibit 27)

E. In any event, evidence showed that on July 16, 2006, Petitioner was charged with Aggravated Assault by the Fayetteville Police Department. (Respondent's exhibit 20) The victim provided a statement that she was "walking down Gables Dr to stop her friend . . . from arguing with [Petitioner]. As she was coming down the hill [Petitioner] had pulled his weapon and pointed it at the car. She states that he then turned to her and pointed the small black handgun at her. He holstered the weapon, she then got in the car and drove her friend back up the hill. He got in his car and left just prior to our arrival." (Respondent's exhibit 20) Law enforcement filed a police report and charged Petitioner with aggravated assault. Fayetteville Police Department Officer Kiger obtained a magistrate's order against Petitioner for assault by pointing a gun. (Respondent's exhibit 21) A voluntary dismissal was taken on the charge. (Respondent's exhibit 23) Nonetheless, Petitioner was in fact charged with aggravated assault or assault by pointing a gun, and Petitioner failed to be truthful when he did not disclose this charge on his Form F-5A with Taylortown Police Department. (Respondent's exhibit 19)

11. In May 2011, Petitioner completed a Mandated Background Investigation and submitted a Form F-8 to Respondent for certification for employment with Taylortown Police Department. (Respondent's exhibit 30)

A. As part of Petitioner's mandated background investigation, he was asked a series of questions concerning his military service. (Respondent's exhibit 30)

B. Petitioner was asked "Explain any negative entries that may have been placed into your personnel file even though they may have been removed." Petitioner answered "none." Petitioner was untruthful when he answered this question because he failed to disclose that when he was a member of the United States Armed Forces, North Carolina National Guard, that he had received a Field Grade Article 15, non-judicial punishment, on November 1, 2010 in which he received the punishment of "Reduction to the Grade of Specialist, E-4."

C. Petitioner was also asked "Were you disciplined to any degree: Court Martialed, Reprimanded (including Article 15), etc." Petitioner answered "no." Petitioner was untruthful when he answered this question because he failed to disclose that when he was a member of the United States Armed Forces, North Carolina National Guard, that he had received a Field Grade Article 15, non-judicial punishment, on November 1, 2010 in which he received the punishment of "Reduction to the Grade of Specialist, E-4."

D. Petitioner was also asked "Describe any arrests or conviction under UCMJ?" Petitioner answered "none." Petitioner was untruthful when he answered this question because he failed to disclose that when he was a member of the United States Armed Forces, North Carolina National Guard, that he had received a Field Grade Article 15, non-judicial punishment, on November 1, 2010 in which he received the punishment of □Reduction to the Grade of Specialist, E-4."

12. On August 7, 2011, Petitioner completed a Mandated Background Investigation and submitted a Form F-8 to Respondent for certification for employment with St. Augustine's College Police Department. (Respondent's exhibit 31) Petitioner was asked questions by C. Lupo for his application for commissioning and his employment with St. Augustine's College Police Department.

A. Petitioner was asked for Question 32: "Describe any criminal involvement that you may have had in the past." Petitioner answered "charged with assault by pointing a gun. That was dismissed by the DA, and I was also exonerated by training and standrds [sic]." Petitioner was untruthful when he answered this question because he failed to disclose that on July 4, 2010, while deployed with the U.S. military to Afghanistan, he was detained and advised of his legal rights by the military police regarding an allegation that he had assaulted an individual.

B. Petitioner was asked for Question 35: "Have you ever been arrested, detained, or charged with a crime, even if the charges against you have been dismissed?" Petitioner answered "Yes." Petitioner was untruthful when he answered this question because he failed to disclose that on July 4, 2010, while deployed with the U.S. military to Afghanistan, he was detained and advised of his legal rights by the military police regarding an allegation that he had assaulted an individual.

C. Petitioner was asked for Question 5 for the questions about his military service: "Explain any negative entries that may have been placed in your personnel file even though they may have been removed." Petitioner answered "None." Petitioner was untruthful when he answered this question because he failed to disclose that when he was a member of the United States Armed Forces, North Carolina National Guard, that he had received a Field Grade Article 15, non-judicial punishment, on November 1, 2010 in which he received the punishment of "Reduction to the Grade of Specialist, E-4."

D. Petitioner was asked for Question 6 for the questions about his military service: "Were you disciplined to any degree? Court Martialed, Reprimanded (including Article 15), etc." Petitioner answered "No." Petitioner was untruthful when he answered this question because he failed to disclose that when he was a member of the United States Armed Forces, North Carolina National Guard, that he had received a Field Grade Article 15, non-judicial punishment, on November 1, 2010 in which he received the punishment of "Reduction to the Grade of Specialist, E-4."

E. Petitioner was asked for Question 9 for the questions about his military service: "Describe any arrests or convictions under UCMJ." Petitioner answered "No." Petitioner was untruthful when he answered this question because he failed to disclose that when he was a member of the United States Armed Forces, North Carolina National Guard, that he had received a Field Grade Article 15, non-judicial punishment, on November 1, 2010 in which he received the punishment of "Reduction to the Grade of Specialist, E-4."

13. On November 18, 2011, Petitioner completed a Form F-3 Personal History Statement to be submitted to the Commission for certification as a law enforcement officer with St. Augustine College Police Department. (Respondent's exhibit 32) Petitioner's November 18, 2011 Form F-3 Personal History Statement was submitted to the Commission for certification with St. Augustine's College Police Department. Petitioner signed, dated, and notarized his Form F-3 Personal History Statement. Directly above Petitioner's signature is a paragraph that states that:

I hereby certify that each and every statement made on this form is true and complete and I understand that any misstatement or omission of information will subject me to disqualification or dismissal. I also acknowledge that I have a continuing duty to update all information contained in this document. I will report to the employing agency and forward to the N.C. Criminal Justice Education and Training Standards Commission any additional information which occurs after the signing of this document.

A. Question 47 asked: "Have you ever been arrested by a law enforcement officer or otherwise charged with a criminal offense?" Petitioner answered the question "yes" and stated that he was charged with assault by pointing a gun on June 16, 2006 by Fayetteville Police Department, and that charges were dismissed by the district attorney. Petitioner was untruthful when he answered this question

because he failed to list that on July 4, 2010, while deployed with the U.S. military to Afghanistan, he was detained and advised of his legal rights by the military police regarding an allegation that he had assaulted an individual.

B. Question 39 asked: "Were you ever court-martialed, tried on charges, or were you the subject of a summary court, deck court, or non-judicial punishment (Captain's mast, company punishment, Article 15, etc.) or any other disciplinary action while a member [of the] armed forces?" Petitioner checked the box "no." (Respondent's exhibit 14) Petitioner was untruthful when he answered this question because he failed to indicated that while a member of the United States Armed Forces, North Carolina National Guard, he had received a Field Grade Article 15, non-judicial punishment, on November 1, 2010 in which he received the punishment of "Reduction to the Grade of Specialist, E-4."

C. Question 40 asked: "List any disciplinary action taken against you in the National Guard or other reserve unit[.]" Petitioner answered "None." (Respondent's exhibit 14) Petitioner was untruthful when he answered this question because he failed to indicated that while a member of the United States Armed Forces, North Carolina National Guard, he had received a Field Grade Article 15, non-judicial punishment, on November 1, 2010 in which he received the punishment of "Reduction to the Grade of Specialist, E-4."

14. Petitioner requested an administrative hearing.

15. Respondent's investigator Richard Squires testified at the hearing that Respondent received documentation submitted on behalf of Petitioner for certification as a law enforcement officer with the North Carolina State Highway Patrol, Central Carolina Community College, Fayetteville State University Police Department, Taylortown Police Department, and St. Augustine's College Police Department. Squires testified that he collected documents for Petitioner's application for certification and that he reviewed the documents and found inconsistencies within the documents. Squires testified that it is important for the applicant for certification to be honest in the completion of the forms. He testified that honesty is also an important trait in law enforcement. Squires testified that he drafted the memorandum to be submitted to the probable cause committee, who found probable cause existed to suspend or deny Petitioner's application for certification. (Respondent's exhibit 33)

16. Petitioner testified and admitted that this information should have been disclosed. He testified that he completed the Form F-3 with the State Highway Patrol, the Form F-3 with Central Carolina Community College, and the Form F-3 with Fayetteville State Police Department. He admitted that he completed three Personal History Statements, and all three contained the same questions for question 48. He admitted that in all three documents, he checked "no." He claimed that he checked no because he had a conversation with someone at the State Highway Patrol, someone at Central Carolina Community College, and someone at Fayetteville State Police Department, and someone with training and standards, and stated that he was told not to list the ex parte domestic

violence protective order or the temporary restraining order. No one testified on Petitioner's behalf to this allegation. He also thought that domestic violence protective orders had been expunged, although he provided no documentation showing that they had been expunged or explaining why he thought they had been expunged. He also failed to explain how a civil order could be expunged and he stated that he now understood that expungements apply to criminal orders only. Petitioner did not update his Form F-3s after discovering this information. Petitioner thought that the Taylortown Police Department forms had been updated after he submitted them to training and standards, but failed to provide any evidence of the updated forms. He admitted that he failed to list military disciplinary actions. He stated that it was an honest mistake for not listing assault by pointing a gun.

17. Petitioner's explanation for why he made nineteen misrepresentations is implausible. Petitioner failed to present any documentation supporting his claims, and failed to provide a reasonable believable excuse for his failure to include this information on the forms. Petitioner knowingly made nineteen material misrepresentations in the forms that he completed to be submitted for certification with the Commission.

BASED UPON the foregoing FINDINGS OF FACT and upon the preponderance or greater weight of the evidence in the whole record, the undersigned makes the following:

CONCLUSIONS OF LAW

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

2. The North Carolina Criminal Justice Education and Training Standards Commission has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9A, to certify law enforcement officers and to revoke, suspend, or deny such certification.

3. 12 NCAC 09A .0204(b)(6) states that:

> (b) The Commission may suspend, revoke or deny the certification of a criminal justice officer when the Commission finds that the applicant for certification or the certified officer:
>
> > (6) has knowingly made a material misrepresentation of any information required for certification or accreditation[.]

4. 12 NCAC 09A .0205(b)(4) provides that when the Commission suspends or denies the certification of a criminal justice officer, the period of sanction shall be not less than five years; however, the Commission may either reduce or suspend the period of sanction

under Paragraph (b) of this Rule or substitute a period of probation in lieu of suspension of certification following an administrative hearing, where the cause of sanction is material misrepresentation of any information required for certification.

5. A preponderance of the evidence exists to support the conclusion that Petitioner knowingly made a material misrepresentation of information required for certification when Petitioner completed a Personal History Statement, Form F-3 on June 9, 2005 for the North Carolina Highway Patrol. Petitioner made a material misrepresentation when he answered Question 48 and failed to truthfully answer when asked whether he had ever had a Domestic Violence Protection Order issued against him.

6. A preponderance of the evidence exists to support the conclusion that Petitioner knowingly made a material misrepresentation of information required for certification when Petitioner completed a Personal History Statement, Form F-3 on December 15, 2006 for Central Carolina Community College. Petitioner made a material misrepresentation when he answered Question 48 and failed to truthfully answer when asked whether he had ever had a Domestic Violence Protection Order issued against him.

7. A preponderance of the evidence exists to support the conclusion that Petitioner knowingly made a material misrepresentation of information required for certification when Petitioner completed a Personal History Statement, Form F-3 on February 5, 2008 for Fayetteville Statement University Police Department. Petitioner made a material misrepresentation when he answered Question 48 and failed to truthfully answer when asked whether he had ever had a Domestic Violence Protection Order issued against him.

8. A preponderance of the evidence exists to support the conclusion that Petitioner knowingly made a material misrepresentation of information required for certification when Petitioner completed a Mandated Background Investigation on February 5, 2008 for Fayetteville Statement University Police Department. Petitioner made a material misrepresentation when he failed to truthfully answer when asked whether he had ever had a Domestic Violence Protection Order issued against him.

9. A preponderance of the evidence exists to support the conclusion that Petitioner knowingly made a material misrepresentation of information required for certification when Petitioner completed a Personal History Statement, Form F-3 on March 25, 2011 for St. Augustine College Police Department. Petitioner made a material misrepresentation when he answered Question 47 and failed to truthfully answer when asked whether he had ever been arrested or charged with a criminal offense.

10. A preponderance of the evidence exists to support the conclusion that Petitioner knowingly made a material misrepresentation of information required for certification when Petitioner completed a Personal History Statement, Form F-3 on March 25, 2011 for St. Augustine College Police Department. Petitioner made a material misrepresentation when he answered Question 39 and failed to truthfully answer when asked whether he had ever been court-martialed, tried on charges, or subject of a summary court, deck court, or non-judicial punishment.

11. A preponderance of the evidence exists to support the conclusion that Petitioner knowingly made a material misrepresentation of information required for certification when Petitioner completed a Personal History Statement, Form F-3 on March 25, 2011 for St. Augustine College Police Department. Petitioner made a material misrepresentation when he answered Question 40 and failed to truthfully answer when asked whether he had ever been subject to any disciplinary action taken against him in the National Guard or other reserve unit.

12. A preponderance of the evidence exists to support the conclusion that Petitioner knowingly made a material misrepresentation of information required for certification when Petitioner completed a Report of Appointment, Form F-5A on May 10, 2011 for Taylortown Police Department. Petitioner made a material misrepresentation when he failed to truthfully answer when asked to list his criminal charges.

13. A preponderance of the evidence exists to support the conclusion that Petitioner knowingly made a material misrepresentation of information required for certification when Petitioner completed a Mandated Background Investigation, Form F-8 in May 2011 for Taylortown Police Department. Petitioner made a material misrepresentation when he answered Question 5 and failed to truthfully answer when asked whether he had ever had any negative entries placed in his personnel file.

14. A preponderance of the evidence exists to support the conclusion that Petitioner knowingly made a material misrepresentation of information required for certification when Petitioner completed a Mandated Background Investigation, Form F-8 in May 2011 for Taylortown Police Department. Petitioner made a material misrepresentation when he answered Question 6 and failed to truthfully answer when asked whether he had ever been disciplined in any degree including court-martialed or reprimanded.

15. A preponderance of the evidence exists to support the conclusion that Petitioner knowingly made a material misrepresentation of information required for certification when Petitioner completed a Mandated Background Investigation, Form F-8 in May 2011 for Taylortown Police Department. Petitioner made a material misrepresentation when he answered Question 9 and failed to truthfully answer when to describe any arrests or convictions under The Uniform Code of Military Justice.

16. A preponderance of the evidence exists to support the conclusion that Petitioner knowingly made a material misrepresentation of information required for certification when Petitioner completed a Mandated Background Investigation, Form F-8 on August 7, 2011 for St. Augustine College Police Department. Petitioner made a material misrepresentation when he answered Question 32 and failed to truthfully answer when asked to describe any criminal conduct he may have had in the past.

