

NORTH CAROLINA REGISTER

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May 15, 2014

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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
Raleigh, North Carolina 27609

(919) 431-3000

(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
Raleigh, North Carolina 27609

(919) 431-3000

(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

Raleigh, North Carolina 27603-8005

(919) 807-4700

(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

Raleigh, North Carolina 27603

(919) 715-2893

contact: Amy Bason

amy.bason@ncacc.org

NC League of Municipalities

215 North Dawson Street

Raleigh, North Carolina 27603

(919) 715-4000

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

Raleigh, North Carolina 27611

(919) 733-2578

(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.



State of North Carolina

PAT McCrORY
GOVERNOR

April 9, 2014

EXECUTIVE ORDER NO. 48

AMENDING EXECUTIVE ORDER NO. 70: RULES MODIFICATION AND IMPROVEMENT PROGRAM

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

Executive Order 70, *Rules Modification and Improvement Program*, issued by Governor Perdue on October 21, 2010, is hereby **amended** as follows:

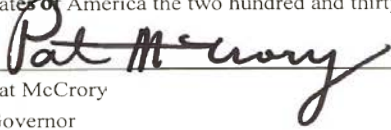
Section 3, *Review of Existing Rules*, is hereby repealed.

Section 4, *Review of New Rules*, is amended by adding the following:

Any board, commission or agency exempt from the provisions of Chapter 150B of the General Statutes that require the preparation of fiscal notes for any rule proposed shall also be exempt from the provisions of this section.

Except as amended herein, Executive Order 70 remains in **full** force and effect. This Executive Order is effective immediately and shall remain in effect until rescinded.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this 9th day of April in the year of our Lord two thousand and fourteen and of the Independence of the United States of America the two hundred and thirty-eight.


Pat McCrory
Governor

ATTEST:

Elaine F. Marshall
Secretary of State



NOTICE OF RULE MAKING PROCEEDINGS AND PUBLIC HEARING

NORTH CAROLINA BUILDING CODE COUNCIL

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

Citation to Existing Rule Affected by this Rule-Making: *North Carolina Electrical, Fire, and Plumbing Codes.*

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

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

Public Hearing: **Tuesday, June 10, 2014, 9:00AM, NCSU McKimmon Center, 1101 Gorman Street, Raleigh, NC 27606.** *Comments on both the proposed rule and any fiscal impact will be accepted.*

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

Statement of Subject Matter:

1. Request by Terry Cromer, representing the NC Association of Electrical Contractors, to amend the 2011 NC NEC, Section 406.4. The proposed amendment is as follows:

406.4(D)(4) Arc-Fault Circuit-Interrupter Protection. Where a receptacle outlet is supplied by a branch circuit that requires arc-fault circuit interrupter protection as specified elsewhere in this *Code*, a replacement receptacle at this outlet shall be one of the following:

- (1) A listed outlet branch circuit type arc-fault circuit interrupter receptacle
- (2) A receptacle protected by a listed outlet branch circuit type arc-fault circuit interrupter type receptacle
- (3) A receptacle protected by a listed combination type arc-fault circuit interrupter type circuit breaker

Exception: Non-grounding type receptacle(s)

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2015.

Reason Given – By replacing a non-grounding type receptacle with an AFCI receptacle would be a code violation as all AFCI receptacles are of the grounding type and the NEC requires that if a non-grounding type receptacle is replaced by a grounding type receptacle it is required to have GFCI protection or be grounded by an equipment grounding conductor.

Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

2. Request by Terry Cromer, representing the NC Association of Electrical Contractors, to amend the 2011 NC NEC, Section 680.42. The proposed amendment is as follows:

680.42(B) Bonding. Bonding by metal-to-metal mounting on a common frame or base shall be permitted. The metal bands or hoops used to secure wooden staves shall not be required to be bonded as required in 680.26.

Equipotential bonding of perimeter surfaces in accordance with 680.26(B)(2) shall not be required to be provided for spas and hot tubs where all of the following conditions apply:

- (1) The spa or hot tub shall be listed as a self-contained spa for aboveground use.
- (2) The spa or hot tub shall not be identified as suitable only for indoor use.
- (3) The installation shall be in accordance with the manufacturer's instructions and shall be located on or above grade.
- (4) The top rim of the spa or hot tub shall be at least 710 mm (28 in.) above all perimeter surfaces that are within 760 mm (30 in.), measured horizontally from the spa or hot tub. The height of nonconductive external steps for entry to or exit from the self-contained spa shall not be used to reduce or increase this rim height measurement.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2015.

Reason Given – This was a TIA to the 2011 NEC eliminating the need to require equipotential bonding for a listed self-contained hot tub.

Fiscal Statement – This rule is anticipated to provide equivalent compliance with a small decrease in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

3. Request by Sean Gerolimos, with Schluter Systems L.P., to amend the 2012 NC Plumbing Code, Section 417.4. The proposed amendment is as follows:

417.4 Shower compartments. Shower compartments shall conform to Table 417.4 and shall have approved shower pan material or the equivalent thereof as determined by the plumbing official. The pan shall turn up on three sides at least 2 inches (51 mm) above the finished curb level. The remaining side shall wrap over the curb. Shower drains shall be constructed with a clamping device so that the pan may be securely fastened to the shower drain thereby making a watertight joint. Shower drains shall have an approved weephole device system to ensure constant drainage of water from the shower pan to the sanitary drainage system. There shall be a watertight joint between the shower and drain and trap. Shower receptacle waste outlets shall be not less than 2 inches (51 mm) and shall have a removable strainer.

Exceptions:

1. Shower compartments with prefabricated receptors conforming to the standards listed in Table 417.4.

2. Where load-bearing, bonded waterproof membranes meeting ANSI A118.10 are used, integrated bonding flange drains shall be approved. Clamping devices and weepholes are not required where shower drains include an integrated bonding flange. Manufacturer's installation instructions shall be followed to achieve a watertight seal between the bonded waterproof membrane and the integrated bonding flange drain. Integrated bonding flange drains shall conform to ASME A112.6.3, ASME A112.18.2/CSA B125.2, or CSA B79.

Motion/Second/Approved – The request was granted and sent to the Plumbing Committee for review. The proposed effective date of this rule is January 1, 2015.

Reason Given – The intent of this proposal is to provide an exception for integrated bonding flange drains with bonded waterproof membranes in lieu of clamping ring shower drains with pan liners.

Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

4. Request by Kevin Huber, with SureSeal MFG, to amend the 2012 NC Plumbing Code, Section 1002.4. The proposed amendment is as follows:

1002.4 Trap seals. Each fixture trap shall have a liquid seal of not less than 2 inches (51 mm) and not more than 4 inches (102 mm), or deeper for special designs relating to accessible fixtures. Where a trap seal is subject to loss by evaporation, a trap seal primer valve or trap seal protection device shall be installed. Trap seal primer valves shall connect to the trap at a point above the level of the trap seal. A trap seal primer valve shall conform to ASSE 1018 or ASSE 1044. A trap seal protection device shall conform to ASSE 1072.

Motion/Second/Approved – The request was granted and sent to the Plumbing Committee for review. The proposed effective date of this rule is January 1, 2015.

Reason Given – This proposal is to recognize a trap seal protection device that provides a level of protection equivalent to a trap seal primer valve.

Fiscal Statement – This rule is anticipated to provide equivalent compliance with a small decrease in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

5. Request by Michael Rettie, representing the Orange County Inspections Department, to amend the 2012 NC Fire Prevention Code, Section 1004.10. The proposed amendment is as follows:

427.3 1004.10[B] Group E in churches, private schools and public schools. Rooms used for first grade children and younger shall be located on the level of exit discharge. Rooms used for second grade children shall not be located more than one story above the level of exit discharge.

Motion – Alan Perdue/**Second** – Lon McSwain/**Approved**. The request was granted and sent to the Fire Committee for review.

Motion/Second/Approved – The request was granted and sent to the Fire Committee for review. The proposed effective date of this rule is January 1, 2015.

Reason Given – The NC Building Code Section 427.3 provides specific egress requirements for new construction regarding the age groups in Group E occupancies. This same standard is lacking in the NC Fire Code, where continued maintenance of the Code requirements are specified.

Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

6. Request by Al Bass, representing the NC Building Code Council, to amend the 2012 NC Plumbing Code, Section 504.6.1. The proposed amendment is as follows:

504.6.1 Support. The discharge pipe shall be clamped or otherwise supported per Table 308.5 with not less than one clamp or support within 12-inches of the point of discharge.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2015.

Reason Given – This proposal is to provide clarity to the Plumbing Code, Section 504.6, Item 6 based on an appeal decision.

Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

NOTICE OF APPLICATION TO MODIFY EXISTING INNOVATIVE APPROVAL OF A WASTEWATER SYSTEM FOR ON-SITE SUBSURFACE USE

Pursuant to NCGS 130A-343(g), the North Carolina Department of Health and Human Services (DHHS) shall publish a Notice in the NC Register that a manufacturer has submitted a request for approval of a wastewater system, component, or device for on-site subsurface use. The following applications have been submitted to DHHS:

Application by: Dick Bachelder
Infiltrator Systems, Inc.
PO Box 768
Old Saybrook, CT 06475

For: Modification of Innovative Approval for Infiltrator Systems, Inc. existing Innovative Approvals IWWS-1993-02-R13, IWWS-1997-02-R10, and IWWS-2010-01

DHHS Contact: Nancy Deal
1-919-707-5875
Fax: 919-845-3973
Nancy.Deal@dhhs.nc.gov

These applications may be reviewed by contacting the applicant or Nancy Deal, Branch Head at 5605 Six Forks Rd., Raleigh, NC, On-Site Water Protection Branch, Environmental Health Section, Division of Public Health. Draft proposed innovative approvals and proposed final action on the application by DHHS can be viewed on the On-Site Water Protection Branch website: <http://ehs.ncpublichealth.com/oswp/>.

Written public comments may be submitted to DHHS within 30 days of the date of the Notice publication in the North Carolina Register. All written comments should be submitted to Ms. Nancy Deal, Branch Head, On-site Water Protection Branch, 1642 Mail Service Center, Raleigh, NC 27699-1642, or Nancy.Deal@dhhs.nc.gov, or fax 919-845-3973. Written comments received by DHHS in accordance with this Notice will be taken into consideration before a final agency decision is made on the innovative subsurface wastewater system application.

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 04 – DEPARTMENT OF COMMERCE

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Alcoholic Beverage Control Commission intends to adopt the rule cited as 04 NCAC 02T .0309 and amend the rules cited as 04 NCAC 02S .0102; 02T .0302, .0303, and .0308.

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

- OSBM certified on:** April 15, 2014
- RRC certified on:**
- Not Required**

Link to agency website pursuant to G.S. 150B-19.1(c):
http://abc.nc.gov/legal/statutes_regulations.aspx

Proposed Effective Date: September 1, 2014

Public Hearing:

Date: June 18, 2014

Time: 10:00 a.m.

Location: NC ABC Commission's Office, 400 East Tryon Road, Raleigh, NC 27610

Reason for Proposed Action:

04 NCAC 02S .0102 – The rule amendment is necessary to comply with Session Law 2013-83, that requires the NC ABC Commission to adopt rules for the suspension of alcohol sales in the latter portion of professional sporting events in order to protect the public safety at the events and after the events.

04 NCAC 02T .0302, .0304, .0308 and .0309 – The rule amendments and the rule adoption are necessary to comply with Session Law 2013-76, that requires the NC ABC Commission to adopt rules dealing with the sanitation of growlers.

Comments may be submitted to: Robert Hamilton, 4307 Mail Service Center, Raleigh, NC 27699-4307, phone (919) 779-8323, fax (919) 662-3583, email Robert.hamilton@abc.nc.gov

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) – Only 04 NCAC 02T .0308 and 04 NCAC 02T .0309 and as certified by OSBM, it is unclear with these two.**
- No fiscal note required by G.S. 150B-21.4**

CHAPTER 02 – ALCOHOLIC BEVERAGE CONTROL COMMISSION

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

SECTION .0100 – DEFINITIONS: PERMIT APPLICATION PROCEDURES

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

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

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

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

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

- (1) name and address of applicant;
- (2) corporate, limited liability company or partnership name;

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

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

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

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

(h) Temporary Permits for Continuation of Business. The Commission may issue temporary permits to an applicant for the

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

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

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

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

- (1) table service of food and non-alcoholic beverages are available to patrons in box seats;
- (2) no alcoholic beverages are delivered to the box seats area until after orders have been taken; and
- (3) box seat areas have been designated as part of the permittee's premises on a diagram submitted by the permittee, and the Commission has granted written approval of alcoholic beverage sales in these seating areas.

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

- (1) obtain a single permit for all its locations in the terminal;
- (2) use one central facility for storing the alcoholic beverages it sells at its locations; and
- (3) pool the gross receipts from all its locations for determining whether it meets the requirements of G.S. 18B-1000(6) and 04 NCAC 02S .0519.

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

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

- (1) the permittee or the permittee's employee shall not wear or display alcoholic beverage branded advertising;
- (2) the permittee or the permittee's employee shall not use branded carrying trays, coolers or other equipment to transport malt beverage products;
- (3) the permittee or the permittee's employee may display the malt beverage product names and prices provided that all of the product names are displayed with the same font size and font style; and
- (4) in-stand sales shall cease, whichever is earlier, upon the cessation of other malt beverage sales or upon the commencement of:
 - (A) the eighth inning during baseball games, provided that if a single ticket allows entry to more than one baseball game, then the eighth inning of the final game;
 - (B) the fourth quarter during football and basketball games;
 - (C) the sixtieth minute during soccer games;
 - (D) the third period during hockey games;
 - (E) the final 25 percent of the distance scheduled for automotive races; and
 - (F) the final hour of the anticipated conclusion of a contest or event for all other events.

Authority 18B-100; 18B-206(a); 18B-207; 18B-900; 18B-901(d); 18B-902; 18B-903; 18B-905; 18B-1000(3); 18B-1001; 18B-1008; 18B-1009.

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

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

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

- (a) All labels for malt beverage and wine products shall be submitted in duplicate to the Commission on an "Application for Label Approval Form."
- (b) Each person requesting label approval shall furnish, in the application for label approval, the names and addresses of the manufacturer, bottler and importer of the product.
- (c) Notwithstanding Paragraphs (a) and (b), holders of retail permits pursuant to G.S. 18B-1001(1), (2) or (16) that fill or

refill growlers on demand are not required to submit the labels required by Rule .0303(b) of this Section.

Authority G.S. 18B-100; 18B-206(a); 18B-207; 18B-1001(1), (2) and (16).

**04 NCAC 02T .0303 LABEL CONTENTS: MALT
BEVERAGES**

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

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

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

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

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

Authority G.S. 18B-100; 18B-101(9); 18B-206(a); 18B-207; 18B-1001(1), (2) and (16); 27 C.F.R. 16.20 through 16.22.

04 NCAC 02T .0308 GROWLERS

(a) As used in this Rule, a growler is a refillable rigid glass, ceramic, plastic, aluminum or stainless steel container with a

flip-top or screw-on lid that is no larger than 2 liters (0.5283 gallons) into which a malt beverage is poured-prefilled, filled or refilled for off-premises consumption.

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

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

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

(e) Holders of retail permits pursuant to G.S. 18B-1001(1), (2) or (16), may fill or refill growlers on demand with draft malt beverage for off-premises consumption provided the label as required by Rules .0303(b) and .0305 of this Section is affixed to the growler.

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

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

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

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

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

Authority G.S. 18B-100; 18B-206(a); 18B-207; 18B-305; 18B-1001(1), (2) and (16).

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

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

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

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

- (1) Manual washing in a three compartment sink:
 - (A) Prior to starting, clean sinks and work area to remove any chemicals, oils or grease from other cleaning activities;
 - (B) Empty residual liquid from the growler to a drain. Growlers shall not be emptied into the cleaning water;

(C) Clean the growler and cap in water and detergent. Water temperature shall be at a minimum 110°F or the temperature specified on the cleaning agent manufacturer's label instructions. Detergent shall not be fat or oil based.

(D) Remove any residues on the interior and exterior of the growler and cap;

(E) Rinse the growler and cap in the middle compartment with water. Rinsing may be from the spigot with a spray arm, from a spigot or from the tub as long as the water for rinsing shall not be stagnant but shall be continually refreshed;

(F) Sanitize the growler and cap in the third compartment. Chemical sanitizer shall be used in accordance with the EPA-registered label use instructions and shall meet the minimum water temperature requirements of that chemical; and

(G) A test kit or other device that accurately measures the concentration in MG/L of chemical sanitizing solutions shall be provided and be readily accessible for use; or

(2) Mechanical washing and sanitizing machine:

(A) Mechanical washing and sanitizing machines shall be provided with an easily accessible and readable data plate affixed to the machine by the manufacturer and shall be used according to the machine's design and operation specifications;

(B) Mechanical washing and sanitizing machines shall be equipped with chemical or hot water sanitization;

(C) Concentration of the sanitizing solution or the water temperature shall be accurately determined by using a test kit or other device; and

(D) The machine shall be regularly serviced based upon the manufacturer's or installer's guidelines;

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

(1) Filling or refilling a growler with a tube as referenced by Paragraph (e):

(A) Food grade sanitizer shall be used in accordance with the EPA-registered label use instructions;

(B) A container of liquid food grade sanitizer shall be maintained for no more than 10 malt beverage taps that will be used for filling and refilling growlers;

PROPOSED RULES

- (C) Each container shall contain no less than five tubes that will be used only for filling and refilling growlers;
- (D) The growler is inspected visually for contamination;
- (E) The growler is filled or refilled with a tube as described in Paragraph (e);
- (F) After each filling or refilling of a growler, the tube shall be immersed in the container with the liquid food grade sanitizer; and
- (G) A different tube from the container shall be used for each fill or refill of a growler; or

(2) Filling a growler with a contamination-free process:

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

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

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

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

Authority G.S. 18B-100; 18B-206(a); 18B-207; 18B-1001(1), (2) and (16); FDA Food Code 2009, Section 3-304.17(c) and Section 4-204.13(a), (b) and (d).

TITLE 13 – DEPARTMENT OF LABOR

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Department of Labor intends to amend the rule cited as 13 NCAC 13 .0401.

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

- OSBM certified on:
- RRC certified on: *July 19, 2013*
- Not Required

Link to agency website pursuant to G.S. 150B-19.1(c):
<http://www.nclabor.com/>

Proposed Effective Date: *October 1, 2014*

Public Hearing:
Date: *June 3, 2014*
Time: *10:00 a.m.*

Location: *North Carolina Department of Labor, Labor Building, 4 West Edenton St, Raleigh, NC 27601*

Reason for Proposed Action: *The amendment of 13 NCAC .0401 is reasonable necessary to ensure that owners of exhibition (historical) boilers of a riveted and/or welded construction are equally able to perform welded repairs or alterations to their respective vessels in a timely and cost-efficient manner. If 13 NCAC 13 .0401 is not amended, the currently accepted design and construction code requires that "R" Stamp holders perform the repairs or alterations on all boilers and pressure vessels and does not allow for the necessary difference in knowledge and experience required by those who undertake repairs or alterations of exhibition or (historical) boilers with a riveted design.*

Comments may be submitted to: *Karissa B Sluss, NC Department of Labor, Legal Affairs Division, 1101 Mail Service Center, Raleigh, NC 27699, email karissa.sluss@nc.labor.gov*

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

CHAPTER 13 – BOILER AND PRESSURE VESSEL

SECTION .0400 – GENERAL REQUIREMENTS

13 NCAC 13 .0401 DESIGN AND CONSTRUCTION STANDARDS

(a) *The design, construction, installation, inspection, stamping, and operation of all boilers and pressure vessels shall conform to the rules in this Chapter and the accepted design and construction code.*

(b) Repairs and alterations to boilers and pressure vessels shall conform to the requirements of the National Board Inspection Code, except as provided in Paragraph (g) of this Rule.

(c) The rules of this Chapter shall control when any conflict is found to exist between the Rules and the accepted design and construction code or the National Board Inspection Code.

(d) Welded repairs and alterations may be made only by an individual or organization in possession of a valid certificate of authorization for use of the National Board "R" symbol stamp-stamp, except as provided in Paragraph (g) of this Rule. Repairs and alterations shall be reported on National Board "R1" and "R2" reports respectively. The forms, along with supplements used, shall be submitted to the Chief Inspector within 60 days of the completion of the work conducted. Repair and alteration forms shall be annotated with the appropriate NC identification number for the pressure equipment repaired.

(e) In such cases where removal of a defect in a pressure-retaining item is not practical at the time of discovery, with approval of the Chief Inspector, the repair may be conducted in compliance with the NBIC, Part 3 Repairs and Alterations, Repair of Pressure-Retaining Items Without Complete Removal of Defects.

(f) Repairs of safety valves or safety relief valves shall be made by an individual or organization in possession of a valid certificate of authorization for use of the National Board "VR" symbol stamp.

(g) Welded repairs and alterations to exhibition (historical) boilers of riveted or welded construction may be conducted by a welder who has been qualified in accordance with the ASME Boiler and Pressure Vessel Code, Section IX, Welding and Brazing Qualifications.

Authority G.S. 95-69.11; 95-69.13; 95-69.14.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 16 - BOARD OF DENTAL EXAMINERS

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Dental Examiners intends to amend the rules cited as 21 NCAC 16E .0103; 16G .0101; 16H .0104, .0203; 16I .0101, .0102, .0105 - .0111; 16J .0101; 16K .0106; 16N .0304, .0307, .0404, .0502, .0504 - .0506, and .0508.

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

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

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

Proposed Effective Date: September 1, 2014

Public Hearing:

Date: June 12, 2014

Time: 6:30 p.m.

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

Reason for Proposed Action:

21 NCAC 16E .0103 - is proposed for amendment to clarify the requirements for provisional licensure;

21 NCAC 16G .0101 - is proposed for amendment to clarify what functions may be delegated to dental hygienists;

21 NCAC 16H .0104 - is proposed to amendment to clarify what dental assistants must do to be classified as a DA II.

21 NCAC 16H .0203 - is proposed for amendment to clarify what procedures may be performed by DA IIs.

21 NCAC 16I .0102 - is proposed for amendment to clarify what self study courses may be counted toward the mandatory continuing education hours requirement and to explain continuing education requirements for formerly exempted licensees who wish to resume active practice.

21 NCAC 16I .0101 and .0105-.0107 - are proposed for amendment to clarify when license renewal applications must be received by the Board.

21 NCAC 16I .0108 - is proposed for amendment to require certificates of renewal of license to bear the original license number and 21 NCAC 16I .0109 - is proposed for amendment to require licensees to display their original license and current renewal certificate.

21 NCAC 16I .0110 - is proposed for amendment to define "good standing" to exclude licensees who are subject to probationary terms.

21 NCAC 16I .0111 - is proposed for amendment to delete a reference to sedation permits, which cannot be held by a hygienist.

21 NCAC 16J .0101 - is amended to clarify that animals other than certified assistance animals required to assist disabled individuals are not allowed in any area of a dental office where clinical work is being performed.

