NORTH CAROLINA REGISTER

VOLUME 29 • ISSUE 04 • Pages 397 – 489

August 15, 2014

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

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

Contact List for Rulemaking Questions or Concerns

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

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

Office of Administrative Hearings
Rules Division
1711 New Hope Church Road (919) 431-3000
Raleigh, North Carolina 27609 (919) 431-3104 FAX

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

Rule Review and Legal Issues

Rules Review Commission
1711 New Hope Church Road (919) 431-3000
Raleigh, North Carolina 27609 (919) 431-3104 FAX

contact:	Amber Cronk May, Commission Counsel	amber.cronk@oah.nc.gov	(919) 431-3074
	Abigail Hammond, Commission Counsel	abigail.hammond@oah.nc.gov	(919) 431-3076
	Amanda Reeder, Commission Counsel	amanda.reeder@oah.nc.gov	(919) 431-3079
	Julie Brincefield, Administrative Assistant	julie.brincefield@oah.nc.gov	(919) 431-3073
	Alexander Burgos, Paralegal	alexander.burgos@oah.nc.gov	(919) 431-3080

Fiscal Notes & Economic Analysis and Governor's Review

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

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

NC League of Municipalities (919) 715-4000
215 North Dawson Street
Raleigh, North Carolina 27603
contact: Sarah Collins scollins@nclm.org

Legislative Process Concerning Rule-making

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

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

This publication is printed on permanent, acid-free paper in compliance with G.S. 125-11.13

NORTH CAROLINA REGISTER

Publication Schedule for January 2014 – December 2014

FILING DEADLINES			NOTICE OF TEXT		PERMANENT RULE			TEMPORARY RULES
Volume & issue number	Issue date	Last day for filing	Earliest date for public hearing	End of required comment Period	Deadline to submit to RRC for review at next meeting	Earliest Eff. Date of Permanent Rule	Delayed Eff. Date of Permanent Rule 31st legislative day of the session beginning:	270th day from publication in the Register
28:13	01/02/14	12/06/13	01/17/14	03/03/14	03/20/14	05/01/14	05/2014	09/29/14
28:14	01/15/14	12/19/13	01/30/14	03/17/14	03/20/14	05/01/14	05/2014	10/12/14
28:15	02/03/14	01/10/14	02/18/14	04/04/14	04/21/14	06/01/14	01/2015	10/31/14
28:16	02/17/14	01/27/14	03/04/14	04/21/14	05/20/14	07/01/14	01/2015	11/14/14
28:17	03/03/14	02/10/14	03/18/14	05/02/14	05/20/14	07/01/14	01/2015	11/28/14
28:18	03/17/14	02/24/14	04/01/14	05/16/14	05/20/14	07/01/14	01/2015	12/12/14
28:19	04/01/14	03/11/14	04/16/14	06/02/14	06/20/14	08/01/14	01/2015	12/27/14
28:20	04/15/14	03/25/14	04/30/14	06/16/14	06/20/14	08/01/14	01/2015	01/10/15
28:21	05/01/14	04/09/14	05/16/14	06/30/14	07/21/14	09/01/14	01/2015	01/26/15
28:22	05/15/14	04/24/14	05/30/14	07/14/14	07/21/14	09/01/14	01/2015	02/09/15
28:23	06/02/14	05/09/14	06/17/14	08/01/14	08/20/14	10/01/14	01/2015	02/27/15
28:24	06/16/14	05/23/14	07/01/14	08/15/14	08/20/14	10/01/14	01/2015	03/13/15
29:01	07/01/14	06/10/14	07/16/14	09/02/14	09/22/14	11/01/14	01/2015	03/28/15
29:02	07/15/14	06/23/14	07/30/14	09/15/14	09/22/14	11/01/14	01/2015	04/11/15
29:03	08/01/14	07/11/14	08/16/14	09/30/14	10/20/14	12/01/14	01/2015	04/28/15
29:04	08/15/14	07/25/14	08/30/14	10/14/14	10/20/14	12/01/14	01/2015	05/12/15
29:05	09/02/14	08/11/14	09/17/14	11/03/14	11/20/14	01/01/15	01/2015	05/30/15
29:06	09/15/14	08/22/14	09/30/14	11/14/14	11/20/14	01/01/15	01/2015	06/12/15
29:07	10/01/14	09/10/14	10/16/14	12/01/14	12/22/14	02/01/15	05/2016	06/28/15
29:08	10/15/14	09/24/14	10/30/14	12/15/14	12/22/14	02/01/15	05/2016	07/12/15
29:09	11/03/14	10/13/14	11/18/14	01/02/15	01/20/15	03/01/15	05/2016	07/31/15
29:10	11/17/14	10/24/14	12/02/14	01/16/15	01/20/15	03/01/15	05/2016	08/14/15
29:11	12/01/14	11/05/14	12/16/14	01/30/15	02/20/15	04/01/15	05/2016	08/28/15
29:12	12/15/14	11/20/14	12/30/14	02/13/15	02/20/15	04/01/15	05/2016	09/11/15

This publication is printed on permanent, acid-free paper in compliance with G.S. 125-11.13

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.

This publication is printed on permanent, acid-free paper in compliance with G.S. 125-11.13

State of North Carolina

PAT McCRORY
GOVERNOR

July 8, 2014

EXECUTIVE ORDER 60

NOTICE OF TERMINATION OF EXECUTIVE ORDERS 57, 58 AND 59

WHEREAS, Executive Order No. 57, was issued on July 2, 2014, declaring a state of emergency due to the approach of Tropical Storm/Hurricane Arthur in the following counties in the State of North Carolina: Beaufort, Bertie, Bladen, Brunswick, Camden, Carteret, Chowan, Columbus, Craven, Currituck, Dare, Duplin, Gates, Hertford, Hyde, Jones, Martin, New Hanover, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Pitt, Tyrrell, and Washington; and

WHEREAS, Executive Order No. 58 was issued on July 2, 2014, waived the maximum hours of service for drivers transporting supplies and equipment for utility restoration and essentials, and with the concurrence of the Council of State temporarily suspended size and weight restrictions on vehicles used for utility restoration and carrying essentials on the interstate and intrastate highways due to anticipated damage and impacts from Tropical Storm/Hurricane Arthur. In addition, Executive Order 59 amended Executive Order 58 and directed the Department of Public Safety to suspend weighing those vehicles used to transport livestock, poultry and crops.

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

Pursuant to N.C.G.S § 166A-19.20(c) the state of emergency that was declared by Executive Order 57 and that waivers in Executive Orders 58 and 59 are hereby terminated immediately.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this eighth day of July 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-nine.

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 Administrative, Building, Electrical, Energy Conservation, Existing Building, Fire, Plumbing, and Residential Codes.*

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

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

Public Hearing: Tuesday, *September 9, 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 October 14, 2014.*

Statement of Subject Matter:

1. Request by David Smith, representing the Residential Ad-Hoc Committee, to amend the 2012 NC Administrative Code, Section 107. The proposed amendment is as follows:

SECTION 107 INSPECTIONS

107.1 General. The inspection department shall perform the following inspections:
1. Footing inspection;
2. Under slab inspection, as appropriate;
3. Foundation inspection~~, wood-frame construction~~;
4. Rough-in inspection;
5. ~~Building~~ Framing inspection;
6. Insulation inspection;
7. Fire protection inspection; and
8. Final inspection.

Commentary: The code enforcement official makes these inspections during certain phases of construction and is not on site at all times when construction is in progress. The code official verifies code compliance and/or code defects visible and subject to discovery during the above listed inspections and spot checks numerous similar items.

Nothing in any of Sections 107.1.1-107.1.8 requirements is intended to prevent partial inspections of the inspection types listed in Section 107.1 "General" as requested by the permit holder as allowed by the local inspection department. Partial inspections approved by the code official shall cumulatively satisfy the same degree of readiness for inspection for viewing as described in Sections 107.1.1 – 107.1.8.

Not all items, such as, but not limited to, nailing of roof or other sheathing material, are always visible at framing inspection, but remain the responsibility of the permit holder to comply with the code.

Temporary electrical service poles may be inspected at any phase of construction as requested by the permit holder. Temporary utility (TU) applications deemed safe by the AHJ or as otherwise permitted by the code shall be allowed.

107.1.1 Footing inspection. Footing inspections shall be made after the trenches are excavated, all grade stakes are installed, all reinforcing steel and supports are in place and appropriately tied, all necessary forms and bulkheads are in place and braced~~, and~~ before any concrete is placed.

107.1.2 Under-slab inspection. Under-slab inspections, as appropriate, shall be made after all materials and equipment to be concealed by the concrete slab are completed.

107.1.3 Foundation inspection~~, crawl space~~. Foundation and crawl space inspections shall be made after all foundation supports are installed. ~~The inspection is to check foundation supports, crawl space leveling, ground clearances and positive drainage when required.~~

*Commentary: Foundation inspections are conducted to verify correct installation and proper bearing support. Poured concrete and masonry walls that have reinforcement steel should be inspected prior to concrete placement. C*rawl space leveling, ground clearances, positive drainage and waterproofing/dampproofing, when required, may be inspected at future inspections prior to concealment.

107.1.4 Rough-in inspection. Rough-in inspections shall be made when all building framing and parts of the electrical, plumbing, fire protection, or heating-ventilation or cooling system that will be hidden from view in the finished building have been placed but before any wall, ceiling finish or building insulation is installed.

Commentary: Plumbing, mechanical, and electrical components installed underground should be considered as rough-in inspections and may be inspected at any point during construction prior to covering.

107.1.5 ~~Building~~ Framing Inspection. Framing inspections shall be made after the roof, excluding permanent roof coverings, wall, ceiling and floor framing is complete with appropriate blocking, bracing and firestopping in place. ~~The following items shall be in place and visible for inspection:~~

~~1. Pipes;~~
~~2. Chimneys and vents;~~
~~3. Flashing for roofs, chimneys, and wall openings;~~
~~4. Insulation baffles; and~~
~~5. All lintels that are required to be bolted to the framing for support shall not be covered by any exterior or interior wall or ceiling finish material before approval. Work may continue without approval for lintels supported on masonry or concrete.~~

Commentary: Intent of this section is to identify a building's level of readiness and what can be visible at this stage of construction. This stage of construction is intended to review structural components. The permanent roof covering may or may not be installed prior to framing inspection.

The following items should be in place and visible for inspection: pipes, chimneys and vents, flashing, and required exterior water-resistant barriers.

107.1.6 Insulation inspection. Insulation inspection shall be made after an approved building framing and rough-in inspection and after the permanent roof covering is installed, with all insulation and vapor retarders in place, but before any wall or ceiling covering is applied.

Commentary: Insulation baffles that cannot be seen at this inspection, such as vaulted ceilings with concealed rafter cavities, should have baffles installed at framing inspection for verification.

It is acceptable that wall cavity insulation enclosed by an air barrier material behind tubs, showers, and fireplace units installed on exterior walls may not be observable by the code official.

107.1.7 Fire protection inspection. Fire protection inspections shall be made in all buildings where any material is used for fire protection purposes. The permit holder or his agent shall notify the inspection department after all fire protection materials are in place. Fire protection materials shall not be concealed until inspected and approved by the code enforcement official.

Commentary: Fire protection inspection is typically performed in commercial building structures and is required in addition to any special inspection as listed in Chapter 17 of the North Carolina Building Code.

107.1.8 Final inspection. Final inspections shall be made for each trade after completion of the work authorized under the technical codes.

Commentary: Each trade shall complete a final inspection giving approval to permitted work. Work required by the technical codes shall be complete before being requested. Temporary certificate of occupancy (TCO) requests may be permitted prior to final inspection.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – The purpose of this amendment is to provide clarification of the required inspections to be performed during construction.
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 Amy Musser, representing Vandemusser Design, PLLC, to amend the 2012 NC Energy Conservation Code, Section 402.5. The proposed amendment is as follows:

402.5 Maximum fenestration *U*-factor and SHGC (Mandatory Requirements). The area-weighted average maximum fenestration *U*-factor permitted using trade-offs from Section 402.1.4 shall be 0.40. Maximum skylight *U*-factors shall be 0.65 in zones 4 and 5 and 0.60 in zone 3. The area-weighted average maximum fenestration SHGC permitted using trade-offs from Section 405 in zones 3 ~~and 4~~ shall be ~~0.40~~0.50.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – This proposal increases the limits on the window solar heat gain factor to match the 2009 IECC when using the Section 405 performance path and allows passive solar design to receive tax credits.
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 Leon Skinner, representing the NC Existing Building Code Committee, to amend the 2015 NC Existing Building Code, Section 505.1. The proposed amendment is as follows:

505.1 Scope. Level 3 Alteration (Reconstruction) ~~apply~~ applies where the work area exceeds 50 percent of the aggregate area of the building in any 12 month period.
Exception: Alterations limited to displays or showrooms in Group M Occupancies.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – The intent of this proposal is to provide a time limit as guidance to prevent simultaneous Level 1 and 2 projects from occurring without upgrading to Level 3 requirements.
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 Leon Skinner, representing the NC Existing Building Code Committee, to amend the 2015 NC Existing Building Code, Section 805.2. The proposed amendment is as follows:

805.2 General. The means of egress shall comply with the requirements of this section.
Exceptions:
1. Where the work area and the means of egress serving it complies with NFPA 101.
2. Means of egress conforming to the requirements of the building code under which the building was constructed shall be considered compliant means of egress if, in the opinion of the code official, they do not constitute a distinct hazard of life.
3. In One and Two Family Dwelling stairways not required for egress may be as narrow as 26 inches.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – This proposal is to offer relief to existing stairways that may need to be renovated or extended.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

5. Request by Leon Skinner, representing the NC Existing Building Code Committee, to amend the 2015 NC Existing Building Code, Section 805.6. The proposed amendment is as follows:

805.6 Dead-end corridors. Dead-end corridors in any work area shall not exceed 35 feet.
Exception:
1. Where dead-end corridors of greater length are permitted by the International Building Code.
2. In other than Group A and H occupancies, the maximum length of an existing dead-end corridor shall be 50 feet in buildings equipped throughout with an automatic fire alarm system install in accordance with the International Building Code.
3. In other than Group A and H occupancies, the maximum length of an existing dead-end corridor shall be 70 feet in buildings equipped throughout with an automatic sprinkler system installed in accordance with the International Building Code.
4. ~~In other than Group A and H occupancies, the maximum length of a newly constructed, or extended dead-end corridor shall not exceed 50 feet on floors equipped with an automatic sprinkler system installed in accordance with the International Building Code.~~ Deleted.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – This proposal is to coordinate the requirement that new work must meet the current code.
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 Leon Skinner, representing the NC Existing Building Code Committee, to amend the 2015 NC Building Code, Chapter 34. The proposed amendment is as follows:

Delete Chapter 34, Existing Building And Structures, from the 2012 NC Building Code.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is March 1, 2015.
Reason Given – This proposal eliminates redundant or potential conflicts with the NC Existing Building Code, Chapters 4 and 14.
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.

7. Request by Sam Caudill, representing himself, to amend the 2011 NEC, Section 230.74 and Section 230.75.

Motion/Second/Denied – The request was denied.
Reason Given – This proposal exceeds the requirements in the NEC. The Council recommended that the proponent submit this proposal to NFPA for consideration in the national code.

8. Request by Clint Latham, representing the North Carolina Plumbing Inspectors Association, to amend the 2012 NC Plumbing Code, Section 706.4. The proposed amendment is as follows:

706.4 Heel- or side-inlet quarter bends. ~~Heel-inlet quarter bends shall be an acceptable means of connection, except where the quarter bend serves a water closet. A low-heel inlet shall not be used as a wet-vented connection. Side-inlet quarter bends shall be an acceptable means of connection for drainage, wet venting and *stack* venting arrangements.~~ Deleted.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – This proposal is to eliminate a potential conflict with Table 706.3, Footnote "f".
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.

9. Request by David Smith, representing the Residential Ad-Hoc Committee, to amend the 2012 NC Residential Code, Section R308.4.

Motion/Second/Denied – The request was denied.
Reason Given – This proposal was denied in favor of modification to June 10, 2014 Agenda Item D-10.

10. Request by David Smith, representing the Residential Ad-Hoc Committee, to amend the 2012 NC Residential Code, Figure AM111. The proposed amendment is as follows:

Revisions to note concerning guards in FIGURE AM111

Guards at a Minimum 36" required per R312.1 with 30" drop and opening limits per R312.2 & R312.3 ~~(4"-on vertical pickets, 6"-on horizontal and ornamental guardrails)~~, top rail and post to support 200 lbs with infill to meet 50 lbs per Table R301.5 and footnotes.

Motion/Second/Approved – The request was granted and sent to the Residential Committee for review. The proposed effective date of this rule is January 1, 2016.
Reason Given – This proposal is to eliminate a conflict with the Section 312.3 sphere limitation.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

11. Request by Steve Knight, PE, BCC Structural Committee Chair, to amend the 2012 NC Residential Code, Sections AM 106 and AM 111 as follows:

Section AM106: Delete partial reprint of Table R502.3.1(2) without substitution.
Section AM111: In Figure AM111 delete partial reprint of Table R502.5(1) without substitution.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – This proposal is to eliminate inconsistencies with the revised Southern Pine design values.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

12. Request by Steve Knight, PE, BCC Structural Committee Chair, to amend the 2012 NC Residential Code, Appendix N, Tables N-1 and N-2 as follows:

Appendix N: Delete Tables N-1 and N-2 and substitute tables at the following link:
http://www.ncdoi.com/OSFM/Engineering_and_Codes/Documents/BCC_Minutes/2014%2006%2014~June%2010,%202014%20(Items%20B-11%20through%20B-21,%20for%20public%20comment) .pdf

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – This proposal is to eliminate inconsistencies with the revised Southern Pine design values.
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.

13. Request by Steve Knight, PE, BCC Structural Committee Chair, to amend the 2012 NC Residential Code, Appendix N, Examples as follows:

Appendix N Example at the top of Page 918 – Change as follows:
By using Table N-1, the required beam is 4 @ 2x12 ~~SYP or~~ SPF
OR
By using Table N-2, the required minimum flitch beam is 2 @ 2x8 with ~~1/2~~" 5/8"x 7" steel plate bolted with 1/2" bolts space at 2' o.c.

Appendix N Example at the bottom of Page 918 – Change as follows:
By using Table N-1, the required beam is ~~3~~ 4 @ 2x12 Southern Pine or 4 @ 2x12 Spruce-pine-fir
OR
By using Table N-2, the required minimum flitch is 2 @ 2x8 with ~~3/8~~" 1/2"x 7" steel plate bolted with 1/2" bolts spaced at 2' o.c.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – This proposal is to eliminate inconsistencies with the revised Southern Pine design values.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

14. Request by Steve Knight, PE, BCC Structural Committee Chair, to amend the 2012 NC Building and Residential Codes pertaining to Docks, Piers, Bulkheads and Waterway Structures as follows:

The complete amendment text is published at the following link:

http://www.ncdoi.com/OSFM/Engineering_and_Codes/Documents/BCC_Minutes/2014%2006%2014~June%2010,%202014%20(Items%20B-11%20through%20B-21,%20for%20public%20comment)_.pdf

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – This proposal is revise the code requirements for waterfront structures to reflect current construction practice.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

15. Request by Wayne Hamilton, NC Fire Service Code Revision Committee, to amend the 2012 NC Fire Code, Section 319 as follows:

SECTION 319 ROOFTOP GARDENS AND LANDSCAPED ROOFS
319.1 General. Rooftop gardens and landscaped roofs shall be installed and maintained in accordance with Sections 319.2 through 319.5 and Sections 1505.0 and 1507.16 of the *International Building Code*.
319.2 Rooftop garden or landscaped roof size. Rooftop garden or landscaped roof areas shall not exceed 15,625 square feet (1,450 m_2) in size for any single area with a maximum dimension of 125 feet (39 m) in length or width. A minimum 6-foot-wide (1.8 m) clearance consisting of a Class A-rated roof system complying with ASTM E 108 or UL 790 shall be provided between adjacent rooftop gardens or landscaped roof areas.
319.3 Rooftop structure and equipment clearance. For all vegetated roofing systems abutting combustible vertical surfaces, a Class A-rated roof system complying with ASTM E 108 or UL 790 shall be achieved for a minimum 6-foot-wide (1.8 m) continuous border placed around rooftop structures and all rooftop equipment including, but not limited to, mechanical and machine rooms, penthouses, skylights, roof vents, solar panels, antenna supports, and building service equipment.
319.4 Vegetation. Vegetation shall be maintained in accordance with Sections 319.4.1 and 319.4.2.
319.4.1 Irrigation. Supplemental irrigation shall be provided to maintain levels of hydration necessary to keep green roof plants alive and to keep dry foliage to a minimum.
319.4.2 Dead foliage. Excess biomass, such as overgrown vegetation, leaves and other dead and decaying material, shall be removed at regular intervals not less than two times per year.
319.4.3 Maintenance plan. The *fire code official* is authorized to require a maintenance plan for vegetation placed on roofs due to the size of a roof garden, materials used, or when a fire hazard exists to the building or exposures due to the lack of maintenance.
319.5 Maintenance equipment. Fueled equipment stored on roofs and used for the care and maintenance of vegetation on roofs shall be stored in accordance with Section 313.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – This proposal is to coordinate the Fire Code with the Building Code, Section 1507.16 to address the fire prevention needs of these gardens and landscaping, such as hydration, waste removal, use of fueled equipment, and fire separation from openings.
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.

16. Request by Wayne Hamilton, NC Fire Service Code Revision Committee, to amend the 2012 NC Fire Code, Section 509.1.1 as follows:

509.1.1 Utility identification. Gas shutoff valves, electric meters, service switches and other utility equipment shall be clearly and legibly marked to identify the unit or space that it serves. Identification shall be made in an *approved* manner, readily visible and shall be maintained.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – This proposal provides emergency responders clear information on what building utility shutoffs serve what units.
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.

17. Request by Wayne Hamilton, NC Fire Service Code Revision Committee, to amend the 2012 NC Fire Code, Section 1208.2 as follows:

Exceptions:
1. An *automatic sprinkler system* shall not be required in Type III-A dry cleaning plants where the aggregate quantity of Class III-A solvent in dry cleaning machines and storage does not exceed 330 gallons (1250 L) and dry cleaning machines are equipped with a feature that will accomplish any one of the following:
1.1. Prevent oxygen concentrations from reaching 8 percent or more by volume.
1.2. Keep the temperature of the solvent at least 30°F (16.7°C) below the flash point.

1.3. Maintain the solvent vapor concentration at a level lower than 25 percent of the lower explosive limit (LEL).
1.4. Utilize equipment *approved* for use in Class I, Division 2 hazardous locations in accordance with NFPA 70.
1.5. Utilize an integrated dry-chemical, clean agent or water-mist automatic fire-extinguishing system designed in accordance with Chapter 9.
2. An *automatic sprinkler system* shall not be required in Type III-B dry cleaning plants where the aggregate quantity of Class III-B solvent in dry cleaning machines and storage does not exceed 3,300 gallons (12 490 L).

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – This proposal provides exceptions to sprinklers in dry cleaning plants that have been approved in the 2012 IFC.
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.

18. Request by Wayne Hamilton, NC Fire Service Code Revision Committee, to amend the 2012 NC Fire Code, Chapter 26 including definitions as follows:

Delete Chapter 26 and substitute text published at the following link:
http://www.ncdoi.com/OSFM/Engineering_and_Codes/Documents/BCC_Minutes/2014%2006%2014~June%2010,%202014%20(Items%20B-11%20through%20B-21,%20for%20public%20comment)_.pdf

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – This proposal recognizes current industry practice and technology for both thermally and non-heated applications.
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.

19. Request by Wayne Hamilton, NC Fire Service Code Revision Committee, to amend the 2012 NC Fire Code, Chapter 47 as follows:

The complete list of revised standards is published at the following link:
http://www.ncdoi.com/OSFM/Engineering_and_Codes/Documents/BCC_Minutes/2014%2006%2014~June%2010,%202014%20(Items%20B-11%20through%20B-21,%20for%20public%20comment)_.pdf

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – This proposal is to update reference standards to recognize current industry standards and technology.
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.

20. Request by Terry Cromer, NC Association of Electrical Contractors, to amend the 2011 NC Electrical Code, Article 338.10(B)(4)(a) as follows:

(4) Installation Methods for Branch Circuits and Feeders.
(a) *Interior Installations.* In addition to the provisions of this article, Type SE service-entrance cable used for interior wiring shall comply with the installation requirements of Part II of Article 334, excluding 334.80.
~~Where installed in thermal insulation the ampacity shall be in accordance with the 60°C (140°F) conductor temperature rating. The maximum conductor temperature rating shall be permitted to be used for ampacity adjustment and correction purposes, if the final derated ampacity does not exceed that for a 60°C (140°F) rated conductor.~~

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – This proposal is to change the cable rating language back to the 2008 NC requirement.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with a small decrease in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

21. Request by Ron Zemke, WindowZ, to amend the 2012 NC Residential Code, Sections R202 DEFINITIONS; R301.2.1 Wind limitations; Table R301.2 (2); R301.2.1.2 Protection of openings; R613.3 Performance; R703.4 Attachments as follows:

The complete amendment text is published at the following link:
http://www.ncdoi.com/OSFM/Engineering_and_Codes/Documents/BCC_Minutes/2014%2006%2014~June%2010,%202014%20(Items%20B-11%20through%20B-21,%20for%20public%20comment)_.pdf

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.