17. A preponderance of the evidence exists to support the conclusion that Petitioner knowingly made a material misrepresentation of information required for certification when Petitioner completed a Mandated Background Investigation, Form F-8 on August 7, 2011 for St. Augustine College Police Department. Petitioner made a material

misrepresentation when he answered Question 35 and failed to truthfully answer when asked whether he had ever been arrested, detained, or charged with a crime.

18. A preponderance of the evidence exists to support the conclusion that Petitioner knowingly made a material misrepresentation of information required for certification when Petitioner completed a Mandated Background Investigation, Form F-8 on August 7, 2011 for St. Augustine College Police Department. Petitioner made a material misrepresentation when he answered Question 5 and failed to truthfully answer when asked whether he had any negative entries that may have been placed in his personnel file.

19. A preponderance of the evidence exists to support the conclusion that Petitioner knowingly made a material misrepresentation of information required for certification when Petitioner completed a Mandated Background Investigation, Form F-8 on August 7, 2011 for St. Augustine College Police Department. Petitioner made a material misrepresentation when he answered Question 6 and failed to truthfully answer when asked whether he had ever been disciplined to any degree.

20. A preponderance of the evidence exists to support the conclusion that Petitioner knowingly made a material misrepresentation of information required for certification when Petitioner completed a Mandated Background Investigation, Form F-8 on August 7, 2011 for St. Augustine College Police Department. Petitioner made a material misrepresentation when he answered Question 9 and failed to truthfully answer when asked whether he had ever been arrested or convicted under The Uniform Code of Military Justice.

21. A preponderance of the evidence exists to support the conclusion that Petitioner knowingly made a material misrepresentation of information required for certification when Petitioner completed a Personal History Statement, Form F-3 on November 18, 2011 for St. Augustine College Police Department. Petitioner made a material misrepresentation when he answered Question 47 and failed to truthfully answer when asked whether he had ever been arrested or charged with a criminal offense.

22. A preponderance of the evidence exists to support the conclusion that Petitioner knowingly made a material misrepresentation of information required for certification when Petitioner completed a Personal History Statement, Form F-3 on November 18, 2011 for St. Augustine College Police Department. Petitioner made a material misrepresentation when he answered Question 39 and failed to truthfully answer when asked whether he had ever been court-martialed, tried on charges, or the subject of a summary court, deck court, captain's mast or company punishment, or any other disciplinary action while a member of the armed forces.

23. A preponderance of the evidence exists to support the conclusion that Petitioner knowingly made a material misrepresentation of information required for certification when Petitioner completed a Personal History Statement, Form F-3 on November 18, 2011 for St. Augustine College Police Department. Petitioner made a material

misrepresentation when he answered Question 40 and failed to truthfully answer when asked to list any disciplinary action taken against him in the National Guard or other reserve unit.

24. The findings of the Probable Cause Committee of the Respondent are supported by substantial evidence.

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

26. Respondent has the burden of proof in the case at bar. Respondent has showed by a preponderance of the evidence that Respondent's proposed denial of Petitioner's law enforcement officer certification is supported by substantial evidence.

PROPOSAL FOR DECISION

After careful consideration of the evidence the proposals and arguments counsel and based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the Undersigned finds that in many respects Petitioner has had a commendable life, and there is no direct proof that his misrepresentations were knowing and intentional. However, there were simply too many instances of this behavior to turn a blind eye to them. Therefore, the undersigned Administrative Law Judge recommends Respondent deny Petitioner's law enforcement officer certification for a period up to four (4) years based upon Petitioner's several material misrepresentations of information required for certification.

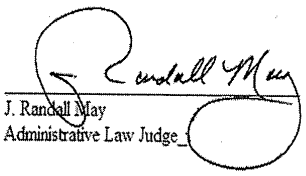
ORDER AND NOTICE

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

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

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 23rd day of August, 2013, *remote supplicio.*



J. Randall May
Administrative Law Judge

On this date mailed to:

EVELYN M SAVAGE
VAN CAMP MEACHAM & NEWMAN, PLLC
PO BOX 1389
PINEHURST, NC 28370
ATTORNEY FOR PETITIONER

CATHERINE F JORDAN
ASSISTANT ATTORNEY GENERAL
NC DEPARTMENT OF JUSTICE
9001 MAIL SERVICE CENTER
RALEIGH, NC 27699
ATTORNEY FOR RESPONDENT

This the 23rd day of August, 2013.

Office of Administrative Hearings
6714 Mail Service Center
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Telephone: 919/431-3000
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STATE OF NORTH CAROLINA COUNTY OF FORSYTH	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 12 OSP 09069
GWENDOLYN CLAIRE MONTGOMERY, Petitioner, v. NC DPS/DOCC/LORI DUNN, Respondents.	**FINAL DECISION**

This contested case was heard before the Honorable Selina M. Brooks, Administrative Law Judge, on April 24, 2013, at the Guilford County Courthouse, High Point, North Carolina.

APPEARANCES

For Petitioner: Gwendolyn C. Montgomery
Pro Se
3362 Hyde Place Circle
Winston-Salem, North Carolina 27103

For Respondent: Yvonne B. Ricci
Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602

PROTECTIVE ORDER

A Protective Order was entered on consent by the Honorable Julian Mann, III on February 25, 2013.

PREHEARING MOTION

Petitioner filed a Motion To Amend Complaint For Additional Harassment And Retaliation. The parties appeared before Judge Mann on February 25, 2013 on various prehearing matters, including this motion, at which time Respondent was given additional time to file a written Response. Respondent did not file a Response. This Motion was orally renewed at the hearing of this contested case on April 24, 2013. The Undersigned granted this Motion on the record, allowing Petitioner to amend her Petition to include the claim of retaliation.

WITNESSES

The *Pro Se* Petitioner, Gwendolyn Montgomery, who testified during the hearing, presented testimony from the following eight witnesses: Joyce Evelyn Ingram, a Lead Judicial Services Coordinator for the Community Corrections Section of the North Carolina Department of Public Safety; Lori Austin Dunn, a Lead Judicial Services Coordinator for the Community Corrections Section of the North Carolina Department of Public Safety; Jean Clemmer Clark, a Chief Probation/Parole Officer for the Community Corrections Section of the North Carolina Department of Public Safety; Jane Leigh Bumgardner, an Assistant Judicial District Manager for the Community Corrections Section of the North Carolina Department of Public Safety; Charles Matthew Dellinger, Network Technician for the Community Corrections Section of the North Carolina Department of Public Safety; Jonathan Marshall Wilson, a Chief Probation/Parole Officer for the Community Corrections Section of the North Carolina Department of Public Safety; Christopher Oxendine, Judicial District Manager for the Community Corrections Section of the North Carolina Department of Public Safety; and Greta Rogers-Bethea, EEO Officer.

The Respondent, North Carolina Department of Public Safety (hereinafter "Respondent" or "NCDPS") did not present any other witnesses.

EXHIBITS

Petitioner's exhibits ("P. Exs.") 1 - 10 were admitted into evidence.

Respondent's exhibits ("R. Exs.") 1 – 8, 11 and 12 were admitted into evidence.

ISSUE

Whether Petitioner, Gwendolyn Montgomery, met her burden to show by a preponderance of the evidence that she was discriminated against, harassed and retaliated against based on her race by the Respondent?

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

BASED UPON the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

FINDINGS OF FACT

1. Petitioner alleges that Respondent, through the various actions of its employees, did unlawfully discriminate against her because of her race, harassed her creating a hostile work environment, and retaliated against her because she filed a complaint with the Respondent's Equal Employment Office ("EEO") on May 8, 2012. (T. p. 14; Petition; Prehearing Statement; Motion To Amend Complaint For Additional Harassment And Retaliation)

2. Petitioner alleges that the conduct of Ms. Dunn, her direct supervisor and a White female, in placing the photograph of a White man in her office, was racially discriminatory and harassing.

3. Petitioner alleges that in 2009 a webcam had been installed in her office that permitted Ms. Bumgardner and Mr. Oxendine to observe her remotely and created a hostile work environment.

4. Petitioner alleges that the Respondent retaliated against her by issuing her a written warning and continuing to investigate her work conduct.

5. The Petitioner is a single African-American female.

6. Petitioner began working for the Respondent in February 2006. (R. Ex. 8.)

7. Ms. Dunn began supervising the Petitioner in February 2006. During the time that Ms. Dunn supervised the Petitioner she also supervised two other African-American females and one White female. She did not treat these employees differently based on their race and she has joked with all of her subordinates. (R. Ex. 1; T. pp. 62- 64)

8. On or about April 9, 2012, Ms. Clark was walking down the hallway when she saw Ms. Dunn laughing. Ms. Dunn said that "she was just going to put some pictures of Deputy Childress in the [Petitioner's] office as a joke and I [Ms. Clark] just went about my business." (T. p. 69)

9. Ms. Clark did not believe that the actions of Ms. Dunn were racially motivated and that to her knowledge the unit did not have racial issues or tensions. (R. Ex. 3; T. p. 71)

10. Petitioner reported to Mr. Oxendine that Ms. Dunn had placed pictures of Deputy Childress in her office and that she "just wanted people to stop playing," but that the Petitioner did not indicate to him that she thought the actions of Ms. Dunn were based on her race. (T. pp. 100-01, 104-05; R. Ex. 2)

11. Ms. Dunn admitted that she placed pictures of Deputy Danny Childress, a married, White male, in the Petitioner's office. When she realized the Petitioner was offended,

she apologized profusely to the Petitioner multiple times and removed the pictures from the Petitioner's office. Ms. Dunn was very sorry for putting the pictures in the Petitioner's office, explaining that it was not malicious. (T. pp. 49-51; P. Ex. 1; R. Ex. 1)

12. Ms. Dunn has never had cause to believe that the relationship between Petitioner and Deputy Childress was overly friendly or inappropriate in any way. (T. p. 65)

13. Ms. Dunn has played the same trick on another coworker by placing framed photographs on the other coworker's credenza while the coworker was on maternity leave. (T. p. 57)

14. Ms. Dunn testified that the joke was not related to Petitioner's race. (T. p. 62)

15. Mr. Oxendine instructed Ms. Clark to discuss the matter with Ms. Dunn. (T. p. 69) Ms. Dunn admitted that she did place the pictures in the Petitioner's office and was apologetic about it. After consulting with his supervisor, the decision was made to discipline Ms. Dunn with a coaching and TAP appraisal entry on April 12, 2012. (R. Ex. 2, 3 & 4; T. pp. 60-61, 64-66, 69-70 & 105-106)

16. Mr. Oxendine did not believe that the placement of the pictures in the office of the Petitioner by Ms. Dunn was racially motivated. (R. Ex. 2; T. pp. 106-107)

17. Ms. Bumgardner did not believe that the placement of the pictures in the office of the Petitioner by Ms. Dunn was racially motivated. (R. Ex. 6; T. p. 81) Ms. Bumgardner believes that a TAP entry was appropriate discipline for Ms. Dunn's actions. (T. p. 80)

18. Petitioner testified that Ms. Dunn has never made a discriminatory comment to her referring specifically to her race or generally to the African-American race. (T. p. 145; R. Ex. 11)

19. On May 8, 2012, Petitioner filed a complaint with the Respondent's EEO office. (T. pp. 116-17; R. Ex. 7)

20. Ms. Dunn testified that on June 1, 2012, the MIS computer technician asked her to determine who was the most recent user of the computer in office #4 because the user was turning it off at night which is against policy. She determined that the last user was Petitioner and asked her not to turn it off when she was finished. No other action was taken. (R. Ex. 1)

21. Ms. Rogers-Bethea was assigned to conduct an investigation of the Petitioner's EEO complaint. (T. p. 117)

22. Ms. Rogers-Bethea interviewed and received written statements from Lori Dunn, Christopher Oxendine, Jean Clark, Joyce Ingram and Jane Bumgardner. (R. Exs. 1, 2, 3, 5 & 6)

23. On August 21, 2012, Mr. Wilson and Mr. Oxendine met with Petitioner to discuss her professionalism and office relations, and made a TAP entry for this discussion. (T. pp. 96-99 & 107; R. Ex. 12)

24. On September 12, 2012, Ms. Rogers-Bethea substantiated that the incident with the photograph occurred, but she found that "there was no evidence that it was racially motivated." Her "investigation did not substantiate retaliation. [Petitioner] was not adversely affected by being asked to log off her computer instead of shutting it down." (R. Ex. 8; T. pp. 117-118)

25. On September 20, 2012, Ms. Ingram met with the Petitioner in her office to discuss that Ms. Ingram was being assigned to supervise the Petitioner effective September 24, 2012. (T. pp. 19-20)

26. Ms. Ingram is an African American female.

27. Ms. Ingram testified that in her opinion she was not assigned to supervise the Petitioner as a negative consequence of the Petitioner having filed an EEO complaint. (T. p. 31)

28. While Ms. Ingram was aware that the Petitioner had filed an EEO complaint against Ms. Dunn, Ms. Ingram denied telling the Petitioner during this meeting that the Petitioner had caused a lot of animosity in the office by filing a complaint with the EEO office. (T. pp. 22)

29. In Ms. Ingram's opinion, the placement of the picture of Deputy Childress in the Petitioner's office by Ms. Dunn was not racially motivated and she was not aware of any racial tension or prejudice within the office. (T. p. 34)

30. Ms. Ingram testified that to her knowledge at the time the Petitioner was under the supervision of Ms. Dunn that Ms. Dunn also supervised two other black female employees and one white female. Ms. Ingram was not aware of any other Judicial Services Coordinators making a complaint that Ms. Dunn treated them differently because of their race. (T. p. 36-37)

31. Petitioner testified that Ms. Ingram has never made a discriminatory comment to her referring generally to the African-American race. (T. p. 145; R. Ex. 11)

32. In her written statement for the EEO investigator Ms. Rogers-Bethea, Ms. Bumgardner wrote that to her knowledge the unit did not have racial issues or tensions, and that she had "never observed or heard of anyone being treated differently based on their race." (R. Ex. 6)

33. Mr. Dellinger testified that the digital webcams installed on computers located in the Forsyth County Hall of Justice in Winston-Salem, including the one used by the Petitioner, could not be accessed for remote viewing and remote control by anyone. MIS policy provided

that such actions could have only been done with the computer user's permission by MIS technicians. (T. pp. 88-92.)