21 NCAC 16K .0103 and .0106 - are proposed for amendment to apply the requirements of those rules to all North Carolina dental schools.

21 NCAC 16N .0304 - is proposed for amendment to specify that written comments to proposed rules must be received within the longer of 60 days after publication of the text in the North Carolina register or the date of the rule making hearing.

21 NCAC 16N .0307 and .0404 - are proposed for amendment to eliminate the requirement that the record of rule making and declaratory ruling proceedings be kept for five years after the rule or ruling are no longer in effect.

21 NCAC 16N .0502 - is proposed for amendment to eliminate unnecessary formatting requirements for requests for an administrative hearing.

21 NCAC 16N .0504 - is proposed for amendment to eliminate references to prehearing conferences from the requirements for contested cases.

21 NCAC 16N .0504 and .0508 - are proposed for amendment to clarify that action is required by a majority of Board members eligible to vote.

21 NCAC 16N .0506 - is proposed for amendment to clarify awkward language and

21 NCAC 16N .0603 - is proposed for amendment to clarify that subpoenas should be served as required by the Rules for Civil Procedure.

Comments may be submitted to: Bobby D. White, 507 Airport Blvd. Ste 105, Morrisville, NC 27650

Authority G.S. 90-226; 90-229(a).

Comment period ends: July 14, 2014

SUBCHAPTER 16G – DENTAL HYGIENISTS

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 16E – PROVISIONAL LICENSURE: DENTAL HYGIENIST

21 NCAC 16E .0103 APPLICATION

(a) All applications for provisional licensure shall be submitted upon made on forms provided by the Board and all information requested shall be provided. furnished by the Board at www.ncdentalboard.org and no application shall be deemed complete which does not set forth all the information required relative to the applicant. Incomplete applications will be returned to the applicant. Any applicant who changes his address shall notify the Board office within 10 business days. Applicants shall ensure that a final transcript from his or her high school is sent to the Board office in a sealed envelope. Applicants must also ensure that an official final transcript from a dental hygiene program as set forth in G.S. 90-224 is sent in a sealed envelope to the Board office.
(b) The nonrefundable application fee shall accompany the application.
(c) Applicants who are licensed in other states shall ensure that the Board receives verification of licensure from the board of each state in which they are licensed. A photograph of the applicant, taken within six months of the date of the application, must be affixed to the application.
(b)(d) All applicants shall submit to the Board a signed release form, completed Fingerprint Record Card, and such other form(s) required to perform a criminal history check at the time of the application. The form and card are available from the Board office.

SECTION .0100 – DENTAL HYGIENISTS

21 NCAC 16G .0101 FUNCTIONS WHICH MAY BE DELEGATED

A dental hygienist may be delegated appropriate functions to be performed under the direct control and supervision of a dentist who shall be personally and professionally responsible and liable for any and all consequences or results arising from performance of such acts and functions. In addition to the functions set out in G.S. 90-221(a) and 21 NCAC 16H .0201, 16H .0203, functions which may be delegated to a dental hygienist include:

- (1) Taking impressions for study models and opposing casts which will not be used for construction of permanent dental appliances, but which may be used for the fabrication of adjustable orthodontic appliances, nightguards and the repair of dentures or partials;
(2) Applying sealants to teeth that do not require mechanical alteration prior to the application of such sealants, provided that a dentist has examined the patient and prescribed the procedure;
(3) Inserting matrix bands and wedges;
(4) Placing cavity bases and liners;
(5) Placing and/or removing rubber dams;
(6) Cementing temporary restorations using temporary cement;
(7) Applying acid etch materials and rinses; materials/rinses;
(8) Applying bonding agents;
(9) Removing periodontal dressings;
(10) Removing sutures;
(11) Placing and removing gingival retraction cord;
(12) Removing excess cement;
(13) Flushing, drying and temporarily closing root canals;
(14) Placing and removing temporary restorations;
(15) Placing and tying in or untying and removing orthodontic arch wires;
(16) Inserting interdental spacers;
(17) Fitting (sizing) orthodontic bands or brackets;
(18) Applying dentin desensitizing solutions;
(19) Performing periodontal screening;
(20) Performing periodontal probing;
(21) Performing subgingival exploration for or removal of hard or soft deposits;
(22) Performing sulcular irrigation;
(23) Applying sulcular antimicrobial or antibiotic agents which are resorbable;
(24) Performing extra-oral adjustments which affect function, fit, or occlusion of any temporary restoration or appliance; and

- (25) Initially forming and sizing orthodontic arch wires and ~~placing place~~ arch wires after final adjustment and approval by the dentist.

~~Assisting National Board, and current certification in CPR.~~

Authority G.S. 90-29(c)(9).

Authority G.S. 90-221; 90-223(b).

SUBCHAPTER 16H – DENTAL ASSISTANTS

SECTION .0200 – PERMITTED FUNCTIONS OF DENTAL ASSISTANT

SECTION .0100 – CLASSIFICATION AND TRAINING

21 NCAC 16H .0104 APPROVED EDUCATION AND TRAINING PROGRAMS

To be classified as a Dental Assistant II, an assistant must meet one of the following criteria:

- (1) successful completion of:
 - (a) an ADA-accredited dental assisting program and current certification in CPR; or
 - (b) one academic year or longer in an ADA-accredited dental hygiene program, and current certification in CPR; or
- (2) successful completion of the Dental Assistant certification examination(s) administered by the Dental Assisting National Board and current certification in CPR; or
- (2)(3) successful completion of:
 - (a) ~~full time employment and experience as a chairside assistant for two years (3,000 hours) of the preceding five; five, during which period the assistant may be trained in any dental delivery setting and allowed to perform the functions of a Dental Assistant II under the direct control and supervision of a licensed dentist;~~
 - (b) a 3-hour course in sterilization and infection control;
 - (c) a 3-hour course in dental office emergencies; emergencies; and
 - (d) ~~radiology training consistent with G.S. 90-29(e)(12); and~~
 - (e)(d) current certification in CPR; or CPR.
 - (e) after completing Sub-items (3)(b), (c) and (d) of this Rule, dental assistants may be trained in any dental delivery setting and allowed to perform the functions of a Dental Assistant II under the direct control and supervision of a licensed dentist, except as listed in Sub-item (3)(f) of this Rule.
 - (f) dental assistants may take radiographs after completing radiology training consistent with G.S. 90-29(c)(12).
- (3) ~~successful completion of the certification examination administered by the Dental~~

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

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

- (1) Take impressions for study models and opposing casts which will not be used for construction of dental appliances, but ~~that~~ which may be used for the fabrication of adjustable orthodontic appliances, nightguards and the repair of dentures or partials;
- (2) Apply sealants to teeth that do not require mechanical alteration prior to the application of such sealants, provided a dentist has examined the patient and prescribed the procedure;
- (3) Insert matrix bands and wedges;
- (4) Place cavity bases and liners;
- (5) Place and remove rubber dams;
- (6) Cement temporary restorations using temporary cement;
- (7) Apply acid etch materials and rinses; ~~materials/rinses;~~
- (8) Apply bonding agents;
- (9) Remove periodontal dressings;
- (10) Remove sutures;
- (11) Place and remove gingival retraction cord;
- (12) Remove excess cement;
- (13) Flush, dry and temporarily close root canals;
- (14) Place and remove temporary restorations;
- (15) Place and tie in or untie and remove orthodontic arch wires;
- (16) Insert interdental spacers;
- (17) Fit (size) orthodontic bands or brackets;
- (18) Apply dentin desensitizing solutions;
- (19) Perform extra-oral adjustments which affect function, fit or occlusion of any temporary restoration or appliance;
- (20) Initially form and size orthodontic arch wires and place arch wires after final adjustment and approval by the dentist; and
- (21) Polish the clinical ~~erown~~ crown, as allowed by 21 NCAC 16H .0104(3)(e), using only;
 - (A) a hand-held brush and appropriate polishing agents; or
 - (B) a combination of a slow speed handpiece (not to exceed 10,000 rpm)

with attached rubber cup or bristle brush, and appropriate polishing agents.

(b) A Dental Assistant II must complete a course in coronal polishing identical to that taught in an ADA accredited dental assisting program, or by a licensed North Carolina hygienist or dentist lasting at least seven clock hours before using a slow speed handpiece with rubber cup or bristle brush attachment. The course must include instruction on dental morphology, the periodontal complex, operation of handpieces, polish aids and patient safety. A coronal polishing procedure shall not be represented to the patient as a prophylaxis and no coronal polishing procedure may be billed as a prophylaxis unless the dentist has performed an evaluation for calculus, deposits, or accretions and a dentist or dental hygienist has removed any substances detected.

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

SUBCHAPTER 16I – ANNUAL RENEWAL OF DENTAL HYGIENIST LICENSE

SECTION .0100 – ANNUAL RENEWAL

21 NCAC 16I .0101 APPLICATIONS

~~A renewal application must be completed in full and received in the Board's office before midnight by the close of business on January 31 of each year for renewal without a fee for late filing. All applications submitted to the Board must be completed in full.~~

Authority G.S. 90-227.

21 NCAC 16I .0102 CONTINUING EDUCATION REQUIRED

(a) As a condition of license renewal, each dental hygienist must complete a minimum of six clock hours of continuing education each calendar year. Any or all the hours may be acquired through self-study courses. To count toward the mandatory continuing education requirement, For self-study courses to be counted towards this continuing education requirement, must be related to clinical patient care and offered by a Board-approved sponsor. The the-hygienist must successfully complete a test following the course and obtain a certificate of completion. Current certification in CPR is required in addition to the mandatory continuing education hours.

(b) A dental hygienist who can demonstrate a disabling condition may request a variance in required continuing education hours during a particular period. Written documentation of a disabling condition that interferes with the hygienist's ability to complete the required hours shall be provided to the Board. The Board may grant or deny such requests on a case by case basis according to this standard. In considering the request, the Board may require additional documentation substantiating any specified disability.

(c) If a licensee who has been exempted from continuing education requirements wishes to resume practice, the licensee must complete continuing education courses in accordance with

this Rule. The Board may require licensees who have not practiced dental hygiene for more than a year to undergo a bench test before allowing the licensee to resume practice, where there is indication of inability to practice dental hygiene.

Authority G.S. 90-225.1.

21 NCAC 16I .0105 PENALTY/NON-COMPLIANCE/CONTINUING EDUCATION REQUIREMENT

If the applicant for a renewal certificate fails to provide proof of completion of reported continuing education hours for the current year as required by 21 NCAC 16I .0102 and .0104 of this Subchapter, the Board may refuse to issue a renewal certificate for the year for which renewal is sought until such time as the licensee completes the required hours of education for the current year and meets all other qualifications for renewal. If the applicant applies for credit for continuing education hours or a reduction of continuing education hours and fails to provide the required documentation upon request, the Board may refuse to issue a certificate of renewal until such time as the applicant meets the qualifications for credit.

If an applicant fails to meet the qualifications for renewal, including completing the required hours of continuing education and delivering the required documentation to the Board's office before ~~midnight~~the close of business on March 31 of each year, the license becomes void and must be reinstated.

Authority G.S. 90-225.1.

21 NCAC 16I .0106 FEE FOR LATE FILING AND DUPLICATE LICENSE

(a) If the application for a renewal certificate, accompanied by the fee required, is not completed in full and received in the Board's office before ~~the close of business~~midnight on January 31 of each year, an additional fee of fifty dollars (\$50.00) shall be charged for the renewal certificate.

(b) A fee of twenty-five dollars (\$25.00) shall be charged for each duplicate of any license or certificate issued by the Board.

Authority G.S. 90-39; 90-227; 90-232.

21 NCAC 16I .0107 LICENSE VOID UPON FAILURE TO RENEW

If an application for a renewal certificate accompanied by the renewal fee, plus the additional late filing fee, is not received in the Board's office before ~~midnight~~the close of business on March 31 of each year, the license becomes void. Should the license become void due to failure to timely renew, the applicant must apply for reinstatement.

Authority G.S. 90-227.

21 NCAC 16I .0108 FORM OF CERTIFICATE

The certificate of renewal of license shall bear the original license a serial number, ~~which need not be the serial number of the original license issued~~, the full name of the applicant, and the date of issuance.

Authority G.S. 90-222; 90-223; 90-227.

21 NCAC 16I .0109 CERTIFICATE DISPLAYED

The original license and current certificate of renewal of license shall at all times be displayed in a conspicuous place at the office where the dental hygienist is employed, and whenever requested the license and the current certificate of renewal shall be exhibited to or produced before the North Carolina State Board of Dental Examiners or its authorized agents. Photocopies may not be substituted for the original license and certificate of renewal or for duplicates issued by the Board.

Authority G.S. 90-227.

21 NCAC 16I .0110 DEFINITIONS

The following definitions apply only to this Subchapter:

- (1) "Dental Board" -- the North Carolina State Board of Dental Examiners.
- (2) "Eligible licensees"-- all hygienists currently licensed by and in good standing with the North Carolina State Board of Dental Examiners who are serving in the armed forces of the United States and who are eligible for an extension of time to file a tax return pursuant to G.S. 105-249.2.
- (3) "Extension period" -- the time period disregarded pursuant to 26 U.S.C. 7508.
- (4) "Good standing" -- a hygienist whose license is not suspended or revoked and who is not practicing under any probationary terms.

Authority G.S. 90-28; 93B-15.

21 NCAC 16I .0111 EXEMPTIONS GRANTED

- (a) Eligible licensees, as defined in Rule .0110 of this Section, are granted a waiver of their mandatory continuing education requirements.
- (b) Eligible licensees are granted an extension period in which to pay license renewal fees and comply with all other requirements imposed by the Dental Board as conditions for maintaining licensure, licensure and current sedation permits.

Authority G.S. 90-28; 93B-15.

SUBCHAPTER 16J - SANITATION

SECTION .0100 - PREMISES

21 NCAC 16J .0101 PREMISES

- (a) The premises of a dental facility shall be kept neat and clean and free of accumulated rubbish and substances of a similar nature which create a public health nuisance.
- (b) The premises shall be kept free of all insects and vermin. Proper methods for their eradication or control shall be utilized.
- (c) Water of a safe, sanitary quality, from a source approved by the health officer, shall be piped under pressure, and in an approved manner, to all equipment and fixtures where the use of water is required.

(d) All plumbing shall be in accordance with the local plumbing ordinances.

(e) Comfortable and sanitary conditions for patients and employees shall be maintained constantly.

(f) All liquid and human waste, including floor wash water, shall be disposed of through trapped drains into a public sanitary sewer system in localities where such system is available. In localities where a public sanitary system is not available, liquid and human waste shall be disposed of in a manner approved by the Environmental Health Section of the Division of Health Services, State Department of Human Resources.

(g) There shall be adequate toilet facilities on the premises of every dental office. They shall conform to standards of the Environmental Health Section of the Division of Health Services, State Department of Human Resources.

(h) No animals, except certified assistance animals required to assist disabled individuals, are allowed in any area of a dental office where clinical work is being performed.

Authority G.S. 90-23; 90-41(a)(23); 90-48.

SUBCHAPTER 16K – DENTAL SCHOOL EXTENSION FACILITIES

21 NCAC 16K .0103 INSTRUCTORS TO BE APPROVED

All dentists acting as instructors in dental school extension facilities shall be approved by that official of ~~the School of Dentistry~~ a North Carolina school of dentistry who is generally responsible for faculty appointments.

Authority G.S. 90-29(c)(4).

21 NCAC 16K .0106 REPORTS TO BOARD

Every North Carolina school of dentistry ~~The School of Dentistry~~ shall keep the Board continuously informed as to the location and nature of each dental school extension facility, the names of the students assigned thereto, and the names and qualifications of all instructors functioning therein.

Authority G.S. 90-29(c)(4).

SUBCHAPTER 16N – RULEMAKING AND ADMINISTRATIVE HEARING PROCEDURES

SECTION .0300 – RULEMAKING HEARINGS

21 NCAC 16N .0304 WRITTEN SUBMISSIONS

Any person may file a written submission containing data, comments or arguments after publication of notice of a rulemaking hearing concerning a proposed rule for 60 days after the text is published in the North Carolina Register or the date of the public hearing, whichever is longer, up to the date of hearing. The Board may in its discretion grant ~~an~~ an additional ~~time~~ time ~~30 days~~ after a hearing for further comment and argument. ~~These written~~ Written comments should be sent to the Board's office. ~~They and~~ They ~~and~~ should clearly state the rule or proposed rule to which such comments are addressed.

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

21 NCAC 16N .0307 RECORD OF PROCEEDINGS

A record of all rulemaking proceedings will be maintained in the Board's office for as long as the rule is in effect, ~~and for five years thereafter~~, following filing. This record will contain: the original petition if any, the notice, all written memoranda and information submitted, and any record or summary of oral presentations, if any. A record of the rulemaking proceedings will be available for public inspection during the regular office hours of the Board.

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

SECTION .0400 – DECLARATORY RULINGS

21 NCAC 16N .0404 RECORD OF DECISION

A record of all declaratory ruling proceedings will be maintained in the Board's office for as long as the ruling is in ~~effect~~, ~~and for five years thereafter~~. This record will contain: the request, all written submissions filed on the request, whether filed by the petitioner or any other person, and a record or summary of all the oral presentations, if any. Records of declaratory ruling proceedings will be available for public inspection during the Board's regular office hours.

Authority G.S. 150B-17.

SECTION .0500 – ADMINISTRATIVE HEARING PROCEDURES

21 NCAC 16N .0502 REQUEST FOR HEARING

(a) Any time an individual believes his rights, duties or privileges have been affected by the Board's administrative action, but has not received a notice of a right to an administrative hearing, that individual may file a request for hearing.

(b) The individual shall submit a request to the Board's office, ~~with the request bearing the notation: REQUEST FOR ADMINISTRATIVE HEARING. The request should contain~~ containing the following information:

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

Authority G.S. 150B-38.

21 NCAC 16N .0504 NOTICE OF HEARING

(a) The Board shall give the party or parties in a contested case a notice of hearing not less than 15 days before the hearing. Said notice shall contain the following information, in addition to the items specified in G.S. 150B-38(b):

- (1) The name, position, address and telephone number of a person at the offices of the Board

to contact for further information or discussion; and

~~(2) The date, time, and place for a prehearing conference, if any; and~~

~~(3)~~(2) Any other information deemed relevant to informing the parties as to the procedure of the hearing.

(b) If the Board determines that the public health, safety or welfare requires such action, it may issue an order summarily suspending a license. Upon service of the order, the licensee to whom the order is directed shall immediately cease practicing in North Carolina. The Board shall promptly give notice of hearing pursuant to G.S. 150B-38 following service of the order. The suspension shall remain in effect pending issuance by the Board of a final agency decision pursuant to G.S. 150B-42.

Authority G.S. 150B-38.

21 NCAC 16N .0505 WHO SHALL HEAR CONTESTED CASES

All administrative hearings will be conducted by the Board, a panel consisting of a majority of Board members eligible to vote on the issue, or an administrative law judge designated to hear the case pursuant to G.S. 150B-40(e).

Authority G.S. 150B-38; 150B-40.

21 NCAC 16N .0506 PETITION FOR INTERVENTION

(a) A person desiring to intervene in a contested case must file a written petition with the Board's office. The request should bear the notation: PETITION TO INTERVENE IN THE CASE OF (NAME OF CASE).

(b) The petition must include the following information:

- (1) The name and address of petitioner;
- (2) The business or occupation of petitioner, where relevant;
- (3) A full identification of the hearing in which petitioner is seeking to intervene;
- ~~(4) The statutory or non-statutory grounds for intervention if any, if not, so state; or a statement that no grounds exist;~~
- (5) Any claim or defense in respect to which intervention is sought; and
- (6) A summary of the arguments or evidence petitioner seeks to present.

(c) The person desiring to intervene shall serve copies of the petition on all parties to the case.

(d) If the Board determines to allow intervention, notice of that decision will be issued promptly to all parties and to the petitioner. In cases of discretionary intervention, such notification will include a statement of any limitations of time, subject matter, evidence or whatever else is deemed necessary which are imposed on the intervenor.

(e) If the Board's decision is to deny intervention, petitioner will be notified promptly. Such notice will be in writing, identifying the reasons for the denial, and will be issued to the petitioner and to all parties.

Authority G.S. 150B-38.

21 NCAC 16N .0508 DISQUALIFICATION OF BOARD MEMBERS

(a) Self Disqualification. If for any reason a Board member determines that personal bias or other factors render that member unable to hear a contested case and perform all duties in an impartial manner, that Board member shall voluntarily decline to participate in the hearing or decision.

(b) Petition for Disqualification. If for any reason any party in a contested case believes that a Board member is personally biased or otherwise unable to hear a contested case and perform all duties in an impartial manner, the party may file a sworn, notarized affidavit with the Board. The title of such affidavit should bear the notation: **AFFIDAVIT OF DISQUALIFICATION OF BOARD MEMBER IN THE CASE OF (NAME OF CASE).**

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

(d) Timeliness and Effect of Affidavit. An affidavit of disqualification will be considered timely if filed ten days before commencement of the hearing. Any other affidavit will be considered timely provided it is filed at the first opportunity after the party becomes aware of facts which give rise to a reasonable belief that a Board member may be disqualified under this Rule. When a petition for disqualification is filed less than ten days before or during the course of a hearing, the hearing shall continue with the challenged Board member sitting. Petitioner shall have the opportunity to present evidence supporting his petition, and the petition and any evidence relative thereto presented at the hearing shall be made a part of the record. The Board, before rendering its decision, shall decide whether the evidence justifies disqualification. In the event of disqualification, the disqualified member will not participate in further deliberation or decision of the case.

(e) Procedure for Determining Disqualification:

- (1) The Board will appoint a Board member to investigate the allegations of the affidavit.
- (2) The investigator will report to the Board the findings of the investigation.
- (3) The Board shall decide whether to disqualify the challenged individual.
- (4) The person whose disqualification is to be determined will not participate in the decision but may be called upon to furnish information to the other members of the Board.
- (5) When a Board member is disqualified prior to the commencement of the hearing or after the hearing has begun, such hearing will continue with the remaining members sitting provided that the remaining members still constitute a majority of the Board.
- (6) If a majority of the members of the Board who are eligible to vote ~~three or more members of the Board~~ are disqualified pursuant to this Rule, the Board shall petition the Office of Administrative Hearings to appoint an

administrative law judge to hear the contested case pursuant to G.S. 150B-40(e).

Authority G.S. 150B-38; 150B-40.

**SECTION .0600 – ADMINISTRATIVE HEARINGS:
DECISIONS: RELATED RIGHTS AND PROCEDURES**

21 NCAC 16N .0603 SUBPOENAS

(a) A request for subpoenas for the attendance and testimony of witnesses or for the production of documents, either at a hearing or for the purposes of discovery, shall be made in writing to the Board, shall identify any documents sought with specificity, and shall include the full name and home or business address of all persons to be subpoenaed and, if known, the date, time, and place for responding to the subpoena. The Board shall issue the requested subpoenas within three days of the receipt of the request.