Reason Given – This proposal allows the installation of windbreak panels for screen enclosures which allows for the removal of a section of the screen to accommodate high-wind events.
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:
Commentary and Interpretations of the North Carolina State Building Codes are published online at the following link.
http://www.ncdoi.com/OSFM/Engineering_and_Codes/Default.aspx?field1=Code_Interpretations&user=Code_Enforcement_Resources

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

NORTH CAROLINA
State Board of Elections

Mailing Address:
P.O. Box 27255
Raleigh, NC 27611-7255

Phone: (919) 733-7173
Fax: (919) 715-0135

KIM WESTBROOK STRACH
Executive Director

July 15, 2014

Ms. Bly Hall, Revisor of Statutes
NC General Assembly Bill Drafting Division
Suite 401 Legislative Office Building
300 N. Salisbury St.
Raleigh, NC 27603

Dear Ms. Hall:

Pursuant to N.C.G.S. §163-278.13(a1), this letter serves as notification that the contribution limitation amounts found in N.C.G.S. §163-278.13(a), (b) and (c) should be revised from five thousand dollars ($5,000) to five thousand one hundred dollars ($5,100), effective January 1, 2015 and remaining in effect through December 31, 2016. This change is based on an increase of approximately 1.84% between the *Consumer Price Index—U.S. city average – all items* (CPI) for July 2013 and the CPI for May 2014 (the most current CPI value available as of July 1, 2014). Please see the full text of the affected statutes below.

§ 163-278.13. Limitation on contributions.

(a) No individual, political committee, or other entity shall contribute to any candidate or other political committee any money or make any other contribution in any election in excess of ~~five thousand dollars ($5,000)~~ five thousand one hundred dollars ($5,100) for that election.

(b) No candidate or political committee shall accept or solicit any contribution from any individual, other political committee, or other entity of any money or any other contribution in any election in excess of ~~five thousand dollars ($5,000)~~ five thousand one hundred dollars ($5,100) for that election.

(c) Notwithstanding the provisions of subsections (a) and (b) of this section, it shall be lawful for a candidate or a candidate's spouse to make a contribution to the candidate or to the candidate's treasurer of any amount of money or to make any other contribution in any election in excess of ~~five thousand dollars ($5,000)~~ five thousand one hundred dollars ($5,100) for that election.

By copy of this letter I am requesting the North Carolina Office of Administrative Hearings to publish this statutory revision in the North Carolina Register.

Please do not hesitate to contact me if you have any questions or require additional information.

Sincerely,

Amy E. Strange
Deputy Director for Campaign Finance & Operations

cc: Dana Vojtko, Office of Administrative Hearings

6400 Mail Service Center ▪ Raleigh, NC 27699-6400
441 N. Harrington Street ▪ Raleigh, NC 27611-7255

Note from the Codifier: Rules Pending Legislative Session beginning May 2014

Rules subject to review pursuant to G.S. 150B-21.3 by the General Assembly in the session beginning in May 2014 have completed 30 legislative days.

Pursuant to G.S. 150B-21.3, if a bill that specifically disapproves a rule is introduced in either house of the General Assembly before the thirty-first legislative day of that session, the rule becomes effective on the earlier of either the day an unfavorable final action is taken on the bill or the day that session of the General Assembly adjourns without ratifying a bill that specifically disapproves the rule. A rule that is specifically disapproved by a bill ratified by the General Assembly before it becomes effective does not become effective.

Rules entered into NC Administrative Code effective July 7, 2014

A legislative bill was not introduced to disapprove these rules within the first 30 legislative days; therefore, the rules went into effect on the 31st legislative day (July 7, 2014).

	RRC Approved
Public Health, Commission for	
10A NCAC 39C .0104	N/A
15A NCAC 18C .0203	06/19/2013
Environmental Management Commission	
15A NCAC 02B .0265	N/A
15A NCAC 02B .0266	N/A
15A NCAC 02B .0267	N/A
15A NCAC 02B .0270	N/A
15A NCAC 02B .0271	N/A
15A NCAC 02D .1104	12/19/2013
15A NCAC 02Q .0711	12/19/2013
Transportation, Department of	
19A NCAC 02D .0531	05/16/2013
19A NCAC 02D .0532	05/16/2013

Legislation Introduced to Disapprove Rule

A legislative bill was introduced within the first 30 legislative days, to disapprove this rule. The bill is still pending legislative action.

	RRC Approved	Bill Introduced
Funeral Service, Board of		
21 NCAC 34A .0201	10/17/2013	H1170

Rules Disapproved by General Assembly

A rule that is specifically disapproved by a bill ratified by the General Assembly before it becomes effective does not become effective.

	RRC Approved	Bill Introduced
NC Industrial Commission		
04 NCAC 10A .0605	03/20/2014	S794
04 NCAC 10A .0609A	04/17/2014	S794
04 NCAC 10A .0701	03/20/2014	S794
04 NCAC 10C .0109	03/20/2014	S794
04 NCAC 10E .0203	03/20/2014	S794
04 NCAC 10L .0101	03/20/2014	S794
04 NCAC 10L .0102	03/20/2014	S794
04 NCAC 10L .0103	03/20/2014	S794
Environmental Management Commission		
15A NCAC 02B .0295	07/18/2013	S883

NORTH CAROLINA ACUPUNCTURE LICENSING BOARD
Public Hearing Correction

Notice: *The Acupuncture Licensing Board Notice of Text for 21 NCAC 01 .0104, .0108-.0111; .0601-.0609 published in NC Register Volume 29, Issue 01 July 1, 2014 contained an error in the address for the public hearing.*

Public Hearing:
Date: *September 12, 2014*
Time: *9:00 a.m.*
Location: ~~*1406*~~ *1046 Washington Street, Raleigh, NC 27605*

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

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 16 – BOARD OF DENTAL EXAMINERS

Notice *is hereby given in accordance with G.S. 150B-21.2 that the North Carolina State Board of Dental Examiners intends to adopt the rules cited as 21 NCAC 16R .0108-.0110, .0201-.0206; and 16U .0103, amend the rules cited as 21 NCAC 16H .0104; 16R .0101, .0102; 16S .0101, .0102; .0202, .0203; 16T .0101, .0102; 16U .0201, .0203-.0204; 16W .0101, .0102; 16Y .0101-.0104; 16Z .0101, and repeal the rules cited as 21 NCAC 16R .0103-.0107.*

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

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

Proposed Effective Date: *November 1, 2014*

Public Hearing:
Date: *September 11, 2014*
Time: *6:30 p.m.*
Location: *Dental Board Office, 507 Airport Boulevard, Ste. 105, Morrisville, NC 27560*

Reason for Proposed Action:
21 NCAC 16H .0104 *is proposed for amendment to clarify how dental assistants may be classified as Dental Assistant IIs;*
21 NCAC 16R .0101 *is proposed for amendment to clarify the license renewal process;*
21 NCAC 16R .0102 *is proposed for amendment to clarify that a charge may be levied for a duplicate license;*
21 NCAC 16R .0103-.0107 *are proposed for repeal as the rules, with amendments, have been moved to a new section of Chapter 16.*
21 NCAC 16R .0109 *is proposed for adoption to clarify what information goes on a certificate of renewal of license;*
21 NCAC 16R .0110 *is proposed for adoption to regulate how certificates of renewal must be displayed;*
21 NCAC 16R .0201 *is proposed for adoption to provide minimum amounts of continuing education that must be passed and discuss self study courses;*
21 NCAC 16R .0202 *is proposed for adoption to regulate approved sponsors and courses for mandatory continuing education;*
21 NCAC 16R .0203 *is proposed for adoption to govern how continuing education courses are reported to the Board;*
21 NCAC 16R .0204 *is proposed for adoption to govern exemptions and variances from the mandatory CE;*
21 NCAC 16R .0205 *is proposed for adoption to provide penalties for non compliance with the mandatory CE rules;*
21 NCAC 16R .0206 *is proposed for adoption to define certain terms used in Chapter 16R;*
21 NCAC 16S .0101 *is proposed for amendment to clarify that the two hygienists elected to the Caring Dental Professionals Program are considered members of the Program;*
21 NCAC 16S .0102 *is proposed for amendment to provide that the Dental Board may, but need not, enter into agreements with impaired dental peer review organizations;*
21 NCAC 16S .0202 *is proposed for amendment to clarify that voluntary participants in the Caring Dental professionals must be reported to the Board in certain situations;*
21 NCAC 16S .0203 *is proposed for amendment to require the Caring Dental Professionals Program to evaluate treatment sources before referring any licensee to the source and to document reasons why any treatment sources is not approved.*
21 NCAC 16T .0101 *is proposed for amendment to update the list of items that must be maintained in a patient's treatment record;*
21 NCAC 16T .0102 *is proposed for amendment to clarify what records must be provided upon request of a patient and to limit the fee that the dentist may charge for duplication records.*
21 NCAC 16U .0102 *is proposed for amendment to clarify that investigative process;*
21 NCAC 16U .0103 *is proposed for adoption to permit the Board to receive reports from the Controlled Substances Reporting System;*
21 NCAC 16U .0201 *is proposed for amendment to require licensees to file a response to a complaint within 15 days of receipt, unless a continuance is granted for good cause shown;*
21 NCAC 16U .0203 *is proposed for amendment to clarify the process used during a prehearing conference;*
21 NCAC 16U .0204 *is proposed for amendment to clarify the process used during the settlement conferences;*
21 NCAC 16W .0101 *is proposed for amendment to clarify when a public health hygienist must practice under direction of a dentist;*
21 NCAC 16W .0102 *is proposed for amendment to clarify the requirements for CPR certification;*
21 NCAC 16Y .0101 *is proposed for amendment to clarify grounds on which the Board may deny an intern permit to an applicant;*
21 NCAC 16Y .0103 *is proposed for amendment to clarify that an intern permit holder may not practice at a for profit hospital;*
21 NCAC 16Y .0104 *is proposed for amendment to improve the wording of the rule;*

21 NCAC 16Z .0101 *is proposed for amendment to clarify the requirements for hygienists to practice outside direct supervision of a dentist.*

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

Comment period ends: *October 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 16H – DENTAL ASSISTANTS

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 CPR certification; or

(3)~~(2)~~ 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(c)(12); and~~
  ~~(e)~~(d) current certification in CPR; or
  (e) after completing Subitems (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 Subitem (3)(f) of this Rule.
  (f) dental assistants may take radiographs only after completing radiology training consistent with G.S. 90-29(c)(12).

~~(3) successful completion of the certification examination administered by the Dental Assisting National Board, and current certification in CPR.~~

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

SUBCHAPTER 16R – CONTINUING EDUCATON REQUIREMENTS: DENTISTS

SECTION .0100 – CONTINUING EDUCATION

21 NCAC 16R .0101 APPLICATIONS

(a)A renewal application must be completed in full and received in the Board's office ~~by~~ before ~~midnight 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.~~

(b) Eligible licensees as defined by Rule .0206 of this Subchapter are granted an extension period as set out in Rule .0206 of this Subchapter in which to pay license renewal fees and comply with all other requirements imposed by the Dental Board as conditions for maintaining licensure and current sedation permits.

Authority G.S. 90-28; 90-31; 93B-15.

21 NCAC 16R .0102 FEE FOR LATE FILING AND DUPLICATE LICENSE

(a) If the application for a renewal certificate, accompanied by the fee required, is not received in to the Board's office ~~by~~ before midnight~~the close of business~~ 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. 90-31; 90-39.

21 NCAC 16R .0103 CONTINUING EDUCATION REQUIRED

~~As a condition of license renewal, every dentist must complete a minimum of 15 clock hours of continuing education each calendar year. Any or all of the hours may be acquired through self study courses. For self study courses to be counted towards this continuing education requirement, the dentist 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.~~

Authority G.S. 90-31.1.

21 NCAC 16R .0104 APPROVED COURSES AND SPONSORS

~~(a) Courses allowed to satisfy the continuing education requirement must be related to clinical patient care. Hours devoted to financial issues or practice development topics will not be counted toward the continuing education requirement. Hours spent reviewing dental journals, publications or videos shall not count toward fulfilling the continuing education requirement, with the exception of self study courses as described in Rule .0103 of this Subchapter that are offered by Board approved sponsors..~~

~~(b) Approved continuing education course sponsors include:~~

- ~~(1) those recognized by the Continuing Education Recognition Program of the American Dental Association;~~
- ~~(2) the Academy of General Dentistry;~~
- ~~(3) North Carolina Area Health Education Centers;~~
- ~~(4) educational institutions with dental, dental hygiene or dental assisting schools or departments;~~
- ~~(5) national, state or local societies or associations; and~~
- ~~(6) local, state or federal governmental entities.~~

Authority G.S. 90-31.1.

21 NCAC 16R .0105 REPORTING OF CONTINUING EDUCATION

~~(a) The number of hours completed shall be indicated on the renewal application form submitted to the Board and confirmed by the dentist. Upon request by the Board or its authorized agent, the dentist shall provide documentation of attendance at courses indicated. Such documentation shall be provided by the organization offering or sponsoring the course. Documentation must include:~~

- ~~(1) the title;~~
- ~~(2) the number of hours of instruction;~~
- ~~(3) the date of the course attended;~~
- ~~(4) the name(s) of the course instructor(s); and~~
- ~~(5) the name of the organization offering or sponsoring the course.~~

~~(b) All records, reports and certificates relative to continuing education hours must be maintained by the licensee for at least two years and shall be produced upon request of the Board or its authorized agent. Evidence of service or affiliation with an agency or institution as specified in Rule .0106 of this Section shall be in the form of verification of affiliation or employment which is documented by a director or an official acting in a supervisory capacity.~~

Authority G.S. 90-31.1.

21 NCAC 16R .0106 VARIANCES AND EXEMPTION FROM AND CREDIT FOR CONTINUING EDUCATION

~~(a) Upon receipt of satisfactory written evidence, the Board may grant exemptions from the mandatory continuing education requirements set out in Rule .0103 of this Subchapter as follows:~~

- ~~(1) A dentist who practices not more than 250 clock hours in a calendar year shall be exempted from all continuing education requirements. Such dentists, who shall be known as semi retired Class I dentists, must maintain current CPR certification.~~
- ~~(2) A dentist who practices not more than 1,000 clock hours in a calendar year shall be exempt from one half of the continuing education courses required of dentists who practice full time. Such dentists, who shall be known as semi retired Class II dentists, must maintain current CPR certification.~~
- ~~(3) A retired dentist who does not practice any dentistry shall be exempt from all continuing education and CPR certification requirements.~~
- ~~(4) A dentist who is disabled may request a variance in continuing education hours during the period of the disability. The Board may grant or deny requests for variance in continuing education hours based on a disabling condition on a case by case basis, taking into consideration the particular disabling condition involved and its effect on the dentist's ability to complete the required hours. In considering the request, the Board may require additional documentation substantiating any specified disability.~~

~~(b) In those instances where continuing education is waived and the exempt individual wishes to resume practice, the Board shall require continuing education courses in accordance with Rule .0103 of this Section when reclassifying the licensee. The Board may require those licensees who have not practiced dentistry for a year or more to undergo a bench test prior to allowing the licensee to resume practice when there is indication of inability to practice dentistry.~~

~~(c) Dentists shall receive 10 hours credit per year for continuing education when engaged in any of the following:~~

- ~~(1) service on a full time basis on the faculty of an educational institution with direct involvement in education, training, or research in dental or dental auxiliary programs; or~~

~~(2) service on a full time basis with a federal, state or county government agency whose operation is directly related to dentistry or dental auxiliaries. Verification of credit hours shall be maintained in the manner specified in Rule .0105 of this Section.~~

~~(d) Dentists who work at least 20 hours per week in an institution or entity described in (c)(1) or (2) of this Rule shall receive five hours credit per year for continuing education.~~

~~(e) Dentists shall receive up to two hours of continuing education credits per year for providing dental services on a volunteer basis at any state, city or county operated site approved by the Dental Board. Credit will be given at ratio of 1:5, with one hour credit given for every five hours of volunteer work.~~

Authority G.S. 90-31.1; 90-38.

21 NCAC 16R .0107 PENALTY/NON-COMPLIANCE/CONTINUING EDUCATION

~~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 Rules .0103 and .0105 of this Section, 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 or exemption from continuing education hours and fails to provide the required documentation upon request, the Board shall refuse to issue a certificate of renewal until such time as the applicant meets the qualifications for exemption or 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 the close of business on March 31 of each year, the license becomes void and must be reinstated.~~

Authority G.S. 90-31.1.

21 NCAC 16R .0108 LICENSE VOID UPON FAILURE TO TIMELY RENEW

If an application for a renewal certificate, accompanied by the renewal fee and any applicable late filing fees, are not received in the Board's office before midnight on March 31 of each year, the license becomes void and the applicant must apply for reinstatement.

Authority G.S. 90-31.1.

21 NCAC 16R .0109 FORM OF CERTIFICATE OF RENEWAL

The certificate of renewal of license shall bear the original license number, the full name of the applicant and the date of issuance.

Authority G.S. 90-31.1.

21 NCAC 16R .0110 RENEWAL CERTIFICATE MUST BE DISPLAYED

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

Authority G.S. 90-31.1.

SECTION .0200 - CONTINUING EDUCATION

21 NCAC 16R .0201 CONTINUING EDUCATION REQUIRED

Except as permitted in Rule .0204 of this Section as a condition of license renewal, every dentist shall complete at least 15 clock hours of continuing education each calendar year. Any or all of the hours may be acquired through self-study courses, provided that the self-study courses must be related to clinical patient care and offered by a Board approved sponsor. The dentist shall pass a test following every self-study course and obtain a certificate of completion. Courses taken to maintain current CPR certification shall not count toward the mandatory continuing education hours.

Authority G.S. 90-31.1.

21 NCAC 16R .0202 APPROVED COURSES AND SPONSORS

(a) Courses allowed to satisfy the continuing education requirement shall be related to clinical patient care. Hours devoted to financial issues or practice development topics shall not be counted toward the continuing education requirement. Hours spent reviewing dental journals, publications or videos shall not count toward fulfilling the continuing education requirement, with the exception of self-study courses as described in Rule .0201 of this Section offered by Board approved sponsors.

(b) Approved continuing education course sponsors include:

(1) those recognized by the Continuing Education Recognition Program of the American Dental Association;
(2) the Academy of General Dentistry;
(3) North Carolina Area Health Education Centers;
(4) educational institutions with dental, dental hygiene or dental assisting schools or departments;
(5) national, state or local societies or associations; and
(6) local, state or federal governmental entities.

Authority G.S. 90-31.1.

21 NCAC 16R .0203 REPORTING CONTINUING EDUCATION

(a) All licensed dentists shall report the number of continuing education hours completed annually on the license renewal application form submitted to the Board. The organization offering or sponsoring each continuing education course shall provide to each attendee a report containing the following information:

(1) course title;
(2) number of hours of instruction;
(3) date of the course attended;
(4) name(s) of the course instructor(s); and
(5) name of the organization offering or sponsoring the course.

(b). Evidence of service or affiliation with an agency or institution as specified in Rule .0204 of this Section shall be in the form of verification of affiliation or employment documented by a director or an official acting in a supervisory capacity.

(c) All licensed dentists shall maintain the report referred to in Paragraph (a) of this Rule for at least two years following completion of the course and shall produce a copy of the report to the Board or its authorized agent upon demand.

Authority G.S. 90-31.1.

21 NCAC 16R .0204 VARIANCES AND EXEMPTION FROM AND CREDIT FOR CONTINUING EDUCATION

(a) Upon receipt of satisfactory written evidence, the Board may grant exemptions from the mandatory continuing education requirements set out in this Rule as follows:

(1) A dentist who practices not more than 250 clock hours in a calendar year shall be exempted from all continuing education requirements. Such dentists, who shall be known as semi-retired Class I dentists, shall maintain current CPR certification.
(2) A dentist who practices not more than 1,000 clock hours in a calendar year shall be exempt from one half of the continuing education courses required of dentists who practice full time. Such dentists, who shall be known as semi-retired Class II dentists, shall maintain current CPR certification.
(3) A retired dentist who does not practice any dentistry shall be exempt from all continuing education and CPR certification requirements.
(4) A dentist who is disabled may request a variance in continuing education hours during the period of the disability. The Board may grant or deny requests for variance in continuing education hours based on a disabling condition on a case by case basis, taking into consideration the particular disabling condition involved and its effect on the dentist's ability to complete the required hours. In considering the request, the Board may require additional documentation substantiating any specified disability.

(b) In those instances where continuing education is waived and the exempt individual wishes to resume practice, the Board shall require continuing education courses in accordance with this Rule when reclassifying the licensee. The Board may require those licensees who have not practiced dentistry for a year or more to undergo a bench test before allowing the licensee to resume practice if there is evidence that the licensee is unable to practice dentistry competently.

(c) Dentists shall receive 10 hours credit per year for continuing education when engaged in any of the following:

(1) service on a full-time basis on the faculty of an educational institution with direct involvement in education, training, or research in dental or dental auxiliary programs; or
(2) service on a full time basis with a federal, state or county government agency whose operation is directly related to dentistry or dental auxiliaries. Verification of credit hours shall be maintained in the manner specified in Rule .0105 of this Subchapter.

(d) Dentists who work at least 20 hours per week in an institution or entity described in Subparagraph (c)(1) or (2) of this Rule shall receive five hours credit per year for continuing education.

(e) Dentists shall receive up to two hours of continuing education credits per year for providing dental services on a volunteer basis at any state, city or county operated site approved by the Dental Board. Credit will be given at ratio of 1:5, with one hour credit given for every five hours of volunteer work.

(f) Eligible licensees as defined by Rule .0206 of this Subchapter are granted a waiver of their mandatory continuing education requirements.

Authority G.S. 90-31.1; 90-38.

21 NCAC 16R .0205 PENALTY/NON-COMPLIANCE/CONTINUING EDUCATION

If an applicant for a renewal of license fails to provide proof of completion of reported continuing education hours for the current year as required by Rules 16R .0201 and .0203 of this Section, the Board may refuse to issue a renewal certificate until the licensee completes the required hours of education for the current year and meets all other qualifications for renewal. If an applicant applies for credit for or exemption from continuing education hours and fails to provide the required documentation upon request, the Board shall refuse to issue a certificate of renewal until such time as the applicant meets the qualifications for exemption or 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 on March 31 of each year, the license becomes void and must be reinstated.

Authority G.S. 90-31.1.

21 NCAC 16R .0206 DEFINITIONS

The following definitions apply only to this Subchapter:

(1) "Dental Board" -- the North Carolina State Board of Dental Examiners.
(2) "Eligible licensees"-- all dentists 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 dentist whose license is not suspended or revoked.

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

SUBCHAPTER 16S – CARING DENTAL PROFESSIONALS PROGRAM

SECTION .0100 - GENERAL

21 NCAC 16S .0101 DEFINITIONS

The following definitions are applicable to impaired dentist programs established in accordance with G.S. 90-48.2:

(1) "Board" means the North Carolina State Board of Dental Examiners;
(2) "Impairment" means chemical dependency or mental illness;
(3) "Board of Directors" means individuals comprising the oversight panel consisting of representatives from the North Carolina Dental Society, the Board, licensed dental hygienists, and the UNC School of Dentistry established to function as a supervisory body to the North Carolina Caring Dental Professionals;
(4) "Director" means the person designated by the Board of Directors to organize and coordinate the activities of the North Carolina Caring Dental Professionals;
(5) "North Carolina Caring Dental Professionals" means the program established through agreements between the Board and special impaired dentist peer review organizations formed by the North Carolina Dental Society made up of Dental Society members designated by the Society, the Board, a licensed dental hygienist upon recommendation of the dental hygienist member of the Board, and the UNC School of Dentistry to conduct peer review activities as provided in G.S. 90-48.2(a).
(6) "North Carolina Caring Dental Professionals members" means the two hygienists appointed by the Dental Board and volunteer Dental Society members selected by the Board of Directors from peer review organizations to serve as parties to interventions, to direct impaired dentists into treatment, and as monitors of those individuals receiving treatment. Peer liaisons and volunteers participating in programs for impaired dental hygienists shall be dental hygienists.

Authority G.S. 90-48; 90-48.2; 90-48.3.

21 NCAC 16S .0102 BOARD AGREEMENTS WITH PEER REVIEW ORGANIZATIONS

The Board ~~shall~~ may enter into agreements with special impaired dentist peer review organizations, pursuant to G.S. 90-48.2, to establish the North Carolina Caring Dental Professionals to be supervised by the Board of Directors. Such agreements shall provide for:

(1) investigation, review and evaluation of records, reports, complaints, litigation, and other information about the practice and practice patterns of licensed dentists and dental hygienists as may relate to impaired dentists and dental hygienists;
(2) identification, intervention, treatment, referral, and follow up care of impaired dentists and dental hygienists; and
(3) due process rights for any subject dentist or dental hygienist.

Authority G.S. 90-48; 90-48.2; 90-48.3.

SECTION .0200 – GUIDELINES FOR PROGRAM ELEMENTS

21 NCAC 16S .0202 CONFIDENTIALITY

Information received by the Program regarding voluntary participants shall remain confidential and shall not be released to any party outside the membership of the ~~Program.~~Program, except as set out in Rule .0203(b) of this Subchapter. Voluntary participants who meet the requirements of Rule .0303(b) of this Subchapter shall be reported to the Board along with evidence of the events leading to the report. ~~However, information~~ Information received about participants referred to the Program by the Board ~~received as a result of a Board referral~~ shall be freely exchanged with the Board or its authorized agents.

Authority G.S. 90-48; 90-48.2.

21 NCAC 16S .0203 INTERVENTION AND REFERRAL

(a) Following an investigation, if an impairment is determined to exist and confirmed, an intervention shall be conducted using specialized techniques designed to assist the dentist or dental hygienist in acknowledging responsibility for dealing with the impairment. The dentist or dental hygienist shall be referred to an appropriate treatment source.
(b) Following an investigation, intervention, treatment, or upon receipt of a complaint or other information, a peer review organization participating in the North Carolina Caring Dental Professionals shall report to the Board detailed information about any dentist or dental hygienist licensed by the Board, if it is determined that:

(1) the dentist or dental hygienist constitutes an imminent danger to the public or himself or herself;
(2) the dentist or dental hygienist refuses to cooperate with the program, refuses to submit to treatment, or is still impaired after treatment and exhibits professional incompetence; or
(3) it reasonably appears that there are other grounds for disciplinary action.

(c) Program members may consult with medical professionals and treatment sources as necessary in carrying out the Program's directives.

(d) Interventions shall be arranged and conducted as expeditiously as possible. When interventions are conducted as a direct result of a Board-initiated referral, a Board representative may be present.

(e) The Program shall evaluate and approve treatment sources as set out in Rule .0204 of this Section~~Treatment sources shall be evaluated and determined applicable~~ before an individual is referred for treatment, and any treatment contracts or aftercare agreements shall be documented and recorded by the Program.