34. Mr. Oxendine was interviewed by the EEO investigator Ms. Rogers-Bethea and provided her with a written statement. He approved all webcam locations, their installation by an MIS technician, and reported this information to the Division Office, stating that "[a]t no time has any web cam been used to monitor Ms. Montgomery." (R. Ex. 2)

35. Ms. Bumgardner testified in the hearing before Judge Mann on February 25, 2013 and before the Undersigned on April 24, 2013, that she did not have a webcam capable of remotely viewing the Petitioner from her office installed on the Petitioner's computer. (T. p. 78, 82-83; R. Ex. 6)

36. Ms. Ingram and Ms. Clark had no knowledge of either Mr. Oxendine or Ms. Bumgardner having a webcam capable of remote viewing from their offices installed on the Petitioner's computer. (T. pp. 34-35, 73-74)

37. Ms. Rogers-Bethea was given a copy of the TAP entry for Ms. Dunn. She felt that this was appropriate corrective action and she recommended that "[m]anagement take no further corrective action based upon the findings and conclusions of this investigation." (T. pp. 119-20; R. Ex. 8)

38. On September 12, 2012, Ms. Rogers-Bethea prepared a written case determination at the conclusion of her investigation. (T. p. 118) The conclusion in Ms. Rogers-Bethea's case determination is as follows: "The investigation found that Ms. Dunn used poor judgment, especially as a supervisor, in placing the deputy's photographs in Ms. Montgomery's office; however, there was no evidence that it was racially motivated. The investigation did not substantiate retaliation, Ms. Montgomery was not adversely affected by being asked to log off her computer instead of shutting it down." (T. pp. 118-19; R. Ex. 8)

39. On October 9, 2012, Petitioner filed a Petition For A Contested Case Hearing with the Office of Administrative Hearings. The hearing was held before the Undersigned on April 24, 2012 in High Point, North Carolina.

40. On January 22, 2013, in the Employee Comments Section of her TAP appraisal, Petitioner wrote: "The sheet that was signed on 8-28-12 is on appeal on the week of 2-25-13 before the Office of Administrative Hearings on 9-20-12 after being switched to Lead Ingram. She stated I had cause [sic] a lot of animosity in the office for filing a complaint with EEO, which statement caused the filing also of my appeal. I was told by processor Cassandra Dean on 12-6-12 the only reason they put Lead Ingram over me was to pit her against me and she is dumb enough to fall for it. GM Gwendolyn Montgomery." (T. p. 41; R. Ex. 12)

42. Ms. Ingram denies the statements attributed to her by Petitioner in her comments on the TAP appraisal. (T. p. 42)

43. On March 14, 2013, Mr. Oxendine issued a written warning to the Petitioner because of the negative comments Petitioner wrote about her supervisor on the TAP appraisal and not because the Petitioner had filed an EEO complaint. (P. Ex. 2; R. Ex 12; T. pp. 39-42, 78 & 108-09)

44. In the opinion of Ms. Ingram and Ms. Bumgardner, this written warning was not issued to the Petitioner because the Petitioner had filed an EEO complaint in May 2012. (T. pp. 43, 81-82)

45. Upon direct examination by Petitioner, Ms. Ingram testified that the Petitioner is currently under investigation that began on April 19, 2013 as a result of three incidents that happened during court sessions in Kernersville. (T pp. 25-26) Petitioner was directed by Ms. Ingram to write a statement about the incidents and Petitioner refused. Ms. Ingram reported her refusal to her supervisors, Mr. Wilson and Ms. Clark. (T. pp. 110-11)

46. Ms. Bumgardner participated in the internal investigation that resulted in a written warning to Petitioner for not following her supervisor's instructions. In the opinions of Mr. Oxendine and Ms. Bumgardner, this current investigation was not initiated because the Petitioner had filed an EEO complaint. (T. p. 81-82 & 110-11.)

47. Mr. Oxendine testified that there had been a "long and varied" history of a lack of cohesiveness in the unit and Petitioner having "issues with everyone in the office" but these issues were not a result of racial tension. (T. pp. 111-12; R. Ex. 2)

48. Petitioner testified that Mr. Oxendine has never made a discriminatory comment to her referring specifically to her race. (T. p. 145; R. Ex. 11.)

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

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of Chapter 126 of the North Carolina General Statutes; the parties properly are before the Office of Administrative Hearings.

Petitioner's Race Discrimination and Harassment (Hostile Work Environment) Claims

2. In the absence of direct evidence of discrimination, under the three-part scheme of proof for discrimination cases developed by the United States Supreme Court, Petitioner has the initial burden of establishing a *prima facie* case of discrimination. Once she presents a *prima facie* case, Respondent has the burden of articulating a legitimate, non-discriminatory reason for

the adverse employment action. At that point, Petitioner has the burden of establishing that the reason asserted by Respondent is not the true reason for its decision, but instead a pretext for intentional, unlawful discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Curtis v. N.C. Department of Transportation.*, 140 N.C. App. 475, 479, 537 S.E.2d 498, 501-02 (2000).

3. The "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253.

4. Plaintiff alleges that she was continuously harassed at the workplace on the basis of her race. To prove a prima facie case of hostile work environment based on racial harassment, a plaintiff must show: 1) there was unwelcome harassment; 2) the harassment was based on race; 3) the harassment was so severe or so pervasive that it altered the conditions of employment and created an abusive atmosphere; and 4) there is some basis for imposing liability on the employer. *Causey v. Balog*, 162 F.3d 795, 801 (4th Cir. 1998). In determining if the third element of the prima facie case is met, the Court must consider the frequency and severity of the harassment, whether it was physically threatening or humiliating, whether it reasonably interfered with work performance, and whether it resulted in physical harm. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993). A mere utterance "'which engenders offensive feelings in an employee'" does not satisfy the element. *Id.* (quoting *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 67, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986)). The severity of the harassment should be judged from "the perspective of a reasonable person in plaintiff's position, considering 'all the circumstances.'" *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998) (quoting *Harris*, 510 U.S. at 23).

5. Petitioner claims that the Respondent intentionally discriminated against her based on her race, African-American, through the actions of Ms. Lori Dunn, a White female, in placing the pictures of a White male Sheriff's Deputy in her office and that Ms. Bumgardner and Mr. Oxendine had a webcam installed on her computer in order to monitor her remotely from their offices.

6. Petitioner failed to amass sufficient evidence to undermine the credibility of Respondent and establish that its true motives were discriminatory. Moreover, Respondent has met its burden of establishing that the actions of Ms. Dunn or Mr. Oxendine were not done with discriminatory animus. Petitioner admits that neither Lori Dunn nor Christopher Oxendine ever made a discriminatory comment to her referring specifically to her race or referring to the African-American race in general. Mr. Oxendine, in consultation with his direct supervisor, directed Ms. Clark to discipline Ms. Dunn with a coaching and TAP appraisal entry, which suggests he was not predisposed to discriminate against Petitioner based on her race.

7. Petitioner failed to offer any evidence of illegal race discrimination, including the installation of a webcam on her computer so that she could be monitored, other than her own

vague testimony about such discrimination. Petitioner failed to prove that she was intentionally discriminated against by Respondent based on her race.

8. Petitioner also fails to amass sufficient evidence of harassment that rises to the level of severity and pervasiveness articulated by the Supreme Court in *Harris* to satisfy a prima facie case of a hostile work environment.

Petitioner's Retaliation Claim

9. For her retaliation claim, Petitioner's prima facie case consists of showing that: (a) she engaged in protected activity; (b) Respondent took an adverse action against her; and (c) there is a causal connection between the protected activity and the adverse action. *Ziskie v. Mineta*, 547 F.3d 220, 229 (4th Cir. 2008).

10. Even though Petitioner has established that Mr. Oxendine was aware that she had filed a complaint with the EEO in May 2012 prior to his issuance of a March 2013 written warning to her and his decision to initiate an investigation concerning three incidents that happened during court sessions in Kernersville between the Petitioner and another staff person, Respondent has articulated legitimate, non-discriminatory explanations for the decisions of Mr. Oxendine. The March 2013 written warning and the pending investigation were due to the work performance and personal conduct of Petitioner. Petitioner cannot establish that Respondent's explanation for its decisions are a pretext for intentional retaliation against Petitioner.

11. Petitioner did not satisfy her burden of proving by a preponderance of the evidence her claims of discrimination, harassment, and retaliation.

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent articulated legitimate, non-discriminatory reasons for the issuance of disciplinary actions against Petitioner. Additionally, Petitioner had not met her burden of proof showing that Respondent's stated reasons for such disciplinary actions were, in fact, a pretext for discrimination. Accordingly, Petitioner failed to prove racial discrimination, harassment, or retaliation.

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 thirty (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, North Carolina 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. 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 thirty (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 5th day of August, 2013.

Selina M. Brooks
Administrative Law Judge

10

A copy of the foregoing was sent to:

Gwendolyn C. Montgomery
3362 Hyde Place Circle
Winston-Salem, NC 27103
PETITIONER

Yvonne B. Ricci
Assistant Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 5th day of August, 2013.

Office of Administrative Hearings
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STATE OF NORTH CAROLINA — IN THE OFFICE OF ADMINISTRATIVE HEARINGS

COUNTY OF WAKE — 13ABC11233

Rio Sports Restaurant And Lounge Inc., Petitioner, v. NORTH CAROLINA ALCOHOLIC BEVERAGE CONTROL COMMISSION, Respondent.	**FINAL DECISION**

APPEARANCES

Petitioner: Glenn B. Lassiter, Jr., Attorney at Law, Chatham County Bar

Respondent: Lorita K. Pinnix, Assistant Counsel, North Carolina Alcoholic Beverage Control Commission

HEARING

This contested case was heard on July 23 and 25, 2013, at the Office of Administrative Hearings in Raleigh by Beecher R. Gray, Administrative Law Judge. On July 24, 2013, Respondent filed an Affidavit of Personal Bias or Disqualification of Administrative Law Judge under the provisions of G.S. 150B-32. Petitioner filed a response in opposition to that affidavit and motion.

In accordance with G.S. 150B-32 and 26 NCAC 03 .0110, this Motion for Disqualification was heard on the record as a first order of business at the hearing on July 25, 2013. Counsel for Petitioner made an oral argument opposing the Motion. Counsel for Respondent deferred to the Affidavit and Motion as speaking for itself and stated that she was directed to file the Affidavit and Motion by the Deputy General Counsel for the Alcoholic Beverage Control Commission. Having heard from the parties and having considered the Affidavit and Motion, the Motion was DENIED.

BACKGROUND

Petitioner appeals from a decision of Deputy Administrator Robert Hamilton of the North Carolina Alcoholic Beverage Control Commission denying its application for Malt Beverages On-Premise, Unfortified Wine On-Premise, and Mixed Beverages Restaurant permits to allow the sale of alcoholic beverages at its business establishment.

ISSUE

The Petition in this matter alleges that Respondent prejudiced Petitioner's rights by acting erroneously, failing to act as required by law or rule, acting arbitrarily or capriciously, failing to use proper procedure, and failing to use appropriate discretion in making the decision to deny Petitioner's application for permits. The issues are whether those allegations are true and, if so, what the appropriate remedy would be. This case is governed by Article 3 of N.C.G.S. Chapter 150B, the Administrative Procedures Act, and Article 9 of N.C.G.S. Chapter 18B, which governs the requirements for alcoholic beverage permitting.

The undersigned Administrative Law Judge, based upon a clear preponderance of the evidence, and after 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, and after careful review of the entire record in this matter, including the evidence taken at the hearing, makes the following:

FINDINGS OF FACT

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

2. Petitioner, through and by Jacqueline Robinson, 100% owner and President of Rio Sports Restaurant and Lounge, Inc., applied for the above-referenced ABC permits for its location at 4927 West Market Street, Suite 3000B in Greensboro, North Carolina on or about September 8, 2011.

3. Petitioner's business is a medium-sized entertainment venue with a fire code occupancy limit of 863 persons, located in a large retail complex that also houses many other businesses, all of which share the address of 4927 West Market Street. The site appears to be a former industrial complex of some kind. (See P. Ex. X)

4. In one building of the complex (in the north central part of the aerial map P. Ex. X), there is a mini mall that houses several other businesses, some with ABC permits. That building also houses a center that hosts large events similar in size to some of the events held at Petitioner's business.

5. In another building on the complex (in the northwest part of the aerial map P. Ex. X), there is a strip mall complex that houses several businesses and shops, as well as restaurants, some of which hold ABC permits.

6. Petitioner's business is located in the rear of the complex (in the downstairs of the building in the south central part of the aerial map P. Ex. X) and located underneath an international grocery store that faces the parking area between the two other buildings.

7. Petitioner's business is located in a lower area down a single-entrance driveway ramp. While customers may park in other areas of the complex, this location provides a good opportunity for Petitioner to oversee its clientele--to the extent possible--as they come and go from its premises.

8. The large amount of parking at this facility, as well as the available control of ingress and egress, make the location desirable for Petitioner's business as there is adequate parking for large crowds as shown by the lack of complaints by any residents or businesses in the area about the operation of Petitioner's business.

9. Petitioner's facility is a large open complex set up for entertainment. It contains several very large televisions, an area with billiard tables, and seating for approximately 185 persons. It has a centrally-located bar area. It has a full kitchen and large restrooms. The premises are generally clean, well lit, and in good order. (P. Exs. H, AA-HH)

10. In addition to management, Petitioner's business routinely employs between six (6) and eighteen (18) bartenders and eight (8) to twelve (12) servers. There are up to twenty-five (25) inside security personnel at the business, depending upon the size and type of event being held. In addition, there is outside security of up to seven (7) or eight (8) bonded officers, plus additional security provided by up to seven (7) off-duty police officers. There also is outside security provided by contract security that patrols the entire complex 24 hours a day.

11. From time to time, Petitioner utilizes a promoter to secure entertainment to appear at its venue and to promote events there, similar to the way larger complexes such as the Greensboro Coliseum operate.

12. At the time of its application in September 2011, Petitioner presented all required documentation for its pending application to Respondent, and Respondent in turn issued temporary ABC permits to Petitioner on September 8, 2011, and initiated an investigation into Petitioner's application(s.)

13. Among the documents submitted to Respondent at the time of the application was a local governmental opinion form, properly executed on behalf of the City of Greensboro by Captain R. B. Whisenant, which indicated that the City of Greensboro approved of the applicant and the applicant's location.

14. Other documents submitted at that time indicated that Petitioner was in compliance with local ordinances regarding zoning, building codes, and fire codes.

15. As a part of the application review and investigation, Respondent requested that the North Carolina Alcohol Law Enforcement Division ("ALE") conduct an investigation for Petitioner's permit application.

16. The investigation report returned to Respondent by the ALE Division found that Petitioner was qualified in all respects to obtain and hold the ABC permits for which it had applied. (See P. Ex. H)

17. The record is devoid of evidence that Respondent completed any further investigation of Petitioner's application prior to May 5, 2012, or that Respondent had any negative information about the applicant, the application, the location, or operation of the applicant's business prior to May 5, 2012. Petitioner operated on a temporary ABC permit during the entire nine (9) month period between September 8, 2011, and May 5, 2012, without any action by Respondent on Petitioner's application, other than renewal of the temporary permit.

