

NORTH CAROLINA REGISTER

VOLUME 28 • ISSUE 20 • Pages 2418 – 2566

April 15, 2014

I. PROPOSED RULES

Elections, State Board of	2418-2420
Environment and Natural Resources, Department of	
Coastal Resources Commission	2422-2424
Justice, Department of	
Criminal Justice Education and Training Standards Commission	2420-2422
Occupational Licensing Boards and Commissions	
Electrical Contractors, Board of Examiners of	2424-2426
Pharmacy, Board of	2426-2429

II. TEMPORARY RULES

Environment and Natural Resources, Department of	
Environmental Management Commission	2430-2432

III. RULES REVIEW COMMISSION

2433-2442

VI. CONTESTED CASE DECISIONS

Index to ALJ Decisions	2443-2457
Text of ALJ Decisions	
12 OSP 02283	2477-2495
12 OSP 06310	2496-2534
12 OSP 08259	2535-2546
12 OSP 08465	2547-2566
13 OSP 08950	2458-2476

PUBLISHED BY

*The Office of Administrative Hearings
Rules Division
6714 Mail Service Center
Raleigh, NC 27699-6714
Telephone (919) 431-3000
Fax (919) 431-3104*

*Julian Mann III, Director
Molly Masich, Codifier of Rules
Dana Vojtko, Publications Coordinator
Tammara Chalmers, Editorial Assistant
Lindsay Woy, Editorial Assistant*

Contact List for Rulemaking Questions or Concerns

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

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

Office of Administrative Hearings

Rules Division

1711 New Hope Church Road

(919) 431-3000

Raleigh, North Carolina 27609

(919) 431-3104 FAX

contact: Molly Masich, Codifier of Rules	molly.masich@oah.nc.gov	(919) 431-3071
Dana Vojtko, Publications Coordinator	dana.vojtko@oah.nc.gov	(919) 431-3075
Tammara Chalmers, Editorial Assistant	tammara.chalmers@oah.nc.gov	(919) 431-3083
Lindsay Woy, Editorial Assistant	lindsay.woy@oah.nc.gov	(919) 431-3078

Rule Review and Legal Issues

Rules Review Commission

1711 New Hope Church Road

(919) 431-3000

Raleigh, North Carolina 27609

(919) 431-3104 FAX

contact: Joe DeLuca Jr., Commission Counsel	joe.deluca@oah.nc.gov	(919) 431-3081
Amanda Reeder, Commission Counsel	amanda.reeder@oah.nc.gov	(919) 431-3079
Abigail Hammond, Commission Counsel	abigail.hammond@oah.nc.gov	(919) 431-3076
Amber Cronk May, Commission Counsel	amber.cronk@oah.nc.gov	(919) 431-3074
Julie Brincefield, Administrative Assistant	julie.brincefield@oah.nc.gov	(919) 431-3073

Fiscal Notes & Economic Analysis and Governor's Review

Office of State Budget and Management

116 West Jones Street

(919) 807-4700

Raleigh, North Carolina 27603-8005

(919) 733-0640 FAX

Contact: Anca Grozav, Economic Analyst	osbmruleanalysis@osbm.nc.gov	(919) 807-4740
--	------------------------------	----------------

NC Association of County Commissioners

215 North Dawson Street

(919) 715-2893

Raleigh, North Carolina 27603

contact: Amy Bason

amy.bason@ncacc.org

NC League of Municipalities

(919) 715-4000

215 North Dawson Street

Raleigh, North Carolina 27603

contact: Erin L. Wynia

ewynia@nclm.org

Legislative Process Concerning Rule-making

Joint Legislative Administrative Procedure Oversight Committee

545 Legislative Office Building

300 North Salisbury Street

(919) 733-2578

Raleigh, North Carolina 27611

(919) 715-5460 FAX

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

NORTH CAROLINA REGISTER
Publication Schedule for January 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:	270 th 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

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) text of proposed rules;
- (3) text of permanent rules approved by the Rules Review Commission;
- (4) emergency rules
- (5) Executive Orders of the Governor;
- (6) 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; and
- (7) other information the Codifier of Rules determines to be helpful to the public.

COMPUTING TIME: In computing time in the schedule, the day of publication of the North Carolina Register is not included. The last day of the period so computed is included, unless it is a Saturday, Sunday, or State holiday, in which event the period runs until the preceding day which is not a Saturday, Sunday, or State holiday.

FILING DEADLINES

ISSUE DATE: The Register is published on the first and fifteen of each month if the first or fifteenth of the month is not a Saturday, Sunday, or State holiday for employees mandated by the State Personnel Commission. If the first or fifteenth of any month is a Saturday, Sunday, or a holiday for State employees, the North Carolina Register issue for that day will be published on the day of that month after the first or fifteenth that is not a Saturday, Sunday, or holiday for State employees.

LAST DAY FOR FILING: The last day for filing for any issue is 15 days before the issue date excluding Saturdays, Sundays, and holidays for State employees.

NOTICE OF TEXT

EARLIEST DATE FOR PUBLIC HEARING: The hearing date shall be at least 15 days after the date a notice of the hearing is published.

END OF REQUIRED COMMENT PERIOD
An agency shall accept comments on the text of a proposed rule for at least 60 days after the text is published or until the date of any public hearings held on the proposed rule, whichever is longer.

DEADLINE TO SUBMIT TO THE RULES REVIEW COMMISSION: The Commission shall review a rule submitted to it on or before the twentieth of a month by the last day of the next month.

FIRST LEGISLATIVE DAY OF THE NEXT REGULAR SESSION OF THE GENERAL ASSEMBLY: This date is the first legislative day of the next regular session of the General Assembly following approval of the rule by the Rules Review Commission. See G.S. 150B-21.3, Effective date of rules.

Note from the Codifier: 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 08 – STATE BOARD OF ELECTIONS

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC State Board of Elections intends to adopt the rules cited as 08 NCAC 15 .0101-.0102; and 16 .0101-.0105.

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

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

Link to agency website pursuant to G.S. 150B-19.1(c): www.ncsbe.gov [in box in lower left area of the page, click on "Rule-making" tab]

Proposed Effective Date: August 1, 2014

Public Hearing:

Date: June 4, 2014

Time: 10:00 a.m.

Location: State Board of Elections office, 441 North Harrington Street, Raleigh, NC 27603

Reason for Proposed Action:

08 NCAC 15 .0101 – Compliance with G.S. 150B-20

08 NCAC 15 .0102 – Compliance with G.S. 150B-04

08 NCAC 16 .0101, .0102, .0103, .0104, .0105 – Session Law 2013-381 mandated temporary and permanent rule-making by the State Board of Elections on the subject of Multipartisan Assistance Teams, temporary rules (08 NCAC 13 .0201 through .0205) were adopted by the State Board of Elections on October 1, 2013, reviewed by the Rule Review Commission, and published in the North Carolina Register (Volume 28, Issue 10). The temporary rules are now being proposed as permanent rules, with a public hearing and comment period ending after the May 6, 2014 primary, which will be the first statewide election event in which the temporary rules are in effect. The State Board of Elections has invited interested parties, including the 100 County Boards of Elections, to provide comment as to the execution of temporary rules during the May 6, 2014 primary.

Comments may be submitted to: George McCue, NC State Board of Elections, 441 North Harrington Street, Raleigh, NC 27603

Comment period ends: June 16, 2014

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the

Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).

- ☐ State funds affected
☐ Environmental permitting of DOT affected
☐ Analysis submitted to Board of Transportation
☐ Local funds affected
☐ Substantial economic impact (≥\$1,000,000)
☒ No fiscal note required by G.S. 150B-21.4

CHAPTER 15 – RULE-MAKING

SECTION .0100 - PETITION FOR RULE-MAKING

08 NCAC 15 .0101 INSTRUCTIONS FOR FILING A PETITION FOR RULE-MAKING

(a) Any person may petition the State Board of Elections to adopt a new rule, or amend or repeal an existing rule by submitting a rule-making petition to the office of the State Board of Elections. The petition must be titled "Petition for Rule-making" and must include the following information:

- (1) the name and address of the person submitting the petition;
- (2) a citation to any rule for which an amendment or repeal is requested;
- (3) a draft of any proposed rule or amended rule;
- (4) an explanation of why the new rule or amendment or repeal of an existing rule is requested and the effect of the new rule, amendment, or repeal on the procedures of the State Board of Elections;
- (5) any other information the person submitting the petition considers relevant.

(b) The State Board of Elections must decide whether to grant or deny a petition for rule-making within 120 days of receiving the petition. In making its decision, the Board will consider the information submitted with the petition and any other relevant information.

(c) When the State Board of Elections denies a petition for rule-making, it must send written notice of the denial to the person who submitted the request. The notice must state the reason for the denial. When the State Board of Elections grants a rule-making petition, it must initiate rule-making proceedings and send written notice of the proceedings to the person who submitted the request.

Authority G.S. 150B-20.

**08 NCAC 15 .0102 DECLARATORY RULINGS:
AVAILABILITY**

(a) The State Board may issue declaratory rulings. All requests for declaratory rulings shall be in writing and submitted to the office of the State Board of Elections.

(b) Every request for a declaratory ruling must include the following information:

- (1) the name and address of the petitioner,
- (2) the reference to the statute or rule in question,
- (3) a statement as to why the petitioner is a person aggrieved, and
- (4) the consequences of a failure to issue a declaratory ruling.

(c) A declaratory ruling shall not be issued on a matter requiring an evidentiary proceeding.

Authority G.S. 150B-4.

CHAPTER 16 – MULTIPARTISAN ASSISTANCE TEAMS

**08 NCAC 16 .0101 MULTIPARTISAN ASSISTANCE
TEAMS**

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

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

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

Authority G.S. 163-226.3(a)(4); S.L. 2013-381, Sec. 4.6(b).

08 NCAC 16 .0102 TEAM MEMBERS

(a) The Team shall be composed as follows:

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

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

Authority G.S. 163-226.3(a)(4); S.L. 2013-381, Sec. 4.6(b).

**08 NCAC 16 .0103 TRAINING AND
CERTIFICATION OF TEAM MEMBERS**

(a) The State Board of Elections shall provide uniform training materials to each County Board of Elections. Each County Board of Elections shall administer training for every Team member as directed by the State Board of Elections.

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

- (1) A statement that the Team member will carry out the duties of the Team objectively, will not attempt to influence any decision of a voter being provided any type of assistance, and will not wear any clothing or pins with political messages while assisting voters;
- (2) A statement that the Team member is familiar with absentee voting election laws and will act within the law, and the Team member will refer to County Board of Elections staff in the event the Team member is unable to answer any question;
- (3) A statement that the Team member will not use, reproduce, or communicate to unauthorized persons any confidential information or document handled by the Team member, including the voting choices of a voter and confidential voter registration information;
- (4) A statement that the Team member will not accept payment or travel reimbursement by

any political party or candidate for work as a Team member;

- (5) A statement that the Team member does not hold any elective office under the United States, this State, or any political subdivision of this State;
- (6) A statement that the Team member is not a candidate for nomination or election, as defined in G.S. 163-278.6(4), for any office listed in Subparagraph (b)(5) of this Rule.
- (7) A statement that the Team member does not hold any office in a State, congressional district, or county political party or organization, and is not a manager or treasurer for any candidate or political party. For the purposes of this Subparagraph, a delegate to a convention shall not be considered a party office;
- (8) A statement that the Team member is not an owner, manager, director, or employee of a covered facility where a resident requests assistance;
- (9) A statement that the Team member is not a registered sex offender in North Carolina or any other state; and
- (10) A statement that the Team member understands that submitting fraudulent or falsely completed declarations and documents associated with absentee voting is a Class I felony under Chapter 163 of the General Statutes, and that submitting or assisting in preparing a fraudulent or falsely completed document associated with absentee voting may constitute other criminal violations.

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

Authority G.S. 163-226.3(a)(4); S.L. 2013-381, Sec. 4.6(b).

08 NCAC 16 .0104 VISITS BY MULTIPARTISAN ASSISTANCE TEAMS

- (a) The State Board of Elections shall provide annual notice regarding availability of Teams in each county. The notice will provide information for covered facilities to contact the County Board of Elections to arrange a Team visit.
- (b) If a facility, or a patient or resident of a facility, requests a visit by the Team, the County Board of Elections shall notify the Team and schedule a visit within seven calendar days if it is able to do so.
- (c) On a facility visit, the composition of the visiting Team members shall comply with the requirements of Rule .0102(a)(1) or (a)(2) of this Section.
- (d) All Team members shall remain within the immediate presence of each other while visiting or assisting patients or residents.

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

- (1) Assistance in requesting a mail-in absentee ballot: The Team shall collect any completed request forms and promptly deliver those request forms to the County Board of Elections office.
- (2) Assistance in casting a mail-in absentee ballot: Before providing assistance in voting by mail-in absentee ballot, a Team member shall be in the immediate presence of another Team member whose registration is not affiliated with the same political party. If the Team members provide assistance in marking the mail-in absentee ballot, the Team members shall sign the voter's container-return envelope to indicate that they provided assistance as allowed by law. Team members may also sign the container-return envelope as a witness to the marking of the mail-in absentee ballot.

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

Authority G.S. 163-226.3(a)(4); S.L. 2013-381, Sec. 4.6(b).

08 NCAC 16 .0105 REMOVAL OF TEAM MEMBERS

(a) The County Board of Elections shall revoke a Team member's certification, granted under Rule .0103 of this Section, for the following reasons:

- (1) Violation of Chapter 163 of the General Statutes or one of the Rules contained in this Section;
- (2) Political partisan activity in performing Team duties;
- (3) Failure to respond to directives from the County Board of Elections; or
- (4) Failure to maintain certification.

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

Authority G.S. 163-226.3(a)(4); S.L. 2013-381, Sec. 4.6(b).

TITLE 12 – DEPARTMENT OF JUSTICE

Notice is hereby given in accordance with G.S. 150B-21.2 that the Criminal Justice Education and Training Standards Commission intends to amend the rule cited as 12 NCAC 09E .0105.

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

- ☐ **OSBM certified on:**
- ☒ **RRC certified on:** *February 21, 2014*
- ☐ **Not Required**

Link to agency website pursuant to G.S. 150B-19.1(c):
<http://ncdoj.gov/About-DOJ/Law-Enforcement-Training-and-Standards/Criminal-Justice-Education-and-Training-Standards/Forms-and-Publications.aspx>

Proposed Effective Date: January 1, 2015

Public Hearing:

Date: August 21, 2014

Time: 10:30 a.m.

Location: Wake Technical Community College, Public Safety Training Center, 321 Chapanoke Road, Raleigh, NC 27502

Reason for Proposed Action: The revisions are necessary to update the annual mandatory law enforcement in-service training topics for the year 2015.

Comments may be submitted to: Trevor Allen, P.O. Drawer 149, Raleigh, NC 27602; phone (919) 779-8211; fax (919) 779-8210; email tjallen@ncdoj.gov

Comment period ends: August 21, 2014

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

Fiscal impact (check all that apply).

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Substantial economic impact (≥\$1,000,000)
- ☒ No fiscal note required by G.S. 150B-21.4

CHAPTER 09 – CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS

SUBCHAPTER 09E – IN-SERVICE TRAINING PROGRAMS

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

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

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

- (1) ~~2014~~ 2015 Firearms Training and Qualification (6 credits);
- (2) ~~2014~~ 2015 Legal Update (4 credits);
- (3) ~~2014~~ 2015 Juvenile Minority Sensitivity Training: ~~A Juvenile – Now What? Training: What does it have to do with me?~~ (2 credits);
- (4) ~~2014 Officer Safety: The First Five Minutes~~ 2015 Domestic Violence: Teen Dating Violence (4 2 credits); and
- (5) ~~2014~~ 2015 Department Topics of Choice (8 10 credits). The Department Head may choose any topic, provided the lesson plan is written in Instructional Systems Design format and is taught by an instructor who is certified by the Commission.

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

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

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

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

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

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

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

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

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

regardless of the amount of time the student spends completing the course.

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

- (1) A written test comprised of at least five questions per credit shall be developed by the agency or the North Carolina Justice Academy for each in-service training topic requiring testing. Written courses that are more than four credits in length are required to have a written test comprising of a minimum of 20 questions. The Firearms Training and Qualifications in-service course is exempt from this written test requirement;
- (2) A student shall pass each test by achieving 70 percent correct answers; and
- (3) A student who completes a topic of in-service training in a traditional classroom setting or online and fails the end of topic exam shall be given one attempt to re-test. If the student fails the exam a second time, the student must complete the in-service training topic in a traditional classroom setting before taking the exam a third time.

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

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Coastal Resources Commission intends to amend the rules cited as 15A NCAC 07H .2601, .2602, .2604, and .2605.

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

- ☒ **OSBM certified on:** *February 15, 2014*
- ☐ **RRC certified on:**
- ☐ **Not Required**

Link to agency website pursuant to G.S. 150B-19.1(c):
<http://portal.ncdenr.org/web/cm/proposed-rules>

Proposed Effective Date: *September 1, 2014*

Public Hearing:

Date: *May 14, 2014*

Time: *5:00 p.m.*

Location: *Double Tree Oceanfront Hotel, 2717 W. Ft. Macon Rd, Atlantic Beach, NC 28512*

Reason for Proposed Action: *Section 7H .2600 defines specific development requirements for the construction of wetland, stream and buffer mitigation sites by the NC Ecosystem Enhancement Program (NCEEP) or the NC Wetlands Restoration Program (NCWRP). The Coastal Resources Commission is proposing to amend its administrative rules to expand this General Permit to include all mitigation bank and*

in-lieu fee projects, and not only those related to the NCEEP and/or the NCWRP.

Comments may be submitted to: *Braxton Davis, 400 Commerce Ave, Morehead City, NC 28557, phone (252) 808-2808, fax (252)247-3330*

Comment period ends: *June 16, 2014*

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

Fiscal impact (check all that apply).

- ☒ **State funds affected**
- ☐ **Environmental permitting of DOT affected**
- ☐ **Analysis submitted to Board of Transportation**
- ☐ **Local funds affected**
- ☐ **Substantial economic impact (≥\$1,000,000)**
- ☐ **No fiscal note required by G.S. 150B-21.4**

CHAPTER 07 – COASTAL MANAGEMENT

SUBCHAPTER 07H – STATE GUIDELINES FOR AREAS OF ENVIRONMENTAL CONCERN

SECTION .2600 – GENERAL PERMIT FOR CONSTRUCTION OF MITIGATION BANKS AND IN-LIEU FEE MITIGATION PROJECTS

15A NCAC 07H .2601 PURPOSE

~~This general permit shall allow for the construction of wetland, stream and buffer mitigation sites by the North Carolina Ecosystem Enhancement Program or the North Carolina Wetlands Restoration Program. This permit shall be applicable only where the restoration, creation or enhancement of a wetland, stream or buffer system is proposed.~~ of mitigation banks and in-lieu fee mitigation projects. This permit shall be applicable only for activities resulting in net increases in aquatic resource functions and services. These activities include: restoration, enhancement, and establishment of tidal and non-tidal wetlands and riparian areas, the restoration and enhancement of non-tidal streams and other non-tidal open waters, and the rehabilitation or enhancement of tidal streams, tidal wetlands, and tidal open waters. However, this This permit shall not apply within the Ocean Hazard System of Areas of

Environmental Concern (AEC) or waters adjacent to these AECs with the exception of those portions of shoreline within the Inlet Hazard Area AEC that feature characteristics of Estuarine Shorelines. Such features include the presence of wetland vegetation, lower wave energy, and lower erosion rates than in the adjoining Ocean Erodible Area.

Authority G.S. 113A-107; 113A-118.1.

15A NCAC 07H .2602 APPROVAL PROCEDURES

(a) The applicant shall contact the Division of Coastal Management (DCM) and request approval for development. The applicant shall provide information on site location, a mitigation plan outlining the proposed mitigation activities, and the applicant's name and address.

(b) The applicant shall provide either confirmation that a written statement has been obtained signed by the adjacent riparian property owners indicating that they have no objections to the proposed work, or confirmation that the adjacent riparian property owners have been notified by certified mail of the proposed work. Such notice shall instruct adjacent property owners to provide any comments on the proposed development in writing for consideration by permitting officials to the Division of Coastal Management within 10 days of receipt of the notice, and, indicate that no response shall be interpreted as no objection.

(c) DCM staff shall review all comments and determine, based on their relevance to the potential impacts of the proposed project, if the proposed project meets the requirements of the rules in this Section.

(d) No work shall begin until a meeting is held with the applicant and appropriate Division of Coastal Management representative. Written authorization to proceed with the proposed development shall be issued. Construction of the mitigation site shall be started within ~~180~~ 365 days of the issuance date of the permit or the general authorization expires and it shall be necessary to re-examine the proposed development to determine if the general authorization shall be reissued.

Authority G.S. 113A-107; 113A-118.1.

15A NCAC 07H .2604 GENERAL CONDITIONS

(a) This permit authorizes only ~~the following those~~ activities associated with the construction of ~~wetland, stream or buffer restoration; creation or enhancement projects conforming to the standards herein; the removal of accumulated sediments; the installation, removal and maintenance of small water control structures, dikes, and berms; the installation of current deflectors; the placement of in-stream habitat structures; modifications of the stream bed or banks to restore or create stream meanders; the backfilling of artificial channels and drainage ditches; the removal of existing drainage structures; the construction of small nesting islands; the construction of open water areas; the construction of oyster habitat over unvegetated bottom in tidal waters; the planting of submerged aquatic vegetation; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; mechanized land clearing to~~

~~remove non-native invasive exotic or nuisance vegetation; and other related activities. mitigation banks and in-lieu fee mitigation projects.~~

(b) Individuals shall allow authorized representatives of DENR to make periodic inspections at any time deemed necessary in order to be sure that the activity being performed under authority of this general permit is in accordance with the terms and conditions prescribed herein.

(c) There shall be no interference with navigation or use of the waters by the public. No attempt shall be made by the permittee to prevent the full and free use by the public of all navigable waters at or adjacent to the authorized work.

(d) This permit shall not be applicable to proposed construction where the DENR has determined, based on an initial review of the application, that notice and review pursuant to G.S. 113A-119 is necessary because there are unresolved questions concerning the proposed activity's impact on adjoining properties or on water quality; air quality; coastal wetlands; cultural or historic sites; wildlife; fisheries resources; or public trust rights.

(e) At the discretion of DCM staff, review of individual project requests shall be coordinated with ~~Division of Marine Fisheries or Wildlife Resources Commission~~ DENR personnel. This coordination may result in a construction moratorium during periods of significant biological productivity ~~or and/or critical life stages~~ stages of fisheries resources.

(f) This permit shall not eliminate the need to obtain any other required state, local, or federal authorization.

(g) Development carried out under this permit shall be consistent with all local requirements, AEC Guidelines, and local land use plans current at the time of authorization.

Authority G.S. 113A-107; 113A-118.1.

15A NCAC 07H .2605 SPECIFIC CONDITIONS

(a) This general permit shall be applicable only ~~for mitigation site proposals made by the North Carolina Ecosystem Enhancement Program or North Carolina Wetlands Restoration Program for the construction of mitigation banks or in-lieu fee mitigation projects.~~

(b) No excavation or filling of any submerged aquatic vegetation shall be authorized by this general permit.

(c) The need to cross wetlands in transporting equipment shall be avoided or minimized to the maximum extent practicable. If the crossing of wetlands with mechanized or non-mechanized construction equipment is necessary, track and low pressure equipment or temporary construction mats shall be utilized for the area(s) to be crossed. The temporary mats shall be removed immediately upon completion of construction.

(d) No permanent structures shall be authorized by this general permit, except for signs, fences, water control structures, or those structures needed for site monitoring or shoreline ~~stabilization of the mitigation site~~ stabilization.

(e) This permit does not convey or imply approval of the suitability of the property for compensatory mitigation for any particular project. The use of any portion of the site as compensatory mitigation for future projects shall be determined in accordance with the regulatory policies and procedures in place at the time such a future project is authorized.

- (f) The authorized work shall result in a net increase in coastal resource functions and values.
- (g) The entire mitigation bank or in-lieu fee project site shall be protected in perpetuity in its mitigated state and shall be owned by the permittee or its approved designee. An appropriate conservation easement, deed restriction or other appropriate instrument shall be attached to the title for the subject property.
- (h) The Division of Coastal Management shall be provided copies of all monitoring reports prepared for the authorized mitigation bank or in-lieu fee project site.
- (i) If water control structures or other hydrologic alterations are proposed, such activities shall not increase the likelihood of flooding any adjacent property.
- (j) Appropriate sedimentation and erosion control devices, measures or structures shall be implemented to ensure that eroded materials do not enter adjacent wetlands, watercourses and property (e.g. silt fence, diversion swales or berms, sand fence, etc.).
- (k) If one or more contiguous acre of property is to be graded, excavated or filled, the applicant shall file an erosion and sedimentation control plan with the Division of Energy, Mineral, and Land Resources, Land Quality Section or government having jurisdiction. The plan shall be approved prior to commencing the land-disturbing activity.
- (l) All fill material shall be clean and free of any pollutants, except in trace quantities.

Authority G.S. 113A-107; 113A-118.1

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 18 – BOARD OF EXAMINERS OF ELECTRICAL CONTRACTORS

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC State Board of Examiners of Electrical Contractors intends to amend the rule cited as 21 NCAC 18B .0303.

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

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

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

Proposed Effective Date: *August 1, 2014*

Public Hearing:

Date: *May 7, 2014*

Time: *10:00 a.m.*

Location: *State Board of Examiners of Electrical Contractors, 3101 Industrial Drive, Suite 206, Raleigh, NC 27609*

Reason for Proposed Action: *G.S. 87-43.3 grants authority to the Board to adjust the project value limits for each class of license based on the project cost index. The limits have not*

changed since 2008. The Board has carried out an analysis of the proposed project value increase and finds that an increase in the size of job available to holders of limited and intermediate licenses is supported by the data and appropriate.

Comments may be submitted to: *Robert L. Brooks, Jr., 3101 Industrial Drive, Suite 206, Raleigh, NC 27609; phone (919) 733-9042*

Comment period ends: *June 16, 2014, 5:00 p.m.*

Procedure for Subjecting a Proposed Rule to Legislative Review:

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

Fiscal impact (check all that apply).

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Substantial economic impact (≥\$1,000,000)
- ☒ No fiscal note required by G.S. 150B-21.4

SUBCHAPTER 18B – BOARD'S RULES FOR THE IMPLEMENTATION OF THE ELECTRICAL CONTRACTING LICENSING ACT

SECTION .0300 - DEFINITIONS AND EXPLANATIONS OF TERMS APPLICABLE TO LICENSING

21 NCAC 18B .0303 ELECTRICAL INSTALLATION: PROJECT: PROJECT VALUE-LIMITATION

For the purpose of implementing G.S. 87-43.3 pertaining to the limited and intermediate electrical contracting license classifications, the following provisions shall apply:

- (1) Electrical Installation. Electrical work is construed to be an electrical installation when the work is made or is to be made:
 - (A) in or on a new building or structure;
 - (B) in or on an addition to an existing building or structure;
 - (C) in or on an existing building or structure, including electrical work in connection with lighting or power rewiring or with the addition or

- replacement of machines, equipment or fixtures; or
- (D) in an area outside of buildings or structures, either overhead or underground or both.
- (2) Project. An electrical installation is construed to be a separate electrical contracting project if all the following conditions are met:
- (A) the installation is, or will be, separate and independently supplied by a separate service, feeder or feeder system; and
- (B) the installation is for:
- (i) an individual building or structure which is separated from other buildings or structures by a lot line or, if located on the same lot with other buildings or structures, is physically separated from such other buildings or structures by an open space or an area separation fire wall;
- (ii) an individual townhouse single-family dwelling unit constructed in a series or group of attached units with property lines separating such units;
- (iii) an individual tenant space in a mall-type shopping center;
- (iv) an addition to an existing building or structure;
- (v) an existing building or structure, including electrical work in connection with lighting or power rewiring or with the addition or replacement of machines, equipment or fixtures; or
- (vi) an outdoor area either overhead or underground or both.
- (C) the negotiations or bidding procedures for the installation are carried out in a manner totally separate and apart from the negotiations or bidding procedures of any other electrical installation or part thereof;
- (D) except for new additions, alterations, repairs or changes to a pre-existing electrical installation, no electrical interconnection or relationship whatsoever will exist between the installation and any other electrical installation or part thereof;
- (E) a separate permit is to be obtained for each individual building structure or outdoor area involved from the governmental agency having jurisdiction; and
- (F) if a question is raised by a party at interest or if requested by the Board or Board's staff for any reason, the owner or the awarding authority or an agent of either furnishes to the Board, and to the inspections department having jurisdiction, a sworn affidavit confirming that each and every one of the conditions set forth in (2)(a) through (e) of this Rule are satisfied.
- (3) Relationship of Plans and Specifications to Definition of Project. Even though such electrical work may not fully comply with each condition set out in Item (2) of this Rule, the entire electrical work, wiring, devices, appliances or equipment covered by one set of plans or specifications is construed to be a single electrical contracting project.
- (4) Project Value Limitation. In determining the value of a given electrical contracting project, the total known or reasonable estimated costs of all electrical wiring materials, equipment, fixtures, devices, and installation must be included in arriving at this value, regardless of who furnishes all or part of same, and regardless of the form or type of contract or subcontract involved. As an example, on a given electrical contracting project, the owner or general contractor will furnish all or part of the electrical wiring, material, etc. and
- (A) if the total cost of the wiring, materials, etc., including that furnished by others, plus the total cost of the installation involved, will be more than ~~forty~~ fifty thousand dollars ~~(\$40,000)~~ (\$50,000) but not more than one hundred ~~ten~~ thirty thousand dollars ~~(\$110,000)~~, (\$130,000), then only an electrical contractor holding either an intermediate or unlimited license is eligible to submit a proposal or engage in the project.
- (B) if the total cost of the wiring, materials, etc., including that furnished by others, plus the total cost of the installation involved, will exceed one hundred ~~ten~~ thirty thousand dollars ~~(\$110,000)~~, (\$130,000), then only an electrical contractor holding an unlimited license is eligible to submit a proposal or engage in the project.
- If a given electrical contracting project is subdivided into two or more contracts or subcontracts for any reason, then the total

value of the combined contracts or subcontracts which may be awarded to or accepted by any one licensee of the Board must be within the total project value in accordance with this Rule. The Board's staff shall make a determination of what constitutes a project in any given situation, and any party at interest may appeal any staff determination to the Board for a final binding decision.

Authority G.S. 87-42; 87-43.

CHAPTER 46 – BOARD OF PHARMACY

Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Pharmacy intends to amend rule cited as 21 NCAC 46 .2507

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

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

Link to agency website pursuant to G.S. 150B-19.1(c):
www.ncbop.org/lawandrules.htm

Proposed Effective Date: *September 1, 2014*

Public Hearing:

Date: *July 14, 2014*

Time: *5:00 p.m.*

Location: *NC Board of Pharmacy, 6015 Farrington Rd, Suite 201, Chapel Hill, NC 27517*

Reason for Proposed Action: *Revisions required by changes in pharmacist immunization authority in Session Law 2013-246.*

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

Comment period ends: *July 14, 2014*

Procedure for Subjecting a Proposed Rule to Legislative Review:

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

Fiscal impact (check all that apply).

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Substantial economic impact (≥\$1,000,000)
- ☒ No fiscal note required by G.S. 150B-21.4

SECTION .2500 – MISCELLANEOUS PROVISIONS

21 NCAC 46 .2507 ADMINISTRATION OF VACCINES BY PHARMACISTS

(a) An Immunizing Pharmacist shall administer only those vaccines or immunizations permitted by G.S. 90-85.15B and shall do so subject to all requirements of that statute and this Rule. ~~Purpose. The purpose of this Rule is to provide standards for pharmacists engaged in the administration of influenza, pneumococcal and zoster vaccines as authorized in G.S. 90-85.3(r) of the North Carolina Pharmacy Practice Act.~~

(b) Definitions. The following words and terms, when used in this Rule, have the following meanings, unless the context indicates otherwise.

(1) ~~"ACPE" means Accreditation Council for Pharmacy Education.~~

(2)(1) "Administer" means the direct application of a drug to the body of a patient by injection, inhalation, ingestion, or other means by:

(A) an Immunizing Pharmacist or a pharmacy intern who is under the direct, in-person supervision of an Immunizing Pharmacist; ~~a pharmacist, an authorized agent under the pharmacist's supervision, or other person authorized by law; or~~

(B) the patient at the direction of either an Immunizing Pharmacist or a health care provider authorized by North Carolina law to prescribe the vaccine. ~~a physician or pharmacist.~~

(2) "Immunizing Pharmacist" shall have the meaning provided in G.S. 90-85.3(i1).

(3) "Pharmacy intern" shall have the meaning provided in 21 NCAC 46 .1317(28). "Antibody" means a protein in the blood that is produced in response to stimulation by a specific antigen. Antibodies help destroy the antigen that produced them. Antibodies against an antigen usually equate to immunity to that antigen.

(4) "Physician" means a currently licensed M.D. or D.O. with the North Carolina Medical Board who is responsible for the on-going, continuous supervision of the Immunizing Pharmacist pursuant to the Written Protocol between the Immunizing Pharmacist and the physician. ~~"Antigen" means a substance recognized by the body as being foreign; it~~

- results in the production of specific antibodies directed against it.
- (5) ~~"Board" means the North Carolina Board of Pharmacy.~~
- (6) ~~"Confidential record" means any health related record that contains information that identifies an individual and that is maintained by a pharmacy or pharmacist such as a patient medication record, prescription drug order, or medication order.~~
- (7) ~~"Immunization" means the act of inducing antibody formation, thus leading to immunity.~~
- (8) ~~"Medical Practice Act" means G.S. 90-1, et seq.~~
- (9) ~~"Physician" means a currently licensed M.D. or D.O. with the North Carolina Medical Board who is responsible for the on-going, continuous supervision of the pharmacist pursuant to written protocols between the pharmacist and the physician.~~
- (10) ~~"Vaccination" means the act of administering any antigen in order to induce immunity; is not synonymous with immunization since vaccination does not imply success.~~
- (11) ~~"Vaccine" means a specially prepared antigen, which upon administration to a person may result in immunity.~~
- (5) RESERVED
- (6) RESERVED
- (7) RESERVED
- (8) RESERVED
- (9) RESERVED
- (10) RESERVED
- (11) RESERVED
- (12) ~~"Written protocol" is a document means a physician's written order, standing medical order, or other order or protocol. A written protocol must be prepared, signed and dated by the physician-Physician and Immunizing Pharmacist that shall pharmacist and contain the following:~~
- (A) ~~the name of the Physicianindividual physician authorized to prescribe drugs and responsible for authorizing the Written Protocol;written protocol;~~
- (B) ~~the name of the Immunizing Pharmacistindividual pharmacist authorized to administer vaccines;~~
- (C) ~~the immunizations or vaccinations that may be administered by the Immunizing Pharmacist;pharmacist;~~
- (D) the screening questionnaires and safety procedures that shall at least include the then-current minimum standard screening questionnaire and safety procedures adopted by the Medical Board, the Board of Nursing and the Board of Pharmacy pursuant to S.L. 2013-246, s. 6.

- (D)(E) ~~the procedures to follow, including any drugs required by the Immunizing Pharmacistpharmacist for treatment of the patient, in the event of an emergency or severe adverse reaction following vaccine administration;~~
- (E)(F) ~~the reporting requirements by the pharmacist-Immunizing Pharmacist to the Physician,physician issuing the written protocol, including content and time frame; and~~
- (F)(G) ~~the locations at which the pharmacist Immunizing Pharmacist may administer immunizations or vaccinations.vaccinations; and~~
- (G) ~~the requirement for annual review of the protocols by the physician and pharmacist.~~

The Physician and the Immunizing Pharmacist must review the Written Protocol at least annually and revise it if necessary.

(c) Policies and Procedures.

- (1) ~~Pharmacists must follow a written protocol as specified in Subparagraph (b)(12) of this Rule for administration of influenza, pneumococcal and zoster vaccines and the treatment of severe adverse events following administration.~~
- (2) ~~The pharmacist administering vaccines must maintain written policies and procedures for handling and disposal of used or contaminated equipment and supplies.~~
- (3) ~~The pharmacist or pharmacist's agent must give the appropriate, most current vaccine information regarding the purpose, risks, benefits, and contraindications of the vaccine to the patient or legal representative with each dose of vaccine. The pharmacist must ensure that the patient or legal representative is available and has read, or has had read to him or her, the information provided and has had his or her questions answered prior to administering the vaccine.~~
- (4) ~~The pharmacist must report adverse events to the primary care provider as identified by the patient.~~
- (5) ~~The pharmacist shall not administer vaccines to patients under 18 years of age.~~
- (6) ~~The pharmacist shall not administer the pneumococcal or zoster vaccines to a patient unless the pharmacist first consults with the patient's primary care provider. The pharmacist shall document in the patient's profile the primary care provider's order to administer the pneumococcal or zoster vaccines. If the patient does not have a primary care provider, the pharmacist shall not administer the pneumococcal or zoster vaccines to the patient.~~

(7) ~~The pharmacist shall report all vaccines administered to the patient's primary care provider and report all vaccines administered to all entities as required by law, including any State registries which may be implemented in the future.~~

(d) ~~Pharmacist requirements. Pharmacists who enter into a written protocol with a physician to administer vaccines shall:~~

(1) ~~hold a current provider level cardiopulmonary resuscitation (CPR) certification issued by the American Heart Association or the American Red Cross or an equivalent certification organization;~~

(2) ~~successfully complete a certificate program in the administration of vaccines accredited by the Centers for Disease Control, the ACPE or a health authority or professional body approved by the Board as having a certificate program similar to the programs accredited by either the Centers for Disease Control or the ACPE;~~

(3) ~~maintain documentation of:~~

(A) ~~completion of the initial course specified in Subparagraph (2) of this Paragraph;~~

(B) ~~three hours of continuing education every two years beginning January 1, 2006, which are designed to maintain competency in the disease states, drugs, and administration of vaccines;~~

(C) ~~current certification specified in Subparagraph (1) of this Paragraph;~~

(D) ~~original written physician protocol;~~

(E) ~~annual review and revision of original written protocol with physician;~~

(F) ~~any problems or complications reported; and~~

(G) ~~items specified in Paragraph (g) of this Rule.~~

(c) ~~A pharmacist~~ An Immunizing Pharmacist who, because of physical disability, is unable to obtain a current provider level CPR certification may administer vaccines in the presence of a pharmacy technician or pharmacist who holds a current provider level CPR certification.

(d) With each dose of vaccine, either the Immunizing Pharmacist or a pharmacy intern must give the appropriate, most current vaccine information regarding the purpose, risks, benefits, and contraindications of the vaccine to the patient or legal representative. The Immunizing Pharmacist or pharmacy intern must ensure that the patient or legal representative has the opportunity to read, or to have read to him or her, the information provided and to have any questions answered prior to administration of the vaccine.

(e) ~~Supervising Physician responsibilities. Pharmacists who administer vaccines shall enter into a written protocol with a supervising physician who agrees~~ The Physician must agree to meet the following requirements:

(1) be responsible for the formulation or approval and periodic review of the Written

Protocol ~~physician's order, standing medical order, standing delegation order, or other order or written protocol~~ and periodically review the Written Protocol ~~order or protocol~~ and the services provided to patients ~~a patient~~ under the Written Protocol ~~order or protocol~~;

(2) be accessible to the Immunizing Pharmacist ~~pharmacist administering the vaccines~~ or be available through direct telecommunication for consultation, assistance, direction, and provide back-up coverage; and

(3) ~~review written protocol with pharmacist at least annually and revise if necessary; and~~

(4)(3) receive a periodic status reports from the Immunizing Pharmacist ~~report on the patient, including any problem—problems or complication—complication~~ encountered.

(f) Drugs. The following requirements pertain to drugs administered by an Immunizing Pharmacist: ~~a pharmacist;~~

(1) Drugs administered by an Immunizing Pharmacist ~~a pharmacist~~ under the provisions of this Rule shall be in the legal possession of:

(A) a pharmacy, which shall be the pharmacy responsible for drug accountability, including the maintenance of records of administration of the immunization or vaccination; or

(B) a physician, who shall be responsible for drug accountability, including the maintenance of records of administration of the immunization or vaccination;

(2) Drugs shall be transported and stored at the proper temperatures indicated for each drug;

(3) ~~Pharmacists, Immunizing Pharmacists,~~ while engaged in the administration of vaccines under the Written Protocol ~~written protocol~~, shall have in their custody and control the vaccines identified in the Written Protocol ~~written protocol~~ and any other drugs listed in the Written Protocol ~~written protocol~~ to treat adverse reactions; and

(4) After administering vaccines at a location other than a pharmacy, the ~~pharmacist~~ Immunizing Pharmacist shall return all unused prescription medications to the pharmacy or physician responsible for the drugs.

(g) Record Keeping and Reporting.

(1) ~~A pharmacist who administers any vaccine~~ An Immunizing Pharmacist shall maintain the following information, readily retrievable, in the pharmacy records regarding each administration:

(A) The name, address, and date of birth of the patient;

(B) The date of the administration;

- (C) The administration site of injection (e.g., right arm, left leg, right upper arm);
 - (D) Route of administration of the vaccine;
 - (E) The name, manufacturer, lot number, and expiration date of the vaccine;
 - (F) Dose administered;
 - (G) The name and address of the patient's primary health care provider, as identified by the patient; and
 - (H) The name or identifiable initials of the Immunizing Pharmacist administering pharmacist.
- (2) ~~A pharmacist who administers vaccines.~~ An Immunizing Pharmacist shall document the annual review with the ~~Physician~~physician of the Written Protocol as required in this Rule. written protocol in the records of the pharmacy that is in possession of the vaccines administered.
- (3) An Immunizing Pharmacist must report adverse events associated with administration of a vaccine to either the prescriber, when administering a vaccine pursuant to G.S. 90-85.15B(a), or the patient's primary care provider, if the patient identifies one, when administering a vaccine pursuant to G.S. 90-85.15B(b).
- (h) ~~Confidentiality.~~ The Immunizing Pharmacist must maintain written policies and procedures for handling and disposal of used or contaminated equipment and supplies.
- (1) ~~The pharmacist shall comply with the privacy provisions of the federal Health Insurance Portability and Accountability Act of 1996 and any rules adopted pursuant to this act.~~
 - (2) ~~The pharmacist shall comply with any other confidentiality provisions of federal or state laws.~~
- Authority G.S. 90-85.3; 90-85.6; 90-85.15B.*

Note from the Codifier: The rules published in this Section of the NC Register are temporary rules reviewed and approved by the Rules Review Commission (RRC) and have been delivered to the Codifier of Rules for entry into the North Carolina Administrative Code. A temporary rule expires on the 270th day from publication in the Register unless the agency submits the permanent rule to the Rules Review Commission by the 270th day.

This section of the Register may also include, from time to time, a listing of temporary rules that have expired. See G.S. 150B-21.1 and 26 NCAC 02C .0500 for adoption and filing requirements.

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

Rule-making Agency: Environmental Management Commission

Rule Citation: 15A NCAC 02H .1002

Effective Date: March 28, 2014

Date Approved by the Rules Review Commission: March 20, 2014

Reason for Action: A serious and unforeseen threat to the public health, safety or welfare; and the effective date of a recent act of the General Assembly: Session Law 2013-413, effective date August 23, 2013.

The purpose of this rulemaking is to amend Rule 15A NCAC 02H .1002 in order to (1) comply with a recent change in state law; (2) prevent a serious and unforeseen threat to the environment and public welfare; and (3) provide clarity to the regulated community on the implementation of rules as required by G.S.143-214.7. This rulemaking is authorized by Section 51.(d) of Session Law 2013-413. During the most recent legislative session, G.S. 143-214.7 was amended to exclude "gravel" from the definition of "built-upon area." Since August 2013, when the amendment became effective, the regulated community has questioned how to interpret the term "gravel" in the amended statute. Laypersons often imprecisely use the term "gravel" to refer to any aggregate material, such as the crushed stone material that is typically used in constructing roads or parking lots. As classified by the American Association of State Highway and Transportation Officials (AASHTO) and the Natural Resources Conservation Service (NRCS), gravel is actually the type of material often used as walkways through gardens and yards or around vegetation as it is permeable, allowing adequate drainage while being harder and more aesthetically pleasing than exposed soil. Crushed stone, on the other hand, typically does not allow water to infiltrate due to clogging at its surface or compaction of the underlying soil (at the time of installation or as a result of ongoing vehicular or foot traffic). Stormwater runoff from aggregate crushed stone surfaces typically has higher velocities, volumes, and pollutant loadings than stormwater runoff from pervious surfaces.