(b) Subpoenas shall contain: the caption of the case; the name and address of the person subpoenaed; the date, hour and location of the hearing in which the witness is commanded to appear; a particularized description of the books, papers, records or objects the witness is directed to bring with him to the hearing, if any; the identity of the party on whose application the subpoena was issued, and a "return of service". The "return of service" form, as filled out, shows the name and capacity of the person serving the subpoena, the date on which the subpoena was delivered to the person directed to make service, the date on which service was made, the person on whom service was made, the manner in which service was made, and the signature of the person making service.

~~(e) Subpoenas shall be served by the sheriff of the county in which the person subpoenaed resides, when the party requesting such subpoena prepays the sheriff's service fee, as permitted by the North Carolina Rules of Civil Procedure. The subpoena shall be issued in duplicate, with a "return of service" form attached to each copy. A person serving the subpoena shall fill out "return of service" form for each copy and promptly return one copy of the subpoena, with the attached "return of service" form completed, to the Board.~~

(d) Any person receiving a subpoena from the Board may object thereto by filing a written objection to the subpoena with the Board's office.

(e) Such objection shall include a concise, but complete, statement of reasons why the subpoena should be revoked or modified. These reasons may include ~~lack of relevancy sought, or any other~~ any reasons sufficient in law for holding the subpoena invalid, such as that the evidence is privileged, that appearance or production would be so disruptive as to be unreasonable in light of the significance of the evidence sought, or other undue hardship.

(f) Any objection to a subpoena must be served on the party who requested the subpoena simultaneously with the filing of the objection with the Board.

(g) The party who requested the subpoena, at such time as may be granted by the Board, may file a written response to the objection. The written response shall be served by the requesting party on the objecting witness simultaneously with the filing of the response with the Board.

(h) After receipt of the objection and response thereto, if any, the Board shall issue a notice to the party who requested the subpoena and the party challenging the subpoena, and may notify any other party or parties of an open a hearing, to be scheduled as soon as practicable, at which evidence and testimony may be presented, limited to the narrow questions raised by the objection and response.

(i) Promptly after the close of such hearing, the majority of the Board members hearing the contested case will rule on the challenge and issue a written decision. A copy of the decision will be issued to all parties and made a part of the record.

Authority G.S. 90-28; 90-48; 90-223(b); 150B-39; 150B-40.

CHAPTER 32 – NORTH CAROLINA MEDICAL BOARD

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Medical Board intends to amend the rules cited as 21 NCAC 32B .1350, .1360, and .1402.

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.ncmedboard.org/about_the_board/rule_changes

Proposed Effective Date: September 1, 2014

Public Hearing:

Date: July 14, 2014

Time: 10:00 a.m.

Location: North Carolina Medical Board, 1203 Front Street, Raleigh, NC 27609

Reason for Proposed Action:

21 NCAC 32B .1360 and .1350 - to establish that applicants applying for reinstatement or reactivation will be held to the licensure requirements established at the time the applicant initially applied for licensure.

21 NCAC 32B .1402 - To establish that applicants applying for reinstatement or reactivation will be held to the licensure requirements established at the time the applicant initially applied for licensure and to establish that applicants must take and pass exams within 3 attempts.

Comments may be submitted to: Wanda Long, Rules Coordinator, NC Medical Board, PO Box 20007, Raleigh, NC 27619, fax (919) 326-0036, email rules@ncmedboard.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

SUBCHAPTER 32B – LICENSE TO PRACTICE MEDICINE

SECTION .1300 – GENERAL

21 NCAC 32B .1350 REINSTATEMENT OF PHYSICIAN LICENSE

(a) Reinstatement is for a physician who has held a North Carolina License, but whose license either has been inactive for more than one year, or whose license became inactive as a result of disciplinary action (revocation or suspension) taken by the Board. It also applies to a physician who has surrendered a license prior to charges being filed by the Board.

(b) All applicants for reinstatement shall:

- (1) submit a completed application, attesting under oath or affirmation that information on the application is true and complete, and authorizing the release to the Board of all information pertaining to the application;
(2) submit documentation of a legal name change, if applicable;
(3) supply a certified copy of applicant's birth certificate if the applicant was born in the United States or a certified copy of a valid and unexpired US passport. If the applicant does not possess proof of U.S. citizenship, the applicant must provide information about applicant's immigration and work status which the Board will use to verify applicant's ability to work lawfully in the United States;
(4) If a graduate of a medical school other than those approved by LCME, AOA, COCA or CACMS, shall furnish an original ECFMG certification status report of a currently valid certification of the ECFMG. The ECFMG certification status report requirement shall be waived if:

- (A) the applicant has passed the ECFMG examination and successfully completed an approved Fifth Pathway program (original ECFMG score transcript from the ECFMG required); or
 - (B) the applicant has been licensed in another state on the basis of a written examination before the establishment of the ECFMG in 1958;
 - (5) submit the AMA Physician Profile; and, if applicant is an osteopathic physician, also submit the AOA Physician Profile;
 - (6) submit a NPDB/HIPDB report dated within 60 days of the application's submission;
 - (7) submit a FSMB Board Action Data Bank report;
 - (8) submit documentation of CME obtained in the last three years, upon request;
 - (9) submit two completed fingerprint cards supplied by the Board;
 - (10) submit a signed consent form allowing a search of local, state, and national files to disclose any criminal record;
 - (11) provide two original references from persons with no family or material relationship to the applicant. These references must be:
 - (A) from physicians who have observed the applicant's work in a clinical environment within the past three years;
 - (B) on forms supplied by the Board;
 - (C) dated within six months of submission of the application; and
 - (D) bearing the original signature of the author;
 - (12) pay to the Board a non-refundable fee pursuant to G.S. 90-13.1(a), plus the cost of a criminal background check; and
 - (13) upon request, supply any additional information the Board deems necessary to evaluate the applicant's qualifications.
- (c) In addition to the requirements of Paragraph (b) of this Rule, the applicant shall submit proof that the applicant has:
- (1) within the past 10 years taken and passed either:
 - (A) an exam listed in G.S. 90-10.1 (a state board licensing examination; NBME; NBOME; USMLE; FLEX; COMLEX; or MCCQE or their successors);
 - (B) SPEX (with a score of 75 or higher); or
 - (C) COMVEX (with a score of 75 or higher);
 - (2) within the past ten years:
 - (A) obtained certification or recertification of CAQ by a specialty board recognized by the ABMS, CCFP, FRCP, FRCS or AOA; or
 - (B) met requirements for ABMS MOC (maintenance or certification) or AOA OCC (Osteopathic continuous Certification);
 - (3) within the past 10 years completed GME approved by ACGME, CFPC, RCPSC or AOA; or
 - (4) within the past three years completed CME as required by 21 NCAC 32R .0101(a), .0101(b), and .0102.
 - (d) All reports must be submitted directly to the Board from the primary source, when possible.
 - (e) An applicant shall be required to appear in person for an interview with the Board or its agent to evaluate the applicant's competence and character if the Board needs more information to complete the application.
 - (f) An application must be complete within one year of submission. If not, the applicant shall be charged another application fee plus the cost of another criminal background check.
 - (g) Notwithstanding the above provisions of this Rule, the licensure requirements established by rule at the time the applicant first received his or her equivalent North Carolina license shall apply.

Authority G.S. 90-8.1; 90-9.1; 90-10.1; 90-13.1.

21 NCAC 32B .1360 REACTIVATION OF PHYSICIAN LICENSE

- (a) Reactivation applies to a physician who has held a physician license in North Carolina, and whose license has been inactive for up to one year except as set out in Rule .1704(e) of this Subchapter. Reactivation is not available to a physician whose license became inactive either while under investigation by the Board or because of disciplinary action by the Board.
- (b) In order to reactivate a Physician License, an applicant shall:
 - (1) submit a completed application, attesting under oath that the information on the application is true and complete, and authorizing the release to the Board of all information pertaining to the application;
 - (2) supply a certified copy of applicant's birth certificate if the applicant was born in the United States or a certified copy of a valid and unexpired US passport. If the applicant does not possess proof of U.S. citizenship, the applicant must provide information about applicant's immigration and work status which the Board will use to verify applicant's ability to work lawfully in the United States; (Note: there may be some applicants who are not present in the US and who do not plan to practice physically in the US. Those applicants shall submit a statement to that effect);
 - (3) submit a FSMB Board Action Data Bank report;

- (4) submit documentation of CME obtained in the last three years;
- (5) submit two completed fingerprint record cards supplied by the Board;
- (6) submit a signed consent form allowing search of local, state, and national files for any criminal record;
- (7) pay to the Board the relevant, non-refundable fee, plus the cost of a criminal background check; and
- (8) upon request, supply any additional information the Board deems necessary to evaluate the applicant's competence and character.

(c) An applicant may be required to appear in person for an interview with the Board or its agent to evaluate the applicant's competence and character.

(d) Notwithstanding the above provisions of this Rule, the licensure requirements established by rule at the time the applicant first received his or her equivalent North Carolina license shall apply.

Authority G.S. 90-8.1; 90-9.1; 90-12.1A; 90-13.1; 90-14(a)(11a).

SECTION .1400 – RESIDENT'S TRAINING LICENSE

21 NCAC 32B .1402 APPLICATION FOR RESIDENT'S TRAINING LICENSE

(a) In order to obtain a Resident's Training License, an applicant shall:

- (1) submit a completed application, attesting under oath or affirmation that the information on the application is true and complete, and authorizing the release to the Board of all information pertaining to the application;
- (2) submit documentation of a legal name change, if applicable;
- (3) submit a photograph, two inches by two inches, affixed to the oath or affirmation which has been attested to by a notary public;
- (4) submit proof on the Board's Medical Education Certification form that the applicant has completed at least 130 weeks of medical education.
- (5) If a graduate of a medical school other than those approved by LCME, AOA, COCA or CACMS, furnish an original ECFMG certification status report of a currently valid certification of the ECFMG. The ECFMG certification status report requirement shall be waived if:
 - (A) the applicant has passed the ECFMG examination and successfully completed an approved Fifth Pathway program (original ECFMG score transcript from the ECFMG required); or

(B) the applicant has been licensed in another state on the basis of a written examination before the establishment of the ECFMG in 1958;

- (6) submit an appointment letter from the program director of the GME program or his appointed agent verifying the applicant's appointment and commencement date;
- (7) submit two completed fingerprint record cards supplied by the Board;
- (8) submit a signed consent form allowing a search of local, state, and national files for any criminal record;
- (9) pay a non-refundable fee pursuant to G.S. 90-13.1(b), plus the cost of a criminal background check;
- (10) provide proof that the applicant has taken and ~~passed~~ passed within three attempts:

(A) the COMLEX ~~Level 1–Level 1~~, within three attempts and each component of COMLEX Level 2 (cognitive evaluation and performance evaluation) ~~within three attempts~~; and if taken, COMLEX Level 3; or

(B) the USMLE Step 1 ~~within three attempts~~ and each component of the USMLE Step 2 (Clinical Knowledge and Clinical ~~Skills~~) ~~within three attempts~~; Skills; and if taken USMLE Step 3; and

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

(b) An applicant shall be required to appear in person for an interview with the Board or its agent to evaluate the applicant's competence and character, if the Board needs more information to complete the application.

(c) If the applicant previously held a North Carolina residency training license, the licensure requirements established by rule at the time the applicant first received his or her North Carolina residency training license shall apply.

Authority G.S. 90-8.1; 90-12.01; 90-13.1.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Perfusionist Advisory Committee of the North Carolina Medical Board intends to amend the rule cited as 21 NCAC 32V .0102.

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.ncmedboard.org/about_the_board/rule_changes

Proposed Effective Date: September 1, 2014

Public Hearing:

Date: July 14, 2014

Time: 10:00 a.m.

Location: North Carolina Medical Board, 1203 Front Street, Raleigh, NC 27609

Reason for Proposed Action: To establish how to handle applications from individuals who graduated from a perfusion program prior to the program becoming accredited.

Comments may be submitted to: Wanda Long, Rules Coordinator, NC Medical Board, PO Box 20007, Raleigh, NC 27619, fax (919) 326-0036, email rules@ncmedboard.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

SUBCHAPTER 32V – PERFUSIONIST REGULATIONS

21 NCAC 32V .0102 DEFINITIONS

The following definitions apply to this Subchapter:

- (1) Approved educational program – Any program within the United States which, at the time of the Applicant’s attendance, was approved by the Commission on Accreditation of Allied Health Education Programs (CAAHEP) or the Accreditation Committee for Perfusion Education (AC-PE), or any Canadian educational program recognized by the Conjoint Committee on Accreditation of the Canadian Medical Association (CMA); or any program, attended by

- Applicant, that was subsequently approved by CAAHEP, ACPE or CME within seven years of the Applicant's graduation.
(2) Board – The entity referred to in G.S. 90-682(5) and its agents.
(3) Committee – The entity referred to in G.S. 90-682(2) and its agents.
(4) Provisional licensed perfusionist - The person who is authorized to practice perfusion pursuant to 90-698.
(5) Registering - Renewing the license by paying the biennial fee and complying with Rule .0104 of this Subchapter.
(6) Supervising - Overseeing the activities of, and accepting the responsibility for, the perfusion services rendered by a provisional licensed perfusionist. Supervision shall be continuous but, except as otherwise provided in the rules of this Subchapter, shall not be construed as requiring the physical presence of the supervising perfusionist at the time and place that the services are rendered. Supervision shall not mean direct, on-site supervision at all times, but shall mean that the supervising perfusionist shall be readily available for consultation and assistance whenever the provisional licensee is performing or providing perfusion services.
(7) "Supervising Perfusionist" means a perfusionist licensed by the Committee and who serves as a primary supervising perfusionist or as a back-up supervising perfusionist.
(a) The "Primary Supervising Perfusionist" is the perfusionist who, by signing the designation of supervising perfusionist form provided by the Committee, accepts responsibility for the provisional licensed perfusionist medical activities and professional conduct at all times, whether the perfusionist is personally providing supervision or the supervision is being provided by a Back-up Supervising Perfusionist.
(b) The "Back-up Supervising Perfusionist" means the perfusionist who accepts the responsibility for supervision of the provisional licensed perfusionist's activities in the absence of the Primary Supervising Perfusionist. The Back-up Supervising Perfusionist is responsible for the activities of the provisional licensed perfusionist only when providing supervision.

Authority G.S. 90-681; 90-682; 90-685(1)(3).

CHAPTER 52 – NC BOARD OF PODIATRY EXAMINERS

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Podiatry Examiners intends to adopt the rule cited as 21 NCAC 52 .0213 and amend the rules cited as 21 NCAC 52 .0611 and .0613.

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

- OSBM certified on:
RRC certified on:
Not Required

Link to agency website pursuant to G.S. 150B-19.1(c): http://www.ncbpe.org/content/executive-board

Proposed Effective Date: September 1, 2014

Public Hearing:

Date: Thursday, July 3, 2014

Time: 9:30 a.m.

Location: 1500 Sunday Dr, Suite 102, Raleigh, NC 27607

Reason for Proposed Action: Pursuant to NCGS 90-202.5(b), to allow the Board to issue temporary licenses for non-military, podiatric, clinical residency training in North Carolina and to set forth the criteria for same.

Comments may be submitted to: Penney De Pas, NC Board of Podiatry Examiners, 1500 Sunday Dr., Suite 102, Raleigh, NC 27607-5151

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.

Fiscal impact (check all that apply).

- State funds affected

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

SECTION .0200 – EXAMINATION AND LICENSING

21 NCAC 52 .0213 TEMPORARY LICENSE FOR CLINICAL RESIDENCY/FELLOWSHIP

(a) The Board may issue a temporary license to practice podiatry to any applicant for licensure, while the podiatrist resides in North Carolina and is participating in a podiatric medical education and training clinical residency ("clinical residency") or fellowship approved by the Council of Podiatric Medical Education (CPME), in accordance with rules established in the most current version of "Standards and Requirements for Approval of Podiatric Medicine and Surgery Residencies" (CPME 320) and the "JJRC and CPME Residency Requirements" available from the CPME web site at http://www.cpme.org/residencies/content.cfm?ItemNumber=2444&navItemNumber=2245, or "Standards and Requirements for Approval of Podiatric Fellowships" (CPME 820) available from the CPME web site at http://www.cpme.org/fellowships/content.cfm?ItemNumber=2442&navItemNumber=2247.

(b) A temporary license is valid only while the licensee is participating in the clinical residency or fellowship program and shall not be extended beyond the length of training.

(c) A podiatrist holding a temporary license to practice in a clinical residency or fellowship program shall practice only within the confines of that program and under the supervision of its director.

(d) In order to obtain a temporary resident's training license, an applicant shall submit a completed temporary license application attesting under oath that the information on the application is true and complete, and authorizing the release to the Board of all information pertaining to the application, attested by a notary public, including the following documentation:

- (1) documentation of legal name change, if applicable;
(2) a photograph, at least two inches by two inches;
(3) proof of an education equivalent to four years of instruction in a high school;
(4) transcript of pre-podiatry college studies from an accredited college or university showing a minimum of two years' of study;
(5) copy of college diploma;
(6) proof of graduation from podiatry school accredited by the Council of Medical Education of the American Podiatry Medical Association (a copy of the diploma or a letter from the school will suffice); and
(7) official transcript of podiatry school studies sent directly from the institution;
(8) an appointment letter from the residency or fellowship program director, or his appointed agent, of the Council on Podiatric Medical

- Education-approved residency or fellowship program, listing the beginning and ending dates of the program;
- (9) a signed consent form allowing a search of local, state, and national records for any criminal record;
- (10) provide proof that the applicant has taken and passed:
 (A) APMLE Part I within 3 attempts, and
 (B) APMLE Part II within 3 attempts;
- (11) upon request, supply any additional information the Board deems necessary to evaluate the applicant's competence and character, including appear in person for an interview with the Board or its agent to evaluate the applicant's competence and character, if the Board needs more information to complete the application.

- (1) Licensure Renewal Application;
 (2) Disclaimer Form;
 (3) Corporate Registration Application;
 (4) Corporate Registration Renewal; ~~and~~
 (5) Specialty Credentialing ~~Application-Application;~~ and
 (6) CME (Continuing Medical Education) Submission Form.

Authority G.S. 55B-10; 55B-11; 90-202.4 (g); 90-202.6; 90-202.7; 90-202.9; 90-20.10; 90-202.11.

21 NCAC 52 .0613 FEE SCHEDULE

The following fees shall apply:

- (1) Application for examination (non-refundable) ~~\$300.00~~ \$300.00;
- (2) Examination (non-refundable) \$50.00
~~\$100.00;~~
- (3) Re-Examination (application + exam fee, non-refundable) ~~\$350.00~~ \$350.00;
- ~~(3)~~(4) License certificate ~~\$100.00~~ \$100.00;
- ~~(4)~~(5) Annual License Renewal ~~Renewal~~ \$200.00
~~\$200.00;~~
- ~~(5)~~(6) License Renewal Late Fee (per month, up to 6 months) ~~\$25.00~~ \$25.00;
- ~~(6)~~(7) Data Processing Fee for Pharmaceutical Verification as set forth in Rule .0210 of this Chapter ~~\$300.00~~ \$300.00;
- ~~(7)~~(8) Returned check ~~the~~ fee as set forth in Rule .0612 of this Section. As of the ~~effective~~ date of the last amendment to this Rule that fee is ~~\$12.00~~ \$12.00;
- ~~(8)~~(9) Incorporation for PA/PC/PLLC ~~\$50.00~~ \$50.00;
- ~~(9)~~(10) Annual Corporate Renewal ~~\$25.00~~ \$25.00;
- ~~(10)~~(11) Corporate Renewal Late Fee ~~\$10.00~~ \$10.00;
and
- (12) Mailing List Fee \$10.00.

Authority G.S. 55B-10; 55B-11; 55B-12; 90-202.4(g); 90-202.5(a); 90-202.6(c); 90-202.9; 90-202.10; 150B-19(5)(e); 150B-21.2(d).

- (e) Upon evaluation of the application, the Board shall either approve the application and issue a temporary license within 30 days of receipt of the completed application and all necessary documentation, unless an interview is necessary, in which case, the decision whether or not to issue the temporary license will occur within 30 days after the interview, or
- (f) notify the applicant within 30 days of receipt of the application that the temporary license has been denied and the reasons for such denial.

Authority G.S. 90-202.5(b); 90-202.6; 93B-15.1.

SECTION .0600 – GENERAL PROVISIONS

21 NCAC 52 .0611 FORMS AND APPLICATIONS

- (a) The Board shall issue the following items:
- (1) Certificate of Licensure;
 - (2) Licensure Renewal Card;
 - (3) Temporary License Certificate; and
 - (4) Certificate of Corporate Registration.
- (b) The Board shall provide and require use of ~~its~~ the following application forms that may be obtained from the Board's web site, <http://www.ncbpe.org> for the following specific purposes that may be obtained from the Board's web site, <http://www.ncbpe.org>: purposes:

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 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Rule-making Agency: NC Medical Care Commission

Rule Citation: 10A NCAC 13B .3110, .3502; 13C .0202, .0205, .0301

Effective Date: May 1, 2014

Date Approved by the Rules Review Commission: April 17, 2014

Reason for Action: The effective date of a recent act of the General Assembly: Session Law 2013-382, Part XIII Fair Health Care Facility Billing and Collections Practices. Effective date: October 1, 2013.

The proposed temporary amendments to rules in Chapters 10A NCAC 13B Licensing of Hospitals and Chapters 10A NCAC 13C Licensing of Ambulatory Surgical Facilities are in response to a recent act of the General Assembly, specifically Session Law 2013-382, Part XIII Fair Health Care Facility Billing and Collections Practices, which became effective on October 1, 2013. The intent of this Act is to improve transparency in the cost of health care provided by hospitals and ambulatory surgical facilities and to provide for fair health care facility billing and collections practices. Section 13.1 of this Act requires the NC Medical Care Commission to adopt rules to ensure that the provisions of the law are properly implemented.

The availability of information related to health care pricing and transparency of that information is of significant importance to the citizens of North Carolina. The proposed temporary rules address billing and collections practices for hospitals and ambulatory surgical centers to ensure that these practices are transparent, fair and reasonable to the health care consumer as intended by the General Assembly. In fact, these rules protect patients' rights to be fully informed of charges they have incurred or may incur, and also empower patients to make informed health care decisions. In light of the complexity of health care, the proposed rules also seek to require providers to present patient billing information and financial assistance resources in a manner that is comprehensible to an "ordinary" lay person.

These proposed amendments require a facility's governing body to assure that written policies and procedures are developed in order to implement the requirements of S.L. 2013-382 regarding transparency, fair billing and collections practices. They also, in accordance with the session law, provide for a way for the Division of Health Service Regulation to verify that a facility is in compliance with the law prior to licensure or renewal of a facility's license.

Transparency in health care pricing and billing is important to North Carolinas. These proposed rules are the first step to achieving it in a manner that is meaningful and useful to the public.