18. Sometime between May 6 and May 10, 2012, Respondent received information from the Greensboro Police Department concerning an alleged incident on May 5, 2012, at Petitioner's location. Based upon those allegations, on May 10, 2012, Respondent, through its administrator Michael Herring, issued a letter suspending Petitioner's temporary ABC permit for 14 days and requiring that Petitioner and all of its employees attend alcohol awareness training. (R. Ex. 3)

19. Petitioner and its employees, including Jacqueline Robinson, attended alcohol awareness training as directed. Upon the completion of the fourteen-day suspension, Petitioner's temporary ABC permit was reinstated.

20. Respondent's letter also stated that further violations of the ABC laws would result in additional suspensions or rejection of Petitioner's application.

21. Detective Calvert of the Greensboro Police Department conducted an ABC inspection and investigation of the alleged incident on May 5, 2012, and issued a Written Warning to Petitioner for some relatively minor technical ABC violations. (P. Ex. K)

22. Detective Calvert's inspection report found that matters inspected were in order, with the exception of one liquor bottle missing a mixed beverage tax stamp.

23. With regard to that bottle, Detective Calvert found that he could not attribute that issue to any wrongdoing by Petitioner, and thus issued only a Written Warning.

24. Subsequent to Respondent's decision to suspend Petitioner's temporary ABC permit, and contemporaneously with efforts by the Greensboro Police Department to convince Respondent to reject Petitioner's application for ABC permits, Detective Calvert filed criminal charges against Jacqueline Robinson for a violation of N.C.G.S. 18B-1005(b) on May 5, 2012. The extent and reach of those efforts by the Police are illustrated in the various Police Department emails offered as Petitioner's Exhibits admitted into evidence. (P. Exs. M-R)

25. In addition to having persons attend the training sessions as noted above, Petitioner, having been made aware of potential security issues, took additional security measures

upon reopening, which included, but were not limited to, having more security personnel on the premises, including off-duty police officers, and conducting more thorough inspections of persons entering the premises.

26. Petitioner at that time entered into an exclusive agreement with Jerry Gilmore to promote various events at its business location.

27. As a promoter, Jerry Gilmore was in charge of contracting for entertainers, or otherwise scheduling and marketing various events for Petitioner's business, while Petitioner maintained full responsibility for overseeing the premises and the alcoholic beverage sales and service.

28. Jerry Gilmore has promoted events for approximately 20 years and has an outstanding record for promoting many events without serious incidents of violence over that time period.

29. After Petitioner's temporary ABC permit was reinstated, and up and until Petitioner's application was rejected, Jerry Gilmore promoted dozens of events for Petitioner without incident at Petitioner's business, other than one additional alleged incident which ultimately contributed to Respondent's rejection of this application.

30. In November 2012, Respondent's Audit Division notified Deputy Administrator Hamilton that there were possible issues with Petitioner qualifying for the restaurant mixed beverage permit sought because of an allegation concerning food sales percentages.

31. After being contacted by Respondent concerning this issue, Petitioner retained William Potter, Attorney at Law, to work with Respondent to resolve this issue.

32. Petitioner, through Attorney Potter, engaged in discussions with Deputy Administrator Hamilton concerning this issue. Based on those discussions, Respondent agreed to give Petitioner an opportunity to switch its application from a mixed beverage restaurant to mixed beverages private club application.

33. Attorney Potter agreed to work with Petitioner to provide the documentation requested by Respondent to make the change to a private club application, including submission of supporting documentation for private clubs and a new local government opinion form from the Greensboro Police Department.

34. Deputy Administrator Hamilton subsequently set several deadlines for the new paperwork to be submitted, but each deadline passed without submission of the documents requested by Respondent. (Ultimately those items were tendered and accepted by Respondent in good order in April 2013, but too late for consideration by Deputy Administrator Hamilton prior to his Notice of Rejection.) Issuance to Petitioner of a permanent private club permit once that documentation was filed was discussed

between Attorney Potter for Petitioner and Deputy Administrator Hamilton sometime during the process and prior to the rejection of Petitioner's application.

35. Respondent never investigated Petitioner's application for a private club permit, but the finding above indicates that, but for the other matters that arose, it is possible that a private club permit could have been issued to Petitioner with no further investigation.

36. Petitioner was attempting to provide the requested documents but was delayed because of the City of Greensboro's requirement that Petitioner submit proof of passing zoning, building code, and fire code inspections. The delay was because of construction and inspection issues, difficulty in scheduling inspections, and additional delays associated with attempting to obtain the approvals during the holiday season.

37. On January 29, 2013, Respondent, through a letter from Deputy Administrator Hamilton, issued a suspension of Petitioner's mixed beverage restaurant temporary permit until Petitioner provided Respondent with the necessary documentation to transfer its mixed beverages permit to a private club permit.

38. Petitioner continued to operate its business with malt beverage and unfortified wine permits while it attempted to comply with the private club requirements.

39. The Greensboro Police Department, through Detective Calvert, in response to Petitioner's attempts to provide the new local governmental opinion form requested by Respondent, faxed to Deputy Administrator Hamilton a 19-page document which included two letters from the Greensboro Police Department setting forth objections to the issuance of any ABC permit to Petitioner.

40. On February 27, 2013, after review of the fax submission and the other documents in the ABC file, and without further investigative review or analysis of those documents or any other item, Deputy Administrator Hamilton issued a Notice of Rejection to Petitioner disapproving Petitioner's application and setting forth various grounds for that disapproval. (R. Ex. 1, P. Ex. A)

41. The facts alleged in the Notice of Rejection were based almost solely on unproved allegations made by officers of the Greensboro Police Department, which wanted to convince Respondent to reject Petitioner's application. Respondent did not request any independent investigation of those allegations nor did it afford Petitioner any opportunity to respond to those allegations prior to making its decision to reject Petitioner's application. No representative of Respondent visited Petitioner's premises, other than during the original ALE investigation, which occurred prior to the May 10, 2012, suspension. Respondent neither met with any representative of Petitioner nor requested from Petitioner any information or response to the allegations after receiving the allegations and prior to its Notice of Rejection.

42. The Notice of Rejection states several facts that purport to be grounds supporting Respondent's decision to reject Petitioner's application. Those grounds can be

summarized as: 1) That on January 1, 2013, Petitioner was charged with various ABC Violations; 2) That Jerry Gilmore and Petitioner were charged with a violation of G.S. 18B-1005 for failing to superintend the premises on January 1, 2013; 3) That Petitioner's ABC permits were suspended for 14 days because of incidents that occurred on May 5, 2012; 4) That between January 1, 2012 and January 24, 2013 there were 115 various police calls to Petitioner's location described as 4927 West Market Street, Greensboro, N.C. without further specification of any exact location; 5) That there were multiple arrests at Petitioner's location during January 2013; and 6) Facts that allege, by implication or otherwise, that Petitioner was engaged in the illegal sale of spirituous liquor on February 23, 2013.

43. Despite the factual assertions in the Notice of Rejection, the Notice of Rejection offers no legal conclusions as to the Statutory or Regulatory basis by which Respondent found that the alleged facts support its decision that Petitioner's application should be denied.

44. North Carolina General Statutes 18B-900 and 18B-901 are statutes that establish qualifications for applicants and the matters which Respondent must review in the application process. No item in either of those statutes is cited in the Notice of Rejection as a basis for the denial of Petitioner's application.

45. Petitioner's 100 percent owner and manager, Jacqueline Robinson, is over 21 years old, a resident of North Carolina, has not been convicted of any crime of a disqualifying nature, has never had an alcoholic beverage permit revoked, and has no outstanding judgments entered against her that would disqualify her under Article 1A of N.C.G.S. Chapter 18B.

46. No persons were arrested inside Petitioner's business while Petitioner's application was pending.

47. All criminal charges resulting from the May 5, 2012, allegations against Jacqueline Robinson were dismissed.

48. No alcoholic beverage offenses or other criminal charges were lodged against Jacqueline Robinson or any employee of the business for any incident occurring on the premises of Petitioner's business while Petitioner's application was pending.

49. Respondent, other than in the Notice of Rejection, did not charge Petitioner with any ABC violation for any incident occurring on the premises of Petitioner's business while Petitioner's application was pending.

50. There is competent evidence that no resident of the neighborhood or no business located in the neighborhood, or any other resident of the City of Greensboro or business located in the City of Greensboro, filed any complaint against the operation of Petitioner's business with the Police Department or Respondent while Petitioner's business was in operation.

51. The police calls and criminal charges referenced in the Notice of Rejection were pulled directly from a computer-generated report provided by facsimile from Detective Calvert to Respondent or asserted in letters from the Greensboro Police Department.

52. Those calls for service and arrest records were pulled based on Petitioner's address (which Petitioner shares with many other businesses) only. The calls and arrests were not analyzed by Detective Calvert or Deputy Administrator Hamilton to determine how they may be related to Petitioner's operation with ABC permits prior to the issuance of the Notice of Rejection.

53. Respondent offered no credible evidence at the trial of this matter establishing that the matters alleged were in any way related to the operation of Petitioner's business with ABC permits, or as to how they were related to the way Petitioner conducted its business operations.

54. The bare bones and conflicting allegations concerning calls for service and arrests, as received but not analyzed by Deputy Administrator Hamilton, and as presented in this hearing, carry reduced or little probative value in determining whether the applicant is entitled to receive the permits for which it has applied.

55. At a minimum, to be relevant to that determination and review, there would need to be a showing as to the exact location of the incidents that are the subject of that information, and there also would need to be a demonstrated association between operation of Petitioner's business and the proffered incidents.

56. Respondent's own evidence concerning the call reports was in conflict and carries little probative value concerning any activities of Petitioner.

57. At the time Deputy Director Hamilton reviewed and rejected Petitioner's application, he believed that a police call was a 911 call to an address. It has been shown that the police calls discussed in this matter may have originated from several sources, including self-reporting by police officers specifically patrolling or assigned to patrol in the general vicinity of an address; there was no contextual analysis by Respondent of this information.

58. Respondent's evidence concerning the ABC violations alleged in its Notice of Rejection, even when viewed in a light most favorable to Respondent, fail to provide a sufficient basis for a conclusion that any ABC violation occurred on Petitioner's premises during the time that Petitioner's application was pending. N.C.G.S. 18B-901(d) states that the ABC Commission has the sole power in its discretion to determine the suitability and qualifications of an applicant for an ABC permit and the authority to determine the suitability of a location.

59. Despite Respondent's assertion that the review of this action is limited to the matters reviewed by it during the application process, the Undersigned finds that when one reviews the applicable statutes, including N.C.G.S. 150B and especially N.C.G.S. 18B-

906(a), the ABC Commission does not have unbridled discretion, but must exercise its discretion in accordance with the applicable laws that govern it. See Waggoner v. North Carolina Board of Alcohol Control, 7. N.C.App. 692, 696-697, 173 S.E. 2d 548, 551(1970).

60. Under N.C.G.S. 150B-23, the Office of Administrative Hearings is charged with reviewing Respondent's action concerning Petitioner's permit application and entering a decision as to whether Respondent substantially prejudiced Petitioner's rights.

61. The statutes that govern the alcoholic beverage permitting process are N.C.G.S. 18B-900 and N.C.G.S. 18B-901.

62. The Notice of Rejection issued by Respondent's Deputy Administrator in this case is wholly inadequate in that it fails to cite valid statutory reasons for the denial of Petitioner's application. It fails to cite any provision from either statute cited in Finding 61 above.

CONCLUSIONS OF LAW

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

2. The Notice of Rejection issued by Deputy Administrator Hamilton on behalf of Respondent fails to cite sufficient statutory reasons for the denial of Petitioner's application.

3. Respondent misapplied the provisions of N.C.G.S. 18B-1005(b) in this matter. That law states that it is illegal for Petitioner [Permittee] to fail to superintend the premises in person or through a manager. Statutory language is to be given its ordinary meanings and judicial notice is taken that the word "superintend" means "to be in charge of." Here, Respondent seeks to apply that statute in an expansive fashion to mean that any undesirable act or omission that occurs on the premises is directly attributable to Petitioner without any further evidence. Petitioner proved that, at all times pertinent to this case, the premises always were superintended by a manager.

4. The evidence proffered by Respondent fails to establish sufficient nexus between the allegations concerning arrests and police calls and the operation of Petitioner's business with or without ABC permits.

5. Petitioner has shown sufficient facts to establish *prima facie* that it is entitled to the issuance of the permits for which it has applied.

6. Respondent prejudiced Petitioner's rights in this case by failing to use proper procedure and by acting erroneously because of insufficient evidence.

7. Respondent correctly contends that it should be given due deference in determining which applications before it should be approved. Respondent asserts that the deference due its decision should be broad and unfettered because Respondent is not an "investigative" agency and because Respondent rarely rejects any application. Respondent is charged with determining the suitability of applicants and locations for the lawful operation of ABC-permitted businesses. As such, Respondent has a duty to the citizens of the State to conduct fair and balanced inquiries into the applications it receives, and to consider certain statutory factors set out in N.C.G.S. 18B. Respondent cannot avoid or alter this responsibility by merely asserting that it is not an investigative agency.

8. It was shown by the evidence in this case that the items Respondent considered in making its decision to reject this application were various assertions made by a Police Department. The degree to which the process utilized by Respondent provides for proper investigation and analysis of third party allegations bears a relationship to the degree of deference Respondent should be afforded in a review of its decisions concerning permit applications.

9. In the instant case, a more thorough analysis and investigation of the data that the Police Department submitted to Respondent was essential. Additionally, that data should have been weighted by consideration of the context within which the data was collected and submitted, and by considering the conclusions that then could be drawn about Petitioner's business operations with alcoholic beverage permits. In a case of this type, the presiding judge has a duty thoroughly to explore the facts supporting the decision made by Respondent. Neither Respondent nor its Police Officer witnesses specifically were able to validate the concerns set out in the Notice of Rejection as legitimate grounds for the denial of this application.

10. There is no competent evidence in the record to support a conclusion that this Petitioner would not comply with the ABC laws or that operation of Petitioner's business is detrimental to the neighborhood as a basis for finding the applicant or the location to be unsuitable.

11. For the current regulatory scheme of the ABC permit application evaluation process to be effective, it is imperative that the official Notice of Rejection state with specificity the factual and statutory bases for rejection of the application.

12. Based upon substantial evidence in the record, Petitioner has made a *prima facie* showing that it is qualified for the permits sought and that its location is a suitable one for the permits for which it applied.

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, and upon the greater weight of the evidence, I find that Petitioner has shown that Respondent's action in this case in

denying Petitioner's Alcoholic Beverage Permit is not supported by the evidence, is erroneous and affected by procedural error, and is REVERSED. Petitioner is entitled to the ABC permit or permits for which it applied in this case or, in the discretion of the Commission as a more appropriate permit, the alternate ABC permit or permits for a Mixed Beverage Private Club.