During the most recent legislative session, N.C. General Statute 143-214.7 was amended to exclude "gravel" from the definition of "built upon area." The term "built upon area" is used in North Carolina law and regulations to determine when development of property requires the stormwater management actions have to be taken. This legislative exclusion for "gravel" raised two issues that persist to this day.

First, the amendment created uncertainty and confusion for DENR, the regulated community and citizens with an interest in protecting water quality from pollution caused by stormwater runoff because it did not provide a definition of the term "gravel." Historically, the General Assembly has recognized that "gravel" is different from "stone" and "rock" as each of these terms are separately used together in a number of statutes. (For example, N.C. General Statute 74-49, also known as the Mining Act, defines "minerals" as including various materials including "stone, gravel,...[and] rock" while N.C. General Statute 20-116, which is part of the Motor Vehicle Act, establishes limitations on vehicles carrying "rock, gravel, [and] stone.") However, the General Assembly did not in those statutes need to define "gravel," "rock" and "stone" to show how they were different from each other because these statutes covered all three. This most recent statutory amendment, however, only applies to "gravel" but did not provide a definition showing how "gravel" was different from "stone" and "rock."

Laypersons often use the term "gravel" to refer to any aggregate material, such as the crushed stone material that is typically used in constructing roads or parking lots. However, that is not how "gravel" is defined in stone, sand and gravel industry. Within that industry, "gravel" is defined as a "loose aggregate of small rounded water-worn or pounded stones" with, per the American Association of State Highway and Transportation Officials (AASHTO) soil classification system, a diameter of between 2.00mm (0.08 inches) and 76mm (3 inches). The same size range for gravel appears in the "Field Book for Describing and Sampling Soils" published by the Natural Resources Conservation Service (NRCS). Gravel must have less than five percent fines, which is the reason the proposed rule states that gravel shall be "clean or washed."

This ambiguity as to what constitutes "gravel" leads directly to the second issue – the protection of water quality in North Carolina. The potential for adverse environmental impacts from stormwater runoff is directly related to the porosity of the surface that the stormwater comes in contact with. Under the industry definition, "gravel" is porous with stormwater able to move through the voids between the individual stones so that it can infiltrate into the subsoil. Larger stones and rocks with significant amounts of fines (which laypersons might characterize as "gravel") are much less porous. Rather, rainwater does not readily infiltrate into the subsoil but rather runs off of these surfaces with sediments and pollutants that reach North Carolina's waterways. In addition, such runoff can travel with much greater velocity causing flooding conditions, damage to stream and river banks, and degraded water quality. If "gravel" as used in this legislative amendment is interpreted to include larger stones and rocks with significant amounts of fines and hence exclude those surfaces from the definition of "built

upon area," development will either not be required to have or will underdesign stormwater management systems or best management practices designed to protect waterways from such pollution and damage. As a result, North Carolina surface waters would be put at significant risk.

Based on the public comments received and information provided by experienced DENR staff responsible for implementation of the stormwater regulations and programs along with the knowledge and experience of its individual members, the Environmental Management Commission has reached the conclusion that the definition of "gravel" in the temporary rule is necessary to protect water quality in North Carolina and that the absence of such a definition poses a serious and unforeseen threat to the public health, safety, or welfare as set forth in N.C. General Statute 150B-21.1(a)(1) (the statute governing the adoption of temporary rules).

Temporary rules may also be adopted when it is required by "The effective date of a recent act of the General Assembly or the United States Congress." N.C. General Statute 150B-21.1(a)(2). This rulemaking is authorized by Section 51.(d) of Session Law 2013-413 which provides that "The Environmental Management Commission shall amend its rules to be consistent with the definition of 'built-upon area' set out in subsection (b2) of G.S. 143-214.7, as enacted by Section 51(a) of this act" which created the exclusion for "gravel." N.C. General Statute 150B-21.1(a2) defines a "recent act" as one "occurring or made effective no more than 210 days prior to the submission of a temporary rule to the Rules Review Commission." This session law was signed by the Governor on August 23, 2013 which was less than 210 days ago meaning that it is a "recent act of the General Assembly" as defined in N.C. General Statute 150B-21.1(a2).

Based on all of the foregoing, adherence to the notice and hearing requirements is contrary to the public interest and immediate adoption of the rule is required.

CHAPTER 02 – ENVIRONMENTAL MANAGEMENT COMMISSION

SUBCHAPTER 02H – PROCEDURES FOR PERMITS: APPROVALS

SECTION .1000 – STORMWATER MANAGEMENT

15A NCAC 02H .1002 DEFINITIONS

The definition of any word or phrase in this Section shall be the same as given in Article 21, Chapter 143 of the General Statutes of North Carolina, as amended. Other words and phrases used in this Section are defined as follows:

- (1) "Built-upon Area" means ~~that portion of a development project that is covered by impervious surface or and partially impervious surface including, but not limited to, buildings; pavement to the extent that the partially impervious surface does not allow water to infiltrate through the surface and gravel areas such as roads, parking lots, and paths; and recreation facilities such as tennis courts into the subsoil.~~ "Built-upon" "Built-upon area" does not include a wooden slatted deck, the water

area of a swimming pool, or ~~pervious or partially pervious paving material to the extent that the paving material absorbs water or allows water to infiltrate through the paving material.~~ gravel.

- (2) "CAMA Major Development Permits" mean those permits or revised permits required by the Coastal Resources Commission ~~according to as set forth in~~ 15A NCAC ~~77~~ 07J Sections .0100 and .0200.
- (3) "Certificate of Stormwater Compliance" means the approval for activities that meet the requirements for coverage under a stormwater general permit for development activities that are regulated by this Section.
- (4) "Coastal Counties" ~~include~~ are Beaufort, Bertie, Brunswick, Camden, Carteret, Chowan, Craven, Currituck, Dare, Gates, Hertford, Hyde, New Hanover, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Tyrrell, and Washington.
- (5) "Curb Outlet System" means curb and gutter installed in a development which meets low density criteria ~~[Rule set forth in Rule .1003(d)(1) of this Section]~~ Section with breaks in the curb or other outlets used to convey stormwater runoff to grassed swales or vegetated or natural areas and designed in accordance with Rule .1008(g) of this Section.
- (6) "Development" means any land disturbing activity that increases the amount of built-upon area or that otherwise decreases the infiltration of precipitation into the soil.
- (7) "Drainage Area or Watershed" means the entire area contributing surface runoff to a single point.
- (8) "Forebay" means a device located at the head of a wet detention pond to capture incoming sediment before it reaches the main portion of the pond. The forebay is typically an excavated settling basin or a section separated by a low weir.
- (9) "General Permit" means a ~~"permit"~~ permit issued under G.S. 143-215.1(b)(3) and (4) authorizing a category of similar activities or discharges.
- (10) "Gravel" means a clean or washed, loose, uniformly-graded aggregate of stones from a lower limit of 0.08 inches to an upper limit of 3.0 inches in size.
- ~~(40)~~(11) "Infiltration Systems" mean stormwater control systems designed to allow runoff to pass or move (infiltrate/exfiltrate) into the soil.
- ~~(44)~~(12) "Notice of Intent" means a written notification to the Division that an activity or discharge is intended to be covered by a general permit and takes the place of ~~the "application"~~ application used with individual permits.
- ~~(42)~~(13) "Off-site Stormwater Systems" mean stormwater management systems that are

- located outside the boundaries of the specific project in question, but designed to control stormwater drainage from that project and other potential development sites. These systems shall designate responsible parties for operation and maintenance and may be owned and operated as a duly licensed utility or by a local government.
- ~~(24)~~(14) "One-year, 24-hour storm" means a rainfall of an intensity expected to be equaled or exceeded, on average, once in 12 months and with a duration of 24 hours.
- ~~(13)~~(15) "On-site Stormwater Systems" mean the systems necessary to control stormwater within an individual development project and located within the project boundaries.
- ~~(26)~~(16) "Permeable pavement" means paving material that absorbs water or allows water to infiltrate through the paving material. Permeable pavement materials include porous concrete, permeable interlocking concrete pavers, concrete grid pavers, porous asphalt, and any other material with similar characteristics. ~~Compacted gravel shall not be considered permeable pavement.~~
- ~~(14)~~(17) "Redevelopment" means any land disturbing activity that does not result in a net increase in built-upon area and that provides greater or equal stormwater control than the previous development. ~~development.~~ ~~(stormwater Stormwater controls shall not be allowed where otherwise prohibited).~~ ~~prohibited.~~
- ~~(27)~~(18) "Residential development activities" has the same meaning as in 15A NCAC 02B .0202(54).
- ~~(15)~~(19) "Seasonal High Water Table" means the highest level that groundwater, at atmospheric pressure, reaches in the soil in most years. The seasonal high water table is usually detected by the mottling of the soil that results from mineral leaching.
- ~~(16)~~(20) "Sedimentation/Erosion Control Plan" means any plan, amended plan or revision to an approved plan submitted to the Division of Energy, Mineral, and Land Resources or delegated authority in accordance with G.S. 113A-57.
- ~~(17)~~(21) "Stormwater" is defined in G.S. 143-~~Article 24~~, ~~143-213(16a)~~.
- ~~(18)~~(22) "Stormwater Collection System" means any conduit, pipe, channel, curb or gutter for the primary purpose of transporting (not treating) runoff. A stormwater collection system does not include vegetated swales, swales stabilized with armoring or alternative methods where natural topography or other physical constraints prevents the use of vegetated swales (subject to case-by-case review), curb outlet systems, or pipes used to carry drainage underneath built-upon surfaces that are associated with development controlled by the provisions of Rule .1003(d)(1) in this Section.
- ~~(49)~~(23) "10 Year Storm" means the surface runoff resulting from a rainfall of an intensity expected to be equaled or exceeded, on the average, once in 10 years, and of a duration which will produce the maximum peak rate of runoff, for the watershed of interest under average antecedent wetness conditions.
- ~~(22)~~(24) "Vegetative Buffer" means an area of natural or established vegetation directly adjacent to surface waters through which stormwater runoff flows in a diffuse manner to protect surface waters from degradation due to development activities. The width of the buffer is measured horizontally from the normal pool elevation of impounded structures, from the bank of each side of streams or rivers, and from the mean high water line of tidal waters, perpendicular to the shoreline.
- ~~(25)~~ "BMP" means Best Management Practice.
- ~~(28)~~(25) "Vegetative conveyance" means a permanent, designed waterway lined with vegetation that is used to convey stormwater runoff at a non-erosive velocity within or away from a developed area.
- ~~(23)~~(26) "Vegetative Filter" means an area of natural or planted vegetation through which stormwater runoff flows in a diffuse manner so that runoff does not become channelized and which provides for control of stormwater runoff through infiltration of runoff and filtering of pollutants. The defined length of the filter shall be provided for in the direction of stormwater flow.
- ~~(20)~~(27) "Water Dependent Structures" means a structure for which the use requires access or proximity to or siting within surface waters to fulfill its basic purpose, such as boat ramps, boat houses, docks, and bulkheads. Ancillary facilities such as restaurants, outlets for boat supplies, parking lots and boat storage areas are not water dependent uses.
- ~~(24)~~(28) "Wet Detention Pond" means a structure that provides for the storage and control of runoff and includes a designed and maintained permanent pool volume.

History Note: Authority G.S. 143-213; 143-214.1; 143-214.7; 143-215.3(a)(1); Eff. January 1, 1988; Amended Eff. August 1, 2012 (see S.L. 2012-143, s.1.(f)); July 3, 2012; December 1, 1995; September 1, 1995; Temporary Amendment Eff. March 28, 2014.

RULES REVIEW COMMISSION

This Section contains information for the meeting of the Rules Review Commission on March 20, 2014 at 1711 New Hope Church Road, RRC Commission Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-431-3000. Anyone wishing to address the Commission should notify the RRC staff and the agency no later than 5:00 p.m. of the 2nd business day before the meeting. Please refer to RRC rules codified in 26 NCAC 05.

RULES REVIEW COMMISSION MEMBERS

Appointed by Senate

Margaret Currin (Chair)
Jeff Hyde
Jay Hemphill
Faylene Whitaker

Appointed by House

Garth Dunklin (1st Vice Chair)
Stefanie Simpson (2nd Vice Chair)
Jeanette Doran
Ralph A. Walker
Anna Baird Choi

COMMISSION COUNSEL

Joe DeLuca	(919)431-3081
Amanda Reeder	(919)431-3079
Abigail Hammond	(919)431-3076
Amber Cronk May	(919)431-3074

RULES REVIEW COMMISSION MEETING DATES

April 17, 2014	May 15, 2014
June 19, 2014	July 17, 2014

RULES REVIEW COMMISSION MEETING MINUTES

March 20, 2014

The Rules Review Commission met on Thursday, March 20, 2014, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Anna Choi, Margaret Currin, Jeanette Doran, Garth Dunklin, Jeff Hyde, Jay Hemphill, Stephanie Simpson, and Ralph Walker.

Staff members present were: Commission counsels Joe DeLuca, Abigail Hammond, Amber Cronk May and Amanda Reeder; and Julie Brincefield, Tammara Chalmers, Dana Vojtko and Lindsay Woy.

The meeting was called to order at 10:03 a.m. with Chairman Currin presiding. She read the notice required by NCGS 138A-15(e) and reminded the Commission members that they have a duty to avoid conflicts of interest and the appearances of conflicts. She also announced that for the first time the Commission was broadcasting meeting audio of the monthly RRC meeting.

Chairman Currin introduced new Commission counsel Amber Cronk May and new editorial assistant Lindsay Woy.

APPROVAL OF MINUTES

Chairman Currin asked for any discussion, comments, or corrections concerning the minutes of the February 20, 2014 meeting. There were none and the minutes were approved as distributed.

FOLLOW-UP MATTERS

NC Rural Electrification Authority

04 NCAC 08 .0101, .0109 – The agency has not responded in accordance with G.S. 150B-21.12(b). There was no action for the Commission to take at the meeting.

04 NCAC 08 .0313 – The Commission reviewed the Rule, which was proposed by the agency to respond to the Commission's February 2014 objection to Rule 08 .0109, Item (6), as the Commission found the agency had no statutory authority to set the process for arbitration outside of rulemaking. The proposed rule will set this process. Pursuant to G.S. 150B-21.12(c), the Commission found that the submission was responsive to the Commission's objection. The

Commission also found that the changes were substantial, creating an effect that could not have reasonably been foreseen from the text of Rule 08 .0109 as published in the Register. The Commission authorized the proposed changes to be published pursuant to G.S. 150B-21.1(a3) and will review the rules again for approval after publication.

Lareena Phillips with the NC DOJ, agency counsel, addressed the Commission.

Commission for Mental Health, Developmental Disabilities and Substance Abuse Services

10A NCAC 27G .0504 – The rule was withdrawn at the request of the agency, in accordance with G.S. 150B-21.12(d). Counsel informed the Commission that notice would be sent to the Governor in accordance with the statute.

Commission for Mental Health, Developmental Disabilities and Substance Abuse Services

10A NCAC 27G .6702; 27H .0201, .0202, .0203, .0204, .0205, .0206, .0207 – The rules were withdrawn at the request of the agency in accordance with G.S. 150B-21.1(b2).

Denise Baker from the agency addressed the Commission.

State Board of Education

16 NCAC 06C .0701 – The agency has not responded in accordance with G.S. 150B-21.1(b1) or (b2). There was no action for the Commission to take at the meeting.

Cemetery Commission

21 NCAC 07A .0101, .0103, .0104, .0106, .0201, .0202, .0203, .0204, .0205; 07B .0103, .0104, .0105; 07C .0103, .0104, .0105; 07D .0101, .0102, .0104, .0105, .0201, .0202, .0203. The agency has not responded in accordance with G.S. 150B-21.12(b). There was no action for the Commission to take at the meeting.

Board of Examiners of Plumbing, Heating and Fire Sprinkler Contractors

The Commission unanimously approved the rewritten version of Rule 21 NCAC .0301.

State Human Resources Commission

Delores Joyner addressed the Commission.

25 NCAC 01B .0350, .0413, .0414, .0429, .0430; 01C .0311, .0403, .0404, .0411, .0412; 01D .0201; 01E .0901; 01H .0901, .0902, .0904, .0905, .1001, .1003, .1004, .1005; 01I .2002; 01J .0603, .0610, .0615, .0616, .1101, .1201, .1202, .1203, .1204, .1205, .1206, .1207, .1208, .1301, .1302, .1304, .1305, .1306, .1307, .1312, .1313, .1314, .1315, .1316, .1317, .1318, .1319, .1320, .1321, .1322, .1401, .1402, .1403, .1404, .1405, .1406, .1407, .1408, .1409, .1410, .1411, .1412 – The agency has not responded with any rewritten temporary rules. The agency, in a letter from its attorney Valerie Bateman, said that it anticipates addressing these rules along with the next rule, 01J .1310, at its April meeting, the same day as the RRC meeting and anticipates submitting rewritten rules in time for review at the Commission's May 2015 meeting. For the record, Ms. Bateman's letter reflected May of 2017. There was no action for the Commission to take at the meeting.

State Human Resources Commission

25 NCAC 01J .1310 – The agency has not responded. There was no action for the Commission to take at the meeting, but responded in the same manner as set out above concerning their other temporary rules.

Building Code Council

2015 NC Existing Building Code – The agency has not responded. The agency anticipates submitting revised rules to address the technical change requests and Commission counsel's other concerns. There was no action for the Commission to take at the meeting.

LOG OF FILINGS

Commission for Public Health

All rules were approved unanimously.

State Board of Education

Both rules were approved unanimously.

Licensing Board for General Contractors

Prior to the review of the rules from the Licensing Board for General Contractors, Commissioner Choi recused herself and did not participate in any discussion or vote concerning these rules because she is the rulemaking coordinator for the board.

All rules were approved unanimously.

Board of Dental Examiners

Prior to the review of the rules from the Licensing Board for Dental Examiners, Commissioner Choi recused herself and did not participate in any discussion or vote concerning these rules because her law firm provides ongoing legal representation for the board.

The two amendments and two repeals were approved unanimously.

Hearing Aid Dealers and Fitters Board

All rules were approved unanimously.

On-Site Wastewater Contractors and Inspectors Certification Board

Prior to the review of the rules from the On-Site Wastewater Contractors and Inspectors Certification Board Commissioner Choi recused herself and did not participate in any discussion or vote concerning these rules because her law firm provides ongoing legal representation for the board

The two rules were approved unanimously.

Office of Administrative Hearings

26 NCAC 03 .0401 was approved unanimously.

Industrial Commission

The Commission approved all rules unanimously except for Rule 10A .0701, with Commissioner Simpson dissenting. In addition, the Commission objected to Rules 04 NCAC 10A .0601, 10A .0609A, 10E .0103 and 10E .0104.

The Commission objected to Rule 04 NCAC 10A .0601, finding the deletion of the language in Paragraph (a) relating to the reasonable sanctions not prohibiting the employer or the carrier from contesting compensability and liability for the claim creates ambiguity by appearing to abrogate statutory requirements. Commissioner Doran dissented from the majority vote.

The Commission unanimously objected to Rule 04 NCAC 10A .0609A, finding the Industrial Commission lacks authority in Paragraph (h) of the Rule to set a specific timeframe for depositions and transcripts of the same without allowing the Deputy Commissioners to reduce or enlarge that period of time, as set forth in G.S. 97-25(g).

The Commission unanimously objected to Rule 04 NCAC 10E .0103 based upon ambiguity. The rule language was unclear what actions the Industrial Commission would take after receiving an application for *pro hac vice* admission.

The Commission unanimously objected to Rule 04 NCAC 10E .0104 based upon ambiguity. The Commission found that the rule language as submitted was unclear regarding the process for attorneys to request and take secured leave.

Speakers addressed the Commission on several rules. Meredith Henderson, Andrew Heath and Wanda Taylor with the agency addressed the Commission. Julia Dixon, Hank Patterson and Victor Farah also addressed the Commission about these rules.

The Commission received ten letters of objection in accordance with G.S. 150B-21.3(b2), requesting a delayed effective date and legislative review, for the following approved rules:

1. 04 NCAC 10A .0605
2. 04 NCAC 10A .0701
3. 04 NCAC 10C .0109
4. 04 NCAC 10E .0203
5. 04 NCAC 10L .0101

6. 04 NCAC 10L .0102; and
7. 04 NCAC 10L .0103

The Commission recessed for lunch at 1:30 and reconvened 2 p.m.

TEMPORARY RULES

Environmental Management Commission

Commissioner Walker was not present during the discussion or vote for this rule.

15A NCAC 02H .1002 was approved unanimously.

COMMISSION BUSINESS

The Commission considered proposed Rules 26 NCAC 05 .0105, .0106, and .0201 - .0211. After consideration and discussion of the comments and the recommended changes of Commission Counsel, the Commission adopted the proposed rules.

The meeting adjourned at 3:03 p.m.

The next regularly scheduled meeting of the Commission is Thursday, April 17th at 10:00 a.m.

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

Respectfully Submitted,

Julie Brincefield
Administrative Assistant

Minutes approved by the Rules Review Commission:

Margaret Currin, Chair

RULES REVIEW COMMISSION

Rules Review Commission

Meeting

Please **Print** Legibly

MARCH 20, 2014

Name	Agency
Meredith Henderson	Industrial Commission
Linda Cheatham	" Please Print Legibly "
Julie Ventaloro	DENR Please Print Legibly
Cynthia Stephens	NCOWCECB
Pamela Young	NCIC Please Print Legibly
Mart Selph	NCBGC Please Print Legibly
Paul Wheeler	APN Please Print Legibly
Brian	SOS Please Print Legibly
Gloria Cannarano	Farm & Com Please Print Legibly
Julia Dixon	Young Modr Henderson
Lee Martin	SBE Please Print Legibly
Jason White	SBE Please Print Legibly
Wanda Taylor	NCIC Please Print Legibly
Mike Carpenter	NCBA Please Print Legibly
Janice Davidson	DOR Please Print Legibly
Katie Cornetto	NCSBE Please Print Legibly
Denise Baka	DMH/DOH/SA Please Print Legibly
Jennifer Everett	NC DENR Please Print Legibly
Carolyn Guthrie	NC DPI Please Print Legibly
Robert Jocz	NC DENR Please Print Legibly
Delores Jaynes	Office of State Human Resources

RULES REVIEW COMMISSION

Rules Review Commission

Meeting

Please **Print** Legibly

MARCH 20, 2014

Name	Agency
<i>and County</i>	<i>Many more</i>
<i>Tom Harris</i>	<i>SEANCE</i>
<i>Bradley Bennett</i>	<i>DENR</i>
<i>Andrew Heard</i>	<i>NCIC</i>
<i>Sumit Gupta</i>	<i>NCIC</i>
<i>Ryan Boyce</i>	<i>NCIC</i>
<i>Bernadine Ballance</i>	<i>NCIC</i>
<i>Catherine Jorgensen</i>	<i>HADFB</i>
<i>Christina Simpson</i>	<i>"</i>
Please Print Legibly	Please Print Legibly
Please Print Legibly	Please Print Legibly
Please Print Legibly	Please Print Legibly
Please Print Legibly	Please Print Legibly
Please Print Legibly	Please Print Legibly
Please Print Legibly	Please Print Legibly
Please Print Legibly	Please Print Legibly
Please Print Legibly	Please Print Legibly
Please Print Legibly	Please Print Legibly
Please Print Legibly	Please Print Legibly
Please Print Legibly	Please Print Legibly
Please Print Legibly	Please Print Legibly
Please Print Legibly	Please Print Legibly
Please Print Legibly	Please Print Legibly
Please Print Legibly	Please Print Legibly
Please Print Legibly	Please Print Legibly

**LIST OF APPROVED PERMANENT RULES
March 20, 2014 Meeting**

INDUSTRIAL COMMISSION

<u>Official Forms</u>	04 NCAC 10A .0102
<u>Reinstatement of Compensation</u>	04 NCAC 10A .0405
<u>Safety Rules</u>	04 NCAC 10A .0410
<u>Responding to a Party's Request for Hearing</u>	04 NCAC 10A .0603
<u>Discovery</u>	04 NCAC 10A .0605
<u>Statement of Incident Leading to Claim</u>	04 NCAC 10A .0608
<u>Depositions</u>	04 NCAC 10A .0612
<u>Expert Witnesses and Fees</u>	04 NCAC 10A .0613
<u>Review by the Full Commission</u>	04 NCAC 10A .0701
<u>Remand from the Appellate Courts</u>	04 NCAC 10A .0704
<u>Waiver of Rules</u>	04 NCAC 10A .0801
<u>Waiver of Rules</u>	04 NCAC 10B .0501
<u>Definitions</u>	04 NCAC 10C .0103
<u>Interaction with Physicians</u>	04 NCAC 10C .0108
<u>Vocational Rehabilitation Services and Return to Work</u>	04 NCAC 10C .0109
<u>Waiver of Rules</u>	04 NCAC 10C .0201
<u>Waiver of Rules</u>	04 NCAC 10D .0110
<u>Document and Record Fees</u>	04 NCAC 10E .0201
<u>Hearing Costs or Fees</u>	04 NCAC 10E .0202
<u>Fees Set by the Commission</u>	04 NCAC 10E .0203
<u>Waiver of Rules</u>	04 NCAC 10E .0301
<u>Foreign Language Interpreters</u>	04 NCAC 10G .0104A
<u>Compensation of the Mediator</u>	04 NCAC 10G .0107
<u>Waiver of Rules</u>	04 NCAC 10G .0110
<u>Waiver of Rules</u>	04 NCAC 10H .0206
<u>Waiver of Rules</u>	04 NCAC 10I .0204
<u>Fees for Medical Compensation</u>	04 NCAC 10J .0101
<u>Form 21 - Agreement for Compensation for Disability</u>	04 NCAC 10L .0101
<u>Form 26 - Supplemental Agreement as to Payment of Compens...</u>	04 NCAC 10L .0102
<u>Form 26A - Employer's Admission of Employee's Rights to P...</u>	04 NCAC 10L .0103
<u>Subpoena</u>	04 NCAC 10L .0104

PUBLIC HEALTH, COMMISSION FOR

<u>Definitions</u>	15A NCAC 18C .0102
<u>Surface Supplies for Public Water Systems</u>	15A NCAC 18C .0201
<u>Removal of Dissolved Matter and Suspended Matter</u>	15A NCAC 18C .0202
<u>Submittals</u>	15A NCAC 18C .0302
<u>Minimum Requirements</u>	15A NCAC 18C .0401
<u>Water Supply Wells</u>	15A NCAC 18C .0402
<u>Storage of Finished Water</u>	15A NCAC 18C .0405
<u>Distribution Systems</u>	15A NCAC 18C .0406
<u>Sedimentation Basin</u>	15A NCAC 18C .0706

<u>Other Design Standards</u>	15A NCAC 18C .0715
<u>Capacities: Determining Peak Demand</u>	15A NCAC 18C .0802
<u>Capacities: Elevated Storage</u>	15A NCAC 18C .0805
<u>Valves</u>	15A NCAC 18C .0907
<u>Fishing</u>	15A NCAC 18C .1204
<u>Control of Treatment Process</u>	15A NCAC 18C .1406
<u>Turbidity Sampling and Analysis</u>	15A NCAC 18C .1505
<u>Maximum Contaminant Levels for Turbidity</u>	15A NCAC 18C .1506
<u>Corrosion Control and Lead and Copper Monitoring</u>	15A NCAC 18C .1507
<u>Inorganic Chemical Sampling and Analysis</u>	15A NCAC 18C .1508
<u>Special Monitoring for Sodium</u>	15A NCAC 18C .1509
<u>Maximum Contaminant Levels for Inorganic Chemicals</u>	15A NCAC 18C .1510
<u>Organic Chemicals Other than TTHM, Sampling and Analysis</u>	15A NCAC 18C .1515
<u>Special Monitoring for Inorganic and Organic Chemicals</u>	15A NCAC 18C .1516
<u>Maximum Contaminant Levels for Organic Chemicals</u>	15A NCAC 18C .1517
<u>Maximum Contaminant Levels for Organic Contaminants</u>	15A NCAC 18C .1518
<u>Monitoring Frequency for Radioactivity</u>	15A NCAC 18C .1519
<u>Maximum Contaminant Levels for Radionuclides</u>	15A NCAC 18C .1520
<u>Maximum Contaminant Level Goals for Radionuclids</u>	15A NCAC 18C .1521
<u>Analytical Methods for Radioactivity</u>	15A NCAC 18C .1522
<u>Public Notification Requirements</u>	15A NCAC 18C .1523
<u>Reporting Requirements</u>	15A NCAC 18C .1525
<u>Record Maintenance</u>	15A NCAC 18C .1526
<u>Coliform Sampling</u>	15A NCAC 18C .1534
<u>Treatment Techniques</u>	15A NCAC 18C .1536
<u>Drinking Water Additives</u>	15A NCAC 18C .1537
<u>Consumer Confidence Report</u>	15A NCAC 18C .1538
<u>Public Hearings on Variances and Schedules</u>	15A NCAC 18C .1605
<u>Variances and Exemptions for Chemicals, Lead and Copper, ...</u>	15A NCAC 18C .1607
<u>Public Hearings on Exemption Schedules</u>	15A NCAC 18C .1612
<u>Bottled Water and Point-of-Use Devices</u>	15A NCAC 18C .1614
<u>Purpose</u>	15A NCAC 18C .1701
<u>Grant Commitments from Current Allocation</u>	15A NCAC 18C .1702
<u>County Allocations Committed Before Statewide Allocation</u>	15A NCAC 18C .1703
<u>Reference Rule</u>	15A NCAC 18C .1704
<u>Application for Certification</u>	15A NCAC 18C .1802
<u>Administrative Penalties</u>	15A NCAC 18C .1902
<u>Considerations in Assessing Administrative Penalties</u>	15A NCAC 18C .1906
<u>Disinfection</u>	15A NCAC 18C .2002
<u>Filter Backwash Recycling Rule</u>	15A NCAC 18C .2003
<u>Analytical and Monitoring Requirements</u>	15A NCAC 18C .2004
<u>Reporting and Record Keeping Requirements</u>	15A NCAC 18C .2006
<u>Enhanced Filtration and Disinfection</u>	15A NCAC 18C .2007
<u>Disinfectants and Disinfection Byproducts</u>	15A NCAC 18C .2008
<u>Application for Permit</u>	15A NCAC 18C .2102
<u>Ground Water Rule</u>	15A NCAC 18C .2202

EDUCATION, STATE BOARD OF

<u>NC General Assembly's Read to Achieve Program</u>	16	NCAC 06D .0508
<u>High School Accreditation Framework</u>	16	NCAC 06G .0203

GENERAL CONTRACTORS, LICENSING BOARD FOR

<u>Structure of the Board</u>	21	NCAC 12 .0103
<u>Classification</u>	21	NCAC 12 .0202
<u>Eligibility</u>	21	NCAC 12 .0204
<u>Filing Deadline/App Seeking Qual/Emp/Another</u>	21	NCAC 12 .0205
<u>Application</u>	21	NCAC 12 .0209
<u>Licensure for Military-Trained Applicant; Licensure for M...</u>	21	NCAC 12 .0309
<u>Renewal of License</u>	21	NCAC 12 .0503
<u>Improper Practice</u>	21	NCAC 12 .0701
<u>Unlawful Practice</u>	21	NCAC 12 .0702
<u>Fee for Submittal of Bad Check</u>	21	NCAC 12 .0703
<u>Definitions</u>	21	NCAC 12 .0901
<u>Processing of Application</u>	21	NCAC 12 .0906

DENTAL EXAMINERS, BOARD OF

<u>Request to Participate</u>	21	NCAC 16N .0301
<u>Content of Request: General Time Limitations</u>	21	NCAC 16N .0302
<u>Receipt of Request: Specific Time Limits</u>	21	NCAC 16N .0303
<u>Transfer of Records Upon Request</u>	21	NCAC 16T .0102

HEARING AID DEALERS AND FITTERS BOARD

<u>Qualifications to Register for Exam</u>	21	NCAC 22F .0104
<u>Passing Examination</u>	21	NCAC 22F .0105
<u>Apprenticeship Requirements</u>	21	NCAC 22F .0113
<u>Training and Supervision</u>	21	NCAC 22F .0114
<u>Sponsors' Duties</u>	21	NCAC 22F .0115
<u>Separation of Apprentice and Sponsor</u>	21	NCAC 22F .0116
<u>Apprenticeship Requirements</u>	21	NCAC 22F .0301
<u>Sponsors' Duties</u>	21	NCAC 22F .0302
<u>Certificate Expiration</u>	21	NCAC 22F .0303
<u>Separation of Apprentice and Sponsor</u>	21	NCAC 22F .0304
<u>Report of Apprenticeship Experience</u>	21	NCAC 22F .0305
<u>Apprentice Discipline</u>	21	NCAC 22F .0306

ON-SITE WASTEWATER CONTRACTORS AND INSPECTORS CERTIFICATION BOARD

<u>Licensure for Military-Trained Applicant; Licensure for M...</u>	21	NCAC 39 .0405
<u>Minimum On-Site Wastewater System Inspection</u>	21	NCAC 39 .1006

PLUMBING, HEATING AND FIRE SPRINKLER CONTRACTORS, EXAMINERS OF BOARD OF

<u>Qualifications Determined by Examination</u>	21	NCAC 50 .0301
---	----	---------------

ADMINISTRATIVE HEARINGS, OFFICE OF

Medicaid Hearing Procedures Rules

26 NCAC 03 .0401

**LIST OF APPROVED TEMPORARY RULES
March 20, 2014 Meeting**

ENVIRONMENTAL MANAGEMENT COMMISSION

Definitions

15A NCAC 02H .1002

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

Melissa Owens Lassiter	A. B. Elkins II
Don Overby	Selina Brooks
J. Randall May	Craig Croom
J. Randolph Ward	

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>DATE</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<u>ALCOHOLIC BEVERAGE CONTROL COMMISSION</u>			
James Ivery Smith, Ivy Lee Armstrong v. ABC Commission	11 ABC 08266	04/12/12	
Trawick Enterprises LLC v. ABC Commission	11 ABC 08901	05/11/12	27:01 NCR 39
Dawson Street Mini Mart Lovell Glover v. ABC Commission	11 ABC 12597	05/23/12	
ABC Commission v. Christian Broome Hunt T/A Ricky's Sports Bar and Grill	11 ABC 13161	05/03/12	
Alabarati Brothers, LLC T/A Day N Nite Food Mart, v. ABC Commission	11 ABC 13545	05/01/12	
Playground LLC, T/A Playground v. ABC Commission	11 ABC 14031	05/16/12	27:01 NCR 64
ABC Commission v. Quick Quality, Inc., T/A Rock Star Grill and Bar	11 ABC 14036	07/05/12	
ABC Commission v. D's Drive Thru Inc. T/A D's Drive Thru	12 ABC 00060	05/29/12	
ABC Commission v. Choudhary, LLC T/A Speedway	12 ABC 00721	05/01/12	
ABC Commission v. Dos Perros Restaurant LLC T/A Dos Perros Restaurant	12 ABC 05312	09/25/12	
ABC Commission v. Bobby Warren Joyner T/A Hillsdale Club	12 ABC 06153	11/06/12	
ABC Commission v. Quick Quality, Inc., T/A Rock Star Grill and Bar	12 ABC 07260	12/11/12	
ABC Commission v. Fat Cats Grill and Oyster Bar Inc, T/A Fat Cats Grill and Oyster Bar	12 ABC 08988	12/19/12	
ABC Commission v. Wachdi Khamis Awad T/A Brothers in the Hood	12 ABC 09188	03/06/13	
ABC Commission v. Double Zero, LLC, T/A Bad Dog	12 ABC 11398	04/08/13	
ABC Commission v. Soledad Lopez de Avilez T/A Tienda Avilez	13 ABC 00002	06/06/13	
ABC Commission v. Two Brothers Food Market, Inc., T/A Circle Mart	13 ABC 10356	07/11/13	
Rio Sports Restaurant and Lounge Inc. v. ABC Commission	13 ABC 11233	08/02/13	28:13 NCR 1573
ABC Commission v. Grandmas Pizza LLC T/A Grandmas Pizza	13 ABC 11401	08/13/13	
Hector Diaz v. ABC Commission	13 ABC 13071	11/08/13	
ABC Commission v. Ola Celestine Morris T/A Nitty Gritty Soul Cafe	13 ABC 14197	10/09/13	
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	
ABC Commission v. Art in a Pickle, LLC T/A Neal's Deli	13 ABC 17128	12/03/13	
ABC Commission v. T C Fox, LLC T/A Fig Café and Wine Bar	13 ABC 17131	01/07/14	
ABC Commission v. Republic, LLC T/A Republic	13 ABC 18414	01/07/14	
Leonard Marable v. ABC Commission	14 ABC 00522	03/20/14	
<u>BOARD OF LAW EXAMINERS</u>			
Jason Vicks and Mekeisha Vicks	13 BAR 20223	03/11/14	

BOARD OF MORTUARY SCIENCE

NC Board of Funeral Services v. John Douglas Bevell, Jr.	13 BMS 08447	11/22/13	28:19 NCR 2400
--	--------------	----------	----------------

BOARD OF NURSING

Douglas E. McPhail v. Board of Nursing	13 BON 20228	02/26/14	
--	--------------	----------	--

DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY

Maggie Yvonne Graham v. Victims Compensation Commission	09 CPS 05287	04/09/13	
Vivian Davis Armstrong v. The NC Crime Victims Compensation Commission	11 CPS 10539	12/06/13	
Brian J. Johnson v. Department of Public Safety Victim Services	12 CPS 01664	12/21/12	
George H. Jaggers, III v. Crime Victims Compensation Commission	12 CPS 01693	11/01/12	
Teresa Herbin v. Department of Public Safety Victim Services	12 CPS 03680	08/10/12	
Jacqueline M Davis victim-Antonio T Davis v. Dept. of Public Safety	12 CPS 05919	11/06/12	
Demario J. Livingston v. Dept. of Public Safety Victim Services	12 CPS 06245	10/19/12	
Shirley Ann Robinson v. NC Crime Victims Compensation Commission	12 CPS 07601	12/07/12	
Harold Eugene Merritt v. State Highway Patrol	12 CPS 07852	05/24/13	
Vanda Lawanda Johnson v. Office of Victim Compensation	12 CPS 09709	04/25/13	
Latoya Nicole Ritter v. Crime Victim Compensation Commission, Janice Carmichael	12 CPS 10572	04/25/13	
Ruffin J. Hyman v. Department of Public Safety, Division of Victim Compensation Services	13 CPS 01570	11/19/13	
Garrett's Towing & Recovery LLC v. Department of Public Safety, State Highway Patrol	13 CPS 09535	10/25/13	28:19 NCR 2412
Teresa f. Williams v. Crime Victims Compensation Commission	13 CPS 09790	07/11/13	
Angela Clendenin King v. Office of Administrative Hearings NC Crime Victims Comp Commission	13 CPS 11239	08/02/13	
Matthew B. McGee v. NC Victims Compensation Commission	13 CPS 12133	08/26/13	
Beth Ford v. NC Victims Compensation	13 CPS 17995	01/06/14	
Brenda Doby Ross v. NC Victim Crime Victim Compensation/NCDPS	13 CPS 19048	02/06/14	
Karen Hoyle v. NC Crime Victims Compensation Commission	13 CPS 19456	03/28/14	
Frankie Adreus v. Victim Compensation Commission of NC	13 CPS 19504	01/27/14	

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Stonestrow Group Home Medicaid Provider #6603018 Owned by Alberta Professional Services Inc v. DHHS, Division of Mental Health/Development Disabilities/ Substance Abuse, and DMA	09 DHR 05790	01/11/13	
Bright Haven Residential and Community Care d/b/a New Directions Group Home v. Division of Medical Assistance, DHHS	10 DHR 00232	04/27/12	
Warren W Gold, Gold Care Inc. d/b/a Hill Forest Rest Home, v. DHHS/Division of Health Service Regulation, Adult Care Licensure Section	10 DHR 01666	05/18/12	
Morrissa Angelica Richmond v. DHHS, Division of Health Service Regulation	10 DHR 05611	02/07/14	
Warren W Gold, Gold Care Inc. d/b/a Hill Forest Rest Home v. DHHS, Division of Health Service Regulation, Adult Care Licensure and Certification Section	10 DHR 05801	05/18/12	
Gold Care Inc. Licensee Hill Forest Rest Home Warren W. Gold v. DHHS, Adult Care Licensure Section	10 DHR 05861	05/18/12	
Robert T. Wilson v. DHHS, DHR	10 DHR 07700	01/29/13	
Daniel J. Harrison v. DHHS Division of Health Service Regulation	10 DHR 07883	04/12/13	28:02 NCR 73
St. Mary's Home Care Services, Inc. v. DHHS, Division of Medical Assistance Finance Management Section Audit Unit	10 DHR 08206	01/08/14	28:19 NCR 2354
Powell's Medical Facility and Eddie N. Powell, M.D., v. DHHS, Division of Medical Assistance	11 DHR 01451	03/05/12	27:01 NCR 75
Julie Sadowski v. DHHS, Division of Health Service Regulation	11 DHR 01955	04/03/12	
Mary Ann Barnes v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	11 DHR 06488	07/16/12	
Comprehensive PT Center v. DHHS, Division of Medical Assistance	11 DHR 09197	08/14/12	27:12 NCR 1204
Cherry's Group Home, Alphonso Cherry v. DHR Michelle Elliot	11 DHR 09590	07/12/12	
Leslie Taylor v. DHHS, Division of Health Regulation	11 DHR 10404	10/19/12	
St. Mary's Home Care Services, Inc. v. DHHS, Division of Medical Assistance Finance Management Section Audit Unit	11 DHR 10487	01/08/14	28:19 NCR 2354
Carlos Kendrick Hamilton v. DHHS, Division of Social Services	11 DHR 11161	10/16/12	27:16 NCR 1679
Teresa Diane Marsh v. DHHS, Division of Health Service Regulation	11 DHR 11456	04/27/12	
Betty Parks v. Division of Child Development, DHHS	11 DHR 11738	06/20/12	
Lorrie Ann Varner v. DHHS, Regulation Health Care Personnel Registry Section	11 DHR 11867	08/02/12	