(f) The Program shall document the reasons why any treatment source is not approved.

Authority G.S. 90-48; 90-48.2; 90-48.3.

SUBCHAPTER 16T – PATIENT RECORDS

SECTION .0100 – PATIENT RECORDS

21 NCAC 16T .0101 RECORD CONTENT

~~(a)~~ A dentist shall maintain complete treatment records on all patients treated for a period of at least 10 years. Treatment records may include such information as the dentist deems appropriate but shall~~must~~ include:

(1) Patient's full name, address and treatment dates;
(2) Patient's nearest relative or responsible party;
(3) Current health history;
(4) Diagnosis of condition;
(5) Specific treatment rendered and by whom; ~~and~~
(6) Name and strength of any medications prescribed, dispensed or administered along with the quantity and date ~~provided~~. provided;
(7) Work orders issued during the past two years;
(8) Treatment plans for patients of record. Treatment plans are not required for patients seen only on an emergency basis;
(9) Diagnostic radiographs, study models and other diagnostic aids, if taken; and
(10) Patients' financial records and copies of all insurance claim forms.

~~(b) Records may also include the following:~~

~~(1) Treatment plans;~~
~~(2) Radiographs, study models and other diagnostic aids; and~~
~~(3) Patient's financial records and copies of all insurance claim forms.~~

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

21 NCAC 16T .0102 TRANSFER OF RECORDS UPON REQUEST

A dentist shall, upon request by the patient of record, provide all information required by the Health Information Portability and Accountability Act (HIPAA) and other applicable law, including original or diagnostic copies of radiographs and a legible copy~~summary~~ of the complete treatment record to the patient or to a licensed dentist identified by the patient. The dentist may charge a fee not exceeding the actual cost of duplicating the records.~~A fee may be charged for duplication of radiographs and diagnostic materials.~~ The ~~treatment summary and radiographs~~ records shall be provided within 30 days of receipt of the request and production shall not be contingent upon current, past or future dental treatment or payment of services.

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

SUBCHAPTER 16U - INVESTIGATIONS

SECTION .0100 - PROCEDURES

21 NCAC 16U .0101 SECRETARY-TREASURER

The Board's Secretary-Treasurer or another Board member ~~appointed by the Board's President~~ shall supervise and direct investigations of acts or practices that might violate the provisions of the Dental Practice Act, the Dental Hygiene Act or the Board's Rules. The Secretary-Treasurer or other Board member appointed by the Secretary-Treasurer,~~Board's President,~~ in consultation with the Investigative Panel, shall determine whether cases involving licensees, interns or applicants for licenses or permits shall be set for hearing or settlement conference and recommend to the Board dispositions of cases which are not set for hearing or settlement conference.

Authority G.S. 90-28; 90-41; 90-41.1; 90-48; 90-223; 90-231.

21 NCAC 16U .0102 INVESTIGATIVE PANEL

The Secretary-Treasurer or another Board member ~~appointed by the President~~ shall chair the Investigative Panel. The Board's Counsel, ~~Investigations Coordinator,~~ Director of Investigations, Investigators and such other staff members appointed by~~as~~ the Secretary-Treasurer~~President may from time to time appoint~~ shall serve on the Panel. The Investigative Panel shall conduct investigations and prepare and present the Board's case in all reinstatement cases and disciplinary proceedings ~~contested case hearings~~ and in civil actions to enjoin the unlawful practice of dentistry.

Authority G.S. 90-28; 90-40.1; 90-41; 90-41.1; 90-48; 90-223; 90-231; 150B-40.

21 NCAC 16U .0103 REPORTS FROM THE CONTROLLED SUBSTANCES REPORTING SYSTEM

The Department of Health and Human Services (DHHS) may submit a report to the North Carolina State Board of Dental Examiners if it receives information that DHHS believes

provides a basis to investigation whether a dentist has issued prescriptions for controlled substances in a manner that may violate laws governing the prescribing of controlled substances or the practice of dentistry.

Authority G.S. 90-41; 90-113.74.

SECTION .0200 - COMPLAINTS

21 NCAC 16U .0201 PROCESSING

Licensees shall be notified of ~~patient~~ complaints against them and given an opportunity to respond ~~except:~~ except in cases:

(1) ~~In cases~~ requiring emergency action for the protection of the public health, safety or welfare; or

(2) ~~In cases where~~ in which notification may jeopardize the preservation or procurement of relevant evidence.

Within 15 days of receipt of a complaint, licensees shall file with the Board a full and accurate written response to the complaint. Extensions of time to respond may be granted by the Secretary-Treasurer or his designee for good cause shown.

Authority G.S. 90-28; 90-41; 90-41.1; 90-48; 90-223; 90-231; 150B-41.

21 NCAC 16U .0203 PRE-HEARING CONFERENCES

(a) A pre-hearing conference shall not be conducted unless the Respondent agrees to participate.

(b) A pre-hearing conference shall be conducted before the Investigative Panel. At the pre-hearing conference, a member of the Investigative Panel~~Board investigator~~ shall summarize the circumstances of the investigation. The Respondent shall have an opportunity to respond and to submit documentation. The pre-hearing conference shall not be recorded nor open to the public.

(c) Following the pre-hearing conference, the Respondent shall be advised in writing of the proposal for disposition of the matter by the Board member presiding over the pre-hearing conference. If the Board member presiding over the pre-hearing conference deems sanctions are appropriate, a Consent Order or letter of reprimand shall be proposed. Should the Respondent accept the terms, the proposed Consent Order or letter of reprimand must be approved by the full Board. Should the Respondent reject the terms of a proposed Consent Order or letter of reprimand, the Board member presiding over the pre-hearing conference shall direct disposition of the matter under Rule .0202 of this Subchapter.

Authority G.S. 90-28; 90-41; 90-41.1; 90-48; 90-223; 90-229; 90-231; 150B-41.

21 NCAC 16U .0204 SETTLEMENT CONFERENCES

(a) A settlement conference shall not be conducted unless the Respondent agrees to participate and to waive any objection to the Board being exposed to a forecast of the evidence.

(b) A settlement conference shall be conducted before the Board or a panel of the Board appointed by the President. At the settlement conference, ~~a Board investigator~~ member of the Investigative Panel shall summarize the circumstances of the investigation and present a forecast of the Board's evidence. The Respondent shall have an opportunity to forecast his or her ~~evidence.~~ evidence and may be questioned by the Investigative Panel and Board members. Forecasts of the evidence may be presented orally or in writing and exhibits may be presented. The complainant~~Witnesses~~ may forecast his or her~~their own~~ testimony but shall not be sworn nor cross-examined. No live witnesses other than the Respondent and complainant may testify. The settlement conference shall not be recorded nor open to the public. The allowed time for ~~initial~~ the presentations shall be ~~agreed upon by counsel ten days prior to the conference, subject to approval by the presiding Board member.~~ determined by the Board.

(c) If the Board deems sanctions are appropriate, a Consent Order or letter of reprimand shall be proposed. Should the Respondent reject the terms of the Consent Order or letter of reprimand, a contested case hearing may be scheduled.

Authority G.S. 90-28; 90-41; 90-41.1; 90-48; 90-223; 90-229; 90-231; 150B-41.

SUBCHAPTER 16W – PUBLIC HEALTH HYGENISTS

SECTION .0100 – PUBLIC HEALTH HYGIENISTS

21 NCAC 16W .0101 DIRECTION DEFINED

Pursuant to G.S. 90-233(a), a public health hygienist may perform clinical procedures under the direction of a licensed dentist, as defined by Rule 16Y .0104(c) of this Chapter, who is employed by a State government dental public health program or a local health department as a public health dentist. The specific clinical procedures delegated to the hygienist must be completed, in accordance with a written order from the dentist, within 60 days of the dentist's in-person evaluation of the patient. The dentist's evaluation of the patient shall include a complete oral examination, thorough health history and diagnosis of the patient's condition. Direction of a licensed dentist is not required for public health hygienists who provide only educational information, such as instruction in brushing and flossing.

Authority G.S. 90-223; 90-233(a).

21 NCAC 16W .0102 TRAINING FOR PUBLIC HEALTH HYGIENISTS

(a) Prior to performing clinical procedures pursuant to G.S. 90-233(a) under the direction of a duly licensed dentist, a public health hygienist must have:

(1) five years of experience in clinical dental hygiene;

(2) current CPR certification, ~~updated annually;~~ taken in a live hands-on course;

(3) six hours of continuing education in medical emergencies each ~~year;~~ year in addition to the minimum continuing education required for license renewal; and

(4) such other training as may be required by the Dental Health Section of the Department of Health and Human Services.

(b) For purposes of this Rule, a minimum of ~~4000~~ 4,000 hours performing primarily prophylaxis or periodontal debridement under the supervision of a duly licensed dentist shall be equivalent to five years experience in clinical dental hygiene.

Authority G.S. 90-223; 90-233(a).

SUBCHAPTER 16Y – INTERN PERMITTING: DENTISTS

21 NCAC 16Y .0101 ELIGIBILITY REQUIREMENTS

(a) Persons shall be eligible for an intern permit under the provisions of G.S. 90-29.4 if they are:

(1) not licensed to practice dentistry in North Carolina, but are a graduate of and have a DMD or DDS degree from a dental school or program accredited by the Commission on Dental Accreditation of the American Dental Association; or

(2) a graduate of a dental program other than a program accredited by the Commission on Dental Accreditation of the American Dental Association who has been accepted into a graduate, intern, fellowship, or residency program at a North Carolina Dental School or teaching hospital offering programs in dentistry.

(b) an intern permit shall not be granted to an individual who:

(1) cannot demonstrate good moral character;

(2) has been disciplined by any dental board or other licensing body in another state or country.

Authority G.S. 90-28; 90-29.4; 90-30.

21 NCAC 16Y .0102 APPLICATION

(a) Applicants for intern permit who are graduates of dental schools or programs as set out in Rule .0101(1) of this Subchapter must:

(1) complete the Application for Intern Permit as furnished by the Board;

(2) submit an official copy of dental school transcripts;

(3) forward a letter from a prospective employer;

(4) submit 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;

(5) ~~successfully complete~~ pass written examination(s) ~~administered~~ approved by the Board; and

(6) pay the nonrefundable intern permit fee.

(b) Applicants for intern permit who are graduates of a dental program as set out in Rule .0101(2) of this Subchapter must:

(1) submit written confirmation that the applicant has qualified for and is currently enrolled in a graduate, intern, fellowship, or residency program in the North Carolina Dental School or teaching hospital offering programs in dentistry;

(2) submit written confirmation that an ad hoc committee (consisting of three associate or full professors, only one of whom represents the department in question) has evaluated the applicant's didactic and clinical performance with the point of observation being not less than three months from the applicant's start of the program, and has determined that the applicant is functioning at a professional standard consistent with a dental graduate from an ADA-accredited dental school;

(3) successfully complete a simulated clinical examination;

(4) submit written confirmation that the applicant has successfully completed a program of study at the training facility in:

(A) clinical pharmacology;

(B) prescription writing in compliance with Federal and State laws; and

(C) relevant laws and administrative procedures pertaining to the DEA;

(5) submit a written statement of the total time required to complete the graduate, intern, fellowship, or residency program, and the date that the applicant is scheduled to complete said program;

(6) submit 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;

(7) successfully complete written examination(s) administered by the Board; and

(8) pay the intern permit fee.

(c) In making application, the applicant shall authorize the Board to verify the information contained in the application or documents submitted or to seek such further information pertinent to the applicant's qualifications or character as the Board may deem necessary pursuant to G.S. 90-41.

(d) Intern permits shall expire on an annual basis and are subject to renewal by the Board upon application and payment of the renewal fee.

Authority G.S. 90-28; 90-29.4.

21 NCAC 16Y .0103 EMPLOYMENT

(a) The practice of dentistry under an intern permit is limited to the confines and registered patients of the following employment sites:

(1) a nonprofit hospital, sanatorium, or a like institution;

(2) a nonprofit health care facility serving low-income populations; or

(3) a state or governmental facility or entity or any political subdivision of such.

Each facility or entity set out in Paragraph (a) of this Rule shall submit documentation to the Board evidencing that it meets the qualifications set out in G.S. 90-29.4(3) in order for the facility or site to be considered an approved employment site.
(b) A listing of said approved sites may be obtained from the Board office.
(c) A request for change in practice location must be submitted in writing to the Board and is subject to the new practice location meeting the requirements of Paragraph (a) of this Rule.
(d) The holder of an intern permit shall not receive any compensation in excess of a reasonable allowance for salaries or other compensation for personal services actually rendered or engage in any other transaction with the employer which results in a diversion of income from the employer.

Authority G.S. 90-28; 90-29.4.

21 NCAC 16Y .0104 DIRECTION AND SUPERVISION
(a) Holders of a valid intern permit who are currently licensed in Canada, a U.S. territory or state may practice under direction of one or more dentists with a current and valid North Carolina license. Such directing dentist shall be responsible for all consequences or results arising from the permit holder's~~permitee's~~ practice of dentistry.
(b) Holders of a valid intern permit who are not currently licensed in Canada, a U.S. territory or state may work only under supervision of one or more dentists with a current and valid North Carolina license. Such supervising dentist shall be responsible for all consequences or results arising from the permit holder's~~permitee's~~ practice of dentistry.
(c) For purposes of this Section, the acts of a permit holder~~permitee~~ are deemed to be under the direction of a licensed dentist when performed in a locale where a licensed dentist is not always required to be physically present during the performance of such acts and such acts are being performed pursuant to the dentist's order, control, and approval.
(d) For purposes of this Section, the acts of a permit holder~~permitee~~ are deemed to be under the supervision of a licensed dentist when performed in a locale where a licensed dentist is physically present during the performance of such acts and such acts are being performed pursuant to the dentist's order, control, and approval.

Authority G.S. 90-28; 90-29.4.

SUBCHAPTER 16Z – LIMITED SUPERVISION HYGIENISTS

21 NCAC 16Z .0101 ELIGIBILITY TO PRACTICE HYGIENE OUTSIDE DIRECT SUPERVISION
(a) To be eligible to perform the clinical hygiene procedures set out in G.S. 90-221(a) without the direct supervision of a dentist, a dental hygienist must:

(1) maintain an active license to practice dental hygiene in this State;
(2) have no prior disciplinary history in any State;
(3) complete at least three years of experience in clinical dental hygiene or at least 2,000 hours of performing primarily prophylaxis or periodontal debridement under the supervision of a dentist licensed in this State within the five calendar years immediately preceding initial approval to work without direct supervision;
(4) ~~successfully complete annual~~ maintain current CPR certification;
(5) successfully complete at least six hours of Board approved continuing education in dental office medical emergencies, in addition to the ~~requirements of G.S. 90-225.1.~~ minimum hours of continuing education required for license renewal.

(b) To retain eligibility to perform the clinical hygiene procedures set out in G.S. 90-221(a) without direct supervision of a dentist, a dental hygienist must:

(1) successfully complete at least six hours of Board approved continuing education in dental office medical emergencies each year, in addition to the ~~requirements of G.S. 90-225.1.~~ minimum hours of continuing education required for license renewal.
(2) ~~successfully complete annual~~ maintain current CPR certification;
(3) comply with all provisions of the N.C. Dental Practice Act and all rules of the Dental Board applicable to dental hygienists; and
(4) cooperate fully with all lawful Board inspections of any facility at which the hygienist provides dental hygiene services without direct supervision of a dentist.

Authority G.S. 90-221; 90-233.

*** * * * * * * * * * * * * * * * * * ***

CHAPTER 22 – HEARING AID DEALERS AND FITTERS BOARD

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the North Carolina State Hearing Aid Dealers and Fitters Board intends to amend the rules cited as 21 NCAC 22A .0503; 22F .0105, .0107, .0108, .0206; and 22I .0114.*

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.nchalb.org/regulatory/rulechange.php*

Proposed Effective Date: *December 1, 2014*

Public Hearing:
Date: *October 2, 2014*
Time: *12:45 p.m.*
Location: *Commission Room, Office of Administrative Hearings, 1711 New Hope Church Rd, Raleigh, NC 27609*

Reason for Proposed Action: *The purpose of the proposed rule changes is to provide uniformity in calculating a deadline for submission of applications or other forms. The Board is removing any reference to "business day" or "working day" and using the term "day" instead. The Board is also clarifying how long exam results are valid.*

Comments may be submitted to: *Catherine Jorgensen, Rule-making Coordinator, NC State Hearing Aid Dealers and Fitters Board, P.O. Box 97833, Raleigh, NC 27624-7833, Phone (919) 834-3661*

Comment period ends: *October 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 22A – BOARD RULES

SECTION .0500 – FEES AND APPLICATIONS

21 NCAC 22A .0503 SUBMISSION OF APPLICATIONS AND FEES

(a) The Board shall accept a digital image of a signed affidavit or other document required as part of an application as the original when submitted electronically in conjunction with the electronic application.

(b) If an applicant submits an incomplete application, the application shall be classified as "abandoned by the applicant" ~~on the 10th business day~~after 14 days following electronic transmission of the application to the Board if the application is not a duly made application, as defined in 21 NCAC 22A .0401. The Board shall not apply any fee paid or document submitted for the abandoned application to any other application. It is the responsibility of the applicant and the sponsor, if any, to ensure that all supplemental documents requested in the application are submitted within ~~10 business~~14 days if all documents are not electronically submitted with the application. This Rule does not extend an application deadline set forth in any other rule of this Chapter.

(c) The exam registration deadline is 45 days prior to the examination date. Late registration is grounds for denying an applicant admission to an examination, based on proximity to examination date, availability of space in the examination, and the applicant or the applicant's sponsor's past history of compliance with the Board's rules. An applicant denied admission to an examination due to late registration shall be registered for the next scheduled examination, if otherwise eligible.

(d) No later than ~~10 business~~ 14 days after an apprentice has held a valid apprentice registration certificate for 365 days, the apprentice shall make application to take the next scheduled licensing examination. All apprentices shall reapply for a license by examination within the time prescribed in Paragraph (c) of this Rule each time they take and fail to pass the licensing examination.

(e) No later than 20 days after the date printed on the Official Notice of Examination Results, a registered apprentice who failed to pass the qualifying examination shall make application to renew the apprentice certificate or the sponsor shall submit written notice to the Board that the apprenticeship is being terminated by the current expiration date of the certificate.

(f) The Board shall deny a late duly made application, except as set forth in Paragraph (c) of this Rule.

(g) In computing any period of time prescribed or allowed by these Rules, or by any applicable statute, the day of the act or event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

Authority G.S. 25-3-506; 93D-3(c); 93D-5; 93D-9.

SUBCHAPTER 22F – LICENSING PROVISIONS

SECTION .0100 - EXAMINATION

21 NCAC 22F .0105 PASSING EXAMINATION

(a) The exam consists of four parts:

(1) Part A shall assess applicant's knowledge of hearing testing through a computer simulation program;
(2) Part B shall assess applicant's practical knowledge and ability to make an ear impression;
(3) Part C shall assess the applicant's knowledge of relevant laws and regulations governing hearing aid specialists; and
(4) Part D shall assess the applicant's knowledge of the following:
(A) audiometry;
(B) anatomy and physiology pertaining to the dispensing of hearing aids;

(C) hearing aids;
(D) hearing aid technologies; and
(E) the scope of practice for hearing aid specialists.

(b) The Board shall annually review the contents and outcome of the previous qualifying examinations and shall determine the minimum performance criteria required for passing the examination. In accordance with G.S. 93B-8(a), each registered applicant shall be informed in writing of the requirements for passing the examination prior to the applicant taking the examination.

(c) An applicant shall pass all parts of the exam ~~within 31 months of the initial issuance of the apprentice registration certificate~~ in order to receive a license.

(d) Exam results shall be valid for 31 months following the date of initial issuance of an apprentice registration certificate of a registered applicant who completed one full year of apprenticeship as defined in 21 NCAC 22A .0401.

(e) Exam results shall be valid for 19 months from the exam date if the registered applicant is exempt from the apprenticeship requirement or had an initial apprentice registration certificate issued more than 31 months prior to the exam date.

Authority G.S. 93B-8; 93D-3(c); 93D-8.

21 NCAC 22F .0107 COMMUNICATION OF RESULTS OF EXAMINATIONS

(a) The office of the Board shall issue written notification to each registered applicant by mailing exam results to the mailing address provided by the applicant concerning the applicant's performance on the qualifying ~~examination no later than 30 working days after the date of the~~ examination.

(b) A copy of the applicant's exam results shall be mailed to the applicant's Registered Sponsor at the mailing address on file with the Board at the same time the results are mailed to the applicant.

(c) The deadline for the Board to mail exam results shall be 30 days after the examination.

Authority G.S. 93B-8; 93D-3(c).

21 NCAC 22F .0108 REVIEW OF EXAMINATION

(a) As set forth in G.S. 93B-8(c), each registered applicant who takes and does not pass the qualifying examination shall be granted an opportunity to review that portion of the examination that is in the custody and control of the Board in the presence of a representative of the Board, upon written request from the applicant.

(b) An applicant shall make a written request by completing the electronic form available on the Board website.

(c) The deadline to request a exam review shall be 20 days ~~request shall be submitted by the registered applicant no later than 30 days~~ after the date of the Official Notice of Examination Results.

(d) The Board shall conduct exam reviews at the Board's office by appointment.

Authority G.S. 93B-8; 93D-3(c).

SECTION .0200 – CONTINUING EDUCATION

21 NCAC 22F .0206 APPEALS AND CE PROGRAM MODIFICATION

(a) Only the initial applicant shall possess the right to appeal the decision of the Board. The applicant's appeal shall include a written statement and any supplemental documentation the applicant determines will support the request for Board reconsideration. The appeal shall be submitted prior to the end of the CEU Accrual Period for the program. The Board shall review the appeal to determine compliance with the rules in this Section. The Board shall respond in writing to the applicant within 30 days. An applicant who is not satisfied with the Board decision after the appeal may request an administrative hearing in accordance with 21 NCAC 22L .0103.

(b) The program sponsor shall submit documentation regarding any modifications to an approved program to the Board within 30 ~~calendar~~ days after the CE Program completion date and shall notify program participants that approved CEU credit is subject to change due to modifications in the agenda.

(c) The program sponsor shall write all program modifications in the appropriate section on the Report of Attendance and sign the form in the area designated for CE Program modifications if any session of an approved CE program is modified after publication of the program announcement or after submission of the program application to the Board.

(d) The Board may modify its approval of sessions and the CEU credit allowed when a program is changed after receiving Board approval. The Board shall update the program status on the website to reflect CEU credit changes.

(e) The program applicant shall submit a new program application if:

(1) the Board approved a CE Program for multiple dates and the content or duration of the CE Program changes after one or more of the approved program dates have occurred. The remaining program dates shall constitute a new CE Program; or
(2) the program sponsor offers a pre-approved CE Program on additional dates. The additional date(s) shall constitute a new CE Program, unless the program sponsor notifies the Board within 20 days of the canceled CE Program's date that a different date has been substituted.

Authority G.S. 93D-3(c); 93D-11.

SUBCHAPTER 22I – PROFESSIONAL AFFAIRS

21 NCAC 22I .0114 CHANGE OF ADDRESS

~~It is the duty of all licensees, registered applicants, and registered apprentices to~~ All individuals regulated by the Board shall provide the Board with current address information by completing the online address change form available on the Board's website (www.nchalb.org) within 14 days of any change in mailing address or ~~notify the Board, within ten working days, of any change~~ in the business name(s) or the street address(es), within the State of North Carolina, of their place(s) of ~~business~~

~~or proposed place(s) of~~ business. Failure to do so may result in disciplinary action after proper notice and hearing.

Authority G.S. 93D-3(c); 93D-10.

* * * * * * * * * * * * * * * * * * * *

CHAPTER 38 – BOARD OF OCCUPATIONAL THERAPY

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Occupational Therapy intends to amend the rule cited as 21 NCAC 38 .0802.*

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.ncbot.org*

Proposed Effective Date: *December 1, 2014*

Public Hearing:
Date: *September 22, 2014*
Time: *11:00 a.m.*
Location: *Wells Fargo Capitol Center, 13th Floor Conference Room, 150 Fayetteville Street, Raleigh, NC 27601*

Reason for Proposed Action: *These amendments are being submitted to clarify continuing competence activity requirements.*
Comments may be submitted to: *Charles P. Wilkins, P.O. Box 2280, Raleigh, NC 27602; phone (919) 832-1380; fax (919) 833-1059; email cwilkins@bws-law.com*
Comment period ends: *October 14, 2014*

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

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

SECTION .0800 – CONTINUING COMPETENCE ACTIVITY

21 NCAC 38 .0802 CONTINUING COMPETENCE REQUIREMENTS FOR LICENSURE

(a) Licensed occupational therapists and occupational therapy assistants applying for license renewal shall document having earned a minimum of 15 points for approved continuing competence activities between ~~June 1~~ July 1 of the preceding licensure period and ~~May 31~~ June 30 of the current licensure period. Documentation of each continuing competence activity shall comply with Rule .0805.
(b) For each renewal period, each licensee shall document completion of at least one contact hour of a qualified activity for maintaining continuing competence related to ethics in the practice of occupational therapy, which shall be included in the total points for the year. Continuing competence activities in ethics shall be related to developing the licensee's ability to reflect on, determine, and act on the moral aspects of practice as required by Rule .0308 of this Chapter.
(c) Continuing competence contact hours exceeding the total needed for renewal shall not be carried forward to the next renewal period.
(d) Continuing competence activities shall not include new employee orientation or annual training required by the employer.
(e) Licensees shall not receive credit for completing the same continuing competence activity more than once during a renewal period.

Authority G.S. 90-270.69; 90-270.75(a).