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 02 day of August, 2013.

Beecher R. Gray
Administrative Law Judge

On this date mailed to:

GLENN B LASSITER
Attorney At Law
PO BOX 1460
PITTSBORO, NC 27312
Attorney For Petitioner

LORITA K PINNIX
Assistant Counsel
NC ABC Commission
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RALEIGH, NC 27699
Attorney For Respondent

This the 5th day of August, 2013.

Anne Hallowell

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STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF WAKE	**13 DOA 12702**

MEDICAL REVIEW OF NORTH CAROLINA, INC. d/b/a THE CAROLINAS CENTER FOR MEDICAL EXCELLENCE,	
Petitioner,	
v.	
NORTH CAROLINA DEPARTMENT OF ADMINISTRATION	
	FINAL DECISION
and	
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,	
Respondents,	
and	
LIBERTY HEALTHCARE CORPORATION,	
Respondent-Intervenor.	

THIS MATTER came on to be heard before the undersigned Administrative Law Judge, Augustus B. Elkins II, for an expedited hearing beginning on July 22, 2013 and concluding on July 25, 2013, at the Office of Administrative Hearings in Raleigh, North Carolina. The record was left open for the parties' submission of post-hearing briefs and proposed orders.

APPEARANCES

For Petitioner

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APPLICABLE LAW

N.C. Gen. Stat. § 150B, Article 3
N.C. Gen. Stat. Chapter 143, Articles 3 and 8.
01 NCAC 05.

ISSUE(S)

Whether Respondents exceeded their authority or jurisdiction, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule in awarding the contract under RFP No. 30-DMA-26993-12 to Liberty Healthcare Corporation.

Petitioner's List of Issues in Pre-Trial Order

Whether the decision of DHHS and DOA to award the contract in RFP No. 30-DMA-26993-12 to Liberty Healthcare Corporation violated N.C. Gen. Stat. § 150B-23(a) to the prejudice of CCME in that DHHS and/or DOA

(1) exceeded their jurisdiction or authority,
(2) acted erroneously,
(3) failed to use proper procedure,
(4) acted arbitrarily and capriciously, and/or

(5) failed to act as required by law or rule, including in any of the follow areas:

1. Improper Downgrade of CCME Proposal under "Vendor Implementation Plan and Methodology" category.
2. Improper Downgrade of CCME Proposal under "Challenges Foreseen by the Vendor and the Vendor's Proposed Solutions to Those Challenges" category.
3. Improper Downgrade of CCME Proposal under "Staffing Plan" category.
4. Improper Failure to Downgrade Liberty Proposal under "Vendor Implementation Plan and Methodology" category.
5. Improper Failure to Downgrade Liberty Proposal under "Staffing Plan" category.
6. Improper Failure to Exclude MTM from the Competition.
7. That DHHS/DOA erred in failing to perform any review of the cost proposals for reasonableness and completeness (as required by RFP Section 7.4(b)).
8. That DHHS erred in failing to determine which proposal was in the best interest of the State (as required by RFP Section 7.4).
9. That DHHS erred in the contacting of a single reference and failed to conduct a comprehensive review of proposals as required by the RFP.
10. That DHHS erred in conducting the reference check.
11. That DHHS erred in deducting points from proposals instead of evaluating strengths of proposals.
12. That DHHS/DOA erred in failing to timely issue a decision on CCME bid protest letter.
13. That DHHS improperly considered information about CCME performance on the incumbent contract outside of the RFP response and "reference check" in evaluating the bids.
14. That DHHS erred in deciding how to score the proposals (including the references) after opening and reviewing the proposals.
15. That DHHS erred in communicating with proposers about the procurement prior to the award decision being made.
16. That DHHS erred in failing to disqualify Liberty for communicating about the merits of their proposal prior to the contract being signed in violation of the RFP, without offering all proposers a similar opportunity.
17. That DHHS erred by giving unequal treatment in the evaluation to the proposals (and/or in failing to compare proposals).
18. That DHHS erred in destroying notes and records of the procurement (spoliation of evidence).

Respondents and Respondent-Intervenor's List of Issues in Pre-Trial Order

1. Has Petitioner met its burden of demonstrating that Respondent Department of Health and Human Services ("DHHS") exceeded its authority or jurisdiction, acted erroneously, or failed to use proper procedure, acted arbitrary or capriciously, or failed to act as required by law or rule and if so, that such action has substantially prejudiced Petitioner's rights?

2. Has Petitioner met its burden of demonstrating that Respondent Department of Administration exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrary or capriciously, or failed to act as required by law or rule and if so, that such action has substantially prejudiced Petitioner's rights?

3. If either issue (1) or (2) is answered "yes," does an Administrative Law Judge have the authority to grant the relief requested by Petitioner in its Petition for Contested Case Hearing?

4. If issue (3) is answered "yes," has Petitioner met its burden of demonstrating that it is entitled to the relief requested by Petitioner in its Petition for Contested Case Hearing?

WITNESSES

Witnesses for Petitioner CCME:

Sandra Terrell, DHHS
Karen Feasel, DHHS
Randall Best, DHHS
Frake Hunsel, DHHS
Lauren Wides, DHHS
Leslie Meilhon CCME

Witnesses for Respondents and Respondent-Intervenor:

Sandra Terrell, DHHS
Karen Feasel, DHHS
Sue Nayda, Liberty

ADMITTED HEARING EXHIBITS
(* = Official Notice)

For Petitioner

1 Recommendation for Review of Cost Proposals, 12/12/12 memo
2 Final Recommendation for Award, 12/18/12 memo
3 RFP No. 30-DMA-26993-12
4 Liberty Technical Proposal
5 Liberty Cost Proposal
6 CCME Technical Proposal
7 CCME Cost Proposal
8 DHHS calendar entries for Evaluation Team
9 CCME Protest Letter, 2/13/13
10 CCME Post-Protest Letter, 3/18/13
11 Scoring Grid Draft, 11/20/12
12 Scoring Grid Draft, 11/26/12
13 Scoring Grid Draft, 12/5/12

14 Scoring Grid Draft, 12/7/12
15 10/19/12 DHHS e-mail thread on RFP evaluation
16 12/3/12 DHHS e-mail thread on references
17 evaluation sheet
18 blank reference form
19 reference reports
20 5/18/12 DHHS e-mail thread on draft RFP
21 5/18/12 redline draft of RFP
22 public record request e-mail
23 12/11/12 and 12/12/12 DHHS e-mail thread re "point deduction"
24 12/12/12 response e-mail from CCME re "point deduction"
25 12/12/12 response e-mail #2 from CCME re "point deduction"
26 12/3/12 DHHS e-mail re references
27 12/18/12 DHHS e-mail re final scores
28 12/12/12 DHHS e-mail comments on technical review
29 12/14/12 DHHS e-mail thread re technical review
30 Liberty Healthcare Career Builder listing for referral processors
31 5/1/13 and 5/2/13 DHHS and DOA e-mail thread re protest
32 3/17/13 DHHS (Mange) e-mail re protest
33 3/26/13 DHHS (Mange) e-mail with Liberty attachment
34 IPS Bid Awarded web page
35 3/18/13 DHHS e-mail re protest
37 3/20/13 DHHS (Mange No. 6) e-mail
38* 01 NCAC 05B .1519 – Protest Procedures
39 1/29/13 DOA authorization memorandum to DHHS
41 10/25/12 e-mail from Karen Feasel titled "PCS RFP critical business processes"
43 4/10/12 e-mail, Breen to Meilhon, re contract extension
44 MTM Technical Proposal
45 MTM Cost Proposal
46 Xerox Technical Proposal
47 Xerox Cost Proposal
48 PCG Technical Proposal
49 PCG Cost Proposal
51 10/19/12 e-mail from Lauren Wides attaching Memo to Bid Evaluators, with attachment; signed copies of Memo to Bid Evaluators
52 excerpts from Sam Byassee deposition
53 excerpts from Steven Mange deposition

For Respondents and Respondent-Intervenor

1 Liberty Technical Proposal
2 MTM Technical Proposal
3 PCG Technical Proposal
4 Xerox Technical Proposal
5 CCME Technical Proposal
6 RFP No. 30-DMA-26993-12

7 Liberty Cost Proposal
8 MTM Cost Proposal
9 PCG Cost Proposal
10 Xerox Cost Proposal
11 CCME Cost Proposal
12 Scoring Grid Draft, 12/7/12
13 Recommendation for Review of Cost Proposals, 12/12/12 memo
14 Final Recommendation for Award, 12/18/12 memo
15 Notification on the Interactive Purchasing System web site of the State of North Carolina, 1/29/13
16 Memorandum of 1/29/13 from COA's Division of Purchase and Contract to DHHS' Office of Procurement and Contract Services authorizing DHHS to contract with Liberty
17 RFP Addendum No. 1
18 RFP Addendum No. 2
19 Memorandum of 1/18/13 from DHHS Office of Procurement and Contract Services to the Department of Administration State Purchase and Contract requesting approval to contract with Liberty
20 Memorandum of 1/28/13 from Avery Johnson to Sam Byassee concurring with DHHS' request and recommending approval
21 Memorandum of 1/30/13 from Margaret Serapin to Rick Robinson with attachments
22 Contract between CCME and DMA for Medicaid Independent Assessment Service for Personal Care Services entered in October of 2009
23 CCME's Technical Proposal in RFP No. 30-DMA-238-09
24 Request for Proposals No. 30-DMA-238-09 and Addendum
25* Clinical Coverage Policy No. 3C, effective 4/1/10
26 CCME's Transition Plan
27 e-mail of 3/11/11, Tomilin to Feasel, Breen, Nason, and Terrell with attachment
28 e-mail of 5/27/11, Feasel to Meilhon and Breen
29 e-mail of 6/27/11, Tomilin to Feasel and Breen
30 e-mail of 7/12/11, Tomilin to Feasel and Meilhon
32 e-mail communications between Wides and Byassee and Wides and Steckel
33 e-mail of 5/8/13, Wides to Byassee
34 excerpts from 30(b)(6) deposition of CCME
35 Evaluation forms completed for each of the bidders

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

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FINDINGS OF FACT

1. Petitioner Medical Review of North Carolina, Inc. dba The Carolinas Center for Medical Excellence ("CCME") is a non-profit corporation organized and existing under the laws of the State of North Carolina.

2. Respondent North Carolina Department of Administration ("DOA") is the North Carolina agency responsible for purchasing services for the State of North Carolina. DOA was responsible for approving the award of the contract under Request for Proposal No. 30-DMA-26993-12 (the "RFP") at issue in this contested case.

3. Respondent North Carolina Department of Health and Human Services ("DHHS"), an agency of the executive branch of the State of North Carolina, is the single state Medicaid agency as set forth in N.C.G.S. § 108A-54 and 42 C.F.R. § 431.210(e), and is responsible for administering the North Carolina Medicaid program in accordance with the Social Security Act and its implementing regulations. Respondent North Carolina Department of Health and Human Services, through its Office of Procurement and Contract Services, issued the RFP on behalf of and at the request of the Division of Medical Assistance ("DMA").

4. Liberty Healthcare Corporation ("Liberty") is a corporation that has over 25 years of experience in providing staffing and management of health care services to a range of publically funded health service systems. Liberty is a quality improvement organization ("QIO")-like entity approved by the federal Centers for Medicare and Medicaid Services ("CMS"). Liberty was awarded the contract under the RFP. (Res. Ex. 15; Res. Ex. 16).

5. In the spring of 2012, DMA began the development of the RFP to seek competitive proposals for a vendor that would enter into a new independent assessment ("IA") contract with DMA. Before the RFP was issued, DMA sought and received approval of the RFP from DHHS' Office of Procurement and Contract Services and from the State Purchase and Contract Division of the Department of Administration.

6. Request for Proposals No. 30-DMA-26993-12 (the "RFP") was issued on August 22, 2012 by DHHS, through its Office of Procurement and Contract Services, on behalf of the DHHS Division of Medical Assistance.

7. The stated purpose of the RFP was to solicit proposals from qualified vendors to manage and provide oversight for assessments for Medicaid Personal Care Services ("PCS") for DMA. Medicaid PCS is a North Carolina health assistance program for individuals who, because of a medical or cognitive impairment, are unable to accomplish tasks they would ordinarily do for themselves. Covered services under this program include hands-on assistance by a professional aide with activities of daily living ("ADLs") and instrumental activities of daily living ("IADLs").

8. In regard to the evaluation of proposals submitted, the RFP stated in Section 7.1 that the "State will conduct a comprehensive, fair, and impartial evaluation of the proposals received in response to this request. All proposals will be evaluated using a two-step

method. . . . As provided by statute, award will be based on the lowest and best proposal (most advantageous to the State). Cost is important but is not an overriding consideration."

9. Section 7.2 of the RFP states that "[a]n Evaluation Committee will read the proposals, conduct corporate and personal reference checks, score the proposals, and make a written recommendation to the DHHS Office of Procurement and Contract Services."

10. The RFP also stated: "The Evaluation Committee will score the proposals using the scoring system shown in the following Table. The highest score that can be awarded to any proposal is 1000 points." RFP, § 7.3. The RFP sets forth a scoring system with a maximum possible technical proposal score of 650 points and a maximum possible cost proposal score of 350 points.

11. The 650 maximum possible technical score was broken down as follows: 150 maximum points for Vendor History and Experience; 100 maximum points for The Vendor's Implementation Plan and Methodology; 100 points for The Challenges Foreseen by the Vendor and Vendor's Proposed Solutions to Those Challenges; 150 points for The Vendor's Staffing Plan; 100 points for The Vendor's Customer Support Center; and 50 points for The Vendor's Training Program.

12. Section 7.4 of the RFP sets forth the three phases of the evaluation process. The first phase was an evaluation of the technical proposals, where the proposals were reviewed to determine whether they were properly executed and timely submitted. Next they were forwarded to an Evaluation Committee with each Evaluation Committee member reading each Vendor's technical proposal. Then, the Evaluation Committee met and scored each technical proposal, by consensus, in accordance with the Section 7.3 factors.

13. After the scoring of the technical proposals, the second phase was the opening and evaluation of the cost proposals. For a proposal to be qualified to proceed to cost evaluation, it first needed to receive a minimum score of 400 and have been deemed acceptable on its technical proposal. Proposals which received below 400 points in the technical scoring would not advance to the cost review. During Phase 2, the RFP required that "the State will evaluate each Cost Proposal for completeness and reasonableness." RFP, § 7.4. The RFP also stated that the "State may reject a proposal if the Cost Proposal is incomplete or if it contains significant inconsistencies or inaccuracies." RFP, § 7.4. The cost proposals were scored based upon a formula set forth in the RFP in which the proposal with the lowest cost received the maximum score of 350 and all other proposals were pro-rated per the specific formula.