CONTESTED CASE DECISIONS

Brenda Brewer v. DHHS, Division of Child Development	11 DHR 12064	08/03/12	27:12 NCR 1210
Timothy John Murray v. DHHS, Division of Health Service Regulation	11 DHR 12594	06/15/12	
Holly Springs Hospital II, LLC v. DHHS, Division of Health Service Regulation, CON Section and Rex Hospital, Inc., Harnett Health System, Inc. and WakeMed	11 DHR 12727	04/12/12	27:04 NCR 486
Rex Hospital, Inc., v. DHHS, Division of Health Service Regulation, CON Section and WakeMed, Holly Springs Hospital II, LLC, and Harnett Health System, Inc.	11 DHR 12794	04/12/12	27:04 NCR 486
Harnett Health System, Inc., v. DHHS, Division of Health Service Regulation, CON Section and Rex Hospital, Inc., Holly Springs Hospital II, LLC, and WakeMed	11 DHR 12795	04/12/12	27:04 NCR 486
WakeMed v. DHHS, Division of Health Service Regulation, CON Section and Holly Springs Hospital II, LLC, Rex Hospital, Inc., and Harnett Health System, Inc	11 DHR 12796	04/12/12	27:04 NCR 486
Sandra Ellis v. DHHS	11 DHR 12959	07/11/12	
Shirley Dowdy v. DHHS	11 DHR 13267	03/25/13	
Vendell Haughton v. DHHS, Division of Medical Assistance	11 DHR 13616	07/05/12	
Tarsand Denise Morrison v. DHHS, Division of Health Service Regulation	11 DHR 13906	07/11/12	
Care Well of Charlotte Inc, Joy Steele v. DHHS	11 DHR 13909	08/02/12	
Carrie's Loving Hands Inc. #MHL #040-047 Felicia McGee v. DHHS, DHSR, Mental Health Licensure and Certification	11 DHR 14172	01/22/13	
Carrie's Loving Hands Inc. #MHL #010-047 Felicia McGee v. DHHS, DHSR, Mental Health Licensure and Certification	11 DHR 14173	01/22/03	
Michael Timothy Smith, Jr. v. DHHS, Division of Health Service Regulation	11 DHR 14184	08/01/12	
John S. Won v. DHHS	11 DHR 14232	09/05/12	27:15 NCR 1547
Cynthia Tuck Champion v. DHHS, Division of Health Service Regulation	11 DHR 14283	06/15/12	
Leslie Taylor, and Octavia Carlton v. Mecklenburg County Department of Social Services Youth and Family Services Division	11 DHR 14335	10/12/12	
Lauren Stewart v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	11 DHR 14570	06/08/12	
Alice M. Oakley v. Division of Child Development, DHHS	11 DHR 14571	05/15/12	27:04 NCR 508
Andrea D. Pritchett v. DHHS Healthcare Personnel Registry Section	11 DHR 14885	01/04/13	28:02 NCR 91
McWilliams Center for Counseling Inc., v. DHHS, Division of Mental Health, Developmental Disabilities, Substance Abuse Services, and agency of the State of NC	11 DHR 15098	11/13/12	
Althea L. Flythe v. Durham County Health Department	12 DHR 00242	05/17/12	
Jerri Long v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	12 DHR 00361	07/06/12	
Renal Advantage, Inc., v. DHHS, Division of Health Service Regulation, CON Section and DVA Healthcare Renal Care, Inc	12 DHR 00518	08/28/12	27:15 NCR 1553
Angela Moye v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	12 DHR 00642	08/23/12	27:12 NCR 1218
Jessica Lynn Ward v. DHHS	12 DHR 00643	05/17/12	
Howard Gene Whitaker v. DHHS, Office of Emergency Medical Services	12 DHR 00888	09/05/13	28:13 NCR 1534
Trinity Child Care II & I v. DHHS, Division of Public Health, Child and Adult Care Food Program	12 DHR 00861	04/20/12	27:04 NCR 518
Dr. Karen J. Williams, LPC v. DHHS, Division of Medical Assistance	12 DHR 00926	09/18/12	
Faith Home Care of NC, Bonita Wright v. DHHS, DMA	12 DHR 00928	07/25/12	
Olar Underwood v. Division of Child Development and Early Education	12 DHR 00990	10/22/12	
Angela C Jackson v. DHHS	12 DHR 01097	06/19/12	
Paula N Umstead v. DHHS	12 DHR 01098	05/11/12	
Daniel W. Harris, Jr., v. DHHS, Division of Health Service Regulation	12 DHR 01138	10/19/12	
ACI Support Specialists Inc. Case #2009-4249 v. DHHS	12 DHR 01141	06/06/12	
AriLand Healthcare Service, LLC, NCMHL #018-092, Shawn Kuhl Director of Operations v. DHHS, Emery E. Milliken, General Counsel	12 DHR 01165	05/25/12	
Kenneth Holman v. DHHS	12 DHR 01244	06/05/12	
Hillcrest Resthome Inc. (\$2000 penalty) v. DHHS	12 DHR 01289	05/30/12	
Hillcrest Resthome Inc. (\$4000 penalty) v. DHHS	12 DHR 01290	05/30/12	
Vivian Barrear v. DHHS, Division of Medical Assistance DHHS	12 DHR 01296	06/06/12	
Patricia Satterwhite v. DHHS	12 DHR 01338	07/23/12	
Anthony Moore d/b/a Hearts of Gold II v. DHHS, Division of Health Service Regulation, Adult Care Licensure Section	12 DHR 01346	04/12/13	28:03 NCR 256
Timothy L Durham v. DHHS, Division of Health Services Regulation	12 DHR 01396	09/04/12	
Clydette Dickens v. Nash Co DSS	12 DHR 01625	05/15/12	
Nicole Lynn Hudson v. DHHS, Division of Health Service Regulation	12 DHR 01732	03/11/13	28:09 NCR 921
American Mobility LLC, Norman Mazer v. DHHS	12 DHR 01733	11/20/12	27:21 NCR 1980
American Mobility LLC, Norman Mazer v. DHHS	12 DHR 01733	03/06/13	28:03 NCR 266
Robert Lee Raines v. DHHS	12 DHR 01736	05/30/12	
Ms. Antoinette L. Williams v. DHHS	12 DHR 01739	06/15/12	
Felicia McGee Owner of Carrie's Loving Hand Inc. and Caring Arms Inc v. DHHS, DHSR	12 DHR 01796	01/22/13	

CONTESTED CASE DECISIONS

Mental Health Licensure Certification			
Katherine Young v. DHHS/Division of Medical Assistance, Emery Millikin Appeals Legal Department	12 DHR 01802	01/08/14	
Tricia Watkins v. DHHS, Division of Medical Assistance, Office of Medicaid TLW-Auditing Office	12 DHR 01807	06/01/12	
First Path Home Care Services Gregory Locklear v. DHHS	12 DHR 01878	06/22/12	
Rochelle A. Gaddy v. DHHS, Division of Health Service Regulation	12 DHR 01998	06/04/13	28:11 NCR 1253
Patriotic Health Care Systems, LLC v. DHHS	12 DHR 02105	09/19/12	
John and Christina Shipman v. DHHS	12 DHR 02107	07/24/12	
Team Daniel, LLC v. DHHS, DMA	12 DHR 02162	09/11/13	27:16 NCR 1696
Leslie Taylor, Octavia Carlton, Paula Carlton	12 DHR 02217	08/31/12	
Madeline Brown v. DHHS, Division of Health Service Regulation	12 DHR 02257	06/01/12	
Evelyn Evans v. DHHS, Division of Health Service Regulation	12 DHR 02258	07/02/12	
Shannon Santimore v. DHHS, Division of Public Health, Epidemiology Section	12 DHR 02348	12/20/12	
Precious Haven Inc. Melissa McAllister v. DHHS, Program Integrity	12 DHR 02430	05/18/12	
Michael and Jamie Hart v. Davidson County, Department of Social Services	12 DHR 02542	07/03/12	
Annamae R. Smith v. DHHS, Division of Medical Assistance	12 DHR 02657	11/05/12	
Our Daily Living, Christopher OnWuka, Director v. DHHS	12 DHR 02777	10/17/12	
Right Trax Inc., Maria Lewis v. DHHS, Division of Health Service Regulation, Mental Health Licensure & Certification	12 DHR 02779	05/06/13	
Jessica L Thomas v. Randolph County DSS	12 DHR 02955	07/24/12	
Moses E Shoffner v. DHHS, Division of Child Development	12 DHR 03459	08/15/12	
Marco Evans v. DHHS, Division of Health Service Regulation	12 DHR 04110	07/30/12	
James C. Bartley v. DHHS, DMA	12 DHR 04116	07/25/12	
Estate of Mary P Lipe Medicaid ID #901463645S Alvena C Heggins v. DHHS, DMS (DHHS Medicaid)	12 DHR 04260	01/16/13	
Emelda Bih Che v. Health Care Personnel Registry	12 DHR 04834	01/24/13	
Daycare for all the Nations, Abura B. Jackson v. DHHS, Division of Child Development	12 DHR 04944	01/03/13	28:03 NCR 275
LaBrenda Jane Elliot v. DHHS, Division of Medical Assistance	12 DHR 04993	09/24/12	
Esther H Beal v. Office of Chief Medical Examiner	12 DHR 05094	11/14/12	27:21 NCR 1987
James Johnson v. DHHS, Division of Health Service Regulation	12 DHR 05148	09/11/12	
Youth Opportunities v. DHHS, Division of Medical Assistance	12 DHR 05227	07/11/13	
Tammy Isley v. Division of Child Development and Early Education	12 DHR 05405	05/15/13	
Cathy Crosland v. DHHS, Division of Health Service Regulation	12 DHR 05610	08/06/12	
Dwight William Osborne v. Glana M Surles, DHHS (Medicaid)	12 DHR 05693	09/14/12	
Brenda Triplett Andrews v. DHHS, Division of Health Service Regulation	12 DHR 05745	12/10/12	
Southern Living Home Care Agency Inc., v. DHHS	12 DHR 05864	11/06/12	
Symakla Home Healthcare v. DHHS-Hearing Office	12 DHR 05918	08/02/13	
Beverly Coleman v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry Section	12 DHR 05961	09/05/12	
Esther McMillian v. DHHS	12 DHR 06061	11/26/13	
Gregory Howard v. Health Care Personnel Registry	12 DHR 06157	09/07/12	
Joshua Goss v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	12 DHR 06158	03/04/13	
Harrison E Shell Jr v. Wake County Human Services	12 DHR 06203	08/28/12	
A Unique Solution Bertha M. Darden v. Division of Child Development & Early Education	12 DHR 06314	05/20/13	
Valtina Bronson v. DHHS, Division of Health Service Regulation	12 DHR 06365	08/29/12	
Danny Skipper AKA Danny Skipper v. DHHS, Division of Health Services Regulation	12 DHR 06403	10/22/12	
Stalin Bailon v. Department of Social Services	12 DHR 06528	10/17/12	
Tonya Diane Warfield v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry Section	12 DHR 06682	01/07/13	
Our Daily Living, Christopher OnWuka, Director v. DHHS	12 DHR 06683	10/17/12	
Latricia N. Yelton, OT v. DHHS, Division of Medical Assistance	12 DHR 06686	04/10/13	28:03 NCR 282
Brittney Nicole Brabham v. DHHS, Division Health Service Regulation, Healthcare Personnel Registry	12 DHR 06786	03/27/13	
Darina Renee Ford v. DHHS	12 DHR 07166	11/19/12	
Marquis Gerade Harrell v. DHHS, Health Care Personnel Registry, Leslie Chabet	12 DHR 07170	10/23/12	
Future Innovations, LLC and David F. Curtis v. DHHS, Division of Health Service Regulation, Mental Health Licensure Section	12 DHR 07215	04/16/13	28:05 NCR 443
Future Innovations, LLC and David F. Curtis v. DHHS, Division of Health Service Regulation, Mental Health Licensure Section	12 DHR 07216	04/16/13	28:05 NCR 443
Future Innovations, LLC and David F. Curtis v. DHHS, Division of Health Service Regulation, Mental Health Licensure Section	12 DHR 07217	04/16/13	28:05 NCR 443
KMG Holdings Inc. – The Lighthouse II of Clayton MHL #051-138 v. DHHS, Division of Health Licensure and Certification	12 DHR 07292	11/08/12	
Curtain Climbers, Rhonda Corn v. Division of Child Development, DHHS	12 DHR 07295	01/16/13	

CONTESTED CASE DECISIONS

Speakeasy Therapy, LLC v. DHHS, Division of Medical Assistance	12 DHR 07296	04/25/13	28:05 NCR 462
Faline Dial v. DHHS, Division of Medical Assistance	12 DHR 07440	02/07/13	28:05 NCR 488
PRN Medical Resources, PLLC v. DHHS, Division of Medical Assistance	12 DHR 07441	03/19/13	28:05 NCR 500
Denise Marie Shear v. DHHS, Division of Health Service Regulation	12 DHR 07547	11/07/12	
Irene Renee McGhee v. DHHS	12 DHR 07589	08/29/13	
Terique Epps, Family Legacy Mental Health Services DBA Task Inc v. DHHS and PBH	12 DHR 07616	11/09/12	
Angela Mackey v. DHHS, Division of Health Service Regulation	12 DHR 07619	10/05/12	
Eloise Dowtin v. The Emmanuel Home IV v. Division of Health Service Regulation	12 DHR 07620	11/06/12	
Orlando Stephen Murphy v. DHHS, DHSR, Health Care Personnel	12 DHR 07640	02/05/13	
Irene Wortham Center, Inc., v. DHHS, DMA	12 DHR 07699	04/12/13	
Yolanda McKinnon v. DHHS	12 DHR 07711	01/11/13	
Koffi Paul Aboagye v. DHHS, Division of Health Service Regulation	12 DHR 07731	11/20/12	
Mark Thomas v. DHHS, Division of Health Service Regulation	12 DHR 07853	01/04/13	
Annie Garner Ham v. DHHS, Division Health Service Regulation	12 DHR 08103	03/04/13	
Darrion Smith v. Murdock Developmental Center and the NC DHHS; Ricky Bass v. NC DHHS; Darrion Smith v. NC DHHS	12 DHR 08134	07/24/13	28:12 NCR 1472
Darrion Smith v. Murdock Developmental Center and the NC DHHS; Ricky Bass v. NC DHHS; Darrion Smith v. NC DHHS	12 DHR 08136	07/24/13	28:12 NCR 1472
Daniel Saft, A+ Residential Care (MHL #092-811) v. DHHS, DHSR, Mental Health Licensure and Certification Section	12 DHR 08197	01/16/13	
Jannett E. Myers v. DHHS, Division of Health Service Regulation	12 DHR 08257	08/07/13	
Gloria Mitchell v. DHHS, Division of Medical Assistance	12 DHR 08258	02/14/13	28:05 NCR 511
Katherine Free v. DHHS, Division of Medical Assistance	12 DHR 08395	04/12/13	
Ronald Dixon v. Division of Child Development, DHHS	12 DHR 08446	11/14/12	
Hillcrest Convalescent Center, Inc. v. DHHS, Division of Health Service Regulation, Certificate of Need Section, and E.N.W., LLC and Bellarose Nursing and Rehab Center, Inc.; Liberty Healthcare Properties of West Wake County, LLC, Liberty Commons Nursing and Rehabilitation Center of West Wake County, LLC, Liberty Healthcare Properties of Wake County LLC, and Liberty Commons Nursing and Rehabilitation Center of Wake County, LLC; Britthaven, Inc. and Spruce LTC Group, LLC; and AH North Carolina Owner LLC d/b/a The Heritage of Raleigh	12 DHR 08666	06/20/13	28:09 NCR 928
Liberty Healthcare Properties of West Wake County, LLC, Liberty Commons Nursing and Rehabilitation Center of West Wake County, LLC, Liberty Healthcare Properties of Wake County LLC, and Liberty Commons Nursing and Rehabilitation Center of Wake County, LLC v. DHHS, Division of Health Service Regulation, Certificate of Need Section, and Hillcrest Convalescent Center, Inc.; E.N.W., LLC and Bellarose Nursing and Rehab Center, Inc.; Britthaven, Inc. and Spruce LTC Group, LLC; and AH North Carolina Owner LLC d/b/a The Heritage of Raleigh	12 DHR 08669	06/20/13	28:09 NCR 928
Jah Mary Weese v. DHHS, Division of Health Service Regulation	12 DHR 08672	01/09/13	
AH North Carolina Owner LLC d/b/a The Heritage of Raleigh v. DHHS, Division of Health Service Regulation, Certificate of Need Section, and Hillcrest Convalescent Center, Inc.; E.N.W., LLC and Bellarose Nursing and Rehab Center, Inc.; Liberty Healthcare Properties of West Wake County, LLC, Liberty Commons Nursing and Rehabilitation Center of West Wake County, LLC, Liberty Healthcare Properties of Wake County LLC, and Liberty Commons Nursing and Rehabilitation Center of Wake County, LLC; and Britthaven, Inc. and Spruce LTC Group, LLC	12 DHR 08691	06/20/13	28:09 NCR 928
Mission Hospital, Inc. v. DHHS Division of Health Service Regulation Certificate of Need Section, and Fletcher Hospital, Inc. d/b/a Park Ridge Health and Carolina Gastroenterology Endoscopy Center, LLC	12 DHR 08733	06/18/13	28:10 NCR 1095
Clifford Lee Druml v. DHHS, Division of Medical Assistance	12 DHR 08776	04/25/13	
Natasha Dionne Howell v. DHHS, Division of Health Service Regulation	12 DHR 08814	03/07/13	
White Oak Homes II Inc., Lisa Atkinson v. DHHS, Mental Health Licensure and Certification Section, Division of Health Service	12 DHR 08994	02/08/13	
Ann-Catherine Baker v. DHHS, Health Care Personnel Registry	12 DHR 09022	08/22/13	28:19 NCR 2382
Erica Eileen Thomas v. DHHS, Division of Health Service Regulation	12 DHR 09139	04/17/13	
Tammy Isley v. Division of Child Development and Early Education	12 DHR 09350	05/15/13	
Eddie Cannon v. DHHS, Division of Health Service Regulation, Personnel Registry	12 DHR 09352	05/21/13	
Carolyn Ragin v. DHHS, Division of Health Services Regulation	12 DHR 09373	12/18/12	
Omar Vickers v. Office of Administrative Hearings	12 DHR 09475	04/16/13	
April Hood-Baker v. DHHS, DMA Glana M. Surles	12 DHR 09489	01/15/13	
Heritage Home Care Agency Inc., Rico Akvia Wagner v. Department of Human Services Hearing Office	12 DHR 09511	07/05/13	
Surgical Care Affiliates, LLC and Blue Ridge Day Surgery Center, L.P. v. DHHS, Division of Health Service Regulation, Certificate of Need Section, and WakeMed	12 DHR 09678	07/23/13	
Tyshon & Shannetta Barfield v. DHHS	12 DHR 09692	02/08/13	
Vicki Lucas-Crowder v. Division of Medical Assistance	12 DHR 09832	04/26/13	

CONTESTED CASE DECISIONS

Cynthia M Rose v. Division of Child Development, DHHS	12 DHR 09846	01/23/13	
Gina Lynne Gilmore Lipscomb v. Health Care Personnel Registry	12 DHR 09953	09/17/13	
Asheville Speech Associates v. DHHS, Division of Medical Assistance	12 DHR 10367	06/21/13	
Our Daily Living MHL 032-481 Christopher Onwuka v. DHHS, DHSR, Mental Health Licensure and Certification	12 DHR 10402	05/06/13	
Glenda Lee Hansley v. DHHS	12 DHR 10430	08/01/13	
Therapeutic Life Center, Inc. v. DHHS, Division of Medical Assistance	12 DHR 10447	07/08/13	28:12 NCR 1450
Sonia Coles Bowers v. DHHS, Division of Social Services	12 DHR 10511	08/26/13	
Charles and Cynthia Collins v. DHHS, Child Welfare Services Section Regulatory & Licensing Services	12 DHR 10538	11/08/13	28:19 NCR 2389
A Great Choice for Home Care, Inc. v. DHHS	12 DHR 10569	08/09/13	28:12 NCR 1461
Carolina Solution, Inc v DHHS	12 DHR 10668	02/08/13	
A Unique Solution Bertha M. Darden v. Division of Child Development & Early Education	12 DHR 10926	05/20/13	
Angels Home Health, Charlotte Robinson, and LaShonda Wofford v. DHHS	12 DHR 11035	04/22/13	
David Keith Trayford v. Division of Medical Assistance via Administrative Hearing Office	12 DHR 11180	07/01/13	
Favour McKinnon v. DHHS, Division of Health Service Regulation	12 DHR 11319	11/15/13	
Surgical Care Affiliates, LLC and Fayetteville Ambulatory Surgery Center Limited Partnership v. DHHS, Division of Health Service Regulation, Certificate of Need Section and FirstHelath of the Carolinas, Inc.; Cumberland County Hospital System Inc. d/b/a Cape Fear Valley Medical Center v. DHHS, Division of Health Service Regulation, Certificate of Need Section and FirstHealth of the Carolinas, Inc.	12 DHR 12086	09/17/13	28:16 NCR 1888
Cumberland County Hospital System, Inc. d/b/a Cape Fear Valley Health System v. DHHS, Division of Health Service Regulation Certificate of Need Section and FirstHealth of the Carolinas, Inc. d/b/a FirstHealth Moore Regional Hospital	12 DHR 12088	05/23/13	28:11 NCR 1262
Surgical Care Affiliates, LLC and Fayetteville Ambulatory Surgery Center Limited Partnership v. DHHS, Division of Health Service Regulation, Certificate of Need Section and FirstHelath of the Carolinas, Inc.; Cumberland County Hospital System Inc. d/b/a Cape Fear Valley Medical Center v. DHHS, Division of Health Service Regulation, Certificate of Need Section and FirstHealth of the Carolinas, Inc.	12 DHR 12090	09/17/13	28:16 NCR 1888
Surgical Care Affiliates, LLC and Fayetteville Ambulatory Surgery Center Limited Partnership v. DHHS, Division of Health Service Regulation, Certificate of Need Section and FirstHelath of the Carolinas, Inc.; Cumberland County Hospital System Inc. d/b/a Cape Fear Valley Medical Center v. DHHS, Division of Health Service Regulation, Certificate of Need Section and FirstHealth of the Carolinas, Inc.	12 DHR 12094	09/17/13	28:16 NCR 1888
St. Mary's Home Care Services, Inc. v. DHHS, Division of Medical Assistance Finance Management Section Audit Unit	12 DHR 12145	01/08/14	28:19 NCR 2354
Kevein Medley v. DHHS, Adult Care Licensure Section	12 DHR 12401	11/20/13	
Speech and Therapy Solutions v. DHHS	12 DHR 12402	03/27/13	
Agape Services, Inc. v. Program Integrity Section of DMA	12 DHR 12405	05/23/13	28:11 NCR 1269
Treasure Dominique Corry v. State of NC Nurse Aide Registry	12 DHR 12408	03/15/13	
Bio-Medical Applications of North Carolina, Inc., D/B/A FMC Anderson Creek	12 DHR 19650	12/17/12	27:22 NCR 2101
Linda Johnson v. Caswell Center	13 DHR 01926	03/06/13	
Carolina Family Alliance, c/o Sabrian Mack Exec Director v. DHHS	13 DHR 02679	03/28/13	
National Deaf Academy Judy Caldwell, RN v. Office of Administrative Hearings, Value Options North Carolina	13 DHR 02701	11/15/13	
Inder P Singh v. DHHS, WIC	13 DHR 05263	03/27/13	
Natasha Howell v. DHHS, Division of Health Service Regulation	13 DHR 07602	08/02/13	
Restoration Home Care Services, Inc., Diane Sherrill, Owner/President v. PCG Consulting Group Consulting Group, DHHS	13 DHR 08373	12/13/13	
Loretta Tinnin v. Division of Medical Assistance	13 DHR 08954	10/03/13	
Extensions of Living, LLC v. DHHS	13 DHR 08986	02/24/14	
Family Choice Home Care v. DHHS	13 DHR 08987	08/14/13	
Leenorta Cooper v. DHHS, Division of Health Service Regulation	13 DHR 09097	10/03/13	
Larry Ratliff, Jr., Alena Ratliff, Larry Ratliff, Sr. v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 09144	07/15/13	
Larry Ratliff, Jr., Alena Ratliff, Larry Ratliff, Sr. v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 09145	07/15/13	
Larry Ratliff, Jr., Alena Ratliff, Larry Ratliff, Sr. v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 09146	07/15/13	
Nikko & Shannon Scott v. DHHS	13 DHR 09422	06/26/13	
Brittany Hinson v. DHHS	13 DHR 09511	11/19/13	
Myra Evans v. Moore County Department of Social Services	13 DHR 09729	10/24/13	28:15 NCR 1818

CONTESTED CASE DECISIONS

Clarice Johnson v. DHHS, Division of Health Service Regulation	13 DHR 09736	10/28/13	
Doris Wilson v. DHHS, Division of Health Service Regulation	13 DHR 09742	07/15/13	
Kesha Johnson v. DHHS, Division of Health Service Regulation	13 DHR 09799	09/03/13	28:15 NCR 1825
Elton Bishop v. Food Stamps	13 DHR 09976	12/05/13	
Teresa Anne Davis v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 10037	09/20/13	
Marcella Marsh v. Forsyth County Department of Social Services	13 DHR 10124	06/21/13	
Wanda Jones v. DHHS	13 DHR 10289	08/15/13	
Berta M. Spencer v. DHHS, Office of the Controller	13 DHR 10335	07/05/13	
Benjamin Headen and Pamela Headen v. DHHS	13 DHR 10488	08/02/13	
Lelia Knox v. DHHS, Division of Child Development	13 DHR 10556	08/28/13	
Lashondrea Nixon v. DHHS, Division of Health Service Regulation	13 DHR 10594	08/30/13	
Edward E. Speaks, Jr. v. Central Regional Hospital	13 DHR 10749	09/10/13	
Scott Hollifield v. McDowell County DSS	13 DHR 10793	07/25/13	
Tammi D. Nichols v. DHHS, Division of Health Service Regulation	13 DHR 10795	10/25/13	
Holly L. Crowell v. DHHS, Division of Health Service Regulation	13 DHR 11091	07/05/13	
Diane Irene McClanton v. DHHS, Division of Health Service Regulation	13 DHR 11563	01/03/14	
Christopher H. Brown DDS PA v. Department of Medical Assistance	13 DHR 11610	07/01/13	
Lawson Support Services LLC v. DHHS, Division of Medical Assistance	13 DHR 11836	10/04/13	
Priscilla Darkwa v. DHHS, Division of Health Service Regulation	13 DHR 11850	12/02/13	
Juan M. Noble v. DHHS, Division of Health Service Regulation	13 DHR 11965	07/12/13	
Nancy Lampley v. DHHS, Office of the Chief Medical Examiner	13 DHR 11969	03/11/14	
Veronica Janae McLemore v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 12033	12/02/13	
Supermexicana Los Reyes Elena D. Flores Garcia Owner v. Nutrition Services Branch, DHHS, Division of Public Health	13 DHR 12129	08/01/13	28:14 NCR 1677
Monalisa Victoria Freeman v. DHHS, Division of Health Service Regulation	13 DHR 12328	07/31/13	
Selina Ashley Lowe v. DHHS, Division of Health Service Regulation	13 DHR 12405	01/27/14	
Johnathan Bradley v. DHHS, Division of Health Service Regulation	13 DHR 12685	08/02/13	
Melissa Stephen Ingle v. DHHS, Division of Child Development	13 DHR 12700	08/30/13	
E. W. Stone Adult Care Center, Evelyn W. Stone v. DHHS	13 DHR 12814	07/29/13	
Martha Watson v. DHHS, Division of Social Services	13 DHR 13302	11/12/13	
Lawson Support Services LLC v. DHHS, Division of Medical Assistance	13 DHR 13349	11/13/13	
Matthew Bradshaw v. DHHS, Division of Health Service Regulation	13 DHR 13381	09/03/13	
Countryside Villa Hal 026-046 John A. Weeks v. DHHS, Division of Health Service Regulation	13 DHR 13545	09/19/13	
Betty S. Mintz v. DHHS, Division of Health Service Regulation	13 DHR 13547	09/10/13	
Dana L. Dalton v. DHHS, Division of Social Services	13 DHR 13728	02/28/14	
Lashawn R. Holland v. DHHS, Division of Health Service Regulation	13 DHR 13858	09/03/13	
Thomas and Elberta Hudson v. DHHS, Division of Social Services	13 DHR 13957	08/02/13	
Paul A. Fredette v. DHHS, Division of Health Service Regulation	13 DHR 14025	09/30/13	
A Angel's Touch In Home Care v. DHHS	13 DHR 14303	09/24/13	
Tabitha Mason v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 14452	12/06/13	
Candace Richardson v. Health Care Personnel Registry	13 DHR 15028	09/30/13	
Mount Zion Christian Church Daycare, Inc. v. DHHS, Division of Child Development	13 DHR 15044	02/18/14	
Kimicka Woodin dba The Kidz Garden v. NC Division of Child Development and Early Education	13 DHR 15143	01/23/14	
Victoria S. Hargrave v. DHHS, Division of Health Service Regulation	13 DHR 15147	08/07/13	
Jamie Ross v. DHHS, Environmental Health Section	13 DHR 15970	01/28/14	
Fred G. Vogler v. DHHS, Division of Public Health	13 DHR 16194	03/14/14	
Americare "Hardin House", Perry Tanis Watkins v. DHHS	13 DHR 16307	11/19/13	
Kenneth W. Haney v. DHHS, Medical Assistance, Third Party Recovery Section	13 DHR 16563	11/20/13	
Estate of Ross Lewis; Ronald B. Lewis v. Office of Administrative Hearings	13 DHR 16694	10/23/13	
Prosperous Home Care Services LLC, Lennis Brown v. DHHS DHSR, Acute and Home Care Licensure and Certification Section	13 DHR 16962	11/26/13	
Gwendolyn Stout v. DHHS, Division of Health Service Regulation	13 DHR 16967	03/18/14	
Dennishia Marsalia DuBose v. Sol Weiner RN HCPR Investigator	13 DHR 17085	11/06/13	
Larry Keith Ratliff, Sr. v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 17125	02/11/14	
Larry Keith Ratliff Jr. v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 17126	02/11/14	
Alena Ratliff v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 17127	02/11/14	
Precyous Cheniaae Johnson v. DHHS, Division of Health Service Regulation	13 DHR 17316	11/05/13	
A Angel's Touch In Home Care v. DHHS	13 DHR 17446	10/31/13	

CONTESTED CASE DECISIONS

Elizabeth Shea Bonner v. DHHS	13 DHR 17448	11/15/13	
Skeen Personal Care Services & Pamela G. Faulkner	13 DHR 17602	02/19/14	
Moses J. Bee v. DHHS, Division of Health Service Regulation	13 DHR 17671	01/13/14	28:18 NCR 2263
Extensions of Living and Monique Robinson v. DHHS	13 DHR 17725	01/08/14	
Jessica Jones v. Cherry Hospital	13 DHR 17904	02/21/14	
Shonda Richardson v. DHHS, Liberty Commons Nursing & Rehab	13 DHR 17910	11/15/13	

Latesha Monique Morse v. Nash County Department of Social Services, Food & Nutrition Unit	13 DHR 18224	01/02/14	
Natalie Siler v. DHHS, Division of Child Development	13 DHR 18232	01/22/14	
Dreamworks II, Inc. v. DHHS	13 DHR 18402	01/23/14	
Metro Home Health Care, Kathy Tucker v. DHHS, Division of Medical Assistance	13 DHR 18424	03/20/14	
George M. Wallace, DDS v. Public Consulting Group (PCG) - a contractor acting on behalf of the Program Integrity Section of the Division of Medical Assistance (DMA)	13 DHR 18443	03/31/14	
Brie Alene Widenhouse v. DHHS, Health Care Registry	13 DHR 18481	02/07/14	
Nijad M. Abdelrahman, Zack's Mart v. DHHS – WIC	13 DHR 18497	01/10/14	
Jennifer Gary-Peterson, Peace of Mind Adult Group Home v. DHHS	13 DHR 18687	02/03/14	
Crystal LaGrone v. DHHS, Division of Health Service Regulation	13 DHR 18688	01/07/14	
Virginia Alford v. DHHS	13 DHR 18699	02/18/14	
Paul M. Stella v. DHHS, Division of Public Health	13 DHR 19269	02/06/14	
Kenneth R. Watson, Sr. v. DHHS, Division of Social Services	13 DHR 19547	02/19/14	
David Vele Diaz v. The North Carolina WIC Program	13 DHR 19982	03/17/14	
Martha S. Watson, Kenneth R. Watson, Sr. v. DHHS, Division of Social Services	13 DHR 20088	02/19/14	

Nancy A. Wood v. Chatham County Department of Social Services	14 DHR 00537	03/25/14	
---	--------------	----------	--

DEPARTMENT OF ADMINISTRATION

Meherrin Indian Tribe v. Commission of Indian Affairs	12 DOA 00986	01/18/13	
Medical Review of North Carolina, Inc. d/b/a The Carolinas Center for Medical Excellence v. NC Department of Administration and NC DHHS and Liberty Healthcare Corporation	13 DOA 12702	08/30/13	28:13 NCR 1585

DEPARTMENT OF CORRECTIONS

Myron Roderick Nunn v. Jennifer O'Neal, Accountant DOC	12 DOC 01022	07/12/12	
Moses Leon Faison v. Department of Correction	13 DOC 10227	04/08/13	
Clarence E. Williams, Jr. v. State of NC, D.H.O. Austin	13 DOC 12137	09/30/13	
Clarence E. Williams, Jr. v. State of NC, D.H.O. Linwood M. Best	13 DOC 14201	09/30/13	

DEPARTMENT OF JUSTICE

Tommy Keith Lymon v. Criminal Justice Education and Training Standards Commission	09 DOJ 03751	07/30/12	27:06 NCR 649
Greary Michael Chlebus v. Criminal Justice Education and Training Standards Commission	11 DOJ 4829	04/27/12	
Steven Davis Boone v. Sheriffs' Education and Training Standards Commission	11 DOJ 06781	06/18/13	28:10 NCR 1062
Dillan Nathaniel Hymes v. Criminal Justice Education and Training Standards Commission	11 DOJ 10315	07/23/12	27:06 NCR 661
Barbara Renay Whaley v. Criminal Justice Education and Training Standards Commission	11 DOJ 10316	04/25/12	
Robert Kendrick Mewborn v. Criminal Justice Education and Training Standards Commission	11 DOJ 10318	04/23/12	
Athena Lynn Prevatte v. Sheriffs' Education and Training Standards Commission	11 DOJ 13148	05/25/12	27:04 NCR 529
Shatel Nate Coates v. Sheriffs' Education and Training Standards	11 DOJ 13151	07/05/12	
James Lee Ray v. Sheriffs' Education Training Standards	11 DOJ 13152	08/27/12	
Ko Yang v. Sheriff's Education and Training Standards Commission	11 DOJ 13153	06/14/12	
Dustin Edward Wright v. Sheriffs' Education and Training Standards Commission	11 DOJ 13154	08/08/12	
Walter Scott Thomas v. Sheriff's Education and Training Standards Commission	11 DOJ 13155	05/10/12	
Darryl Howard v. Criminal Justice Education and Training Standards Commission	11 DOJ 13157	04/12/12	
John Jay O'Neal v. Criminal Justice Education and Training Standards Commission	11 DOJ 13158	07/06/12	27:07 NCR 749
Charlesene Cotton v. Criminal Justice Education and Training Standards Commission	11 DOJ 13159	06/05/12	27:04 NCR 538
William James Becker v. Criminal Justice Education and Training Standards Commission	11 DOJ 13160	08/16/12	
Steve Michael Galloway, Jr, Private Protective Services Board	11 DOJ 14434	04/23/12	
Justin Thomas Medlin v. Alarm Systems Licensing Board	11 DOJ 14493	04/23/12	
Argentina Rojas v. Department of Justice, Campus Police Officer Commission	12 DOJ 00394	11/02/12	
Bruce Clyde Shoe v. Private Protective Services Board	12 DOJ 00556	09/26/12	
Angela Louise Giles v. Private Protective Services Board	12 DOJ 00557	04/18/12	

CONTESTED CASE DECISIONS

Marshall Todd Martin v. Sheriffs' Education	12 DOJ 00650	07/13/12	
Frances Gentry Denton v. Sheriffs' Education and Training Standards Commission	12 DOJ 00651	08/30/12	
James Philip Davenport v. Criminal Justice Education and Training Standards Commission	12 DOJ 00653	11/21/12	
Alvin Louis Daniels v. Criminal Justice Education and Training Standards Commission	12 DOJ 00654	08/17/12	
Michael Wayne McFalling v. Private Protective Services Board	12 DOJ 00814	05/21/12	
Robert John Farmer v. Alarm Systems Licensing Board	12 DOJ 00887	05/04/12	
Ricky Lee Ruhlman v. Private Protective Services Board	12 DOJ 01211	04/18/12	
Leroy Wilson Jr., Private Protective Services Board	12 DOJ 01293	04/18/12	
Clyde Eric Lovette v. Alarm Systems Licensing Board	12 DOJ 01498	05/02/12	
Vincent Tyron Griffin v. Alarm Systems Licensing Board	12 DOJ 01663	09/27/12	
Andre Carl Banks Jr., v. Alarm Systems Licensing Board	12 DOJ 01695	06/22/12	
Ryan Patrick Brooks v. Private Protective Services Board	12 DOJ 01696	06/05/12	
Dustin Lee Chavis v. Private Protective Services Board	12 DOJ 01697	06/01/12	
Jeffrey Adam Hopson v. Sheriffs' Education and Training Standards Commission	12 DOJ 01761	06/07/12	
John Henry Ceaser v. Sheriffs' Education and Training Standards Commission	12 DOJ 01762	06/18/12	
Jerome Douglas Mayfield v. Private Protective Services Board	12 DOJ 02381	06/15/12	
Elijah K. Vogel v. Private Protective Services Board	12 DOJ 02619	06/05/12	
Timmy Dean Adams v. Department of Justice, Company Police Program	12 DOJ 02778	12/21/12	
Carlito Soler v. Alarm Systems Licensing Board	12 DOJ 03457	09/26/12	
Danielle Marie Taylor v. Criminal Justice Education and Training Standards Commission	12 DOJ 03838	01/24/13	28:06 NCR 554
Rodney Lyndolph Bland v. Criminal Justice Education and Training Standards Commission	12 DOJ 03839	01/11/13	
Sherman Montrell Devon McQueen v. Criminal Justice Education and Training and Standards Commission	12 DOJ 03842	12/21/12	
Matthew Brian Hayes v. Criminal Justice Education and Training Standards Commission	12 DOJ 03843	11/27/12	27:22 NCR 2139
Antonio Cornelius Hardy v. Criminal Justice Education and Training Standards Commission	12 DOJ 03844	11/19/12	27:21 NCR 1994
Jonathan Dryden Dunn v. Sheriffs' Education and Training Standards	12 DOJ 03845	03/28/13	
Barry Louis Christopher, Jr v. Private Protective Services Board	12 DOJ 05041	08/27/12	27:15 NCR 1570
Bettina Hedwig Vredenburg v. Sheriffs' Education and Training Standards Commission	12 DOJ 05140	11/09/12	27:21 NCR 2002
Wallace Connell Ranson v. Sheriffs' Education and Training Standards Commission	12 DOJ 05141	05/07/13	28:07 NCR 676
Raymond Louis Soulet v. Sheriffs' Education and Training Standards Commission	12 DOJ 05142	08/27/12	
Graham Avon Hager v. Sheriffs' Education and Training Standards Commission	12 DOJ 05143	12/19/12	28:07 NCR 686
Dustin Wilson Grant v. Sheriffs' Education and Training Standards Commission	12 DOJ 05145	10/25/12	
Glenn Alvin Brand v. Sheriffs' Education and Training Standards Commission	12 DOJ 05146	10/08/12	
Shannon Wallace v. DHHS	12 DOJ 05355	02/26/13	
Lawrence W. Sitgraves v. Private Protective Services	12 DOJ 06059	09/13/12	
Collin Michael Berry v. Private Protective Services Board	12 DOJ 06590	10/22/12	
Tiffany Ann Misel v. Private Protective Services Board	12 DOJ 06817	10/17/12	
John Machouis v. Alarm Systems Licensing Board	12 DOJ 07161	12/19/12	
Moses Lavan Balls v. Private Protective Services Board	12 DOJ 07162	01/07/14	
Tina Marie Fallon v. NC Alarm Systems Licensing Board	12 DOJ 07298	01/08/14	
William John Cherpak v. Private Protective Services Board	12 DOJ 07300	01/08/14	
Christopher A. Field v. Private Protective Services Board	12 DOJ 07548	12/19/12	
Porschea Renee Williams v. Private Protective Services Board	12 DOJ 07549	01/09/13	
Ralph R. Hines v. Criminal Justice Education and Training Standards	12 DOJ 07812	11/07/12	
Kevin Lee Hullett v. Criminal Justice Education and Training Standards Commission	12 DOJ 08007	09/10/13	28:17 NCR 2126
Shannon Pendergrass v. Criminal Justice Education and Training Standards Commission	12 DOJ 08008	12/05/13	
William Franklin Dietz v. Criminal Justice Education and Training Standards	12 DOJ 08010	02/19/13	
Elizabeth Crooks Goode v. Criminal Justice Education and Training Standards Commission	12 DOJ 08014	12/14/12	
Karen Jesaad Taylor v. Sheriffs' Education and Training Standards Commission	12 DOJ 08018	04/02/13	28:08 NCR 751
Brian Thomas Jones v. Sheriffs' Education and Training Standards Commission	12 DOJ 08023	11/26/13	
Sheronica Hall Smith v. Sheriffs' Education and Training Standards Commission	12 DOJ 08026	09/11/13	28:15 NCR 1831
Sabrina Richelle Wright v. Sheriffs' Education and Training Standards Commission	12 DOJ 08048	01/16/13	
Phillip Eugene Dendy v. Sheriffs' Education and Training Standards Commission	12 DOJ 08049	01/18/13	
Reginald E. James v. Private Protective Services Board	12 DOJ 08195	12/20/12	
Kenneth Levern Bradley v. Private Protective Services Board	12 DOJ 08260	01/08/14	
Omega Young v. Private Protective Services Board	12 DOJ 08261	12/17/12	
Joseph T. Ferrara v. Private Protective Services Board	12 DOJ 08309	01/11/13	
Jovan Lamont Sears v. Private Protective Services Board	12 DOJ 08447	12/20/12	
Christopher Robell Hunter v. Sheriffs' Education and Training Standards Commission	12 DOJ 10182	05/07/13	28:08 NCR 758
Joseph Ryan Fowler v. Sheriffs' Education and Training Standards Commission	12 DOJ 10184	11/26/13	
Gregory Paul Kelly v. Sheriffs' Education and Training Standards Commission	12 DOJ 10187	09/30/13	28:17 NCR 2139
Marilyn Cash Smalls v. Sheriffs' Education and Training Standards Commission	12 DOJ 10188	04/29/13	
Timothy Allen Bruton v. Criminal Justice Education and Training Standards Commission	12 DOJ 10199	05/29/13	
Bilal Abdus-Salaam v. Criminal Justice Education and Training Standards Commission	12 DOJ 10200	08/16/13	
Lee Daniel Wilkerson v. Criminal Justice Education and Training Standards Commission	12 DOJ 10201	10/10/13	
Brad Tisdale v. Criminal Justice Education Training Standards Commission	12 DOJ 10203	05/06/13	