CHAPTER 13 – NC MEDICAL CARE COMMISSION

SUBCHAPTER 13B – LICENSING OF HOSPITALS

SECTION .3100 – PROCEDURE

10A NCAC 13B .3110 ITEMIZED CHARGES

(a) The facility shall either present an itemized list of charges to all discharged patients or the facility shall include on patients' bills, ~~which bills that~~ are not itemized, notification of the right to request an itemized bill within ~~30 days~~ three years of receipt of the non-itemized ~~bill~~ bill or so long as the hospital, a collections agency, or other assignee asserts the patient has an obligation to pay the bill.

(b) If requested, the facility shall present an itemized list of charges to each ~~patient~~ patient or the patient's responsible party. This list shall detail in language comprehensible to an ordinary layperson the specific nature of the charges or expenses incurred by the patient.

(c) The itemized listing shall ~~include, at a minimum,~~ include all charges incurred, including those charges incurred in the following service areas:

- (1) room rates;
- (2) laboratory;
- (3) radiology and nuclear medicine;
- (4) surgery;
- (5) anesthesiology;
- (6) pharmacy;
- (7) emergency services;
- (8) outpatient services;
- (9) specialized care;
- (10) extended care; and
- (11) prosthetic and orthopedic appliances.
appliances; and
- ~~(12) professional services provided by other independently billing medical personnel.~~

History Note: Authority G.S. 131E-79; 131E-91; S.L. 2013-382, s. 13.1;

Eff. January 1, 1996;

Temporary Amendment Eff. May 1, 2014.

SECTION .3500 – GOVERNANCE AND MANAGEMENT

10A NCAC 13B .3502 REQUIRED POLICIES, RULES, AND REGULATIONS

(a) The governing body shall adopt written policies, rules, and regulations in accordance with all requirements contained in this Subchapter and in accordance with the community responsibility of the facility. ~~As a minimum, the~~ The written policies, rules, and regulations shall:

- (1) state the ~~general and specific goals~~ purpose of the facility;
- (2) describe the powers and duties of the governing body officers and committees and the responsibilities of the chief executive officer;
- (3) state the qualifications for governing body membership, the procedures for selecting members, and the terms of service for members, officers and committee chairmen;
- (4) describe the authority delegated to the chief executive officer and to the medical staff. No assignment, referral, or delegation of authority by the governing body shall relieve the governing body of its responsibility for the conduct of the facility. The governing body shall retain the right to rescind any such delegation;
- (5) require Board approval of the bylaws of any auxiliary organizations established by the hospital;
- (6) require the governing body to review and approve the bylaws of the medical staff organization;
- (7) establish a procedure for processing and evaluating the applications for medical staff membership and for the granting of clinical privileges;
- (8) establish a procedure for implementing, disseminating, and enforcing a Patient's Bill of Rights as ~~described set forth~~ in Rule .3302 of this Subchapter and in compliance with G.S. 131E-117 where applicable; and G.S. 131E-117; and
- (9) require the governing body to institute procedures to provide for:
 - (A) orientation of newly elected board members to specific board functions and procedures;
 - (B) the development of procedures for periodic reexamination of the relationship of the board to the total facility community; and
 - (C) the recording of minutes of all governing body and executive committee meetings and the dissemination of those minutes, or summaries thereof, on a regular basis to all members of the governing body.

(b) The governing body shall adopt written policies and procedures to assure billing and collection practices in

accordance with G.S. 131E-91. These policies and procedures shall include:

- (1) how a patient or patient's representative may dispute a bill;
- (2) issuance of a refund when a patient has overpaid the amount due to the hospital;
- (3) providing written notification to the patient or patient's responsible party prior to submitting a delinquent bill to a collection agency;
- (4) providing the patient or patient's responsible party with the facility's charity care and financial assistance policies, if the facility is required to file a Schedule H, federal form 990; and
- (5) the requirement that a collections agency, entity, or other assignee obtain written consent from the facility prior to initiating litigation against the patient or responsible party.

~~(b)~~(c) The written policies, rules, and regulations shall be reviewed ~~at least~~ every three years, revised as necessary, and dated to indicate when last reviewed or revised.

(d) To qualify for licensure or license renewal, each facility must provide to the Division, upon application, an attestation statement in a form provided by the Division verifying compliance with the requirements in Paragraph (b) of this Rule.

History Note: Authority G.S. 131E-79; 131E-91; S.L. 2013-382, s. 10.1; S.L. 2013-382, s. 13.1;

Eff. January 1, 1996;

Temporary Amendment Eff. May 1, 2014.

SUBCHAPTER 13C – LICENSING OF AMBULATORY SURGICAL FACILITIES

SECTION .0200 – LICENSING PROCEDURES

10A NCAC 13C .0202 REQUIREMENTS FOR ISSUANCE OF LICENSE

(a) Upon application for a license from a facility never before licensed, a representative of the Department shall make an inspection of that facility. Every building, institution or establishment for which a license has been issued shall be inspected for compliance with the rules found in this Subchapter. An ambulatory surgery facility shall be deemed to meet licensure requirements if the ambulatory surgery facility is accredited by The Joint Commission (formerly known as "JCAHO"), JCAHO, AAAHC or AAAASF. Accreditation does not exempt a facility from statutory or rule requirements for licensure nor does it prohibit the Department from conducting inspections as provided in this Rule to determine compliance with all requirements.

(b) If the applicant has been issued a Certificate of Need and is found to be in compliance with the Rules found in this ~~Subchapter~~ Subchapter, then the Department shall issue a license to expire on December 31 of each year.

(c) The Department shall be notified at the time of:

- (1) any change of the owner or operator; as to the person who is the operator or owner of an ambulatory surgical facility;

- (2) any change of location;
- (3) any change as to a lease; and
- (4) any transfer, assignment or other disposition or change of ownership or control of 20 percent or more of the capital stock or voting rights thereunder of a corporation which is the operator or owner of an ambulatory surgical facility, or any transfer, assignment, or other disposition of the stock or voting rights thereunder of such corporation which results in the ownership or control of more than 20 percent of the stock or voting rights thereunder of such corporation by any person.

A new application shall be submitted to the Department in the event of such a change or changes.

(d) The Department shall not grant a license until ~~the~~ plans and specifications, specifications which are stated in Section .1400 of this Subchapter, covering the construction of new buildings, additions, or material alterations to existing buildings are approved by the Department.

(e) The facility design and construction shall be in accordance with the licensure rules for ambulatory surgical facilities found in this Subchapter, the North Carolina State Building Code, and local municipal codes.

(f) Submission of ~~Plans~~ Plans.

- (1) Before construction is begun, plans and specifications covering construction of the new buildings, alterations, renovations or additions to existing buildings, shall be submitted to the Division for approval.
- (2) The Division shall review the plans and notify the licensee that said buildings, alterations, additions, or changes are approved or disapproved. If plans are disapproved the Division shall give the applicant notice of deficiencies identified by the Division.
- (3) In order to avoid unnecessary expense in changing final plans, as a preliminary step, proposed plans in schematic form shall be reviewed by the Division.
- (4) The plans shall include a plot plan showing the size and shape of the entire site and the location of all existing and proposed facilities.
- (5) Plans shall be submitted in duplicate, ~~duplicate in order that the~~ The Division may shall distribute a copy to the Department of Insurance for review of the North Carolina State Building Code ~~requirements~~, requirements if required by the North Carolina State Building Code which is incorporated by reference, including all subsequent amendments. Copies of the code may be purchased from the International Code Council online at <http://www.iccsafe.org/Store/Pages/default.aspx> at a cost of five hundred twenty-seven dollars (\$527.00) or accessed electronically free of charge at [esources/2012NorthCarolina/12NorthCarolina_main.html.](http://www.ecodes.biz/ecodes_support/Free_R</u>

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(g) To qualify for licensure or license renewal, each facility must provide to the Division, upon application, an attestation statement in a form provided by the Division verifying compliance with the requirements defined in Rule .0301(d) of this Subchapter.

History Note: Authority G.S. 131E-91; 131E-147; 131E-149; S.L. 2013-382; Eff. October 14, 1978; Amended Eff. April 1, 2003; Temporary Amendment Eff. May 1, 2014.

10A NCAC 13C .0205 ITEMIZED CHARGES

(a) The facility shall either present an itemized list of charges to all discharged patients or the facility shall include on patients' bills which are not itemized notification of the right to request an itemized bill within ~~30 days~~ three years of receipt of the non-itemized ~~bill~~, bill or so long as the facility, collections agency, or other assignee asserts the patient has an obligation to pay the bill.

(b) If requested, the facility shall present an itemized list of charges to each ~~patient~~, patient or his or her representative, ~~responsible party~~. This list shall detail in language comprehensible to an ordinary layperson the specific nature of the charges or expenses incurred by the patient.

(c) The listing shall ~~include, at a minimum,~~ include all charges incurred, including those charges incurred in the following service areas:

- (1) Surgery (facility fee);
- (2) Anesthesiology;
- (3) Pharmacy;
- (4) Laboratory;
- (5) Radiology;
- (6) Prosthetic and Orthopedic appliances; and
- (7) Other professional services.

(d) The facility shall indicate on the initial or renewal license application that patient bills are itemized, or that each patient or ~~responsible party~~ his or her representative is formally advised of the patient's right to request an itemized listing within ~~30 days~~ three years of receipt of a non-itemized bill.

History Note: Authority G.S. 131E-91; 131E-147.1; S.L. 2013-382, s. 13.1; Eff. December 1, 1991; Temporary Amendment Eff. May 1, 2014.

SECTION .0300 – GOVERNING AUTHORITY AND MANAGEMENT

10A NCAC 13C .0301 GOVERNING AUTHORITY

(a) The facility's governing authority shall adopt bylaws or other ~~appropriate~~ operating policies and procedures ~~which shall~~ to assure that:

- (1) ~~specify by name the person to whom responsibility for operation and maintenance of the facility is delegated and methods~~

~~established by the governing authority for holding such individuals responsible;~~

a named individual is identified who is responsible for the overall operation and maintenance of the facility. The governing authority shall have methods in place for the oversight of the individual's performance.

- (2) ~~provide for~~ at least annual meetings of the governing authority are conducted if the governing authority consists of two or more individuals. Minutes shall be maintained of such meetings;
- (3) ~~maintain a policies and procedures manual which is designed to ensure professional and safe care for the patients. The manual shall be reviewed, and revised when necessary, at least annually. a policy and procedure manual is created which is designed to ensure professional and safe care for the patients. The manual shall be reviewed annually and revised when necessary.~~ The manual shall include provisions for administration and use of the facility, compliance, personnel quality assurance, procurement of outside services and consultations, patient care policies and services offered; and
- (4) ~~provide for annual reviews and evaluations of the facility's policies, management, and operation.~~ annual reviews and evaluations of the facility's policies, management, and operation are conducted.

(b) When services such as dietary, laundry, or therapy services are purchased from others, the governing authority shall be responsible to assure the supplier meets the same local and state

standards the facility would have to meet if it were providing those services itself using its own staff.

(c) The governing authority shall provide for the selection and appointment of the professional staff and the granting of clinical privileges and shall be responsible for the professional conduct of these persons.

(d) The governing authority shall establish written policies and procedures to assure billing and collection practices in accordance with G.S. 131E-91. These policies and procedures shall include:

- (1) how a patient or patient's representative may dispute a bill;
- (2) issuance of a refund when a patient has overpaid the amount due to the ambulatory surgical facility;
- (3) providing written notification to the patient or patient's responsible party prior to submitting a delinquent bill to a collection agency;
- (4) providing the patient or patient's responsible party with the facility's charity care and financial assistance policies, if the facility is required to file a Schedule H, federal form 990; and
- (5) the requirement that a collections agency, entity, or other assignee obtain written consent from the facility prior to initiating litigation against the patient or responsible party.

History Note: Authority G.S. 131E-91; 131E-149; S.L. 2013-382, s. 10.1; S.L. 2013-382, s. 13.1; Eff. October 14, 1978; Amended Eff. November 1, 1989; November 1, 1985; December 24, 1979; Temporary Amendment Eff. May 1, 2014.

RULES REVIEW COMMISSION

This Section contains information for the meeting of the Rules Review Commission on April 17, 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

June 19, 2014	July 17, 2014
August 21, 2014	September 18, 2014

**RULES REVIEW COMMISSION MEETING
MINUTES
April 17, 2014**

The Rules Review Commission met on Thursday, April 17, 2014, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Anna Choi, Margaret Currin, Garth Dunklin, Jeff Hyde, Jay Hemphill, Stephanie Simpson, Ralph Walker and Faylene Whitaker.

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

The meeting was called to order at 10:00 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. The Chairman reminded the Commission members that the audio of the meeting was being broadcast.

APPROVAL OF MINUTES

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

FOLLOW-UP MATTERS

NC Rural Electrification Authority

All rules were unanimously approved.

Industrial Commission

All rules were unanimously approved.

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 approved Rule 04 NCAC 10A .0609A.

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.

State Human Resources 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. 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.

Building Code Council

2015 NC Existing Building Code – The agency filed its rewritten rules the day before the meeting, and the Commission had no chance to review them prior to the meeting. There was no action for the Commission to take at the meeting, but the Commission will review these rules at its May meeting.

LOG OF FILINGS

Department of Justice, Division of Criminal Information

The Commission extended the period of review for all rules filed. It did this in order to give the agency more time to complete the requested technical changes and make any other necessary changes to the rules.

Private Protective Services Board

All rules were unanimously approved.

Criminal Justice Education and Training Standards Commission

All rules were unanimously approved.

Environmental Management Commission

All rules were unanimously approved.

Coastal Resources

15A NCAC 07H .0304 was unanimously approved.

Wildlife Resources Commission

David Cobb with the agency addressed the Commission.

All rules were approved unanimously with the following exception:

The Commission objected to 15A NCAC 10K .0101 based on the adopted amended language creating unclear or ambiguous course requirements. Specifically, in Paragraph (a) of the amended language, the requirement of “a minimum of 10 hours of instruction” was deleted and as adopted, the Rule merely states “[a] hunter education instructor-led course or self-paced, independent study option.” There is no longer a definitive minimum period of instruction time. In Paragraph (b) of the amended language “four hours” is deleted, but as adopted, this Rule maintained the language “60 percent.” The percentage of time without a definitive minimum period of instruction time makes the language “60 percent” unclear and ambiguous.

Department of Transportation

19A NCAC 03B .0201 was unanimously approved.

Board of Examiners in Optometry

Chairman Currin stepped away and Vice Chairman Dunklin presided over the discussion and vote on the Board of Optometry rules.

Chairman Currin did not participate in the discussion or vote for these rules.

The Commission objected to 21 NCAC 42B .0107 and .0114 for failure to comply with the Administrative Procedure Act. In the initial filing on March 20, 2014, the Board stated on the Submission for Permanent Rule forms that the rules had not yet been formally adopted by the agency, but would be on November 14, 2014. Agencies are required to adopt rules before submitting them to the Commission, pursuant to G.S. 150B-21.1. In response to a Request for Technical Change from Commission staff that requested the actual date of adoption by the agency, the Board filed new Submission for Permanent Rule forms on April 11, 2014. The new forms stated the rules had been adopted by the Board on November 14, 2013. The comment period for both rules was January 2, 2014 through March 3, 2014. G.S. 150B-21.2(g) states, in relevant part, "An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed[.]"

Based upon the submissions of the agency, the Commission found that the Board failed to comply with the Administrative Procedure Act. If the Board did comply with the Act, it may file evidence of compliance with the Commission for review at a later meeting in accordance with G.S. 150B-21.12.

The Commission also objected to Rule 42B .0114 based upon ambiguity. In Subparagraphs (a)(1) and (b)(2), the Board proposed to determine "other methods as appropriate to the Board" and gave no guidance on how this will be determined. This lack of guidance makes the rule unclear. The Commission also objected to the rule for lack of statutory authority to require in Subparagraph (a)(1)(iii) for the applicant to be performing at a satisfactory level of competency in the occupational specialty. G.S. 93B-15.1 requires performance in the specialty, but it does not require the individual to be actively performing it to seek licensure under the statute. This statute does not confine itself to active duty military members, but instead speaks to those who have received military training and been awarded an MOS. The law can extend to retired or discharged military applicants seeking licensure. In addition, the language is ambiguous, as there is no guidance in the Rule as to what will constitute the "satisfactory level" of competency.

Office of Administrative Hearings

26 NCAC 03.0103 - The Commission extended the period of review on this Rule. The Commission noted that the provision in the last sentence of (g) was permissive as to the dismissal of the case by the Administrative Law Judge and as such, created an ambiguous circumstance where a case might be left in limbo for an undetermined period of time with the parties not knowing whether the case was to proceed. The agency noted that the cases are dismissed unless there is good cause shown and the Commission extended the period of review for the agency to consider revising the language to reflect actual practice that the case shall be dismissed unless good cause is shown and address deadlines for such showing.

26 NCAC 03.0132 - The Commission extended the period of review on this Rule. The Commission noted that the phrase "reasonable hourly rate based upon prevailing market rate" is ambiguous as a standard standing alone without consideration of other factors. Further, the Commission noted that there are well settled criteria for the determination of reasonable attorney's fees, use of which (by statement or reference) might eliminate the ambiguity and avoid possible concerns with anti-trust issues were attorneys required to argue that there is a prevailing rate to establish their fees. The agency and the Commission noted that the Administrative Law Judge's authority to award reasonable attorney's fees is clear and that given that fact and the well-settled case and statutory law regarding determination of reasonable attorney's fees, perhaps the rule is not even necessary. The Commission extended the period of review to permit the agency to consider either withdrawing the rule or re-writing the rule to address the ambiguity and possible anti-trust considerations.

Commissioner Walker offered his assistance in working with the agency to address the Commission concerns as to both rules.

TEMPORARY RULES

Medical Care Commission

Prior to the review of the rules from the Medical Care Commission, Commissioner Simpson recused herself and did not participate in any discussion or vote concerning these rules because of a possible perception of conflict with her husband's law firm.

All rules were unanimously approved.

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

Criminal Justice Education and Training Standards Commission

The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed rules 12 NCAC 09B .0202, .0205, .0302, .0304, .0401, .0406, .0408, .0413, .0414, .0416.

Alarm Systems Licensing Board

The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed rule 12 NCAC 11 .0201.

COMMISSION BUSINESS

The Commission discussed the use of the Office of Administrative Hearings' Website for posting documents for the meeting. The Commissioners would like emails about the addition of new documents. The Commissioners encourage staff to use discretion in posting communications from agencies and third parties and to make certain the information is relevant for review by the public.

The Commission agreed to reschedule its June meeting to Wednesday, June 18th.

The meeting adjourned at 11:35 a.m.

The next regularly scheduled meeting of the Commission is Thursday, May 15th 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

APRIL 17, 2014

Name	Agency
Kate Pipkin	NCWRC
David Cobb	NCWRC
Tamara Zmuda	NCDDQ
Azzie Conley	NC DHHS/DHSR
GORDON MYERS	NCWRC
Frances Liles	NCREA
Trevor Allen	CJETS
Meredith Henderson	NCIC
Victor Farah	Attorney
Chris Evans	BCSSNC
Joelle Burleson	NC DENR - DAQ
SUMIT GUPTA	NCIC
Ryan Boyce	"
Janice Davidson	NC DOR
Jennifer Everett	DENR
Jeff Gray	NSD
Patrick Knowlson	NC DENR - DAQ
BRIAN LIVECCHI	NCISOT
Ann Wall	SOA

LIST OF APPROVED PERMANENT RULES
April 17, 2014 Meeting

NC RURAL ELECTRIFICATION AUTHORITY

<u>Purpose</u>	04 NCAC 08 .0101
<u>Authority Staff</u>	04 NCAC 08 .0109

INDUSTRIAL COMMISSION

<u>Employer's Obligations Upon Notice; Denial of Liability; ...</u>	04 NCAC 10A .0601
<u>Medical Motions and Emergency Medical Motions</u>	04 NCAC 10A .0609A
<u>Admission of Out-of-State Attorneys to Appear Before the ...</u>	04 NCAC 10E .0103
<u>Secure Leave Periods for Attorneys</u>	04 NCAC 10E .0104

PRIVATE PROTECTIVE SERVICES BOARD

<u>Prohibited Acts</u>	12 NCAC 07D .0106
<u>Experience Requirements for a Polygraph License</u>	12 NCAC 07D .0501
<u>Polygraph Trainee Permit Requirements</u>	12 NCAC 07D .0502
<u>Polygraph Examination Requirements</u>	12 NCAC 07D .0503
<u>Polygraph Instruments</u>	12 NCAC 07D .0504
<u>Required Continuing Education Hours</u>	12 NCAC 07D .1302

CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

<u>Basic Training - Juvenile Court Counselors and Chief Cour...</u>	12 NCAC 09B .0235
<u>Basic Training - Juvenile Justice Officers</u>	12 NCAC 09B .0236
<u>Juvenile Justice Specialized Instructor Training - Restra...</u>	12 NCAC 09B .0241
<u>Terms and Conditions of Specialized Instructor Certification</u>	12 NCAC 09B .0305
<u>Terms and Conditions of School Director Certification</u>	12 NCAC 09B .0502
<u>Instructors: Annual In-Service Training</u>	12 NCAC 09E .0104
<u>Terms and Conditions of Specialized Instructor Certification</u>	12 NCAC 09G .0311
<u>Corrections Specialized Instructor Training - Firearms</u>	12 NCAC 09G .0415
<u>Corrections Specialized Instructor Training - Controls, R...</u>	12 NCAC 09G .0416

ENVIRONMENTAL MANAGEMENT COMMISSION

<u>Toxic Air Pollutant Guidelines</u>	15A NCAC 02D .1104
<u>Applicability</u>	15A NCAC 02Q .0701
<u>Exemptions</u>	15A NCAC 02Q .0702
<u>Definitions</u>	15A NCAC 02Q .0703
<u>New Facilities</u>	15A NCAC 02Q .0704
<u>Existing Facilities and SIC Calls</u>	15A NCAC 02Q .0705
<u>Modifications</u>	15A NCAC 02Q .0706
<u>Demonstrations</u>	15A NCAC 02Q .0709
<u>Emission Rates Requiring a Permit</u>	15A NCAC 02Q .0711
<u>Wastewater Treatment Systems at Pulp and Paper Mills</u>	15A NCAC 02Q .0714