14. The third phase determined the successful proposal. The Vendor whose proposal was determined to be in the best interest of the State was recommended as the successful Vendor. After reviewing the recommendation for compliance with purchasing rules, the DHHS Office of Procurement and Contract Services forwarded the recommendation to the North Carolina Department of Administration, Division of Purchase and Contract. DOA is the agency that gives final approval of the award to the successful Vendor and posts the notice of award on the State website.

15. The RFP contained eleven different goals and objectives that were critical to the scope of work under the new IA contract.

16. In the RFP issued on August 22, 2012, the deadline for a proposal submission and the opening date of the technical proposals was September 25, 2012. Through two Bid Addenda, the bid opening date was extended until October 17, 2012. Addendum 2 also included responses to vendor questions, which became part of the RFP.

17. Five proposals were received in response to the RFP in October 2012 from CCME, Liberty, Xerox, Public Consulting Group (PCG), and Medical Transportation Management (MTM). The total volume of the proposals exceeded 1,600 pages.

18. An Evaluation Committee of four members was selected by Sandra Terrell, Assistant Director for Clinical Policy and Programs for DMA. Ms. Terrell has worked for DMA since December 20, 2010. Ms. Terrell's job duties at the time included oversight of all vendor contracts in the Home and Community Based Services section of DMA, which included CCME's incumbent contract for independent assessment of PCS services. Ms. Terrell's supervisor was Tara Larson, Assistant Director of DMA. Ms. Terrell had procurement experience from working in private organizations. Ms. Terrell is currently the Acting Chief Operating Officer for DMA and oversees DMA's contracts.

19. The original composition of the Evaluation Committee included two members who had previously worked for CCME. After the proposals were submitted and the identity of the bidders known, these two persons were removed from the committee to avoid any concerns of bias.

20. Four employees of DMA served on the Evaluation Committee: Sandra Terrell, RN; Karen Feasel, PhD; Randall Best, MD; and Frake Hunsel. Ms. Terrell and Mr. Hunsel were added to the committee after the removal of the two initial members.

21. Dr. Feasel was a policy analyst for the DMA Home and Community Care Section at the time of the review of the proposals. Dr. Feasel earned her PhD in psychology and is trained as a research psychologist. Dr. Feasel completed a two-year postdoctoral fellowship, specializing in quantitative psychology, including assessment and measurement of human behavioral phenomenon and reliability and validity of assessments. Dr. Feasel had frequent involvement with CCME in its performance of the existing IA contract. She had previously served on an evaluation committee while at DMA.

22. Dr. Best is the Chief Medical Officer of DMA and also held this position at the time of the review of the proposals. Dr. Best had previously served on an evaluation committee at DMA.

23. Mr. Hunsel is a physical therapy consultant for DMA Clinical Programs and also held this position at the time of the review of the proposals. Mr. Hunsel had procurement experience, having previously served on two evaluation committees for DMA.

24. The Evaluation Team was given a memorandum of instructions by Lauren Wides, the Chief of Medicaid Contracts for DMA. The memorandum stated that the committee members should not discuss the evaluation with non-committee personnel including co-workers, supervisors, other DMA or Departmental Management and any vendors. The memorandum also provided that all written notes, spreadsheets, and correspondence including emails would become public record and must be returned to DMA.

25. Ms. Wides also spoke to the Evaluation Committee at an early meeting. She directed the committee to limit its review to what was in the RFP and the documents, and that items outside the RFP were not proper for consideration.

26. Each of the four members of the Evaluation Committee read each of the five (5) vendors' proposals submitted in response to the RFP. The members of the Evaluation Committee met on four different occasions to discuss each of the proposals and the scoring of each proposal based upon the point allocation in the scoring table set forth in the RFP. Between meetings, members of the Evaluation Committee also had conversations about the proposals and their evaluations.

27. None of the Evaluation Committee members took any notes during their review of the proposals. The Evaluation Committee assigned Dr. Feasel to take notes for the Committee during its meetings. Dr. Feasel did take handwritten notes during Evaluation Committee meetings which she testified she later transferred into the scoring grids the committee created to score the proposals. She also took notes for creating a reference check form. When Dr. Feasel transferred to another division of DHHS in January 2013, these notes were shredded along with other materials she no longer felt she had any use for.

28. Dr. Feasel recorded the consensus views of the Committee in handwritten form at the Committee's meetings. After the meetings Dr. Feasel transcribed her handwritten notes into the electronic scoring grids. The Evaluation Committee reviewed the draft scoring grids and confirmed that the information contained therein accurately reflected the consensus views of the Evaluation Committee. The handwritten notes that were shredded by Dr. Feasel did not contain any information about the procurement process beyond that which is in the electronic documents. These documents were retained and produced. There was no improper motive in the failure to retain Dr. Feasel's handwritten notes.

29. The record of the work of the Evaluation Committee and DHHS in deciding to make the award consists of the following documents:

(a) The Evaluation Committee created a scoring grid showing the points assigned to each proposal for each evaluation category with an explanation for each score. There were four drafts of the grid.

(b) For reference checks, the committee used a single page form it created during the evaluation process for a single reference check done on each vendor.

(c) The final scoring grid was incorporated into a memorandum from the Evaluation Committee dated December 12, 2012, which represented the final product of the technical review of the proposals, which was used to seek approval of DOA to review the cost proposals.

(d) A separate and final memorandum dated December 18, 2012 was created by Ms. Wides and included the cost scores for each proposal, titled "Final Recommendation for Award." The memorandum states the recommendation "that DMA award the contract to Liberty for a total amount of $51,101,444.04".

30. The Evaluation Committee decided that it would score each proposal by starting with the maximum possible number of points for each of the six evaluation categories. The committee would then deduct points from proposals for perceived weaknesses. If a proposal was deemed to meet the RFP minimum requirements for a category, it received the maximum

number of points in that category. The committee did not assign scores based on which proposal was the best or highest quality proposal in each category.

31. Dr. Feasel testified at the hearing that differing methods were used to deduct points from proposals in the different evaluation categories. These methods are not documented in the procurement record.

32. Dr. Feasel testified that five points were deducted for each identified weakness in the Vendor History and Experience Section in the final scoring grid. In the scoring grid drafts created prior to the final grid, this five point deduction system was not used. Dr. Feasel testified that the five point system was added for the benefit of Ms. Wides, who posed questions to Dr. Feasel in December about whether the scoring done by the committee had been consistent in scoring the different proposals.

33. After the proposals were opened and were under review, the Evaluation Committee sought guidance from Ms. Wides as to whether references could be checked. The Evaluation Committee was informed that references could be checked as long as all vendors were treated equally. In discussing the evaluation factor of Vendor History and Experience, the Committee decided that it would be helpful to check references.

34. The Evaluation Committee authorized Sandra Terrell to conduct the reference checks for each vendor. The Evaluation Committee determined that Ms. Terrell would contact the person listed as the contact person by each vendor for the contract that was closest in scope to the IA contract that was the subject of the RFP. The Evaluation Committee determined that Ms. Terrell would contact one reference for each vendor. The form used for each reference check was the same for each of the vendors. In conducting the reference checks, Ms. Terrell used a script and asked the same questions of each person she contacted. The script was not saved and is not in the procurement record.

35. Ms. Terrell conducted one reference check for each vendor between November 29 and December 3. She chose who to contact for each vendor and did not consult the RFP in determining who she should contact.

36. On the reference check, a different methodology for scoring was used. Dr. Feasel and Ms. Terrell testified that any vendor getting above a minimum "satisfactory" score on its reference form (3 out of 5 on the form the committee created) received the maximum point score (50 points) for references. No scoring differential was applied to determine which proposal was the best on references checked. This methodology is not documented in the RFP or the scoring grid.

37. The RFP did not include a line for references in the evaluation table in RFP § 7.3. The first version of the scoring grid, created on November 20, included point scores on each category for all vendors and comments on each score. On this grid, CCME had received the full 150 points allowable for Vendor History and Experience, and was at that point the proposal with the second highest point total on the technical review, behind Liberty. A second version of the scoring grid was created on November 26. A new row was added to this grid titled "Reference Check" and which stated "History & Experience scores subject to change, contingent on reference checks?"

38. The RFP required the submission by vendors of information on contracts with "at least three other departments of state government, county governments, municipal governments, or large corporate employers in North Carolina or in other states within the last 5 years ..." RFP § 6.2.

39. In its proposal, CCME submitted in response to RFP § 6.2 information on five current contracts it has in North Carolina and elsewhere. Following that information, it included a section of its proposal titled "Additional Experience with the Division." In this section, CCME listed its experience on current contracts with DMA including performing assessments on the PCS program. For the PCS program, CCME listed Tara Larson as a manager with knowledge of CCME's performance.

40. Ms. Terrell met in person with her supervisor Tara Larson on the morning of December 3, to conduct references check for CCME and PCG, both of whom had current contracts with DMA. The reference check forms reflect that the PCG reference was done at 11am, and the CCME referenced immediately followed at 11:30am.

41. The reference check form included a line to "Describe how your organization works with this vendor." For CCME, Ms. Terrell recorded Ms. Larson as reporting that CCME's contracts included "Post payment and prepayment review for Home and Community Based Programs." CCME had a contract with DMA at the time of the reference check for prepayment review of HCBS services, but did not have a contract for post payment review of such services. PCG does have a contract with DMA for "Post Payment Reviews".

42. The reference check form for CCME included scores between Weak (2 of 5) and Good (4 of 5). Under the section for "problem identification", where an overall score of 2.5 is recorded, the handwritten notes include a reference to "post payment review" work.

43. After completing the reference check of CCME on the morning of December 3, Ms. Terrell informed Ms. Wides that the Evaluation Committee needed to reconvene and that it would be changing the scoring.

44. After the reference checks were conducted, the Evaluation Committee met on December 5. The committee decided to assign 50 points for the reference check, taking those points out of the 150 points of the Vendor History and Experience section of the evaluation table that CCME previously had received full credit for. The Evaluation Committee decided that all proposals which received scores of 3 or above on the reference check categories would receive the maximum 50 points for references. This scoring methodology is not documented in the procurement record.

45. All vendors except CCME received the maximum 50 points for the reference check, although some vendors received stronger references than others. CCME received 20 points for its reference check. The Evaluation Committee did not attempt to evaluate the reference checks to determine which was the strongest.

46. MTM received 50 points for its reference check although the reference reported that MTM performs transportation services for medical patients, and that it was "interesting" that MTM would apply for a contract to provide clinical services. Ms. Terrell testified that as long as a vendor received "satisfactory" or above in all categories of the

reference check, regardless of the type of experience shown by the reference, it would receive full credit.

47. Dr. Feasel testified that she believed the reference provided by Ms. Larson to Ms. Terrell was "generous" and she would have rated CCME lower. Ms. Terrell testified that she had "lost confidence" in CCME sometime by 2012, which is when the RFP evaluation took place.

48. Following the last meeting of the Evaluation Committee on December 5, 2012, Dr. Feasel prepared the final grid, which bears the date of December 7, 2012. The final grid sets forth the decisions reached by a consensus of the members of the Evaluation Committee on each of the evaluation factors set forth in the RFP.

49. In the scoring of the technical proposals, Liberty received the highest points of all five vendors. Liberty's technical proposal scored a total of 630 points; CCME's scored 520 points; PCG's scored 560 points; MTM's scored 415 points; and Xerox's scored 505 points.

50. The RFP provided that following the completion of the technical evaluation, the cost proposals of those vendors who scored at least 400 points on the technical would be opened. All five vendors were found to meet the minimum score of 400 points on the technical proposal. The Evaluation Committee recommended that the cost proposals of all five vendors be opened.

51. Lauren Wides took the comments and scoring contained in the Evaluation Committee's final grid and prepared a draft of a letter to the DHHS Office of Procurement and Contract Services recommending that the evaluation of all submitted proposals proceed to the opening and scoring of the cost proposals. Each member of the Evaluation Committee reviewed the final draft of this Memorandum recommending that all costs proposals be opened and scored, and each member initialed the Memorandum.

52. Lauren Wides, Chief of Medicaid Contracts, and two employees of the DHHS Office of Procurement and Contract Services, Margaret Serapin and Sherri Garte, opened the cost proposals

53. Ms. Wides, Ms. Serapin, and Ms. Garte reviewed the cost proposals for inconsistencies and inaccuracies. They then added up the costs in each cost proposals. Then cost proposals of each vendor were given a point score based upon the equation set forth in the RFP. In this formula, the lowest cost proposal, which was MTM, was given the maximum cost proposal score of 350 points.

54. Ms. Wides testified that she reviewed cost proposals for "completeness" by checking to see if all blanks were filled in, the calculations properly performed and signatures included. Ms. Wides also testified that she did not review cost proposals or technical proposals for "reasonableness or content." She agreed she was not qualified to review the cost proposals for quality, and also did not evaluate the cost narratives including the vendor's explanations of their cost proposals.

55. One vendor, MTM, proposed costs that were less than half the proposed cost of the next lowest vendor. MTM's cost proposal contained significant inconsistencies. For example, MTM proposed to charge $384 per mediation and $383 per appeal hearing, even though appeal hearings require a higher level of effort and preparation. MTM's costs for performing assessments and other services were also far below other vendors.

56. Following the scoring of the cost proposals, it was determined that Liberty had the highest total points, considering both the scoring of the technical and cost proposals. Since Liberty was the highest scored vendor on the technical proposal and was the highest overall scorer, it was determined that there was no need for further evaluation of the cost proposals.

57. Following the opening of the cost proposals and determination of final scores, Lauren Wides, DMA Section Chief Contracts, sent a Memorandum to DHHS Office of Procurement and Contract Services, communicating the final recommendation that the contract award be made to Liberty.

58. By Memorandum dated January 18, 2013, the DHHS Office of Procurement and Contract Services informed the Department of Administration State Purchase and Contract about the results of the technical and cost evaluation process and requested that the award be made to Liberty, the vendor with the highest overall score. In this Memorandum, Liberty scored the highest overall points of 772 and MTM scored the second highest overall points of 762. Though the lowest in Technical points (almost too low to proceed to Phase 2), MTM's overall point total came out unreasonably high due to its cost proposal which was on its face extremely low for the work being sought in the RFP. CCME scored the lowest overall points of 678. PCG scored 682 points, and Xerox scored 679 points.

59. By Memorandum dated January 28, 2013, Avery Johnson, who is an employee of State Purchase and Contract, recommended to Sam Byassee, the Director of State Purchase and Contract, that DHHS' request to contract Liberty be approved. Mr. Byassee approved the request.

60. By Memorandum dated January 29, 2013, State Purchase and Contact communicated with the DHHS Office of Procurement and Contract Services that DHHS was authorized to contract with Liberty for the Personal Care Services Administrative and Support Services covered by the RFP. On the same date, the award to Liberty was posted on the State of North Carolina Interactive Purchasing System website.