CONTESTED CASE DECISIONS

Ron Allen Hedrington v. Criminal Justice Education and Training Standards Commission	12 DOJ 10204	08/23/13	28:13 NCR 1544
Forrest Travis Coston v. Criminal Justice Education and Training Standards Commission	12 DOJ 10205	03/25/14	
Clinton Weatherbee Jr v. Criminal Justice Education and Training Standards Commission	12 DOJ 10206	03/25/13	
Scott Douglas Neudecker v. Criminal Justice Education and Training Standards Commission	13 DOJ 01924	09/03/13	28:17 NCR 2165
JonPaul D. Wallace v. Private Protective Services Board	13 DOJ 02422	04/26/13	
Andrew George Anderson v. Sheriffs' Education and Training Standards Commission	13 DOJ 03417	08/29/13	
Frank John Fontana, Jr. v. NC Alarm Systems Licensing Board	13 DOJ 03740	09/12/13	
Jerome Douglas Mayfield v. Private Protective Services Board	13 DOJ 04393	04/26/13	
Cameron Imhotep Clinkscale v. Private Protective Services Board	13 DOJ 05095	04/26/13	
Ashely B. Sellers v. NC Alarm Systems Licensing Board	13 DOJ 08759	10/30/13	
Eddie Hugh Hardison v. Private Protective Services Board	13 DOJ 08765	04/02/13	
Antonio R. Dickens v. Private Protective Services Board	13 DOJ 08953	08/09/13	28:14 NCR 1684
Danielle J. Rankin v. Private Protective Services Board	13 DOJ 09038	08/09/13	28:14 NCR 1689
Tony Lynn Cannon v. Sheriffs' Education and Training Standards Commission	13 DOJ 09567	10/22/13	
Trudy Lane Harris v. Sheriffs' Education and Training Standards Commission	13 DOJ 09570	10/01/13	28:17 NCR 2173
Thomas Lee Phillips, Jr. v. Sheriffs' Education and Training Standards Commission	13 DOJ 09571	11/19/13	
Jesse Alan Tyner v. NC Alarm Systems Licensing Board	13 DOJ 09863	08/09/13	28:15 NCR 1837
Marcus Teer Benson v. Private Protective Services Board	13 DOJ 09974	05/15/13	28:10 NCR 1155
Steven Wesley Jones v. Sheriffs' Education and Training Standards Commission	13 DOJ 11188	10/22/13	
Logan Roy Clonts v. Sheriffs' Education and Training Standards Commission	13 DOJ 11694	10/17/13	
LaMarcus Jarrel Outing v. Criminal Justice Education and Training Standards Commission	13 DOJ 11932	08/07/13	
Jeffrey D. Angell v. NC Alarm Systems Licensing Board	13 DOJ 12333	10/09/13	
Patricia Mary Cotto v. Criminal Justice Education and Training Standards Commission	13 DOJ 12452	12/10/13	
Casmire E. Perez v. NC Alarm Systems Licensing Board	13 DOJ 13006	02/26/14	
Myron Troy Davidson v. Private Protective Services Board	13 DOJ 13379	09/13/13	
Rhonda N. Thorpe v. NC Alarm Systems Licensing Board	13 DOJ 13600	12/11/13	
Marcus L. Fuller v. Private Protective Services Board	13 DOJ 13653	09/03/13	
Christopher T. Place v. NC Alarm Systems Licensing Board	13 DOJ 13859	08/02/13	28:14 NCR 1695
Cathy M. Brown v. Private Protective Services Board	13 DOJ 14219	01/13/14	28:18 NCR 2266
Martise Lamar Jones v. NC Alarm Systems Licensing Board	13 DOJ 14844	10/30/13	
Marshall Letitus Wiley v. Criminal Justice Education and Training Standards Commission	13 DOJ 15365	01/10/14	
Dominic Orlando Chavis v. Criminal Justice Education and Training Standards Commission	13 DOJ 15454	01/29/14	
Trina Liverman Basnight v. Criminal Justice Education and Training Standards Commission	13 DOJ 15455	01/07/14	
Charles Robert Austin, Jr. v. NC Alarm Systems Licensing Board	13 DOJ 15507	10/30/13	
Bobby Russell v. Sheriffs' Education and Training Standards Commission	13 DOJ 13549	01/17/14	
Deane Eugene Barnette v. Sheriffs' Education and Training Standards Commission	13 DOJ 16248	12/03/13	
Reza M. Salami v. NC Department of Justice and Attorney General Roy Cooper	13 DOJ 17903	11/12/13	
Jesse J. Williamson v. Private Protective Services Board	13 DOJ 17912	02/19/14	
Alejandro Maurent v. Private Protective Services Board	13 DOJ 17940	01/31/14	
Jimmy Wayne Ford v. NC Alarm Systems Licensing Board	13 DOJ 17997	01/27/14	
David Lee Kroger v. NC Alarm Systems Licensing Board	13 DOJ 18373	01/13/14	28:18 NCR 2271
Vernon L. Rodden v. NC Alarm Systems Licensing Board	13 DOJ 18445	01/13/14	28:18 NCR 2275
Kelsie Lamel Floyd v. Private Protective Services Board	13 DOJ 18988	02/21/14	

DEPARTMENT OF LABOR

United Quest Care Services v. Department of Labor	13 DOL 12224	09/17/13	
Absolute Contracting Service Inc., Felicia Myers v. NCDOL, Adriana King	13 DOL 16701	10/30/13	
TP's Resurrection Co., LLC, Thomas A. Patterson, Registered Agent v. NC Department of Labor (NCDOL)	13 DOL 18426	01/31/14	

DEPARTMENT OF TRANSPORTATION

Lorie Cramer v. NC Quick Pass Customer Service Center and DOT	13 DOT 08753	07/19/13	28:06 NCR 589
---	--------------	----------	---------------

DEPARTMENT OF STATE TREASURER

Dwaine C. Coley v. Department of State Treasurer	10 DST 00233	04/05/13	28:02 NCR 81
Ella Joyner v. Department of State Treasurer Retirement System Division	11 DST 02437	07/12/12	27:07 NCR 758
William R. Tate v. Department of Treasurer, Retirement System Division	11 DST 04675	09/07/12	27:15 NCR 1574
Brenda C. Hemphill v. Department of Treasurer, Retirement System Division	11 DST 10252	09/26/12	
Russell E. Greene v. Department of State Treasurer Retirement Systems Division	11 DST 10875	06/14/12	27:04 NCR 543
James A Layton v. Department of State Treasurer	11 DST 12958	11/30/12	
Marsha W Lilly, Robert L Hinton v. Retirement System	12 DST 01108	05/22/12	

CONTESTED CASE DECISIONS

Reza M. Salami v. NC A&T State University, Chancellor Harold Martin, General Counsel Charles Waldrup, Vice Chancellor Linda McAbee, Interim Provost Winser Alexander, and Chairman Willie Deese	13 DST 13911	02/06/14	
Ruby J. Edmondson v. Department of Treasurer	13 DST 15268	11/12/13	28:18 NCR 2280
Nathaniel I. Orji v. Department of State Treasurer, Retirement Systems Division	13 DST 16695	02/04/14	

STATE ETHICS COMMISSION

Reza M. Salami v. UNC-General Administration, UNC President Thomas Ross, UNC Vice President for Legal Affairs Laura B. Fjeld, UNC Board of Governors Peter D. Hans	13 EBD 13914	02/06/14	
Reza M. Salami v. North Carolina A & T State University, Chancellor Harold Martin, General Counsel Charles Waldrup, Vice Chancellor Linda McAbee, Interim Provost Winser Alexander, and Chairman Willie Deese	13 EBD 13916	11/20/13	

STATE BOARD OF EDUCATION

Louis A. Hrebar v. State Board of Education	11 EDC 01445	07/27/12	
Delene Huggins v. Department of Public Instruction	11 EDC 08899	06/28/12	
Myra F. Moore v. NC Board of Education	11 EDC 11927	05/01/12	
Dwayne White v. Department of Public Instruction, NC State Board of Education	11 EDC 11864	07/18/12	27:07 NCR 769
Jeffery Sloan v. NCDPI	11 EDC 14077	11/09/12	27:21 NCR 1974
Lia C Long v. DPI	12 EDC 00805	10/18/13	27:16 NCR 1716
North Carolina Learns Inc. d/b/a North Carolina Virtual Academy	12 EDC 01801	05/18/12	
Katherine Kwesell Harris v. Public Schools, Board of Education	12 EDC 06520	09/05/12	
Bonnie Aleman v. State Board of Education, Department of Public Instruction	12 EDC 07293	06/14/13	
Emma Seward v. Department of Public Instruction	12 EDC 07438	07/17/13	
Jodi Esper v. Department of Public Instruction	12 EDC 10259	06/04/13	
Glennette McRae v. NC State Board of Education	12 EDC 10448	11/15/13	
Matthew Schneider v. Department of Public Instruction	12 EDC 12183	07/17/13	28:12 NCR 1467
Wanda McLaughlin v. State Board of Education	12 EDC 12410	03/27/13	
Kirk V. Stroupe v. State Board of Education	13 EDC 13003	01/16/14	
Gary Alan Cooper v. Department of Public Instruction	13 EDC 13731	12/30/13	

DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Pamlico-Tar River Foundation, NC Coastal Federation, Environmental Defense Fund, and Sierra Club v. DENR, Division of Water Quality and PCS Phosphate Company, Inc	09 EHR 1839	04/26/12	27:01 NCR 87
ALCHEM Inc., v. NCDENR	10 EHR 00296	02/05/13	
Don Hillebrand v. County of Watauga County Health Dept	10 EHR 00933	05/10/12	
ALCHEM Inc., v. NCDENR	10 EHR 05463	02/05/13	
House of Raeford Farms, Inc., v. DENR	10 EHR 05508	05/31/12	27:01 NCR 99
Lacy H Caple DDS v. Division of Radiation Protection Bennifer Pate	11 EHR 11454	05/09/12	
Friends of the Green Swamp and Blue Ridge Environmental Defense League, Inc v. DENR Division of Waste Management and Waste Management of the Carolinas, Inc., d/b/a Waste Management of Wilmington	11 EHR 12185	08/08/12	27:12 NCR 1224
Holmes Development & Realty, LLC, and H.L. Homes v. DENR – Land Quality Section (Re: LQS 11-018)	11 EHR 13208	06/29/12	27:07 NCR 774
Ik Kim IT and K Enterprise v. DENR	11 EHR 13910	11/06/12	
Edward Dale Parker v. DENR	11 EHR 14390	02/22/13	
Janezic Building Group LLC v. Orange County	12 EHR 01104	12/03/12	27:21 NCR 2008
Save Mart of Duplin LLC v. DENR	12 EHR 02328	07/25/12	
NC Coastal Federation, Cape Fear River Watch, PenderWatch, and Conservancy Sierra Club v. DENR, Division of Air Quality and Carolina Cement Company, LLC	12 EHR 02850	09/23/13	
James D. Halsey v. DENR, Division of Environmental Health	13 EHR 10216	06/05/13	
Joe Waldroop v. NC DENR	13 EHR 12077	11/20/13	
NC Coastal Federation, Cape Fear River Watch, PenderWatch, and Conservancy Sierra Club v. DENR, Division of Air Quality	13 EHR 16148	11/04/13	
American Rivers v. DENR, Division of Water Resources	13 EHR 17234	02/06/14	

CONTESTED CASE DECISIONS

Paul M. Stella v. DHHS, Division of Public Health	13 EHR 19269	02/06/14
Denise Leavitt v. DENR, Division of Coastal Management	13 EHR 19954	02/07/14

DIVISION OF EMPLOYMENT SECURITY

Dwight Marvin Wright v. Department of Commerce, Division of Employment Security	12 ESC 05042	07/27/12
---	--------------	----------

Reza M. Salami v. Employment Security Commission	13 ESC 13908	02/28/14
--	--------------	----------

DEPARTMENT OF INSURANCE

Megan L. Hartzog v. NC State Health Plan	12 INS 00364	05/06/13	28:07 NCR 691
Jan Fjelsted v. NC State Health Plan	12 INS 04763	01/16/13	28:07 NCR 706
Susan E. Montgomery Lee v. State Health Plan; Blue Cross Blue Shield	12 INS 10145	03/25/13	

Lori Matney v. Blue Cross Blue Shield of NC, State Health Plan	12 INS 10790	08/20/13
Jean Kirkland and John Ritchie v. State Health Plan	12 INS 11957	04/11/13

BOARD OF LICENSED PROFESSIONAL COUNSELORS

Beth Ford v. Bonnie Strickland	14 LPC 00313	03/26/14
--------------------------------	--------------	----------

MISCELLANEOUS

Richard Lee Taylor v. City of Charlotte	11 MIS 14140	05/15/12	
Lloyd M Anthony v. New Hanover County Sheriff Office	12 MIS 01803	06/07/12	
Jackie Poole, Jamyan Brooks v. Orange County	12 MIS 02379	11/09/12	27:21 NCR 2016
David L. Smith v. NC Innocence Inquiry Commission	13 MIS 12404	06/19/13	28:10 NCR 1160
Thomas Franklin Cross, Jr. v. NC Innocence Inquiry Commission	13 MIS 12642	06/19/13	28:10 NCR 1160
Moses Leon Faison v. NC Parole Commission, Paul G. Butler, Jr.	13 MIS 13004	09/05/13	
Jabar Ballard v. NC Innocence Inquiry Commission	13 MIS 13005	06/19/13	28:10 NCR 1160
Paul Michael Simmons v. Luis Hernandez, Forest City Police Department	13 MIS 14274	11/13/13	

OFFICE OF STATE PERSONNEL

Amanda Thaxton v. State Ethics Commission	09 OSP 03754	09/20/12	
Jacob W. Scott v. Department of Crime Control and Public Safety Alcohol Law Enforcement	10 OSP 04582	07/19/13	28:12 NCR 1419
Dorothy H. Williams v. DHHS, Central Regional Hospital	10 OSP 05424	03/28/12	27:01 NCR 119
Stephen R. West v. The University of North Carolina at Chapel Hill	10 OSP 01567	11/26/12	27:21 NCR 1959
Larry F. Murphy v. Employment Security Commission of North Carolina	10 OSP 03213	06/04/12	
Walter Bruce Williams v. Dept. of Crime Control and Public Safety Butner Public Safety Division	10 OSP 03551	04/23/12	27:01 NCR 148
Teresa J. Barrett v. DENR	10 OSP 04754	10/22/12	27:16 NCR 1726
Daniel Chase Parrott v. Crime Control and Public Safety, Butner Public Safety Division	10 OSP 04792	05/30/12	
Steven M Mukumgu v. DAG	10 OSP 05199	08/07/12	
Valerie Small v. NC Agricultural and Technical State University	11 OSP 03245	05/24/13	28:11 NCR 1231
Beatrice T. Jackson v. Durham County Health Department	11 OSP 03835	06/08/12	
Brenda D. Triplett v. DOC	11 OSP 04605	03/20/12	27:06 NCR 669
Barry G. Eriksen v. NC State University	11 OSP 04968	12/16/13	
Tommie J. Porter v. DOC	11 OSP 05352	06/05/12	27:06 NCR 678
Fortae McWilliams v. DOC	11 OSP 06236	05/30/12	27:06 NCR 684
Katheryn Renee Johnson v. NC Department of Correction	11 OSP 06493	12/16/13	
Kimberly F. Loflin v. DOT, DMV	11 OSP 06762	07/10/12	
John Hardin Swain v. DOC, Hyde Correctional Inst.	11 OSP 07956	04/23/12	27:06 NCR 693
John Fargher v. DOT	11 OSP 08111	04/18/12	
Maria Isabel Prudencio-Arias v. UNC at Chapel Hill	11 OSP 09374	03/28/13	28:02 NCR 99
Gerald Price v. Department of Agriculture & Consumer Services, Standards Division	11 OSP 09588	02/27/13	28:02 NCR 139
Tammy Cagle v. Swain County, Department of Social Services	11 OSP 10307	09/26/12	27:16 NCR 1747
Doris Wearing v. Polk Correctional Inst. Mr. Solomon Superintendent	11 OSP 11023	10/19/12	
Fredericka Florentina Demmings v. County of Durham	11 OSP 11498	06/12/12	
Derick A Proctor v. Crime Control and Public Safety, State Capital Police Division	11 OSP 11499	12/06/12	
David B. Stone v. Department of Cultural Resources	11 OSP 11926	08/10/12	27:12 NCR 1245
Pattie Hollingsworth v. Fayetteville State University	11 OSP 12152	02/27/13	
William C. Spender v. Dept. of Agriculture & Consumer Services, Veterinary Division	11 OSP 12479	04/27/12	
Terrence McDonald v. NCSU	11 OSP 12682	05/21/12	
Terrence McDonald v. DHHS, Emery Milliken	11 OSP 12683	05/18/12	

CONTESTED CASE DECISIONS

Phyllis Campbell v. DOC	11 OSP 13381	08/27/12	27:15 NCR 1579
Thomas W. Wheeler v. NC Department of Transportation	11 OSP 13440	12/03/13	
Raeferd Quick v. DOC	11 OSP 14436	05/22/12	
Tawana McLaurin v. DOC	12 OSP 00116	08/21/12	
Vera Ricks v. NC Department of Public Safety	12 OSP 00246	03/28/13	28:07 NCR 714
Marva G. Scott v. Edgecombe County Social Services Board (Larry Woodley, Fate Taylor, Ernest Taylor, Viola Harris and Evelyn Johnson), Edgecombe County Commissioners and Edgecombe county manager, Lorenzo Carmon	12 OSP 00430	12/20/12	27:22 NCR 2152
Ladeana Z. Farmer v. Department of Public Safety	12 OSP 00460	04/10/13	28:06 NCR 564
Rhonda Whitaker v. DHHS	12 OSP 00519	05/17/13	28:08 NCR 766
Thomas B. Warren v. DAG, Forest Services Division	12 OSP 00615	11/27/12	
Bon-Jerald Jacobs v. Pitt County Department of Social Services	12 OSP 00634	06/12/12	
Sherry Baker v. Department of Public Safety	12 OSP 00841	10/09/12	
Diane Farrington v. Chapel Hill-Carrboro City Schools	12 OSP 01300	07/12/12	
Cynthia Moats v. Harnett County Health Dept	12 OSP 01536	08/10/12	
Natalie Wallace-Gomes v. Winston-Salem State University	12 OSP 01627	05/15/12	
Clark D. Whitlow v. UNC-Chapel Hill	12 OSP 01740	06/12/12	
John Medina v. Department of Public Safety	12 OSP 01940	01/30/13	28:08 NCR 783
Jeffrey L Wardick, v. Employment Securities Commission of NC	12 OSP 02027	07/17/12	
Ricco Donnell Boyd v. NC A&T University	12 OSP 02219	01/31/13	
Larry C. Goldston v. UNC-Chapel Hill	12 OSP 02222	09/26/12	27:16 NCR 1754
Marilyn R. Brewington v. NC Agricultural & Technical State University	12 OSP 02283	01/03/14	28:20 NCR 2477
Larry Batton v. Dept of Public Safety	12 OSP 02320	02/18/13	
Sandra Kay Tillman v. County of Moore Department of Social Services, John L. Benton, Director	12 OSP 02433	07/29/13	
Sheila Bradley v. Community College System Sandhills Community College	12 OSP 02473	06/06/12	
Brenda S. Sessoms v. Department of Public Safety	12 OSP 02507	07/25/12	
Donnette J Amaro v. Onslow County Department of Social Services	12 OSP 02578	11/21/12	
Ronald Gilliard v. N.C. Alcoholic Law Enforcement	12 OSP 02618	09/26/12	
Kimberly Hinton v. DOT	12 OSP 02848	10/05/12	
James B. Bushardt III v. DENR, Division of Water Quality	12 OSP 02872	02/19/13	
Natalie Wallace-Gomes v. Winston Salem State University	12 OSP 02950	08/01/12	
Katie F. Walker v. Rutherford County/Department of Social Services	12 OSP 03041	03/15/13	28:08 NCR 791
Norlishia Y. Pridgeon v. Department of Public Safety, Division of Adult Correction and Department of Corrections	12 OSP 03150	08/02/13	
Jaymar v. Department of Corrections, Central Prison	12 OSP 03381	07/20/12	
Ronald Wayne Crabtree Jr., v. Butner Public Safety	12 OSP 03846	10/09/12	
Natalie Wallace-Gomes v. Winston Salem State University	12 OSP 03910	10/22/12	
Natalie Wallace-Gomes v. Winston Salem State University	12 OSP 04107	10/22/12	
Michelle Houser v. Department of Public Safety, Division of Prisons	12 OSP 04826	09/26/12	
Audrey Melissa Tate v. Department of Public Safety, Division of Juvenile Justice	12 OSP 05182	08/03/12	
Jonathan Ashley Stephenson v. UNC-Chapel Hill	12 OSP 05223	01/15/13	
Charles E. Rouse v. DMV, Dist Sup Stacey Wooten	12 OSP 05315	09/05/12	
Edwards Robert Esslinger v. DPI	12 OSP 05459	09/12/12	
Barry L. Pruett v. DMV, Driver and Vehicle Services	12 OSP 05785	09/11/12	
Joseph Sandy v. UNC Chapel Hill	12 OSP 06152	09/05/12	
Natalie Wallace-Gomes v. Winston Salem State University	12 OSP 06309	10/22/12	
Carrie J. Tucker v. Department of Public Safety	12 OSP 06310	01/08/14	28:20 NCR 2496
Paul Jeffrey Treadway v. Department of Public Safety, Division of Adult Supervision	12 OSP 06634	12/18/12	
Darrion Smith v. Murdock Developmental Center and the NC DHHS; Ricky Bass v. NC DHHS; Darrion Smith v. NC DHHS	12 OSP 06780	07/24/13	28:12 NCR 1472
Phillip W Smith v. Department of Commerce, Division of Employment Security	12 OSP 06821	09/20/12	
Asia T. Bush v. DOT	12 OSP 06980	04/23/13	28:03 NCR 293
David W. Morgan v. Department of Public Safety, NC Highway Patrol	12 OSP 07543	08/29/13	28:17 NCR 2149
Bonnie S. Rardin v. Craven Correctional Institution, Department of Public Safety	12 OSP 07443	04/19/13	
Shirley M. Parker v. Department of Public Safety Caledonia Correctional Institution	12 OSP 07617	04/04/13	
Christopher Rashad Pippins v. PCS BOE PCS Facility Services	12 OSP 07744	10/18/12	
Wanda Edwards v. UNC School of Dentistry	12 OSP 07851	01/09/13	
Gary C. Clement v. DHHS	12 OSP 08105	11/14/12	
Shannon P. Baker v. Department of Public Safety	12 OSP 08259	02/14/14	28:20 NCR 2535
Brandon Clay Taylor v. Department of Public Safety	12 OSP 08465	10/22/13	28:20 NCR 2547
Oswald Woode v. DHHS, Central Regional Hospital	12 OSP 08664	01/09/13	
Gwendolyn Claire Montgomery v. NC DPS/DOCC/Lori Dunn	12 OSP 09069	08/05/13	28:13 NCR 1562
Gary C. Clement v. DHHS	12 OSP 09581	01/04/13	
Roseth Kyremartin v. DHHS	12 OSP 10209	06/21/13	28:11 NCR 1278

CONTESTED CASE DECISIONS

Patricia Burgess v. NC Community College System	12 OSP 10339	08/09/13	28:14 NCR 1669
Daniel J. Dugan, Jr. v. UNCW	12 OSP 10620	10/15/13	
Judy Knox v. UNC at Charlotte	12 OSP 10856	07/11/13	
Sherry Young v. DHHS, Division of Child Development and Early Education	12 OSP 11078	10/07/13	
Anesa Trevon Lucas v. NC Division of Child Development and Early Education	12 OSP 12082	11/04/13	
David Ryan Brown v. Department of Public Safety, Division of Community Corrections	12 OSP 12179	10/08/13	
David A. Tuno v. Lincoln Correctional Center	13 OSP 00031	09/10/13	
Van Buchanan v. Department of Public Safety	13 OSP 08950	01/13/14	28:20 NCR 2458
Keisha L. Hill v. Elizabeth City State University	13 OSP 09481	02/07/14	
Jeffrey Wayne Ellis v. North Carolina A & T University	13 OSP 09564	08/08/13	
Kimberly D. Hinton v. Department of Transportation	13 OSP 09565	09/06/13	
Charles Tony Weeks v. Department of Public Safety	13 OSP 10290	03/31/14	
Wiley Daniel Thomas v. Department of Transportation, Division of Motor Vehicles	13 OSP 10577	10/07/13	
Helen Karen Radford v. Buncombe County Department of Health	13 OSP 10629	09/27/13	
Alphonsus U. Nwadike v. DHHS, Central Regional Hospital (Butner)	13 OSP 10977	07/15/13	
Kevin D. Terry v. State of NC Office of State Controller	13 OSP 11088	07/15/13	
Lionel James Randolph v. NC Office of State Personnel	13 OSP 11170	07/15/13	
Cynthia C. Goodwin v. Department of Revenue	13 OSP 11232	08/02/13	
Robert E. Hines v. Department of Transportation	12 OSP 11278	09/13/13	
Natalie Wallace-Gomes v. Winston-Salem State University	13 OSP 11293	08/13/13	
Joann C. Pearson v. UNC-Charlotte	13 OSP 11562	09/17/13	
Amy J. Rains v. Department of Public Safety	13 OSP 11930	12/11/13	
John Charchar v. DHHS	13 OSP 11966	03/18/14	
Rotisha Hawthorne v. Department of Safety (Polk)	13 OSP 12639	09/05/13	
Stephanie K. Willis v. Montgomery County Board of Education	13 OSP 13012	08/07/13	
Christine M. Forrester Martin-El v. Wyatt A. Pettengill, NC State Bureau of Investigation	13 OSP 13225	04/03/14	
Dianne E. Pankey v. Department of Social Services Michael Becketts	13 OSP 13544	12/11/13	
Edward Hodges v. DHHS	13 OSP 13692	03/07/14	
Leora Robin Johnson v. Broughton Hospital, Alicia Nexeon HR, Rebecca Powell, RN NSA, Denise Lunsford	13 OSP 14357	09/12/13	28:15 NCR 1843
David M. Andrews v. Department of Transportation, Technical Services-Client Support	13 OSP 15144	10/03/13	
Linda G. Griffin v. NC DPS Hoke Corr	13 OSP 15267	01/30/14	
Sharon Riddick v. Department of Public Safety, Adult Correction, Andrew Riddick v. Department of Public Safety, Adult Correction	13 OSP 15445	12/16/13	
Sharon Riddick v. Department of Public Safety, Adult Correction, Andrew Riddick v. Department of Public Safety, Adult Correction	13 OSP 15446	12/16/13	
Luchana A. Woodland v. Fayetteville State University	13 OSP 15499	09/11/13	
Mary E. Wilson v. Mecklenburg County, NC	13 OSP 15512	10/03/13	
Carlina K. Sutton v. Department of Public Safety, DOBBS YDC	13 OSP 17367	02/24/14	
Daniel J. Dugan, Jr. v. UNC Wilmington	13 OSP 17402	03/03/14	
Joy Diane Felton v. J. Iverson Riddle Developmental Center and DHHS	13 OSP 17603	11/13/13	
Larry Parker v. Department of Public Safety	13 OSP 18189	03/07/14	
Armin Robinson v. North Carolina Central Prison	13 OSP 18463	12/31/13	
Sabrina Powell v. Caswell Development Center	13 OSP 18465	01/23/14	
Heather Englehart v. DHHS, NC Division of Social Services	13 OSP 18540	01/07/14	
Dominic Corwin v. Equal Opportunity/ADA Office-University of North Carolina	13 OSP 18836	01/03/14	
Kimberly Newsome v. Winston-Salem State University	13 OSP 18950	02/06/14	
Maxine Evans-Armwood v. Department of Public Safety	13 OSP 19059	01/03/14	
Derrick Copeland v. Department of Public Safety	13 OSP 19257	01/16/14	
David Scott Ayscue v. Department of Public Safety	13 OSP 19895	02/07/14	
Phyllis S. Nobles v. Elizabeth City State University	13 OSP 20154	02/24/14	
Ethel Albertina McGirt v. NC Agricultural & Technical State University	14 OSP 00274	03/04/14	

REAL ESTATE COMMISSION

Angela A. Thomas v. NC Real Estate Commission	13 REC 20125	03/20/14
---	--------------	----------

DEPARTMENT OF REVENUE

Jerry Lamont Lindsey v. Department of Revenue	11 REV 1914	07/25/12
Thomas E Gust v. Department of Revenue	11 REV 13557	08/15/12
James Cooper III Sui Juris v. Department of Revenue	11 REV 13792	11/14/12
Brian Daniel Reeves v. Department of Revenue	12 REV 01539	06/04/12
David Roser v. Department of Revenue	12 REV 01694	09/10/12

CONTESTED CASE DECISIONS

Ronnie Lee Nixon v. Department of Revenue	12 REV 01881	10/03/12	
James M. Slowin, REFS LLC v. Department of Revenue	12 REV 02218	02/11/13	28:06 NCR 583
William S. Hall v. Department of Revenue	12 REV 04115	08/27/12	
Noah D. Sheffield v. Department of Revenue	12 REV 07074	11/14/12	
Jenny M. Sheffield v. Department of Revenue	12 REV 07075	11/14/12	
Jesus A. Cabrera v. Department of Revenue	12 REV 08968	01/03/13	
Sybil Hyman Bunn v. Department of Revenue	12 REV 08973	05/06/13	
William Scott v. Department of Revenue	13 REV 06646	04/29/13	28:06 NCR 593
Chase Auto Finance Corporation v. Department of Revenue	13 REV 10115	06/19/13	28:10 NCR 1164
Karim B. Mawji/Mama Brava's v. Department of Revenue	13 REV 13648	12/18/13	
Olivier N. Sayah v. Department of Revenue	13 REV 13956	11/19/13	
Joseph Lewis Moore v. Department of Revenue	13 REV 17720	11/13/13	
Tavious Montrell Hinson v. Department of Revenue	13 REV 17727	11/26/13	
Mark A. Lovely v. Department of Revenue	13 REV 18226	12/23/13	
Wanda Y. Robinson v. Department of Revenue	13 REV 18482	02/03/14	
Mary G. Tillery v. Department of Revenue	13 REV 19688	03/03/14	

OFFICE OF SECRETARY OF STATE

Michael Anthony Farrow-Bey v. Department of Secretary of State	12 SOS 07865	12/14/12	
Jennifer Lynn Pierce-Founder Share Our Shoes v. Secretary of State's Office	12 SOS 01653	07/11/12	
Bethany Thompson v. Department of the Secretary of State	12 SOS 11648	05/02/13	
Holley Shumate Knapp v. Ann Wall, General Counsel Department of the Secretary	13 SOS 09039	05/23/13	
Trvuun B. Alston v. Department of the Secretary of State	13 SOS 10113	07/08/13	
John Claude Barden v. Department of the Secretary of State	13 SOS 12528	10/03/13	
Connie Huntsman v. Department of the Secretary of State	13 SOS 16505	12/13/13	
Dianne Michele Carter v. Department of the Secretary of State, Ozie Stalworth, and John Lynch	13 SOS 18498	12/18/13	

UNC HOSPITALS

Onyedika C Nwaebube v. UNC Hospitals	12 UNC 01110	06/25/12	
Nephatiya Wade v. UNC Hospitals Chapel Hill NC	12 UNC 01209	07/17/12	
Fredia R Wall v. UNC Physicians & Associates	12 UNC 02256	10/04/12	
Carolyn A. Green v. UNC Hospitals	12 UNC 02259	09/19/12	
Annie E. Jarrett v. UNC Hospitals	12 UNC 03716	10/09/12	
Vikki J Goings v. UNC Hospital	12 UNC 04109	09/18/12	
Elonnie Alston v. UNC Hospitals	12 UNC 04551	09/11/12	
Diara Z Andrews v. UNC Hospitals	12 UNC 04827	08/15/12	
David Ryan Pierce v. UNC Hospitals, Patient Account Services, SODCA	12 UNC 05306	03/20/13	
Shonte Hayes v. UNC P&A	12 UNC 05746	09/10/12	
Tracy A. Spaine (Currier) v. UNC Hospitals	12 UNC 06822	11/06/12	
Candis Miller v. UNC Hospitals	13 UNC 10374	08/19/13	
Deborah Wright v. UNC Hospitals	13 UNC 10574	11/15/13	
Chiduzie Oriaku v. UNC Hospitals	13 UNC 11434	10/07/13	
Julie C. Rose v. UNC Hospitals	13 UNC 12019	11/05/13	
Jason Paylor v. UNC Hospitals Patient Accounts	13 UNC 12636	07/26/13	
Robbyn L. Labelle v. UNC Hospitals	13 UNC 13685	11/18/13	
Joseph B. Millikan v. UNC Hospitals	13 UNC 13905	01/07/14	
Pamela Klute v. UNC Hospitals	13 UNC 15828	11/25/13	
Barney Kohout v. UNC Hospitals	13 UNC 18549	01/23/14	
Cilenia Mendez v. UNC Hospitals	13 UNC 18560	02/11/14	

WILDLIFE RESOURCES COMMISSION

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

STATE OF NORTH CAROLINA

COUNTY OF WAKE

**BEFORE THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 OSP 08950**

VAN BUCHANAN,
Petitioner,

v.

NC DEPARTMENT OF
PUBLIC SAFETY,
Respondent.

FINAL DECISION

This matter was heard before the Honorable Donald W. Overby, Administrative Law Judge, on September 11, 2013 at the Office of Administrative Hearings in Raleigh, North Carolina.

APPEARANCES

Petitioner:	Michael C. Byrne Law Offices of Michael C. Byrne 150 Fayetteville Street, Suite 1130 Raleigh, NC 27601
Respondent:	Yvonne Ricci Tamika Henderson Assistant Attorney General North Carolina Department of Justice Post Office Box 629 Raleigh, NC 27602

WITNESSES

The Respondent, North Carolina Department of Public Safety (hereinafter "Respondent" or "NCDPS") presented testimony from the following seven witnesses: Petitioner, Van Buchanan; Michael Lamonds, a Correctional Training Instructor II for the Office of Staff Development and Training ("OSDT") for NCDPS; Robert Carver, a Chief Probation/Parole Officer ("CPPO") in the Division of Community Corrections ("DCC"), NCDPS; Michael Warren, a retired Probation/Parole Officer ("PPO") for NCDPS, DCC; Blake Walker, a PPO for NCDPS, DCC; Hanna Rowland, the Special Operations Administrator for NCDPS, DCC; and Diane Isaacs, the Division Administrator for Division 2 for NCDPS, DCC.

Petitioner Van Buchanan testified during Respondent's case in chief. The Petitioner did not present any other witnesses.

EXHIBITS

Petitioner's exhibits ("P. Exs.") 1 and 2 were admitted into evidence. Respondent's exhibits ("R. Exs.") 1, 2, 4 - 22 were admitted into evidence. Respondent's exhibits 12, 14 - 18 were admitted containing hearsay, which was subject to corroboration, and subject to the appropriate weight to be given to the hearsay evidence if corroborated as well as the other evidence contained within those exhibits.

ISSUE

Whether Respondent had just cause to demote Petitioner for unacceptable personal conduct for employing a "shock knife" while teaching a training course at Piedmont Community College.

PRELIMINARY MATTERS

1. Petitioner moved to exclude witnesses from the hearing room, which was allowed by the Court.

2. Petitioner moved to exclude from evidence all evidence supporting any alleged ground for dismissal was not cited in the demotion letter given to Petitioner as required by law, specifically N.C.G.S. 126-35(a). The Court took the motion under advisement to rule on such issues as appropriate during the course of the hearing.

3. Petitioner stipulated at the outset of the hearing that he was offered the required internal procedural protections relating to the disciplinary action challenged, that he was given a pre-disciplinary conference, and that he properly received a demotion letter.

4. Petitioner also stipulated that he was afforded, and took advantage of, all the levels of the internal grievance procedure and that the Respondent, in that procedure, upheld its decision to demote Petitioner.

5. Petitioner stipulated that he did, as alleged by Respondent, employ a so-called "shock knife" or shock training knife, the property of Piedmont Community College, which was at that facility when Petitioner was conducting a training course there.

6. The Court excluded from evidence a written warning for "Unsatisfactory Job Performance" issued to Petitioner by Respondent on June 22, 2012. This written warning was not cited in the demotion letter as reason for demoting Petitioner.

BURDEN OF PROOF

The burden of proof is on the Respondent to show by the greater weight of the evidence that it had just cause to demote Petitioner for disciplinary reasons for unacceptable personal conduct.

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 foregoing and upon greater weight of the evidence in the complete record, the Undersigned makes the following:

FINDINGS OF FACT

1. The parties are properly before the Office of Administrative Hearings on a Petition for contested case hearing pursuant to Chapter 126 of the General Statutes, and the Office of Administrative Hearings has jurisdiction over both the parties and the subject matter as such.
2. Petitioner Van Buchanan is a career status permanent position employee of the Respondent North Carolina Department of Public Safety. As of the date of hearing, Petitioner had twenty years of service. Petitioner began his duties with Respondent as a Correctional Sergeant. Over the course of his service Petitioner was promoted to acting sergeant and then to lead correctional officer. Petitioner was subsequently promoted to Intensive Surveillance Officer and to Correctional Training Instructor in 2007. Petitioner performed his duties as a Correctional Training Instructor for approximately five years. This was the position Petitioner held at the time of his demotion. (T. p. 53-54)
3. Petitioner was also certified in other areas of training including Basic Law Enforcement General Instructor Training, NCPDS Firearms, NCDPS Control, Restraints, and Defensive Techniques, and Sheriff's Standards Commissioned Detention Officers certification, among others. (T. p. 62)
4. Petitioner was demoted to a Judicial Service Coordinator effective October 9, 2012, for unacceptable personal conduct. (T. p. 7; R. Ex. 8) Prior to Petitioner's demotion, Respondent properly afforded Petitioner a pre-disciplinary letter and conference. (T. p. 7; R. Exs. 4 and 5)
5. Diane Isaacs, currently the Division Administrator for Division Two for NCDPS, DCC, was Deputy Director of NCDPS, DCC at the time the decision was made to recommend discipline for the Petitioner. Ms. Isaacs recalls getting a report from then Division Two Administrator Kim Williams that the Petitioner had used a "shock knife" in training on January 30, 2012. After consulting with then NCDPS, DCC Director Guice, an internal investigation was initiated. (T. pp. 273 - 274)

6. Petitioner's basic duties as a Correctional Training Instructor were scheduling, documenting, and conducting in-service training, including assisting with lesson plans and all aspects of in-service training. (T. p. 17.) Petitioner does not train anyone in his demoted position. (T. p. 63)

7. Petitioner generally trained probation and parole officers and other community corrections personnel. These persons were employees who had already completed basic training and were actively working in the field. T. 61. Petitioner also provided certified in-service training for probation, parole and community corrections personnel, who likewise were generally experienced personnel who had been working with offenders for many years. (T. pp. 61-62)

8. As a Correctional Training Instructor, Petitioner was also called upon to assist with instructor level training. In-service training is for NCDPS employees that are attempting to get re-certified whereas instructor training is for NCDPS employees who are or are training to become instructors. The intensity level of instruction is different for each type of training. (T. p. 18.)

9. Petitioner began teaching Control, Restraints and Defensive Techniques ("CRDT") in spring 2006. Respondent's CRDT in-service training has a lesson plan that is taught in two sections one being for basic functions and moves and a second for advanced skill training in blunt-edged weapon defense. (T. pp. 21 - 22.)

10. The incident that led to Petitioner's demotion occurred on January 30, 2012 when Petitioner was conducting a training course in "Blunt-Edged Weapons Defense, Phase III." (T. 63, R. Ex. 11). Respondent's 11 is the "lesson plan" for the training course Petitioner was conducting, along with other instructors, on the relevant date. (T. pp. 63-64) This was at least the second time the trainees in the class at issue had gone through this training. (T. 26)

11. The equipment listed on the lesson plan for the Blunt Edged Weapons Defense course is listed in the lesson plan as, "trauma bags, gymnastic mats, training knives, pen, pencil, and paper." (Emphasis added) (T. 64, R. Ex. 11)

12. The lesson plan, as noted, refers only to "training knives". It does not define or specify at all that a particular kind of knife is to be used in training, whether it be rubber, plastic, or shock knives. (T. p. 64)

13. Respondent owns equipment to be used for training and at times the instructors take that equipment with them for the training. At other times the facility where the training is to be conducted will provide the equipment. It is not unusual for the facility to provide the equipment to be used in training. (T. p. 65)

14. Petitioner did not bring training equipment to the training site at Piedmont Community College. The training equipment to be used by Petitioner and his fellow trainers on the day in question was provided by the college. (T. pp. 64-65)

15. The "training knives" provided to Petitioner on January 30, 2012, were training knives made of rubber, knives made of plastic, and a "shock knife". (T. p. 66) The "shock knife"

is a blunt-edged knife, specifically designed for training in blunt-edged weapons defense. (T. p. 127) It provides a mild electrical shock or biofeedback when the blade touches the skin and has settings for adjusting the intensity of the shock. (T. p. 30) Respondent only owns one "shock knife."

16. Petitioner, along with his fellow trainers, was to provide two-four hour blocks of instruction. The instructors had completed their course of instruction in accord with the lesson plan but had approximately one hour left in hour to complete the full eight hour training. Petitioner understood that he was expected to use the full eight hours designated for the course for training purposes. (T. p. 32)

17. Petitioner and instructor S.O. Newcombe introduced the shock knife to the class and demonstrated it. The shock knife Petitioner used belonged to Piedmont Community College and was about eight to ten inches long. The trainees were then told to engage in one on one "round-robin" training using the shock knife. The training with the shock knife, unlike the rubber and plastic knives used earlier in the class, could not be conducted other than one on one, as only one shock knife was available. (T. pp. 30, 33, 40)

18. Once the students were in "round-robin" instead of in groups, the level of anxiety increased. Petitioner had to separate two students, Roy Williams and Mike Warren, when Williams became too aggressive with the shock knife. (T. pp. 35-36)

19. Petitioner admits that he did not ask his supervisor or anyone in higher command if he could introduce the "shock knife" during the January 30, 2012 in-service training. (T. pp. 28-29, 79.) There is no evidence of a rule or a policy that required Petitioner to seek permission for using the "shock knife."

20. For all previous times the Petitioner has instructed in-service training, the training knives that were available at the training locations were either a hard plastic knife or a rubber-edged knife. Petitioner had not previously used a shock knife while instructing in-service training.

21. Petitioner was introduced to the use of a shock knife while assisting Mike Lamonds and Mose Cannon with an instructor level class, not in-service training. (T. p. 26 - 27, 30.)

22. The Office of Staff Development and Training ("OSDT") for NCDPS is the primary training provider, holds the curriculum lesson plans, and developed the lesson plans and training for staff of the Respondent's Division of Community Correction and Division of Prisons. OSDT staff is responsible for consulting with Respondent's management and administration to obtain approval for lesson plans and ensures that Respondent's training staff is following the established lesson plans. (T. pp. 95 - 96.)

23. OSDT created the CRDT program with two levels of training. One is the instructor level training program in which the participants must undergo a medical evaluation prior to the training. The second is the in-service training program in which the participants are

not required to undergo a medical evaluation prior to this training. OSDT staff are responsible for the training and certification of all the instructors.

24. Michael Lamonds is a Correctional Training Instructor II for OSDT. He has been employed in numerous positions with OSDT since March 1, 2005. Mr. Lamonds was employed as OSDT's CRDT Coordinator from about July 1, 2006 until about July 1, 2007, and in that role he was responsible for coordinating the CRDT instructor training program. (T. pp. 96 - 98, 156.)

25. Mr. Lamonds current position with OSDT is with E-Learning and Technology and it is not clear what his current job duties are. It is clear from his testimony that the function of OSDT is to train the instructors who are then certified by a training and standards commission. (T. pp. 95 - 97)

26. To Mr. Lamonds' knowledge, the Respondent owns only one shock knife. Mr. Lamonds himself purchased the shock knife for OSDT in 2006 while he was the CRDT Coordinator. According to Mr. Lamonds, in order to use and instruct others on the "shock knife", he had to complete an instructor certification provided for by the manufacturer of the "shock knife." To his knowledge he is the only person employed by NCDPS that has that certification to use the "shock knife." (T. pp. 115, 138, 154.)

27. The "certification" was offered by the manufacturer, not by the Respondent. The "certification" consisted of one hour of training, by completing a power point. There is no evidence that Respondent required either Mr. Lamonds or any other instructor to be "certified" to use the shock knife. (T. pp. 138 - 139)

28. To Mr. Lamonds's knowledge, the "shock knife" purchased by OSDT has been utilized in the six CRDT instructor schools and utilized in four cell extraction instructor training schools for which he was the coordinator from July 2006 until July 2007. To his knowledge it has not been approved for use in CRDT in-service training and has not been provided to instructors who instruct in-service training courses by OSDT. (T. pp. 115 -116, 121.) The use of the shock knife for training does not fall within the purview of his current duties. (T. p. 152)

29. Mr. Lamonds knowledge is limited to his experience in training instructors. While he testified about the lesson plan used for the in-service training at issue herein (as opposed to instructor training), there is no evidence how he is familiar with those lesson plans, or what degree if any he had in the formulation of those lesson plans. He does say that he edited the lesson plan at some point, but the plan itself shows who prepared it, who approved it, and who annually reviewed it—none of whom was Mr. Lamonds.

30. In offering his opinion about those lesson plans, Mr. Lamonds contended that "training knives" were the hard plastic or rubber knives only. Mr. Lamonds acknowledged that there is no rule, no regulation, no lesson plan or anything in writing anywhere with the Respondent which defined "training knives." (T. pp. 103-105.)

31. Mr. Lamonds also admits that his answers were applicable only to the time he was the training coordinator, a position which he has not held since 2007. He acknowledges that he has not been privy to what has happened with the training since he left the position as

coordinator, including if, when or how many times the Respondent's shock knife may have been used in training.

32. Mr. Lamonds was not Petitioner's instructor for the instructor level training and certification.

33. Mr. Lamonds stated that the "round robin" exercise described by the Petitioner is an exercise that he utilized as the CRDT Coordinator in the CRDT instructor level training course, and he introduced the "shock knife" during this instructor level training. Mr. Lamonds contends that the CRDT in-service lesson plan does not provide for instruction that includes the "round robin" exercise; however, the lesson plan likewise does not exclude that type of instruction. The lesson plan is silent on that subject.