COASTAL RESOURCES COMMISSION

AECS Within Ocean Hazard Areas 15A NCAC 07H .0304

WILDLIFE RESOURCES COMMISSION

Funding Sources 15A NCAC 10A .1301
Offenses and Reward Amounts 15A NCAC 10A .1302
Eligibility 15A NCAC 10A .1303
Permitted Archery Equipment 15A NCAC 10B .0116
Sale of Wildlife 15A NCAC 10B .0118
Taking Deer and Bear with Handguns 15A NCAC 10B .0120
Bear 15A NCAC 10B .0202
Deer (White Tailed) 15A NCAC 10B .0203
Reciprocal License Agreement 15A NCAC 10C .0203
Public Mountain Trout Waters 15A NCAC 10C .0205
Trotlines and Set-Hooks 15A NCAC 10C .0206
Public Access for Anglers Only 15A NCAC 10C .0217
Manner of Taking Inland Game Fishes 15A NCAC 10C .0302
Striped Bass 15A NCAC 10C .0314
Manner of Taking Nongame Fishes: Purchase and Sale 15A NCAC 10C .0401
Taking Nongame Fishes for Bait or Personal Consumption 15A NCAC 10C .0402
Special Devices 15A NCAC 10C .0404
General Regulations Regarding Use 15A NCAC 10D .0102
Hunting On Game Lands 15A NCAC 10D .0103
Fishing on Game Lands 15A NCAC 10D .0104
Application for Certificate of Vessel Number 15A NCAC 10F .0102
Transfer of Ownership 15A NCAC 10F .0103
Display of Vessel Numbers 15A NCAC 10F .0106
Validation Decal 15A NCAC 10F .0107
Pamlico County 15A NCAC 10F .0326
Northampton and Warren Counties 15A NCAC 10F .0336
Pitt County 15A NCAC 10F .0354
Totally Disabled License Eligibility 15A NCAC 10G .0601

TRANSPORTATION, DEPARTMENT OF

Driver's License Examination 19A NCAC 03B .0201

LIST OF APPROVED TEMPORARY RULES
April 17, 2014 Meeting

MEDICAL CARE COMMISSION

Itemized Charges 10A NCAC 13B .3110
Required Policies, Rules, and Regulations 10A NCAC 13B .3502
Requirements for Issuance of a License 10A NCAC 13C .0202
Itemized Charges 10A NCAC 13C .0205

LIST OF CERTIFIED RULES
April 17, 2014 Meeting

CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

<u>Responsibilities of the School Director</u>	12 NCAC 09B .0202
<u>Basic Law Enforcement Training</u>	12 NCAC 09B .0205
<u>General Instructor Certification</u>	12 NCAC 09B .0302
<u>Specialized Instructor Certification</u>	12 NCAC 09B .0304
<u>Time Requirement for Completion of Training</u>	12 NCAC 09B .0401
<u>Comprehensive Written Examination - Basic Law Enforcement...</u>	12 NCAC 09B .0406
<u>Comprehensive Written Examination - Basic SMI Certification</u>	12 NCAC 09B .0408
<u>Comprehensive Written Exam - Instructor Training</u>	12 NCAC 09B .0413
<u>Comprehensive Written Exam - Specialized Instructor Training</u>	12 NCAC 09B .0414
<u>Satisfaction of Minimum Training - SMI Instructor</u>	12 NCAC 09B .0416
<u>Pre-Delivery Report of Training Course Presentation</u>	12 NCAC 09C .0211
<u>Reports of Training Course Presentation and Completion</u>	12 NCAC 09C .0403
<u>General Instructor Certification</u>	12 NCAC 09G .0308
<u>Comprehensive Written Exam - Instructor Training</u>	12 NCAC 09G .0314
<u>Instructor Training</u>	12 NCAC 09G .0414

ALARM SYSTEMS LICENSING BOARD

<u>Application for License</u>	12 NCAC 11 .0201
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CONTESTED CASE DECISIONS

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

CONTESTED CASE DECISIONS

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. Jagers, III v. Crime Victims Compensation Commission 12 CPS 01693 11/01/12

Teresa Herbin v. Department of Public Safety Victim Services 12 CPS 03680 08/10/12

Jacqueline M Davis victim-Antonio T Davis v. Dept. of Public Safety 12 CPS 05919 11/06/12

Demario J. Livingston v. Dept. of Public Safety Victim Services 12 CPS 06245 10/19/12

Shirley Ann Robinson v. 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 Adrews 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

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

CONTESTED CASE DECISIONS

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	
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William Franklin Dietz v. Criminal Justice Education and Training Standards	12 DOJ 08010	02/19/13	
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Phillip Eugene Dendy v. Sheriffs' Education and Training Standards Commission	12 DOJ 08049	01/18/13	
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Andrew George Anderson v. Sheriffs' Education and Training Standards Commission	13 DOJ 03417	08/29/13	
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Steven Wesley Jones v. Sheriffs' Education and Training Standards Commission	13 DOJ 11188	10/22/13	
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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	

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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	
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Wanda McLaughlin v. State Board of Education	12 EDC 12410	03/27/13	
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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	
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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

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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	
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Susan E. Montgomery Lee v. State Health Plan; Blue Cross Blue Shield	12 INS 10145	03/25/13	
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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	
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Patrice A. Bernard v. NC A&T	08 OSP 01724	03/10/14	28:21 NCR 2676
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Amanda Thaxton v. State Ethics Commission	09 OSP 03754	09/20/12	
Betty M. Jones v. DHHS, DMA	10 OSP 00085	11/22/13	28:21 NCR 2687
Nathan Anthony Swanson v. DHHS, Division of Mental Health	10 OSP 00929	01/31/14	28:21 NCR 2694
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
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Daniel Chase Parrott v. Crime Control and Public Safety, Butner Public Safety Division	10 OSP 04792	05/30/12	
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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
Purnell Sowell v. DOT, Division of Motor Vehicles	11 OSP 10308	01/31/14	28:22 NCR 2759
Doris Wearing v. Polk Correctional Inst. Mr. Solomon Superintendent	11 OSP 11023	10/19/12	
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Filed

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

11 OSP 10308

COUNTY OF WAKE

Office of
Administrative Hearings

PURNELL SOWELL,

Petitioner,

v.

NORTH CAROLINA DEPARTMENT
OF TRANSPORTATION, DIVISION
OF MOTOR VEHICLES,

Respondent.

DECISION

This hearing was held before the Hon. Donald W. Overby, Administrative Law Judge, on September 26, 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: Neil Dalton
Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27602

WITNESSES

Called by Petitioner: Joseph Gardner, Purnell Sowell, Keith King (for cross examination)

Called by Respondent: Keith King, Amanda Olive, Ronald Kaylor

PRELIMINARY MATTERS

1. Petitioner made a motion to exclude witnesses from the hearing room, which the Court granted. The witnesses were instructed on sequestration issues.

2. The Court previously denied the Respondent's Motion for Summary Judgment.

ISSUE

Whether the Respondent discriminated against the Petitioner on the basis of race in failing to promote Petitioner in two promotional matters.

BURDEN OF PROOF

The burden of proof is on Petitioner to make a prima facie case. The burden of proof is on Respondent to articulate and prove a legitimate, non-discriminatory basis for its adverse employment action against Petitioner. If so done, the burden is on Petitioner to prove that the basis articulated and proved by the Respondent was a pretext for unlawful adverse employment action.

FINDINGS OF FACT

In making the Findings of Fact, the undersigned has weighed all the evidence and assessed the credibility of the witnesses. The undersigned has taken into account the appropriate factors for judging credibility of witnesses, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have. Further, the undersigned has carefully considered 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. After careful consideration of the sworn witness testimony presented at the hearing, the documents and exhibits admitted into evidence, and the entire record in this proceeding, the undersigned finds as follows:

1. Petitioner Purnell Sowell, an African-American male, is an employee of DMV's License and Theft Division.
2. The License and Theft Bureau is the police arm of the DMV, and has approximately 203 sworn law enforcement officer positions including the Petitioner who currently holds the rank of Inspector. The License and Theft Bureau is organized into eight districts around the State, each managed by a Supervisor. The position at issue is a Supervisor, (Law Enforcement Manager) position in the Mecklenburg County Office. (T. 18, 32, 36, 46).
3. Petitioner first worked for License and Theft in 1987. Petitioner began as a weight officer and was subsequently promoted to Motor Carrier Officer. Petitioner was promoted to Inspector in 1993. An Inspector is a non-uniformed officer assigned to a particular county. (T. 36-38). Petitioner was an Inspector for ten (10) years.
4. In 2003, Petitioner was promoted to Assistant District Supervisor. In the formerly used military style hierarchy of DMV, this position was known as a "Lieutenant". The Assistant Supervisor supervises the Inspectors and assists the District Supervisor (formerly known as a

“Captain”) in supervising the District. There are eight DMV districts consisting of varying numbers of counties. (T. 38-39).

5. Petitioner served as an Assistant Supervisor for two and a half years. He was then promoted to District Supervisor or “Captain”. District Supervisors supervise DMV districts. The District Supervisor has two Assistant Supervisors (the position previously held by Petitioner as noted) and in total supervises about 33 people and three clerical personnel. (T. 39-40).

6. District Supervisor is the position that is at issue in this contested case. Petitioner held and performed the duties and responsibilities of the District Supervisor position for almost three years. (T. 39-40).

7. While serving as District Supervisor, Petitioner received performance reviews from his superiors and his performance reviews were generally “Very Good” ratings, the second highest on the state scale below “Outstanding”. (T. 41). There is no evidence that Petitioner did not perform the duties of District Supervisor in other than a good and professional manner. Petitioner possessed the skill and ability to perform the duties and requirements of the position as required, and did so.

8. In 2008, Petitioner was terminated from DMV on the alleged grounds of unacceptable personal conduct. T. 42. Petitioner filed a contested case petition challenging the dismissal and a settlement of that case was reached in mediation. (T. 42; Pet. Ex. 2).

9. The terms of the mediated agreement state that Petitioner “shall be eligible to apply for and shall be considered for any promotions within the North Carolina Division of Motor Vehicles on a fair and equitable basis with other candidates for those positions. Petitioner understood that the circumstances of his termination would not be held against him when applying for subsequent promotions. (T. 45).

10. After settlement was reached, Petitioner returned to work at License and Theft. He made multiple attempts to be promoted without success. (T. 45).

11. Keith King is the Deputy Director of the Division of Motor Vehicles [DMV], License and Theft Bureau. DMV is a Division of the N. C. Department of Transportation [DOT]. As the Deputy Director, he was responsible for the promotional process for License and Theft Bureau Supervisors and Assistant Supervisors. (T. 71, 104, 105).

12. In early 2009, the DMV Commissioner, instructed Mr. King to promulgate a new process for the promotion of supervisors in the License and Theft Bureau. Mr. King was charged with creating a policy that ensured promotions would be made in a more uniform, thorough, and documented professional manner than in the past. In doing so, he reviewed the promotional processes and assessment tools being utilized by other State and local CALEA [Commission on Accreditation of Law Enforcement Agencies] accredited law enforcement agencies. (T. 105, 135).

13. The policy drafted by Mr. King was reviewed by both the Office of State Personnel and the Civil Rights Division of DOT.

14. The promotional policy drafted by Mr. King went into effect on December 1, 2009. By policy, the promotional process consisted of both verbal and written components. This policy was approved by the DOT Chief Operating Officer as well as the DOT Human Resources Department and Equal Employment Opportunity Office. The policy and the test questions were approved by the Office of State Personnel and the DOT EEO as well. (T. 105-108; R Ex 1, R Ex 3).

15. All sworn law enforcement officers in the License and Theft Bureau including Petitioner were notified in writing of the new policy on or about December 17, 2009. The policy regarding the promotional process was distributed electronically among the License and Theft Bureau including Mr. Sowell. In addition, hard copies were available within the district offices and supervisors were given written copies. Members were encouraged to print their own copies if they desired. (T. 112-113).

16. The DOT Policy on Merit Based Hiring mandates that hiring be made based upon "job related criteria" and allows for written testing as a selection tool. (T. 109-111; R Ex 2).

17. By policy, all applicants for supervisor must complete all phases of the promotional process in order to be considered for promotional positions. (T. 110-111; R Ex 3 page 2).

18. Since it was the original Beta test, the 2010 promotional process written test had a passing score of 60 percent. The revised 2011 promotional process written test had a passing score requirement of 70 percent. It also had an in-basket exercise, a role-play exercise, and a general panel interview. Applicants with successful passing scores in each phase were encouraged to apply for any available positions that came open. (T. 91, 111).

19. By policy a successful candidate must complete the written examination to continue in the promotional process, and a failing score would disqualify the candidate for that particular promotional process. (T. 112; R. Ex. 3 page 3).

20. A passing score on the written exam may be good for up to 24 months if no new process is put into place. No candidate in the promotional processes in the License and Theft Bureau has ever been allowed to carry forward passing scores from one process to the next. (T. 112-113; R Ex 3).

21. The 2011 revised License and Theft Bureau policy relating to the promotional process again was reviewed by DOT Human Resources, the DOT EEO Office and the Office of State Personnel. These entities found the test questions to be relevant, job related, properly worded and defensible in terms of validity and adverse impact, and to meet all criteria of OSP, and DOT HR and EEO Offices. These entities gave their approval to move forward with the 2011 process as revised in January, 2011. (T. 113-114; R Ex 4).

22. In requesting approval for the test questions, the License and Theft Bureau submitted both the test questions as well as their suggested answers with page references to the answers in the policy manual, which was also included in the submission. (T. 115; R. Ex 5).

23. The promotional process for supervisor was begun in 2011 due to the fact that the available pool for supervisors that had passed the promotional assessment had become too small. (T. 133, 134).

24. Mr. Sowell took the 2011 written test as part of the promotional process for supervisor in January 2011. (T. 115; R. Ex. 5).

25. The multiple choice tests were graded by Deputy Director King who graded the tests without knowing whose individual tests he was grading. Since applicants were required to obtain 70 percent of available points on each test in order to be successful, they would need 35 of 50 correct answers on the multiple choice test. The Petitioner's multiple choice test was graded as a fail since he scored 64 out of a possible 100 points, in that Petitioner had 32 correct answers out of 50 questions. (T. 115-118; R. Ex. 5). Petitioner had passed the previous versions of the multiple choice test.

26. Petitioner was notified in writing on January 31, 2011 that he had failed the multiple choice test and that he was not eligible to continue in the promotional process. (R. Ex. 5).

27. Although the successful candidate for the position had less experience than Petitioner and no experience at the position at issue, he did pass the written test. (T. 119; R. Ex. 6).

28. Although he did not pass the promotional process, Petitioner applied for and was eventually interviewed for the position at issue. He was rated lower by the panel of three interviewers than was the successful candidate, (39 for the successful candidate and 32 for the Petitioner). One of the panel members was African American who also rated the Petitioner lower than the successful applicant, (37.5 for successful applicant and 29.6 for the Petitioner). (T. 120-122; R. Ex's. 9, 10 and 11).

29. The License and Theft Bureau was notified by the DOT EEO Office at the time of the selection of the successful candidate, that black males were not under represented for the position at issue. In conjunction with meeting CALEA standards, the License and Theft Bureau has been successful in recruiting minority candidates. (T. 123, 170; R. Ex. 11).

30. From 2010 to 2012, in all of DMV 13 white males were promoted as opposed to 26 African Americans. (T. 165; R. Ex. 18).

31. Petitioner inquired about his test scores and met with the Deputy Director of License and Theft Jack Coltrane (white male) to discuss his scores. Mr. Coltrane refused to allow Petitioner to review his test work. When Petitioner protested this refusal, Mr. Coltrane responded, "See you in court". Petitioner said that he took from this comment that "there was no way I was going to pass this test no matter how it went." (T. 50-51).

32. When Petitioner re-tested in 2011, he failed both tests. (T. 54). At the time these tests were administered, Ronald "Ronnie" Kaylor (a white male) was the Director of License and Theft.

33. Mr. Kaylor had ordered all applicants to be retested in 2011. (T. 54-55). Although Mr. Kaylor denied giving this order, a memorandum identifying Mr. Kaylor as the source of the retesting order was received into evidence. Other witnesses also identified Mr. Kaylor as the source of the retesting order.

34. Joseph Gardner was the former deputy director of License and Theft. (T. 12). Mr. Gardner related a conversation he had with Mr. Kaylor in the early fall of 2009. This conversation was concerning Petitioner's attempts to obtain promotion to the District Supervisor position. At the time, Mr. Kaylor had the ultimate authority within License and Theft to approve or disprove promotional and hiring decisions. (T. 14).

35. Mr. Gardner stated that he told Mr. Kaylor that while he (Gardner) may have not have agreed with the mediated agreement returning Petitioner to employment with DMV, the agreement was in place, and when Petitioner had held the District Supervisor position previously he had done a good job. (T. 15). Mr. Gardner told Mr. Kaylor that in his observations of Petitioner in the District Supervisor position, the Petitioner was well liked in the area and did a good job cooperating with other agencies. Mr. Gardner said that he told Mr. Kaylor that he "didn't see a reason" why Petitioner should not be promoted and "I felt we were going to have a hard time if he appealed why we didn't [select Petitioner for the position]." (T. 15).

36. Mr. Gardner testified that Mr. Kaylor replied by stating that the Commissioner of Motor Vehicles Mike Robertson (a white male) did not want Petitioner in the District Supervisor position. Mr. Robertson was at the time the highest ranking person in DMV. As such, Mr. Robertson had ultimate authority over who was hired and promoted within DMV. (T. 16).

37. Mr. Robertson did not testify. Mr. Kaylor did not deny making this statement during his testimony for the Respondent.

38. Mr. Gardner contends that Mr. Kaylor told him in this conversation that if the matter of Petitioner's promotion ended up in court, that Mr. Kaylor would "do what I have do ... if I have to commit perjury, I will say what I have to say basically to keep Mr. Sowell from getting the job." (T. 16 -17).

39. Mr. Gardner described Mr. Kaylor's comment as "mind-boggling, to be honest with you. I just didn't believe a law enforcement officer would say that, you know." (T. 17). Mr. Gardner had been a law enforcement officer for over thirty years. In his opinion, integrity is a paramount consideration for all law enforcement officers. He had never heard a fellow law enforcement officer make a comment such as Mr. Kaylor's before. (T. 17).

40. Mr. Gardner opined that at that time the Respondent would probably lose in court if the Petitioner challenged the hiring decision. Mr. Gardner explained that the Petitioner had performed the job in question and that DMV was actively seeking minorities who were underrepresented in DMV management. Mr. Gardner believed that his made promoting Petitioner a "win-win". (T. 17-18).

41. Mr. Gardner expressed his view that he did not think the decision to not promote Petitioner was based on Petitioner's race. (T. 27). On further examination, Mr. Gardner confirmed that he did not know the mindset regarding any racial animus or motivation on the part of Kaylor, Coltrane, or Robertson.

42. It is found as fact that Mr. Gardner's testimony was credible, including his description of Mr. Kaylor's comments. Mr. Gardner had nothing to gain or lose by the outcome of this case and there is nothing of record negatively affecting his credibility.

43. Mr. Kaylor denied saying to Mr. Gardner that he would commit perjury to keep Petitioner from being promoted. (T. 198). Mr. Kaylor testified that he told Mr. Gardner that he would promote "people I trusted." (T. 202).

44. When the Court inquired of Mr. Kaylor whether he trusted Petitioner, Mr. Kaylor gave ambiguous answers, even after being asked the question twice. When the Court asked whether it was fair to say that he would not have promoted Petitioner even if Petitioner had passed the test, Mr. Kaylor likewise gave an ambiguous answer. (T. 203). Mr. Kaylor was evasive and less than straight-forward with the Court.

45. Mr. Kaylor initially contended that he had nothing to do with the decision to order re-tests for the position in 2011. Mr. Kaylor continued to deny involvement in the re-test order even after being shown a DMV memorandum attributing the re-test order to him. (T. 199-200).

46. The Court does not find Mr. Kaylor to be a credible witness on the issues of the origin of the order and the reasons for the re-testing of the promotional applicants and Mr. Kaylor's attributed comment that he would commit perjury to prevent Petitioner from being promoted.

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings.
2. In interpreting N.C.G.S. § 126-36, the North Carolina Courts look to federal case law addressing federal discrimination statutes for guidance. *See, North Carolina Department of Correction v. Gibson*, 308 N.C. 131,136, 301 S.E.2d 78, 82 (1983).
3. Under the three-part scheme of proof for disparate treatment cases developed by the United States Supreme Court, a plaintiff has the initial burden of establishing a prima facie case of discrimination. *See, McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668 (1973).
4. Under North Carolina law, the prima facie case consists of showing that: 1) the employee is of a certain race and/or gender; 2) the employee failed to win a promotion; and 3) the employee's race and/or gender was a substantial or motivating factor in his/her failure to win the promotion. *Dept. of Correction v. Gibson*, 308 N.C. at 136-137, 301 S.E.2d at 82 (1983). If the employee has made out a prima facie case, the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for the employee's rejection. *Id.* Then if the employer has met its burden, the employee is given the opportunity to show that the stated reasons for the

employer's decision are a mere pretext for discrimination. The burden of proof remains on the employee to prove that the decision was based upon discrimination. *Id.*

5. Petitioner is a male African American. Petitioner failed to win a promotion.

6. The Petitioner has not shown that his race was any part of the reason for his non-selection since he failed an objective written component of the selection process. Whether or not Petitioner can establish a prima facie case, Respondent has non-discriminatory reasons for his non-selection, that is, his failure of the written multiple choice test. *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. Md. 1996). Petitioner has not shown that Respondent's non-discriminatory reasons were not the true reasons for the non-selection. *Id.*

7. The DMV in fact had legitimate, non-discriminatory reasons for promoting the successful applicant instead of Petitioner, that is, the successful applicant passed all of the components of the promotional process and did better in the interview for the position at issue. Since the grader of the multiple choice test did not know whose test he was grading and the test was objective to begin with, it would be difficult for the Petitioner to prove that testing in the manner herein had a "disparate impact" on a particular race. Petitioner has made no such showing.

8. To make out a disparate impact case, Petitioner must identify the specific employment practice that is being challenged. *Anderson v. Westinghouse*, 406 F.3d at 266; see, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994, 101 L. Ed. 2d 827, 108 S. Ct. 2777 (1988) (plurality opinion). Petitioner must then prove must causation. He must show that the above-mentioned practices caused a disparate impact on [his race]. *Id.* Petitioner has not identified the challenged employment action nor proved that it caused a disparate impact.

9. The Petitioner's subjective belief that the decision to not promote him was motivated by unlawful discriminatory intent is insufficient to establish a case of discrimination. See, e.g., *Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 444 (4th Cir. Va. 1998). See also *Schultz v. General Electric Capital Corp.*, 37 F.3d 329, 334 (7th Cir. Ill. 1994). The employer's perception that the test was a good tool to evaluate employees should be given great weight. *Furr v. Seagate Tech.*, 82 F.3d 980, 988 (10th Cir. Okla. 1996).

10. Petitioner cannot establish his own criteria for judging his qualifications for the promotion. He must compete for the promotion based on the qualifications established by his employer. *Anderson v. Westinghouse*, 406 F.3d 248, 269 (4th Circ. S.C. 2005); see *Beall v. Abbott Labs.*, 130 F.3d 614, 620 (4th Circ. Md 1997). The crucial issue in a Title VII action is an unlawfully discriminatory motive for a defendant's conduct, not the wisdom or folly of its business judgment. *Anderson v. Westinghouse*, 406 F.3d at 271.

11. Petitioner has made no showing that his failure to be promoted was based upon his race, and no showing of motivation of racism or disparate impact.

12. It is legally significant that multiple senior persons with the ultimate authority at both License and Theft and DMV generally have been shown under the evidence to have expressed animus for whatever reason against Petitioner and specific opposition to his promotion.