61. On January 30, 2013, Margaret Serapin from the DHHS Office of Procurement and Contract Services notified Rick Robinson, the contact person for Liberty, that Liberty had been awarded the contract. Ms. Serapin's stated that DMA would execute the agreement and forward a copy to Liberty.

62. On February 12, 2013, CCME submitted a bid protest letter and requested a bid protest meeting. In its protest letter, CCME contended that the State had improperly downgraded CCME's proposal under Vendor History and Experience, Vendor's Implementation Plan and Methodology, Challenges Foreseen by the Vendor and the Vendor's Proposed Solutions to Those Challenges, and the Vendor's Staffing Plan. CCME also contended that the State improperly failed to exclude MTM from the competition and that the State had evaluated

the proposals unequally and improperly rated Liberty's proposal too highly under Vendor's Implementation Plan and Methodology and Vendor's Staffing Plan.

63. A bid protest meeting was held before Sam Byassee, Director of State Purchase and Contracting of the Department of Administration, on March 12, 2013. Under 01 NCAC 05B, Mr. Byassee was required to issue a ruling within 10 days of the protest meeting.

64. At the protest meeting, Sam Byassee indicated to CCME's representatives that he would not be able to render his written decision within ten days of the protest meeting because of the number of issues raised by CCME. CCME did not object to Mr. Byassee's statement that it would take in excess of ten days to issue his written decision.

65. On March 18, 2013, CCME submitted a follow-up letter to Mr. Byassee asking the contract award be stayed pending decision on the protest meeting if he was going to take more than 10 days.

66. DMA determined that it would not sign the contract with Liberty while the protest was still pending. As a result of the protest, CCME's contract with DMA to provide independent assessments for PCS was further extended until September 30, 2013.

67. Mr. Byassee never issued a ruling on the protest meeting. DMA made requests to Mr. Byassee to seek a ruling, ultimately giving him a May 10 deadline to rule.

68. On May 8, 2013, Lauren Wides sent an e-mail to Sam Byassee reminding him that DMA was at a "critical juncture and needing to get this contract with Liberty Healthcare signed." Ms. Wides' e-mail (Res. Ex. 33) further states: "There is an extensive implementation period required in this contract, which even with the extension of the CCME contract which you just approved, has to be reduced from six months to four months. There are also significant programmatic implications for not completing that implementation. Therefore, DMA will execute this contract unless we hear otherwise from you by the close of business on Friday, May 10th." Mr. Byassee made no contact with DMA in response to Ms. Wides' e-mail.

69. On Monday, May 13, 2013, Carol Steckel, the Director of DMA, signed the contract with Liberty. Liberty's proposal includes a six-page list of activities that it will perform as part of the transition.

70. At the time of the hearing, Liberty and DMA were in the third phase of transition. Liberty had hired its management team and was in the process of hiring other employees, had signed a long term lease for office space, and was fully engaged in numerous activities required for the transition of vendors from the old contract to the new one.

71. Liberty has made investments in its performance of this contract, including signing a long-term lease, hiring key employees, attending regular meetings with DMA and its staff and with Viebridge (DMA's information technology vendor), and performing the transition required under the RFP under a compressed timetable.

72. Sam Byassee, the Director of State Purchase and Contract, responded to no party regarding the protest hearing and his obligations under State law and regulation. On May 21, 2013, CCME filed a Petition for Contested Case Hearing and Motion for Preliminary

Injunction. By Order dated May 30, 2013, Liberty was allowed to intervene in the contested case.

73. CCME decided that it would not proceed to schedule its Motion for Preliminary Injunction after the parties and this Tribunal agreed to an expedited hearing schedule. As a result, the hearing in this matter was held beginning on July 22, 2013, instead of the week beginning October 28, 2013, as originally scheduled.

74. In its Petition, CCME seeks a permanent injunction ordering Respondents to stop transition of the work under the RFP. CCME also asks that DHHS' award to Liberty be rescinded and that DHHS reevaluate proposals consistent with the terms of the RFP.

75. At the hearing, CCME's representative, Leslie Meilhon, testified that it was CCME's position that it could have won the award if points had not been deducted from CCME incorrectly or had not been attributed to Liberty incorrectly and the cost issue with MTM's proposal had caused the proposal to be thrown out.

76. CCME contends that the Evaluation Committee members should not have been discussing or considering CCME's performance problems with its existing IA contract. Ms. Meilhon testified that this was based solely on instructions to the Evaluation Committee from Lauren Wides, but Ms. Wides testified that her instructions did not apply to information about a vendor's experience and reputation.

77. CCME's representative, Leslie Meilhon, testified about CCME's awareness of DMA's concerns and DMA's dissatisfaction with CCME's performance of its IA contract with DMA. These performance problems included a backlog of assessments, erroneous letters being sent to PCS recipients and applicants, inaccurate and invalid assessments, and unsatisfactory work quality. CCME admits that DMA discussed these issues with CCME intermittently, over the years of the IA contract.

78. Section 6.2 of the RFP requires the vendor's "implementation plan and methodology including timelines and project milestones."

79. The Evaluation Committee reviewed each vendor's implementation plan and methodology to determine whether the implementation plan and methodology addressed the RFP requirements and the independent assessment program's goals and objectives. The Evaluation Committee scored each proposal's Implementation Plan and Methodology on a scale of 100 points.

80. The Evaluation Committee awarded Liberty the full 100 points based on Liberty's "comprehensive plan that addressed all the RFP components and with strong emphasis on project management, program logistics, employee and provider training, collaboration with IT vendor, customer support, and data-driven approach to quality of services and reporting." (Res. Ex. 13).

81. The Evaluation Committee assigned 70 points to CCME, PCG, and Xerox. The Evaluation Committee deducted 30 points from these vendors because their proposals did not include activities, timelines, and milestones related to critical, quantitative data-driven

quality assurance ("QA") functions such as those necessary to ensure validity and reliability of the independent assessment (pursuant to RFP sections 3.12(e) and 3.13).

82. Sections 3.12 and 3.13 include a program requirement that the independent assessment entity ensure the validity and reliability of the independent assessments. As CCME's representative admits, Section 6.2 of the RFP requires timelines and milestones.

83. Data-driven quality assurance measures were a significant focus of the business goals and objectives of the RFP.

84. Quality assurance measures were central to what was being requested in the RFP. Dr. Feasel testified that quality should permeate every element of the program. Mistakes in the IA program are costly to the State, and are costly to the Medicaid recipients.

85. The importance of quality assurance was also a component of the data collection and reporting requirements. As Dr. Feasel testified that there needed to be a robust quality assurance program in place to monitor all data.

86. Leslie Meilhon, CCME's representative, admitted that CCME's proposal had not addressed the quantitative, data-driven QA functions in its timelines and milestones.

87. CCME contends that DHHS rated Liberty's proposal too high under the "Vendor's Implementation Plan and Methodology" component. Specifically, CCME alleges that Liberty's proposal does not fully address the following requirements in the Scope of Work: Sections 3.1, 3.4, 3.6, 3.7, 3.8, 3.9(b)–(i), 3.10, 3.11, 3.12, 3.13, 3.14(b), (d) & (e), 3.17(b), (c), (d), & (g)–(i), 3.18, and 3.19.

88. Not all of the provisions under Article 3 (Scope of Work) are "requirements" of the RFP. Some provisions just provide an overview and information to the Vendor.

89. Liberty's technical proposal meets all requirements of the RFP. These requirements include those that CCME contends were not addressed as follows:

a. Processing of physician referrals as required under Section 3.7 of the RFP;

b. Completing the independent assessment process as required under Section 3.8 of the RFP;

c. Ensuring provider choice and due process for recipients as required under Section 3.9 of the RFP;

d. Issuing the appropriate notices as required under Section 3.10 of the RFP;

e. Managing the mediation, appeals, and assessment process as required under Section 3.11 of the RFP;

f. Overseeing and ensuring the reliability and validity of the independent assessments as required under Section 3.12 of the RFP;

g. Developing and providing reports as required under Section 3.13 of the RFP;

h. Employing the appropriate staff as required under Section 3.14 of the RFP;

i. Providing the appropriate PCS program administration as required under Section 3.17 of the RFP; and

j. Meeting the performance standards as required under Section 3.18 of the RFP.

90. DHHS appropriately evaluated and scored CCME's and Liberty's Implementation Plans and Methodologies.

91. In evaluating and scoring the proposals under Vendor Implementation Plan and Methodology, DHHS appropriately considered the business goals and objectives of the RFP and scored Liberty's proposal higher than CCME's because it better addressed the business objectives defined in the RFP.

92. CCME failed to prove that DHHS acted erroneously or arbitrarily or capriciously in reaching the results in scoring on Vendor Implementation Plan and Methodology.

93. The Evaluation Committee scored each vendor's responses to the Challenges Foreseen by the Vendor and Proposed Solutions to Those Challenges based upon a 100 point scale, as set forth in the RFP.

94. The Evaluation Committee awarded Liberty the full 100 points based on the Evaluation Committee's consensus determination that Liberty's proposal included and addressed "many historical and probable challenges, including those related to work plan requirements, IT and workflow issues, staffing, vendor transition issues, stakeholder involvement and functions, and program data volume and quality.

95. The Evaluation Committee assigned CCME 80 points for challenges foreseen and proposed solutions. The Evaluation Committee deducted 20 points for "CCME's failure to address initial plan of care review volume (pursuant to RFP Section 3.8(e))" and for CCME's failure to "identify challenges related to the volume and quality of program data and reporting requirements (Pursuant to RFP Section 3.13)." (Res. Ex. 13).

96. CCME contends that it should not have lost points for failing to foresee these as challenges because it was the incumbent vendor and thus was experienced with the volume and quality of program data and reporting requirements.

97. As the incumbent vendor, CCME has not had to provide the volume and quality of program data and reporting required under this RFP. The increased emphasis on data collection and reporting would be a challenge for CCME, as it would be for any other vendor.

98. As the incumbent vendor, CCME has never completed any plan of care reviews. It was a contract requirement that CCME never performed. Therefore, initial plan of

care review volume would be a challenge for CCME. CCME's proposal failed to address how it would deal with this new volume of plan of care reviews.

99. The RFP provided the volume of assessments that would be required. Part of the assessment process is the plan of care review.

100. In evaluating and scoring the proposals under Challenges Foreseen by the Vendor and the Vendor's Proposed Solutions to Those Challenges, DHHS did not act erroneously or arbitrarily and capriciously in determining that CCME failed to address challenges that it should have foreseen.

101. CCME failed to prove that DHHS acted erroneously or arbitrarily or capriciously in reaching the results in scoring on Challenges Foreseen by the Vendor and the Vendor's Proposed Solutions to Those Challenges.

102. In evaluating vendors' proposals on Staffing Plans, the Evaluation Committee allocated 100 out of 150 points to CCME, MTM, and Xerox. One hundred and twenty-five (125) points were given to PCG, and the full 150 points were given to Liberty.

103. In allocating 150 points to Liberty, the Evaluation Committee determined that Liberty's Staffing Plan accounts for all program requirements, with strong emphasis on project management and quantitative data-driven approach to quality. In evaluating CCME's Staffing Plan, the Evaluation Committee determined that CCME's Staffing Plan does not include one or more positions dedicated in whole or in part to quantitative and systematic data QA and did not sufficiently address staffing requirements for Plan of Care review.

104. CCME contends that it should not have lost any points on Staffing Plan and that Liberty should not have received 150 points because CCME contends that Liberty plans to use data processors to do the review of Plans of Care.

105. Liberty's proposal includes a full-time Director of Quality and Data Reporting who will have a team of six (6) people working under him or her. Liberty also sets forth many activities of the Director of Quality and Data Reporting throughout its Implementation Plan and time table for completing each task.

106. In contrast, CCME admits that its proposal does not state that there will be a person dedicated solely to quantitative and systematic data collection for quality assurance. CCME references its two business analysts. The Evaluation Committee understood that CCME's staffing plan included these individuals and credited CCME in evaluating CCME's staffing plan.

107. The program goals and objectives set forth in the RFP include a strong emphasis on quantitative and systematic data quality assurance. Because Liberty's proposal includes a Staffing Plan with a strong emphasis on project management and a quantitative, data-driven approach to quality, it scored higher than those proposals that did not adequately address this important objective of the contract.

108. In its proposal, CCME is unclear about staffing for Plan of Care reviews. Instead, CCME's proposal indicates that not all of the elements of the Plan of Care reviews can

be automated and that with the Division's approval, it will use registered nurses to perform Plan of Care reviews. CCME admits that its proposal contains no affirmative statement that nurses will do Plan of Care reviews, and Plan of Care reviews are not included as part of any job description.

109. CCME's contention that only word processors will be involved in Plan of Care reviews for Liberty is not accurate. Liberty's proposal describes the duties of the processors as "including reviewing technical denials, change of provider notifications, and adverse decision notices to the referring physicians, recipients and providers as well as reviewing acceptances of provided Plans of Care." (Res. Ex. 1). Word processors will do the technical acceptance and transmittal of Plans of Care. Other statements in Liberty's proposal make it clear that RNs will be involved in the substantive review of Plans of Care.

110. In evaluating and scoring the proposals under Vendor's Staffing Plan, DHHS did not act erroneously or arbitrarily and capriciously in determining that CCME's staffing plan should score less than Liberty's staffing plan.

111. CCME failed to prove that DHHS acted erroneously or arbitrarily or capriciously in reaching the results in scoring on Vendor's Staffing Plan.

112. DHHS was not required to publish as a part of the RFP exactly how the Evaluation Committee would determine points within each of the evaluation categories set forth in the RFP. This was determined by consensus during the meetings of the Evaluation Committee.

113. CCME has contended that the Evaluation Committee should have added points instead of deducting them. However, CCME was not aware of any regulation imposing such a requirement.

114. As of the date of CCME's filing of its Petition for Contested Case Hearing, Mr. Byassee had not issued a bid protest decision. CCME has raised in its Petition for Contested Case Hearing the same issues that it raised in its protest letters. Further, the protest letter is attached to the Petition and incorporated by reference.

115. In CCME's list of issues, CCME contends that DHHS erred in communicating with bidders about the procurement prior to the award decision being made.

116. CCME contends that these allegations involve an e-mail that was sent from Sandra Terrell to Megan Tomilin. Sandra Terrell sent an e-mail message to CCME's Megan Tomilin on December 12, 2012, after the Evaluation Committee had completed its evaluation of the technical proposals and made final decisions, by consensus, on the scoring of each proposal. The e-mail was sent by Ms. Terrell in reaction to DMA's discovery that CCME had sent notification letters to PCS recipients that included an error regarding the deadline for submitting an appeal to receive maintenance of service. CCME's Megan Tomilin admitted that the error appeared in every letter that included an appeals page. Ms. Terrell's e-mail to Ms. Tomilin asked if there was a point deduction somewhere.