34. Mr. Lamonds confirmed that the lesson plan specifies only "training knives" and that the lesson plan does not prohibit, as written, the use of shock knives. T. 126, 131. He identified all three knives – rubber, plastic, and shock – as constituting "training knives" and that all three serve exactly the same purpose. (T. pp. 126 – 127).

35. Mr. Lamonds also expressed that he would have liked to use shock knives in in-service training as well as the instructor training but the cost of the shock knives was prohibitive.

36. Mr. Lamonds described Petitioner as "a very good subject matter expert and a good instructor in the classroom". (T. p. 139)

37. Mr. Lamonds confirmed that per policy there would be instructors in addition to Petitioner present on the date in question given there were 15 to 16 trainees and the proper ratio of trainees to instructors is eight to one. (T. p. 141)

38. Mr. Lamonds acknowledged that if an instructor was using what would be recognized as an unauthorized or dangerous or unapproved training technique, he would have expected other instructors to intervene. (T. p. 142.) There is no evidence that the other DPS instructors intervened to stop usage of the shock knife. There was testimony that an instructor from the community college left the area at the time the shock knife was being used. There is no evidence as to why the instructor left the area nor any evidence that this instructor intervened in any regard. Neither the community college instructor nor any other instructor present at the training, other than Petitioner himself, appeared to testify at the hearing.

39. Mr. Lamonds agrees that Respondent's Exhibit No. 11 is a copy of the lesson plan that would have been taught in the January 30, 2012, CRDT class in which the Petitioner was an instructor. Mr. Lamonds stated that the lesson plans for this CRDT in-service training course described training knives and that in his opinion based on his knowledge of OSDT policies and as a former CRDT Coordinator that the OSDT accepted and approved training knives for in-service training is either a rubberized or a rigid training knife.

40. His testimony in that regard is not supported by the credible evidence. There is no evidence of a "policy" at OSDT or the Respondent as to what constituted "accepted" or "approved" knives for training. There is no evidence of the course of conduct of any who have

held the coordinator position since Lamonds left in July 2007, nor how such coordinator has conducted classes and training. There is no evidence of how or if the shock knife has been used at all since Mr. Lamonds left. There is no evidence of how other instructors such as Petitioner have been instructed on using shock knives. Other than uncorroborated statements and speculation there is no evidence of a policy or written rule or even consistently communicated unwritten rule about the use of the shock knives.

41. Since the plain words of the lesson plan specified only “training knives,” Petitioner interpreted that to mean he was not restricted to the use only of rubber or plastic knives and that the shock knife was not prohibited. Petitioner’s recollection was that he was told orally in 2006 during a training school with Mr. Lamonds that the shock knife was an approved training tool for any training classes he conducted. (T. pp. 39, 41)

42. Mr. Lamonds contends that he explained to the Petitioner during a course of instructor level training at Vance Granville Community College that a “shock knife” is only authorized for use in CRDT instructor training and cell extraction instructor training. (T. pp. 109-112, 121; R. Ex. 11.) Mr. Lamonds did not recall a conversation with the Petitioner in which he told him that a “shock knife” could be used in CRDT in-service training. (T. pp. 101 - 102, 111, 113.)

43. Petitioner had used shock knives in other DPS training activities in the past. (T. pp. 65-66) All of the lesson plans for both instructor classes and for in-service training describes the knives to be used for training as “training knives,” the same as Respondent’s Exhibit 11. Mr. Lamonds agreed that the lesson plans for the training in which the shock knife was used was written the same way as the lesson plan being taught by Petitioner on the day in question with respect to training knives. (T. pp. 66, 133)

44. Petitioner contends that he did not order the class to use the shock knife. Petitioner stated that no trainee stated they were frightened of the shock knife and that the trainees seemed “excited” about using it. (T. pp. 71-72)

45. The evidence clearly shows that at least some members of the class were very apprehensive about using the shock knife but felt that it was part of their required training and their certification would be jeopardized if they did not go through with the training. The class members did not think participating in that part of the training was optional. They were not instructed that it was an optional exercise.

46. PPO Jessica Lynch, PPO James Lynch, and PPO Taylor Pratt participated in Petitioner’s class and each believed that they had to use the “shock knife” based on the instructions of the Petitioner in order to keep their certification; i.e., participation was not optional. (T. pp. 229 - 238; R. Exs. 16 - 18.)

47. In response to questions from the Court, Petitioner stated that the “round robin” process was of persons volunteering to use the shock knife. Petitioner stated that no one objected to using the shock knife. (T. pp. 73, 90) It is particularly found as fact that participants did not “volunteer” to participate in the round robin, but instead in the round robin format each class member had to participate in front of the rest of the group.

48. Petitioner did inquire of the class at the conclusion of the training if anyone had been injured and no one responded that they were in fact injured. No one reported any injuries from using the shock knife, nor did anyone raise a question about it including the other instructors. (T. p. 73)

49. Robert Carver, a CPPO in NCDPS, DCC, was a participant in the CRDT in-service training on January 30, 2012 at Piedmont Community College in which the Petitioner was a lead instructor. Mr. Carver had attended approximately six to eight CRDT in-service training sessions prior to January 30, 2012 in which the Petitioner was an instructor, and the Petitioner had not previously used a “shock knife” during the training. (T. pp. 166 - 169.)

50. Mr. Carver stated that the Petitioner had the class participate in a round robin session in which the class used a shock knife to demonstrate on each other the six points of attack. The Petitioner decided who would demonstrate the attacks during this session. Mr. Carver felt that the level of aggression changed once the shock knife was introduced by the Petitioner for use of the class. Mr. Carver felt that the class was required to use the shock knife during the round robin session. (T. p. 170 - 178, 186; R. Ex. 12.)

51. Mr. Carver was present at the training as a trainee and he was concerned about being shocked by the knife and, additionally, was concerned for his subordinates. Carver did not, however, report the incident to anyone as a perceived policy violation. (T. p. 179)

52. Mr. Carver confirmed that at the end of the class Petitioner asked if everyone was OK. Carver likewise indicated in his written statement that Petitioner “asked ... if everyone was OK and all staff either verbally said yes or did not answer. No one said, No.” (T. pp. 179-180)

53. Mr. Carver in his written statement erroneously described the shock knife as a “Taser knife”. (T. p. 185) Mr. Carver testified that he did not ask to be excused from the shock knife drill, but he did not know he had that option. He likewise did not express any concerns to Petitioner about the use of the shock knife at the lesson. (T. p. 181) Mr. Carver acknowledged that trainees were instructed by Petitioner that if they had questions about something that is being done or conducted during the training, that they should ask the instructors. (T. pp. 188-189) Neither Mr. Carver nor other witnesses asked any questions or raised concerns at the training about the propriety or safety of the usage of the shock knife. (T. pp. 178-182)

54. Michael Warren, a retired PPO for Respondent, was a participant in the CRDT in-service training on January 30, 2012 in which the Petitioner was the lead instructor. Mr. Warren was sixty-one years old when he participated in this class. Mr. Warren had attended one in-service class prior to January 30, 2012 in which the Petitioner was an instructor, and the Petitioner had not previously used a shock knife during the training. (T. pp. 192 - 193.)

55. Mr. Warren stated that the Petitioner instructed the class on how to use the “shock knife.” Mr. Warren was shocked by the knife during the class. After the class Mr. Warren observed a bruise which he believed was caused by the point of the shock knife sticking into his chest, not by the shock from the knife: “I don’t think the shock would make you bruised ... I don’t know whether it would or not.” (T. p. 212)

56. Although Mr. Warren had a mark or a bruise from the use of the knife, he stated that “it was nothing that required medical treatment ... I was fine.” Warren did not report any injuries at the close of the class nor did he make any complaint about the use of the shock knife for the duration of his remaining employment with DPS. (T. pp. 196-197, 211)

57. Following his retirement from NCDPS, in July 2012, Mr. Warren responded to a letter from Assistant Division Administrator Carla Bass. Mr. Warren advised Ms. Bass that he was ordered to use a shock knife by the Petitioner during CRDT training in January 2012. He wrote in part, “In my opinion I did not feel it was safe. . . . I obtained a minor injury to my chest area, and Roy Williams to best of my knowledge had a minor injury to his neck, due to contact from the shock knife.” (T. p. 194 - 199; R. Ex. 13.)

58. On examination Mr. Warren clarified his statement, that he “did not raise that [the shock knife] in the way of a complaint.” (T. p. 200) Mr. Warren stated further that “if I hadn’t gotten the letter [from Bass] I may have never said anything.” (T. p. 217)

59. His report to Ms. Bass was six months after the date of the incident. In those intervening months no participants in the training class had complained to anyone in management in any regard about any impropriety within that training session.

60. As with others, Mr. Warren believed that he had to use the shock knife based on the instructions of the Petitioner in order to keep his certification. After Mr. Warren had participated in the part of the training session that involved the use of the shock knife he was a bit nervous and tense. Mr. Warren recalled sweating profusely and leaving the training room to go to the rest room so he could wash his face with cold water before returning to the training session. (T. p. 195 - 197.)

61. Mr. Warren did not report during the class that he was frightened. He did not ask to be excused from training with the shock knife. Warren stated that he did not think he could ask to be excused; however, he testified that he left the training area without asking permission from Petitioner and Petitioner “didn’t bother me” and said nothing to him. (T. pp. 214-215).

62. Mr. Warren confirmed that his training partner became aggressive with the shock knife and Petitioner stepped in and separated them; however, Mr. Warren stated that the amount of intensity or aggression was the same during the training with the shock knife and the rubber knife. (T. pp. 196, 222)

63. Mr. Warren felt “intimidated” by Petitioner. However, there were other instructors, “two or three more at least”, present at the class in addition to Petitioner. Warren was not intimidated by any of the other instructors but made no complaint to them and did not ask them to be excused from the training. (T. pp. 223-224)

64. Blake Walker, a PPO for Respondent was a participant in the CRDT in-service training on January 30, 2012, in which the Petitioner was the lead instructor. The Petitioner had not previously used a “shock knife” during the in-service classes Mr. Walker had attended prior to January 30, 2012, in which the Petitioner was an instructor. (T. pp. 239 - 240.)

65. As with others, Mr. Walker stated that he did not think use of the shock knife during training was voluntary. Mr. Walker asserted that the knife left a mark on knuckles on his right hand and the left side of his stomach. (T. pp. 240-241) Mr. Walker claimed that the injuries were caused by the power of the shock, not the point of the knife. (T. p. 247)

66. In his written statement, Mr. Walker wrote that Petitioner never stated that use of the shock knife was a mandatory exercise. (T. p.) 244. In his written statement, Walker wrote that Petitioner and another trainer, S.O. Newcastle, showed the class the shock knife.

67. Mr. Walker did not like Petitioner very much. He wrote that he always felt uncomfortable during training because Petitioner would “single him out” and call him by a name which apparently Mr. Walker did not like. (T. p. 245)

68. Mr. Walker confirmed, along with other witnesses, that Petitioner asked at the end of the class whether everyone was OK, and he did not report any injury. Mr. Walker did not file or make any complaint to higher authority. Mr. Walker confirmed that Petitioner told the class that if they had any questions about the training during the course, that they could and should ask them. (T. p. 248)

69. Although the minor injuries reported by Mr. Warren and Mr. Walker are not doubted, it does not seem that the injuries are directly related to the particular characteristics of the shock knife. Based upon the testimony of Mr. Lamonds and the demonstration by defense counsel during the hearing, it does not seem that the shocking element of the shock knife would have caused any red marks or bruises. The shock knife has various settings for intensity. At the time he used it in training, Petitioner set the knife to the lowest setting. (T. pp. 73-74) More plausibly the minor injuries would have been caused by the physical nature of the training.

70. Hanna Rowland, the Special Operations Administrator for NCDPS, DCC, testified that she is familiar with and knowledgeable of what are considered approved training knives for use in CRDT in-service training and that a shock knife is not approved for use during in-service training. (T. pp. 252 - 256.)

71. To Ms. Rowland’s knowledge, no inquiry has been made to initiate the process for approval of the use of the shock knife for CRDT in-service training. There is no evidence that the shock knife was “approved” for use in instructor training.

72. In Ms. Rowland’s opinion, the Petitioner’s use of the shock knife during the in-service training in January 2012 was inconsistent with the written lesson plan. (T. pp. 257 - 258.) According to Mr. Lamonds, the shock knife is a “training knife” and there is no evidence to the contrary. Ms. Rowland’s assertion is contradictory to the plain English language of the lesson plan. Further there is no written or documentary evidence that defines what constitutes “training knives”; there are no rules or regulations or writing of any nature that would confirm her opinion.

73. Ms. Roland admitted, along with other witnesses, that the lesson plan does not distinguish between particular types of training knives. (T. pp. 261-262) Roland never provided

any instructions to Petitioner about the manner in which the training was to be conducted and was never present for any training conducted by Petitioner. When asked whether the training materials for the course in which the shock knife was in fact used employ the same verbiage as the course Petitioner taught, Roland replied: "I do not recall." (T. p. 263)

74. Ms. Roland testified that at no point did she ever instruct Petitioner that he was not to use the shock knife in training. (T. p. 264) There is no evidence that anyone specifically instructed Petitioner that he was not to use the shock knife in training.

75. Ms. Roland confirmed that there were two other fully certified instructors present at the training course on the day in question in addition to the Petitioner. (T. p. 270)

76. Although there were as many as three other instructors present at the training session in question, no one was subjected to disciplinary action except the Petitioner. None of the other instructors ever tried to intercede in any manner to try to prevent the Petitioner from using the shock knife in the training. No other instructor spoke up during the training questioning the propriety of using the shock knife; none ever reported to his or her chain of command that there had been any impropriety during the training. This included instructor S.O. Newcombe, despite Blake Walker identifying Newcombe as being one of the two persons who showed the training class the shock knife. (T. pp. 291-300)

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 per Chapter § 126 and § 150B of the North Carolina General Statutes. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

2. At the time of his discharge, Petitioner was a career State employee subject to the provisions of the State Personnel Act, N.C. Gen. Stat. § 126-1 et. seq. N.C.G.S. § 126-35(a) provides that "No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." In a career State employee's appeal of a disciplinary action, the department or agency employer bears the burden of proving that "just cause" existed for the disciplinary action. N.C.G.S. § 126-35(d) (2007).

3. 25 NCAC 11.2301(c) enumerates two grounds for disciplinary action, up to and including dismissal, based upon just cause: (1) unsatisfactory job performance, including grossly inefficient job performance; and (2) unacceptable personal conduct, which includes among others, "the willful violation of known or written work rules" and "conduct for which no reasonable person should expect to receive prior warning." 25 NCAC 01J .0614(8)(a) and 25 N.C.A.C. 01J .0614(8)(d).

4. The demotion letter specified that Petitioner was being demoted for unacceptable personal conduct. Specifically the letter dated October 9, 2012 states, “Your willful decision not to follow the approved lesson plan and require class participants to utilize a shock knife constitutes unacceptable personal conduct.” (R.’s Ex. 8)

5. Respondent complied with the procedural requirements for demotion for unacceptable personal conduct pursuant to 25 N.C.A.C. 01J .0608 and .0613.

6. At the time of the demotion letter, Petitioner had a prior Written Warning which had been issued within eighteen (18) months; however, neither the pre-dismissal nor the dismissal letter made any reference to the written warning having been considered. 25 N.C.A.C. 1J.0614(6)(c).

7. N.C.D.E.N.R. v. Clifton Carroll, 358 N.C. 649, 599 S.E.2d 888 (2004), states that the fundamental question in determining just cause is whether the disciplinary action taken was “just.” Citing further, “Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations.” Our Supreme Court has said that there is no bright line test to determine “just cause”—it depends upon the specific facts and circumstances in each case. Furthermore, “not *every* violation of law gives rise to ‘just cause’ for employee discipline.”

8. In the more recent case of Warren v. NC Dept. of Crime Control & Public Safety, the Court of Appeals established a three-step analysis in further elucidating the Carroll analysis as follows:

The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based “upon an examination of the facts and circumstances of each individual case.” Carroll, at 669, 599 S.E.2d at 900.

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

9. In order to apply the Warren tests, one must first look to the allegations to determine exactly for what the Petitioner is being punished. The demotion letter states he undertook a “willful decision” that he would not follow the approved lesson plan, and that having made that decision he would require the class to utilize a shock knife for training. The demotion letter further contends that the shock knife was an unapproved training device and that device left red marks and bruises on several of the participants. Further allegations are that the

training became so aggressive that it was necessary to stop the participants. Those allegations are taken as true by Respondent in finding that Petitioner engaged in unacceptable personal conduct.

10. NCDPS has a policy governing the personal conduct of its employees. (Respondent's Exhibit (R. Ex. 22) The personal conduct policy is found in the NCDPS *Personnel Manual* as Appendix C to the Disciplinary Policy and Procedures. (R. Ex. 22 at pp. 38 - 41) The policy states, "All employees of the Department of Correction shall maintain personal conduct of an acceptable standard as an employee and member of the community. Violations of this policy may result in disciplinary action including dismissal without prior warning." (R. Ex. 19 at p. 38) As listed in the NCDPS *Personnel Manual*, "Personal Conduct" lists seven examples of what may be included in unacceptable personal conduct. The only ones that might have relevance to this contested case are #1. "[c]onduct for which no reasonable person should expect to receive prior warning;" and #4. "[t]he willful violation of known or written work rules." (R. Ex. 19 at p. 38)

11. The pre-disciplinary letter from Hannah Rowland dated August 30 2012 cites both of the specific reasons cited in paragraph 10 above; however, it states that "in general" these are included in unacceptable personal conduct without any explanation of how Petitioner's actions fit either description.

12. The demotion letter from Anne Precythe, dated October 9, 2012 and which is controlling, only states that using the shock knife as described was unacceptable personal conduct without reference at all to either of the specific reasons.

13. Based upon the facts and circumstances of this particular contested case, there is not sufficient credible evidence that Petitioner's actions were so egregious as to constitute conduct for which no reasonable person should expect to receive prior warning prior to a disciplinary action.

Warren Test: Step One

14. Step one of the Warren test asks if the Petitioner engaged in the conduct the employer alleges. The overwhelming evidence is clear that Petitioner did not willfully decide that he would not follow the lesson plan; in fact to the contrary he consciously followed the lesson plan.

15. The evidence clearly demonstrates that Petitioner made a conscious decision to utilize a shock knife during the in-service training on January 30, 2012. There is substantial evidence to show that two participants of the training did have red marks and or a bruise after the training. There is substantial evidence to show that the interaction between two participants became aggressive enough for Petitioner to intercede, but those two participants completed the training.

16. While Petitioner's decision to use the shock knife was willful, there is no evidence to support the contention that Petitioner willfully decided to not follow the lesson plan. The evidence is clear that Petitioner did indeed follow the lesson plan.

17. The lesson plan for this training lists “training knives” among the equipment to be used. There is no definition given for what constitutes “training knives” either in the lesson plan itself or in any written documentation within the auspices of the Respondent. The overwhelming evidence from Respondent’s witnesses is that shock knives are indeed a type of “training knife.”

18. The same phrase “training knives” is used in all lesson plans for all training in defense of blunt/edged weapons, including both the instructor training and the in-service training. The evidence is not clear as to whether or not the shock knives have been used in any in-service training, although there was some anecdotal and unsubstantiated testimony that to the very limited knowledge of those witnesses the shock knives were not used for in-service.

19. Assuming *arguendo* that shock knives have not been used in other in-service training, such is not in any measure persuasive that they were prohibited for such in-service training. Respondent’s witness Mr. Lamonds stated that he would like to use the shock knives for in-service but that the reason that they were not used was because of the cost for purchasing the shock knives.

20. There is substantial and credible evidence that the shock knife was “approved” for use. The shock knives are approved for use in other trainings, especially the training of instructors. Petitioner was certified and had taught all levels of training and had been introduced to the shock knife during such training. While Respondent contends that there was nothing in the lesson plan that allowed use of the shock knife, there was nothing in the plan—or anywhere else for that matter—which prohibited its use. Use of the shock knife is simply not addressed—anywhere. The equipment to be used in the other course lesson plans was the same—“training knives” without specification. Common sense dictates that if they were to be banned from in-service then they would be banned from all training, because the lesson plans and all written directives are the exact same.

21. Ms. Rowland’s opinion that the Petitioner’s use the shock knife during the in-service training in January 2012 was inconsistent with the written lesson plan is not supported by the competent evidence. (T. pp. 257 - 258.) According to Mr. Lamonds, the shock knife is a “training knife” and there is no evidence to the contrary. Ms. Rowland’s assertion is contradictory to the plain English language of the lesson plan. Further there is no written or documentary evidence that defines what constitutes “training knives”; there are no rules or regulations or writing of any nature that would confirm her opinion.

22. The greater weight of the credible evidence does not support the contention that Petitioner was ever directed or that there was anything in writing to state that Petitioner was not to use the shock knife in in-service training. There is no rule or policy or any other written or consistent oral understanding of what constitutes training knives and when a shock knife may be used in training. Obviously no such “policy” was never communicated to the facility providing the equipment.

23. While it is true that two of the participants did have marks on their bodies after the training exercise, the contention that those marks were caused by the “device” is not supported by the credible evidence. The testimony of the witnesses who actually received those marks on their bodies contradicts the assertion that the marks were caused by the “device.”

24. The most plausible explanation is that the marks were caused by the nature of the training and that at least one participant became overly aggressive. The marks were on two participants and not "several." Further, it was not necessary to stop any participants, let alone all participants as may be inferred from the demotion letter. Petitioner did intercede between two participants when one became overly aggressive. Mr. Warren even stated that the level of aggression was no more with the shock knives than it had been with the plastic and rubber knives, even though he was one of the ones who had marks on his body.

25. Prior to beginning instruction Petitioner advised the entire group that should they have any questions at all that they should ask either the Petitioner or one of the other instructors. During the training with the shock knife, no one raised any question or concern. It was reasonable for Petitioner to assume that if a participant had reservations that participant would have expressed his or her concerns to one of the instructors.

26. Conversely, most of the participants felt that they had no latitude in whether or not to participate. Each felt that it was required training that required successful completion in order to be re-certified and to continue employment. It was not perceived as voluntary participation in the round robin training sessions with the shock knife. Such belief by those participants also was reasonable.

27. After the class Petitioner asked if any one was injured or if there were any issues to which everyone either responded that there were no injuries or did not respond at all.

28. Petitioner's use of the shock knife in training which left marks on two of the participating trainees is only egregious and subject to discipline if he "willfully" decided to not follow the lesson plan as written. Petitioner followed the lesson plan and thus did not engage in the conduct as alleged for his demotion.

Warren Test: Step Two

29. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Having found in Step One above that the Petitioner did not engage in the specific conduct the employer alleges as grounds for his demotion, it is not necessary to address Step Two. However, this Tribunal chooses to address the second step as set out in Warren.

30. The October 9, 2012 demotion letter does not state which category of unacceptable personal conduct was impugned by Petitioner's use of the shock knife. As stated above, only two categories might apply to the facts and circumstances here and one has been addressed and dismissed in paragraph 13 above. The only "category of unacceptable personal conduct" to be addressed would be the willful violation of known or written work rules.

31. The "lesson plan," which is the document Respondent claims Petitioner violated, is not a "work rule," the knowing violation of which constitutes unacceptable personal conduct. Even if it was, Petitioner did not violate the lesson plan as discussed in Step One above.

32. There is no evidence that Petitioner or anyone else could be disciplined for failing to follow the lesson plan as set forth by policy or rule or other writing within the Respondent. There was no evidence that Petitioner was told or warned that he could be disciplined at all for failure to follow the lesson plan. In fact, part of Petitioner's rationale was to use the shock knife to fill in the training for an additional hour because the class had successfully completed the other parts of the training. Some testimony was to the effect that he could have ended the class early, which clearly would have been contrary to the written lesson plan. Petitioner followed the lesson plan as written.

33. There is no evidence of what constitutes "training knives" or what constitutes an "approved" training knife (or what is not approved) in existence in written form anywhere within the Respondent.

34. If such existed, there is no evidence of how anyone within Respondent's employ would have had knowledge of approval or disapproval of use of shock knife. Ms. Rowland may have "known" but no evidence how or if such knowledge would have been disseminated, and there is no evidence that such information was in fact disseminated. One cannot expect any employee to abide by a written or known work rule if it is neither written nor known.

35. The training equipment for this training course was provided by Piedmont Community College, including the shock knife. Absent specific prohibition or rule or policy, it was not unreasonable for Petitioner and the other instructors to believe that the shock knife was available for use. Piedmont Community College was obviously not on notice that the shock knife was not to be used.

36. Respondent's claims that the shock knife posed a special threat of injury were not borne out by the evidence. The special characteristics of the shock knife were not responsible for the very minor injuries during the course of instruction.

37. Petitioner inquired at the end of the training if there were any injuries. None were reported. Petitioner, therefore, did not know that any trainee suffered injury through training with the shock knife blade.

38. This Court concludes that Respondent did not meet its burden of proof in showing that the Petitioner actions in training with the shock knife constituted any of the categories of unacceptable personal conduct.

Warren Test: Step Three

39. The Tribunal only proceeds to the third step of the Warren test "If the employee's act qualifies as a type of unacceptable conduct." Having found in Steps One and Two that indeed Petitioner's acts do not constitute unacceptable conduct as alleged in the demotion letter, further analysis is not required. As in Step Two, this Tribunal chooses to address the third step briefly. Assuming *arguendo* that the facts and circumstances of this case did demonstrate some level of unacceptable personal conduct, the Court concludes that the discipline imposed would not be equitable and would not be "just."

40. There were no complaints by anyone involved in the training; neither students nor other trainers. The inquiry which gave rise to the discipline was in response to Mr. Warren responding to a letter, and Mr. Warren even states that he was not complaining.

41. Even if the trainees felt as though they had no choice but to participate, there was never any expression that the training was excessive or in any way inappropriate—at any level.

42. There was an interval of six months between the events and the discipline. But for Warren's off-hand comments nothing would have come of this. There was no effort on the part of Petitioner or anyone else to conceal the use of the knife: i.e., there was no "cover-up."

43. There were as many as three other instructors participating in the training. None of them reported a policy violation, protested, or intervened against the use of the shock knife. Petitioner was the only person disciplined over the incident.

Based on these Findings of Fact and Conclusions of Law, and the competent evidence at hearing, the Court makes the following:

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, and all the competent evidence at hearing, Respondent's decision to demote Petitioner is **REVERSED** and Petitioner shall be retroactively reinstated by Respondent to the same or similar position held prior to his demotion, with back pay and attorney's fees paid to Petitioner and his attorney by Respondent.

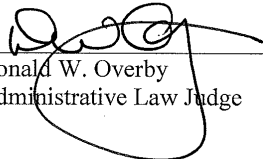
ORDER AND NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34. Under 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 the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed.

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 13th day of January, 2014.



Donald W. Overby
Administrative Law Judge

FILED

2014 JAN -3 PM 12:45

STATE OF NORTH CAROLINA

COUNTY OF GUILFORD

OFFICE OF
ADMINISTRATIVE HEARINGS

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 OSP 2283

Marilyn R. Brewington,
Petitioner,

vs.

North Carolina Agricultural & Technical
State University,
Respondent.

FINAL DECISION

The above-captioned case was heard before the Honorable Selina M. Brooks Administrative Law Judge on August 8 and 9, 2013.

APPEARANCES

For Petitioner: J. Heydt Philbeck
Bailey & Dixon
434 Fayetteville Street, Suite 2500
Raleigh, NC 27601

For Respondent: Kimberly D. Potter
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602

EXHIBITS

Admitted for Respondent:

Exhibit	Description
1	Request Budgeted Salary Change to Accommodate Competency Level
2	3/5/07 letter from Alton Thompson to Vanessa Lawson, re: Request in-range salary increase for Brewington

3	2/4/11 letter from Donald McDowell to Linda McAbee, re: Request salary adjustment for Brewington
5	10/28/11 email chain between Giddings, William Randle, and Brewington, re: CEPHT Tenure Application
9	11/10/11 emails between Brewington and William Randle, re: Job description
10	11/11/11 email from Brewington to William Randle, re: Job descriptions
12	11/23/11 email from William Randle to Brewington, re: Performance, correction
14	11/29/11 email from Brewington to William Randle, re: Performance
15	11/11/11 email from William Randle to Brewington, re: employee roster
16	12/2/11 email chain between Brewington and William Randle, re: BD-119
17	12/2/11 email from Brewington to William Randle, re: BD-119
18	12/5/11 email from William Randle to Donald McDowell, Brewington, re: Office of Dean e-files and paper files
19	12/5/11 email chain between William Randle and Brewington, re: Incomplete SAES personnel roster
20	12/6/11 email chain between William Randle and Brewington, re: Incomplete SAES personnel roster
21	12/7/11 email from William Randle to Brewington, re: Continued non-performance
22	12/7/11 email from Brewington to William Randle, re: Continued non-performance
23	12/7/11 email from Louis Jackai to William Randle, re: Sent on behalf of Dr. Shahbazi
24	12/8/11 email from Brewington to Willie Ellis, re: Adjunct Faculty
25	12/8/11 email chain between William Randle and Sylvia Anderson, re: Position #8530 w/attachments

26	12/6/11 memo from Donna Holland to Marilyn Brewington, re: EEO 102 & EEO 103 for new hire Carinthia A. Cherry
27	12/12/11 Pre-Disciplinary Conference Notification Letter for Conduct to Brewington
28	12/15/11 NC A&T State University Family and Medical Leave Application for Brewington
29	12/15/11 Letter of Dismissal
30	12/20/11 Email from William Randle to Akua Matherson to various departments, re: Signature authority for William Randle
31	12/22/11 Emails between Linc Butler and Donald McDowell, re: Brewington
32	1/27/12 Statement from Star Surgeon
33	2/2/12 Interview Notes of Star Surgeon
34	Statement from Star (Graduate Student)
36	NC A&T State University - SPA Sick Leave Policy
37	NC A&T State University - Disciplinary Action Policy
39	Brewington Annual Performance Reviews
40	SPA Mediation and Grievance Policy and Procedures

Admitted for Petitioner:

1	8/07/2013	Stipulations of Parties
2	10/19/2011	Email from Brewington to William Randle re creating a position of Director, identifying funding; obtaining approval
3	11/28/2011	Email from Brewington to W. Randle re notice of leave request being returned because it was on the wrong form

4	10/28/2011	Emails: 10/17 Giddings to W. Randle Drs. Chen and Sang on tenure track; Randle to Brewington 10/27 asking her to clarify Dr. Giddings question; 10/28 Brewington to Randle stating research scientists at CEPHT are housed under Dept of Family & Consumer Sciences
5	10/28/2011	Brewington email to Randle re CEPHT tenure application - extension guidelines is a work in progress
6	Undated	Brewington statement re filing grievance with (4) points and (6) resolutions requested
7	1/13/2012	Letter from Linc Butler to Dr. McDowell regarding reporting relationships; and Ipad sent message from McDowell to Linc Butler re Gwen Robinson reporting to Dr. Randle and Brewington to McDowell
8	12/21/2011	Handwritten, notarized affidavit of Gwen Robinson
9	12/23/2011	Dr. Shirley Hymon-Parker letter to Whom It May Concern addressing a communique from Dr. Randle alleging that Hymon-Parker said word had spread about complaints about how Dr. Randle ran his office
10	12/29	Signed, notarized statement from Dr. McDowell re support for Brewington
11	1/06/2012	Letter from Dr. McDowell to Vice Chancellor McAbee re lack of compliance to SPA dismissal/termination process
13	6/16/2010	NCA&T performance management, competency assessment & validation form; performance rating 5/outstanding
14	2/17/2009	NCA&T performance management, competency assessment & validation form; performance rating 5/outstanding
15	11/14/2006	Certificate of Appreciation to Marilyn Brewington 30 years of service

WITNESSES

Called by Petitioner:

Marilyn Brewington
Dr. Shirley Hymon-Parker
Gwendolyn Robinson
Michael Antoine Bratcher
Dr. Donald Ray McDowell

Called by Respondent:

Star Thompson Surgeon
Louis T. Ellis, Jr.
Sylvia Anderson Clark
Dr. William Mason Randle, II

ISSUE

Whether North Carolina Agricultural & Technical State University (NCA&T) had just cause to discharge Petitioner?

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

FINDINGS OF FACT

1. At all times relevant to the present case, the Petitioner, Marilyn Brewington, was employed at NCA&T in the School of Agricultural and Environmental Sciences (SAES) as the Executive Assistant to the Dean. The Petitioner had been employed at NCA&T for 37 years, beginning in November 1974. (T. pp. 469, 471; P. Ex. 15)

2. For more than 25 years of the Petitioner's employment with NCA&T, she provided administrative support to Dr. Donald R. McDowell. As Dr. McDowell moved to various positions in the SAES, including administrative positions, the Petitioner's position would follow him. As Dr. McDowell was promoted, the Petitioner would be reassigned or promoted to provide Dr. McDowell with administrative support. (T. pp. 398, 444-445)

3. In 2002, Dr. McDowell was appointed as Associate Dean in the SAES and moved to the Office of the Dean. (T. p. 445)

4. From 2002 until 2008, the Petitioner provided administrative support to the then Dean, Dr. Alton Thompson, and the Associate Dean, Dr. McDowell. (T. pp. 402, 472-475; R. Ex. 2) Dr. McDowell completed the Petitioner's performance reviews during this time. (T. p. 402; P. Exs. 13 & 14; R. Ex. 39)

5. In an effort to obtain a pay raise for Petitioner in March 2007, Dr. Thompson sent a letter to the University's Department of Human Resources (HR) in which he listed the Petitioner's job responsibilities which included planning the SAES Homecoming event, performing preparations for the Dean for both University and non-University meetings, and working closely with the SAES Budget Officer in preparing budget requests. (T. p. 543; R. Exs. 1 & 2)

6. Dr. McDowell was appointed and served as Interim Dean from 2008-2011. After his appointment, he promoted Petitioner to a position with dual reporting to the Dean and to the Associate Dean which included a pay raise and a physical move into the Office of the Dean. (T. pp. 402, 404, 445-446)

7. The Interim Dean or Dean, the Petitioner, Gwen Robinson and Vashti Pinnix had offices physically located in the Dean's suite of offices. (T. p. 483)

8. The Petitioner was extremely helpful to Dr. McDowell and, among other things, made sure he had materials prepared for his meetings. (T. p. 23)

9. While serving as Interim Dean, Dr. McDowell tried to obtain a 14% pay raise for Petitioner in February 2011. (T. pp. 446, 544) In a letter to HR, Dr. McDowell indicated that "[a]lthough Mrs. Brewington's job title is Executive Assistant, her working title has been Special Assistant to the Dean." He further detailed her extensive job duties which included working with budget managers and serving as office manager for the Office of the Dean. He considered Petitioner to be a secondary administrator in the Office of the Dean and when he became Interim Dean, the Petitioner provided administrative support to him and to the Assistant Dean, Dr. Ray. (T. pp. 447-449; R. Ex. 3)

10. Dr. McDowell has an "open-door policy" and only closes his door when he is having a private conversation. (T. p. 408)

11. As Interim Dean, Dr. McDowell had a weekly staff meeting with verbal and written reports concerning all work in the Dean's office, approximately 30 to 40 minutes long. (T. pp. 413-415)

12. On "numerous occasions", Dr. McDowell also held closed-door discussions with the Petitioner that lasted "from 30 minutes to an hour". (T. p. 460)

13. As Interim Dean, Dr. McDowell signed a form that gave the Petitioner, Ms.

Robinson, and Ms. Pinnix “complete control in terms of signing my signature when things came into the office.” (T. p. 415) The Petitioner had suggested that Dr. McDowell sign the form. (T. p. 416)

14. Dr. McDowell testified that he signed a waiver for the Petitioner and Ms. Robinson to sign his name to documents, and that issues only arose when there were changes in personnel in other areas on campus because some personnel are “sticklers to the rules and policies on campus.” (T. pp. 416-417)

15. When the position for Dean was posted, Dr. McDowell applied for it but was not selected. He believed that he should have been appointed Dean. In his opinion, he was demoted when he returned to a faculty position which also meant a decrease in pay as well as removal of administrative duties and reporting to a Department Head. (T. pp. 451-453)

16. Dr. William Randle was selected as Dean in the summer of 2011 and officially began in his new position in the SAES in September 2011. (T. p. 207)

17. Dr. Randle was the first Caucasian Dean of the SAES in the last 100 years. He was the first Dean of the SAES to be selected from outside the University in over 60 years and was previously employed at Ohio State University. (T. pp. 207-208; P. Ex. 1)

18. Louis T. Ellis, Jr., Associate Dean of the SAES, did not know whether the SAES had ever had a Caucasian Dean and was uncertain about his appointment. He was “pleasantly surprised” and has observed Dean Randle to be “a very rational manager” who “seeks feedback” and “asks very good questions and especially when he first arrived.” (T. p. 107)

19. Compared to Dr. McDowell, Associate Dean Ellis found Dean Randle’s management style to be “more open and collaborative.” (T. p. 124)

20. Prior to Dean Randle’s arrival at NCA&T, the Petitioner, Dr. McDowell, and Ms. Robinson, an accounting clerk in the SAES, had prayer sessions in the Dean’s office during work hours. (T. pp. 410-413)

21. During these prayer sessions, the Petitioner and Ms. Robinson prayed that Dean Randle would not come to NCA&T and “proclaimed” that the position of Dean was Dr. McDowell’s, and the Petitioner and Ms. Robinson would speak in tongues. These prayers could be overheard by nonparticipants. (T. pp. 42-43, 366, 380-381, 615; R. Ex. 32)

22. Ms. Robinson testified that during these prayer sessions, they would be “hollering and crying and praising the Lord” and “when Dr. McDowell comes to see what’s going on with us and then there’s three of us and it’s an explosion.” (T. p. 365)

23. During examination by the Petitioner’s counsel while describing the prayer sessions, Ms. Robinson interrupted the examination, saying, “I’m about to get happy now” with religious fervor. (T. pp. 384-386) The hearing paused for a moment to allow her to regain her composure.

24. Dr. McDowell testified that after his non-selection for the Dean's position, he met with the Chancellor and expressed his concerns that "too many Caucasians and too many females" were being hired, and his "data was to pinpoint[] discrimination against African American men". (T. pp. 453-454)

25. The Petitioner testified that she was not disappointed that Dr. McDowell was not appointed Dean because he had been rejected twice before for the position. (T. p. 618)

26. The Petitioner claimed she did not know who was selected as Dean or when the new Dean would arrive even though Dean Randle called her in August to discuss moving and reimbursement. (T. pp. 481-483)

27. The Petitioner first met Dean Randle when he arrived on September 5, 2011. (T. p. 477) He told the Petitioner that he needed a key and a parking permit. (T. pp. 407, 478)

28. The Petitioner did not assist Dean Randle in obtaining a parking permit or notify him that the Dean of the SAES had a specifically allocated parking space. As a result, for the first month of his employment at NCA&T, Dean Randle was parking without a permit. (T. p. 222)

29. When Dean Randle first started in September 2011, the Petitioner and Ms. Robinson approached him and asked if they should continue business as they had in the past. He indicated to them that they should continue as they had been doing until he got a sense of how business was done at NCA&T as he did not want to stop the business function of the SAES. (T. pp. 211-212, 341)

30. On September 8, 2011, the Petitioner started a two-week leave of absence, returning to work on September 26, 2011. On Thursday evenings during her leave, the Petitioner went to the office to process paperwork for researchers and faculty payroll, and signed Dean Randle's name to payroll forms. (T. pp. 486-487; P. Ex. 6)

31. The Petitioner testified that she told Dean Randle that she had signed his name and he accepted it. (T. p. 502)

32. The Petitioner testified that when Dean Randle arrived she knew that she could not sign his name without authorization. She perceived that Dean Randle gave verbal authorization to the Petitioner for signing his name on payroll documents, to Ms. Robinson on travel and budget documents, and to Ms. Pinnix for changes and major forms on the academic side. (T. pp. 484-85, 504)

33. In early fall 2011, forms from around campus were returned with notes indicating that Dean Randle's original signature was needed. The Petitioner and Ms. Robinson informed Dean Randle that documents that they had signed on his behalf were being returned and that they could not sign for him. (T. pp. 212, 345-347; P. Ex. 6; R. Ex. 32)

34. Thereafter, Dean Randle understood that his signature was necessary on certain documents. He did not sign any forms authorizing the Petitioner or Ms. Robinson to have signatory authority for him. (T. pp. 212-213)

35. Petitioner knew that travel authorizations were returned and in a written statement said: "The travel office requested original signatures or a statement or letter giving authority for someone to sign for you. We all knew this was a policy of travel. The same thing happened when signing Dr. McDowell's name. ... I am not familiar with a University Policy stating no one could sign for you unless the proper paperwork is filed" (P. Ex. 6)

36. When such forms were returned, the Petitioner stated to Star Surgeon, a part-time student worker, that forms were coming back and Dean Randle needs to sign these forms himself. (R. Ex. 32)

37. When the Petitioner returned to work, she was informed by Ms. Robinson that she needed written authorization to sign Dean Randle's name for a check request and another time was informed that she needed his authorization to sign his name for travel documents. (T. pp. 502-503; P. Ex. 6)

38. The Petitioner testified that she knew written authorization was required because she had followed the same procedure to obtain authorization to sign for Dr. McDowell. (T. pp. 502-503)

39. The Petitioner did not like the fact that Dean Randle did not hold a staff meeting. (T. p. 505)

40. The Petitioner told Associate Dean Ellis that he should tell Dean Randle to talk to her and that she was "not going to bite him." (T. p. 510)

41. The Petitioner did not like the fact that Dean Randle communicated with her primarily via email rather than face-to-face. (T. p. 550) Her personal style is to meet in someone's office and she wanted more face-to-face interaction with Dean Randle. (T. p. 551) Dean Randle would send emails after hours making requests rather than speaking to her directly during office hours. (T. p. 568)

42. The Petitioner testified that Dean Randle gave her authority to approve budgets in October 2011. (T. pp. 546-547) No documentary evidence supporting this claim was admitted or offered into evidence.