* * * * * * * * * * * * * * * * * * * *

CHAPTER 61 – NORTH CAROLINA RESPIRATORY CARE BOARD

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Respiratory Care Board intends to amend the rule cited as 21 NCAC 61 .0401.*

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.ncrcb.org*

Proposed Effective Date: *January 1, 2015*

Public Hearing:
Date: *September 4, 2014*
Time: *1:00 p.m.*
Location: *1100 Navaho Drive, Suite 242, Raleigh, NC 27609*

Reason for Proposed Action: *21 NCAC 61.0401 is proposed for amendment to require those licensees that elect to complete 12 hours or more of approved continuing education to have at least 6 hours of the continuing education from workshops, panel, seminars, lectures, or symposiums that provide for direct interaction between the speakers and the participants. The Board believes that face to face instruction will improve the licensee's practice of respiratory care. The proposed changes allow for continuing education credit for those licensees that provide clinical instruction for respiratory care students. The proposed changes are also needed due to examination changes at the National Board for Respiratory Care.*

Comments may be submitted to: *William L. Croft, PhD, RRT, RCP, 1100 Navaho Drive, Suite 242, Raleigh, NC 27609; phone (919) 878-5595; fax (919) 878-5565; email bcroft@ncrcb.org*

Comment period ends: *October 14, 2014*

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

Fiscal impact (check all that apply).

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

SECTION .0400 – CONTINUING EDUCATION REQUIREMENTS FOR LICENSE HOLDERS

21 NCAC 61 .0401 CONTINUING EDUCATION REQUIREMENTS

(a) Upon application for license renewal, a licensee shall attest to having completed one or more of the following learning activity options during the preceding renewal cycle and be prepared to submit evidence of completion if requested by the Board:

(1) Completion of a minimum of 12 hours of Category I Continuing Education (CE) activities directly related to the licensee's practice of respiratory care and currently approved by the Board, the American Association for Respiratory Care (AARC) or the Accreditation Council for Continuing Medical Education (ACCME). All courses and programs shall: 1) Contribute to the advancement, extension and enhancement of professional clinical skills and scientific knowledge in the practice of respiratory care; 2) Provide experiences which contain scientific integrity, relevant subject matter and course materials; and 3) Be developed and presented by persons with education and/or experience in the subject matter of the program. At least six contact hours shall be obtained each reporting year from workshops, panel, seminars, lectures, or symposiums that provide for direct interaction between the speakers and the participants. "Category I" Continuing Education may include any one of the following:

(A) Lecture – a discourse given for instruction before an audience or through teleconference;

(B) Panel – a presentation of a number of views by several professionals on a given subject with none of the views considered a final solution;

(C) Workshop – a series of meetings for intensive, hands-on study, or discussion in a specific area of interest;

(D) Seminar – a directed advanced study or discussion in a specific field of interest;

(E) Symposium – a conference of more than a single session organized for the purpose of discussing a specific subject from various viewpoints and by various presenters; and

(F) Distance Education – includes such enduring materials as text, Internet or CD, provided the proponent has included an independently scored test as part of the learning package; Educational programs may be provided by any print medium or presented through the internet or other electronic medium. The licensee shall submit proof of successful completion of a test administered as part of the nontraditional or alternative educational program. A maximum of six contact hours each reporting year may be obtained from nontraditional or alternative educational programs.

(G) Clinical instruction. Clinical instruction shall mean the education and evaluation of a respiratory therapy student in the clinical setting. A maximum of three contact hours may be given for clinical instruction.

(2) Retake the ~~Certified Respiratory Therapist Examination (CRT)~~ Therapist Multiple-Choice Exam, administered by the National Board for Respiratory Care (NBRC), and achieve a passing score as determined by the NBRC for the Certified Respiratory Therapist (CRT) credential or take any of the following examinations and achieve a passing score as determined by the sponsor of the examination: the Therapist Multiple-Choice Exam ~~Registry Examination~~ for Advanced Respiratory Therapists (RRT), administered by the NBRC; the Neonatal/Pediatric Respiratory Care Specialty Examination (NPS), administered by the NBRC; the Certification Examination for Entry Level Pulmonary Function Technologists (CPFT), administered by the NBRC; the Registry Examination for Advanced Pulmonary Function Technologist (RPFT), administered by the NBRC; the Sleep Disorders Specialty (SDS) exam, administered by the NBRC; Adult Critical Care Specialty (ACCS) exam, administered by the NBRC, the Registry Examination for Polysomnographic Technologist (RPSGT), administered by the Board of Registered Polysomnographic Technologists (BRPT); or the Asthma Educators Certification Examination (AE-C), administered by the National Asthma Educator Certification Board (NAECB);

(3) Completion of a Respiratory Care refresher course offered through a Respiratory Care Education program accredited by the Commission for the Accreditation of Allied Health Educational Programs;

(4) Completion of a minimum of three semester hours of post-licensure respiratory care academic education leading to a baccalaureate or masters degree in Respiratory Care;

(5) Presentation of a Respiratory Care Research study at a continuing education conference; and

(6) Authoring a published Respiratory Care book or Respiratory Care article published in a medical peer review journal.

(b) The completion of certification or recertification in any of the following: Advanced Cardiac Life Support (ACLS) by the American Heart Association, Pediatric Advanced Life Support (PALS) by the American Heart Association, and Neonatal Resuscitation Program (NRP) by the American Academy of Pediatrics, shall count for a total of five hours of continuing education for each renewal period; but no more than five hours of total credit will be recognized for each renewal period for the completion of any such certification or recertification.

(c) A licensee shall retain supporting documentation to provide proof of completion of the option chosen in Paragraph (a) of this Rule for a period of no less than three years.

(d) A licensee shall maintain a file at his or her practice facility that contains a copy of the RCP license, a copy of a current Basic Cardiac Life Support (BCLS) certification, a copy of advanced life support certifications and a copy of all credentials issued by the National Board for Respiratory Care.

(e) A licensee is subject to random audit for proof of compliance with the Board's requirements for continuing education.

(f) The Board shall inform licensees of their selection for audit upon notice of license renewal or request for reinstatement. Evidence of completion of the requirements of Paragraph (a) of this Rule shall be submitted to the Board no later than 30 days of receipt of the audit notice.

(g) Failure of a licensee to meet the requirements of this Rule shall result in disciplinary action pursuant to G.S. 90-666.

(h) The Board shall charge twenty dollars ($20.00) per approved hour of CE with a maximum of one hundred and fifty dollars ($150.00) per application for providers of continuing education who apply for approval of continuing education programs.

(i) The Board shall grant requests for extensions of the continuing education requirements due to personal circumstances as follows. The Board shall require documentation of the circumstances surrounding the licensee's request for extension.

(1) Having served in the regular armed services of the United States at least six months of the 12 months immediately preceding the license renewal date; or

(2) Having suffered a serious or disabling illness or physical disability that prevented completion of the required number of continuing education hours during the 12 months immediately preceding the licensee renewal date.

Authority G.S. 90-652(2)(13); 90-658; 90-660(b)(9).

*** * * * * * * * * * * * * * * * * * * ***

CHAPTER 66 - VETERINARY MEDICAL BOARD

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the NC Veterinary Medical Board intends to amend the rule cited as 21 NCAC 66 .0108.*

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.ncvmb.org*

Proposed Effective Date: *January 1, 2015*

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice)*: *Write to the Board office: Thomas Mickey, Executive Director, 1611 Jones Franklin Rd., Ste. 106, Raleigh, NC 27606.*

Reason for Proposed Action: *G.S. 90-186(6)d was updated to read: "Inspection of a veterinary practice facility in the amount of one hundred twenty-five dollars ($125.00)." This was signed by the Governor on July 7th, 2014, and is effective October 1, 2014. We are updating the rule to correct it pursuant to this General Statute.*

Comments may be submitted to: *Thomas Mickey, Executive Director, 1611 Jones Franklin Rd., Ste. 106, Raleigh, NC 27606*

Comment period ends: *October 15, 2014*

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

Fiscal impact (check all that apply).

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

SECTION .0100 – STATUTORY AND ADMINISTRATIVE PROVISIONS

21 NCAC 66 .0108 FEES

Fees required for applications, registrations, examinations, renewals, reinstatements and late penalties with respect to veterinary licenses, limited licenses, faculty certificates, zoo veterinary certificates, and veterinary technician registrations; veterinary practice facility inspections; applications for temporary permits; application for registration as veterinary intern or preceptee; and copies of the roster, materials and other publications or services of the Board are payable in advance to the Executive Director of the Board. The fees currently established and published by the Board are:

(1) Veterinary License
  (a) Issuance or Renewal $150.00
  (b) National Board Examination (fee shall be in an amount directly related to the costs to the Board.)
  (c) Clinical Competency Test (fee shall be in an amount directly related to the costs to the Board.)
  (d) North Carolina License Examination $250.00
  (e) Late Renewal Fee $50.00
  (f) Reinstatement $100.00
(2) Veterinary Technician Registration
  (a) Issuance or Renewal $50.00
  (b) National Board Examination for Veterinary Technicians (fee shall be in amount directly related to the costs to the Board.)
  (c) North Carolina Veterinary Technician Examination $50.00
  (d) Late Renewal Fee $50.00
  (e) Reinstatement $100.00
(3) Professional Corporation Certificate of Registration
  (a) Issuance or Renewal 150.00
  (b) Late Renewal Fee $50.00
  (c) Reinstatement $100.00
(4) Limited Veterinary License
  (a) Issuance or Renewal $150.00
  (b) Late Renewal Fee $50.00
  (c) Reinstatement $100.00
(5) Veterinary Faculty Certificate
  (a) Issuance or Renewal $150.00
  (b) Late Renewal Fee $50.00
  (c) Reinstatement $100.00
(6) Zoo Veterinary Certificate
  (a) Issuance or Renewal $150.00
  (b) Late Renewal Fee $50.00
  (c) Reinstatement $100.00
(7) Temporary Permit: Issuance $150.00
(8) Veterinary Student Intern Registration: Issuance $25.00
(9) Veterinary Student Preceptee Registration: Issuance $25.00
(10) Limited Liability Partnership Registration
  (a) Issuance or Renewal $150.00
  (b) Late Renewal Fee $50.00
  (c) Reinstatement $100.00
(11) Limited Liability Company Registration
  (a) Issuance or Renewal $150.00
  (b) Late Renewal Fee $50.00
  (c) Reinstatement $100.00
(12) Veterinary Practice Facility Inspection ~~$75.00~~ $125.00
(13) Copies of Board publications, rosters, or other materials available for distribution from the Board (fees shall be in amounts determined by the Board reasonably related to the costs of providing the copies.)

Authority G.S. 55B-11; 90-185(6); 90-186(3); 90-187(b); 90-187.5; 90-187.6; 132-6.

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: *Commission for Public Health*

Rule Citation: *10A NCAC 43K .0101, .0102, .0103*

Effective Date: *July 25, 2014*

Date Approved by the Rules Review Commission: *July 17, 2014*

Reason for Action: *The effective date of a recent act of the General Assembly: S.L. 2013-45, effective May 8, 2013. To expand the Newborn Screening Program established by the Department of Health and Human Services to include newborn screening for congenital heart disease utilizing pulse oximetry, as recommended by the North Carolina Child Fatality Task Force, the Commission for Public Health shall adopt temporary and permanent rules to include newborn hearing screening and pulse oximetry screening in the newborn screening program.*
Adoption of the temporary rules while the permanent rules are in process provides expedited implementation of screening for critical congenital heart disease, which potentially affects up to 200 newborns each year in North Carolina. Timely diagnosis can prevent major disease complications and death which are possible outcomes if critical congenital heart diseases are not detected.
Temporary rules allow the statute to be implemented as soon as possible in an evidence based manner and to assure that we are not missing neonates with critical congenital heart disease.
The temporary rules are the only way to assure that all medical facilities and attending providers of neonate and infants in NC (as defined in the rules) are using a consistent screening protocol based on national standards. The temporary rules also are the only means to assure that all medical facilities and attending providers of neonates and infants have a consistent and standardized plan for evaluation and follow up of positive critical congenital heart defect screenings.
These temporary rules are also the only way to allow data collection and monitoring of screening for critical congenital heart disease by attending providers across the state in medical facilities and other locations of where neonates are born.

CHAPTER 43 – PERSONAL HEALTH

SUBCHAPTER 43K – NEWBORN SCREENING FOR CRITICAL CONGENITAL HEART DEFECTS

10A NCAC 43K .0101 DEFINITIONS
As used in this Section:

(1) "Neonate" means any term infant less than 28 days of age or any preterm infant less than 28 days corrected age.

(2) "Infant" means a person who is less than 365 days of age.

(3) "Critical congenital heart defects" (CCHD) means heart conditions present at birth that are dependent on therapy to maintain patency of the ductus arteriosus for either adequate pulmonary or systemic blood flow and that require catheter or surgical intervention in the first year of life. ~~These~~ Critical congenital heart defects are associated with significant morbidity and mortality and may include ~~but are not limited to~~ hypoplastic left heart syndrome, pulmonary atresia, tetralogy of Fallot, total anomalous pulmonary venous return, transposition of the great arteries, tricuspid atresia, and truncus arteriosus.

(4) "Medical facility" means a birthing center, licensed hospital, or licensed ambulatory surgery center where scheduled or emergency births occur or where inpatient neonatal services are provided.

(5) "Pulse oximetry" means a non-invasive transcutaneous assessment of arterial oxygen saturation using near infrared spectroscopy. This screening test measures with high reliability and validity the percentage of hemoglobin that is ~~oxygenated~~ oxygenated, also known as the blood oxygen saturation.

(6) "Positive screening" means the final result is a failed or abnormal pulse oximetry screening for critical congenital heart defects for a neonate or infant using a screening protocol based on the most current American Academy of Pediatrics and American Heart Association (AAP/AHA) recommendations. This includes neonates or infants who have not yet been confirmed to have critical congenital heart defects or have other conditions to explain abnormal pulse oximetry results. A copy of the recommendations is available for inspection at the NC Division of Public Health, Women's and Children's Health Section, Children and Youth Branch, 5601 Six Forks Road, Raleigh, NC 27609. In addition, the recommendations can be accessed at the American Academy of Pediatrics website at: http://pediatrics.aappublications.org/content/12

8/5/e1259.full.pdf+html?sid=85e81711-f9b8-43d1-a352-479168895a72.

(7) "Negative screening" means the final result is a passed or normal pulse oximetry screening for critical congenital heart defects for a neonate or infant using a screening protocol based on the most current AAP/AHA recommendations.

(8) "Attending providers of the neonate or infant" means the health care providers such as pediatricians, family physicians, physician assistants, midwives, nurse practitioners, ~~neonatologists~~ neonatologists, and other specialty ~~physicians)~~ physicians who perform neonatal and infant assessments and review positive and negative pulse oximetry screening results to perform an ~~appropriate~~ evaluation and to create a plan of care for the neonate or infant prior to discharge from the care of the health care provider. This includes health care providers who attend to neonates or infants in hospitals, birthing centers, ~~homes~~ homes, or other locations.

History Note: *Authority G.S. 130A-125;*
Temporary Adoption Eff. July 25, 2014.

10A NCAC 43K .0102 SCREENING REQUIREMENTS

(a) All medical facilities and attending providers of ~~the~~ a neonate or infant shall ~~assure:~~ assure the following:

(1) Screening of every neonate for critical congenital heart defects (CCHD) using pulse oximetry shall ~~must~~ be performed at 24 to 48 hours of age using a protocol based upon and in accordance with the most current recommendations from the American Academy of Pediatrics and American Heart Association (AAP/AHA) which are incorporated by reference including subsequent amendments and editions, unless a diagnostic neonatal echocardiogram has been performed. A copy of the recommendations is available for inspection at the NC Division of Public Health, Women's and Children's Health Section, Children and Youth Branch, 5601 Six Forks Road, Raleigh, NC 27609. In addition, the recommendations can be accessed at the American Academy of Pediatrics website at: http://pediatrics.aappublications.org/content/128/5/e1259.full.pdf+html?sid=85e81711-f9b8-43d1-a352-479168895a72.

(2) Screening of neonates and infants in neonatal intensive care units for critical congenital heart defects using pulse oximetry screening shall ~~must~~ be performed using a protocol based on the AAP/AHA recommendations as soon as the neonate or infant is stable and off oxygen and before discharge unless a diagnostic echocardiogram is performed on the neonate or infant after birth and prior to discharge from the medical facility.

(3) Only U.S. Food and Drug Administration ~~FDA~~ approved pulse oximetry equipment is used and maintained to screen the neonate or infant for the presence of critical congenital heart defects.

(b) Parents or guardians may object to the critical congenital heart defects screening at any time before the screening is performed in accordance with G.S. 130A-125.

(c) All medical facilities and attending providers of the neonate or infant shall have and implement a plan for evaluation and follow up of positive critical congenital heart defect screenings.

(1) Evaluation and follow up of a positive screening for all neonates shall be in accordance with the most current published recommendations from the American Academy of Pediatrics and American Heart Association (AAP/AHA) which is incorporated by reference including subsequent amendments and editions. A copy of the recommendations is available for inspection at the NC Division of Public Health, Women's and Children's Health Section, Children and Youth Branch, 5601 Six Forks Road, Raleigh, NC 27609. In addition, the recommendations can be accessed at the American Academy of Pediatrics website at: http://pediatrics.aappublications.org/content/128/5/e1259.full.pdf+html?sid=85e81711-f9b8-43d1-a352-479168895a72.

(2) For neonates with positive screenings who are born in a birthing facility, a ~~home~~ home, or other location, the AAP/AHA recommended evaluation and follow up ~~should~~ shall occur as soon as possible but no later than 24 hours after obtaining the positive screening result.

(3) Attending providers of neonates and infants in neonatal intensive care units must have a written process for evaluation and follow up of positive screenings in place at their medical facility.

(4) Options for neonatal or infant echocardiograms may ~~can~~ include on-site, telemedicine, or by transfer or referral to an appropriate medical facility with the capacity to perform and interpret a neonatal or infant echocardiogram. Echocardiograms must be interpreted as recommended by the most current recommendations from the AAP/AHA which are incorporated by reference including subsequent amendments and editions. A copy of the recommendations is available for inspection at the NC Division of Public Health, Women's and Children's Health Section, Children and Youth Branch, 5601 Six Forks Road, Raleigh, NC 27609. In addition, the recommendations can be accessed at the American Academy of Pediatrics website at:

http://pediatrics.aappublications.org/content/128/5/e1259.full.pdf+html?sid=85e81711-f9b8-43d1-a352-479168895a72.

History Note: *Authority G.S. 130A-125;*
Temporary Adoption Eff. July 25, 2014.

10A NCAC 43K .0103 REPORTING REQUIREMENTS

(a) All medical facilities and attending providers of neonates or infants performing critical congenital heart defect screening shall report to the NC Birth Defects Monitoring Program the following information within seven days of all positive screenings:

(1) name, ~~Name,~~ date and time of birth of the neonate or infant, the medical facility or birth location, and the medical record number of the neonate or ~~infant;~~ infant; and

(2) age ~~Age~~ in hours at time of ~~screening,~~ screening; all pulse oximetry saturation values, ~~which include~~ including initial, ~~subsequent~~ subsequent, and final screening ~~results,~~ results; final diagnosis if ~~known,~~ known; any known interventions and ~~treatment~~ treatment; ~~and~~ any need for transport or ~~transfer,~~ transfer; and the location of the transfer or transport if known.

(b) All medical facilities and attending providers of neonates or infants performing critical congenital heart defect screening shall report aggregate information related to critical congenital heart defect screenings quarterly ~~using a web-based system~~ to the Perinatal Quality Collaborative of North Carolina (PQCNC).

(c) PQCNC shall report aggregate information to the NC Birth Defects Monitoring Program within 30 days after the end of each quarter during a calendar year.

(d) The required quarterly aggregate information from medical facilities and attending providers of neonates or infants reported to PQCNC and that PQCNC ~~must report~~ reports to the NC Birth Defects Monitoring Program shall include the total unduplicated counts of:

(1) live ~~Live births~~ births;

(2) neonates ~~Neonates~~ and infants who were ~~screened~~ screened;

(3) negative ~~Negative screenings~~ screening;

(4) positive ~~Positive screenings~~ screening;

(5) neonates ~~Neonates~~ or infants whose parents or guardians objected to the critical congenital heart defect ~~screenings~~ screening;

(6) transfers ~~Transfers~~ into the medical facility, not previously ~~screened~~ screened; and

(7) neonates ~~Neonates~~ and infants not screened due to diagnostic echocardiograms being performed after birth and prior to discharge, transfer out of the medical facility, missed screening, ~~death~~ death, or other reasons.

History Note: *Authority G.S. 130A-125;*
Temporary Adoption Eff. July 25, 2014.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Rule-making Agency: *NC Wildlife Resources Commission*

Rule Citation: *15A NCAC 10B .0106 and .0219*

Effective Date: *August 1, 2014*

Date Approved by the Rules Review Commission: *July 17, 2014*

Reason for Action: *A recent federal court injunction (U.S. District Court for the Eastern District of North Carolina's order number 2:13-CV-60-BO) prohibits hunting of coyotes in Dare, Hyde, Washington, Tyrrell, and Beaufort counties and places other restrictions on take of coyotes in these counties. In order to fully comply with the injunction and enforce its restrictions, the Wildlife Resources Commission must pursue rule-making. The permanent rule-making process would unduly delay the implementation of the judge's order so the Commission initiated temporary rule-making.*

CHAPTER 10 -WILDLIFE RESOURCES AND WATER SAFETY

SUBCHAPTER 10B – HUNTING AND TRAPPING

SECTION .0100 – GENERAL REGULATIONS

15A NCAC 10B .0106 WILDLIFE TAKEN FOR DEPREDATIONS

(a) Depredation permits allow the take of undesirable or excess wildlife resources as described in Subparagraphs (1) and (2) of this Paragraph. The taking of depredating coyotes in the counties of Dare, Hyde, Washington, Tyrrell, and Beaufort, with or without a permit, is allowed only as described in Paragraph (g) of this Rule. Only employees of the Wildlife Resources Commission and Wildlife Damage Control Agents may issue depredation permits. Each permit must be written on a form supplied by the Commission. No permit is needed for the owner or lessee of a property to take wildlife while committing depredations on the property, however the manner of taking, disposition of dead wildlife and reporting requirements as described in this Rule still apply

No permit shall be issued to take any endangered or threatened species of wildlife listed under 15A NCAC 10I, except alligators, by reason of depredations to property. Only the Executive Director may issue depredation permits for Special Concern species listed in 15A NCAC 10I .0103 and for alligators. An individual may take an endangered or threatened species in immediate defense of his own life or of the lives of others without a permit. Any endangered or threatened species that may constitute a demonstrable but non-immediate threat to human safety shall be reported to a federal or state wildlife enforcement officer, who, upon verification of the report, may take or remove the specimen as provided by 15A NCAC 10I .0102. Depredation permits for other species shall be issued under the following conditions:

(1) for taking wildlife that is or has been damaging or destroying property provided there is evidence of property damage. No permit may be issued for the taking of any migratory birds and other federally protected animals unless a corresponding valid U.S. Fish and Wildlife Service depredation permit, if required, has been issued. The permit shall name the species allowed to be taken and may contain limitations as to age, sex or any other condition within the species so named. The permit must be issued to a landholder or an authorized representative of a unit of local government for depredations on public property. The permit shall be used only by individuals named on the permit.

(2) for taking of wildlife resources in circumstances of overabundance or when the wildlife resources present a danger to human safety. Cities as defined in G.S. 160A-1(2) seeking such a depredation permit must apply to the Executive Director using a form supplied by the Commission requesting the following information:

(A) the name and location of the city;

(B) the acreage of the affected property;

(C) a map of the affected property;

(D) the signature of an authorized city representative;

(E) the nature of the overabundance or the threat to public safety; and

(F) a description of previous actions taken by the city to ameliorate the problem.

(b) Wildlife Damage Control Agents: Upon completion of a training course designed for the purpose of reviewing and updating information on wildlife laws and safe, humane wildlife handling techniques and demonstration of a knowledge of wildlife laws and safe, humane wildlife handling techniques, an individual with no record of wildlife law violations may apply to the Wildlife Resources Commission (Commission) to become a Wildlife Damage Control Agent (WDCA). Those persons who demonstrate knowledge of wildlife laws and safe, humane wildlife handling techniques by a passing score of at least 85 percent on a written examination provided by a representative of the Wildlife Resources Commission in cooperation with the training course provider shall be approved. Those persons failing to obtain a passing score shall be given one chance for re-testing without re-taking the course. Those persons approved as agents by the Commission may then issue depredation permits for depredation as defined in Subparagraph (a)(1) of this Rule to landholders and be listed as a second party to provide the control service. WDCAs may not issue depredation permits for coyotes in the counties of Dare, Hyde, Washington, Tyrrell, and Beaufort, big game animals, bats, or species listed as endangered, threatened or special concern under 15A NCAC 10I .0103, .0104 and .0105 of this Chapter. WDCAs must report to the Wildlife Resources Commission the number and disposition of animals taken, by county, annually. Records must be available for inspection by a Wildlife Enforcement officer at any time during normal business hours. Wildlife Damage Control Agent status shall be revoked at any time by the Executive Director when there is evidence of violations of wildlife laws, failure to report, or inhumane treatment of animals by the WDCA. A WDCA may not charge for the permit, but may charge for his or her investigations and control services. In order to maintain a knowledge of current laws, rules, and techniques, each WDCA must renew his or her agent status every three years by showing proof of having attended at least one training course provided for the purpose of reviewing and updating information on wildlife laws and safe, humane wildlife handling techniques within the previous 12 months.

(c) Each depredation permit shall have an expiration date or time after which the depredation permit is no longer valid. The depredation permit authorizes possession of any wildlife resources taken under the permit and must be retained as long as the wildlife resource is in the permittee's possession. All individuals taking wildlife resources under the authority of a depredation permit are obligated to the conditions written on the permit and the requirements specified in this Rule.

(d) Manner of Taking:

(1) Taking Without a Permit. Wildlife taken without a permit while committing depredations to property may, during the open season on the species, be taken by the landholder by any lawful method. During the closed season such depredating wildlife may be taken without a permit only by the use of firearms or archery equipment as defined in 15A NCAC 10B .0116.