13. This Court is satisfied and convinced, and therefore concludes, that this personal animus toward Petitioner was such that they did not want to promote Petitioner, but this court is equally satisfied and convinced that the failure to promote was not based upon any racial motivation.

14. This Court is not called upon to rule as to whether or not there was a breach of contract with the terms of the settlement agreement.

On the basis of the above Findings of Fact and Conclusions of Law, the undersigned makes the following:

DECISION

Petitioner has not shown by a preponderance of the evidence that Respondent's legitimate nondiscriminatory reasons for its failure to promote Petitioner amounted to a pretext to conceal intentional discrimination against him on the basis of his race. Respondent's decision to not promote Petitioner is **UPHELD**.


NOTICE

The Agency that will make the final decision in this contested case is the North Carolina State Personnel Commission.

The Agency is required to give each party an opportunity to file exceptions to the recommended decision and to present written arguments to those in the Agency who will make the final decision. N.C.G.S. § 150-36(a). The Agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

In accordance with N.C.G.S. § 150B-36, the Agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

This the 31st day of January, 2014.



Donald W. Overby
Administrative Law Judge

FILED

STATE OF NORTH CAROLINA 2014 FEB 28 PM 12:45 IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF CABARRUS OFFICE OF ADMIN HEARINGS 12 DOJ 00649

TIMOTHY TYLER RUSSELL,)
)
 Petitioner,)
)
 v.)
)
 NORTH CAROLINA SHERIFFS')
 EDUCATION AND TRAINING)
 STANDARDS COMMISSION,)
)
 Respondent.)
 _____)

PROPOSAL FOR DECISION

On November 6-7, 2013, Administrative Law Judge Selina M. Brooks heard this case in Charlotte, North Carolina. This case was heard after Respondent requested, pursuant to N.C. Gen. Stat. § 150B-40(e), designation of an administrative law judge to preside at the hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

APPEARANCES

For Petitioner:

J. Heydt Philbeck, Esq.
Bailey & Dixon, L.L.P.
434 Fayetteville Street, Suite 2500
Raleigh, North Carolina 27601

For Respondent:

Matthew L. Boyatt
Assistant Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

ISSUES

1. Is Respondent's proposed denial of Petitioner's justice officer certification based upon Petitioner's commission of the Class B misdemeanor offense of filing a false police report supported by a preponderance of the evidence?

2. Is Respondent's proposed denial of Petitioner's justice officer certification based upon Petitioner's failure to meet or maintain the minimum employment standards that every justice officer shall be of good moral character supported by a preponderance of the evidence?

APPLICABLE LAW

N.C. Gen. Stat. §§ 14-225; 12 NCAC 10B .0103, .0204, .0205, .0300, & .0301

EXHIBITS ADMITTED INTO EVIDENCE

Petitioner's Exhibits ("P. Ex.") 1, 2, and 3
Respondent's Exhibits ("R. Ex.") 1, 2, 3, 4, 6, 7, 8, 9, 10 and 11

WITNESSES

For Respondent:

Jerrod L. Saunders, Officer with Charlotte-Mecklenburg Police Department ("CMPD")
Katie Schwartz, Officer with CMPD
J. O. Holmes, Lieutenant with State Highway Patrol
Diane Konopka, Deputy Director of the Sheriffs' Education and Training Standards Commission

For Petitioner:

Ricky Hedden, friend
J.R. Rowell, former trooper with State Highway Patrol
Mike James, Chief of Police of Spencer
Randy Hagler, former Officer with CMPD and current Deputy Chief of Police of Charlotte-Mecklenburg Schools
Michele Russell, Petitioner's mother
Timothy Tyler Russell, Petitioner's father, former Master Trooper of State Highway Patrol and current Sergeant of Iredell County Sheriff's Office
Timothy Tyler Russell, Petitioner, current employee with Cabarrus County Sheriff's Office

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

In the absence of a transcript, the Undersigned has reviewed her notes as well as the documentary evidence to refresh her recollection. All facts are supported by testimony and where additionally supported by documentary evidence it is so noted.

Wherefore, the Undersigned makes the following Findings of Fact, Conclusions of Law and Proposed Decision.

FINDINGS OF FACT

1. Petitioner was a probationary trooper with the North Carolina State Highway Patrol (hereinafter "Highway Patrol") from June 4, 2009 until August 25, 2010, approximately 15 months. He received certification as a sworn law enforcement officer through the North Carolina Criminal Justice Education and Training Standards Commission on June 4, 2009. R. Ex. 4

2. Petitioner's family has a history in law enforcement and it was his lifelong dream to follow in his father's footsteps as a Highway Patrol trooper. Petitioner admires his father and when he became a trooper, other troopers would comment that he "had big shoes to fill."

3. Petitioner met trooper Clay L. Amaral when he was first assigned to Charlotte. They were "good friends" and he "trusted" him. Trooper Amaral was not a family friend, but always appeared professional in his conduct. Upon inquiry, Petitioner's father assured him that Amaral was someone a new trooper could turn to for guidance. R. Ex. 9, p. 4, 22, 45 & 54

4. Petitioner knew that trooper Amaral was having personal difficulties and loaned him approximately \$200 which he never paid back.

5. At some time in 2010, the Highway Patrol received a complaint by Mrs. Amaral regarding her husband. Mrs. Amaral and her husband were separated. Mrs. Amaral had concerns regarding a handgun her husband kept under the mattress in their home. According to Mrs. Amaral, he had told her that he obtained the weapon illegally following a vehicle stop in which he arrested somebody, but later he recanted this statement and told her that he really got the weapon from Petitioner and that he was considering purchasing the handgun from Petitioner.

6. Lieutenant Holmes and First Sergeant Dancy conducted the Highway Patrol's internal affairs investigation into Mrs. Amaral's allegations. Petitioner was interviewed three times, and the interviews were recorded and transcribed. R. Ex. 9

7. On July 21, 2010, the Petitioner was interviewed two times concerning the complaint against trooper Amaral and whether Petitioner possessed a Ruger handgun (hereinafter "Ruger") that he was considering selling to trooper Amaral. R. Ex. 9, p. 3 & 21

8. Petitioner denied ever loaning a Ruger to trooper Amaral with the intention of selling it. R. Ex. 9 p. 20-21

9. Petitioner explained how he received the Ruger from trooper Amaral. Petitioner was on-duty when his Sergeant gave approval for Petitioner to give Amaral a ride to his house in Monroe to pick up his motorcycle. Trooper Amaral gave Petitioner the Ruger and said that he had found it. P. Ex. 9 p. 12-14, 26-32

10. Petitioner stated that he had turned the Ruger over to the Charlotte-Mecklenburg Police Department (hereinafter "CMPD") because the weapon was not his. R. Ex. 9, p. 21

11. Based on this statement, Lieutenant Holmes contacted the CMPD in order to gather additional information regarding the Ruger and, on July 23, 2010, he interviewed CMPD Officers Katie Schwartz and Jarred L. Saunders who had knowledge regarding the manner in which Petitioner surrendered the Ruger. R. Ex. 9, p. 2

12. Officer Schwartz is a sworn law enforcement officer who received her justice officer certification in March 2007 and has served as a CMPD officer since July 2006. She began a casual dating relationship with Petitioner in early 2010.

13. On February 14, 2010, Petitioner removed the Ruger from his residence in Concord, placed it in his motor vehicle, and drove to the residence of Officer Schwartz in Charlotte, North Carolina. Petitioner told Officer Schwartz that he found the Ruger on the side of the road while on his way to her home and asked her what he should do with it. Petitioner did not disclose to Officer Schwartz that he obtained the Ruger approximately two (2) days earlier.

14. Officer Schwartz advised Petitioner that the Ruger should be turned over to the police immediately since Petitioner found the Ruger abandoned in public. She immediately contacted CMPD dispatch to report that a Ruger had been found near her residence and to request that an on-duty officer respond to take possession of it. R. Ex. 9 p. 15-16 & 33

15. Officer Saunders has been employed as a patrol officer with CMPD since 2008. He is a sworn justice officer through the North Carolina Criminal Justice Education and Training Standards Commission, and has held that certification since 2008.

16. Officer Saunders was on routine patrol on February 14, 2010 when he got a call for service in reference to a firearm that had been discovered in the vicinity of Officer Schwartz's residence. Officer Saunders had not met Officer Schwartz or Petitioner prior to February 14, 2010.

17. Officer Saunders was met by Petitioner and Officer Schwartz in the parking lot. Officer Schwartz identified herself to Officer Saunders as an off-duty CMPD officer.

18. Petitioner did not tell Officer Saunders that he was an off-duty Highway Patrol trooper or that he was a law enforcement officer. R. Ex. 9 p. 2, 12 & 34

19. Officer Saunders took possession of the Ruger and completed a CMPD Property Report and evidence sheet in order to document the manner in which the weapon was retrieved. He also ran an ATF trace form and checked through NCIC to determine whether the weapon had been stolen. All documents and the Ruger were then submitted to CMPD as a package. P. Ex. 3; R. Ex. 9, p. 2

20. On the CMPD Property Report, Officer Saunders recorded that the Ruger was "Found" property on February 14, 2010 and was found in the vicinity of Sardis Cove Drive in

Charlotte, North Carolina. Officer Saunders recorded that the owner of the Ruger was "Unknown" and that the owner's address was unknown. P. Ex. 3

21. Officer Saunders completed the CMPD Property Report based upon the information given to him by the Petitioner. If Petitioner had told him that trooper Amaral gave him the handgun, then Officer Saunders would have noted the Ruger was surrendered rather than found on the property report form.

22. CMPD had recently responded to an armed robbery in the area where Petitioner claimed to have found the Ruger. Officer Saunders contacted CMPD's Armed Robbery Unit in an attempt to determine whether the Ruger was involved in that crime. CMPD's Armed Robbery Unit indicated they would follow up on this new information.

23. On July 23, 2010, Officer Saunders was contacted by Lieutenant Holmes and Sergeant Dancy and was questioned regarding Officer Saunders' interaction with Petitioner on February 14, 2010. R. Exs. 9 & 11

24. Officer Saunders testified that at some point following this conversation, he received a message from his dispatcher. He returned the call and spoke with a man identifying himself as Petitioner, who asked questions about what Officer Saunders told the Highway Patrol internal affairs. Officer Saunders reported this contact to CMPD internal affairs.

25. CMPD conducted an internal affairs investigation of Officer Saunders and Schwartz as a result of Petitioner reporting the handgun as "found" on February 14, 2010. Both Officers were cleared of any wrongdoing.

26. Lieutenant Holmes and First Sergeant Dancy conducted the Highway Patrol's internal affairs investigation of Petitioner as a result of Petitioner reporting the handgun as "found" on February 14, 2010. On July 23, 2010, they interviewed Officers Schwartz and Saunders. R. Ex. 9 p. 2

27. In his third interview with Lieutenant Holmes and First Sergeant Dancy on July 27, 2010, Petitioner stated that Amaral gave him the Ruger to do whatever he wanted with it. Petitioner did not question the gift of the gun. R. Ex. 9, p. 30-31

28. Petitioner did not remember trooper Amaral saying that he had "found" the gun. R. Ex. 9, p. 32

29. Petitioner did not recall telling Officer Schwartz or Officer Saunders that he found the Ruger on the sidewalk near a used car lot near Officer Schwartz's residence. R. Ex. 9, p. 35

30. Petitioner stated that he did not tell Officer Schwartz or Officer Saunders where he got the Ruger because "it was a piece of crap gun and I didn't wanna tell 'em that -that a trooper gave it to me." R. Ex. 9, p. 26 & 52

31. Petitioner agreed that his statements about finding the Ruger were a lie. R. Ex. 9, p. 37
32. Petitioner stated "I don't even really recall talking to [Officer Saunders] except for telling him my name and address." R. Ex. 9, p. 38
33. Petitioner admitted that he could have just turned the Ruger into evidence at the Highway Patrol. R. Ex. 9, p. 24
34. Petitioner could not articulate why he did not turn in the Ruger to the Highway Patrol. R. Ex. 9, p. 52-53
35. Petitioner stated that he told CMPD the story about finding the gun because "if I would've just told 'em that I found it that they wouldn't've took it. I mean, I thought that I had to—that I had to have had a story to turn it in." p. 53.
36. Lieutenant Holmes testified that Petitioner was trained on how to surrender such property with the Highway Patrol.
37. Lieutenant Holmes and First Sergeant Dancy's investigation determined that the Ruger had been stolen from a personal vehicle approximately one-and-a-half years prior to the investigation conducted in July 2010. R. Ex. 9 p. 3.
38. In each interview with Lieutenant Holmes and First Sergeant Dancy, Petitioner stated that he turned the Ruger in to CMPD as a "lost" or "found" weapon even though trooper Amaral gave the Ruger to Petitioner. R. Ex. 9, p. 9, 11, 12, 23, 31, 32, 33, 34, 36 & 38
39. On August 25, 2010, Petitioner was charged with violating Highway Patrol policy, specifically: (1) filing a false police report on February 14, 2010, in violation of N.C. Gen. Stat. § 14-225; (2) engaging in conduct unbecoming of a sworn law enforcement officer; and (3) untruthfulness. R. Ex. 6
40. Lieutenant Colonel Gilchrist concurred with the recommendation that Petitioner should be dismissed by memorandum dated August 25, 2010. R. Ex. 7.
41. Petitioner submitted his resignation from the Highway Patrol on August 25, 2010. R. Ex. 4.
42. Petitioner is now an employee of the Cabarrus County Sheriff's Office and an applicant for justice officer certification through the Sheriffs' Commission. Petitioner has not previously held certification through this Commission. R. Ex. 10
43. The Sheriffs' Commission certifies deputy sheriffs in the State of North Carolina, ensuring that all applicants meet the minimum standards for certification.

44. The Sheriffs' Commission received a Report of Separation from the Highway Patrol regarding Petitioner's employment, dated August 30, 2010, and investigated the nature of Petitioner's separation from the Highway Patrol prior to certifying Petitioner. R. Ex. 4

45. Petitioner's case was submitted to the Sheriffs' Commission's Probable Cause Committee (hereinafter "Committee") for consideration. The Committee is comprised of five (5) elected Sheriffs that meet regularly to review cases and to determine whether probable cause exists to believe an applicant and/or certified justice officer's certification should be denied, revoked, or suspended.

46. Among other things, the Committee considered the Highway Patrol charging documents, investigative reports, Rules of Conduct, report of separation, and transcribed interviews of Petitioner. R. Ex. 1

47. The Committee found probable cause existed to deny Petitioner's application for justice officer certification for commission of a Class B misdemeanor of False Police Report and for lack of good moral character. R. Exs. 2 & 3

48. An administrative hearing was held before the Undersigned on November 6-7, 2013.

49. Petitioner testified that he discussed the Ruger with his father who advised him to turn it in as "found property" and so two days later he went to Officer Schwartz's home to turn it in.

50. Officer Schwartz testified that Petitioner told her that he had found the Ruger by the side of the road or by the side of the sidewalk.

51. Officer Saunders testified that Petitioner told him that he found the Ruger on the sidewalk near a used car dealership and wanted to turn it in as found property.

52. Petitioner testified that he did not tell Officer Schwartz or Officer Saunders that he found the Ruger by the road.

52. To the extent that Petitioner believed the handgun was trooper Amaral's weapon, Petitioner was required to disclose that ownership to Officer Saunders.

53. Petitioner was untruthful when he reported to Officer Saunders that he found the Ruger on the way to Officer Schwartz's residence.

54. Regrettably, Petitioner's untruthfulness caused a CMPD internal affairs investigation of Officers Schwartz and Saunders.

55. Petitioner offered several character witnesses at the administrative hearing. These witnesses generally testified as to Petitioner's upbringing in a household within the law enforcement community, and also testified that they believed Petitioner to be of good character.

These character witnesses were not aware of the circumstances surrounding the internal affairs investigation at the Highway Patrol involving Petitioner's conduct on February 14, 2010.

56. Petitioner testified that he disagreed with certain facts as stated in the document entitled "Petitioner's Prehearing Statement", filed on March 6, 2012, to wit: he was not forced to resign but rather chose to resign before a termination decision was made.

57. The Undersigned finds the testimony of Lieutenant Holmes, Officers Saunders and Officer Schwartz to be credible and of greater weight.

58. The Undersigned finds the testimony of Petitioner to be not credible and of lesser weight.

59. There is no competent evidence before the Undersigned which suggests that Petitioner was coerced or intimidated at any time during the pendency of the Highway Patrol's investigation.

60. For the reasons set out above, Petitioner's actions and conduct during the pendency of the Highway Patrol's investigation demonstrate that Petitioner does not possess the good moral character that is required of all sworn law enforcement officers in this State.

61. For the reasons set out herein, Petitioner filed a false police report with CMPD in violation of N.C.G.S. § 14-225 and also was untruthful and engaged in conduct unbecoming of a sworn law enforcement officer.

CONCLUSIONS OF LAW

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received notice of hearing, and that the Petitioner received by certified mail the Notification of Probable Cause to Deny Justice Officer Certification letter, mailed by Respondent on December 20, 2011.

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

3. 12 NCAC 10B .0301(a)(8) provides that all justice officers employed or certified in the State of North Carolina shall be of good moral character.

4. 12 NCAC 10B .0204(d)(1) provides the Sheriffs' Commission may deny the certification of a justice officer when the Commission finds that the applicant has committed or been convicted of:

(1) a crime or unlawful act defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor which occurred after the date of initial certification.

5. Facilitating the filing of a false police report in violation of N.C. Gen. Stat. § 14-225 is classified as Class B Misdemeanor pursuant to 12 NCAC 10B .0103 (10)(b) and the Class B Misdemeanor Manual adopted by Respondent.

6. N.C. Gen. Stat. § 14-225 provides that it shall be a misdemeanor to “wilfully make or cause to be made to a law enforcement agency or officer any false, misleading or unfounded report, for the purpose of interfering with the operation of a law enforcement agency, or to hinder or obstruct any law enforcement officer in the performance of his duty.”

7. While a false statement to the police, standing alone, does not amount to the filing of a false police report, conduct that is designed to interfere with the functioning of a law enforcement agency or officer, or that is designed to mislead or obstruct the officer or agency in the performance of its official duties, clearly does constitute a violation of N.C. Gen. Stat. §§ 14-225. State v. Dietze, 190 N.C. App. 198, 660 S.E. 2d 197 (2008).

8. The preponderance of the evidence presented at the administrative hearing, establishes that Petitioner intentionally lied and provided false information to Officers Schwartz and Saunders on February 14, 2010.

9. For the reasons set out herein, Petitioner facilitated the filing of a false police report on February 14, 2010, within the meaning of N.C.G.S. § 14-225. A preponderance of the evidence supports the finding that on or about February 14, 2010, Petitioner committed the Class B Misdemeanor offense of filing a false police report.

10. 12 NCAC 10B .0204(b)(2) further provides the Sheriffs’ Commission shall revoke, deny, or suspend a justice officer’s certification when the Commission finds that the justice officer no longer possesses the good moral character that is required of all sworn justice officers.

11. Good moral character has been defined as “honesty, fairness, and respect for the rights of others and for the laws of the state and nation.” In Re Willis, 288 N.C. 1, 10 (1975).

12. Given the totality of the evidence presented at the administrative hearing, the Undersigned concludes Petitioner no longer possesses the good moral character that is required of all sworn justice officers in this State for the reasons set out herein. Pursuant to 12 NCAC 10B .0205, the period of denial shall be for an indefinite period based on Petitioner’s lack of good moral character.

13. Based on the evidence presented and the testimony of the witnesses at the administrative hearing, the Respondent’s proposed denial of Petitioner’s certification due to Petitioner’s lack of good moral character and failure to maintain the minimum standards required of all sworn justice officers under 12 NCAC 10B .0301 is supported by a preponderance of the evidence.

14. Pursuant to 12 NCAC 10B .0205(2)(a), when the Commission denies the certification of a justice officer, the period of sanction shall be for a period of 5 years where the cause of sanction is commission or conviction of offenses as specified in 12 NCAC 10B .0204(d)(1).

PROPOSAL FOR DECISION

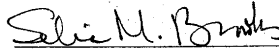
Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the Undersigned recommends the Respondent deny Petitioner's certification due to Petitioner's failure to maintain the good moral character that is required of sworn justice officers under 12 NCAC 10B .0300, in addition to Petitioner's commission of the Class B Misdemeanor offense of filing a false police report on or about February 14, 2010.

NOTICE

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

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

This the 28th day of February, 2014.



Selina M. Brooks
Administrative Law Judge

FILED

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

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IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12OSP01288

OFFICE OF
ADMINISTRATIVE HEARINGS

James Thomas Stephens,
Petitioner,

v.

Division of Community Corrections,
Respondent.

FINAL DECISION

This contested case was heard before the Honorable Selina M. Brooks, Administrative Law Judge, on June 18, 2013, at the Vanguard Center, Charlotte, North Carolina.

APPEARANCES

For Petitioner: James Thomas Stephens
Pro Se
13417 Golden Apple Court
Charlotte, NC 28215

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

PROTECTIVE ORDER

A Protective Order was entered on consent by the Honorable J. Randall May on October 30, 2012.

WITNESSES

The *Pro Se* Petitioner, James Thomas Stephens, who testified during the hearing, did not present any other witnesses.

The Respondent, North Carolina Department of Public Safety (hereinafter "Respondent" or "NCDPS") presented testimony from the following three witnesses: Keith T. Campbell, a Chief Probation/Parole Officer for the Community Corrections Section of the North Carolina Department of Public Safety; Tracy K. Lee, a Judicial District Manager for District 26 for the Community Corrections Section of the North Carolina Department of Public Safety; and Lori

Millette, the Personnel Manager for the Community Corrections Section of the North Carolina Department of Public Safety.

EXHIBITS

Petitioner's exhibits ("P. Exs.") 1 - 4 were admitted into evidence. Respondent's exhibits ("R. Exs.") 1 - 9, 10, and 12 were admitted into evidence.

ISSUE

Whether Petitioner, James Thomas Stephens, met his burden to show by a preponderance of the evidence that he was denied a promotion to a Chief Probation/Parole Officer in violation of N.C. Gen. Stat. § 126-82 that provides for the consideration and application of the Veterans' Preference by the Respondent?

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

FINDINGS OF FACT

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.
2. Petitioner alleges that Respondent, through the various actions of its employees, denied him a promotion to a Chief Probation/Parole Officer position in violation of N.C. Gen. Stat. § 126-82 that provides for the consideration and application of the Veterans' Preference by the Respondent. (Transcript ("T.") pp. 107 – 109; Petitioner's Prehearing Statement.)
3. Petitioner began working for the Respondent in 1999. Petitioner had almost twelve years of service with the Respondent with over nine years of experience with the Division of Community Corrections. (Petitioner's Prehearing Statement.)
4. Petitioner submitted a State of North Carolina Application for Employment, dated August 15, 2011, to Respondent applying for a position titled Chief Probation/Parole Officer ("CPPO") in Mecklenburg County, vacancy number 4550-3010-1561-211. (R. Ex. 5.)