43. On November 2, 2011, the Petitioner was given authority to sign for Dean Randle but this authority was limited to Banner funds for purchases on Aggie Mart. (T. pp. 625-628; P. Ex. 6)

44. Before Dean Randle arrived, when people would call and inquire about the new Dean, Ms. Surgeon overheard the Petitioner state that she would not do "shit" that Dean Randle asked her to do. (T. p. 45-46, Resp. Ex. 32)

45. After Dean Randle began work at NCA&T in the fall 2011, the Petitioner was generally unhelpful and disrespectful towards Dean Randle. (T. pp. 23, 211)

46. The Petitioner testified that she did “[e]verything that he asked me to do” and the emails admitted into evidence demonstrate that she did assist Dean Randle. (T. pp. 536-540, 605; Exs. 2, 3, 4 & 5)

47. Contrary to the Petitioner’s testimony, examples of Petitioner’s nonresponsiveness and discourteous attitude are shown in her email correspondence with Dean Randle. (P. Ex. 5; R. Exs. 5, 9, 10, 14, 16, 19, 20 & 22)

48. The Petitioner informed Ms. Surgeon that “a white man couldn’t run the school and you couldn’t trust white people.” (T. pp. 46-47, R. Ex. 32)

49. The Petitioner told Surgeon that she was “SPA” (meaning “State Personnel Act” or career state personnel) and that Dean Randle could not fire her. (T. pp. 47, 49; R. Ex. 32)

50. The Petitioner testified that she assisted with hiring Ms. Surgeon and that she always treated her nice. (T. p. 612)

51. In October 2011, the Petitioner sent emails advising that she was taking leave to attend funerals and submitted forms for Dean Randle to sign. (T. p. 560)

52. At NCA&T, Homecoming is an important event for students and alumni. Each year the SAES hosts a Homecoming event prior to the football game which is open to alumni and students. (T. pp. 23-24, 107-108; R. Ex. 32)

53. In 2006, the Petitioner planned a “Southern Taste” cookout and a wine and cheese reception for the SAES Homecoming events, as well as performing as the campaign leader and coordinator to the SAES Capital Campaign which was launched during Homecoming. (R. Ex. 2)

54. After Dean Randle began as Dean in fall 2011, the Petitioner did not inform Dean Randle regarding Homecoming at NCA&T and its significance to the University community. Dean Randle only became aware of Homecoming when he attended meetings of the University’s Dean’s Council and other deans described the upcoming events scheduled for their schools and colleges. Thereafter, Dean Randle started inquiring about the events scheduled for Homecoming for the SAES and learned that no events were planned. (T. pp. 213-214)

55. At that point, there was less than two weeks before the University’s Homecoming. Associate Dean Ellis advised Dean Randle that it would be negatively perceived by the SAES and alumni if Dean Randle, as the new Caucasian Dean of the SAES, did not host a Homecoming event. (T. pp. 108-110, 215-216)

56. Without the knowledge or approval of Dean Randle, the Petitioner and Ms. Robinson had cancelled the tent and water bottles which had been previously ordered for the fall

2011 SAES Homecoming event. (T. pp. 48-49, R. Ex. 32)

57. Dr. McDowell testified that the first week after Dean Randle's arrival, he met with Dean Randle and informed him of the importance of Homecoming, the need to plan for the event and claimed that Dean Randle told him there would not be a Homecoming alumni tent for the SAES. (T. p. 418-420)

58. Dean Randle requested that Associate Dean Ellis inquire with Ms. Robinson what funds were available for the SAES to host a Homecoming event. (T. pp. 110-111, 214)

59. While Associate Dean Ellis was talking with Ms. Robinson about funds for Homecoming, the Petitioner came into Ms. Robinson's office, interrupted the conversation, was upset with Associate Dean Ellis, raised her voice at him, and demanded to know why he was helping Dean Randle when he never assisted Dr. McDowell. (T. pp. 24, 31, 110-111)

60. The Petitioner then stated loudly, such that others overheard, that Associate Dean Ellis was "nothing but a house nigger." (T. p. 31; R. Ex. 32)

61. The Petitioner testified that Associate Dean Ellis had been "demoted" and "didn't have a job" and she was "upset with him, not because he was doing work for Dean Randle, but because he just preferred to do the work and not include us." (T. p. 511)

62. Ultimately, based on the hard work of several individuals, including the Petitioner, the SAES hosted a Homecoming cookout for alumni and students. (T. pp. 215-216)

63. The Petitioner testified that she helped Dean Randle when she told him to wear an NCA&T shirt during Homecoming. (T. pp. 512-13)

64. Dean Randle expected his executive assistant to make sure he understood the significance of Homecoming at NCA&T. (T. p. 217)

65. On November 10, 2012, Dean Randle met with the Petitioner to inform her that he did not appreciate her hostility and to express his dissatisfaction with her job performance. He detailed his expectations for the Petitioner which included preparing his materials for various meetings, including the Dean's Council, and notifying him of her absences. The Petitioner responded that it was not her job to prepare Dean Randle's material for the Dean's Council meetings even though she was copied on the emails with the attached documents for the meetings. (T. p. 225) The Petitioner told him that she reports to Dr. McDowell. (T. p. 618; R. Ex. 12)

66. Dean Randle informed Petitioner that she would need to submit requests for leave to him as opposed to Dr. McDowell. Specifically, Dean Randle informed the Petitioner that he expected her to follow the leave policy which requires prior approval of leave and not simply notification. (R. Ex. 12)

67. Dean Randle also requested during the November 10, 2011 meeting, as he had on

other occasions, for the Petitioner to provide him with a list of SAES personnel. The Petitioner's response to that date had been that the information exists at the departmental level but did nothing to obtain the information. (T. pp. 225-226; R. Ex. 12 & 15)

68. In order to understand the Petitioner's position and job responsibilities, Dean Randle asked the Petitioner to provide him with her job description. In response, the Petitioner informed him that she did not have a job description or a contract, but created a list which detailed her duties as she viewed them as "Office manager." (T. p. 509, 550; R. Ex. 9) The Petitioner also directed Dean Randle to the Office of State Personnel's website where she informed him that he could find her job description. (T. pp. 219-221, 549-550; R. Ex. 10)

69. As Dean Randle went through his list of issues and future expectations, the Petitioner became angry, started to "yell" at Dean Randle, and told him that he was arrogant. (T. p. 223) The Petitioner further informed Dean Randle that she and Dr. McDowell were a "package deal", her allegiance was to Dr. McDowell, and she viewed Dr. McDowell as her supervisor, not Dean Randle. (T. p. 224; R. Ex. 12) The Petitioner told him that she reports to Dr. McDowell. (T. pp. 560, 618)

70. The Petitioner testified that she did not print documents for Dean Randle because "nobody printed a bunch of documents" and if he had asked then she would have had a student print them out for him. She testified that she did not prepare Dean Randle for meetings with the Provost but she would print documents for him for Dr. McDowell's meeting or for the Dean's office if requested. (T. pp. 520-523)

71. The Petitioner testified that she did not provide him with copies because "he did not talk to her." (T. pp. 623-624)

72. The Petitioner denies that Dean Randle discussed leave requests with her. (T. pp. 552, 554)

73. The Petitioner testified that Dean Randle told her "what people were saying that I was saying about him" and she responded that "the same people that's telling you that I'm talking about you ask them what they're saying about you because they're talking about you, too." The Petitioner testified that she told Dean Randle he "was arrogant". (T. pp. 507, 618)

74. On November 18, 2011, the Petitioner sent an email informing others that she was taking annual leave on November 22 and 23, 2011 because that was past practice for requesting leave. (T. pp. 551-552) She claims Dean Randle never told her to submit an annual leave request or discussed this with her on November 10, 2011. (T. p. 551; R. Ex. 12)

75. On November 23, 2011, Dean Randle sent to the Petitioner an email regarding her "early open hostility towards me and your lack of workplace responsiveness to the position of Dean in the SAES" in which he summarized the issues discussed during the November 10, 2011 meeting and detailed his future expectations regarding her duties and performance. He warned her that her continued level of performance was not acceptable. He further clarified that Petitioner reported to him as Executive Assistant to the Dean and that she did not report to Dr.

McDowell. Any requests for excused leave required Dean Randle's approval and leave policy must be followed which requires prior approval and not just notification. She was required to prepare and provide documents for any meetings he attends. Dean Randle again noted that Petitioner had not provided him with documents for the council meeting he attended on November 22, 2011. Failure to provide requested documents is a failure to perform a basic job function. (R. Ex. 12)

76. The Petitioner testified that when she read this email, she understood that Dean Randle directed her that he would approve any leave and that he was her supervisor. (T. pp. 619-623)

77. The Petitioner testified that when she read this email, she was confused because both Dean Randle and Dr. McDowell claimed to be her supervisor. (T. pp. 619-623).

78. On November 29, 2011, the Petitioner responded to the email of November 23, 2011. In her response, the Petitioner admitted that she did tell Dean Randle during the November 10, 2011 meeting that he was "arrogant." She also stated that she did not report to Dean Randle but instead reported to Dr. McDowell "because it had always been that way." (T. pp. 624-625; R. Ex. 14)

79. As to Dean Randle's request for Petitioner to prepare materials for him for specific meetings, the Petitioner responded that even though she received copies of the emails with the relevant attachments prior to Dean Randle's meetings, it was not her job to print them and prepare the materials for Dean Randle's study and preparation. The Petitioner informed Dean Randle that "[t]he emails are not sent to me for me to prepare the materials for your study and preparation. The emails are sent to you for your study and preparation." (T. pp. 624-625; R. Ex. 14)

80. Despite the meeting of November 10, 2011 and the email of November 23, 2011 in which Dean Randle set out his expectations for the Petitioner's performance, the Petitioner continued to perform in the same manner.

81. In particular, the Petitioner never provided Dean Randle a list of the current personnel in SAES even though tracking of funding for positions within the SAES had been a responsibility that Petitioner had assumed for prior Deans. (T. pp. 231-236; R. Exs. 15-20)

82. Despite repeated communication and requests via emails, Petitioner did not provide Dean Randle the basic information regarding the personnel employed by the SAES or provide him sufficient explanation as to why she could not provide the information. (R. Exs. 5, 15-20)

83. The Petitioner claims she assisted Dean Randle by obtaining a roster. (T. pp. 563-567; R. Exs. 16 & 17)

84. Ms. Surgeon testified that when she was collecting money for the Christmas party in the Dean's office, the Petitioner referred to Dean Randle as a "white devil." (T. p. 48)

85. On December 5, 2011, Dean Randle sent an email to both Dr. McDowell and the Petitioner asking them to provide all files related to the Dean's Office to him. (R. Ex. 18)

86. The Petitioner testified that if Dean Randle wanted files "all he had to do was ask me." (T. 570)

87. On December 7, 2011, Dean Randle sent an email to the Petitioner warning her about continued instances of her "non-performance." Specifically, Petitioner had not provided him documents for the December Administrative Council meeting held on December 6, 2011 even though Dean Randle had reminded her of this responsibility in his email dated November 23, 2011. (R. Ex. 21)

88. The Petitioner responded via email stating that "I am not sent copies of emails to make copies for you" and complains that he communicates with her via email. (R. Ex. 22)

89. The Petitioner testified that "he had never asked me to prepare documents for meetings. He mentions it in the first – in another email and then he mentions it here, but he never said it to me." (T. p. 576)

90. The Petitioner testified that if Dean Randle wanted copies then he should have asked her and she would have had a student make the copies. (T. p. 581)

91. The Petitioner testified that "everything" stated in Dean Randle's email dated December 7, 2011 "did not take place". (T. 578; R. Ex. 21)

92. The Petitioner forwarded Dean Randle's emails concerning her job performance to other staff members in the Dean's office. (R. Ex. 32)

93. The Petitioner complained that Dean Randle had asked Associate Dean Ellis to look into release funds for hiring of adjunct faculty, an area within her knowledge and job responsibilities. (T. pp. 114, 580; R. Ex. 22)

94. Dean Randle had not authorized Petitioner to arrange for the use of release funds for the hiring of adjuncts. His only instruction was to Associate Dean Ellis to investigate sources of funding to pay for the cost of hiring adjuncts. The decision whether to move money from one source to another was one to be made by senior administration. Dean Randle's only instruction to Petitioner was to assist Associate Dean Ellis. (T. pp. 244-247)

95. The Petitioner was not responsive to requests from Associate Dean Ellis about funds for adjunct faculty. He then attempted to go outside the SAES to seek help from members of the University salary administration department to determine if there were available funds. (T. pp. 115-117)

96. Upon learning of the Petitioner's refusal to provide assistance to Associate Dean Ellis, Dean Randle then approached the Petitioner and informed her that Associate Dean Ellis

had come to her at his direction. Dean Randle specifically instructed the Petitioner to provide Associate Dean Ellis the requested information regarding the availability of funds to cover the hiring of adjuncts. (T. pp. 244-245)

97. In her testimony, the Petitioner denied that Dean Randle “instructed” her to assist Associate Dean Ellis but stated that he told her to work with him. (T. p. 617)

98. Dean Randle had not given Associate Dean Ellis any authority to move money to cover the adjunct faculty salaries but simply to investigate sources of money to cover adjunct salaries. (T. p. 118)

99. Subsequently, Dean Randle learned that the Petitioner was making preparations for the transfer of release funds from the Department of Natural Resources in SAES to the Department of Family and Consumer Sciences for the hiring of the adjuncts. (T. pp. 245-247, R. Exs. 23 & 24)

100. On December 8, 2011, Dean Randle received an email from Sylvia Anderson, NCA&T Director of Employee Relations and Affirmative Action, in which she copied him on a hiring form, EEO Form 102. The attached hiring form authorized the hiring of an individual into a department in SAES. The Petitioner had signed the form on behalf of Dean Randle and noted her initials after his name. (R. Exs. 25 & 26) If the form had proceeded forward through the hiring process, this person would have been hired as an employee of Cooperative Extension without Dean Randle’s knowledge or review. (T. pp. 160-161, 250)

101. The Petitioner testified that Dean Randle gave her “verbal authority to sign his name” to hiring forms and she has no written documentation to support this statement. (T. p. 629)

102. The Petitioner testified that on December 8, 2012, Dean Randle informed her that she did not have the authority to sign his name to payroll documents and that he had assigned to Associate Dean Ellis the responsibility for determining what funds would be used to pay the adjunct faculty. (T. pp. 490-491)

103. The Petitioner testified that after this conversation with Dean Randle she initiated conversations and correspondence concerning the funding of adjunct faculty positions. (T. pp. 491-494)

104. The Petitioner testified that she was cooperative with Dean Randle and Associate Dean Ellis even though she involved herself with payroll processing after she was instructed by Dean Randle that it was not her responsibility. (T. pp. 494-496)

105. The Petitioner testified that Dean Randle’s email to Ms. Anderson dated December 8, 2011 was not a fair statement. The Petitioner had continued to sign the personnel forms because after his arrival Dean Randle told them to operate as they had in the past and that “[h]e never met with us to tell us any different” even after forms were returned for unauthorized signature. (T. pp. 587-588; R. Ex. 25) “Even after Gwen had travel returned. He still didn’t

meet with us to tell us to do anything different.” (T. p. 588)

106. The Petitioner testified that she understood that she had Dean Randle’s authorization to sign personnel forms even though “I had never gone to him and told him these were being returned. So he had never told us anything different.” (T. p. 589)

107. Dean Randle responded to Ms. Anderson’s email of December 8, 2011, and informed her that he was not aware that the Petitioner had signed the form on his behalf. Dean Randle further informed Ms. Anderson that this was the first time this was brought to his attention and that he had never given Petitioner authority to sign his name for such documents. (R. Exs. 25 & 26)

108. After consultation with University Human Resources, Dean Randle provided the Petitioner a pre-disciplinary conference notice dated December 12, 2011. In the notice, Dean Randle detailed several instances of unacceptable personal conduct which included: signing a hiring form without permission; failure to provide Associate Dean Ellis the requested budgetary information for the hiring of adjunct faculty; and subsequent efforts to move release funds from one department to another department without authorization. (R. Ex. 27)

109. The Petitioner received the pre-disciplinary conference notice and attended the conference on December 13, 2011 with Dean Randle and Ms. Anderson. (T. p. 164)

110. During the conference, when the Petitioner was provided an opportunity to respond to the issues detailed in the notice, she indicated that she reported to Dr. McDowell, not Dean Randle. (T. pp. 165-166) The Petitioner denied the issues stated in the notice and stated that she “did not know how to help [him].” (T. p. 516) In Petitioner’s view, she did not “profit anything from signing his name without authority. ... I was really helping him.” (T. pp. 517) She also stated that she “had been helping [Dean Randle] all the time. He stopped, stopped speaking.” (T. pp. 593)

111. On December 14 and 15, 2011, the Petitioner did not report to work. On those dates when the Petitioner was absent, she did not contact Dean Randle by telephone or submit a written request for sick leave. Instead she called the office and informed fellow staff members that she would not be at work. (T. p. 599; R. Ex. 29)

112. The Petitioner testified that Dean Randle had not discussed sick leave policy with her, only annual leave. (T. p. 603)

113. Following the pre-disciplinary conference, Dean Randle again consulted with HR. (T. pp. 167-168) After evaluating the Petitioner’s conduct, it was determined that her conduct constituted unacceptable personal conduct justifying discharge of her employment. By letter dated December 15, 2011, Dean Randle notified Petitioner of her discharge and detailed specific instances of unacceptable personal conducts as the basis for this decision: signing a hiring form without permission; failure to provide Associate Dean Ellis the requested budgetary information for the hiring of adjunct faculty; subsequent efforts to move release funds from one department to another department without authorization; and her continued refusal to request leave as

directed. (R. Ex. 29)

114. On December 16, 2011, the Petitioner submitted an application for FMLA leave, signed by Dr. McDowell as her supervisor. (R. Ex. 28)

115. Dr. McDowell testified that at the time of the Petitioner's termination, he believed that she reported to him. (T. pp. 404, 439-440) Via email dated December 22, 2011, Dr. McDowell asked HR to clarify who was Petitioner's supervisor because she "has been under my supervision since we came to the Dean's office in 2000, as such, should she remain under my supervision[?]" (R. Ex. 31; P. Ex. 7; T. pp. 403-404)

116. In a letter dated December 29, 2011, Dr. McDowell makes several hearsay statements concerning Dean Randle's performance, complains that Dean Randle has not held a staff meeting or met personally with him, and that Dean Randle demanded "his files and emails as it relate[s] to my tenure as interim dean" and refused to give them to Dean Randle. (P. Ex.10)

117. Dr. McDowell testified that Dean Randle "very seldom spoke to me" and when he called an Executive Committee meeting in January 2012, Dean Randle "fuss[ed]" at him and directed that Dr. McDowell give him everything from his computer. (T. pp. 431-432, 463-464)

118. Dr. McDowell testified that he did not give Dean Randle any paper or electronic files because Dean Randle did not request them. (T. p. 467) He thought that email was "disrespectful" and copied to the Provost and the HR "like I had done something wrong." (T. p. 467; R. Ex. 18)

119. Dr. McDowell wrote a letter, dated January 6, 2012, in support of Petitioner alleging that personnel policies were not followed. (P. Ex. 11; T. pp. 435-436)

120. Dean Randle terminated Dr. McDowell's employment as an at-will employee at the end of January 2012. (T. pp. 432-433)

121. Based upon the Undersigned's observation of the demeanor of the witnesses as well as consideration of the testimony and all other admissible evidence, the Undersigned finds the testimony of Dean Randle, Associate Dean Ellis, Sylvia Anderson and Star Surgeon to be credible.

122. The Undersigned finds as fact that the testimony of the Petitioner, Dr. McDowell and Gwen Robinson does not negate a finding that the Petitioner engaged in unacceptable personal conduct.

123. NCA&T established just cause to discharge Petitioner for unacceptable personal conduct.

CONCLUSIONS OF LAW

Based upon the sworn testimony of witnesses, including assessment of the witnesses' credibility, demeanor, interest, bias, and prejudice; assessment of the reasonableness and consistency of each witness's testimony; consideration of the documents admitted into evidence; and the entire record in this proceeding; the Undersigned makes the following conclusions of law, as follows:

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over the just cause issue in this contested case pursuant to Chapter 126 and Chapter 150B of the North Carolina General Statutes.

2. N.C. Gen. Stat. § 126-35(a) provides that "[n]o career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." "'Just cause' is a legal basis, set forth by statute, for the termination of a State employee . . ." *Skinner v. N.C. Dept. of Correction*, 154 N.C. App. 270, 280, 572 S.E.2d 184, 191 (2002).

3. To demonstrate just cause, a State employer may show "unacceptable personal conduct." 25 N.C.A.C. 1J.0604(b)(2). Unacceptable personal conduct includes "insubordination," "conduct for which no reasonable person should expect to receive prior warning"; and "the willful violation of known or written work rules." 15 NCAC 1J.0614(7); 25 N.C.A.C. 1J.0614(8)(a) & (d).

4. The State employer may discharge an employee for unacceptable personal conduct without any prior warning or disciplinary action. 25 N.C.A.C. 1J.0608(a).

5. The State Personnel Manual provides that before an employee can be discharged for unacceptable personal conduct the employee must have a current unresolved incident of unsatisfactory job performance and a pre-disciplinary conference. A sole instance of unacceptable personal conduct, by itself, constitutes just cause for discharge. *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).

6. Respondent demonstrated with credible and substantial evidence that Petitioner's conduct was conduct for which no reasonable person should expect to receive a prior warning, that it willfully violated known or written work rules, and that it constituted insubordination.

7. Petitioner received notification of a pre-disciplinary conference by letter dated December 12, 2011.

8. Petitioner attended the pre-disciplinary conference and was allowed an opportunity to respond.

9. Ultimately, Dean Randle determined that Petitioner's conduct as detailed in the notice of pre-disciplinary conference and her continued failure to request leave as directed by him following the pre-disciplinary conference constituted unacceptable personal conduct.

10. For the reasons stated in the pre-disciplinary conference notice and the discharge letter, NCA&T had just cause for discharging Petitioner for unacceptable personal conduct.

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the Undersigned issues the following:


FINAL DECISION

It is hereby ordered that Respondent has proved by a preponderance of the evidenced that it had just cause to discharge Petitioner based on her unacceptable personal conduct, and NC A&T University's decision to discharge Petitioner is **AFFIRMED**.

NOTICE

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

This the 2nd day of January, 2014.



Selina M. Brooks
Administrative Law Judge

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
1/8/2014 4:37 PM

STATE OF NORTH CAROLINA

COUNTY OF

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12OSP06310

Carrie J Tucker, Petitioner, v. North Carolina Department of Public Safety, Respondent.	FINAL DECISION
---	-----------------------

This case was commenced on July 16, 2012 by the filing of a petition in the Office of Administrative Hearings. This contested case was heard in Wayne County before administrative law judge Beecher R. Gray on May 10, 2013 and May 15, 2013. Petitioner filed a proposed decision on January 8, 2014.

APPEARANCES

Petitioner: Glenn Barfield, Esq.

Respondent: Lisa Harper, Assistant Attorney General

ISSUE

Whether Respondent had just cause to demote Petitioner for unacceptable personal conduct.

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. Respondent, North Carolina Department of Public Safety, is subject to Chapter 126 of the North Carolina General Statutes, and is Petitioner's employer.
3. Prior to March 16, 2012, Petitioner was employed by Respondent as a Correctional Psychological Services Coordinator at Craven Correctional Institution, pay grade 77.
4. On March 16, 2012, Respondent demoted Petitioner to Staff Psychologist II, pay grade 73, and transferred Petitioner to Greene Correctional Institution.
5. Petitioner's home is approximately 22 from miles Craven Correctional Institution; it is approximately 48 miles from Greene Correctional Institution.
6. Petitioner was notified of her demotion and transfer by letter from Larry Dail, Superintendent at Craven Correctional Institution, dated March 16, 2012, and admitted as Respondent's Exhibit 1.
7. This letter states that the disciplinary action was based on Respondent's determination that Petitioner had engaged in unacceptable person conduct as described in the letter.
8. The letter alleged "inappropriate comments" by Petitioner in the workplace, describing these as profanities, including several instances of use of the F-word, several instances of name-calling, and then cited to Respondent's Unlawful Workplace Harassment and Professional Conduct Policy.
9. Respondent did not allege or cite as grounds for Petitioner's demotion any illegal discrimination or harassment under state or federal law and specifically did not allege or contend that the conduct at issue violated the prohibition against unlawful workplace harassment by means of unwelcome or unsolicited speech or conduct based upon race, sex, creed, religion, national origin, age, color, or handicapping condition.
10. Respondent also alleged that Petitioner's unacceptable personal conduct included Petitioner signing names other than her own on "Request for Leave" forms submitted by her subordinate Bonnie Bright (Carter) on June 2, 2011 and on August 17, 2011; specifically signing the name "Kelly Clarkson" on the form dated June 2, 2011, and the name "Angelina Jolie" on the form dated August 17, 2011. (The Undersigned takes judicial notice of the fact that Kelly Clarkson, a singer/songwriter, is a well-known celebrity and that Angelina Jolie, an actress, is a well-known celebrity.)
11. Respondent contended that the profanity, name calling, and signing of celebrity names were "actions that were unprofessional and inappropriate; constituting unacceptable personal conduct."
12. Petitioner had been given a written warning on May 31, 2011, for unacceptable personal conduct described in the warning (R. Ex. 18) as "inappropriate comments, name calling, jokes, and profanity in the workplace."

13. Petitioner acknowledged that since May 31, 2011, she occasionally had uttered a profanity in the workplace, but described the profanities as the words “damn” and “hell.”
14. Petitioner did not call Robert Murphy a “fucking idiot” or otherwise use the F-word.
15. Petitioner did not refer to Stephen Jacobs as “Jaba” (or “Java”) after May 31, 2011.
16. Petitioner acknowledged that she had used celebrity names in jest in signing “Request for Leave” forms on the two occasions noted in Respondent’s Exhibit 1 (Notice of Demotion) and on some other occasions.
17. Petitioner did not intend to misrepresent to any person that she was in fact any of the celebrities whose names she signed.
18. The employees whose “Request for Leave” forms were signed in jest by Petitioner with celebrity names were present at the time the forms were signed and knew that Petitioner actually signed the forms.
19. The forms were not copied or otherwise kept by Respondent; rather they were kept by the employee requesting leave, in order that, if necessary, the employee could later document that such leave had been approved.
20. Given that Kelly Clarkson and Angelina Jolie are well-known celebrity entertainers, Petitioner’s use of those names in jest did not deceive any employee and did not have the capacity to deceive any person.
21. Petitioner’s use of the celebrity names clearly was in jest.
22. Bonnie Carter testified that she felt “harassed” and disrespected when Petitioner signed her “Request for Leave” forms with celebrity names, and further testified that Petitioner would throw the signed forms at her feet instead of handing them back to her.
23. The Undersigned does not find Ms. Carter’s testimony to be credible; Ms. Carter never complained to Petitioner or any of Petitioner’s supervisors that she felt harassed; Petitioner’s use of the celebrity names did not have the capacity to harass Ms. Carter or any other employee; nor did the practice have the capacity to create a hostile work environment.
24. Petitioner did not throw the forms on the floor.
25. Several of Respondent’s witnesses characterized Petitioner’s use of the celebrity names in signing the “Request for Leave” forms as “falsification” of “an official state document.” Such characterization is inaccurate and unreasonable, and, in its Notice of Demotion, Respondent did not characterize the use of the celebrity names as “falsification” of “an official state document.”

26. Respondent's management witnesses acknowledged that there existed no prohibition of making jokes or jests in the workplace. What was prohibited was inappropriate, off color, or harassing jokes or jests.
27. On October 19, 2011, Respondent's witness Misty Hardison provided Respondent a written statement (R. Ex. 8) in which she alleged that Petitioner had used extremely profane language and made otherwise inappropriate statements. At the hearing, Ms. Hardison authenticated her October 19, 2011 statement and testified to its contents.
28. However, the Undersigned does not find Ms. Hardison's testimony to be credible for the following reasons:
 - A. Ms. Hardison's testimony was directly contradicted by the testimony of Petitioner, who the Undersigned does find to be a credible witness.
 - B. Ms. Hardison had been "written up for tardiness" by Petitioner on April 7, 2011; Petitioner had written up Ms. Hardison for leaving the workplace prior to the end of her scheduled work day, without prior approval, on two separate occasions.
 - C. On February 10, 2012, Ms. Hardison was issued an unsatisfactory TAP entry and received a written warning for unacceptable personal conduct for failure to timely report a misdemeanor charge of simple worthless check.
 - D. After Petitioner received the written warning in May 2011, Ms. Hardison became increasingly rude and hostile towards Petitioner and hostile towards other employees in the unit Petitioner supervised, and sometimes refused to comply with job-related requests from Petitioner and Joan Irvine, another psychologist on the unit (this behavior was testified to by both by Petitioner and by Ms. Irvine whose testimony in this regard the Undersigned finds credible), yet Ms. Hardison testified unconvincingly that she was not in the least bothered by being written up by Petitioner and that she was always polite and pleasant to all persons in the workplace, which testimony was inconsistent with other believable evidence.
 - E. Ms. Hardison's demeanor on the witness stand supports my determination that her testimony was not credible.
29. Petitioner did use some mild profanities, such as "hell" and "damn," in the workplace, but such usage was conversational, was not vulgar, was never directed towards any other employee or inmate, and did not actually offend or harass any employee or inmate, nor did such usage create a hostile work environment. Other employees of Respondent used various profanities in the same workplace, including Petitioner's supervisors, but none were disciplined in any way for doing so.
30. Petitioner's performance as a psychologist was very good.

31. Petitioner sought assistance and direction from her supervisors, including Superintendent Dail, during the period between May 31, 2011 and October 2011, regarding the rude and disdainful conduct of some of her subordinates, including Ms. Hardison and Ms. Bright (Carter), and regarding Ms. Hardison's continued tardiness.
32. Petitioner attempted to use the "tools" of supervision as directed by Superintendent Dail, but her subordinate staff--particularly Ms. Carter and Ms. Hardison--continued to express disdain, defiance, and resentment towards Petitioner.
33. Petitioner expressed to Mr. Dail her concern that further attempts to use the disciplinary process to manage Ms. Carter and Ms. Hardison would result in their making unfounded claims and accusations against her because they knew that she was essentially on "probation" because of the May 31, 2011 written order.
34. Petitioner expressed to Mr. Dail that she needed his support and to know that retaliatory complaints against her would be seen in that light, but Mr. Dail did not offer substantial reassurance to her that she would be safe from retaliatory complaints.
35. The investigation of Petitioner was prompted by a complaint from Misty Hardison to Respondent's EEO office.
36. The EEO office determined that the information submitted by Ms. Hardison did not fall within the jurisdiction of the EEO office, and that office declined to investigate the complaint.
37. Danny Safrit, Respondent's director of its Eastern Region Office, then assigned Wayne Harris and Belinda Dudley to conduct an internal investigation into Ms. Hardison's allegations.
38. Mr. Harris and/or Ms. Dudley interviewed a number of the employees supervised by Petitioner, including Ms. Carter and Ms. Hardison, as well as other employees and staff members, including Mr. Dail and Mr. Jacobs.
39. In their report dated November 22, 2011 (R. Ex. 5), Mr. Harris and Ms. Dudley concluded that "... it is evident that there is tension among the staff in the psychological section at Craven Correctional Institution. Of the nine (9) staff interviewed for this investigation the majority of staff referred to tension in the mental health section in varying degrees. It is impossible to determine with certainty, if the tension exhibited in the mental health section is a result of the day to day interaction of Ms. Tucker with Ms. Bright and Ms. Hardison or the interaction of subordinate staff with one another. However, it [is] necessary for team building to occur and to be lead by Superintendent Dail and Assistant Superintendent Jacobs for a productive staff. These two supervisors must assist Ms. Tucker with the development of her supervisory skills and her interaction with her staff in a positive manner or this section will continue to deteriorate." (emphasis added)

40. The Harris/Dudley report was provided to Mr. Dail.
41. Mr. Dail read the report, including the recommendation that he and Assistant Superintendent Jacobs lead “team building” in the mental health section and that he and Mr. Jacobs “must assist Ms. Tucker with the development of her supervisory skills and her interaction with her staff.”
42. Superintendent Dail testified that he, in fact, took this as a recommendation.
43. However, Mr. Dail then recommended up the chain of command that Ms. Tucker be demoted and transferred out of Craven Correctional Institution.
44. Mr. Dail testified that he believed this action was an implementation of the Harris/Dudley recommendation and was in Petitioner’s interest.
45. While serving in the position of Correctional Psychological Services Coordinator at Craven Correctional Institution, Petitioner was paid for hours on-call in addition to her annual base salary.
46. Petitioner was on-call on a regular basis.
47. Petitioner’s on-call pay was a significant component of her total compensation.
48. Unacceptable personal conduct is defined as:
 - a. Conduct for which no reasonable person should expect to receive prior warning;
 - b. Job related conduct which constitutes a violation of state or federal law;
 - c. Conviction of a felony or an offense involving moral turpitude that is detrimental to or impacts an employee’s service to the state;
 - d. The willful violation of known or written work rules;
 - e. Conduct unbecoming a state employee that is detrimental to state service;
 - f. The abuse of a clients, patients, students or a person over whom the employee has a charge or to whom the employee has a responsibility or an animal owned by the state;
 - g. Absence from work after all authorized leave credits and benefits have been exhausted; or
 - h. Falsification of a state application or an employment documentation.

25 NCAP 1J.0614(8).

Based on Respondent’s Exhibit 1, its Notice to Petitioner of her demotion, Respondent only could be proceeding under subsections a, d, e, and/or h.

49. Petitioner’s counsel has indicated that Petitioner will file an application for an award of attorney’s fees and costs in this case but will not have that application and supporting

affidavits filed in the Office of Administrative Hearings by the end of the day on January 8, 2014. As of the end of the business day on January 8, 2014, the Undersigned Administrative Law Judge will resign from the position of ALJ to be sworn in as a Special Superior Court Judge on January 9, 2014. The presiding ALJ will enter an Order for attorney's fees and costs in this case based upon personal, extensive experience and knowledge as to justifiable awards in the area of State employment law litigation in the Office of Administrative Hearings. Petitioner's Application and Affidavits will be appended to, and become a part of, this decision when they are filed to demonstrate a factual basis beyond the Undersigned's determination based upon 28 years of experience.

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.
2. Petitioner was a "career State employee" at the time of her demotion and transfer, as that phrase is defined in G.S. 126-1.1.
3. The conduct of Petitioner proved at the hearing by a preponderance of the credible evidence did not constitute conduct falling within any of those subsections discussed in Finding of Fact 48 and did not otherwise constitute just cause.
4. Therefore, Respondent did not have just cause to demote Petitioner from the position of Correctional Psychological Services Coordinator at Craven Correctional Institution, pay grade 77, to Staff Psychologist II at Greene Correctional Institution, pay grade 73.
5. Were the Undersigned to find that such conduct did amount to unacceptable personal conduct, the Undersigned would nonetheless conclude that such conduct, as demonstrated by the evidence in this case, did not give Respondent just cause to demote Petitioner.
6. Based upon the evidence and the experience of the presiding Administrative Law Judge, I find that Petitioner is entitled to \$3,000 in costs and \$20,000 in attorney's fees from this two (2) day hearing.

On the basis of the above Findings of Fact and Conclusions of Law, the Undersigned issues the following:

FINAL DECISION

The use of the term "shall" in this Final Decision is a mandatory term and not a directory term. The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Findings of Fact and Conclusions of Law cited above and that the Findings of Fact properly and sufficiently support the Conclusions of Law. The Undersigned enters this 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 proved facts in this case, the Undersigned holds that Respondent has failed to carry its burden of proof by a greater weight of the evidence that there was just cause to demote Petitioner from her position as Correctional Psychological Services Coordinator at Craven Correctional Institution, pay grade 77, to Staff Psychologist II, pay grade 73, at Greene Correctional Institution.

Petitioner is entitled to be reinstated, effectively immediately, to the position of Correctional Psychological Services Coordinator, pay grade 77. She is entitled to an award of back pay, including on-call pay at a rate based on her actual on-call pay during the 12 months prior to her demotion. The award of back pay should include any difference in contributions into the state retirement system, and any and all other benefits Petitioner would have obtained had she not been demoted. In addition, Respondent shall pay Petitioner mileage reimbursement at the State's rate(s) in effect during the period Petitioner was assigned to Greene Correctional Institution, but such additional reimbursement shall not be paid for the number of weeks of vacation leave Petitioner has accrued during the time she has been assigned to Greene Correctional Institution. Should Respondent decline to reassign Petitioner to Craven Correctional Institution, Respondent shall pay Petitioner additional compensation in the form of mileage at the State's rate(s) for any distance such re-assignment adds to Petitioner's commute in comparison to her commute to Craven Correctional Institution.

Petitioner shall be reimbursed her reasonable attorney's fees and costs as follows:

1. Costs: \$3,000
2. Attorney's Fees: \$20,000

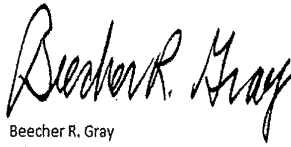
NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

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 the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **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 8th day of January, 2014.



Beecher R. Gray
Administrative Law Judge

Hollowell, Anne M

From: Glenn A. Barfield <barfield@hbhklaw.com>
Sent: Thursday, January 09, 2014 4:15 PM
To: Hollowell, Anne M
Cc: 'Finarelli, Joseph'
Subject: request for fees/costs
Attachments: Application for Attorney's fees and costs.doc.pdf; Lawrence affidavit.pdf; Jarrett affidavit.pdf; Affidavit Barfield.pdf; Costs.pdf; Timesheet.pdf

Please find attached Petitioner's Application for Attorneys Fees and costs, together with supporting affidavits and records.

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 OSP 06310

COUNTY OF WAYNE

Carrie J. Tucker,)	
Petitioner,)	
)	
v.)	APPLICATION FOR
)	ATTORNEY'S FEES
)	AND COSTS
North Carolina Department of Public Safety,)	
Respondent.)	

NOW COME Petitioner and counsel for Petitioner requesting that the Administrative Law Judge determine and order payment of Petitioner's reasonable attorney fees, and her reasonable costs incurred in prosecution of this contested case. In support of this application, Petitioner and counsel show unto the ALJ as follows:

1. On March 16, 2012, Respondent demoted Petitioner to Staff Psychologist II, pay grade 73, and transferred Petitioner to Green Correctional Institution, on the ground that Petitioner had engaged in unacceptable personal conduct.
2. Petitioner timely filed her petition for this contested case.
3. A hearing was held before Administrative Law Judge Beecher R. Gray on May 10 and May 15, 2013.
4. On January 9, 2014 Judge Gray entered a Final Decision finding and concluding that Respondent had not proved that just cause existed for Petitioner's demotion and transfer.
5. The Final Decision included an order requiring Respondent to pay the Petitioner's reasonable attorneys fees and costs.
6. Attached to this Application is the Affidavit of undersigned counsel for the

Petitioner stating his experience, and his customary and usual rates; attached thereto is a timesheet showing the time undersigned counsel spent in the prosecution of this contested case; also attached is true copy of the retainer agreement with Petitioner. Petitioner does not seek an award reimbursing the portion of the retainer fee representing a "true retainer", but seeks only the fees associated with the time actually spent by undersigned counsel in prosecution of this contested case.

7. Petitioner has not included any staff time, nor mileage.

8. Also attached to Affidavit of undersigned counsel is a schedule of costs actually incurred by Petitioner in the prosecution of this action.

Respectfully submitted this the 8th day of January, 2014.

HAITHCOCK, BARFIELD, HULSE & KINSEY, PLLC

By: 

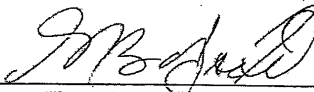
Glenn A. Barfield
State Bar No. 13770
Post Office Drawer 7
Goldsboro, NC 27533-0007
Telephone: 919-735-6420
Facsimile: 919-734-6296
E-mail: barfield@hbhklaw.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing APPLICATION FOR
ATTORNEYS FEES AND COSTS on counsel of record by depositing a copy in the United
States mail, first-class postage prepaid, addressed as follows:

Lisa Y. Harper
Joseph Finarelli
N.C. Department of Justice
PO Box 629
Raleigh, North Carolina 27602-0629

This the 9th day of January, 2014


Glenn A. Barfield

STATE OF NORTH CAROLINA.

WAYNE COUNTY

AFFIDAVIT OF RONALD T. LAWRENCE II

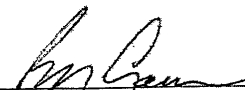
I, Ronald T. Lawrence II, being first duly sworn, depose and say as follows:

1. I am an attorney licensed to practice law in the State of North Carolina and have been continuously licensed in the State of North Carolina since 1995.
2. The majority of my practice has been in the field of civil litigation.
3. I am familiar with the range of usual and normal hourly rates charged by experienced civil litigators representing parties in the Wayne County area.
4. I am aware that Mr. Barfield frequently litigates on behalf of state employees in the Office of Administrative Hearings; I am aware of few if any other Wayne County lawyers practicing extensively in OAH.
6. For a lawyer with Mr. Barfield's experience (27 years) and reputation, the rate of \$250.00 per hour is within a range of hourly rates usually and customarily charged by such experienced attorneys in this area.
7. I have litigated a number of cases with Mr. Barfield, both as co-counsel and as opposing counsel.
8. Mr. Barfield is an experienced and competent civil litigator and I am aware that he is well regarded by other members of the Bar with regard to his integrity and skill in the practice

of civil litigation, including particularly employment related litigation.

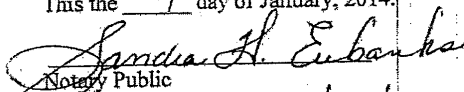
Further the Affiant sayeth naught.

This the 9 day of January, 2014.


Ronald T. Lawrence II

Before me, Sandra H. Eubanks a Notary Public in and for said State and Country,
appeared Ronald T. Lawrence II, and he executed the foregoing Affidavit.

This the 9 day of January, 2014.


Notary Public

My commission expires: 6/30/14



STATE OF NORTH CAROLINA

WAYNE COUNTY

AFFIDAVIT OF TOMMY JARRETT

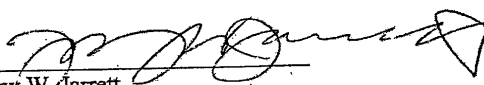
I, Tommy W. Jarrett, being first duly sworn, depose and say as follows:

1. I am an attorney licensed to practice law in the State of North Carolina and have been continuously licensed in the State of North Carolina since 1967 during which time I have served term as the President of the North Carolina State Bar.
2. The majority of my practice has been in the field of civil litigation.
3. I am familiar with the range of usual and normal hourly rates charged by experienced civil litigators representing parties in the Wayne County area.
4. I am aware that Mr. Barfield frequently litigates on behalf of state employees in the Office of Administrative Hearings; I am aware of few if any other Wayne County lawyers practicing extensively in OAH.
6. For a lawyer with Mr. Barfield's experience (27 years) and reputation, the rate of \$250.00 per hour is within a range of hourly rates usually and customarily charged by such experienced attorneys in this area.
7. I have litigated a number of cases with Mr. Barfield, both as co-counsel and as opposing counsel.
8. Mr. Barfield is an experienced and competent civil litigator and I am aware that he is well regarded by other members of the Bar with regard to his integrity and skill in the practice

of civil litigation, including particularly employment related litigation.

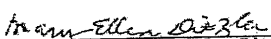
Further the Affiant sayeth naught.

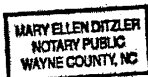
This the 9th day of January, 2014.


Tommy W. Jarrett

Before me, Mary Ellen Ditzler, a Notary Public in and for said State and Country,
appeared Tommy W. Jarrett, and he executed the foregoing Affidavit.

This the 9th day of January, 2014.


Notary Public Mary Ellen Ditzler



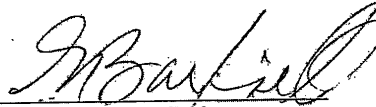
My commission expires: 02/20/18

5. With regards to my experience, I state the following:

- a. I was admitted to practice law in the State of North Carolina in 1986 and have been continuously licensed since that time.
- b. I was admitted to practice in the United States District Court for the Eastern District of North Carolina in 1990, and have been continuously licensed in that forum since that time.
- c. I was admitted to practice before the Fourth Circuit Court of Appeals in 1991, and have been continuously licensed in that forum since that time.
- d. Since my admission to practice in 1986, the majority of my practice has always been in litigation.
- e. Although my criminal practice has been very limited for the last 6 or 7 years, during that time I have been designated by the Capital Defender as qualified to be lead counsel in capital murder litigation, and in fact have served as counsel in such cases on many occasions.
- f. The great majority of my practice during the last 7 or 8 years has been civil litigation, in all areas except family law.
- g. I have represented a number of other State employees in contested cases, seeking relief from adverse employment decisions.
- h. Among these were at least 15 career state employees in similar contested cases.

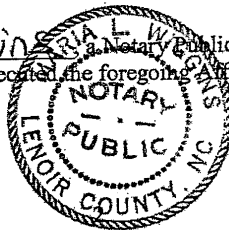
Further the Affiant sayeth naught.

This the 9th day of January, 2014.


Glenn A. Barfield

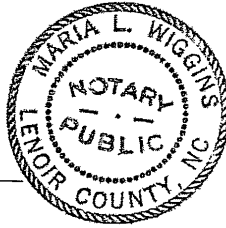
Before me, Maria L. Wiggins, Notary Public in and for said State and Country, appeared Glenn A. Barfield, and he executed the foregoing Affidavit.

This the 9 day of January, 2014.



Maria L. Wiggins
Notary Public

My commission expires: 4-7-18



Glenn A. Barfield

DATE September 20, 2013

Date	ITEM #	DESCRIPTION	CHARGES	CREDITS	BALANCE
13-Jul-12		Office of Administrative Hearings - Filing Fee	\$ 20.00		\$ 20.00
8-May-13		Carolina Court Reporters	1,121.25		1,141.25
8-May-13		Carolina Court Reporters	609.25		1,750.50
15-Apr-13		Joy A. Heath - Court Reporter	541.70		2,292.20
3-Sep-13		NC-OAH - Transcript of Hearing	4.50		
			\$ 2,296.70	\$ -	
TOTAL					\$ 2,296.70

Make all checks payable to Haithcock, Barfield, Hulse & Kinsey

THANK YOU !



Carolina Court Reporters, Inc.