(2) Taking With a Permit. Wildlife taken under a depredation permit may be taken only by the method or methods authorized by the permit. When trapping is authorized, in order to limit the taking to the intended purpose, the permit may specify a reasonable distance from the property sought to be protected, according to the particular circumstances, within which the traps must be set. The Executive Director or agent may also state in a permit authorizing trapping whether or not bait may be used and the type of bait, if any, that is authorized. In addition to any trapping restrictions that may be contained in the permit the method of trapping must be in accordance with the requirements and restrictions imposed by G.S. 113-291.6 and other local laws passed by the General Assembly. No depredation permit shall authorize the use of poisons or pesticides in taking wildlife except in accordance with the provisions of the North Carolina Pesticide Law of 1971, the Structural Pest Control Act of 1955, and G.S. 113, Article 22A. No depredation permit shall authorize the taking of wildlife by any method by any landholder upon the lands of another except when the individual is listed as a second party on a depredation permit.

(3) Intentional Wounding. It is unlawful for any landholder, with or without a depredation permit, intentionally to wound a wild animal in a manner so as not to cause its immediate death as suddenly and humanely as the circumstances permit.

(e) Disposition of Wildlife Taken:

(1) Generally. Except as provided by the succeeding Subparagraphs of this Paragraph, any wildlife killed without a permit while committing depredations shall be buried or otherwise disposed of in a safe and sanitary manner on the property. Wildlife killed under a depredation permit may be transported to an alternate disposal site if desired. Anyone in possession of carcasses of animals being transported under a depredation permit must have the depredation permit in his or her possession. Except as provided by the succeeding Subparagraphs of (d)(2) through (5) of this Rule, all wildlife killed under a depredation permit must be buried or otherwise disposed of as stated on the permit.

(2) Deer and feral swine. The edible portions of feral swine and deer may be retained by the landholder for consumption but must not be transported from the property where the depredations took place without a valid depredation permit. The landholder may give a second party the edible portions of the feral swine and deer taken under the depredation permit. The receiver of the edible portions must hold a copy of the depredation permit. The nonedible portions of any deer carcass, including head, hide, feet, and antlers, shall be disposed of as specified in Subparagraph (1) of this Paragraph or turned over to a wildlife enforcement officer for disposition.

(3) Fox. Any fox killed under a depredation permit may be disposed of as described in Subparagraph (1) of this Paragraph or, upon compliance with the fur tagging requirements of 15A NCAC 10B .0400, the carcass or pelt thereof may be sold to a licensed fur dealer.

(4) Furbearing Animals. The carcass or pelt of any furbearing animal killed during the open season for taking such furbearing animal for control of depredations to property, whether with or without a permit, may be sold to a licensed fur dealer provided that the person offering such carcass or pelt for sale has a valid hunting or trapping license, provided further that, bobcats and otters may only be sold upon compliance with any required fur tagging requirement set forth in 15A NCAC 10B .0400.

(5) Animals Taken Alive. Wild animals in the order Carnivora, armadillos, groundhogs, nutria, and beaver shall be humanely euthanized either at the site of capture or at a facility designed to humanely handle the euthanasia or released on the property where captured. Feral swine must be euthanized while still in the trap in accordance with G.S. 113-291.12. For all other animals taken alive, the animal must be euthanized or else released on property with permission of the landowner. When the relocation site is public property, written permission must be obtained from an appropriate local, state or federal official before any animal may be released. Animals transported or held for euthanasia must be euthanized within 12 hours of capture. Anyone in possession of live animals being transported for relocation or euthanasia under a depredation permit must have the depredation permit in his or her possession.

(f) Reporting Requirements. Any landholder who kills an alligator, deer, Canada goose, bear or wild turkey under a valid depredation permit shall report such kill on the form provided with the permit and mail the form upon the expiration date to the Wildlife Resources Commission. The killing and method of disposition of every alligator and bear taken without a permit shall be reported to the Wildlife Resources Commission within 24 hours following the time of such killing.

(g) In the counties of Dare, Hyde, Washington, Tyrrell, and Beaufort depredating coyotes may be taken subject to the following restrictions:

(1) Taking coyotes without a permit. Depredating coyotes may be harassed by non-lethal means. Coyotes may be shot in defense of a person's safety or the safety of others, or if livestock or pets are threatened.

(2) Taking coyotes with a permit. Only employees of the Commission shall issue depredation permits for the taking of coyotes in these counties. Commission employees shall only authorize trapping or other non-lethal manners of take in the permit.

(3) Reporting and disposition. All coyotes taken under a depredation permit shall be reported to the Wildlife Resources Commission within 24 hours and disposed of as stated on the permit. All coyotes killed in accordance with Subparagraph (g)(1) of this Rule shall be reported to the Wildlife Resources Commission within 24 hours.

History Note: Authority G.S. 113-134; 113-273; 113-274; 113-291.4; 113-291.6; 113-300.1; 113-300.2; 113-307; 113-331; 113-333; 113-334(a); 113-337;
Eff. February 1, 1976;
Amended Eff. August 1, 2013; January 1, 2012; August 1 2010; July 1, 2010; May 1, 2008; August 1, 2002; July 1, 1997; July 1, 1995; January 1, 1995; January 1, 1992; August 1, 1990;
Temporary Amendment Eff. August 1, 2014 and shall remain in effect until amendments expire as specified in G.S. 150B-21.1(d) or the United States District Court for the Eastern District of

North Carolina's court order number 2:13-CV-60-BOs signed on May 13, 2014 is rescinded, whichever date is earlier. The court order is available at www.ncwildlife.org.

SECTION .0200 – HUNTING

15A NCAC 10B .0219 COYOTE

(a) This Rule applies to hunting coyotes. In all counties of the State, except those counties specified in Paragraph (b) of this Rule, the following apply:

(1) There is no closed season for taking coyotes.

(2) Coyotes may be taken on private lands anytime during the day or night.

(3) Coyotes may be taken on public lands without a permit from the hours of one-half hour before sunrise until one-half hour after sunset, and from one-half hour after sunset to one-half hour before sunrise by permit only.

(b) In the counties of Dare, Hyde, Washington, Tyrell and Beaufort, coyote hunting is prohibited.

(c)~~(b)~~ There are no bag limit restrictions on coyotes.

(d)~~(c)~~ Manner of Take. Hunters may use electronic calls and artificial lights.

History Note: Authority G.S. 113-134; 113-264; 113-291.1; 113-291.2;
Eff. July 1, 1993;
Temporary Amendment Eff. October 1, 2011;
Amended Eff. January 1, 2012;
Temporary Amendment Eff. August 1, 2012.
Amended Eff. July 26, 2013;
Temporary Amendment Eff. August 1, 2014 and shall remain in effect until amendments expire as specified in G.S. 150B-21.1(d) or the United States District Court for the Eastern District of North Carolina's court order number 2:13-CV-60-BOs signed on May 13, 2014 is rescinded, whichever date is earlier. The court order is available at www.ncwildlife.org.

This Section contains information for the meeting of the Rules Review Commission on July 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	**Appointed by House**
Margaret Currin (Chair)	Garth Dunklin (1st Vice Chair)
Jeff Hyde	Stefanie Simpson (2nd Vice Chair)
Jay Hemphill	Jeanette Doran
Faylene Whitaker	Ralph A. Walker
	Anna Baird Choi

COMMISSION COUNSEL

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

RULES REVIEW COMMISSION MEETING DATES

August 21, 2014	September 18, 2014
October 16, 2014	November 20, 2014

RULES REVIEW COMMISSION MEETING
MINUTES
July 17, 2014

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

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

The meeting was called to order at 10:02 a.m. with Chairman Currin presiding.

Chairman Currin 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.

Chairman Currin introduced OAH Externs Elizabeth Larner and Andrew Johnstone.

APPROVAL OF MINUTES

Chairman Currin asked for any discussion, comments, or corrections concerning the minutes of the June 18, 2014 meeting. There were none and the minutes were approved as distributed.

FOLLOW-UP MATTERS

Medical Care Commission

10A NCAC 13D .3201 was unanimously approved.

Commission for Public Health

10A NCAC 43K .0101, .0102, .0103 - The Commission granted a waiver of the 210-day submission requirement upon the request of the agency. Commissioner Hyde objected to the waiver. All rules were unanimously approved.

Dr. Gerri Mattison with the Commission for Public Health addressed the Commission

Bob Martin with the Commission for Public Health addressed the Commission.

Peg O'Connell with the March of Dimes addressed the Commission.

Home Inspector Licensure Board
11 NCAC 08 .1103 was unanimously approved.

Commissioner Walker was not present during the vote.

Department of Public Safety
14B NCAC 07A .0116 - The agency did not respond in accordance with G.S. 150B-21.12. The Office of State Budget and Management did not respond to the Commission's request made pursuant to G.S. 150B-21.9. There was no action for the Commission to take at the meeting.

Engineers and Surveyors, Board of Examiners for
Prior to the review of these rules Commissioner Whitaker recused herself and did not participate in any discussion or vote concerning these rules.

21 NCAC 56 .0501, .0502, .0503, .0601, .0602, .0603, .0802, .0901, .1402, .1602, .1603, .1604, .1606, .1608, .1703, .1704, .1705 – All rules were unanimously approved.

Real Estate Commission
Prior to the review of the rule Chairman Currin recused herself and did not participate in any discussion or vote concerning the rule because she has an inactive real estate broker's license.

Prior to the review of the rule Vice-Chairman Dunklin recused himself and did not participate in any discussion or vote concerning the rule because he practices before the Commission.

21 NCAC 58A .1709 was unanimously approved.

LOG OF FILINGS
Department of Agriculture
The Commission extended the period of review for all rules in accordance with G.S. 150B-21.10. They did so in response to a request from the agency to extend the period in order to allow the agency to receive final approval from the Board of Agriculture and submit the rewritten rules at a later meeting.

Commission for Public Health
10A NCAC 41A .0101 was unanimously approved.

Dr. Zack Moore with the agency addressed the Commission.

Department of Justice – Division of Criminal Information
All rules were unanimously approved.

Criminal Justice Education and Training Standards Commission
All rules were unanimously approved.

Coastal Resources Commission
All rules were unanimously approved.

Board of Cosmetic Art Examiners
All rules were unanimously approved. Rules 21 NCAC 14H .0401 and 0505 were approved contingent upon receiving technical corrections. The rewritten rules were subsequently received.

Board of Dental Examiners
The Commission objected to the following rules in accordance with G.S. 150B-21.10: 21 NCAC 16B .0101, .0201, .0202, .0301, .0303, .0401, .0402, .0403, .0404, .0405, .0406, .0501, .0601, .0701, .0801, .0901, .1002, and .1101, and 16C .0601

The Commission objected to all of the rules in Subchapter 16B because the agency failed to comply with the Administrative Procedure Act, as it adopted the rules before the close of the comment period.

The Commission also objected to Rule 21 NCAC 16B .1101, finding the rule as written was ambiguous, as it stated that applicants may be required to take refresher courses at the discretion of the Board, but the rule does not state when that may occur or what may be required.

The Commission objected to Rule 21 NCAC 16C .0601, finding it was ambiguous as written. The rule stated that applicants may be required to take refresher courses at the discretion of the Board, but the rule does not state when that may occur or what may be required.

In addition to the objections, the Commission extended to period of review pursuant to G.S. 150B-21.10 for Rules 16C .0101, .0202, .0301, .0303, .0311, .0401, .0402, .0403, .0404, .0405, .0501 and 16Q .0303. The Commission did this in response to a request by the agency to extend the period of review.

Board of Pharmacy
All rules were approved unanimously.

TEMPORARY RULES
Wildlife Resources Commission
Both rules were unanimously approved.

G.S. 150B-19.1(h) RRC CERTIFICATION
Sheriffs Education and Training Standards Commission
The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed rules 12 NCAC 10B .2005 and .2006.

EXISTING RULES REVIEW
Office of State Auditor
The agency did not conduct the review. The Commission asked for a letter to be sent to the Joint Legislative Administrative Procedure Oversight Committee to clarify what information the Committee is seeking from the Commission when an agency does not conduct the review.

NC Irrigation Contractors' Licensing Board
All agency final determinations were unanimously approved.

Tina Simpson with the Department of Justice, the agency's attorney, addressed the Commission.

Board of Examiners for Nursing Home Administrators
All agency final determinations were unanimously approved.

Jack Nichols, the agency's attorney, addressed the Commission.

Prior to the review of the report Commissioner Choi recused herself and did not participate in any discussion or vote concerning the report because her firm provides legal representation to the board.

COMMISSION BUSINESS
Staff gave the Commission a brief legislative update.

The meeting adjourned at 1:05 p.m.

The next regularly scheduled meeting of the Commission is Thursday, August 21st 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

Rules Review Commission
Meeting
Please **Print** Legibly

July 2014

Name	Agency
Lynda Elliott	NC Bd of Cosmetic Arts
Karen Waddell	NCDOT
David Tuttle	NC Bd of Engineers & Surveyors
Steven Lewis	NC DHHS/DHSR
Jay Campbell	BOP
Curtis Alderdifer	NCREC
Melissa Vuotto	NCREC
Mike Heydusek	NCDOI / ~~NC HLAB~~
Bob Martin	NC DPH
Geri Mattson	NC DPH
Peg O'Connell	March of Dimes
Ann Wall	~~Ace Insurance~~
Denise Stanford	HLAB
Janice Davidson	NC DOR
Zack Moore	NC DHHS/DPH
Anita Valiani	NC DHHS/DPH
Katie Yale	NC DOJ
Morgan Cutright	NC DOJ Intern
Betsy Vetter	American Heart Assn
Rose Vetter	American Heart Ass.
Kim Chidester	American Heart Assoc
Trevor Allen	CJ ETS
Jack Hawkins	Allen, Annis & Nichols
Megan Lamphere	DHHS

Kate Pipkin NCWRC
Jennifer Everett DENR
Jane Baker NCBENHD
Tina Simpson NCDOJ / NCICL13

LIST OF APPROVED PERMANENT RULES
July 17, 2014 Meeting

MEDICAL CARE COMMISSION	
Required Spaces	10A NCAC 13D .3201
PUBLIC HEALTH, COMMISSION FOR	
Reportable Diseases and Conditions	10A NCAC 41A .0101
HOME INSPECTOR LICENSURE BOARD	
Purpose and Scope	11 NCAC 08 .1103
JUSTICE, DEPARTMENT OF - DIVISION OF CRIMINAL INFORMATION	
Name and Location	12 NCAC 04E .0101
Function of DCI	12 NCAC 04E .0102
Advisory Policy Board	12 NCAC 04E .0103
Definitions	12 NCAC 04E .0104
Forms	12 NCAC 04E .0105
Manuals	12 NCAC 04E .0106
Eligibility for Full or Limited Access to the DCI Network	12 NCAC 04E .0201
Management Control Requirements	12 NCAC 04E .0202
Non-Terminal Access	12 NCAC 04E .0203
SBI Task Force Management Control	12 NCAC 04E .0204
User Agreement	12 NCAC 04E .0301
User Access Fee Agreement	12 NCAC 04E .0302
Servicing Agreement	12 NCAC 04E .0303
Management Control Agreement	12 NCAC 04E .0304
Disclosure Agreement	12 NCAC 04E .0305
DCI Terminal Operator	12 NCAC 04E .0401
Certification and Recertification of DCI Operators	12 NCAC 04E .0402
Suspension and Revocation of Operator Certification	12 NCAC 04E .0403
Period of Suspension	12 NCAC 04E .0404
Minimum Standards for DCI Terminal Operators	12 NCAC 04E .0405
Security of DCI Equipment	12 NCAC 04F .0101
Official Use of DCI Information	12 NCAC 04F .0102
Documentation and Accuracy	12 NCAC 04F .0201
Validations	12 NCAC 04F .0202
Hit Confirmation	12 NCAC 04F .0203
Arrest Fingerprint Card	12 NCAC 04F .0301
Final Disposition Information	12 NCAC 04F .0302
Prison Fingerprint Card	12 NCAC 04F .0303
Dissemination of CCH Records	12 NCAC 04F .0401
Accessing of CCH Records	12 NCAC 04F .0402
Use of CCH for Criminal Justice Employment	12 NCAC 04F .0403
Individual's Rights to Review	12 NCAC 04F .0404
CCH Licensing and Non-Criminal Justice Employment Purposes	12 NCAC 04F .0405

Restrictive Use of CCH for Employment Purposes	12	NCAC 04F	.0406
Research Use and Access of CCH Records	12	NCAC 04F	.0407
Limitation Requirements	12	NCAC 04F	.0408
Expungements	12	NCAC 04F	.0501
Purges	12	NCAC 04F	.0502
Automated Fingerprint Identification System	12	NCAC 04F	.0601
Eligibility for Full or Limited Access to the AFIS Network	12	NCAC 04F	.0602
AFIS Agreement	12	NCAC 04F	.0603
Available Data	12	NCAC 04F	.0604
Dissemination of Driver History Information	12	NCAC 04F	.0701
Audits	12	NCAC 04F	.0801
Definitions	12	NCAC 04G	.0101
Penalty Provisions	12	NCAC 04G	.0102
Notice of Violation	12	NCAC 04G	.0201
Informal Hearing Procedure	12	NCAC 04G	.0301

CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

Applicability of Radar/TDS Standards Pre 7/1/82	12	NCAC 09A	.0108
Certified Instructors Pre 7/1/82	12	NCAC 09B	.0311
Application for Law Enforcement Employment	12	NCAC 09C	.0217
Form Order Blank	12	NCAC 09C	.0218
Acquisition of Forms	12	NCAC 09C	.0220

COASTAL RESOURCES COMMISSION

Technical Standards for Beach Fill Projects	15A	NCAC 07H	.0312
General Conditions	15A	NCAC 07H	.1204
Specific Conditions	15A	NCAC 07H	.1205
Specific Conditions	15A	NCAC 07H	.1305

COSMETIC ART EXAMINERS, BOARD OF

License Waiver for Armed Forces	21	NCAC 14A	.0401
Issuance of Declaratory Ruling	21	NCAC 14B	.0504
Licensees and Students	21	NCAC 14H	.0401
Systems of Grading Beauty Establishments	21	NCAC 14H	.0504
Rule Compliance and Enforcement Measures	21	NCAC 14H	.0505
Application/Licensure/Individuals Who Have Been Convicted...	21	NCAC 14I	.0401
Live Model Performances	21	NCAC 14K	.0107
Live Model Performances	21	NCAC 14O	.0106
Operations of Schools of Cosmetic Art	21	NCAC 14P	.0113
Continuing Education	21	NCAC 14R	.0105
Esthetics Curriculum	21	NCAC 14T	.0604
Manicuring Curriculum	21	NCAC 14T	.0605
Natural Hair Care Styling Curriculum	21	NCAC 14T	.0606
Field Trips	21	NCAC 14T	.0615
Additional Hours	21	NCAC 14T	.0616
Teacher Trainees	21	NCAC 14T	.0617

School Operations/Licensure Maintenance	21	NCAC 14T	.0701

PHARMACY, BOARD OF

Medication in Health Departments	21	NCAC 46	.2401
Drugs and Devices to be Dispensed	21	NCAC 46	.2403

ENGINEERS AND SURVEYORS, BOARD OF EXAMINERS FOR

Requirements for Licensing	21	NCAC 56	.0501
Application Procedure: Individual	21	NCAC 56	.0502
Examinations	21	NCAC 56	.0503
Requirements for Licensing	21	NCAC 56	.0601
Application Procedure: Individual	21	NCAC 56	.0602
Examinations	21	NCAC 56	.0603
Procedure	21	NCAC 56	.0802
Offices	21	NCAC 56	.0901
Opportunity for Licensee or Applicant to have Hearing	21	NCAC 56	.1402
Surveying Procedures	21	NCAC 56	.1602
Classification of Boundary Surveys	21	NCAC 56	.1603
Mapping Requirements for Boundary Surveys	21	NCAC 56	.1604
Specifications for Topographic and Planimetric Mapping, I...	21	NCAC 56	.1606
Classification/Land Information System/Geographic Informa...	21	NCAC 56	.1608
Requirements	21	NCAC 56	.1703
Units	21	NCAC 56	.1704
Determination of Credit	21	NCAC 56	.1705

REAL ESTATE COMMISSION

Extensions of Time to Complete Continuing Education	21	NCAC 58A	.1709

LIST OF APPROVED TEMPORARY RULES
July 17, 2014 Meeting

PUBLIC HEALTH, COMMISSION FOR

Definitions	10A	NCAC 43K	.0101
Screening Requirements	10A	NCAC 43K	.0102
Reporting Requirements	10A	NCAC 43K	.0103

WILDLIFE RESOURCES COMMISSION

Wildlife Taken for Depredations	15A	NCAC 10B	.0106
Coyote	15A	NCAC 10B	.0219

LIST OF CERTIFIED RULES
July 17, 2014 Meeting

SHERIFFS EDUCATION AND TRAINING STANDARDS COMMISSION

Minimum Training Requirements	12 NCAC 10B .2005
In-Service Training Program Specifications	12 NCAC 10B .2006

RRC DETERMINATION PERIODIC RULE REVIEW
July 17, 2014

Necessary with Substantive Public Interest

Irrigation Contractors Licensing Board
21 NCAC 23 .0104
21 NCAC 23 .0206
21 NCAC 23 .0207
21 NCAC 23 .0406
21 NCAC 23 .0505

Nursing Home Administrators, Board of Examiners for
21 NCAC 37D .0202
21 NCAC 37D .0303
21 NCAC 37D .0402
21 NCAC 37D .0404
21 NCAC 37D .0602
21 NCAC 37D .0703
21 NCAC 37E .0101
21 NCAC 37E .0102
21 NCAC 37F .0102
21 NCAC 37G .0102
21 NCAC 37G .0201
21 NCAC 37G .0401
21 NCAC 37H .0102

RRC DETERMINATION PERIODIC RULE REVIEW
July 17, 2014

Necessary without Substantive Public Interest

Irrigation Contractors Licensing Board
21 NCAC 23 .0101
21 NCAC 23 .0102
21 NCAC 23 .0103
21 NCAC 23 .0201
21 NCAC 23 .0202
21 NCAC 23 .0203
21 NCAC 23 .0204
21 NCAC 23 .0205
21 NCAC 23 .0301
21 NCAC 23 .0401
21 NCAC 23 .0402
21 NCAC 23 .0403
21 NCAC 23 .0404
21 NCAC 23 .0405

21 NCAC 23 .0407
21 NCAC 23 .0501
21 NCAC 23 .0502
21 NCAC 23 .0503
21 NCAC 23 .0504
21 NCAC 23 .0506
21 NCAC 23 .0507
21 NCAC 23 .0508
21 NCAC 23 .0509
21 NCAC 23 .0510
21 NCAC 23 .0511
21 NCAC 23 .0601
21 NCAC 23 .0602
21 NCAC 23 .0603
21 NCAC 23 .0701

Nursing Home Administrators, Board of Examiners for
21 NCAC 37B .0101
21 NCAC 37B .0102
21 NCAC 37B .0103
21 NCAC 37B .0201
21 NCAC 37B .0202
21 NCAC 37B .0203
21 NCAC 37B .0204
21 NCAC 37B .0205
21 NCAC 37C .0101
21 NCAC 37C .0102
21 NCAC 37C .0103
21 NCAC 37D .0101
21 NCAC 37D .0102
21 NCAC 37D .0201
21 NCAC 37D .0203
21 NCAC 37D .0204
21 NCAC 37D .0301
21 NCAC 37D .0302
21 NCAC 37D .0401
21 NCAC 37D .0403
21 NCAC 37D .0405
21 NCAC 37D .0406
21 NCAC 37D .0407
21 NCAC 37D .0408
21 NCAC 37D .0409
21 NCAC 37D .0410
21 NCAC 37D .0412
21 NCAC 37D .0501
21 NCAC 37D .0502
21 NCAC 37D .0503
21 NCAC 37D .0504
21 NCAC 37D .0601
21 NCAC 37D .0603
21 NCAC 37D .0604
21 NCAC 37D .0605
21 NCAC 37D .0701
21 NCAC 37D .0702
21 NCAC 37D .0704
21 NCAC 37E .0103
21 NCAC 37F .0101
21 NCAC 37G .0101
21 NCAC 37G .0202

21 NCAC 37G .0301
21 NCAC 37G .0302
21 NCAC 37H .0101
21 NCAC 37H .0103
21 NCAC 37H .0104
21 NCAC 37I .0101

RRC DETERMINATION PERIODIC RULE REVIEW
July 17, 2014

Unnecessary

Nursing Home Administrators, Board of Examiners for
21 NCAC 37A .0606
21 NCAC 37A .0912

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

AGENCY	CASE NUMBER	DATE	PUBLISHED DECISION REGISTER CITATION
ALCOHOLIC BEVERAGE CONTROL COMMISSION			
Melody Locklear McNair v. ABC Commission	14 ABC 02323	06/25/14	
DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY			
Carl John Perkinson v. Department of Public Safety	14 CPS 02245	06/24/14	
Waheeda Ammeri v. Department of Public Safety	14 CPS 03254	07/21/14	
DEPARTMENT OF HEALTH AND HUMAN SERVICES			
AHB Psychological Services v. DHHS and Alliance Behavioral Healthcare	13 DHR 00115	01/06/14	29:02 NCR 202
Albert Barron, Sr. v. Eastpointe Human Services Local Management Entity	13 DHR 00784	04/22/14	29:04 NCR 444
AHB Psychological Services v. DHHS and Alliance Behavioral Healthcare	13 DHR 08874	01/06/14	29:02 NCR 202
Kenneth Terrell Ford v. DHHS, Division of Facility Services	13 DHR 10745	02/12/14	29:03 NCR 356
Tricare Counseling and Consulting, Inc. v. DHHS, Division of Medical Assistance	13 DHR 14221	12/31/13	29:04 NCR 460
J. Mark Oliver DDS, PLLC v. DHHS, Division of Medical Assistance	13 DHR 14369	02/19/14	29:02 NCR 206
Genesis Project 1 Inc. v. DHHS, Division of Medical Assistance and its agent, Mecklink Behavioral Healthcare	13 DHR 17094	12/16/13	29:01 NCR 70
Ervin Smith v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 17560	07/30/14	
Estate of Earlene W. Alston, Lewis E. Alston v. DHHS, DMA	13 DHR 17909	04/08/14	29:02 NCR 211
Susan Arrowood, OLPC v. DHHS, Division of Medical Assistance and its agent Partners Behavioral Health Management	13 DHR 19981	01/08/14	29:03 NCR 366
Jacqueline Marie Jackson v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	14 DHR 00460	07/10/14	
Nadiah Porter v. Durham County Department of Social Services (DSS) (Formerly Durham's Alliance for Child Care Access, DACCA)	14 DHR 01309	06/30/14	
Wittner Wright and Lisa Wright v. DHHS	14 DHR 01510	07/21/14	
Elizabeth Mitchell v. Durham DSS	14 DHR 01982	06/23/14	
Wayne Mitchell v. Durham DSS	14 DHR 02044	06/23/14	
Prince Onwuka, Roda V. Onwuka v. Division of Child Development and Early Education	14 DHR 02636	07/24/14	
Andrea Cook v. DHHS, Division of Health Service Regulation	14 DHR 02947	07/29/14	
Harold Eku John Coker v. Office of Administrative Hearings	14 DHR 03644	08/01/14	
Peter K. Kagwanja, owner Lighthouse Foodmart v. DHHS, Division of Public Health	14 DHR 03335	07/03/14	
DEPARTMENT OF JUSTICE			
Stephen James Riley v. NC Sheriffs' Education and Training Standards Commission	13 DOJ 09572	10/30/13	29:04 NCR 465