5. Petitioner documented on his State Application for a CPPO position in Mecklenburg County all his previous supervisory experience (nearly twelve years part-time and three years full-time, training (seven military leadership schools), and advanced education (Master of Arts in Human Behavior). Petitioner also declared Veterans' Preference by attaching DD Form 214 to his application. (T. p. 109, 113 - 114; P. Ex. 2; R. Ex. 5.)

6. Petitioner interviewed for a CPPO position in Mecklenburg County on September 8, 2011. (T. p. 107 - 111; Petitioner's Prehearing Statement; R. Ex. 7.) The Petitioner alleges that the other persons that were interviewed for this CPPO position all had the exact same job title and performed similar work. The Petitioner further alleges that he was not afforded Veterans' Preference because the person that was selected for this CPPO position had less service time, education, supervisory experience, and training than the Petitioner. (Petitioner's Prehearing Statement; T. p 107 - 109, 114.)

7. The Respondent has a policy to provide equal employment opportunity to all applicants with all selection decisions based solely on job-related criteria and to comply with all federal and state employment laws, regulations, and policies. The primary purpose of the Respondent's Merit-Based Recruitment and Selection Process is to ensure that positions subject to the State Personnel Act are filled with the most qualified individuals as determined by job-related criteria and in the judgment of unbiased, objective human resource professionals. (R. Ex. 2 at p. 1; T. pp. 66 -67.)

8. Respondent's Merit-Based Recruitment and Selection Plan describes the process for screening applications as follows:

Screening will separate all timely applications into one of three groups: not qualified (not meeting minimum requirements), qualified (meeting at least the minimum qualifications required), or most qualified (exceeding to the greatest extent the minimum requirements of the position). Applicants in the most qualified grouping, as well as those applicants possessing employment/reemployment priorities requiring that they be considered for the position, even if the individual only minimally qualifies, will be forwarded to the hiring manager for consideration. (R. Ex. 2 at p. 10.)

9. Respondent's Merit-Based Recruitment and Selection Plan outlined in Respondent's Personnel Manual must also comply with established procedural guidelines issued by the Office of State Personnel including giving consideration for Veterans' Preference. (R. Ex. 2 at p. 18.) These procedural guidelines are found in the State Personnel Manual Veterans' Preference, wherein it states, "State law requires that employment preference be given for having served in the Armed Forces of the United States on active duty . . . during periods of war or any other campaign, expedition, or engagement for which a campaign badge or medal is authorized by the United States Department of Defense." (R. Ex. 1 at p. 41.) The Manual also states that that "after applying the preference to veterans who are current State employees" in the case of

promotion, "the eligible veteran competes with all other applicants who have substantially equal qualifications." (R. Ex. 1 at p. 44.)

10. During the hearing, Lori Millette, the Personnel Manager for the Community Corrections Section of NCDPS, testified that state policy requires that additional experience credit be added to the qualifications of an eligible veteran. Ms. Millette further testified that state policy separates how to calculate the military service credit into military experience that is related to the job applied for and military experience that is not related to the job. The maximum amount of credit that can be awarded to the applicant for unrelated military experience is forty-eight months. (T. p. 58; R. Ex. 1 at pp. 43 - 44.)

11. Ms. Millette testified that Employment Specialist Beth Thornton screened the applications that were submitted for the CPPO position separating the applications into three groups, specifically those applicants that were deemed not qualified, qualified, and most qualified. Ms. Millette further testified that those applicants determined to be most qualified were forwarded to a panel to be interviewed for the CPPO position. In this case, an applicant had to have sixty or more months of experience, including military experience, to be included in the most qualified pool of applicants that were to be interviewed. Ms. Millette further testified that in this case even if the Petitioner had not been awarded the additional forty-eight months of experience he had sufficient experience in excess of sixty months and would have still been grouped into the most qualified pool and afforded an interview. (T. pp. 56 - 57, 101.)

12. In this case, Ms. Thornton also had to determine based on the information recorded on each applicant's State Application whether any listed military experience was related or unrelated to the CPPO position. (T. p. 59.)

13. The Petitioner did meet the minimal qualification requirement for the CPPO position for which he applied, and Ms. Thornton awarded the Petitioner an additional forty-eight months of experience for his military service as recorded on the CPPO screening form for position number 61211. (T. pp. 60 - 61; R. Ex. 3.)

14. Ms. Millette testified that the Petitioner was not awarded credit for his total years of military service because his experience as recorded on his State Application was not relevant to the CPPO position. For the CPPO position, military experience would be relevant if it was with the military police with powers of arrest. Therefore, the Petitioner was awarded the maximum amount of time for unrelated service which is forty-eight months. (T. pp. 61 - 62; R. Ex. 1 at pp. 43 - 44.)

15. The CPPO screening form for position number 61211 shows that the Petitioner had a total of 116 months over the minimum education and experience required for the CPPO position and was grouped into the most qualified pool and was afforded an interview. (R. Ex. 3; T. pp. 62 - 64.)

16. Ms. Millette testified that for promotions once the Veterans' Preference is applied and the eligible veteran is placed in the most qualified pool and afforded an interview the applicant that was awarded the Veterans' preference is not due any other priority status over the other most qualified applicants that are afforded interviews. Ms. Millette further testified that the application and award of additional credit for military service through the Veterans' Preference does not guarantee that the eligible veteran will be selected for the position for which he or she applied. (T. pp. 64 -65.)

17. In the opinion of Ms. Millette and based on her review of the screening form that was completed by Ms. Thornton the Petitioner was properly afforded Veterans' Preference for his application for a CPPO position in Mecklenburg County. (T. p. 67; R. Ex. 3.)

18. The Judicial District Manager for District 26 for the Community Corrections Section of NCDPS Tracy K. Lee testified during the hearing that he was one of the interviewers for the CPPO position in Mecklenburg County. He interviewed the Petitioner and the person who was selected for the position William Sinclair on September 8, 2011. Mr. Lee testified that based on the answers provided to the interview questions he gave the Petitioner an overall rating of Average ("A") and Mr. Sinclair an overall rating of Above Average ("AA"). (T. pp. 21, 27, 30, and 32; R. Exs. 7, 10, and 12.)

19. Mr. Lee recommended to the Division Administrator Debra Debruhl that Mr. Sinclair be selected for the CPPO position in Mecklenburg County based on his interview, in which Mr. Sinclair was rated as AA. (T. p. 31; R. Ex. 10.)

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

CONCLUSIONS OF LAW

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

2. N.C. Gen. Stat. § 126-80 provides that,

It shall be the policy of the State of North Carolina that, in appreciation for their service to this State and this country during a period of war, and in recognition of the time and advantage lost toward the pursuit of a civilian career, veterans shall be granted preference in employment for positions subject to the provisions of this Chapter with every State department, agency, and institution.

3. N.C. Gen. Stat. § 126-82 provides in part that,

(a) The State Personnel Commission shall provide that in evaluating the qualifications of an eligible veteran against the minimum requirements for obtaining a position, credit shall be given for all military service training or schooling and experience that bears a reasonable and functional relationship to the knowledge, skills, and abilities required for the position. This preference applies to initial employment with the State and extends to other employment events including subsequent hirings, promotions, reassignments, and horizontal transfers.

(b) The State Personnel Commission shall provide that if an eligible veteran has met the minimum requirements for the position, after receiving experience credit under subsection (a) of this section, he shall receive experience credit as determined by the Commission for additional related and unrelated military service. This preference applies to initial employment with the State and extends to other employment events including subsequent hirings, promotions, reassignments, and horizontal transfers.

...

(d) Any eligible veteran who has reason to believe that he or she did not receive a veteran's preference in accordance with the provisions of this Article or rules adopted under it may appeal directly to the State Personnel Commission.

...

4. The State Personnel Commission ("SPC") adopted the following rules to assist in the interpretation and application of how the Veterans' Preference would be accorded to "eligible veterans" consistent with N.C. Gen. Stat. § 126-82:

CLAIMING VETERANS' PREFERENCE

In order to claim veterans' preference, all eligible persons shall submit a DD Form 214, Certificate of Release or Discharge from Active Duty, along with a State Application for Employment (PD-107 or its equivalent) to the appointing authority. Appointing authorities are responsible for verifying eligibility and may request additional documentation as is necessary to ascertain eligibility. Eligible veterans shall meet the minimum qualifications, as defined in 25 NCAC 1H .0635, for the position.

25 N.C.A.C. 1H.1102 (2013)

APPLICATION OF THE VETERANS' PREFERENCE

(a) Veterans' preference shall be accorded eligible veterans, as defined in 25 NCAC 1H .1105, by giving additional credit as follows:

(1) In initial employment, subsequent employment, promotion, reassignment, and horizontal transfer procedures, where numerically scored examinations are used in determining the relative ranking of candidates, 10 points shall be awarded to eligible veterans.

(2) In initial employment, subsequent employment, promotion, reassignment, and horizontal transfer procedures where structured interview, assessment center, in-basket, or any other procedure, not numerically scored, is used to qualitatively assess the relative ranking of candidates, the veteran who has met the minimum qualification requirements for the vacancy, and who has less than four years of related military experience beyond that necessary to minimally qualify, shall also receive additional experience credit for up to four years of unrelated military service. The spouse or dependent shall not receive additional experience credit for the veteran's unrelated military service. To determine the amount of additional experience credit to be granted for unrelated military service, first determine the amount of related military service possessed by the eligible veteran beyond that required to meet the minimum qualifications, then apply the following:

(A) If the total of such experience equals or exceeds four years, the additional credit for unrelated military service does not apply.

(B) If the total of such experience is less than four years, the veteran shall receive direct experience credit for unrelated military service in an amount not to exceed the difference between the eligible veteran's related military service and the four-year maximum credit that may be granted.

(3) In reduction-in-force situations, when calculating length of service, the eligible veteran shall be accorded one year of State service for each year or fraction thereof of military service, up to a maximum of five years credit. This additional credit does not count as total state service.

(b) After applying the preference to candidates from outside the State government structure, upon initial employment or subsequent employment as outlined in Subparagraph (a)(1) or (2) of this Rule, the eligible veteran shall be hired when the veteran's overall qualifications are substantially equal to the non-veterans in the applicant pool as provided in 25 NCAC 1H .0701(b). Substantially equal qualifications occur when the employing agency cannot make a reasonable determination that the qualifications held by one or more applicants are significantly better suited for the position than the qualifications held by another applicant.

(c) The spouse, surviving spouse or surviving dependent of that veteran may claim veterans' preference without regard to whether such preference has been claimed previously by the veteran.

(d) For promotion, reassignment and horizontal transfer, after applying the preference to veterans who are current State employees as explained under Subparagraph (a)(1) or (2) of this Rule, the eligible veteran receives no further preference and competes with all other applicants who have substantially equal qualifications.

25 N.C.A.C. 1H.1104 (2013)

5. Petitioner bears the burden of proof as to the issue of whether he is entitled to Veterans' Preference. See *N.C. Dept. Of Correction v. Hodge*, 99 N.C. App. 602, 394 S.E.2d 285 (1990).

6. Petitioner claims that he was denied a promotion to a Chief Probation/Parole Officer in violation of N.C. Gen. Stat. § 126-82 that provides for the consideration and application of the Veterans' Preference by the Respondent.

7. Petitioner failed to amass sufficient evidence to undermine the credibility of Respondent and establish that Respondent, through the various actions of its employees, failed to properly apply the Veterans' Preference when screening the applications for a Chief Probation/Parole Officer position in Mecklenburg County in violation of N.C. Gen. Stat. § 126-82 and the SPC rules promulgated at 25 N.C.A.C. 1H.1104. Moreover, Respondent has met its burden of establishing that the Veterans' Preference was afforded to the Petitioner in accordance with State law and SPC rules.

8. Petitioner did not satisfy his burden of proving by the preponderance of the evidence his claim that he was denied a promotion to a Chief Probation/Parole Officer in violation of N.C. Gen. Stat. § 126-82 that provides for the consideration and application of the Veterans' Preference by the Respondent.


FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent articulated legitimate, non-discriminatory reasons for not selecting the Petitioner for a Chief Probation/Parole Officer position in Mecklenburg County. Additionally, Petitioner had not met his burden of proof showing that Respondent failed to properly apply the Veterans' Preference in violation of N.C. Gen. Stat. § 126-82.

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 23rd day of August, 2013.



Selina M. Brooks
Administrative Law Judge

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
1/8/2014 12:33PM

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

COUNTY OF

12OSP02255

Christine Smith, Petitioner, v. North Carolina Department of Public Safety, Respondent.	FINAL DECISION
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The above-captioned contested case was heard before the Honorable Beecher R. Gray, Administrative Law Judge, on October 12, 2012, and May 7, 2013, in Goldsboro, North Carolina.

APPEARANCES

FOR PETITIONER: Glenn A. Barfield
Haithecock, Barfield, Hulse & Kinsey, PLLC
PO Drawer 7
Goldsboro, North Carolina 27533-0007

FOR RESPONDENT: Yvonne B. Ricci
Assistant Attorney General
NC Department of Justice
PO Box 629
Raleigh, NC 27602-0629

EXHIBITS

Admitted for Petitioner:

Exhibit Number	Description
1	Certified Copy of the Record in Petitioner's Worker's Compensation Case, I.C. No. W73702, Christine Smith v. NC Department of Public Safety

Admitted for Respondent:

Exhibit Number	Description
1	Letter to Petitioner from ADA Compliance Officer Brian A. Murray dated March 13, 2012
2	Letter to Petitioner from Wayne Correctional Center Superintendent Robert E. Hines – Re: Verbal Resignation dated March 19, 2012
3	NCDOC Employment Statements signed by Petitioner dated March 1, 2006
4	Letter to Laura Price from David C. Hogarty, D.O. – RE: Christine Smith Chart #28176 dated December 12, 2011
5	DC-730 Request for Reasonable Accommodation for Petitioner dated November 25, 2011
6	Response from David C. Hogarty, D.O. to specific questions related to Petitioner’s ability to perform the essential job functions of a correctional officer dated January 1, 2012
7	NCDOC Personnel Manual – Subject: Americans With Disabilities Act
8	NCDOC Personnel Manual – Subject: Americans With Disabilities Act – Disability Review Process
9	NCDOC Personnel Manual – Subject: Workers’ Compensation and Salary Continuation Programs
10	Letter to NCDPS from Petitioner’s Attorney – Re: Notice of Appeal dated March 27, 2012
11	Letter to Petitioner from EEO Officer Antonio Cruz – Re: Appeal of Accommodation dated April 12, 2012

WITNESSES

Called by Petitioner: None
Called by Respondent: Laura Price
 Brian Murray

ISSUES

1. Whether Petitioner resigned her position as a Correctional Officer with Respondent.
2. If not, whether Respondent terminated Petitioner from that position.
3. Whether Respondent afforded Petitioner her internal grievance rights.
4. Whether Respondent terminated Petitioner without just cause.
5. Whether Respondent failed to make a reasonable accommodation for Petitioner’s medical restrictions.

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 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 was reasonable; and whether such testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACTS

1. 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 is Petitioner's employer.
3. Prior to March 19, 2012, Petitioner was employed by Respondent as a Correctional Officer at Wayne Correctional Institution.
4. Petitioner was a "career state employee" as defined in G.S. 126-1.1.
5. The Undersigned hereby finds as facts and incorporates herein those facts stipulated to by the parties in their "JOINT TRIAL STIPULATIONS" approved and ordered filed by the court on October 12, 2012, a copy of which is attached hereto.
6. On November 25, 2011, Petitioner delivered a form DC-730 "REQUEST FOR REASONABLE ACCOMMODATION" to Respondent's facility ADA coordinator, Ms. Laura Price. (R. Ex. 5)
7. On March 13, 2012, Respondent's ADA compliance officer, Brian A. Murray, mailed Petitioner a letter (R. Ex. 1) informing Petitioner that the request for reasonable accommodation had been denied, and which stated "Assuming, without deciding, that you have a disability as defined by the ADA, there is no reasonable accommodation that will allow you to perform these correctional officer essential job functions. Therefore you cannot be accommodated in your position as a correctional officer."
8. The March 13, 2012, letter from Mr. Murray to Petitioner also indicated that after a search of job postings in the Respondent agency was conducted, "it was determined that there was not an available position for which you are qualified."
9. On March 19, 2012, Petitioner telephoned Ms. Price to inquire about the effect of the March 13, 2012, letter on her job status.

10. During the telephone conversation, Petitioner never stated that she was resigning and never used the word “resign;” Petitioner did not say that she was quitting.
11. Ms. Price made it clear to Petitioner that the March 13, 2012, letter meant that Petitioner could not continue working.
12. Nothing Petitioner said to Ms. Price during the March 19, 2012, telephone conversation could be reasonably understood to be an indication that Petitioner was voluntarily resigning or voluntarily separating from state service.
13. On March 19, 2012, Robert E. Hines, Superintendent of Respondent’s Wayne Correctional Center wrote to Petitioner “to accept your verbal resignation that you gave to Ms. Laura Price, Administrative Officer, this morning, March 19, 2012.” (R. Ex. 2)
14. On March 27, 2012, Petitioner through counsel sent to Respondent a letter denying that Petitioner had resigned and notifying Respondent that Petitioner would contest her dismissal. (Joint Stipulation 33)
15. At Wayne Correctional Center, there were then 15 mandatory posts to be filled by correctional officers; all of those posts are rotating posts where no officer is permanently assigned to a post, unless they are recuperating from some type of injury. (Joint Stipulation 40) (Testimony of Lt. Mallard in I.C. matter)
16. On January 1, 2012, Petitioner’s treating physician, David C. Hogarty, D.O. responded to specific questions regarding Petitioner’s ability to perform the essential job functions of a correctional officer; Dr. Hogarty’s responses indicated Petitioner could perform 18 of the 21 listed “ESSENTIAL JOB FUNCTIONS,” but that Petitioner could not perform 3 of the essential job functions. (R. Ex. 6)
17. As of March 19, 2012, Respondent had been accommodating Petitioner’s physical restrictions for approximately 3 years by assigning Petitioner to surveillance duty in the monitoring room at Wayne Correctional Center. Petitioner was assigned that duty for all of her regular work shifts from early in 2009 through the date of her separation from state employment on or about March 19, 2012. (Joint Stipulations 23 and 24)
18. Based on the information provided by Petitioner’s doctor, her restricting medical conditions are likely permanent in nature, and the accommodation which had been provided to Petitioner through March 19, 2012, and which is requested by Petitioner, would be a permanent accommodation, as opposed to a temporary accommodation. Where Petitioner is not reasonably expected to ever be able to perform all of the essential job functions of a correctional officer, accommodation on a permanent basis would not be reasonable.
19. Respondent could have given Petitioner notice of “separation due to unavailability,” but because Respondent took the position that Petitioner had resigned her position, it did not

notify Petitioner of separation due to unavailability, nor of any of the appeal rights Petitioner would have had in that circumstance.

20. Petitioner did not resign her position; rather, Respondent terminated Petitioner on or about March 19, 2012.
21. Petitioner and her attorney agreed on \$250.00 per hour for his fees. Her attorney billed for 41.8 hours. \$200.00 per hour for a total of \$8,360.00 is found to be reasonable and consistent with a recent case involving the same attorney. Petitioner is entitled to recover the \$20.00 filing fee in this case.

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings. Because Petitioner, a career state employee, did not resign but was in fact terminated, Respondent was required to show just cause for her termination.
2. G.S. 126-34.02(b)(3) (2013) provides that in an involuntary non-disciplinary separation due to an employee's unavailability, the agency shall not have the burden of proving just cause, but only the burden of proving that the employee was unavailable. This statute has no application to the present case as it did not become effective until August 21, 2013, and applies only to grievances and contested cases filed on or after that date.
3. Respondent failed to show by a preponderance of evidence that it had just cause to terminate Petitioner.
4. In the alternative, Respondent failed to properly notify Petitioner of her termination and of her appeal rights accruing upon termination.
5. Respondent did not fail to offer Petitioner a reasonable accommodation, in that the only accommodation requested was not reasonable, because it was requested as a permanent accommodation, meaning Petitioner would be excused from performing three of the 21 essential job functions.
6. Based upon the evidence and the experiences of the presiding Administrative Law Judge, I find that Petitioner is entitled to \$20.00 in costs and \$8,360.00 in attorney's fees.

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 dismiss Petitioner from her position as a correctional officer at Wayne Correctional Institution, and the Undersigned holds that Respondent failed to afford Petitioner her appeal rights upon that termination.

Because the evidence indicates that Petitioner is unable to perform all of the essential job functions of a correctional officer, reinstatement is not an appropriate remedy. Petitioner is entitled to an award of back pay and reimbursement of her reasonable attorney's fees and costs.

Back pay shall be awarded to Petitioner for the period beginning with March 19, 2012, concluding May 7, 2013. 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 prior to May 7, 2013, had she not been dismissed.

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

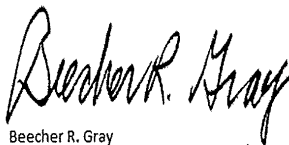
Costs: \$20.00
Attorney's Fees: \$8,360.00

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

STATE OF NORTH CAROLINA
COUNTY OF WAYNE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 OSP 02255

CHRISTINE SMITH,)
Petitioner,)
)
v.)
)
NORTH CAROLINA DEPARTMENT OF)
PUBLIC SAFETY,)
Respondent.)

JOINT TRIAL STIPULATIONS

Petitioner and Respondent hereby stipulate to the following facts:

1. Petitioner was continuously employed by the State of North Carolina as a Correctional Officer from April 3, 2006 through March 16, 2012.
2. Petitioner was a career state employee.
3. On January 7, 2009, while working at Wayne Correctional Center, Petitioner reported that she was struck by a kitchen mat which flew off of a chain link fence in high winds.
4. Petitioner further reported being struck by the mat caused her to fall.
5. On January 8, 2009, the Petitioner completed a Form DOC-WC-4 stating that as a result of being struck by the kitchen mat and falling, she sustained injuries to her right shoulder, right arm, right hip, right leg, left foot, left hand, and the second finger on her left hand.
6. Petitioner did not miss any of her regular work day on the date she was injured, and returned to work the following day.
7. On January 8, 2009, Petitioner presented at Immediate Care of Goldsboro and reported that she fell at work and had pain in her right side and left ankle.
8. Petitioner was diagnosed with left ankle sprain and tendonitis, and was given a note stating work restrictions of "no pushing or pulling" and "may not walk or stand more than 30 minutes per hour".
9. Petitioner was to be rechecked on January 19, 2009.
10. Petitioner submitted this work restriction note to the appropriate administrator at Wayne Correctional.