252-355-4700
800-849-8448
FAX 252-355-4707
E-mail: depo@carolinacourtreporters.com
Web page: http://www.carolinacourtreporters.com

DATE: 04/10/13

INVOICE NUMBER: 24099.GHP

FEDERAL TAX I.D. 56-1784912

TO: MR. GLENN BARFIELD
HAITHCOCK, BARFIELD, HULSE & KINSEY, PLLC
231 EAST WALNUT STREET
GOLDSBORO, NORTH CAROLINA 27530

DEPONENT(S): BELINDA DUDLEY; WAYNE HARRIS

CASE: CARRIE J. TUCKER VS. N.C. DEPARTMENT OF PUBLIC SAFETY

CASE NUMBER: 12-OSP-06310 WAYNE COUNTY

DATE: MARCH 13, 2013

LOCATION: GREENVILLE, NORTH CAROLINA

DELIVERY: REGULAR: XXX EXPEDITE:

APPEARANCE FEE: \$ 150.00

ORIGINAL/COPY: 221 AT \$ 4.25 PER PAGE \$ 939.25

COPIES: AT \$ 2.25 PER PAGE \$.

EXHIBITS: NONE AT \$ 0.40 PER PAGE \$.

READ & SIGN: (TO MS. LISA Y. HARPER) \$ 20.00

VIDEO RECORDING FEE: HRS. & MINS. \$.

VIDEO COPY: HRS. & MINS. \$.

VIDEO TEXT SYNC: HRS. & MINS. \$.

DVD: \$.

S&H: \$ 12.00

TOTAL AMOUNT DUE: \$1,121.25

PLEASE INCLUDE OUR INVOICE NUMBER ON YOUR CHECK.
**ALL TAPES ARE ERASED AFTER NINETY (90) DAYS UNLESS OTHERWISE
REQUESTED WITHIN TEN (10) DAYS OF THE DATE OF THIS INVOICE**SPO

105 Oakmont Professional Plaza • Greenville, North Carolina 27858



Carolina Court Reporters, Inc.

252-355-4700
800-849-8448
FAX 252-355-4707
E-mail: depo@carolinacourtreporters.com
Web page: http://www.carolinacourtreporters.com

DATE: 04/15/13

INVOICE NUMBER: 24104.GHP

FEDERAL TAX I.D. 56-1784912

TO: MR. GLENN BARFIELD
HAITHCOCK, BARFIELD, HULSE & KINSEY, PLLC
231 EAST WALNUT STREET
GOLDSBORO, NORTH CAROLINA 27530

DEPONENT(S): JOAN IRVINE; MISTY HARDISON

CASE: CARRIE J. TUCKER VS. N.C. DEPARTMENT OF PUBLIC SAFETY

CASE NUMBER: 12-OSP-06310 WAYNE COUNTY

DATE: MARCH 14, 2013

LOCATION: GREENVILLE, NORTH CAROLINA

DELIVERY: REGULAR: XXX EXPEDITE:

APPEARANCE FEE: \$ 75.00

ORIGINAL/COPY: 121 AT \$ 4.25 PER PAGE \$ 514.25

COPIES: AT \$ 2.25 PER PAGE \$.

EXHIBITS: NONE AT \$ 0.40 PER PAGE \$.

READ & SIGN: (TO MS. LISA Y. HARPER) \$ 20.00

VIDEO RECORDING FEE: HRS. & MINS. \$.

VIDEO COPY: HRS. & MINS. \$.

VIDEO TEXT SYNC: HRS. & MINS. \$.

DVD: \$.

S&H: PREVIOUSLY BILLED \$.

TOTAL AMOUNT DUE: \$ 609.25

PLEASE INCLUDE OUR INVOICE NUMBER ON YOUR CHECK.
**ALL TAPES ARE ERASED AFTER NINETY (90) DAYS UNLESS OTHERWISE
REQUESTED WITHIN TEN (10) DAYS OF THE DATE OF THIS INVOICE**SPO

105 Oakmont Professional Plaza • Greenville, North Carolina 27858

Joy A. Heath
Court Reporter
4342 Davis Hardy Road
Kinston, NC 28504
(252) 569-7311

Mr. Glenn A. Barfield
Haithcock, Barfield, Hulse & Kinsey
P. O. Box 7
Goldsboro, NC 27533

Date: April 15, 2013

RE: CARRIE J. TUCKER VS. NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY
FILE NO. 12 OSP 06310 - WAYNE COUNTY

Deposition of LARRY DAIL

Original and one regular copy - 70 pages @ 4.45
Index

\$311.50
n/c

Deposition of DANNY SAFRIT

Original and one regular copy - 36 pages @ 4.45
Index

160.20
n/c

Appearance fee

70.00

TOTAL AMOUNT DUE

\$541.70

EIN 45-3761505

State of North Carolina
Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
Phone: (919) 431 - 3000
Fax: (919) 431 - 3100
Federal Id # 56-1527 030

INVOICE

RECEIVED BY	INVOICE DATE	INVOICE NUMBER
Lynette McGaughey	8/28/2013	14749

BILL TO:

MAIL TO:

Halithcock, Barfield, Husle & Kinsey
 PO Drawer 7
 Goldsboro NC 27533-0007

Glenn A Barfield ph: 919735-6420
 PO Drawer 7
 231E, Walnut St
 Goldsboro NC 27533-0007

ITEM	DESCRIPTION	
12osp06310 & 12osp 02255	11 Tapes @ .50 per tape <i>TUCKER</i> <i>9 TAPES</i>	5.50
	Subtotal	0.37
	6.75% Tax	
	Total	5.87

Return one copy of this invoice with your check made payable to:

OFFICE OF ADMINISTRATIVE HEARINGS
 6714 MAIL SERVICE CENTER
 RALEIGH, NC 27699-6714
 within 30 days of the invoice date

		RECEIVED BY	INVOICE DATE	INVOICE NUMBER
		Lynette McGaughey	8/28/2013	14749

MAIL TO:

Glenn A Barfield ph: 919735-6420
PO Drawer 7
231E. Walnut St
Goldsboro NC 27533-0007.

Return one copy of this invoice with your check made payable to:

OFFICE OF ADMINISTRATIVE HEARINGS
6714 MAIL SERVICE CENTER
RALEIGH, NC 27699-6714
within 30 days of the invoice date

HAITHCOCK, BARFIELD, HULSE & KINSEY, PLLC
231 E. WALNUT ST., P. O. DRAWER 7
GOLDSBORO, N.C. 27533-0007
Telephone: 919-735-6420
Fax: 919-734-6296

BARFIELD

To: Carrie J. Tucker
 311 N. Charlotte St.
 Washington, NC 27889

Re: Carrie J. Tucker v. NC Dept. of Public Safety

DATE	DESCRIPTION	NUMBER OF HOURS
05-31-12	Review Notice regarding final appeal decision; email t/f CJ Tucker regarding same.	0.4
07-09-12	Review file; draft and review petition; draft attachment to petition.	0.9
07-10-12	Editing and finalizing petition and attachments; direct filing and service of same.	0.5
08-16-12	Review DOC Pre-Hearing Statement; review file and documents; prepare Pre-Hearing Statement.	2.4
08-20-12	Review emails and documents provided by CJ Tucker.	0.3
09-26-12	Review materials provided to CJ Tucker at ERC hearing, including documents related to prior complaint; review policies including UWH and PC policy; review witness statements and investigative reports; draft initial discovery and draft planning memo.	3.9
10-01-12	Meet with CJ Tucker regarding Respondent's discovery; review responses to Request for Admissions.	0.3

Re: **Carrie J. Tucker v. NC Dept. of Public Safety**

DATE	DESCRIPTION	NUMBER OF HOURS
10-09-12	Emails t/f L. Long, V. Bullock and Attorney General regarding rescheduling settlement conference; email to CJ Tucker regarding same;	0.2
	Revisions to written discovery.	0.2
10-18-12	To Raleigh; mediation; return to Goldsboro.	5.1
10-23-12	Additional revisions to Plaintiff's first discovery to Respondent; instruct to L. Long regarding service of same.	0.6
10-31-12	Email from L. Harper regarding schedule and discovery; review pleadings regarding same; reply to L. Harper.	0.2
11-01-12	Emails t/f L. Harper regarding extensions of time.	0.2
11-06-12	Email from C. Tucker with additional information.	0.2
01-04-13	Review draft discovery responses; review DPS responses to plaintiff's discovery; dictate notes and plans for addressing certain issues.	6.1
01-07-13	Revise draft discovery responses; instruct L. Long regarding meeting with CJ Tucker; long email to CJ Tucker.	3.9
01-08-13	Editing discovery responses.	0.5
	Email from CJ Tucker regarding TAPS; reply.	0.2
01-09-13	Review/edit discovery responses.	0.4
01-10-13	Additional edits; meet with CJ Tucker; finalize responses.	4.1
01-16-13	Review docket notice; email to L. Harper regarding depositions.	0.2
01-29-13	Email t/f L. Harper regarding discovery schedule.	0.3

Re: Carrie J. Tucker v. NC Dept. of Public Safety

DATE	DESCRIPTION	NUMBER OF HOURS
03-12-13	Prepare for depositions.	5.4
03-13-13	To Greenville; conduct depositions; return.	8.5
03-14-13	Prepare for M. Hardison and J. Irvine depositions; to Greenville; conduct depositions; return.	4.9
04-05-13	To Greenville; depositions of L. Dail and D. Safrit; return.	4.5
04-08-13	Email from L. Harper with proposed motion and order; review and reply.	0.2
04-09-13	Emails t/f L. Harper regarding continuance.	0.2
04-11-13	Review settlement offer and consider deposition testimony in evaluation of same.	0.3
04-29-13	Emails t/f ALJ, attorney, client regarding rescheduling hearing.	0.4
	Telephone call to E. Reddick.	0.2
05-08-13	Prepare for meeting with CJ Tucker for trial preparation.	3.5
05-09-13	Preparation for hearing.	1.7
05-10-13	Prepare for and attend hearing.	8.3
05-13-13	Review CJ Tucker's notes and prepare for CJ examination; email to CJ regarding same.	0.2
05-15-13	Continue with hearing; prepare with CJ Tucker over break; finish hearing; meet with CJ Tucker regarding results and next steps in process.	8.7
06-04-13	Emails t/f L. Harper regarding DPS decision regarding appeal.	0.2
06-05-13	Email to CJ Tucker regarding DPS decision and offer.	0.1

Re: Carrie J. Tucker v. NC Dept. of Public Safety

DATE	DESCRIPTION	NUMBER OF HOURS
06-06-13	Prepare time sheet; email to L. Harper regarding counter offer on fees/costs; email to CJ Tucker regarding same.	0.4
06-07-13	Emails t/f L. Harper regarding appeal and settlement negotiations.	0.4
06-12-13	Telephone call to L. Harper regarding status of decision regarding appeal; email to CJ Tucker regarding status.	0.2
06-19-13	Email from L. Harper regarding settlement; email reply; email to CJ Tucker regarding same.	0.2
06-20-13	Email from CJ Tucker regarding settlement terms; review relevant DPS policies; reply.	0.5
07-16-13	Review notice of appearance by J. Finarelli; email t/f CJ Tucker regarding status of negotiations.	0.3
07-06-13	Review email between G. Barfield and L. Harper regarding appeal, fees and settlement v. entry of order; review statutes and regulations on back pay; review state personnel provisions on salaries; legal research regarding same; long email to J. Finarelli regarding case, settlement possibilities, and extent of back pay to be awarded.	2.2 0.2
08-19-13	Additional emails t/f J. Finarelli. Email to J. Finarelli.	0.2
08-20-13	Email to CJ Tucker.	0.2
08-26-13	Email from J. Finarelli regarding appeal and reimbursement issues; reply.	0.2
09-19-13	Email from J. Finarelli.	0.2
09-20-13	Email from J. Finarelli with offer; reply; additional emails t/f CJ Tucker and J. Finarelli all regarding settlement.	0.5

Re: Carrie J. Tucker v. NC Dept. of Public Safety

DATE	DESCRIPTION	NUMBER OF HOURS
11-13-13	Emails t/f CJ Tucker regarding settlement offer; email to J. Finarelli regarding same.	0.2
11-14-13	Email from J. Finarelli with revised offer; review; email to CJ Tucker regarding same.	0.7
11-15-13	Email from CJ Tucker; research regarding reinstatement and transfer rule; email to CJ Tucker regarding same; email to J. Finarelli.	1.1
11-27-13	Email from CJ Tucker with policies; review; email to CJ Tucker; telephone call to J. Finarelli; Telephone call to CJ Tucker.	0.8
	Additional email t/f J. Finarelli regarding terms.	0.1
12-03-13	Emails from CJ Tucker regarding settlement questions; reply; email to J. Finarelli regarding same.	0.2
12-06-13	Email from CJ Tucker regarding email inadvertently sent to her; initiate and implement steps to quarantine information and communicate with J. Finarelli regarding same; direct process to safeguard information; telephone call to state bar; telephone calls and email t/f CJ Tucker regarding same; telephone call to J. Finarelli regarding same and regarding status of settlement discussions.	2.5
12-09-13	Emails t/f J. Finarelli; email to state bar regarding misdirected communication.	0.5
12-10-13	Emails t/f state bar and J. Finarell regarding misdirected email.	0.4
12-12-13	Email from J. Finarelli with offer; research prior offers; reply.	0.2
12-13-13	Email from J. Finarelli regarding clarifying offer.	0.1

Re: **Carrie J. Tucker v. NC Dept. of Public Safety**

DATE	DESCRIPTION	NUMBER OF HOURS
12-18-13	Additional research regarding reinstatement to same location; email to CJ Tucker regarding same.	0.5
	Emails t/f J. Finarelli regarding status of offer.	0.2
12-19-13	Emails t/f CJ Tucker regarding settlement terms and placement options.	0.2
01-07-14	Begin drafting Proposed Final Decision; email to OAH	1.3
01-08-14	Continue and complete drafting Proposed Final Decision	6.8
01-09-14	Draft application for fees/costs and associated affidavits; Communicate with Lawrence and Jarrett re affidavits.	2.7
TOTAL HOURS		97.7
Glenn A. Barfield..... 102.7 hours @ \$250.00 per hour		\$24,425.00

Hollowell, Anne M

From: Glenn A. Barfield <barfield@hbhklaw.com>
Sent: Thursday, January 09, 2014 4:55 PM
To: Hollowell, Anne M
Cc: 'Finarelli, Joseph'
Subject: corrected timesheet
Attachments: CJ Tucker Bill 2.pdf

Ms. Hollowell, attached is a corrected timesheet. The bottom line is the same. When I was reviewing the bill today I found a recording error, which had added five hours. I corrected that and in the total hours at the bottom, and corrected the total fee figure, but had not corrected it in the line showing the hrs times the fee rate.

Thanks,

Glenn

HAITHCOCK, BARFIELD, HULSE & KINSEY, PLLC
 231 E. WALNUT ST., P. O. DRAWER 7
 GOLDSBORO, N.C. 27533-0007
 Telephone: 919-735-6420
 Fax: 919-734-6296

BARFIELD

To: Carrie J. Tucker
 311 N. Charlotte St.
 Washington, NC 27889

Re: Carrie J. Tucker v. NC Dept. of Public Safety

DATE	DESCRIPTION	NUMBER OF HOURS
05-31-12	Review Notice regarding final appeal decision; email t/f CJ Tucker regarding same.	0.4
07-09-12	Review file; draft and review petition; draft attachment to petition.	0.9
07-10-12	Editing and finalizing petition and attachments; direct filing and service of same.	0.5
08-16-12	Review DOC Pre-Hearing Statement; review file and documents; prepare Pre-Hearing Statement.	2.4
08-20-12	Review emails and documents provided by CJ Tucker.	0.3
09-26-12	Review materials provided to CJ Tucker at ERC hearing, including documents related to prior complaint; review policies including UWH and PC policy; review witness statements and investigative reports; draft initial discovery and draft planning memo.	3.9
10-01-12	Meet with CJ Tucker regarding Respondent's discovery; review responses to Request for Admissions.	0.3

Re: Carrie J. Tucker v. NC Dept. of Public Safety

DATE	DESCRIPTION	NUMBER OF HOURS
10-09-12	Emails t/f L. Long, V. Bullock and Attorney General regarding rescheduling settlement conference; email to CJ Tucker regarding same;	0.2
	Revisions to written discovery.	0.2
10-18-12	To Raleigh; mediation; return to Goldsboro.	5.1
10-23-12	Additional revisions to Plaintiff's first discovery to Respondent; instruct to L. Long regarding service of same.	0.6
10-31-12	Email from L. Harper regarding schedule and discovery; review pleadings regarding same; reply to L. Harper.	0.2
11-01-12	Emails t/f L. Harper regarding extensions of time.	0.2
11-06-12	Email from C. Tucker with additional information.	0.2
01-04-13	Review draft discovery responses; review DPS responses to plaintiff's discovery; dictate notes and plans for addressing certain issues.	6.1
01-07-13	Revise draft discovery responses; instruct L. Long regarding meeting with CJ Tucker; long email to CJ Tucker.	3.9
01-08-13	Editing discovery responses.	0.5
	Email from CJ Tucker regarding TAPS; reply.	0.2
01-09-13	Review/edit discovery responses.	0.4
01-10-13	Additional edits; meet with CJ Tucker; finalize responses.	4.1
01-16-13	Review docket notice; email to L. Harper regarding depositions.	0.2
01-29-13	Email t/f L. Harper regarding discovery schedule.	0.3

Re: Carrie J. Tucker v. NC Dept. of Public Safety

DATE	DESCRIPTION	NUMBER OF HOURS
03-12-13	Prepare for depositions.	5.4
03-13-13	To Greenville; conduct depositions; return.	8.5
03-14-13	Prepare for M. Hardison and J. Irvine depositions; to Greenville; conduct depositions; return.	4.9
04-05-13	To Greenville; depositions of L. Dail and D. Safrit; return.	4.5
04-08-13	Email from L. Harper with proposed motion and order; review and reply.	0.2
04-09-13	Emails t/f L. Harper regarding continuance.	0.2
04-11-13	Review settlement offer and consider deposition testimony in evaluation of same.	0.3
04-29-13	Emails t/f ALJ, attorney, client regarding rescheduling hearing.	0.4
	Telephone call to E. Reddick.	0.2
05-08-13	Prepare for meeting with CJ Tucker for trial preparation.	3.5
05-09-13	Preparation for hearing.	1.7
05-10-13	Prepare for and attend hearing.	8.3
05-13-13	Review CJ Tucker's notes and prepare for CJ examination; email to CJ regarding same.	0.2
05-15-13	Continue with hearing; prepare with CJ Tucker over break; finish hearing; meet with CJ Tucker regarding results and next steps in process.	8.7
06-04-13	Emails t/f L. Harper regarding DPS decision regarding appeal.	0.2
06-05-13	Email to CJ Tucker regarding DPS decision and offer.	0.1

Re: Carrie J. Tucker v. NC Dept. of Public Safety

DATE	DESCRIPTION	NUMBER OF HOURS
06-06-13	Prepare time sheet; email to L. Harper regarding counter offer on fees/costs; email to CJ Tucker regarding same.	0.4
06-07-13	Emails t/f L. Harper regarding appeal and settlement negotiations.	0.4
06-12-13	Telephone call to L. Harper regarding status of decision regarding appeal; email to CJ Tucker regarding status.	0.2
06-19-13	Email from L. Harper regarding settlement; email reply; email to CJ Tucker regarding same.	0.2
06-20-13	Email from CJ Tucker regarding settlement terms; review relevant DPS policies; reply.	0.5
07-16-13	Review notice of appearance by J. Finarelli; email t/f CJ Tucker regarding status of negotiations.	0.3
07-06-13	Review email between G. Barfield and L. Harper regarding appeal, fees and settlement v. entry of order; review statutes and regulations on back pay; review state personnel provisions on salaries; legal research regarding same; long email to J. Finarelli regarding case, settlement possibilities, and extent of back pay to be awarded.	2.2 0.2
08-19-13	Additional emails t/f J. Finarelli. Email to J. Finarelli.	0.2
08-20-13	Email to CJ Tucker.	0.2
08-26-13	Email from J. Finarelli regarding appeal and reimbursement issues; reply.	0.2
09-19-13	Email from J. Finarelli.	0.2
09-20-13	Email from J. Finarelli with offer; reply; additional emails t/f CJ Tucker and J. Finarelli all regarding settlement.	0.5

Re: Carrie J. Tucker v. NC Dept. of Public Safety

DATE	DESCRIPTION	NUMBER OF HOURS
11-13-13	Emails t/f CJ Tucker regarding settlement offer; email to J. Finarelli regarding same.	0.2
11-14-13	Email from J. Finarelli with revised offer; review; email to CJ Tucker regarding same.	0.7
11-15-13	Email from CJ Tucker; research regarding reinstatement and transfer rule; email to CJ Tucker regarding same; email to J. Finarelli.	1.1
11-27-13	Email from CJ Tucker with policies; review; email to CJ Tucker; telephone call to J. Finarelli; Telephone call to CJ Tucker.	0.8
	Additional email t/f J. Finarelli regarding terms.	0.1
12-03-13	Emails from CJ Tucker regarding settlement questions; reply; email to J. Finarelli regarding same.	0.2
12-06-13	Email from CJ Tucker regarding email inadvertently sent to her; initiate and implement steps to quarantine information and communicate with J. Finarelli regarding same; direct process to safeguard information; telephone call to state bar; telephone calls and email t/f CJ Tucker regarding same; telephone call to J. Finarelli regarding same and regarding status of settlement discussions.	2.5
12-09-13	Emails t/f J. Finarelli; email to state bar regarding misdirected communication.	0.5
12-10-13	Emails t/f state bar and J. Finarell regarding misdirected email.	0.4
12-12-13	Email from J. Finarelli with offer; research prior offers; reply.	0.2
12-13-13	Email from J. Finarelli regarding clarifying offer.	0.1

Re: Carrie J. Tucker v. NC Dept. of Public Safety

DATE	DESCRIPTION	NUMBER OF HOURS
12-18-13	Additional research regarding reinstatement to same location; email to CJ Tucker regarding same.	0.5
	Emails t/f J. Finarelli regarding status of offer.	0.2
12-19-13	Emails t/f CJ Tucker regarding settlement terms and placement options.	0.2
01-07-14	Begin drafting Proposed Final Decision; email to OAH	1.3
01-08-14	Continue and complete drafting Proposed Final Decision	6.8
01-09-14	Draft application for fees/costs and associated affidavits; Communicate with Lawrence and Jarrett re affidavits.	2.7
TOTAL HOURS		97.7
Glenn A. Barfield..... 97.7 hours @ \$250.00 per hour		\$24,425.00

STATE OF NORTH CAROLINA

COUNTY OF WAYNE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 OSP 08259

Shannon P. Baker,
Petitioner,

v.

North Carolina Department of Public Safety,
Respondent.

FINAL DECISION

The above-captioned case was heard before the Honorable Donald W. Overby, Administrative Law Judge, on December 11, 2013 in Goldsboro, North Carolina. Petitioner filed a proposed decision on January 24, 2014.

APPEARANCES

For Petitioner: Glenn A. Barfield
Haithcock, Barfield, Hulse & Kinsey, PLLC
PO Drawer 7
Goldsboro, North Carolina 27533-0007

For Respondent: Jodi Harrison
Assistant Attorney General
NC Department of Justice
PO Box 629
Raleigh, NC 27602-0629

EXHIBITS

Admitted for Petitioner:

Exhibit Number	Description
B-1	Probation and Parole Record for Mechelle Desalme
B-2	Mechelle Desalme's Criminal Record as Recorded in her Probation File
B-4	NCDPS Offender Public Information
C-2	Inmate Release Plan for Mechelle Desalme
E	Carolina Trucking Academy Employment Information for Mechelle Desalme

Admitted for Respondent:

Exhibit Number	Description
1	Email from Xiomara Laureano to Mike Chase, 10/12/11

2	Statement of Mechelle Desalme, 11/16/11
3	Statement of Mechelle Desalme, undated
4	The Appraisal Process (TAPS), Shannon P. Baker, 2010-2011
5	The Appraisal Process (TAPS), Shannon P. Baker, 2011-2012
6	PREA Investigation Memo, 09/16/11
9	Memo to Carla Bass from Cynthia Sutton, 09/20/11
10	OPUS Online Narrative Notes regarding Mechelle Desalme, 8/08/11 through 10/12/11
11	Section 8 of the Department of Correction Personnel Manual, "Personal Dealings With Offenders of the Department of Correction"
12	Section 6 of the Department of Correction Personnel Manual, "Appendix to Disciplinary Policy and Procedure"
13	Memo to Cornell McGill from Cynthia Sutton, 04/13/12
14	Memo to Cornell McGill to Diane Isaacs, regarding Internal Investigation, 09/30/11

WITNESSES

Called by Petitioner: Shannon P. Baker
 Charlie Gray, Jr.

Called by Respondent: Christina Glaspie
 Xiomara Laureano
 Cynthia Sutton
 Heather Bevell
 Cornell McGill

ISSUE

The sole issue for consideration is whether Respondent had just cause to dismiss Petitioner for unacceptable personal conduct.

ON THE BASIS of careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following Findings of Fact. In making these Findings, the Undersigned has weighed all the evidence and has assessed the credibility, including, but not limited to, the demeanor of the witness; any interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know, and remember the facts or occurrences about which the witness testified; whether the testimony of the witness was reasonable; and whether such testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACTS

1. The parties are properly before the Office of Administrative Hearings on a Petition pursuant to Chapter 126 of the General Statutes, and the Office of Administrative Hearings has jurisdiction over both the parties and the subject matter as such. The parties received notice of hearing more than 15 days prior to the hearing, and each stipulated on the record that notice was proper.
2. Respondent, North Carolina Department of Public Safety, is subject to Chapter 126 of the North Carolina General Statutes, and was Petitioner's employer.
3. Prior to June 1, 2012, and at all times relevant to this case, Petitioner was employed by the North Carolina Department of Public Safety as a Probation Parole Officer II in District 8, Wayne County, North Carolina. (R. Ex. 4, 5.)
4. As of June 1, 2012 Petitioner was a career state employee as defined pursuant to G.S. 126-1.1.
5. Respondent terminated Petitioner on June 1, 2012.
6. Respondent's notice to Petitioner of his termination stated that an investigation had determined that Petitioner "engaged in undue familiarity with offender Mechelle Desalme who was an offender under your supervision. Your actions were a violation of policy and constitute unacceptable personal conduct."
7. On August 8, 2011, Petitioner was assigned the supervision of probationer Mechelle Desalme ("Desalme"), a new probationer. (Desalme Deposition ["Dep."] 56; R. Ex. 10.)
8. In August 2011, Ms. Desalme met with Petitioner at the probation office. During this visit Ms. Desalme leaned over Petitioner's desk to view a calendar, apparently exposing cleavage. Petitioner properly advised Ms. Desalme that she should dress appropriately and not be revealing in her attire. (Dep. 62, 70; Dep. Ex. 4.) Both Petitioner and Ms. Desalme confirm this conversation.
9. On September 16, 2011, Petitioner was administratively reassigned. His probation caseload was reassigned to other probation officers. (Transcript ["Tr."] 73.) Due to this reassignment, Petitioner was only Ms. Desalme's probation officer for five weeks, from August 8, 2011, to September 16, 2011. (Tr. 73.)
10. On October 12, 2011, Ms. Desalme met with probation officer Xiomara Laureano ("Laureano"). During this meeting, Ms. Desalme told Ms. Laureano that she would like to have a different probation officer assigned. When pressed as to why she wanted a different officer, it is reported that Ms. Desalme stated that she was not

comfortable having Petitioner as her probation officer because he had made inappropriate advances towards her. Ms. Laureano relayed Ms. Desalme's statement to Ms. Laureano's supervisor, Mike Chase. (R. Ex 2, 8; "Dep." 86-87; Tr. 45.)

11. On November 16, 2011, Judicial District Manager Cynthia Sutton ("Sutton") was assigned to investigate the matter. (R. Ex. 9; Tr. 64.) Ms. Desalme was called into the probation office and was interviewed by Ms. Sutton and Chief Probation and Parole Officer Heather Bevell ("Bevell"). (R. Ex. 9; Dep. 88.) During this meeting, Ms. Desalme disclosed that on August 26, 2011, during a visit to her home, Petitioner had pressured her for sex and masturbated over her buttocks. (Dep. 82-85; Dep. Ex. 4, 5; R. Ex. 2, 9.)
12. District Manager Ms. Sutton found Ms. Desalme to be credible in her version of events and Petitioner not to be credible. (Tr. 77-80.) Ms. Bevell likewise believed Ms. Desalme but did not believe Petitioner. (Tr. 123-124.) Both felt that Ms. Desalme had been consistent in her recitation of the events.
13. Both Ms. Sutton and Ms. Bevell felt that Petitioner had not been consistent; however, when pressed the lack of consistency was the fact that Petitioner's version of the facts did not match Ms. Desalme's. Petitioner has steadfastly denied the allegations and has consistently told the same version of events, up to and including his testimony in court.
14. Ms. Sutton contends that Petitioner was less than consistent because he did not make detailed narratives of his home visits and he had failed to properly document such visits. Petitioner had been counseled before for failing to document. Petitioner contends that he cannot type or types very poorly. Ms. Sutton acknowledges that failing to document is a very common problem with probation officers across the entire state, not something unique to Petitioner.
15. Ms. Sutton contends that Petitioner should have offered something to refute Ms. Desalme's story. He steadfastly denied the allegations from the outset. He did make the statement that he "would not take a felony for Alicia Keys much less Desalme." He offered that Ms. Desalme should be able to describe his anatomy. Rhetorically, what else could he do to refute her story?
16. Petitioner was criticized for not interrupting Ms. Sutton as she was telling him of the allegations. Ms. Sutton was the Judicial District Manager, at least two steps his superior. Common sense and respect would seem to dictate that one would not interrupt such a superior while he or she are talking, even if relating something with which you may disagree.
17. Ms. Bevell and Ms. Sutton chose to believe Ms. Desalme over Petitioner but not because he was less than consistent in his version of events.

18. Ms. Sutton stated that the allegations were reported to the local District Attorney's Office. Despite the serious nature of the allegations there was no evidence that any criminal investigation of the incident or of Mr. Baker was ever initiated, and Mr. Baker was never interviewed by any law enforcement officer, other than by his supervisors in the probation and parole division.
19. The hearing of this contested case was originally set for Tuesday, August 27, 2013. Prior to the scheduled August 27, 2013 hearing date, Respondent arranged for Ms. Desalme to travel to North Carolina for the purpose of testifying at the hearing.
20. Ms. Desalme's itinerary as arranged by Respondent was attached to Respondent's motion to continue the hearing from August 27, 2013, which indicates that Respondent had arranged and paid for Ms. Desalme's travel to North Carolina on August 26, 2013, and for her return to Texas on August 27, 2013.
21. Late on Friday, August 23, 2013, Ms. Desalme contacted counsel for Respondent and represented to her that Ms. Desalme's father was gravely ill in Texas and that Ms. Desalme was traveling that night to be with him. Some evidence tends to indicate that she was already in Texas and had been staying there for some time. It is uncontroverted that she was in Texas in May 2013.
22. Ms. Desalme contacted Respondent's counsel again on Sunday, August 25, 2013, and represented to her that Ms. Desalme's father was terminally ill, had executed a "Do Not Resuscitate" order, and was not expected to live.
23. Consequently Respondent filed a motion to continue the hearing from August 27, 2013.
24. The Undersigned Administrative Law Judge required Respondent to produce from Ms. Desalme some documentary evidence supporting her statements regarding her father's terminally ill condition.
25. On August 26, 2013, Respondent's counsel spoke with Ms. Desalme who informed her that Ms. Desalme's father was to see a doctor at 2:00 PM central time and that Ms. Desalme would provide "a note from the doctor as soon as she receives it".
26. Later on Monday, August 26, 2013, the Undersigned Administrative Law Judge agreed to continue the case from its hearing date of August 27, 2013, "conditioned on OAH receiving something in written form from the doctor that her father is gravely ill or terminally ill." As stated in the email communication from this Tribunal, failure to provide that information would mean that Ms. Desalme's testimony would not be allowed.
27. Still later on the same day of August 26, 2013, Petitioner's counsel received from Ms. Desalme a note appearing to be from a medical provider in San Antonio Texas, stating that Ms. Desalme had been her father's "ride to physician office after ER visit."

Providing transportation to a doctor's office is hardly documentation that her father is "gravely ill or terminally ill."

28. The Undersigned Administrative Law Judge deemed this note to be insufficient to show that Ms. Desalme's father was gravely ill or terminally ill. In order to be fair with Respondent's counsel who had made such diligent efforts, the Undersigned gave her until the end of the week to produce the documentation. It was communicated again that failure to produce was grounds for not allowing Ms. Desalme's testimony.
29. Ms. Desalme had represented to Respondent's counsel that a "Do Not Resuscitate" order had been signed by her father, but no such order was ever provided to Respondent's counsel or to the court.
30. The hearing of this contested case was rescheduled for 9:00 AM, December 11, 2013.
31. Respondent's counsel diligently made concerted attempts to communicate with Ms. Desalme regarding her attendance at the hearing, but Ms. Desalme did not return her calls and Ms. Desalme did not appear at the hearing.
32. Ms. Desalme's probation records show that, approximately one year prior to claiming to Respondent's counsel that her father was terminally ill on the verge of death, Ms. Desalme had made repeated claims of a similar nature to her probation officers in support of her several requests to be allowed to travel to the State of Texas, which requests were granted. However it does not appear that Ms. Desalme ever documented her father's condition to her probation officers.
33. Ms. Desalme was deposed in this case on May 24, 2013. Desalme had apparently moved to Texas. Although the Undersigned had stated unequivocally that Ms. Desalme's testimony would not be allowed if the conditions of the continuance were not met, the Undersigned admitted her deposition into evidence due to her unavailability giving due regard to the circumstances as set forth above in determining the weight to be given and deemed appropriate to the deposition.
34. At the time of Ms. Desalme's deposition on May 24, 2013, and on and immediately prior to the first date for hearing on August 27, 2013, and on and immediately preceding the commencement of the hearing of this contested case on December 11, 2013, Ms. Desalme was residing in the State of Texas.
35. Ms. Desalme traveled to North Carolina and appeared for her deposition on May 24, 2013, with her travel and lodging expenses having been paid by Respondent and/or Petitioner.
36. Petitioner through counsel had proper notice of the deposition and Petitioner's counsel questioned Ms. Desalme during the course of the deposition regarding her allegations against Petitioner.

37. During Ms. Desalme's deposition, she testified that the Petitioner, her probation officer, had come to her home on August 26, 2011, and at some time over the course of several hours Petitioner forced himself upon her, ultimately kissing her bottom and masturbating in her presence, while his service weapon was at his feet.
38. Ms. Desalme did not report this incident to any authority at that time, but at some later time made a statement to a different probation officer, Xiomara Laureano, wondering if Mr. Baker had gotten into trouble. It was only upon further questioning from Laureano and Sutton that Ms. Desalme recounted her claims of sexual assault and battery.
39. The only evidence of the alleged sexual assault was the deposition testimony of Ms. Desalme.
40. Ms. Desalme's allegations of sexual assault were the only basis for Respondent's determination that the Petitioner had engaged in unacceptable personal conduct.
41. During Ms. Desalme's deposition, she testified to being sexually assaulted by her employer, Charlie Gray, while she was on work release. Prior to her deposition, Ms. Desalme had not reported these alleged assaults to any authority.
42. Ms. Desalme testified that these sexual assaults took place in Mr. Gray's office at Carolina Trucking Academy.
43. Mr. Gray appeared at the hearing, and testified under oath.
44. The Undersigned Administrative Law Judge was able to see and hear Mr. Gray's testimony and observe his demeanor.
45. Mr. Gray denied all of Ms. Desalme's accusations of sexual assault, and further testified that his office at Carolina Trucking Academy is just inside the entrance to the building, and that there is a large window looking from the hallway into his office, through which any person entering or exiting the building could easily see any activity occurring in his office.
46. Mr. Gray went to great lengths to try to help Ms. Desalme. The Court finds Mr. Gray to be credible. Ms. Desalme's claim that Mr. Gray assaulted her is not credible.
47. Petitioner Shannon Baker testified under oath at the hearing. The Undersigned Administrative Law Judge was able to see and hear his testimony and to observe his demeanor.
48. Petitioner denied Ms. Desalme's allegations and recounted his home visit at her residence on the day in question. Petitioner's testimony at hearing was consistent with his previous statements when interviewed regarding the allegations. The Court finds Petitioner to be credible.

49. Ms. Desalme's inability or refusal to provide the requested documentation in support of her claims to Respondent's counsel that her father was gravely or terminally ill, her having used the exact same excuse approximately a year before without providing documentation to the probation office, and her later refusal to communicate with Respondent's counsel, and other matters of record indicate that Ms. Desalme had engaged in deception and was untrustworthy.
50. Ms. Desalme has a lengthy criminal record, and a lengthy history of serious drug abuse. These facts tend to suggest to the court additional reasons to find Ms. Desalme unreliable and to find that her deposition testimony was not credible.
51. A review of Ms. Desalme's testimony in the deposition reveals that it was rambling, disjointed and contradictory almost throughout the entire deposition questioning. Oftentimes her answers were contradictory; sometimes within the same rambling statement, sometimes within minutes. She admitted that she was still smoking crack while on probation although how much was very subject to change from moment to moment. She admitted that she was still prostituting while on probation, but that too was subject to change as to exactly what was meant by "prostituting" and whether or not her boyfriend knew. Even the recitation of the facts at issue was less than coherent and concise. Although the general description of the major events remained the same as she reported, the more particular facts were subject to change. It is difficult to understand exactly what Ms. Sutton and Ms. Nevel thought was consistent in her story since the story was not even consistent as she was relating it.
52. The Undersigned has personally either represented as a defense attorney or adjudicated as a district court judge literally hundreds of people who are substance abusers and drug addicts. It would be extraordinarily rare for someone to resort to prostitution to support a drug habit who was only an occasional user as Ms. Desalme reported in her deposition. Further, it is not uncommon for chronic substance abusers, including alcoholics, to tell his or her listener whatever the abuser thinks the listener wants to hear, and not necessarily with any regard to the truth. In this instance, the Court was not capable of observing Ms. Desalme in court and under oath in order to assess her truthfulness.
53. Two facts that did remain constant was Ms. Desalme stating that she just wanted another probation officer and that she did not want to get Petitioner into trouble, which could be interpreted to mean, among other things, that she really did not expect her story to have gathered so much momentum.
54. Ms. Desalme also stated that she was very aware of the form probationer's sign concerning the boundaries between probation officers and probationers, that she has signed several such forms and that she very easily could have reported these allegations.
55. Ms. Desalme is not credible.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case per Chapter § 126 and § 150B of the North Carolina General Statutes. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.
2. At the time of his discharge, Petitioner was a career State employee subject to the provisions of the State Personnel Act, N.C. Gen. Stat. § 126-1 et. seq. Petitioner, therefore, could only “be warned, demoted, suspended or dismissed by” Respondent “for just cause.” 25 NCAC 01J .0604(a). The burden of showing “just cause” for discharge rests with the department or agency employer. N.C. Gen. Stat. §126-35(d) (2013).
3. One of the two bases for “just cause” is “unacceptable personal conduct,” 25 N.C.A.C. 01J .0604(b)(2), which includes, “the willful violation of known or written work rules” and “conduct for which no reasonable person should expect to receive prior warning,” as listed in the NCDPS *Personnel Manual*. 25 NCAC 01J .0614(8)(a) and 25 N.C.A.C. 01J .0614(8)(d); Respondent’s Exhibit [“R. Ex.”] 12.
4. The June 1, 2012, Dismissal Letter specified that Petitioner was being discharged for unacceptable personal conduct. Respondent complied with the procedural requirements for discharge for unacceptable personal conduct pursuant to 25 N.C.A.C. 01J .0608 and .0613.
5. NCDPS policy governing the personal conduct of its employees is found in the NCDPS *Personnel Manual* as Appendix C to the Disciplinary Policy and Procedures. The policy states, “All employees of the Department of Correction shall maintain personal conduct of an acceptable standard as an employee and member of the community. Violations of this policy may result in disciplinary action including dismissal without prior warning.”
6. NCDPS policy governing the personal dealings with offenders by NCDPS personnel is found in the NCDPS *Personnel Manual*, Section 8. The policy states, “All employees of the Department of Correction as described in the section entitled ‘coverage’ shall treat offenders in a quiet, but firm manner and shall refrain from inappropriate and improper contact with them.” Activities prohibited by this policy include, “Engag[ing] in sexual relations with an offender. Sexual relations includes, but is not limited to, vaginal intercourse, fondling, kissing, hugging, or any other intimate contact. Such acts are prohibited regardless of the offender’s consent to the act.” (R. Ex. 11.)
7. *N.C.D.E.N.R. v. Clifton Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004), states that the fundamental question in determining just cause is whether the disciplinary action taken was “just.” Citing further, “Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations.” Our Supreme Court has said that there is no bright line test to determine

“just cause”—it depends upon the specific facts and circumstances in each case. Furthermore, “not every violation of law gives rise to ‘just cause’ for employee discipline.”

8. The case of *Warren v. North Carolina Dep’t of Crime Control & Public Safety* sets forth what this tribunal must consider as to the degree of discipline. It states:

This passage instructs us to consider the specific discipline imposed as well as the facts and circumstances of each case to determine whether the discipline imposed was “just.” Based on this language, and the authorities relied upon by the Supreme Court, we hold that a commensurate discipline approach applies in North Carolina. (Citing *N.C. Dep’t of Env’t & Natural Resources v. Carroll*, 358 N.C. 649, 666, 599 S.E.2d 888, 898 (2004)) The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee’s conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee’s act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based “upon an examination of the facts and circumstances of each individual case.” (Internal cites omitted)

Warren v. North Carolina Dep’t of Crime Control & Public Safety, N. Carolina Highway Patrol, 726 S.E.2d 920, 924-925 (N.C. Ct. App. 2012) review denied, 735 S.E.2d 175 (N.C. 2012)

9. Despite having twice advised Respondent that Ms. Desalme’s deposition would not be admitted into evidence, this Tribunal admitted Ms. Desalme’s deposition in its entirety giving the deposition weight deemed appropriate under the facts and circumstances of this particular case.
10. In this instant contested case, the Court was not capable of observing Ms. Desalme under oath in order to assess her truthfulness. Her rambling deposition, her lack of truthfulness and cooperation with Respondent’s counsel and this Court, her having lied about Mr. Gray and her having used the same excuse before without justification are all indicative that she lacks credibility and that she has not been truthful in relating the events concerning Petitioner.
11. No credible evidence was introduced at the hearing tending to substantiate Ms. Desalme’s allegations. The Respondent failed to prove at the hearing by a preponderance of the credible evidence that Petitioner engaged in the conduct for which he was terminated.
12. In accord with the tests established by *Warren*, Respondent has failed to show that Petitioner engaged in the conduct alleged by his employer, and thus has failed to meet the first prong of the test. Respondent has not met its burden of proof and established by

substantial evidence in the record that it had just cause to dismiss Petitioner for unacceptable personal conduct that violated NCDPS's Personal Conduct Policies.

13. Respondent did not have just cause to dismiss Petitioner from his position as a Probation Officer.

On the basis of the above Findings of Fact and Conclusions of Law, the Undersigned issues the following:

FINAL DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Findings of Fact and Conclusions of Law cited above, and that the Findings of Fact properly and sufficiently support the Conclusions of Law. The Undersigned enters this 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 proven facts in this case, the Undersigned holds that Respondent has failed to carry its burden of proof by a greater weight of the evidence that there was just cause to dismiss Petitioner from his as a Probation Officer.

Petitioner is entitled to be reinstated, effectively immediately, to the same position from which he was dismissed, or to a comparable position with the same pay grade and benefits to which he is entitled by law. Petitioner is entitled to an award of back pay including any contributions into the state retirement system, and any and all other benefits Petitioner would have obtained had he not be dismissed. Petitioner shall be reimbursed his reasonable attorney's fees and costs.

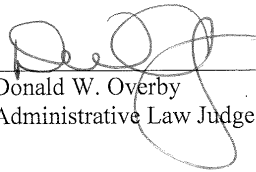
The Undersigned Administrative Law Judge has reviewed the application of Petitioner's counsel for an award of attorney's fees and costs, and based on the application, and the accompanying affidavits, and on the Court's knowledge of the reasonable and usual fees and costs incurred in the prosecution of similar contested cases, Petitioner is awarded reasonable attorney's fees in the amount of \$12,075.00 and his reasonable costs in the amount of \$2,142.65.