William Dale Aaronson v. NC Sheriffs' Education and Training Standards Commission	13 DOJ 11693	01/07/14	29:03 NCR 373
Jose Monserrate Acosta v. NC Private Protective Services	13 DOJ 15271	12/11/13	29:02 NCR 213
Kent Patrick Locklear v. NC Sheriffs' Education and Training Standards Commission	13 DOJ 15368	01/03/14	29:01 NCR 74
Michael Tyler Nixon v. NC Alarm Systems Licensing Board	13 DOJ 16246	11/25/13	29:01 NCR 79
Garrett Dwayne Gwin v. NC Criminal Justice Education and Training Standards Commission	13 DOJ 17240	06/10/14	
Howard Ron Simons v. NC Sheriffs' Education and Training Standards Commission	13 DOJ 19148	06/20/14	
Janet Staricha v. University of NC at Chapel Hill	13 DOJ 19693	06/06/14	
Lisa Paulette Childress v. NC Sheriffs' Education and Training Standards Commission	14 DOJ 00869	07/07/14	
Angela Renee Joyner v. NC Sheriffs' Education and Training Standards Commission	14 DOJ 00873	06/23/14	
Jeremy Samuel Jordan v. NC Sheriffs' Education and Training Standards Commission	14 DOJ 01203	06/12/14	

DEPARTMENT OF STATE TREASURER

Reza M. Salami v. NC A&T State University, Retirement Systems Division	13 DST 09273	06/26/14	
Ozie L. Hall v. Department of State Treasurer, Retirement Systems Division, Teachers' and State Employees Retirement System	14 DST 02877	07/07/14	

DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Certain Teed Corporation v. Department of Environment and Natural Resources, Division of Water Resources	13 EHR 13548	06/30/14	
Certain Teed Corporation v. Department of Environment and Natural Resources, Division of Water Resources	13 EHR 14024	6/30/14	
NC Coastal Federation, Cape Fear River Watch, Penderwatch and Conservancy, Sierra Club v. Department of Environment and Natural Resources, Division of Air Quality and Carolinas Cement Company LLC	13 EHR 17906	07/01/14	

OFFICE OF STATE HUMAN RESOURCES (formerly OFFICE OF STATE PERSONNEL)

Azlea Hubbard v. Department of Commerce, Division of Workforce Solutions	12 OSP 08613	05/19/14	
Mark Smagner v. Department of Revenue	13 OSP 05246	12/05/13	29:04 NCR 471
Chauncey John Ledford v. Department of Public Safety	13 OSP 12223	12/31/13	29:03 NCR 381
Lenton Credelle Brown v. Department of Public Safety, W. Ellis Boyle General Counsel	13 OSP 13729	05/16/14	
Kenneth Shields v. Department of Public Safety	13 OSP 15762	02/26/14	29:01 NCR 84
Tammy Cagle v. Swain County Consolidated Human Services Board	13 OSP 15763	12/19/13	29:04 NCR 480
Rena Pearl Bridges v. Department of Commerce	13 OSP 15896	02/19/14	29:01 NCR 95
Barbara Hinton v. Surry County Health and Nutrition Center	13 OSP 16230	02/12/14	29:03 NCR 388
Joseph Vincoli v. Department of Public Safety	14 OSP 00389	04/10/14	29:02 NCR 218
Craig Williams v. Billy Deaver NCCU Superintendent, NC Central University of Building Trades	14 OSP 02111	06/06/14	
Crystal McLean v. Alicia Lopez, NC SCO/DOA, NC State Construction Office/Department of Administration	14 OSP 02944	07/01/14	

DEPARTMENT OF REVENUE

Cyril Broderick, Jr. v. Department of Revenue	14 REV 01773	06/24/14	
C-Co Mini Mart Inc. v. Department of Revenue	14 REV 10490	08/01/14	

WILDLIFE RESOURCES COMMISSION

People for the Ethical Treatment of Animals, Inc., Jacob Matthew Norris, and Julie Coveleski v. North Carolina Wildlife Resources Commission and Gordon Myers, as Executive Director, North Carolina Wildlife Resources Commission	14 WRC 01045	08/01/14	
People for the Ethical Treatment of Animals, Inc., Jacob Matthew Norris, and Julie Coveleski v. North Carolina Wildlife Resources Commission and Gordon Myers, as Executive Director, North Carolina Wildlife Resources Commission	14 WRC 01348	08/01/14	

STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF GREENE	13 DHR 00784
ALBERT BARRON, SR. Petitioner, v. EASTPOINTE HUMAN SERVICES LOCAL MANAGEMENT ENTITY, Respondent.	**FINAL DECISION**

The above-captioned case was heard before the Honorable Donald W. Overby, Administrative Law Judge, on October 23, 2013, in Pitt County, North Carolina, and on January 16, 2014, in Greene County, North Carolina.

APPEARANCES

For Respondent:

Jose A. Coker
William W. Aycock, Jr.
The Charleston Group
P.O. Box 1762
Fayetteville, N.C. 28302-1762

For Petitioner:

Angela N. Gray
Gray Newell
7 Corporate Center Court, Suite B
Greensboro, N.C. 27408

EXHIBITS

Admitted for Respondent:

Exhibit No.	Date	Document
1	10/23/2013	Job Description for A. Barron

		for Director of Housing
2	10/23/2013	User Learning – A. Barron
3	10/23/2013	Human Resources Policy and Procedure Manual
4	10/23/2013	November 11, 2012 notes of Dr. Susan Corriher regarding Consumer JS
5	10/23/2013	November 30, 2013 summary of events by A. Barron
6	10/23/2013	Transcribed text messages between A. Barron and Consumer JS
7	10/23/2013	November 26, 2013 notes of Dr. Susan Corriher regarding Consumer JS
8	10/23/2013	December 19, 2012 notification of termination to A. Barron
9	10/23/2013	Sign posted in lobby referring to Consumer JS
10	10/23/2013	U.S. Cellular billing charges for bill date 8/22/12, p.37-42; bill date 9/22/12, p. 37-40; bill date 10/22/12, p. 39; and bill date 11/22/12, p. 37- 39.
11	10/23/2013	Photo of text message from A. Barron to Consumer JS
12	10/23/2013	Picture of J. Smith requested by A. Barron

Admitted for Petitioner:

Exhibit No.	Date	Document
1	10/23/2013	2011 Corporate Compliance Manual
2	01/16/2014	Cellular Telephone Summary-bill date 9/22/2012, p. 3-9, and p. A0000001-A0000003
3	01/16/2014	Cellular Telephone Summary-bill date 10/22/2012, p. 3-9, and p. A0000001- A0000005
4	01/16/2014	Cellular Telephone Summary-bill date 11/22/2012, p. 3-8, and p. A0000001- A0000004

5	01/16/2014	November 6, 2012 letter from Eastpointe to A. Barron regarding investigatory placement
6	01/16/2014	December 4, 2012 letter from Eastpointe to A. Barron regarding extending investigatory status
7	01/16/2014	December 12, 2012 correspondence between Dr. Susan Corriher and A. Barron regarding notice of pre-dismissal conference
8	01/16/2014	January 10, 2013 Judgment from Wayne County, N.C. regarding sexual battery charges

Depositions of Dr. Susan Corriher and Ms. Karen Holliday were used for impeachment purposes during their individual testimonies. The depositions were not introduced into evidence and are not in any manner considered substantive evidence.

WITNESSES

Called by Respondent:

Dr. Susan Corriher
Theresa Edmondson
Consumer JS

Called by Petitioner:

Dr. Susan Corriher
Joy Coley
Karen Holliday
Albert B. Barron, Sr.

ISSUES

Whether Eastpointe Human Services ("Respondent") had "just cause" to terminate its employment of Albert B. Barron, Sr. ("Petitioner") for unacceptable personal conduct and conduct unbecoming of an employee that is detrimental to the agency services.

Based on careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the undersigned makes the following findings of fact. In making these findings, the undersigned

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

FINDINGS OF FACT

1. This matter is properly before the Office of Administrative Hearings, which has both personal and subject matter jurisdiction. The parties were properly noticed for hearing.

2. At the time of his termination, the Petitioner was a Career State Employee entitled to the protections of the North Carolina State Personnel Act (N.C. Gen. Stat. § 126-1 *et seq.*), and specifically the "just cause" provision of N.C. Gen. Stat. § 126-35.

3. On January 14, 2013, Petitioner filed a Petition for a Contested Case Hearing with the Office of Administrative Hearings ("OAH") claiming he was terminated without "just cause" based on false accusations. He also contends that his dismissal was based on erroneous information, was arbitrary and capricious.

4. The Petitioner graduated from Mt. Olive College with a B.S. in Church Ministries in 1999. He holds two certifications. Since March 2006 he has held certification to provide substance abuse counseling issued through CSAC for the State of North Carolina by the North Carolina Practice Board. He is a certified occupancy specialist, being certified through the National Center for Housing Management, which he received in November, 2011. (T. Vol. 2, p. 301).

5. The Petitioner began his employment with the Respondent in January, 2001 when he was hired by Respondent's predecessor agency as a Substance Abuse Counselor trainee. He became a full-time Substance Abuse Counselor and worked in that position until 2006.

6. Petitioner was employed as the Housing Coordinator for Respondent from 2006 until 2012. (T. p. 306) His title changed to Director of Housing in July 2012. (R. Ex. 1) (T. Vol. 2, p. 303, 306). Respondent went through a merger and Petitioner's job title changed, but Petitioner's job position and duties did not change. (T. p. 21) Petitioner executed a new job description entitled Director of Housing in July 2012. (R. Ex. 1) (T. p. 24)

7. As Director of Housing, Petitioner ultimately determined who could get housing from Respondent. (T. p. 449)

8. Susan Corriher, PhD, ("Dr. Corriher") is the Chief of Clinical Operations, which includes supervision over Respondent's Housing Department. (T. pp. 19-20) Dr. Corriher was Petitioner's direct supervisor from 2010 until Respondent terminated him in 2012. (T. p. 21-22)

9. Petitioner was already employed with Respondent when Dr. Corriher came to work there. While Dr. Corriher never personally provided any particular instructions on how Petitioner was to perform his job, there is ample evidence that Petitioner received considerable on-line training through his employment. (T. Vol. 2, p. 324-325)

10. Respondent maintained policy and procedure manuals and the employees, including Petitioner, would have ready access to those manuals. (R. Ex. 2, 3) Petitioner was provided access to the policies and procedures of Respondent online. All of Respondent's employee acknowledged that they read said policies. (T. pp. 23)

11. Respondent's Policy Manuel discusses safeguarding consumer information, conducting oneself in a professional manner, the prohibition against personal relationships with consumers, and honest dealing with consumers and employees of Respondent. (R. Ex. 3) (T. p. 92)

12. Violation of Respondent's Policy Manuel, including the Code of Conduct is grounds for dismissal. (R. Ex. 3) (T. p. 92)

13. Petitioner received training on matters including housing operations, HIPPA, client rights, customer relations, and customer service. (T. pp. 22, 425)

14. Petitioner was provided a copy of Respondent's Policy Manual, which includes Respondent's Code of Conduct, procedures related to disciplinary action, appeals, and grievances. The Policy Manual also addresses unacceptable personal conduct and dismissal. (R. Ex. 3) (T. pp. 28-29)

15. The Petitioner worked independently in the Goldsboro office, while Dr. Corriher worked in the Beulaville office. Therefore, Dr. Corriher did not supervise him on a day-to-day basis. (T. Vol. 1, p. 48-49) She did not expect him to talk to her about the day-to-day operations; however, she did expect him to report to her about matters that could affect the agency. (T. Vol. 1, p. 50-51).

16. Respondent's Housing Department provides a housing program that oversees grants and housing for people who have serious mental illness and are homeless. These consumers can be particularly vulnerable. (T. pp. 20, 104)

17. As Housing Coordinator, the Petitioner was responsible for seeking and applying for various grants through HUD. He was also required to meet with other agencies and representatives from the community that worked with housing, as well as with the service provider agencies that worked within Eastpointe's catchment areas. The homes were required to be inspected to make sure they met HUD's criteria for occupancy. On occasion, Petitioner also met with the clients themselves, at their homes or at the agencies. (T. Vol. 2, p. 307).

18. Karen Holliday has worked with the Respondent for approximately thirteen (13) years. For the last year and a half, she has worked as a Housing Specialist. She was supervised by the Petitioner from approximately 2008 until 2012. Petitioner was her direct supervisor.

19. Ms. Holliday first spoke to Consumer JS ("JS") when JS applied for admission in the Shelter Plus Care program offered by the Respondent. The Shelter Plus Care program assists individuals with serious mental illnesses who are homeless with finding safe, affordable and decent housing. Consumer JS's case manager, Joy Coley, submitted JS's application to Holliday. JS's application included information about her mental illness. Mental illness was a condition of JS obtaining housing through this program.

20. The Petitioner initially met Consumer JS when she was with her Case Manager, Joy Coley, at Eastpointe completing paperwork for the Shelter Plus Care Program. (T. Vol. 2, p. 342-344). The Petitioner was aware that everyone in the Shelter Plus Care program suffered a mental illness and homelessness. (T. Vol. 2, p. 315).

21. Ms. Holliday asked Petitioner if he would stop by Consumer JS's house to drop off a copy of her lease while in route to Duplin County. It was late in the work day and Ms. Holliday was aware that Petitioner was going in that direction for a meeting the next day. The Petitioner agreed to stop at Consumer JS's residence, and Ms. Holliday agreed that she would make Ms. Coley aware of it. (T. Vol. 2, p. 347).

22. There are several discrepancies between the testimonies of Ms. Holliday and Ms. Coley. Ms. Holliday contends that she called Ms. Coley and told her that the Petitioner would be dropping off the lease on his way to Warsaw and for Ms. Coley to let JS know that the Petitioner would be coming by the next day. Ms. Coley denies that Ms. Holliday called before Ms. Coley received a phone call from JS that Petitioner was at her home. Ms. Holliday contends that Ms. Coley had requested the lease be delivered to JS. Coley denies that she asked. There is also some discrepancy as to when Petitioner arrived at JS's home the first time.

23. While there are these discrepancies, the essence of the series of events is that Petitioner was asked by Ms. Holliday to go to JS's residence on the morning of August 24, 2012, and he did so.

24. Petitioner contends that he was going to JS's residence do an inspection as well as drop off the lease. Ms. Holliday was clear that the only request was that Petitioner was to drop off the lease because JS needed the lease in order to get the water cut on to the residence. Ms. Holliday said that she usually did the inspections and that it was rare for Petitioner to do the inspections. Petitioner contends that he did all of the inspections.

25. On the morning of August 24, 2012, went to JS's house. He went to the door but no one answered. As he walked back to the agency vehicle, JS came to the door. He returned, identified himself and said he was there to give her a copy of the lease agreement and conduct a walk through. JS indicated that she was not ready for him to come in at that time and asked him if he could return later. The Petitioner agreed. (T. Vol. 2, p. 348-349).

26. JS called Ms. Coley to tell her when she was ready for the Petitioner to return. Ms. Coley agreed and called Ms. Holliday that it was okay for Petitioner to stop at JS's home.

27. Petitioner received a call from Ms. Holliday indicating that JS's case manager had contacted her and said that JS was ready for him to stop back there. (T. Vol. 2, p. 350).

28. When the Petitioner arrived the second time, the front door was open, but the storm door was closed. He knocked and JS came to the door. She asked him in and he provided her a copy of the lease agreement. JS was cooking breakfast for her two boys. Her boys were sitting in the kitchen and looking at pictures on her mobile phone. (T. pp. 178 -179, 429)

29. Petitioner contends that he just dropped off the lease and conducted the inspection. He engaged in friendly banter with the small children. JS contends that he did not drop off the lease and that he did not conduct an inspection.

30. Petitioner walked over to Consumer JS in the kitchen to tell her how "fine" and "sexy" she looked and requested a hug. While hugging Consumer JS, Petitioner grabbed her buttocks and as she turned grabbed her private parts. (T. pp. 179-180)

31. While he was in her home, Petitioner threatened to take her house from her if she told anyone about the contact. (T. pp. 179-180, 200) Because of what he told her, Consumer JS was scared that she could lose her home.

32. While in her home, Petitioner also promised to help Consumer JS get furniture. (T. p. 181) There had been a time when Petitioner did help clients within the program to obtain furniture, but money was not available on August 24, 2012.

33. At some point on that same day after Petitioner left Consumer JS's home, he texted her mobile phone from his personal mobile number and requested pictures from Consumer JS. (R. Ex. 11) (T. p. 182) Consumer JS sent Petitioner at least one picture per his request. (R. Ex. 12) (T. pp. 185-186) The Petitioner responded by texting, "gorgeous". (T. Vol. 2, p. 362-366)

34. At the time, it was common practice at Respondent to communicate with co-workers on their personal cell phones during work hours and for work related issues. Ms. Holliday communicated with the Petitioner on both his agency cell and personal cell phones on the day in question day. There is evidence in the phone records which indicate that his agency phone was working properly and being used on that day. Five phone calls were either made from or to his work cell phone on August 24, 2012. (T. Vol. 2, p. 357) There was a period of time from sometime in September, 2012 through the date of his termination that his work cell phone was being serviced and he did not have a work cell phone.

35. There was an exchange of emails between JS and Petitioner over the next several days after Petitioner was at JS's home on August 24, 2012, and then the communication stopped for a period of time.

36. Within two days of the date when Petitioner was in JS's home on August 24, 2012, JS called Ms. Holliday complaining of Petitioner's actions while at her home. She was upset about how the Petitioner had treated her as well as having shown disrespect to her in front of her children. (T. pp. 261-262, 434)

37. Ms. Holliday emailed Petitioner telling him that she needed to talk with him. He came to her office the next day. Ms. Holliday told Petitioner that JS had complained of inappropriate conduct by him at her residence. Ms. Holliday was purposely vague and did not specify the exact nature of the complaint lodged against him by JS. She was confident that Petitioner knew to what she was referring. (T. pp. 261-262, 264)

38. Petitioner was evasive and not admitting to having done anything inappropriate at JS's home. Ms. Holliday reported this issue to Petitioner who was Holliday's direct supervisor. She did not report the incident further up the chain of command as policy would dictate, since he was the person upon whom the complaint was based. She did recommend to JS that she should call a 1-800 number to register a complaint.

39. JS had also complained about Petitioner promising help with furniture but not following through with the promise. There was a time when money was available to help clients with furniture, but such money was not available in August 2012.

40. The issue with the furniture was a separate issue. Ms. Holliday reported that issue directly to Petitioner as well who denied that he had promised furniture and that was considered the end of that issue. Petitioner was Holliday's direct supervisor and she did not report the incident further up the chain of command as policy would dictate, since he was the person upon whom the complaint was based.

41. According to Dr. Corriher, policy was for the employee receiving the complaint to make a written memorandum of the complaint and that a written response to the complaint should be mailed to the complainant within five days of the complaint. That was not done for either complaint from JS to Ms. Holliday concerning Petitioner.

42. Petitioner likewise did not report either complaint up the chain of command to Dr. Corriher or anyone else. He contends that he had always handled the complaints about furniture within his department, and, therefore, he felt no compulsion to report this one even though it was a complaint against him in particular.

43. Sometime during September 2012, Petitioner started receiving more text messages from Petitioner. He did not respond. Petitioner received further texts on October 31, 2012, from a number he did not recognize. He responded to this text and realized they were coming from JS. On November 2, 2012, he received more texts and it was at that time that he decided to call Dr. Corriher.

44. At the time he contacted Dr. Corriher, Petitioner was on vacation. Dr. Corriher scheduled a meeting to be held on November 5, 2012, Petitioner's first day back to work.

45. After returning to work but prior to going to that meeting with Dr. Corriher, Petitioner reviewed JS's file. The evidence is not clear concerning a criminal record check for JS. At her deposition, Ms. Holliday stated that she had run a copy of JS's criminal record and that she made a copy of it and gave it to Petitioner. At hearing she stated that she did not print the record check. Petitioner told Dr. Corriher that he had pulled the criminal record check, but at the hearing he denies that.

46. A criminal record has no effect at all on whether or not the applicant would qualify or get the requested housing. It makes no sense relative to their respective jobs as to why either Petitioner or Ms. Holliday would bother to get a criminal record for JS, even though there is some representation that JS had a prospective court date.

47. No evidence was introduced that either Ms. Holliday or Petitioner used any protected confidential medical information in order to obtain a criminal record check. There is no evidence that either violated HIPPA in order to obtain the criminal record check.

48. Dr. Corriher was not aware of allegations of misconduct involving Petitioner until he called her on November 2, 2012. When Petitioner called Dr. Corriher he told her that he was calling per the advice of his counsel. Petitioner denies that he was calling at the advice of counsel and denies that he told Dr. Corriher that he was. (T. pp. 30-31)

49. Petitioner met with Dr. Corriher and Ken Jones, CEO of Eastpointe, on November 5, 2012, regarding allegations by JS. (T. p. 32) At the time of this meeting there had not been any written complaint or any notation of any complaint by anyone at Respondent concerning any interaction between Petitioner and JS. At that time Petitioner had not had any disciplinary action against him at all since becoming an employee of Respondent. (T. Vol. 2, p. 389)

50. After meeting with Petitioner on November 5, 2012, Dr. Corriher contacted Respondent's Human Resources and Compliance Director, Theresa Edmondson ("Edmondson"), to investigate the allegations against Petitioner. (T. pp. 36-37, 122) An investigative team was assembled to review the allegations involving Petitioner. The team consisted of Dr. Corriher, Edmondson, Respondent's Human Resources specialist Lynn Parrish ("Parrish"), and Respondent's Director of Grievance and Appeals Tashina Raynor ("Raynor"). (T. p. 38)

51. On November 6, 2012, Respondent placed Petitioner on investigatory status with pay pending investigation for unacceptable personal conduct. (R. Ex. 8) (T. pp. 123, 127)

52. Petitioner contends that the meeting with Dr. Corriher on November, 5, 2012 was the first time that he was aware that JS had made any complaint against him. However, Mrs. Holliday had made him aware of allegations within two days of the date he was in JS's home in August 2012 concerning both inappropriate contact with JS as well as the issue about furniture.

53. Respondent provided Petitioner an opportunity to submit information to address the allegations made against him by Consumer JS. Petitioner was interviewed and he submitted

a written statement. (T. p. 128) Petitioner's written statement was dated November 30, 2012. (R. Ex. 5) (T. pp. 44-45)

54. Petitioner's November 30, 2012 written statement refers to the text messages between him and Consumer JS. (R. Ex. 5) (T. p. 107) Petitioner provided Ken Jones some of those text messages which were forwarded over to Mr. Jones' cell phone. Respondent had those text messages transcribed. (R. Ex. 6) (T. pp. 46-47)

55. Dr. Corriher talked with Consumer JS by telephone on two (2) occasions regarding her allegations against Petitioner. (T. pp. 39, 108) Both telephone calls were on November 12, 2012.

56. During the first call, JS told Dr. Corriher that she did not want to talk to her and that she preferred to go through her lawyer. (T. Vol. 1, p. 64). JS was irritated at Dr. Corriher for calling her and asked her not to call again. (T. Vol. 1, p. 232). JS called Joy Coley, her case manager, and Ms. Coley told her who Dr. Corriher is and assured JS that it was alright for her to talk with Dr. Corriher.

57. JS subsequently called Dr. Corriher on the same day. She told Dr. Corriher during this second conversation that Petitioner touched her private parts. She also reported that Petitioner promised Consumer JS living room furniture. JS reported that Petitioner threatened to take away her housing if she told anyone and that she was afraid to report the incident. (T. pp. 39-40, 110) Dr. Corriher documented her telephone interviews with Consumer JS as part of the investigation file. (R. Exs. 4, 7) (T. pp. 40, 109)

58. Dr. Corriher never received a written statement from JS regarding inappropriate conduct by the Petitioner or a complaint regarding the alleged promise of furniture. (T. Vol 1, p. 66-67)

59. Joy Coley first learned of JS's allegations against the Petitioner when JS contacted her over the phone on November 12, 2012. The call to Ms. Coley was prompted by Dr. Corriher's call to JS. JS had not previously called and/or made a report to Ms. Coley about Petitioner. (T. Vol. 1, p. 243-247).

60. Dr. Corriher called Ms. Coley on November 19, 2012. Ms. Coley confirmed that JS made no complaints about the Petitioner. Ms. Coley said she had never heard any complaints about the Petitioner.

61. Ms. Coley stated that she reported the incident concerning her client JS to her superiors who reported to Respondent, who responded that the incident was being investigated.

62. Prior to the complaint made by JS against the Petitioner, Dr. Corriher had never received any other complaints or accusations against the Petitioner of inappropriate conduct by consumers or by any employee. She had never had to discipline the Petitioner for any reason.

63. Petitioner contends that the pictures were requested from JS to document a success story for the department, and that he would include those pictures in a power point presentation. Petitioner contends that he kept the pictures in a file with other pictures of other clients.