11. Petitioner was assigned "light duty" working in a "monitoring room" where her job was primarily to monitor the surveillance camera feeds and notify her supervisors and other officers when she detected activities which required a response from these other officers.
12. On January 13, 2009, Respondent filed a Form-19 Report of Employee Injury with the Industrial Commission.
13. Petitioner was next seen at Immediate Care of Goldsboro on January 29, 2009, as a follow up of hip pain. An x-ray of Petitioner's hip and pelvis showed some arthritis but was otherwise unremarkable. Petitioner was instructed to continue heat applications and range of motion exercises and to try some over-the-counter ibuprofen. The physician's note included the impression of "hip strain, improving".
14. Petitioner was then given a work limitation note indicating restrictions of "no pushing or pulling", and "no climbing of stairs or ladders".
15. Petitioner was to be rechecked on February 9, 2009.
16. Petitioner submitted this work restriction note to the appropriate administrator at Wayne Correctional, and was continued on her light duty assignment in the monitoring room.
17. On February 9, 2009, Petitioner was seen at Immediate Care of Goldsboro and given a work status note indicating that Petitioner could resume work immediately with no restrictions.
18. Petitioner submitted this work restriction note to the appropriate administrator at Wayne Correctional, and was assigned to regular duty.
19. As of that date, Petitioner had not missed any time from work due to her injury.
20. Petitioner did not agree with the opinion of the staff at Immediate Care and sought a second opinion from Dr. David Hogarty.
21. Dr. Hogarty examined Petitioner and recommended that she continue some restrictions of her work activities.
22. Thereafter Petitioner remained under the care of Dr. Hogarty from February 13, 2009 through her separation from employment on or about March 16, 2012.
23. Throughout that time Dr. Hogarty continued to provide documentation indicating that Petitioner should have a lifting restriction of 15 pounds occasionally and unlimited lifting of 10 pounds or less; that she should be able to sit up to 8 hours per day but should be provided the opportunity to stand and stretch every hour as needed; that she should avoid stooping or kneeling

activities; that walking would be unlimited but that Petitioner would not ever be able to be involved in a "take down" of a disruptive inmate.

24. Respondent began accommodating these restrictions sometime in early 2009 by assigning Petitioner to surveillance duty in the monitoring room, and this duty was then assigned to Petitioner for all of her regular work shifts through the date of her separation from State employment on or about March 16, 2012.

25. On or about June 12, 2009, Dr. Hogarty provided Petitioner with a note, which Petitioner provided Respondent, requesting that Petitioner be exempted from her next following firearms recertification requirement.

26. In the meantime, a worker's compensation claim was eventually filed by Petitioner, denied by Respondent, and litigated between the parties as set forth in the Stipulated NCIC Exhibits and the Certified NCIC File.

27. Respondent did not in the meantime assign Petitioner to any duty post other than the monitoring room.

28. During the 3 years and more that Petitioner was assigned to surveillance duties in the monitoring room, her job performance was rated "good" or "very good" for every period for which she was rated.

29. Form DC-730 is a form on which an employee requests a "reasonable accommodation" of the employee's disabling condition.

30. On December 12, 2011, Dr. Hogarty wrote in reply to Ms. Price, stating that he believed Petitioner's restrictions were permanent but that "as far as its impact on her ability to work, I feel as long as she is afforded the above restrictions, she should do fine and has done so under these restrictions for some time."

31. Respondent had supplied Dr. Hogarty with a form describing 21 separate "essential job functions" for Correctional Officers.

32. Dr. Hogarty indicated that Petitioner could perform all but 3 of those functions; as to those 3 he noted that performing the functions would "likely aggravate [low back pain]".

33. On March 27, 2012, Petitioner through counsel sent Respondent a letter denying that Petitioner had re 0 signed, and notifying the Respondent that Petitioner would contest her dismissal.

34. On April 9, 2012, Petitioner commenced this contested case alleging termination without just cause and discrimination based on her handicapping condition.

35. On May 11, 2012, Petitioner's workers' compensation case came on for an evidentiary hearing before the North Carolina Industrial Commission.

36. During the course of the hearing Lieutenant Steven Mallard testified on behalf of Respondent.

37. Lieutenant Steven Mallard was called as a witness by Respondent in the workers' compensation hearing, and he testified initially that he was the training coordinator for the Wayne Correctional facility.

38. Lieutenant Mallard testified that a certified correctional officer is required to have training that requires physical exertion. A certified officer would have to "use a baton and be physical by actually getting on the floor and doing particular exercises, CPR, which is also a routine where you have to be on the floor and do particular activities, and then what we call CRDT, which is an advanced form of self-defense that is required throughout the State for certified correctional officers they have to perform each year."

39. Lieutenant Mallard further testified that if an officer is unable to complete the physical portion of the recertification training for Correctional Officers, they could continue on as a Correctional Officer with an administrative waiver from the certification requirement.

40. Lieutenant Mallard further testified that at Wayne Correctional "We have mandatory 15 posts that we have to fill, so we have at least 15 officers there to man these posts. All of our posts are called rotating posts where nobody is permanently assigned to a post, not unless they do have particular issues where it might take them time to recuperate from some type of injury. Once they do so, then as soon as they are eligible or able to, that's when I'll go ahead and send them back to recertify."


41. Lieutenant Mallard further testified that the job Petitioner had been doing in the control/monitoring room since her injury in January 2009 was an essential job that someone had to be assigned to and that the person in that job had to be a reliable mature adult who would be on time, and that Petitioner had met that criteria.

42. Lieutenant Mallard further testified that a person working in the monitoring room on a constant basis needs to be a certified officer because it is an assigned post.

43. Lieutenant Mallard further testified that at Wayne Correctional there was a "shortage of adult, mature, on time people working".

Approved and Ordered Filed:

This the 12 day of October, 2012.



Beecher R. Gray
Administrative Law Judge Presiding

Filed

STATE OF NORTH CAROLINA) DEC -5 AM 10:49

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

COUNTY OF

Office of
Administrative Hearings

13DHR09727

<p>CARING HANDS HOME HEALTH INC, Petitioner,</p> <p>v.</p> <p>NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent.</p>	<p>FINAL DECISION</p>
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THIS MATTER came on for hearing before Beecher R. Gray, Administrative Law Judge, August 9, 2013, in Raleigh, North Carolina. Petitioner submitted a proposed decision on October 30, 2013. On April 3, 2013, Respondent filed a Motion to Dismiss this contested case for lack of subject matter jurisdiction because it was untimely filed. Petitioner filed a written response in opposition to the Motion on April 16, 2013. Respondent's Motion to Dismiss was DENIED in an Order entered on April 17, 2013. At the outset of this contested case hearing, Counsel for Respondent orally renewed Respondent's earlier written Motion to Dismiss. The oral Motion to Dismiss was DENIED on the record. Counsel for Respondent announced that Respondent would not offer any exhibits or produce any evidence, relying instead solely on its Motion to Dismiss.

APPEARANCES

For Petitioner: Robert A. Leandro, Esq.
Parker Poe Adams & Bernstein, LLP
150 Fayetteville Street
Suite 1400
Raleigh, North Carolina 27601

For Respondent: Brenda Eaddy, Esq.
Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629

APPLICABLE LAW

The laws and regulations applicable to this contested case are N.C. Gen. Stat. Chapter 150B, Article 3, the North Carolina Administrative Procedure Act, N.C. Gen. Stat. Chapter 108C, Articles 1, 2, and 3, and 10A NCAC 22F.

BURDEN OF PROOF

Under N.C. Gen. Stat. § 108C-12(d), Respondent North Carolina Department of Health and Human Services has the burden of proof as to any “adverse determination.” The definition of “adverse determination” includes the decision to recoup funds from Petitioner. *See* N.C. Gen. Stat. § 108C-2(1).

As to the decision to dismiss Petitioner’s Reconsideration Review Request, because this is not an “adverse determination” as defined by N.C. Gen. Stat. § 108C-2(1), Petitioner has the burden of proof.

ISSUES

The issues to be resolved in this case are whether Respondent violated the standards of N.C. Gen. Stat. § 150B-23 when it determined through a post-payment review conducted by its contractor, the Public Consulting Group, that Caring Hands was overpaid in the amount of \$328,623.00 and whether the Respondent’s Departmental Hearing Office erred when it dismissed Caring Hands’ Reconsideration Review Request.

EXHIBITS

Petitioner’s Exhibits (“P. Exs.”) 9-13 and 20-65 were admitted into evidence.

The Undersigned also takes judicial notice of and has considered documents filed in this case prior to the hearing, including the Verified Petition and attached exhibits and the Affidavit of Richelle Wilkins and attached exhibits.

Respondent presented no exhibits and no evidence during the hearing.

WITNESSES

Petitioner presented the testimony of Richelle Wilkins, the owner and operator of Caring Hands.

Respondent presented no witnesses during the hearing.

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witness presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, including the undisputed affidavit of Richelle Wilkins and the Verified Contested Case Petition, 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 witness 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 creditable evidence in the case.

The Parties

1. Petitioner Caring Hands provides personal care services (“PCS”) to Medicaid recipients in North Carolina.
2. Respondent North Carolina Department of Health and Human Services (the “Agency” or “Respondent”) is an administrative agency operating under the laws of North Carolina. The Agency oversees the Medicaid program through its Division of Medical Assistance (“DMA”). DMA conducts post-payment reviews of Medicaid services under 42 CFR §§ 455 *et. seq.* and 10A NCAC 22F.
3. 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.
4. Respondent’s Counsel made no objection to the hearing date or time. However, Respondent provided no testimony or evidence on any of the issues raised by Petitioner. Respondent instead stated that the Agency would rely on the jurisdictional argument made in its previous Motion to Dismiss, which was not supported by any affidavits or exhibits. Respondent’s Motion was denied by the undersigned on April 17, 2013.

Contested Actions

5. On or around Monday, December 3, 2012, Caring Hands received a letter titled “Tentative Notice of Overpayment” (“Tentative Notice”) dated November 27, 2012. The Tentative Notice was sent to Caring Hands by the Public Consulting Group (“PCG”) on PCG letterhead. (P. Ex. 9; Testimony of Richelle Wilkins)
6. The Tentative Notice informed Caring Hands that, as a result of a post-payment review conducted by PCG, Medicaid overpayments had been identified in the amount of \$328,623.00. (*Id.*)
7. The PCG Notice made clear that the Notice and Findings were tentative in nature and not final. (*Id.*)

8. The alleged overpayment amount was based upon the review of recipient records for only 100 individual dates (“claims”) for which Caring Hands provided services between August 1, 2010 and August 31, 2011. (*Id.*)
9. Based on PCG’s review of these 100 claims, PCG tentatively determined that Caring Hands had been overpaid in the amount of \$2,658.54. (*Id.*)
10. PCG then extrapolated its tentative findings to all Medicaid payments made to Caring Hands between August 1, 2010 and August 31, 2011 to determine a “tentative overpayment amount” of \$328,623.00. (*Id.*)
11. PCG indicated in the Tentative Notice that Caring Hands had the right to seek an informal reconsideration with the Department Hearing Office under 10A NCAC 22F .0402. (*Id.*)
12. PCG’s Tentative Notice provided a one-page form that Caring Hands could complete and send to the Department Hearing Office to begin the reconsideration process. (*Id.*) The Tentative Notice stated that Caring Hands had 15 business days from receipt of PCG’s Tentative Notice to seek reconsideration. (*Id.*)
13. The Tentative Notice also stated that Caring Hands had no less than 30 days to submit additional documentation that was not provided during the original audit to the Department Hearing Office for review. (*Id.*)
14. On Monday, December 12, 2012, Caring Hands completed the one page Reconsideration Request form for the PCG post-payment review at issue in this case (“Reconsideration Request”). Richelle Wilkins signed the form, addressed the mailing envelope, and stamped it for mailing to the Department Hearing Office. Before mailing the request, Caring Hands made a copy of the completed Reconsideration Request form. (P. Ex. 10; Testimony of Richelle Wilkins)
15. Caring Hands mailed the Reconsideration Request on Monday, December 12, 2012, by depositing the Reconsideration Request in an outgoing mailbox which is checked daily (Monday through Friday) by the U.S. Postal Service. The Reconsideration Request was sent by Caring Hands well before the fifteen business day deadline set forth in the PCG Tentative Notice. (Testimony of Richelle Wilkins)
16. After Caring Hands submitted its Reconsideration Request form, it began gathering additional documentation to support its appeal, as instructed by the PCG Tentative Notice. (Testimony of Richelle Wilkins)
17. On January 17, 2013, Caring Hands sent additional documentation to the Department Hearing Office, which it contends disputed the findings. Because the information sent to the Department Hearing Office contained medical records, Caring Hands sent its package via Certified Mail to the Department Hearing Office. (Testimony of Richelle Wilkins)

18. On January 25, 2013, Caring Hands received a "Notice of Dismissal" dated January 22, 2013 from the Department Hearing Office. The Notice of Dismissal stated that the additional documentation sent by Caring Hands on January 17, 2013, was received after the 15 business-day deadline. (Testimony of Richelle Wilkins; Verified Petition, Ex. B)
19. The January 25, 2013 Notice of Dismissal did not reference the previously mailed Reconsideration Request and based its dismissal solely on the date the Hearing Office received the additional documentation sent by Caring Hands. (*Id.*)
20. The Notice of Dismissal was the first communication that Caring Hands received from a State Agency. The Agency never has provided Caring Hands with any written notice that PCG's Tentative Notice was final or had been adopted by the Agency. (Testimony of Richelle Wilkins)
21. The Agency provided no testimony or evidence regarding the basis for dismissing Caring Hands' Reconsideration Request following Petitioner's receipt of PCG's Tentative Notice of Overpayment. The Agency failed to provide any evidence that the Agency did not receive Caring Hands' December 12, 2012 Reconsideration Request.
22. On January 31, 2013, Caring Hands received a Remittance and Status Report from the Agency dated January 31, 2013. The Remittance and Status Report states:

Alert! May be subjected to penalty and interest or adjustments processed. Monies are due back to Medicaid. Per N.C. Statute 147, this RA serves as your required dunning notification. All outstanding adjustment balances must be paid within 30 days or a 10% one-time penalty will be assessed and interest will be charged. (Wilkins Affidavit, Ex. A, p. 33)
23. The Agency did not provide Caring Hands with any written notice that PCG's Tentative Notice was final or had been adopted by the Agency. The January 31, 2013 Remittance and Status Report was the only communication that Caring Hands received from the Agency indicating that it was seeking to recoup the alleged overpayment identified in PCG's Tentative decision.
24. Caring Hands filed a Contested Case Petition challenging the decision to dismiss its Reconsideration Request on the grounds that it had timely requested a reconsideration of PCG's Tentative Notice of Overpayment.
25. Caring Hands' Petition also requested that the Office of Administrative Hearings determine that the findings of the Tentative Notice were erroneous and requested that the Undersigned find that Caring Hands owed no funds to the Agency based on PCG's review and the Tentative Notice.

PCG's Post-Payment Review Findings

26. At the Contested Case Hearing, the Agency provided no testimony or evidence as to the basis for the Tentative Findings made by PCG.
27. The Agency provided no testimony or evidence to support PCG's tentative findings that all or part of the 100 claims that PCG reviewed were determined to be out of compliance with State or federal law or regulation, Clinical Coverage Policy 3C, or any other policy or guidance issued by the Agency.
28. The Agency provided no testimony or evidence as to whether it agreed with any or all of PCG's tentative findings and the amount that it believes should be recouped from Caring Hands.

PCG's Extrapolation of the Post-Payment Findings

29. PCG's Tentative Notice indicated that--based on the review of 100 claims--it was extrapolating the overpayment amount to include every claim billed by Caring Hands during the selected review period. (P. Ex. 9)
30. The Agency provided no testimony or evidence as to the basis for the extrapolation, the reason for the use of extrapolation, the extrapolation methodology, or whether it supported the use of extrapolation as set forth in PCG's Tentative Notice.
31. The Agency provided no evidence or testimony that Caring Hands failed to substantially comply with State or federal law or regulations.
32. The Agency provided no evidence or testimony that the PCG reviewers in this case were credentialed by the Department in the matters to be audited.
33. The Agency provided no evidence or testimony that the extrapolation was conducted using disproportionate stratified random sampling. The random sampling description that was included in the Tentative Notice of Overpayment contains no information stating that a disproportionate stratified random sample of claims was reviewed. (P. Ex. 9, p. 24)
34. The Department's Provider Claims Sampling and Extrapolation Authorization and Procedures Manual states that stratified samples should be used in extrapolation and that the number of strata must be between 2 and 4 inclusive. (P. Ex. 11)

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 as Conclusions of Law. Based upon the foregoing Findings of Fact, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. All parties properly are before the Office of Administrative Hearings.
2. An ALJ need not make findings as to every fact which arises from the evidence and need find only 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 (1993).
3. The sixty (60) day time period for filing a contested case under N.C. Gen. Stat. § 150B-23(f) commences when notice is given of the agency decision to all persons aggrieved. Such notice must be in writing and must set forth the agency action.
4. Based upon the uncontroverted evidence produced in this hearing, Caring Hands timely appealed the Departmental Hearing Office's decision to dismiss Petitioner's Reconsideration Request because it filed a Petition for Contested Case within sixty (60) days of the Departmental Hearing Office's Notice of Dismissal.
5. 10A NCAC 22F .0402 requires that a provider such as Petitioner has fifteen working days to request a Reconsideration Review of a tentative decision.
6. The evidence in this record demonstrates that Caring Hands met its burden to show that it timely requested a Reconsideration Review from the Departmental Hearing Office.
7. Based on the evidence in the record, Respondent substantially prejudiced Petitioner's rights by dismissing Caring Hands' Reconsideration Review Request.
8. Based on the evidence in the record, the Agency erred and acted contrary to its own rules when it issued a Notice of Dismissal of Caring Hands' Request for Reconsideration.
9. As it relates to the recoupment action, N.C. Gen Stat. § 150B-23(f) allows a person aggrieved by an "agency decision" sixty (60) days after notice is given to appeal such decision to the Office of Administrative Hearings. Such notice must be in writing and must set forth the agency action.
10. N.C. Gen. Stat. § 150B-2(1a) defines "Agency" to mean an agency or an officer in the executive branch of the government of this State.
11. PCG is not an Agency as defined by N.C. Gen. Stat. § 150B-2(1a).
12. The PCG Tentative Notice does not constitute an "agency decision" under N.C. Gen. Stat. § 150B-23(f) because it was issued by a private contractor and not by an "Agency" as defined by the North Carolina Administrative Procedure Act.
13. Even if PCG could be considered an "Agency" for the purposes of commencing the sixty (60) day time period for filing a contested case, the PCG Tentative Notice does not

constitute an “agency decision” under N.C. Gen. Stat. § 150B-23(f) because it is tentative notice and not a decision.

14. Caring Hands timely appealed the Agency’s decision to recoup funds based on the PCG audit because it filed a Petition for Contested Case within sixty (60) days of receiving the January 31, 2013 Remittance Advice and Status Report indicating that DMA was attempting to recoup funds from Caring Hands.
15. N.C. Gen. Stat. § 108C-12(d) states that “the Department shall have the burden of proof in appeals of Medicaid providers or applicants concerning an ‘adverse determination.’” N.C. Gen. Stat. § 108C-2(1) defines an “adverse determination” to include a decision by the Department to recoup Medicaid payments.
16. As to the Agency’s determination that it would recoup funds from Caring Hands as set forth in the January 31, 2013 Remittance Advice and Status Report, Respondent Agency has the burden of proof.
17. Respondent failed to meet its burden of proof demonstrating that Caring Hands had been overpaid by Medicaid in any amount or that any recoupment was appropriate and supported by the evidence.
18. The Agency failed to provide any testimony or evidence to support the recoupment, including, but not limited to: (1) the claims reviewed during the audit; (2) the finding for each claim reviewed; (3) the amount of the recoupment sought for each claim reviewed; or (4) the basis of the finding that the documentation reviewed evidenced any violation of law, rule, or policy.
19. Based on the lack of any evidence in the record that any recoupment is appropriate, the Agency substantially prejudiced Petitioner’s rights by attempting to recoup funds from Caring Hands.
20. Based on the lack of any evidence in the record that any recoupment is appropriate, the Agency erred and acted contrary to rule and law by attempting to recoup funds from Caring Hands based on PCG’s tentative findings.
21. 10A NCAC 22F .0302(c) states that, when conducting an audit of a Medicaid provider, the Agency must:

[r]eview the findings, conclusions, and recommendations [of the investigation of provider abuse] and make a tentative decision for disposition of the case from among the following administrative actions:

- (1) To place provider on probation with terms and conditions for continued participation in the program.
- (2) To recover in full any improper provider payments.
- (3) To negotiate a financial settlement with the provider.

- (4) To impose remedial measures to include a monitoring program of the provider's Medicaid practice terminating with a "follow-up" review to ensure corrective measures have been introduced.
 - (5) To issue a warning letter notifying the provider that he must not continue his aberrant practices or he will be subject to further division actions.
 - (6) To recommend suspension or termination.
- 22. The Agency provided no testimony or evidence to show that either PCG or the Agency reviewed PCG's findings and made a determination regarding whether recoupment would be the appropriate administrative action.
 - 23. The Agency acted contrary to rule and failed to use proper procedure by not providing evidence or testimony that it reviewed the tentative findings to determine the appropriate administrative action that should have been taken as required by 10A NCAC 22F .0302.
 - 24. Under N.C. Gen. Stat. § 108C-5(i), in order for the Agency to use extrapolation when conducting an audit of Medicaid providers, it must determine that the provider "failed to substantially comply with State law or regulation."
 - 25. The Agency did not meet its burden of proof that Caring Hands failed to substantially comply with State or federal law or regulation, as it put forward no testimony or evidence of the alleged violations found during the PCG audit.
 - 26. Under N.C. Gen. Stat. § 108C-5(i), in order to use extrapolation, the Agency is required to issue credentials to auditors in the matter to be audited.
 - 27. The Agency did not meet its burden of proof that the PCG auditors were credentialed by the Department in the review of personal care services.
 - 28. The Agency erred and acted contrary to law and rule by attempting to extrapolate PCG's tentative findings. The Agency failed to demonstrate that Caring Hands did not substantially comply with State or federal law or regulation, failed to demonstrate that the auditors used in this case were credentialed by the Department, and failed to demonstrate that it used disproportionate stratified random sampling when conducting this audit.
 - 29. The Agency erred and acted contrary to law and rule by attempting to extrapolate PCG's tentative findings.

FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, I find that Petitioner's request for a reconsideration review was timely under the evidence produced in this contested case hearing and that Respondent DMA's decision to recoup any funds from Caring Hands--

based on the PCG post-payment review--is not supported by the evidence or applicable law, which should be, and hereby is, REVERSED.

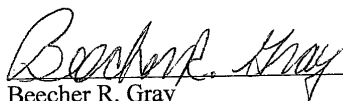
As to the Undersigned's decision regarding the Agency's adverse determination to recoup funds, which is subject to N.C. Gen. Stat. § 108C, the Agency delayed its filing of a response to Petitioner's Motion for Stay beyond the ten (10) days allowed by the rules that govern this forum. Respondent further filed a Motion to Dismiss, which was not supported by any affidavit or testimony, which was heard by the Undersigned. Such delays extend this forum's time for entering the Final Decision, to the extent that an extension is required.

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 05 day of December, 2013.



Beecher R. Gray
Administrative Law Judge