117. Ms. Terrell admitted that the communication was a "poor joke." However, the communication did not involve the substance of CCME's proposal and instead was

the result of ongoing business relations between DMA and CCME on the existing IA contract. The scoring had already been completed and the Evaluation Committee had finished its evaluation of the technical proposals. CCME has failed to show that it was substantially prejudiced by this communication.

118. CCME also contends that DHHS erred in failing to disqualify Liberty because of the communication that occurred between a lobbyist for Liberty and Steve Mange of DMA in which the Liberty's lobbyist was providing summary information about Liberty that had been requested by Mr. Mange. In his deposition, Steve Mange testified that he asked Liberty's lobbyist for a description of Liberty so that he could provide this information to Carol Steckel, the new Director of DMA, along with summary information about CCME. This communication occurred on March 26, 2013, two months after the contract was awarded to Liberty.

119. Section 2.5 of the RFP prohibits certain communications between any vendor and the Department or its agents about the RFP, the vendor's proposal, or any other vendor's proposal from the date the RFP is issued until the date the contract is awarded. The e-mail communication about which CCME complains occurred two months after the contract was awarded to Liberty. CCME has failed to prove that these communications substantially prejudiced CCME's rights as the evaluation had been completed before they occurred.

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

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this action. CCME timely filed its petition for contested case hearing pursuant to N.C. Gen. Stat. § 150B-23. The parties received proper notice of the hearing in the matter.

2. 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.

3. A court need not make findings as to every fact that 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, 440, 429 S.E.2d 611, 612, *aff'd*, 335 N.C. 234, 436 S.E.2d 588 (1993).

4. When challenging an Agency decision under Article 3 of the Administrative Procedure Act, a Petitioner must establish by a preponderance of the evidence that: (1) the Agency's decision deprived Petitioner of property, ordered the Petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the Petitioner's right and (2) 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. *Britthaven, Inc. v. N.C. Dep't of Human Res.,* 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995); *see also* N.C.G.S. § 150B-23(a).

5. In this matter, Petitioner bears the burden of proof on each and every element of its case. *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 704, 635 S.E.2d 442, 447–48 (2006).

6. The procurement at issue in this contested case was a best value procurement as defined in N.C. Gen. Stat. § 143-135.9. Best value procurement means "[t]he selection of a contractor based on a determination of which proposal offers the best trade-off between price and performance, where quality is considered an integral performance factor." N.C. Gen. Stat. § 143-135.9(a)(1). The evaluation process followed by DHHS in this procurement, which evaluated and scored the technical proposals as Step 1 of the process and opened and scored the cost proposals as Step 2 of the process, was designed to accomplish the trade-off between price and performance required in a best value procurement.

7. DHHS followed its statutory requirements by making its decision based upon multiple factors, including total cost, the vendor's past performance, and the evaluated probability of performing the requirements stated in the solicitation on time, with high quality, and in a matter that accomplishes the stated business objectives and maintain industry standards compliance.

8. DHHS sought competitive bids for the independent assessment contract, consistent with the requirements of N.C. Gen. Stat. § 143-52. DHHS considered the criteria required by N.C. Gen. Stat. § 143-52(a), which are: prices offered; best value, as defined in N.C. Gen. Stat. § 143-135.9; the quality of the articles offered; the general reputation and performance capabilities of the bidders; and the substantial conformity with the specifications and other conditions set forth in the request for bids.

9. The preponderance of the evidence shows that Respondent, DHHS erred in its conduct regarding the reference check. The RFP required the submission of information from bidders on contracts with "other" state agencies or entities. This provision was permissible to include in the RFP, and prevented DMA from using itself as a "reference" to either unfairly benefit or harm any vendor and to ensure a fair and impartial evaluation of the proposals pursuant to RFP § 7.1. This provision of the RFP was consistent with the memorandum given to the Evaluation Committee directing them not to discuss their work with anyone at DMA, including their supervisor.

10. Moreover and most evidently, DHHS erred in its method of assigning points for reference checks. The first version of the scoring grid included 150 points allowable for Vendor History and Experience. A second version of the scoring grid was created on November 26, and a new row was added to this grid titled "Reference Check" and which stated "History & Experience scores subject to change, contingent on reference checks?" After the reference checks were conducted, the Evaluation Committee decided to assign 50 points for the Reference Check, taking those points out of the 150 points of the Vendor History and Experience section of the evaluation table that CCME previously had received full credit for. The Evaluation Committee decided that all proposals which received scores of 3 or above on the reference check categories would receive the maximum 50 points for references. This is certainly

akin to someone scoring a 51 on a test and receiving a grade of 100 while another scored a grade of 49 and being required to keep that 49 grade. All vendors except CCME (who received 20 points) received the maximum 50 points for the reference check, although some vendors received stronger references than others. In fact MTM received 50 points for its reference check although the reference reported that MTM performs transportation services for medical patients, and that it was interesting that MTM would apply for a contract to provide clinical services.

11. Administrative agency decisions may be reversed as arbitrary and capricious upon a showing that they are "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 Services for the State of North Carolina*, 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997). DHHS's method of conducting and scoring reference checks was arbitrary and capricious and should be and is rightfully struck from the scoring. As such Liberty's technical score which was 630 should now be 580 (630-50) and CCME's technical score which was 520 should now be 500 (520-20).

12. CCME failed to prove by a preponderance of the evidence that DHHS violated any of the standards of N.C. Gen. Stat. § 150B-23(a) in its scoring of the proposals of the Vendor Implementation Plan and Methodology. The Evaluation Committee's determination that a data-driven approach to quality of services and reporting is important to the PCS independent assessment contract and that vendors should have included activities, timelines, and milestones for the development of these functions is consistent with the goals and objectives of the RFP and the intent of the best value procurement. A best value procurement allows an agency to select the most appropriate solution to meet the business objectives defined in its solicitation.

13. CCME failed to prove by a preponderance of the evidence that DHHS violated any of the standards of N.C. Gen. Stat. § 150B-23(a) in scoring CCME's proposal under the evaluation factor of Challenges Foreseen by the Vendor and the Vendor's Proposed Solution to Those Challenges. Because CCME as the incumbent vendor was not engaged in either plan of care reviews or the level of data collection and reporting that the RFP required, the Evaluation Committee did not act erroneously or arbitrarily or erroneously in deducting points from CCME because it failed to foresee these as challenges.

14. CCME failed to prove by a preponderance of the evidence that DHHS violated any of the standards of N.C. Gen. Stat. § 150B-23(a) in its scoring of the proposals under Staffing Plans. DHHS acted in accordance with the intent of best value procurement: (a) when it assigned more points to Liberty's proposal because of Liberty's strong emphasis on project management and Liberty's quantitative, data-driven approach to quality; and (b) when it assigned fewer points to CCME because CCME failed to dedicate one or more positions dedicated to these important business objectives. *See* N.C. Gen. Stat. § 143-135.9. CCME also failed to prove its allegation that Liberty's proposal should have been downgraded for staff that would be involved in plan of care reviews.

15. Since the 50 points for reference checks were a part of and removed from the Vendor History and Experience Section and since the Undersigned finds that the remainder of the Vendor History and Experience Section was properly scored as well as all other sections, the overall technical scoring (minus the removal of the reference check points) is not otherwise disturbed. The overall corrected technical evaluation with Liberty scoring 580 points and CCME

scoring 500 points stands as proper in moving to the second phase of the opening and evaluation of the cost proposals.

16. In finding that the reference checks were arbitrary and capricious and must be struck, MTM's new technical evaluation score drops from 415 to 365 (415-50) thus technically making it ineligible to proceed to the evaluation of cost proposal phase. Disregarding this mathematical technicality, the Undersigned nonetheless finds that MTM's proposed costs that were less than half the proposed cost of the next lowest vendor should be and must be disregarded.

17. Most importantly, for purposes of this case, the preponderance of the evidence at this hearing reveals that DHHS erred in failing to review the cost proposals for "reasonableness and completeness." The RFP required this review to be done, and such review is not reflected in the procurement record or elsewhere. DHHS admitted that it performed no review of the "reasonableness" of cost proposals. If the review had been completed, the evidence shows that the MTM proposal would have been and should have been disqualified.

18. The preponderance of the evidence at this hearing does show that the remaining four proposals were reasonable and complete, making Xerox the low bidder at $41,887,301 and eligible for the maximum score of 350 points.

19. Using the formula of 350 times $41,887,301 divided by the cost of the Cost Proposal being evaluated (350 x $41,887,301/Cost Proposal), the new and corrected score of Petitioner CCME is 318 points (350 x $41,887,301/$46,076,501.08).

20. Using the formula of 350 times $41,887,301 divided by the cost of the Cost Proposal being evaluated (350 x $41,887,301/Cost Proposal), the new and corrected score of Respondent-Intervenor Liberty is 287 points (350 x $41,887,301/$51,101,444.04).

21. Other than the issue regarding reference checks and its effect on the Technical Proposal Score as set out above, and the issue regarding cost evaluations and its effect on the Cost Proposal Score as set out above, the other factors considered cannot be shown by a preponderance of the evidence to have violated the requirements of Chapter 143 of the North Carolina General Statutes that address competitive bidding procedures and best value procurements.

22. Ms. Terrell's email message to CCME regarding the erroneous notices issued by CCME under its current contract with DMA did not violate any procurement law or rule or any provision of the RFP.

23. The post-award communications between Mr. Mange and Liberty's lobbyist did not violate any procurement law or rule or any provision of the RFP. As set forth in the RFP, any restrictions on communications ended with the award of the contract to Liberty, which occurred on January 29, 2013. Before it filed its protest in February of 2013, CCME was provided access to the public records of the procurement, consistent with state law making procurement information public record after the award of contract.

24. Mr. Byassee's failure to issue a timely ruling on CCME's protest must be viewed as a denial of the protest. CCME has had a full and complete hearing on all issues raised

in the protest in this contested case. CCME has not been substantially prejudiced by Mr. Byassee's failures.

25. CCME has failed to prove by a preponderance of the evidence that DHHS violated any of the standards of N.C. Gen. Stat. § 150B-23 by not requiring that individual Evaluation Committee members take notes. Nothing under North Carolina procurement law or the RFP terms requires that the Evaluation Committee take notes.

26. CCME has failed to prove by a preponderance of the evidence that Dr. Feasel's and Sandra Terrell's failure to preserve certain documents violated any of the standards of N.C. Gen. Stat. § 150B-23. The written documents that were made and not maintained were Dr. Feasel's handwritten comments recorded on the printed scoring grid at each Evaluation Committee meeting and then transcribed into electronic form after each meeting, and Ms. Terrell's script that followed the typed reference form. There is no evidence that such destruction was intentional or in consideration of the likelihood or even possibility of future litigation.

27. The spoliation of evidence only applies "[w]hen the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized inquiry." *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 187–88, 527 S.E.2d 712, 718 (2000) (quotation omitted). "The evidence lost must be 'pertinent' and 'potentially supportive of plaintiff's allegations." *Arndt v. First Union Nat. Bank*, 170 N.C. App. 518, 528, 613 S.E.2d 274, 281 (2005) (quoting *McLain*, 137 N.C. App. at 188, 527 S.E.2d at 718. Evidence that is no longer available "creates a permissible 'adverse inference,' not a mandatory presumption." *Arndt*, 170 N.C. App. at 527, 613 S.E.2d at 281 (citation omitted). "The factfinder *is free* to determine the documents were destroyed accidentally or for an innocent reason and reject the inference. *Id.*, 613 S.E.2d at 281 (quotation omitted) (emphasis in original).

28. Dr. Feasel's destroyed notes were memorialized in electronic documents, which were later approved by the Evaluation Committee. Ultimately, the Evaluation Committee produced and approved a Memorandum containing its consensus evaluations of the technical proposal.

29. Based on the conclusions set out above, the Technical Proposal Score for Petitioner Medical Review of North Carolina, Inc. dba The Carolinas Center for Medical Excellence is correctly 500 points and the Cost Proposal Score is correctly 318 points for a total of 818 points.

30. Based on the conclusions set out above, the Technical Proposal Score for Liberty Healthcare Corporation is correctly 580 points and the Cost Proposal Score is correctly 287 points for a total of 867 points.

31. An injunction is an equitable remedy allowed only after the petitioner shows that it has a right to be protected and that there has been an infringement of that right. *See, e.g.*, *Holleman v. Aiken*, 193 N.C. App. 484, 503, 668 S.E.2d 579, 591 (2008); *Anderson v. Town of Waynesville*, 203 N.C. 37, 164 S.E. 583, 588 (1932). "Injunctions are denied in particular cases when the plaintiff fails to establish any underlying right." 1 Dan B. Dobbs, *Law of Remedies* § 2.9(2), at 227 (2d ed. 1993).

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32. CCME has established no underlying right to enjoin the transition and Liberty's performance of its contract with DHHS. CCME is requesting that the award be rescinded and Liberty's contract be enjoined. CCME has established no right to such relief. Further, based upon the combined Technical and Cost scores, the preponderance of the evidence does not establish a conclusion that the award to Liberty should be overturned and the same awarded to Petitioner.

33. To the extent CCME is seeking an extension of CCME's no-bid contract by the relief it is requesting, such relief is contrary to North Carolina procurement law, which clearly establishes a preference for competitive bidding. *See, e.g.*, N.C. Gen. Stat. §§ 143-49, 143-52; 01 NCAC 05B .0501; 01 NCAC 05B .1401.

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

FINAL DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned enters the following Final Decision 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.

Based on those conclusions and the facts in this cases, the Undersigned holds that even taking into account the errors committed in the procurement process as set out above, the Petitioner Medical Review of North Carolina, Inc. dba The Carolinas Center for Medical Excellence failed to carry its burden of proof by a greater weight of the evidence that the awarding of the Personal Care Services and Administrative Support Services contract to Liberty Healthcare Corporation was in error. The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side. The weight of Petitioner's evidence does not overbear in that degree required by law the weight of evidence of Respondent to the ultimate issue, and as such the contract award decision in this case made by the North Carolina Department of Administration and the North Carolina Department of Health and Human Services is hereby affirmed.

NOTICE

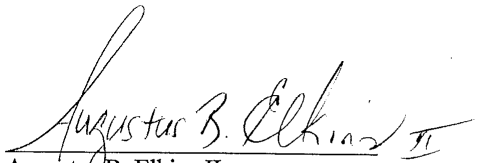
THIS IS A FINAL DECISION issued under the authority of N.C. GEN. STAT. § 150B-34. Under the provisions of North Carolina General Statutes Chapter 150B, Article 4, any party wishing to appeal the Final Decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county

in which the party resides. The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. In conformity with the Office of Administrative Hearings' Rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.

N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This is the 30th day of August, 2013.



Augustus B. Elkins II
Administrative Law Judge

On this date mailed to:

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