64. Credible evidence presented shows that no clients photographs had been used in power point presentations and that no such file containing photographs as contended by Petitioner has been found with JS's or any other consumer's picture, either in Petitioner's office or elsewhere. Petitioner's request for personal photographs from Consumer JS had nothing to do with Respondent's operations or serve any business purpose. (T. pp. 80, 82, 107, 473-474)

65. In early December 2012, Ms. Edmondson saw a sign that read, "Do not let [Consumer JS] go to Eastpointe under any circumstances per Albert Barron." The sign was located in the reception area of DSS, which is within the same building that Eastpointe occupies. (R. Ex. 9) (T. pp. 139-140, 154) The building is a locked building with security. Although the sign was theoretically visible to the public, there is limited access to the area where the sign was posted. (T. pp. 140-142, 476)

66. The sign was only observed approximately one month after Petitioner was placed on investigatory leave. The evidence does not support the contention that Petitioner requested the sign to be put up. Assuming *arguendo* that Petitioner did request the sign to be put up, there is no evidence to support the contention that such a sign with nothing more than a person's name is in any manner a HIPPA violation.

67. On December 17, 2012, Respondent provided Petitioner a pre-disciplinary conference pursuant to its Policy Manual. (T. p. 129)

68. On December 19, 2012, Respondent dismissed Petitioner from his employment with Respondent for unacceptable personal conduct and conduct unbecoming an employee that is detrimental to the agency services after considering all the information obtained during the investigation. (R. Ex. 8). (T. pp. 126, 129-131)

69. Respondent provided Petitioner with a copy of the December 19, 2012 termination letter and the internal grievance procedures. (T. pp. 132, 136)

70. JS filed a criminal charge of Sexual Battery against the Petitioner three months after the alleged incident took place. Both the Petitioner and JS testified at trial and the Petitioner was found not guilty. (T. Vol. 1, p. 204; T. Vol. 2, p. 413-414; Petitioner's Exhibit 8).

CONCLUSIONS OF LAW

1. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law contain Findings of Fact, they should be so considered without regard to the given labels.

2. Depositions of Dr. Susan Corriher and Ms. Karen Holliday were used for impeachment purposes during their individual testimonies. The depositions were not introduced into evidence and are not in any manner considered substantive evidence.

3. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to Chapters 126 and 150B of the North Carolina General Statutes. The parties have been given proper notice of the hearing.

4. A career State employee may be dismissed only for ""just cause"." N.C.G.S. § 126-35(a). The State employer has the burden of proving that there was "just cause" for the dismissal. N.C.G.S. § 126-35(d).

5. Petitioner was notified of his dismissal by letter dater December 19, 2012. Respondent followed the internal grievance procedures and the pre-disciplinary conference procedures. There is no issue that proper procedural steps were taken.

6. Pursuant to regulations promulgated by the Office of State Personnel, there are two bases for the dismissal of an employee for "just cause": (1) unsatisfactory job performance; and (2) unacceptable personal conduct. 25 NCAC 1J.0604 (b).

7. An employee may be dismissed without any warning or disciplinary action when the basis for dismissal is unacceptable personal conduct. 25 NCAC 1J.0608 (a). One instance of unacceptable conduct constitutes "just cause" for dismissal. Hilliard v. North Carolina Dep't of Corr., 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).

8. In order to prove "just cause" based on unacceptable personal conduct, Respondent must prove (1) Petitioner engaged in the conduct Respondent alleged; and (2) the conduct constitutes "just cause" for dismissal. North Carolina Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004).

9. N.C.G.S. § 126-35(a) has been interpreted to require that the acts or omissions be described, "with sufficient particularity so that the discharged employee will know precisely what acts or omissions were the basis of his discharge. ... An employee wishing to appeal his dismissal must be able to respond to agency charges and be able to prepare an effective representation." Employment Security Commission v. Wells, 50 N.C. App. 389, 274 S.E.2d 256, (1981)

10. The December 19, 2012 dismissal letter specified that Petitioner was being discharged for "unacceptable personal conduct and conduct unbecoming an employee that is detrimental to the agency services." (R. Ex. 8) "Conduct unbecoming an employee that is detrimental to the agency services" is merely one type of "unacceptable personal conduct" and not a stand-alone separate grounds for discipline. 25 NCAC 1J.0614 (I)

11. Standing alone, to state that one is disciplined for "unacceptable personal conduct" is not sufficient notice so that Petitioner would "know precisely what acts or omissions were the basis of his discharge." The termination letter set out 6 numbered paragraphs which articulate the basis for the disciplinary action.

12. While the termination letter is rather inartfully drawn, Petitioner was given sufficient proper statutory notice of the reasons for his dismissal and the dismissal letter met the requirements of the law.

13. Petitioner was sufficiently notified of the specific acts that led to his dismissal allowing him to respond to the charges and prepare an effective representation, which he did. The dismissal letter was sufficiently specific. (R Ex. 8)

14. Although the statute does not define "just cause", the words are to be accorded their ordinary meaning. Amanini v. Dep't of Human Resources, 114 N.C. App. 668, 443 S.E.2d 114 (1994) (defining "just cause" as, among other things, good or adequate reason).

15. While "just cause" is not susceptible of precise definition, our courts have held that it is "a flexible concept, embodying notions of equity and fairness that can only be determined upon an examination of the facts and circumstances of each individual case." NC DENR v. Carroll, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004).

16. 25 NCAC 1J .0604(b) provides that an employer may discipline or dismiss an employee for "just cause" based upon unacceptable personal conduct or unsatisfactory job performance.

17. Pursuant to 25 NCAC 1J .0608(a), an employer may dismiss an employee without warning or prior disciplinary action for a current incident of unacceptable personal conduct.

18. In pertinent part, "Unacceptable personal conduct" is defined by 25 NCAC 1J.0614 (I) as:

(1) conduct for which no reasonable person should expect to receive prior warning; or
(4) the willful violation of known or written work rules; or
(5) conduct unbecoming a state employee that is detrimental to state service.

19. In the case of "conduct unbecoming a state employee that is detrimental to state service," the State employer is not required to make a showing of actual harm, "only a potential detrimental impact (whether conduct like the employee's could potentially adversely affect the mission or legitimate interests of the State employer)." Hilliard v. North Carolina Dep't of Corr., 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).

20. Primarily the conduct at issue concerns Petitioner's interactions with Consumer JS, who had made accusations of inappropriate conduct by the Petitioner. JS has consistently told the same story from the outset. She reported first to Ms. Holliday, and later to Ms. Coley and to Dr. Corriher. Even though she decompensated in open court, she told the same story to this Tribunal that she has previously reported. It is found that her rendition of events is credible.

21. Within a matter of days of the interaction between JS and Petitioner in August 2012, Ms. Holliday told the Petitioner that JS was making accusations about him having inappropriate conduct while at her residence. Petitioner did not report that to anyone of authority above him until November 2, 2012, after had JS started contacting him again in October 2012.

22. The fact that he used is personal cell phone in contacting JS is of no consequence in that it was a usual and customary and accepted practice of Respondent's at that time. The contacts themselves were not work related and were inappropriate.

23. Petitioner asking JS for a photograph that her children had shown him was totally inappropriate. Petitioner's rationalization as to why he asked for the photograph is without merit.

24. Respondent has failed to prove that Petitioner directed anyone to erect a sign or in any regard give instructions that JS was not to be allowed to enter the building.

25. Respondent has failed to prove that Petitioner's obtaining a criminal record check was in any way improper.

26. Respondent has failed to prove that Petitioner violated HIPPA regulations in obtaining the criminal record check of JS. Respondent has failed to prove that posting a sign in public with JS's name on it violated HIPPA regulations, even if Petitioner had been responsible for the posting.

27. Respondent's Policy Manual and the HIPPA regulations are known and written work rules. Respondent has failed to prove HIPPA violations by Petitioner.

28. Respondent's Policy Manual discusses safeguarding consumer information, conducting oneself in a professional manner, the prohibition against personal relationships with consumers, and honest dealing with consumers and employees of Respondent. (R. Ex. 3) (T. p. 92)

29. Violation of Respondent's Policy Manuel, including the Code of Conduct is grounds for dismissal. (R. Ex. 3) (T. p. 92)

30. Petitioner received training on matters including housing operations, HIPPA, client rights, customer relations, and customer service. (T. pp. 22, 425)

31. Petitioner was provided access to the policies and procedures of Respondent online. All of Respondent's employee acknowledged that they read said policies. (T. pp. 23)

32. Petitioner was provided a copy of Respondent's Policy Manual, which includes Respondent's Code of Conduct, procedures related to disciplinary action, appeals, and grievances. The Policy Manual also addresses unacceptable personal conduct and dismissal. (R. Ex. 3) (T. pp. 28-29)

33. Petitioner's willful failure to report the allegations against him until matters escalated violated known and written work rules.

34. Petitioner's personal relations and touching of Consumer JS were inappropriate behavior that constituted unacceptable personal conduct and conduct unbecoming an employee. Petitioner's interactions and text messaging with Consumer JS was "conduct unbecoming a state employee that is detrimental to state service."

35. A willful violation of known or written work rules occurs when an employee "willfully takes action which violates the rule and does not require that the employee intend [the] conduct to violate the work rule." Teague v. N.C. Dept. of Correction, 177 N.C. App. 215, 628 S.E.2d 395, 400 (2006) citing Hilliard v. N.C. Dept. of Correction, 173 N.C. App. 594, 620 S.E.2d 14, 17 (2005).

36. In Carroll, the Supreme Court explained that the fundamental question is whether "the disciplinary action taken was 'just'. Further, the Supreme Court held that, "Determining whether a public employee had 'just cause' to discipline its employee requires two separate inquires: First, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes 'just cause' for the disciplinary action taken." NC DENR v. Carroll, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004).

37. In Carroll, the Court went on to say that "not *every* violation of law gives rise to 'just cause' for employee discipline." In other words, not every instance of unacceptable personal conduct as defined by the Administrative Code provides just cause for discipline. *Id.* at 670, 599 S.E.2d at 901.

38. In this case, Petitioner did in fact engage in the conduct as alleged in four of the six enumerated bases in the termination letter of December 19, 2012, which constitutes unacceptable conduct as defined by 25 NCAC 1J.0614 (I). Respondent had "just cause" for disciplining Petitioner.

39. Determining "just cause" rests on an examination of the facts and circumstances of each individual case. The facts of a given case might amount to just cause for discipline but not dismissal.

40. Having found the two prongs of the Carroll case have been met, then the next inquiry is whether or not the punishment is appropriate. The case of Warren v. N. Carolina Dep't of Crime Control & Pub. Safety sets forth what this tribunal must consider as to the degree of discipline. It states:

> We conclude that the best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis. This avoids contorting the language of the Administrative Code defining unacceptable personal conduct. The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish "just cause" for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to "just cause" for the disciplinary action taken. (Internal cites omitted)
>
> Warren v. N. Carolina Dep't of Crime Control & Pub. Safety, N. Carolina Highway Patrol, 726 S.E.2d 920, 924-925 (N.C. Ct. App. 2012) review denied, 735 S.E.2d 175 (N.C. 2012)

41. Respondent met its burden of proof that it did not substantially prejudice Petitioner's rights, exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act in violation of Constitutional provisions, fail to act as required by law, act arbitrarily or capriciously, and/or abuse its discretion when Respondent dismissed Petitioner for "just cause".

42. Respondent had "just cause" to dismiss Petitioner for his unacceptable personal conduct.

43. Having given due regard to factors in mitigation, including Petitioner's longevity without any disciplinary action while employed with Respondent, and based on the preponderance of the evidence, Respondent met its burden of proof that it had "just cause" to dismiss Petitioner for unacceptable personal conduct without warning or other disciplinary action. Because of the particular facts of this case, the punishment of termination was appropriate.

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned issues the following:

DECISION

It is hereby ordered that Respondent has sufficiently proved that it had just cause to dismiss Petitioner based on his unacceptable personal conduct. Petitioner's dismissal is therefore **AFFIRMED**.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34. Under North Carolina General Statute § 150B-45, any party wishing to appeal the Final Decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed.

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 22nd day of April , 2014.

Donald W. Overby
Administrative Law Judge

16

STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF WAKE	13 DHR 14221

TRICARE COUNSELING AND CONSULTING INC Petitioner	)	
vs.	)	**PARTIAL SUMMARY JUDGMENT**
N. C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE Respondent	)	

Upon consideration of Petitioner's Motion for Summary Judgment pursuant to Rule 56 of the NC Rules of Civil Procedure, Respondent's response thereto, the pleadings and filings that are part of the official record, the undersigned **GRANTS** Summary Judgment for Respondent as to Issue 1, and **GRANTS** Petitioner's Summary Judgment in part as to Issue 2. Uncontroverted findings are set forth in this Decision to aid further Tribunals in the review of this Decision.

APPEARANCES

For Petitioner: Knicole C Emanuel
Williams Mullen
Attorney for Petitioner
PO Box 1000
Raleigh NC 27602

For Respondent: Thomas J Campbell
Asst. Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh NC 27699-9001

ISSUES

1. Whether Respondent violated N.C. Gen. Stat. § 108C-5(j) by failing to credential PCG's auditor prior to extrapolation?

2. Whether Respondent violated N.C. Gen. Stat. § 108C-5(i) by failing to provide Petitioner proper notice prior to extrapolation?

FINDINGS OF FACT

ISSUE 1

1. There is no genuine issue of material fact that both the initial clinician/auditor, and the clinician who performed the most recent audit in this case have the appropriate credentials to perform this audit. Before hiring its temporary or permanent employees, PCG confirmed all certifications, licenses, good standing status, and continuing education credits for all employees before such employees were allowed to participate in conducting Respondent's post-payment review audits. Additionally, all PCG employees were required to complete the appropriate service type training from DMA before conducting any audits of Medicaid providers.

ISSUE 2

2. There is no genuine issue of material fact that on November 28, 2012, Public Consulting Group ("PCG"), Respondent's agent as a Medicaid review contractor, issued a Notice of Tentative Overpayment ("TNO") to Petitioner. In that TNO, PCG advised Petitioner that the results of its post-payment review of Medicaid claims submitted by Petitioner revealed that Petitioner "failed to substantially comply with the requirements of State and federal law or regulation." The TNO stated that "the total amount of improperly paid claims in the [reviewed] sample [was] $18,003.33," and that PCG "utilized random sampling and extrapolation in order to determine that your agency received a total Medicaid overpayment in the amount of $241,792.00."

3. The November 28, 2012 TNO was the first notice Petitioner received that it had "failed to substantially comply with the requirements of State and federal law or regulation."

4. After a reconsideration review on May 1, 2013, Respondent notified Petitioner that it was upholding PCG's recoupment for the claims in dispute, but was also modifying PCG's original recoupment amount, "based on the extrapolation . . . as provided by PCG" to $207,976. The total Medicaid overpayment for the sample reviewed was $22,608.73.

CONCLUSIONS OF LAW

1. Respondent's Program Integrity Unit and its authorized agents, PCG, conduct post-payment reviews of Medicaid paid claims to identify program abuse and overpayments in accordance with 42 USC § 1396a, 42 CFR 455 & 456, and 10A NCAC 22F.

ISSUE 1

2. N.C. Gen. Stat. § 108C-5 sets forth the process and procedures whereby Respondent and its agents conduct those post-payment reviews. N.C. Gen. Stat. § 108C-5(q) states:

> Except as required by federal agency, law, or regulation, or instances of credible allegation of fraud, the provider shall be subject to audits which result in the extrapolation of results for a time of up to 36 months from date of payment of a provider's claim.

3. N.C. Gen. Stat. § 108C-5(j) states:

> Audits that result in the extrapolation of results must be performed and reviewed by individuals who shall be credentialed by the Department, as applicable, in the matters to be audited, including, but not limited to, coding or specific clinical issues.

4. In this case, there is no genuine issue of material fact that Respondent's agent PCG complied with the requirements of N.C. Gen. Stat. § 108C-5(j) by having its individual reviewers credentialed in the matters audited in this case. As there is no genuine issue of material fact, Respondent is entitled to summary judgment as a matter of law regarding this issue.

ISSUE 2

5. N.C. Gen. Stat. § 108C-5 describes the process Respondent or its agent must follow in seeking recoupment of any overpaid Medicaid funds from a Medicaid provider. N.C. Gen. Stat. § 108C-5(k) states that:

> The Department, prior to conducting audits that result in the extrapolation of results, shall identify to the provider the matters to be reviewed and specifically list the clinical, including, but not limited to, assessment of medical necessity, coding, authorization, or other matters reviewed and the time periods reviewed.

6. N.C. Gen. Stat. § 108C-5(i) provides:

> Prior to extrapolating the results of any audits, the Department shall demonstrate and inform the provider that (i) the provider failed to substantially comply with the requirements of State or federal law or regulation or (ii) the Department has credible allegation of fraud concerning the provider.

7. N.C. Gen. Stat. § 108C-5(p) provides:

The provider shall have no less than 30 days from the date of the receipt of the Department's notice of tentative audit results to provide additional documentation not provided to the Department during any audit.

8. Reading N.C. Gen. Stat. § 108C-5 in its entirety, and in context with the applicable provisions of 42 CFR 455 & 456, and 10A NCAC 22F, N.C. Gen. Stat. § 108C-5 requires Respondent demonstrate and inform Petitioner that Petitioner "failed to substantially comply" with the applicable State and Federal law or regulation before Respondent extrapolates the results of any audits. The purpose of N.C. Gen. Stat. § 108C-5(i) is to allow the provider time to submit additional documentation to Respondent/PCG before PCG performs an extrapolation of any overpayment.

a. In this case, there are no allegations that Petitioner committed any fraud.

b. In this case, there is no genuine issue of material fact that Respondent, through its agent PCG, violated N.C. Gen. Stat. § 108C-5(i) when it simultaneously notified Petitioner, in the November 28 2012 TNO, that (1) Petitioner failed to substantially comply with the State and federal requirements, and (2) Petitioner owed an extrapolated overpayment amount based on such audit findings.

c. By violating the procedural requirements of N.C. Gen. Stat. § 108C-5(i), Respondent's extrapolated recoupment amount of $207,976.00 is invalid and void. Petitioner is entitled to summary judgment as matter of law as to that issue, and Respondent may not recoup the extrapolated recoupment/overpayment amount from Petitioner.

9. Nevertheless, there remains a genuine issue of material fact concerning what effect, if any, did PCG's violation of the procedural requirement of N.C. Gen. Stat. § 108C-5 have on the original claims in dispute, totaling $22,608.73, that Respondent actually reviewed, which Respondent's agent PCG seeks to recoup from Petitioner. Given that issue of material fact, this case is ripe for a contested case hearing on that issue.

FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned **GRANTS** Summary Judgment for Respondent as to Issue 1, and **GRANTS** Summary Judgment for Petitioner on Issue 2 regarding the extrapolated overpayment amount. The remaining issue for trial is whether Respondent, through its agent PCG, erred in determining that Respondent overpaid Petitioner $22,608.73 in Medicaid claims.

NOTICE

Under the provisions of N.C. Gen. Stat. § 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 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.

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 the Superior Court within 30 days of receipt of the Petitioner 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 31st day of December, 2013.

Melissa Owens Lassiter
Administrative Law Judge

STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13DOJ09572

STEPHEN JAMES RILEY, Petitioner, v. NORTH CAROLINA SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION, Respondent.	**PROPOSAL FOR DECISION**

On October 1, 2013, Administrative Law Judge Beecher R. Gray heard this case in Raleigh, North Carolina. This case was heard after Respondent requested, under N.C.G.S. § 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

Petitioner: *Pro Se*

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

ISSUE

Whether Petitioner possesses the good moral character that is required of sworn justice officers under Respondent's Rules.

FINDINGS OF FACT

1. The parties received notice of hearing by certified mail more than 15 days prior to the hearing, and each stipulated on the record that notice was proper. Petitioner received, by certified mail, the Notification of Probable Cause to Revoke Justice Officer Certification letter, mailed by Respondent on January 2, 2013.

2. The North Carolina Sheriffs' Education and Training Standards Commission (hereinafter the "Sheriffs' 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(b)(2) further provides that 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.

5. Petitioner received his Probationary Deputy Sheriff Certification (PR 237045689) from the Sheriffs' Commission on August 6, 2001. Petitioner then received his General Deputy Sheriff Certification (GN 237045689) from the Sheriffs' Commission on September 6, 2002. (R. Ex. 15)

6. Petitioner was employed as a sworn justice officer through the Orange County Sheriff's Office from July 24, 2001 until his separation from that agency on November 16, 2011. (R. Ex. 6)

7. Major Charles Blackwood (hereinafter "Major Blackwood") testified at the administrative hearing. Major Blackwood has over 30 years of law enforcement experience. He began his law enforcement career with the Orange County Sheriff's Office in 1982 and continued to move up through the ranks with that agency until his retirement on December 17, 2012. At the time of his retirement, Major Blackwood was Major of Operations at the Orange County Sheriff's Office. His duties included, but were not limited to, oversight of the jail and transportation division, in addition to liaison to the courts.

8. In November 2011, Major Blackwood was assigned to investigate the possible falsification of agency records by Petitioner. The general essence of the complaint was that Petitioner was completing Vacation Leave Request Forms, wherein he would request "Vacation Leave." Petitioner later would record his time as "Sick Leave" on his 28 Day Cycle Time Sheet. Lieutenant Turner of the Orange County Sheriff's Office observed the discrepancy in Petitioner's time sheets and subsequently questioned the practice, which ultimately triggered the internal investigation.

9. Major Blackwood conducted an audit of Petitioner's Vacation Leave Request Forms and 28 Day Cycle Time Sheets for the period 2009 through 2011. This audit revealed that Petitioner routinely was requesting vacation leave on his Vacation Leave Request Forms. Petitioner later would record the leave as "Sick Leave" on his official 28 Day Cycle Time Sheet. During the period in question, Major Blackwood discovered the following misreporting by Petitioner (R. Ex. 1):

a. November - December 2008: 12 hours requested as a personal day, but later recorded as Sick Leave on Time Sheet;

b. August - September 2009: 24 hours requested as Vacation Leave, but later recorded as Sick Leave on Time Sheet;

c. May - June 2010: 36 hours requested as Vacation Leave, but later recorded as Sick Leave on Time Sheet;

d. June - July 2010: 24 hours requested as Vacation Leave, but later recorded as Sick Leave on Time Sheet;

e. October - November 2010: 19 hours requested as Vacation Leave, but later recorded as Sick Leave on Time Sheet;

f. March - April 2011: 36 hours requested as Vacation Leave, but later recorded as Sick Leave on Time Sheet;

g. May - June 2011: 48 hours requested as Vacation Leave, but later recorded as Sick Leave on Time Sheet;

h. July - August 2011: 24 hours requested as Vacation Leave, but later recorded as Sick Leave on Time Sheet; and

i. October - November 2011: 36 hours requested as Vacation Leave, but later recorded as Sick Leave on Time Sheet.

10. Major Blackwood interviewed Petitioner and questioned him regarding the above-referenced deceptive time sheet entries. Petitioner admitted that between 2009 and 2011, Petitioner's practice was to request vacation time on his Vacation Leave Request Forms, and then later record the time as sick time on his 28 Day Cycle Time Sheets. Petitioner admitted that the time off was not because of illness or medical reasons. Petitioner contended that this was common practice and that he was advised that he could do this by Pam Pope in the Human Resources Department of the Orange County Sheriff's Office. Petitioner further stated that other deputies, such as Deputy Hilton, engaged in such recording practices. Major Blackwood interviewed Ms. Pope and Deputy Hilton and could find no evidence that either of these individuals instructed Petitioner to record false and deceptive information on his 28 Day Cycle Time Sheets. Further, Major Blackwood examined the time sheets of Deputy Hilton and could find no such deceptive and false time sheet entries.

11. In addition to the foregoing, Major Blackwood conducted a random audit of the 4 different squads responsible for Orange County jail oversight, to include Petitioner's squad. That audit revealed that Petitioner's colleagues were completing their Vacation Leave Request Forms and 28 Day Cycle Time Sheets honestly and accurately. Major Blackwood was unable to locate any other cases where an Orange County deputy

requested vacation leave on a Vacation Leave Request Form, but then later recorded that time as sick leave on a 28 Day Cycle Time Sheet.

12. Major Blackwood testified that in his 32 years at the Orange County Sheriff's Office, he never had seen or heard of such a deceptive reporting practice, wherein a deputy would request vacation leave and then later record it as sick leave. Major Blackwood stated this reporting practice was deceptive and untruthful. Such a practice would make it impossible for the chain of command to determine how an employee was taking time off, and would lead to the chain of command relying on false information contained in an agency report.

13. Further, Major Blackwood testified that under no circumstance should a sworn justice officer knowingly record false information on any agency form whatsoever, whether it be an incident report, time sheet, leave request form, or any other agency document that is passed through the chain of command and relied on to be honest and accurate. The core value of all sworn justice officers is unwavering honesty. This must be exhibited at all times by sworn justice officers, and it is a quality we demand of the profession. Assuming, *arguendo*, that Petitioner's colleagues were engaged in similar deceptive recording practices or that Petitioner was "told" to record false information on a time sheet, this does not justify the deceptive practice. As a sworn law enforcement officer, one has a duty to remain honest and truthful at all times. Where, as here, a sworn justice officer knowingly records false information on a law enforcement agency form, that officer no longer possesses the good moral character that is required of a sworn justice officer in the State of North Carolina. Such intentional misreporting of false information cannot be tolerated in the law enforcement profession.

14. Major Blackwood testified regarding the Sheriff's policy on sick leave, in addition to the County's policies on sick leave and vacation leave. In 2008, Orange County Sheriff Lindy Pendergrass issued General Order No. 20040. Under this Order, all employees of the Orange County Sheriff's Office were specifically advised that sick leave only was to be used for illness or medical purposes. (R. Ex. 2)

15. In addition to General Order No. 20040, under the Orange County Personnel Rules and Regulations, sick leave only is authorized for illness and/or medical purposes. The Personnel Rules cautioned employees that any use of sick leave for non-medical purposes was improper and could result in "loss of pay and/or disciplinary action." (R. Ex. 4)

16. Petitioner does not deny that he was given, and also provided, access to General Order No. 20040 and the County's Personnel Rules and Regulations. Petitioner contends that he was too busy at work to review the General Orders issued by the Sheriff and that the Personnel Rules were such that Petitioner was told that some applied to him, and some did not.