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 14th day of February 2014.


Donald W. Overby
Administrative Law Judge

2013 OCT 22 PM 5:04

Office of
Administrative Hearings

V.

FINAL DECISION

1

ISSUE

Whether just cause existed to dismiss Petitioner for unacceptable personal conduct.

WITNESSES

For Petitioner:

Brandon Clay Taylor
Edward Bailey
Jack Springs
Carolyn Jensen

For Respondent:

Brandon Clay Taylor, Petitioner
Jay Kellum, Probation and Parole Officer, North Carolina Department of Public Safety
Gary London, Chief Probation and Parole Officer, NCDPS
William "David" Guice, Commissioner, Division of Adult Correction, NCDPS
Diane Issacs, Deputy Director, Division of Community Corrections, NCDPS
Carla Bass, Assistant District Administrator, Division of Community Corrections, NCDPS
Thurman Turner, Judicial District Manager, Division of Community Corrections, NCDPS

EXHIBITS

For Petitioner:

1. Note from L. Milette
2. Email to Diane Issacs
3. Email to Theresa Starling
4. Petitioner's Award

For Respondent:

1. Department of Correction Policies & Procedures
2. Portion of Department of Correction Manual
3. Approval of Disciplinary Package
4. Letter to Mr. Taylor
5. Pre-Disciplinary Conference Acknowledgement Form
6. Notice of Disciplinary Conference
7. Administrative Reassignment
8. Notice to Report for Polygraph Test (Mar 29, 2012)
9. Administrative Reassignment Memorandum
10. Memorandum to C. Bass
11. Memorandum of Investigative Report
12. Internal Investigation Memorandum

- 13. Termination Letter
- 14. Policy Receipt Confirmation
- 16. Job Description
- 17A. Internal Investigation Form
- 17B. Employee/Witness Statement
- 18. Request for Extension of Time
- 19. Request for Extension of Time
- 20. Petitioner's Response to Pre-Disciplinary Conference
- 21. Personal Dealings with Offenders Policy
- 33. Gary London Notes

SPECIFIC STATUTES AND RULES

N.C. Gen. Stat. § 126-35
N.C. Gen. Stat. §§ 74C-1, -2, -3(5), -9
12 NCAC 7D .0501
12 NCAC 7D .0503
12 NCAC 7D .0504

PRE-HEARING MOTION IN LIMINE

Petitioner presented a written motion in limine, which was orally argued. Petitioner's motion in limine sought to confine the hearing to the charge asserted in the dismissal letter (R. Ex. 13) as required by N.C.G.S. 126-35. This requirement is also codified as an SPC regulation; *see* 25 N.C.A.C. 1J.0613 (2008). While the Undersigned allowed Respondent to develop evidence relating to matters not directly connected with the sole reason for discharge in the dismissal letter, in deciding this case, the Undersigned has confined the admissible evidence in the case to an assessment of the facts and reason set forth in the dismissal letter as per N.C.G.S. 126-35.

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 by a preponderance of the evidence. 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 this case.

FINDINGS OF FACTS

1. Petitioner worked for Respondent for approximately 19 years and seven months. Petitioner began working for Respondent in 1992 with the Division of Prisons and, in 2000, began working as a Surveillance Officer with the Division of Community Corrections. Petitioner was born in 1971. He grew up in Onslow County and graduated from Cyprus High School in 1991. Petitioner is married and has two children.

2. Petitioner acknowledged that, during his employment with Respondent, he was assigned supervision responsibilities of Jonathan Apple. Apple resided approximately 700 yards from Petitioner's residence, on the same road as Petitioner, one of four houses on the road. Petitioner testified that, at the time Apple came under his supervision as an offender, he knew Apple's girlfriend, Julie Rankin, who also resided near Petitioner. Petitioner also referred to Rankin as Apple's fiancé.

3. Petitioner became the subject of a complaint by Julie Rankin in December, 2011. Rankin's complaint alleged that Petitioner and others raped her on varying alleged non-specific dates. A report alleged that Petitioner sexually assaulted Rankin and, moreover, that officer(s) with the Onslow County Sheriff's Department as well as officer(s) with the North Carolina Highway Patrol had also sexually assaulted Julie Rankin. The report also alleged that Petitioner had used drugs with Ms. Rankin's ex-husband. Ms. Rankin's allegations were reported to the Onslow County Sheriff's Department who referred the complaint to the State Bureau of Investigation

4. Petitioner initially became aware of allegations made by Rankin around December 7, 2011 when he received a call from Becky Kellum while he was in Jones County bear hunting. Jonathan Apple had been arrested the night before by Jay Kellum who began supervising Apple around July 2011. On December 7th Jay Kellum received a call from Becky Kellum that Apple was in superior court telling the bailiffs that there would be problems if he saw Kellum because Kellum had raped his girlfriend. Soon after, Apple was called to Kellum's office by Kellum and stated that he did not say that Kellum had raped Rankin but that Petitioner, Clay Taylor, had raped Rankin.

5. Petitioner reported to work on December 7 for his 1:00 pm to 10:00 pm shift. He was instructed by Probation and Parole Officer Gary London to remain in a specific office location and to not approach the area in Respondent's offices where Rankin and Apple were located. The following day, Petitioner was notified by Sherry Whitaker, his supervisor, that Judicial District Manager Thurman Turner had instructed that Petitioner was not to conduct any further supervision of Apple.

6. Petitioner took a planned vacation beginning December 9th, 2011 with the intention of returning to work on December 15. While on vacation, Petitioner received a text from Sherry Whitaker stating that, per Mr. Turner's instructions, he could not return to work until he had a meeting with Mr. Turner. Petitioner called Turner who stated he would have to take personal leave, not administrative leave. Petitioner called Turner's supervisor, Cornell McGill. Mr.

McGill stated he had no knowledge of what was going on and he would leave that to the discretion of Turner.

7. Petitioner's supervisor came to him to make him aware that he needed to sign his time sheet reflecting vacation time for any worked missed between December 15th until the 19th as Mr. Turner had directed. Petitioner would not sign the sheet until he consulted with Frank Rogers who indicated that Petitioner should be paid as administrative leave. Petitioner's leave which was originally noted in the computer as vacation was credited back to him as administrative leave.

8. Thurman Turner was the Judicial District Manager whose office was in Craven County at the relevant time. There was job related conflicts prior to the Rankin allegations between Turner and Petitioner, which involved three heated discussions and episodes. Mr. Turner felt Petitioner had questioned a lot of things he did but saw that as perhaps a natural consequence of Mr. Turner being promoted from outside of the district.

9. On December 19th, 2011, Petitioner returned to work and met with Mr. Turner at Respondent's offices. Probation and Parole Officer Gary London was also present. Mr. Turner presented Petitioner with a notice of an investigation. During the conference, Petitioner requested to know what the allegations against him were and Turner stated he could not tell him. Petitioner asked what the investigation pertained to and Turner said personal conduct. Petitioner proceeded to take notes and Turner instructed him that he was not allowed to take notes. Turner proceeded with a line of questions and Petitioner responded to the best of his ability. Mr. Turner did not tell Petitioner what the investigation was about other than it was misconduct. Petitioner stated that, after being questioned by Turner, he filled out a written statement which he provided to Turner. R. Ex. 17B. Petitioner had an opinion the misconduct might center around Ms. Rankin. At the meeting on December 19, 2012, London was under the impression that Taylor knew the substance of the allegations against him. According to London, Petitioner's knowledge of the allegations against him came from sources inside the Sheriff's Department. The written statement by Petitioner provides: "I have not violated any laws or state policies pertaining to these allegation. I do deny all allegation stated by Julie Rankin and Jon Apple." R. Ex. 17B.

10. The notice of investigation provided to Petitioner informed him of his requirement to cooperate with Respondent's officials during their investigation, including during any interviews, and that any failure by Petitioner to cooperate during the investigation, including the refusal to answer questioning, would be considered hindering an internal investigation which is personal misconduct and could lead to discipline including dismissal. Petitioner testified that the notice informed him that any questions asked of him during the investigation would relate only to his official duties and personal conduct and that any answers which he provided could not be used against him in a criminal prosecution. R. Ex. 17A.

11. Also on December 19, 2011, Petitioner was informed in writing and by Turner that he was assigned to administrative duties during the pendency of the internal investigation. Petitioner testified that, following the December 19, 2011, meeting with Turner, he continued to work on administrative duty and would call Turner and Turner's supervisor, Cornell McGill to check the status of the investigation.

12. Respondent conducted an investigation. Gary London, Chief Probation and

Parole Officer in Craven County, was asked to become involved in the investigation of Petitioner by Mr. Turner. London's assignment was to interview Apple and Rankin. The interviews of Apple, Rankin and others were not tape recorded. Rankin and Apple were not sworn when they were interviewed. When London interviewed Rankin, he was not aware of her criminal history. He was further unaware of the number of multiple allegations she had made against others concerning being sexually assaulted by them. London testified that Apple and Rankin reported to him that Petitioner had raped Rankin and alleged that Petitioner and his wife were swingers and hosted parties. London's interview of Rankin lasted about 45 minutes. Mr. London turned his interview notes over to become a part of the official file.

13. Respondent's investigation concluded that the allegations against Petitioner could not be substantiated. In fact, the Investigative Report dated January 31, 2012 stated: "The incident was reported to us a day after Ms. Rankin's boyfriend, John Apple, was arrested for probation violations. At the beginning of the investigation, Ms. Rankin was referred to the Onslow County Sheriff Department, which referred the case to the State Bureau of Investigation. The case was assigned to agent Matt Warner. After consulting with his supervisor, District Attorney Ernie Lee, Fourth Judicial district, and Onslow County Sheriff Ed Brown, it was determined that based on the information obtained, they would not pursue the investigation. From written statements by persons interviewed during this investigation, we were unable to substantiate the allegations of unacceptable personal conduct by Surveillance Officer Clay Taylor." R. Ex. 11. There was never any criminal charge lodged against Petitioner in connection with any of the allegations made against him. Ms. Rankin filed a 50C complaint against Petitioner, which was dismissed by the Court because she never appeared.

14. It appears as of January 31, 2012 the sexual assault allegations by Ms. Rankin against officer(s) with the Onslow County Sheriff's Department as well as officer(s) with the North Carolina Highway Patrol were not being investigated further by any department or agency. Mr. Thurman recalled communication from a Highway Patrol Internal Affairs officer which found that Ms. Rankin was not credible and they were not going forward with any charges based on their investigation.

15. As Petitioner remained on administrative duties, he would call Mr. Turner or Mr. McGill on a weekly or bi-weekly basis to find out his status as various time periods had passed. Mr. Turner would respond that he did not know or that he could not tell him. Mr. McGill responded that he was waiting to hear and that he should know something soon. In March, Petitioner contacted the new director, David Guice, and in speaking with him requested that he give Petitioner some insight into the resolution of the issues.

16. Despite Respondent's official report of January 31, 2012, which was never modified, Respondent decided to subject Petitioner to a polygraph examination on March 29, 2012, some two months after the conclusion of the investigation. R. Ex. 8. The sole charge against Petitioner Brandon Clay Taylor in his dismissal was that he refused to take a polygraph examination by Respondent on March 29, 2012. Specifically, Respondent's dismissal letter dated May 15, 2012 states, "Your refusal to submit to the polygraph examination as directed on March 29, 2012 hindered the Community Corrections ability to thoroughly investigate the serious allegations made by Julie Rankin and resulted in your failure to cooperate with the investigation and also hindered the internal investigation." R. Ex. 13.

17. On March 21, 2012 Petitioner went on vacation with a scheduled return to work date of March 28. While in Mississippi on vacation, Mr. Turner called and told him to report to Raleigh on March 29. After a discussion about transportation, Mr. Turner stated that Petitioner would be transported to Raleigh by a male supervisor. Petitioner subsequently asked Turner why he was going to Raleigh and Turner responded, "I don't know. You are the one that called David." T. 96. Petitioner was under the impression that Turner was referring to David Guice, the agency Director. When Petitioner asked who he was going to see, Mr. Turner replied that he could not tell him. Petitioner then called Cornell McGill who told him that he could not tell Petitioner where he was going and all that he could say was that he would be dropped off to Theresa Starling. When Petitioner asked who Theresa Starling was, Mr. McGill told him that he couldn't tell him who she was but that he would be dropped off to her. When asked who would be transporting him, McGill told him that Gary London would be the one driving him.

18. On March 29, 2012, Petitioner came into work and went to Raleigh willingly and not knowing the purpose of it. Very little was said between London and Petitioner on the drive. London was told to not advise Petitioner as to why he was going to Raleigh. According to London, he did not believe that Mr. Turner created the instruction not to provide any information to Petitioner, but rather, Turner simply passed along the instructions that had been provided to him.

19. When Petitioner and London arrived at Respondent's administrative offices in Raleigh on March 29, 2012, they were met by an unidentified female who escorted them to an office, shut the door, and instructed Petitioner to sit down at a table. Petitioner stated that he assumed the female was Ms. Starling.

20. The female then gave Petitioner a form, which he identified as a notice to report for a polygraph test. Prior to arriving in Raleigh on March 29, 2012, Petitioner had no idea at all prior to entering the room that he was going to possibly be given a polygraph examination. It came as a total surprise to him. The notice to report for polygraph test was dated March 29, 2012 and was not from an individual but from "DCC Admin". The notice ordered Petitioner to report to DCC Admin on 5/29/12 "to take a polygraph (lie detector) test" which was to be administered by LM Pittman. R. Ex. 8. Petitioner read the form. The female who never identified herself told Mr. London to read the form and then to re-read to Petitioner the clause relating to disciplinary action.

21. The notice further provided that the polygraph test was being given in connection with an internal investigation and that the refusal to take the polygraph examination or refusal to answer questions during the polygraph examination would be considered refusal to cooperate with the investigation and may be grounds for discipline up to and including dismissal. The notice further states that the questions asked during the test would relate specifically and narrowly to the performance of official duties or to matters of personal conduct for which Petitioner may be disciplined; and that answers provided during the test could not be used against the Petitioner in any subsequent criminal prosecution.

22. Respondent's Exhibit No. 8 (Notice to Report for Polygraph Test) did not provide further information about the polygraph operator, the polygraph test, the polygraph questions to be posed, the polygraph testing procedures, the nature and type of the polygraph instrument, the calibration, testing or maintenance of the polygraph instrument, or the training, licensure,

experience and qualifications of L.M. Pittman. Further, Petitioner was not otherwise provided this information.

23. Petitioner stated that he was not refusing to take a polygraph examination. Mr. London testified that Petitioner may have said that he was not refusing the polygraph test. Petitioner told London and the female, if he had been made aware of the purpose of the meeting and that I was being presented a polygraph, then things could have been handled differently today. If I'd been made aware on the 21st as I'm being told today with this notice, then things could have been different." T. 104-05. Petitioner emphasized again that he was not refusing but if the department would be willing to present to him or his attorney in writing the questions to be asked so they could be reviewed, that he would consider taking a polygraph. According to London, after he read the notice to Petitioner, Petitioner "indicated to me that he could have saved me a trip because he wasn't going to take a polygraph test, he was advised by his attorney not to take one." T. 238.

24. When London went to report Petitioner's unwillingness to sign the form to the unidentified female (known by London to be Starling), he relayed that Petitioner indicated he would consider signing the notice at some later date if he was given ample prior notice to the polygraph test and if he was allowed to have his attorney available. During London's private conversation with Starling, Mr. Lacey Pittman, the polygraph examiner, was present. According to London, Starling informed him that Petitioner's requests were not possible.

25. Petitioner primarily spoke with Gary London regarding the proposed polygraph test. Only in Raleigh, did Mr. London learn that he was going to be somewhat specifically involved in the polygraph process. This was his first experience with a polygraph examination under these type circumstances. Though he had been involved in a lot of investigations none had gone to the point of a polygraph. London had not reviewed any departmental policy regarding the polygraph process or procedure.

26. After a series of communications, a polygraph test was not administered to Petitioner. London informed Petitioner that he did not have the authority to decide whether to present the polygraph examination to Petitioner. London wrote down "Refusal to Sign" on the Notice form. For the first time the unidentified female was identified to Petitioner as Theresa Starling when she wrote her name as a witness on the form. London exited the room and, upon returning to the room, provided a copy of the form to Petitioner. Petitioner stated that he was at Respondent's administrative offices for less than ten minutes.

27. At hearing, Petitioner stated that during the period of his employment with Respondent he participated in internal investigations and that he had knowledge of both the Division of Prisons and Division of Community Corrections policies which required his cooperation during said investigations. Petitioner testified that, as Respondent's employee, he had a duty to be knowledgeable of all of Respondent's policies and procedures. Petitioner also stated that, by acknowledging his job functions with NCDPS, he agreed to abide by Respondent's policies and procedures.

28. Petitioner did not know or recognize an individual referred to as L.M. Pittman. None of Petitioner's colleagues or supervisors identified Pittman. Though Pittman was in the

building that day, he/she did not talk to Petitioner. Apparently Respondent had contracted with L.M. Pittman to administer a polygraph examination to Petitioner. After Petitioner's discussion with supervisors about the possible polygraph test, no one invited or requested Pittman into the room to join the discussion.

29. No one told Petitioner what if any polygraph training that Pittman had. No one told Petitioner whether or not Pittman was licensed by the State of North Carolina to conduct polygraphs. No one, on behalf of Respondent, provided Petitioner with any documents identifying anything about Pittman by way of his/ her background, experience, qualifications, training or anything to do with polygraphs. No one ever told Petitioner as to whether Pittman had ever completed a course of instruction by the American Polygraph Association. No one ever told Petitioner as to whether or not Pittman had administered 50 or more polygraph tests. No one told Petitioner whether Pittman had conducted less than ten polygraphs in the preceding twenty four hour period.

30. Petitioner was not told by any of his supervisors or colleagues as to what the specific purpose of the proposed polygraph examination was going to be.

31. Petitioner was never shown any type of polygraph machine or instrument. No one ever told Petitioner what type of polygraph instrument or machine that they were proposing to be used for the test. No one told Petitioner whether or not if any machine that was to be used for the test had been calibrated. No one ever told Petitioner as to whether the polygraph instrument that was going to be used was capable of three physiological tracings. No one offered to show or showed Petitioner any of the records associated with the maintenance and the calibration of the polygraph instrument or machine that they intended to use.

32. No one on behalf of the employer gave Petitioner any information about the nature of the questions to be asked. Petitioner was never given any specific questions that would be posed to him. Other than Respondent's Exhibit No. 8, none of Petitioner's colleagues or supervisors provided him with any other documents. No one provided Petitioner with any type of document denominated as any type of consent form. No one told Petitioner that if a polygraph test was begun, then he would have an opportunity to stop the test.

33. According to the Petitioner, he had consulted with an attorney regarding possible criminal investigation of Rankin's allegations, but had not retained the attorney. Respondent was not aware of any relationship Petitioner may have had with an attorney.

34. Petitioner explained that he indicated to Gary London and Theresa Starling that the attorney that he had previously consulted with had advised him not to consent to taking a polygraph examination. That was the attorney's position, and not that of Petitioner. Petitioner further explained that he was advised in connection with the criminal investigation, but that the attorney did not advise Petitioner on the employment issue.

35. On or about April 13, 2012, Petitioner testified that he was approached by Jonathan Apple in the yard at his home. Apple stated that Rankin had been lying and that Apple had tried to contact Mr. Turner to tell him that Rankin had lied. While with Apple, Petitioner called Mr. Turner and Apple spoke with Turner telling him the same thing he had told Petitioner. Petitioner

recorded the statements made by Apple.

36. On April 19, 2012, Petitioner was given notice of a pre-disciplinary conference which informed him that his failure to submit to the polygraph examination hindered Respondent's internal investigation, was considered unacceptable conduct, and warranted discipline up to and including dismissal.

37. On April 23, 2012, Petitioner met with Mr. London and Mr. Turner and was informed that he was being placed on administrative reassignment. At the pre-disciplinary conference on April 23, 2012, Petitioner presented a written statement or response regarding his discipline to Mr. Turner.

38. David Guice testified. Mr. Guice is the Commissioner of Adult Corrections. In 2012, he was the Director of Community Corrections. In his position as Director, Guice testified that he would routinely review internal investigations of employees, including that of the Petitioner. In his review of internal investigations, Guice testified that he may see the need for additional information and may send the investigation back for additional information, call staff, or request additional information through other investigative tools. Mr. Guice does not provide a road map on investigations but gives a general idea of what expectations are.

39. Mr. Guice became the Director of Community Corrections on January 1, 2012. It was only a week or so after he started that he became aware of the situation with Mr. Taylor when he received packets of information regarding situations in particular areas under his supervision. In his new position Mr. Guice was extremely busy and became involved two or three times with the Taylor situation. Mr. Guice learned that both a Highway Patrolman and Deputy Sheriff were accused of the same thing by Rankin, that she was raped. When asked about the conclusion of the Highway Patrol investigation as to what its findings were, Guice testified that he was not sure that he knew what the conclusion of the Highway Patrol investigation was. Guice was aware of the report of the Onslow County District Attorney, that there was no basis for criminal prosecution of any of the law enforcement officers that were accused by Rankin.

40. When Guice requested the polygraph examination be performed on Petitioner, he sent the directive to the Deputy Director of Community Corrections, Diane Issacs, who he believed would follow through with contacting staff and making arrangements to set up the polygraph examination. Mr. Guice went on to testify that "I also contact Mr. Taylor and in this situation we made an effort to contact Ms. Rankin to see if she would also submit to a polygraph." T. 340. Mr. Guice testified that he does not give any instructions to keep anything a secret from employees. Though Mr. Guice acknowledged it seemed to be a practice not to tell an employee of a polygraph, he does not share information because he does not know the questions. He did state that "I did not say don't talk to this person or you don't give them anything." T. 342

41. When Guice was asked if there were occasions when his agency uses retained outside private investigators to help with investigations, he testified that the Agency uses a combination of departmental staff and they also use contractual outside investigators. At the time when Petitioner's polygraph was being considered, the agency had a contract with the prior provider to perform the polygraph examinations for the Agency. Guice did not know any details about the outside polygrapher that was being used by contract as to his/her qualifications. He did

not know the details of the specific terms and conditions of that contract.

42. Mr. Guice testified that the agency does not have a written agency procedure to govern the administration of polygraphs. Guice testified that neither he nor any of his staff are involved in preparing questions to be used for the actual polygraph questions. When asked who determines the polygraph questions, Guice testified that he assumed it would be the polygraph operator that would determine those questions. Guice testified that after polygraph questions are developed to be given to employees, they are not submitted to Guice or any other agency official for approval before the test is actually administered.

43. Guice acknowledged that he saw Petitioner's concern as to who the polygrapher operator was and if he was credentialed or licensed. Guice acknowledged that seemed to be a fair concern, as to if the polygrapher operator was credentialed or licensed. When Guice was asked if he was going to be subjected to some sort of test, if he would want to know if that person selected to administer the test was properly licensed to give a valid test, Guice answered by saying "Better believe it". T382

44. Mr. Guice approved Petitioner's dismissal from Respondent's employment due to Petitioner's failure to submit to the polygraph examination. According to Guice, Petitioner's failure to take the polygraph examination "affirmed" that "there was an opportunity" for Petitioner to provide Respondent with additional information regarding the investigation, but Petitioner declined to do so. Tr. 347. Thus, the underlying allegations of Petitioner's behavior were not ever substantiated or unsubstantiated. *Id.*

45. The official agency report of January 31, 2013 found that the allegations against Petitioner were not substantiated. After Mr. Guice reviewed Mr. Turner's official investigative report, he did not issue any amendment or modification to that report. He acknowledged that he did not tweak in any way the investigation report that came to him.

46. Deputy Director of Community Corrections, Diane Issacs, testified that, in 2012, she received a directive from Guice to administer a polygraph examination to Petitioner. Ms. Issacs then directed her assistant, Theresa Starling, to contact Lacey Pittman to arrange for the polygraph examination of Petitioner. To Issacs' knowledge, Starling's contact with Pittman was verbal.

47. Ms. Issacs testified that to her knowledge, Pittman was qualified to conduct the polygraph examination of Petitioner. Issacs also testified that it is Respondent's common practice not to inform employees of polygraph examinations prior to the time that they are to be administered. Issacs stated that his practice began with instruction from Pittman not to inform the employees of their polygraph examination prior to their arrival at Respondent's administrative offices.

48. Ms. Isaacs did not know whether Pittman's polygraph questions would relate to matters that are outside of the allegations contained in the internal investigations. Isaacs did not have any knowledge as to what questions that Pittman may have posed. As a routine or ordinary basis, no agency personnel reviews or approves the polygraph questions that Pittman selects to use. The Agency relies on Pittman to come up with whatever questions that he wishes to pose as

the polygraph examiner based on his review of the internal investigations. Isaacs explained that some of the internal investigation is made available to Pittman, but not the entire file. Personnel file documents such as appraisals and performance evaluations are among the documents not provided. Pittman was provided the investigative file involving Petitioner on the day that the polygraph was scheduled. Ms. Isaacs acknowledged that the investigative file provided to Pittman for his review on the day of the scheduled polygraph was maybe three to three and one half inches thick.

49. At the relevant time, the Agency Personnel Officer was Lori Millette. Millette's duties and responsibilities would have encompassed conducting review of the investigative file. Ms. Millette, as a part of her duties and responsibilities, was expected to make a recommendation regarding personnel matters. When Millette reviews an internal investigation she will attach a note to the investigation with her recommendation. A note from Ms. Millette dated May 1, 2012 states "There is nothing to substantiate the rape allegation." P. Ex. 1. Millette also observed that Rankin "waited six weeks to report the incident."

50. Ms. Isaacs testified that Petitioner was not terminated because of the allegations, but was terminated for his alleged refusal to take the polygraph examination. According to Isaacs, Petitioner's refusal to submit to the polygraph hindered Respondent's internal investigation and constituted unacceptable personal conduct.

51. Carla Bass, the Assistant Division Administrator for Division I of the Division of Community Corrections was familiar with Mr. Turner's official report of the Taylor investigation dated January 31, 2012. R. Ex. 11. Ms. Bass found Turner's investigation to be appropriately thorough and complete. Ms. Bass acknowledged that the Agency's internal investigation could not substantiate the allegations against Petitioner. Ms. Bass also testified that Petitioner's refusal to submit to the polygraph was, in her opinion, unacceptable personal conduct.

52. Mr. Turner did not make any request prior to January 31, 2012 when his report was concluded, for there to be any polygraph of anyone. There was no proposal by anyone in the Agency as of January 31, 2012 for there to be a polygraph of Petitioner, Ms. Rankin or Mr. Apple.

53. Edward Bailey, a licensed attorney in North Carolina for 47 years was called as a character witness for the Petitioner. Bailey has practiced criminal trial law for around 40 years in Superior Court and District Court, and has had many clients that have been placed on probation. Bailey had known Petitioner for as long as Petitioner had served as a probation officer. He has observed Petitioner in his official capacity working on matters in the criminal justice community. Mr. Bailey testified that Petitioner has always been a very honest and forthright person and he thought that it was the reputation Petitioner had among the other members of the bar that practice in the criminal court system.

54. Jack Springs, a Captain with the Onslow County Sheriff's Department, testified on behalf of Petitioner. Captain Springs has served 13 years and has known Petitioner for eight to nine years. Captain Springs has had the opportunity to observe Petitioner's professional character and conduct. He has always found Petitioner to be straight forward and one hundred percent trustworthy and honest. He stated that he knew colleagues in the law enforcement community shared those observations of Petitioner's character. Captain Springs testified that law

enforcement officers could always depend on what Petitioner told them.

55. Carolyn Jensen was called as a character witness. Ms. Jensen served with the Probation Office in Jacksonville beginning in 1988 and retiring in 2010. She was the Chief Probation Officer at the time of her retirement. Jensen knew Petitioner as a colleague employee and as supervisor. Regarding Petitioner's reputation and specific character traits of honesty, truthfulness and integrity, Jensen testified that she saw those characteristics every day on a first hand basis. She found him to be strictly professional in his dealings with other officers, court personnel, the District Attorney's office, and attorneys who would represent defendants. Ms. Jensen found Petitioner to be a man of his word at all times.

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.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this action. Petitioner timely filed his 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. At the time of the termination of his employment, Petitioner was subject to the State Personnel Act in accord with N.C. Gen. Stat. § 126-5. The Petitioner was a "career state employee" as defined by N.C. Gen. Stat. § 126-1.1 and is subject to and governed by the provisions of the State Personnel Act, codified at N.C. Gen. Stat. § 126-1 *et seq.* The Petitioner's claim is that Respondent lacked just cause to dismiss him for an alleged act of unacceptable personal conduct, i.e., refusal to submit to a polygraph examination.
5. N.C. Gen. Stat. §126-35 states that in contested cases pursuant to Chapter 150B of the General Statutes, the burden of showing that a career employee subject to the State Personnel Act was discharged, suspended, or demoted for just cause rests with the department or agency employer.
6. N.C. Gen. Stat. § 126-35 only permits disciplinary action against career state

employees for "just cause". Although "just cause" is not defined in the statute, the words are to be accorded their ordinary meaning. *Amanini v. Dep't of Human Resources*, 114 N.C. App. 668, 443 S.E.2d 114 (1994) (defining "just cause" as, among other things, good or adequate reason). "Just cause, like justice itself, is not susceptible of precise definition. It is a flexible concept, embodying notions of equity and fairness that can only be determined upon an examination of the facts and circumstances of each individual case." *N. Carolina Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004).

7. Respondent terminated Petitioner because of its contention that Petitioner refused to take a polygraph test on March 29, 2012. Respondent asserted that the refusal hindered the agency's ability to thoroughly investigate the allegations made by Julie Rankin and resulted in a failure to cooperate with the investigation and "also hindered the internal investigation."

8. The preponderance of the evidence shows that Petitioner cooperated in the investigation of the allegations made by Ms. Rankin which was complete and unaltered by January 31, 2012. Further as of January 31, 2012, the evidence reveals that the allegations by Ms. Rankin against officer(s) with the Onslow County Sheriff's Department as well as officer(s) with the North Carolina Highway Patrol were not being investigated further by any department or agency. Respondent failed to produce by a preponderance of the evidence, the rationale for a continuance of the completed investigation or an addendum to the January 2012 investigation that prompted the March 2012 polygraph issues in this case.

9. Petitioner did not refuse to take a polygraph examination on March 29, 2012. No lawful polygraph test was properly proposed to Petitioner on that date. Petitioner made proper inquiries about the polygraph examination being proposed by Respondent and Petitioner's questions regarding the polygraph were reasonable. Rather than attempting to have the assigned polygrapher confer with Petitioner to explore whether the questions could be addressed and the issues resolved, Respondent stopped the course of events leading to a polygraph test.

10. Polygraph examinations have been held to be unreliable by North Carolina Courts which have further consistently held that polygraph evidence is generally inadmissible. The most current North Carolina cases reaffirm the unreliability of polygraph testing and its inadmissibility. *State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983); *State v. Allen*, 731 S.E.2d 510 (N.C. App. 2012).; *State v. Baber*, 741 S.E. 2d 513 (N.C. App. 2013).

11. Polygraph testing, however, can be utilized by North Carolina public employers under appropriate circumstances when compliant with the governing North Carolina law.

12. The practice of polygraphy is a regulated industry in North Carolina. See N.C.G.S. 74C-3(5) (Detection of deception examiners). Polygraph operators must be licensed in North Carolina N.C.G.S. 74C-2,-9. The Private Protective Services Board regulates polygraphers "in order to safeguard the public health, safety and welfare." N.C.G.S. 74C-1.

13. North Carolina law contains regulations that govern the administration of polygraph tests. The relevant regulations appear at 12 NCAC 7D .0501, .0503, and .0504, and contain numerous subparts. Several of these subparts are applicable to this case.

14. 12 NCAC 7D .0501 provides in pertinent part:

0501 EXPERIENCE REQUIREMENTS FOR A POLYGRAPH LICENSE

(a) In addition to the requirements of 12 NCAC 7D .0200, applicants for a polygraph license shall:

- (1) pass an examination and a performance test administered by a panel of polygraph examiners designated by the Board;
- (2) successfully complete a course of instruction at any polygraph school approved by the American Polygraph Association; and
- (3) have one year of polygraph experience or successfully complete at least six months of training as a holder of a polygraph trainee permit, and administer no less than 50 polygraph examinations.

15. 12 NCAC 7D.0503 provides in pertinent part:

0503 POLYGRAPH EXAMINATION REQUIREMENTS

Polygraph licensees and trainees shall comply with the following:

- (1) Obtain written consent from the individual to be examined which shall be signed in the presence of both the examiner and examinee. The consent form shall include a statement advising the examinee that he may terminate the examination at any time;
- (6) All questions to be considered for chart analysis shall be in writing and shall be reviewed with the examinee prior to any testing;
- (10) An examiner shall conduct no more than ten examinations in a 24 hour period.

16. 12 NCAC 7D .0504 provides in pertinent part:

0504 POLYGRAPH INSTRUMENTS

A polygraph examiner shall not conduct an examination unless the instrument used makes a simultaneous recording of at least three physiological tracings: the pneumograph, the cardiophymograph, and the galvanograph. This recording must be in a form suitable for examination by another polygraph examiner. Such recordings shall be available to the Board or its designated representative. This requirement shall not prohibit recording additional physiological phenomenon on the same charts. A polygraph examiner shall not conduct an examination on an instrument unless the manufacturer has provided information for self-calibration and sensitivity standards for that instrument. A polygraph examiner shall calibrate his instrument at least monthly and keep a signed and dated record of the dates of calibration as well as a signed and dated chart of that calibration.

17. The polygraph regulations mandate specific conditions and procedures that must be followed in the administration of all polygraph tests. The regulations governing the administration of polygraphs serve important objectives and must be enforced for the protection of examinees. N.C.G.S. 74C-1.

18. The process utilized by Respondent failed to comply with polygraph regulations. The evidence demonstrates that Respondent did not establish that its designated polygrapher met

all of the requirements in 12 NCAC 7D .0501 including subsections (a)(1), (2),(3) and (b). Respondent failed to establish that it met the examination requirements in 12 NCAC 7D .0503 including subsections (1), (6) and (10). Respondent failed to establish that it met the requirements for the mandatory type of polygraph instrument required by 12 NCAC 7D .0504.

19. The polygraph testing process involves an electronic instrument that is in part affixed to the examinees' body and purports to measure physiological conditions. See Maschke & Scalabrini, *The Lie Behind The Lie Detector* (4th ed. 2005). Petitioner was entitled to be afforded the benefit of and protections provided by all polygraph regulations. Polygraph testing, like other forms of employee testing such as medical, psychological, physical, fitness for duty, promotional and other testing must be conducted in accordance with governing law.

20. Respondent has failed to prove by a preponderance of the evidence that Petitioner was not justified in declining a polygraph test under the circumstances presented to him on March 29, 2012.

21. Insubordination "is the willful failure or refusal to carry out a reasonable order from an authorized supervisor." 25 NCAC 1I .2304(8) and 25 NCAC 1J .0614(7). See *Mendeuhall v. N.C. Department of Human Resources*, 119 N.C. App. 644, 651, 459 S.E.2d 820 (1995) (directive must be reasonable); *Thompson v. Wake County Bd. of Education*, 31 N.C. App. 401, 424-25, 230 S.E.2d 164 (1976), rev'd on other grounds, 292 N.C. 406, 233 S.E.1d 538 (1977). In order for an order to be reasonable, it must be lawful and the acts ordered must be in compliance with law. E.g. Isodore Silver, *Public Employee Discharge and Discipline*, Volume 1, section 3.05 at 256-265 (Aspen 2001). A public employee cannot be expected to comply with an order for a test that is not in compliance with law.

22. A public employer is entitled to conduct a lawful and reasonable investigation of its employees pursuant to *Garrity v. New Jersey*, 385 U.S. 493 (1967) and its progeny. Under *Garrity*, the scope of questioning is limited. Questions posed must relate specifically and narrowly to the performance of official duties.

23. Any questions to be posed in a coerced polygraph of a public employee must "relate specifically and narrowly to the performance of official duties." *Warren v. City of Asheville*, 74 N.C. App. 402, 328 S.E.2d 859 (1985). *Warren* demonstrates how the scope of public employee polygraph questioning is narrow and limited. *Warren* found that the officer there was justified in refusing the polygraph test because of the improper questions. Here, Petitioner was similarly justified in his actions because of Respondent's non-compliance with law and unreasonableness of the proposed polygraph. Respondent's refusal to disclose the questions prior to the test violated both the *Warren* principle and 12 NCAC 7D .0503(6) ("All questions to be considered...shall be in writing and reviewed with the examinee prior to any testing").

24. Respondent does not have a defined polygraph procedure to govern and regulate the conduct of employer personnel or employees being requested to undergo a polygraph test, or the conduct of polygraph examiners. This lack of a clear procedure deprived Petitioner of clear notice of what was expected of him in connection with a polygraph test.

25. In *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), the Supreme Court

explained the void for vagueness doctrine:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application

26. The North Carolina test for vagueness provides that a provision is “vague if it either: (1) fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited; or (2) fails to provide explicit standards for those who apply the law.” *State v. Sanford Video & News, Inc.*, 146 N.C. App. 554, 556, 553 S.E.2d 217, 218 (2001)(omitting internal quotation marks).

27. In *Lewis v. City of Kinston*, the Court of Appeals invalidated a public employment policy, a residency requirement, on North Carolina constitutional grounds. 127 N.C. App. 150, 488 S.E.2d 274 (1997). There, the challenged policy contained a provision allowing the city manager to grant “extensions” from the residency requirement but contained no standards or criteria, which essentially afforded the city manager “practically unlimited discretion . . .” *Id.* at 155, 488 S.E.2d at 277. The Court explained that “[a]n ordinance which vests unlimited or unregulated discretion in a municipal officer is void.” *Id.* at 154, 488 S.E.2d at 277.

28. In *Isler v. New Mexico Activities Association*, 2012 WL 4466996 (D.N.M. 2012), the Court explained and applied the void for vagueness doctrine in a public employee case. There, the Court ruled in favor of the employee on vagueness grounds because the personnel policy in issue “lacked any standard whatsoever,”...”provided no notice to Plaintiff that his conduct could be interpreted as violating [the policy]...” *Id.* at 5. Other public employee conduct policies have similarly been held as unduly vague. E.g. *Via v. Taylor*, 224 F.Supp.2d 753, 766-768 (D. Del. 2002)(state police officer conduct code held void for vagueness)

29. Here, the Respondent's complete absence of a polygraph procedure deprived Petitioner of reasonable notice as to what was expected of him during the requested polygraph procedure. The lack of a polygraph procedure to govern the process was devoid of standards, rules or procedures. Consequently, Respondent's polygraph procedure failed to provide adequate due process of law.

30. Respondent has failed to carry its burden of proof that just cause existed to dismiss Petitioner for unacceptable personal conduct. Petitioner prevails on several alternative grounds. First, Petitioner's actions in inquiring about the polygraph procedures did not constitute unacceptable personal conduct or just cause for termination. Second, Respondent failed to establish that its intended polygraph examination of Petitioner was valid and in compliance with North Carolina law. Petitioner is not required to submit to a polygraph test that is not fully in

compliance with law. Third, the Respondent's lack of a defined polygraph procedure fails to provide Petitioner with sufficient notice of expected behaviors. And fourth, because Respondent's polygraph procedure is not defined, it is unduly vague and is not enforceable

31. In accordance with N.C. Gen. Stat. § 126-37 entitled, "Administrative Law Judge's final decision", "The administrative law judge is hereby authorized to reinstate any employee to the position from which the employee has been removed, to order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied or to direct other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improperly discriminatory action of the appointing authority."

32. In accordance with N.C. Gen. Stat. § 150B-33(b)(11), an administrative law judge may "order the assessment of reasonable attorneys' fees and witnesses' fees against the State agency involved in contested cases decided under Chapter 126 where the administrative law judge ...orders reinstatement or back pay."

33. The starting point for determining the amount of a reasonable fee is the calculation of "the number of hours reasonable expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed2d 40 (1983).

34. The determination of a reasonable attorney's fee is a matter of discretion with the Court. See *Robinson v. Equifax Info. Services*, 560 F.3d 235, 243 (4th Cir. 2009). In determining what is reasonable, the Fourth Circuit has instructed that a Court should be guided by the following factors, known as the "Johnson factors": (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases. *Grissom v. The Mills Corp.*, 549 F.3d 313, 321 (4th Cir. 2008) (applying twelve-factor test set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.1974)) (citation omitted).

35. Petitioner has filed a Petition for Attorney Fees, an Affidavit of Petitioner's Counsel, an Affidavit from attorney John Gresham, an Affidavit from attorney Michael Byrne, and a Statement of Labor/Services and Receipts, an Attorney/Client Fee Agreement. Respondent filed a Response to Petitioner's Petition for Attorney Fees and Costs which included an Affidavit from attorney Mary-Ann Leon and an invoice submitted to Bruce Williams from the Law Offices of Michael C. Byrne. Petitioner filed a Reply to Respondent's Response to Petitioner's Petition for Attorney Fees and Costs which included a Supplemental Affidavit of attorney Michael C. Byrne in support of Petitioner Attorney's Fee Petition and a signed copy of the Attorney/Client Fee Agreement. The Undersigned has studied and considered a matters submitted by both parties.

36. Petitioner seeks an award of attorneys' fees and related costs in the amount of

\$38,386.49 based upon legal services and travel related to the handling of this case. The attorney representing the Petitioner is J. Michael McGuinness who is licensed in the State of North Carolina and who is an attorneys in good standing with the North Carolina Courts.

37. In support of Petitioner's claim for attorneys' fees, Mr. McGuinness has submitted the proper material for consideration including the contract for legal services between Petitioner and the McGuinness Law Firm., as well as detailed billing records of the work performed. The Undersigned is satisfied that the time spent for legal services plus travel was reasonably expended in furtherance of this litigation.

38. An award of attorney fees should be based on rates prevailing in the community where the action takes place. Mr. McGuinness has submitted his own Affidavit as well the Affidavits of two other attorneys who practice in the area of North Carolina personnel law. The Undersigned has reviewed the qualifications and experience of Mr. McGuinness, who is a sole practitioner, as well as the reasonableness of the charges associated with paralegal services. Based on the information provided and the Undersigned's own knowledge of and experience with prevailing rates charged in the relevant community, the Undersigned finds the requested hourly fees to be reasonable.

39. Petitioner seeks to recover costs incurred by his attorney for filing fees, postage, coping, faxes, and the like. The Undersigned concludes the claimed costs are reasonable.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following Final Decision.

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. 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 case, the Undersigned holds that Respondent failed to carry its burden of proof by a greater weight of the evidence that there was just cause to dismiss Petitioner from employment for unacceptable personal conduct. 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 Respondent's evidence does not overbear in that degree required by law the weight of evidence of Petitioner to the ultimate issue, and as such Respondent's discharge of Petitioner was in error.

Petitioner is entitled to be reinstated, effective immediately, to his position of employment with the same pay. He is to be paid all compensation to which he would otherwise have been

entitled since the date of his dismissal, including but not limited to back pay, leave, contributions into the State retirement system, and any and all benefits to which he would have been entitled.

The Undersigned further holds that Petitioner Brandon Clay Taylor's Petition for Attorney Fees and Costs is granted, and Petitioner shall have and recover of the Respondent the sum of Thirty-Eight Thousand Three Hundred and Eighty-Eight Dollars and Twenty-Nine Cents (\$38,388.29) in attorney's fees and costs.

NOTICE

THIS IS A FINAL DECISION issued under the authority of N.C. Gen. Stat. § 150B-34.

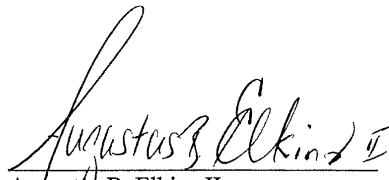
Under the provisions of North Carolina General Statutes Chapter 150B, Article 4, any party wishing to appeal the Final Decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. 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. N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties.

In conformity with the Office of Administrative Hearings' Rules, 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.

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 22nd day of October, 2013.


Augustus B. Elkins II
Administrative Law Judge