17. Major Blackwood testified regarding Orange County's Personnel Rules relating to the taking of sick leave. Major Blackwood stated the policy prohibiting the taking of sick leave for non-medical reasons was long standing, dating back at least a decade. Further,

Major Blackwood stated the Sheriff's General Orders were disseminated down through the ranks and that a deputy with Petitioner's experience would know to read all General Orders issued by the Sheriff. These Orders were contained in written form and were accessible at all times to staff. In addition, command staff periodically reviewed all general orders with staff to ensure that all deputies were current with policies at the Sheriff's Office.

18. Regarding the accumulation of vacation leave, the Orange County Personnel Rules and Regulations provide that an employee may accrue up to 240 hours in vacation leave. In the event the employee is separated from employment, that employee receives a cash payment for all accumulated vacation leave, up to 240 hours. (R. Ex. 3)

19. At the time of Petitioner's separation, Petitioner had accumulated the maximum 240 hours in vacation leave. At separation, Petitioner was paid a lump sum for the accumulated 240 hours vacation. (R. Ex. 5) Petitioner does not dispute that he was paid for the 240 hours of accumulated vacation leave.

20. Major Blackwood testified that Petitioner's practice of requesting vacation leave but then recording sick leave on his 28 Day Cycle Time Sheet resulted in an windfall to Petitioner. At the time of separation, Petitioner would have a cash payout for the maximum 240 hours because Petitioner was not debiting vacation time from his vacation account.

21. Orange County's Personnel Rules regarding accumulation of sick time differed from the accumulation of vacation time. At separation, an employee was NOT paid for accrued sick time. (R. Ex. 4)

22. Major Blackwood testified that Petitioner was separated from the Orange County Sheriff's Office on November 16, 2011. (R. Ex. 6) The separation was designated "At the discretion of the Sheriff." Major Blackwood, however, stated that Petitioner's separation was for cause. Petitioner was separated from the Orange County Sheriff's Office because of the falsification of agency records, as set out in greater detail above. (See also R. Exs. 7–12)

23. Petitioner received timely notification of Respondent's Notice of Probable Cause to Revoke Certification. (R. Ex. 13) Petitioner thereafter requested an administrative hearing. Petitioner testified that he believes he was not engaged in wrongdoing because he was told by "higher ups" that he could request vacation leave and then later record it as sick leave on the 28 Day Cycle Time Sheets. Petitioner testified that the higher up was Pam Pope in the Human Resources Department. Despite this claim, Petitioner admitted that Ms. Pope was not a sworn law enforcement officer and was not in Petitioner's chain of command.

CONCLUSIONS OF LAW

1. Both parties properly are before the Office of Administrative Hearings.

2. Petitioner's practice of requesting vacation leave on a Vacation Leave Request Form and then later recording sick time on a 28 Day Cycle Time Sheet was intentionally deceptive. Petitioner knew at the time he was making these data entries on agency leave forms that they were false and misleading. This intentional and deceptive conduct, whether done one time or multiple times, evidences the individual's lack of good moral character. Such intentional misreporting of information by a sworn officer on an agency form is not, under any circumstances, justifiable.

3. Given the totality of the evidence presented at the administrative hearing, I find that Petitioner no longer possesses the good moral character required of all sworn justice officers in this State. The basis of this finding is that Petitioner knowingly recorded false information on agency leave forms. Petitioner's knowing misrepresentation of information on time sheets was deceptive and resulted in a windfall to Petitioner at the time of his separation, in that Petitioner was being paid for accumulated vacation leave that should have been debited from his vacation account.

4. Respondent's proposed revocation of Petitioner's certification for a lack of good moral character is supported by a preponderance of the evidence.

PROPOSAL FOR DECISION

Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the undersigned finds that Respondent's decision to revoke Petitioner's certification because of Petitioner's failure to maintain the good moral character that is required of sworn justice officers under 12 NCAC 10B .0300 is supported by the evidence and is AFFIRMED.

NOTICE AND ORDER

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

It hereby is ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714.

This the 30 day of OCTOBER, 2013.

Beecher R. Gray
Administrative Law Judge

STATE OF NORTH CAROLINA	)	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF MECKLENBURG	)	**13 OSP 05246**
MARK SMAGNER, **Petitioner,**	)	**FINAL DECISION**
v.	)	
N.C. DEPARTMENT OF REVENUE, **Respondent.**	)	

This matter was heard by the undersigned Administrative Law Judge in a bench trial on September 30, 2013, in Charlotte, North Carolina.

APPEARANCES

For Petitioner: Mark Smagner, *pro se*
1900 Garibaldi Av.
Charlotte, NC 28208

For Respondent: Peggy S. Vincent
Assistant Attorney General
N.C. Department of Justice
PO Box 629
Raleigh, NC 27602-0629

WITNESSES

For Petitioner: Mark Smagner

For Respondent: John Quinn
Lynda Whitener
Alan Woodard

EXHIBITS ADMITTED INTO EVIDENCE

Petitioner's Exhibits 1 and 2

Respondent's Exhibits 1 through 55

APPLICABLE LAW

N.C. Gen. State. §§ 126-35, 126-84 and 126-85
25 N.C.A.C. 1J .0600
N.C. Office of State Personnel, Personnel Policies, Section 7
N.C. Department of Revenue Agency Grievance Policy and Procedures, effective June 24, 2012

ISSUE

Whether the Petitioner was terminated from his employment with the Department for just cause.

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

FINDINGS OF FACT

1. Mr. Smagner was employed by the Department as a field auditor trainee in the Examinations Division in the Raleigh Office. T. p. 121.

2. In March, 2007, while still a trainee, he was allowed to transfer to the Charlotte office at his request. T. pp. 73, 122-23.

3. At the time of his termination, his direct supervisor was his team leader, John Quinn. T. p. 29.

4. During the time at issue in this case, his next level supervisor was Lynda Whitener, supervisor of the Department's Charlotte Examination Office, followed by Armeneous Adams, the assistant director of examinations, followed by Alan Woodard, the director of examinations. T. pp. 73, 122.

5. Mr. Quinn experienced personal conduct problems with Mr. Smagner as had his previous supervisors, team leaders Doug Rothrock and Elaine Green. T. pp. 74-80; R. Ex. 20-22.

6. In October, 2011, Mr. Smagner asked a series of questions by e-mail to the assistant manager of the computer assisted audit unit (CAA) who replied appropriately and in a timely manner. Mr. Smagner forwarded the e-mail string to his manager, Ms. Lynda Whitener, stating, "Are we working as a team Lynda? I simply asked for some information and did not receive it." Shortly thereafter, he again e-mailed Ms. Whitener with copies this time to his then team leader and the manager of the CAA unit stating, "Please let me know how to avoid this disruption in the future. Is Heidi an auditor or is she transferring data from excel into access. I requested the information more than one time. Taxpayer sent the request to me at 8:30 AM I

was not able to respond until 1:00 PM. I really don't think I need to explain myself after seven years when it comes to asking for something that we both know exists." Thereafter, the CAA manager contacted Ms. Whitener to ask that she take care of the situation by addressing the inappropriateness of the e-mail with Mr. Smagner. T. pp. 75-80; Ex. 20-21.

7. On February 23, 2012, Mr. Smagner met with Mr. Woodard and Ms. Whitener in regard to Mr. Smagner's concern that auditors selecting their own cases to audit was unethical. Mr. Woodard listened to Mr. Smagner's concerns and explained the Department's process. After approximately 10 to 15 minutes, Mr. Smagner, indicating they would never agree, announced that the meeting was over and walked out. T. pp. 80-86, 128-131; Ex. 22, 32.

8. Also on February 23, 2012, Mr. Smagner left the office for the rest of the day around 3:30pm without following standard operating procedures of signing out. He later complained that someone "turned him in" for not signing out properly. T. pp. 87-89; Ex. 23.

9. On February 24, 2013, Mr. Woodard sent Mr. Smagner an e-mail to reschedule the meeting. Mr. Smagner responded with an e-mail to Mr. Woodard and the human resources director, Angela Crawford, stating, in part that "Alan teased and mocked my concerns in a condescending manner," and "I will only meet with you (Mr. Woodard) behind closed doors with a human resources employee present." Ms. Crawford e-mailed Mr. Smagner, in part, that it was "inappropriate for you to refuse and (sic) reasonable assignment or discussion about your job from your Director." T. pp. 131-138; Ex. 33-35.

10. Ms. Crawford thereafter referred the matter to the Department's in-house counsel, Canaan Huie, for an opinion on whether the Department can require auditors to select their own audits. He wrote an e-mail which gave the opinion that the practice was not forbidden and was what the legislature intended. This e-mail was forwarded to Mr. Smagner. He responded, "The email from general counsel further supports my intentions of having this issue brought before the legislation (sic). I want to further make you and all that are now involved aware that G.S. 126-85 & G.S. 126-84 protects me from retaliatory actions on the part of management. Essentially if you plan to meet with me and threaten my job in anyway (sic) there very well could be consequences based on the aforementioned general statutes." T. pp.138-142; Ex. 36-37.

11. On February 28, 2012, Mr. Smagner e-mailed Mr. Woodard copying a previous request and answer for the "Examination Strategy." He then states, "If this document does exist ("audit strategy"), would you please forward a copy to me when you have a moment." Mr. Woodard responded again with an explanation. Mr. Smagner replied, in part, "Face it Alan there is no strategy. I only read the first sentence and have realized you offer no direction what so ever (sic)." T. pp. 143-150; Ex. 38-39.

12. On March 8, 2012, Mr. Smagner was given a written warning for unacceptable personal conduct for his inappropriate conduct with his director and his inappropriate communications with Department leadership. T. pp. 151-155; Ex. 40.

13. On May 1, 2012, Mr. Smagner was assigned to Mr. Quinn's team, in part, because Mr. Smagner needed assistance with audit selection, an area in which Mr. Quinn excelled. T. pp. 12-13.

14. Mr. Smagner had been given a corrective action plan ("CAP") by his previous team leader, which indicated areas in which he needed to improve. T. pp. 13-14

15. When Mr. Smagner first joined Mr. Quinn's team, he and the other team member were verbally asked to provide data on their work in progress before the end of the day, per customary procedure. T. p. 15

16. The other team member promptly provided the information. Mr. Smagner was sent an e-mail reminder when he failed to provide the information by the end of the day. When, on the following Monday Mr. Smagner still failed to respond to the request, Mr. Quinn printed the data without the benefit of any editing or updating by Mr. Smagner. T. pp. 15-16.

17. On May 4, 2012, Mr. Quinn sent an e-mail to the team members requesting the expected work day schedule for each member on an excel spreadsheet. Mr. Smagner replied in an e-mail attachment, "In @ 7:45 Eat when Im (*sic*) hungry Leave @ 4:15." T. pp. 16-19; R. Ex. 1-2.

18. In May, 2012, Mr. Quinn was having problems with his on-line calendar and was, therefore, unable to provide access to it for his team members without also allowing access to confidential e-mails. In lieu thereof, he was providing his team members with a paper calendar of his schedule while the IT department worked on the issue. Mr. Smagner was presumably aware of the problem. On May 31, 2012, Mr. Smagner wrote an e-mail to Ms. Whitener stating in part, that: "[i]f John is having difficulty allowing access to his calendar may I suggest contacting on (sic) of our key users? . . .We need to know where our team leader is at all times in order to ask questions." T. pp. 90-92; Ex. 24.

19. On or about June 6, 2012, Mr. Smagner submitted a transmittal letter and Information and Document Request ("IDR") to Mr. Quinn for approval before being sent to the taxpayer. Mr. Quinn responded that Mr. Smagner needed assistance with the document and subsequently sent Mr. Smagner a sample of the Department's preferred IDR form. Mr. Smagner responded, "Can you explain why you would waste my time creating an idr when you had one of your 'standard' letters ready? I really don't want to play games. Please don't play games with me." Mr. Quinn replied that he had merely provided a guide which he thought Mr. Smagner would appreciate. Mr. Smagner replied that Mr. Quinn was "micro managing" and that Mr. Smagner did not see Mr. Quinn as a manager. Subsequently, on June 8, Ms. Whitener met with Mr. Smagner and told him that such e-mails to his team leader were inappropriate. She affirmed that Mr. Quinn was his direct supervisor. T. pp. 19-29, 92-94; R. Ex. 3-6, 25.

20. Mr. Quinn joined the meeting between Ms. Whitener and Mr. Smagner of June 8, 2012, after it had started. Mr. Smagner had with him one of four taxpayer audit files that Mr. Quinn had directed be brought up to date and delivered to Mr. Quinn by May 31, over a week beforehand. The files had still not been delivered. T. pp.96-97; Ex. 25.

21. On June 26, 2012, Mr. Smagner sent an e-mail to Mr. Quinn at 1:23 pm, stating he would be leaving for the day at 1:30pm, and not completing an audit. Mr. Quinn responded later that afternoon, that in the future, requests for leave should be made in advance to allow sufficient time for them to be approved by him or Ms. Whitener and to allow for Mr. Quinn to plan accordingly. Such procedure is a policy of the examination division. The following day, Mr. Smagner responded by e-mail, "Scheduling your day? You're here all the time John. You need to get out of the office and work audits." T. pp. 29-34; R. Ex. 7.

22. On or about June 27, 2012, Mr. Smagner was conducting an audit of the type in which the Department frequently uses computer assistance to sort large amounts of data, known as a computer assisted audit ("CAA"). Mr. Quinn had suggested to Mr. Smagner that he involve the CAA unit. Mr. Smagner responded by e-mail, "Actually you should contact (Taxpayer). Taxpayer on more than one occasion has stated to me that they do not want to do a caa. If you want to contact them you should do it on your own accord. I have a good professional relationship with Debi. I do not want to be part of harassing a taxpayer over something that we can not demand." T. pp. 35-39; R. Ex. 8.

23. Subsequent to the aforementioned e-mail exchange, Mr. Smagner told Mr. Quinn that he disagreed with referring the audit to CAA and wanted to consult his and Mr. Quinn's supervisor, Ms. Whitener. Ms. Whitener recommended the situation be run by Thad Cable, the CAA supervisor. Mr. Cable thought a CAA was appropriate and asked for a completed CAA request form. Mr. Quinn informed Mr. Smagner of the request, and thought a nod from Mr. Smagner was indication of his agreement to provide the form. However, the following day, Mr. Smagner sent an e-mail stating to Ms. Whitener, "If possible, please remove me as lead auditor on this particular exam. I find this to be a shameful act by the Department to pressure a taxpayer into providing information electronically." T. pp. 40-45; R. Ex. 9.

24. On or about June 29, 2012, Mr. Smagner was given his performance evaluation on his Work Plan for the work cycle 2011-2012. He was given an overall rating of "below good" in combined dimensions, which are behaviors, and a combined overall rating of "good." He wrote comments on the evaluation such as, "What you have done is drag my name through the mud without the ability to defend myself; . . . I know Lebron James has it in him to show us the way," and signed his name as "Daffy Duck." He sent an e-mail to Mr. Woodard complaining that he should have been given a "BG" for below good. He again stated that his name had been dragged through the mud without the ability to defend himself, even though he could have appealed the rating he received. He further states, "[I]f a furlough and priority hiring could ever be worked out I would leave and never look back. Im (sic) ashamed to be an employee of the Department of Revenue." T. pp. 97-108, 182-184; Ex. 26, 48.

25. Mr. Smagner was given a Corrective Action Plan on June 29, 2012. He signed it, "Daffy Duck" and wrote comments such as, "Please evaluate the effectiveness of John Quinn." and "Daffy Duck sure sounds disrespectful and immature. What I have realized throughout 7 years of service is that it does not matter what I do I will always receive these vulgar biased reviews." T. pp. 108-114; Ex.27.

26. Mr. Smagner was given a standard form from Human Resources for listing physical work requirements for purposes of compliance with the ADA. Mr. Smagner signed it, "Daffy Duck." T pp. 114-115; Ex. 28.

27. Mr. Smagner was given a position description form from the Office of State Personnel. He wrote comments on it such as, "We need leadership that knows what they are doing in reference to leading employees to revenue generating work." He signed the form, "Daffy Duck." T. pp. 115-117; Ex. 29.

28. Mr. Smagner was given a Work Plan for the work cycle 2012-2013. He signed it, "Daffy Duck." T. pp.117-118; Ex. 30.

29. On July 6, 2012, at 1:25 PM, Mr. Smagner sent Mr. Quinn an e-mail stating, "In @ 7:45. Lunch 1:30 – 2:00 PM. VL 2:00 – 4:15 PM. Pretty Please." Mr. Smagner subsequently left for the day approximately five minutes later. A few weeks earlier he had been reminded that all leave needed to be approved in advance, with requests made as to allow sufficient time for it to be approved by Mr. Quinn or Ms. Whitener. T. pp. 45-46, 29-34; R. Ex. 7 and 10.

30. On July 9, 2012, at 11:40 AM, Mr. Smagner sent Mr. Quinn and Ms. Whitener an e-mail stating, "lunch 1:30 – 2:00 PM. VL 2:00 – 4:15 PM. Pretty please with sugar on top." T. pp. 46-47; R. Ex. 11.

31. Mr. Quinn authorized the leave approximately forty minutes later. Mr. Smagner responded to Mr. Quinn and Ms. Whitener, "After seven years this would be the first. You cant (sic) see this but Im (sic) saluting both of you. Thank you so much, your (sic) too kind." T. pp.47-48; R. Ex. 12.

32. On or about July 12, 1012, Mr. Smagner turned in an audit for approval by Mr. Quinn which had a gap between the ending date of the audit and the period for which the next tax was due. Mr. Quinn requested that Mr. Smagner correct this error. On July 13, Mr. Smagner replied, "Taxpayer needs to rely upon information given by the auditor. Your (sic) not really making any sense right now John. 30 dollars tax is not worth the time and effort of getting folks involved. You need to start thinking pro-actively. Sign out some new audits and get working! I think you will enjoy it :)." T. pp. 49-56; R. Ex. 14.

33. On July 16, 2012, Mr. Quinn informed Mr. Smagner that the audit would not be approved without it being corrected. This was the usual and customary practice of the Department. Mr. Smagner responded to Mr. Quinn and Mr. Woodard, in part, "You both should be ashamed of yourselves. Your attempts to undermine my work by involving an innocent taxpayer is absurd and I will not be part of it. . . . I will not be singled out because leadership fails to hold themselves accountable for their failures." T. pp. 57-58; R. Ex. 15.

34. Also on July 16, 2012, Mr. Quinn had e-mailed various questions to Mr. Smagner regarding another audit. After receiving the answers, Mr. Quinn requested that Mr. Smagner bring him the checklist. This is the document which the supervisor initials to indicate that he is satisfied with the work papers. Mr. Smagner replied in an e-mail, "Im (sic) not going to play

your reindeer games Johnny. This is a simple use tax audit. You don't want to look over it fine." T. pp. 60-62; Ex. 16.

35. On July 16, 2012, Mr. Smagner sent an e-mail to Secretary of Revenue David Hoyle requesting a meeting with the Secretary to discuss Mr. Smagner's concern that audit self-selection was unethical. Secretary Hoyle replied that Mr. Smagner needed to contact Dr. Milsaps as the Secretary had discussed the matter with her and had asked her to work with Mr. Smagner on the Secretary's behalf. Mr. Smagner replied, "With all due respect sir do you believe an employee of the Department of Revenue should be required to find their own work and subsequently graded upon the amount of revenue generated from it?" T. pp. 191-194; Ex. 51.

36. On July 17, 2012, Mr. Smagner sent an e-mail to Ms. Crawford requesting a copy of the "directive dated from 1985" regarding lunch breaks. Ms. Crawford responded that he should follow the directive from his division. He replied, "That seems like a knee jerk reaction to a valid question and the fact that you cc a Director tells me that there may be some sort of animosity behind your response. I will again ask you to please forward the directive you have so eloquently referenced in your previous email dated 04/23/12." Ms. Crawford replied, in part, "Your response to me is inappropriate and will not be tolerated." T. pp. 194-197; Ex. 52.

37. On July 24, 2012, Mr. Quinn advised Mr. Smagner that they needed to schedule a meeting after the end of the month to discuss Mr. Smagner's progress on his Corrective Action Plan. Mr. Smagner replied the following day stating, "Would you please provide another corrective action plan to me. For some reason I thought it would serve a better purpose back in June. I used it to clean up after my dog George when he made a mess in the house." T. pp. 62-65; Ex. 17.

38. On the morning of August 1, 2012, Mr. Quinn set a meeting with Mr. Smagner for that afternoon to discuss IRS Federal Tax Information ("FTI"). FTI is important to the Department and access can be lost if the Department fails to adhere to the IRS's procedures. At 10:54 AM, Mr. Smagner sent Mr. Quinn an e-mail which stated, "1:30 – 2:00 Lunch. 2:00 – 4:15 VL. 2.25 Hours." Mr. Quinn sent a reply stating, "I'm not able to approve your leave request for this afternoon. Sorry for the inconvenience. I need you to be here for the meeting this afternoon." Mr. Smagner responded via e-mail stating, "This is for a cultural and or ethnic related event." Subsequently, Mr. Smagner called down the hall to Mr. Quinn saying, "John, I got your e-mail. I will be taking leave." When Mr. Smagner was signing out to take the leave, he saw Mr. Quinn and said to him, "That was a good one. Now go tattle." T. pp. 65-69; Ex. 18.

39. On or about July 25, 2012, Mr. Smagner filed a complaint with the State Ethics Commission against Secretary Hoyle, Dr. Millsaps, John Sadoff, and Mr. Woodard alleging that they had compromised the integrity of the audit process by requiring auditors to self-select tax audits ("Ethics Complaint"). The Commission concluded that the complaint and supporting documentation did not allege facts sufficient to constitute a violation. T. pp. 197-200; Ex. 53.

40. Ms. Whitener and Mr. Quinn were not aware of the Ethics Complaint until after Mr. Smagner's employment with the Department had been terminated. T. pp. 71, 118-119, 201.

41. Mr. Woodard recused himself from any activity associated with Mr. Smagner once Mr. Woodard became aware of the Ethics Complaint. He assigned all further activity to the Assistant Director of the Examinations Division, David Simmons. T. pp. 200, 207.

42. On August 6, 2012, Mr. Smagner was given a notice of pre-disciplinary conference recommending his employment be terminated for insubordination. He met with Ms. Whitener and Mr. Simmons to discuss the disciplinary action. On August 7, 2012, he was sent a dismissal letter terminating his employment for unacceptable personal conduct including insubordination. T. pp. 200-207; Ex. 54-55.

CONCLUSIONS OF LAW

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.

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

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

4. The Department met its burden of proof in showing that Mr. Smagner engaged in unacceptable personal conduct.

5. The Petitioner was not terminated from the Department's employment because he filed a complaint with the North Carolina Ethics Commission.

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent had just cause to terminate Petitioner's employment for unacceptable personal conduct.

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 4th day of December, 2013.

Selina M. Brooks
Administrative Law Judge

STATE OF NORTH CAROLINA **COUNTY OF WAKE**	**IN THE OFFICE OF ADMINISATRATIVE HEARINGS** **13 OSP 15763**

TAMMY CAGLE, Petitioner, **v.** **SWAIN COUNTY CONSOLIDATED HUMAN SERVICES BOARD,** Respondent.	)	**FINAL DECISION**

THIS MATTER came on to be heard before Fred Gilbert Morrison Jr, Senior Administrative Law Judge, on September 16, 2013, in Raleigh, North Carolina.

APPEARANCES

For Petitioner: Michael C. Byrne
Law Offices of Michael C. Byrne, P.C.
150 Fayetteville Street
Suite 1130
Raleigh, North Carolina 27601
(919) 865-2572
michael@mcbyrnelaw.com

For Respondent: William E. Cannon, Jr. and Michael W. McConnell
Cannon Law, P.C.
Post Office Box 207
Waynesville, NC 28786
(828) 456-4800
bcannon@cannonlawpc.net
mcconnell@cannonlawpc.net

WITNESSES

For Petitioner:

1. Tammy Cagle, Petitioner

For Respondent:

1. Robert White, Former Chairman of Swain County Social Services Board
2. Thomas Decker, Former Swain County Social Services Board Member
3. Talmage Lee Jones, Jr., Former Swain County Social Services Employee
4. Sybil Wheeler, North Carolina Work First Program Consultant
5. Shelia Sutton Swain County Social Services Employee

EXHIBITS

For Petitioner:

7. Memorandum from Jerry Smith, interim director of Swain County Social Services
11. Facebook message from Kim Cunningham

For Respondent:

1. Notice to Petitioner from Respondent that Petitioner was being placed on investigative leave with pay, dated March 31, 2011
2. Notice to Petitioner from Respondent that Petitioner's leave was being extended, dated April 21, 2011
3. Notice to Petitioner from Respondent that Petitioner's leave was being extended for a second time, dated May 23, 2011
4. Notice to Petitioner from Respondent informing Petitioner of a scheduled pre-disciplinary conference for dismissal, dated June 7, 2011
5. Notice to Petitioner from Respondent confirming the result of the pre-disciplinary conference held on June 21, 2011, dated June 22, 2011
6. Notice to Petitioner from Respondent of Respondent's denial of appeal from decision to terminate Petitioner's employment, dated July 22, 2011
7. Swain County Personnel Policy
8. Swain County DSS Policy & Procedures Manual
9. Results of Case Review
10. Contact/Activity Log, dated September 30, 2009
11. Contact/Activity Log, dated May 10, 2011
12. Application of Jessica Kirkland
13. Client File for KaShayla B. Lossiah
14. Written telephone records from Talmage Lee Jones, Jr.

15. Written telephone records from Kim Cunningham
16. Written telephone records from Shelia Sutton

ISSUE

Whether Respondent had just to dismiss Petitioner from her employment?

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

FINDINGS OF FACT

1. Prior to her dismissal, Petitioner had been employed with the Swain County Department of Social Services (Agency) for approximately thirteen (13) years.

2. Petitioner initially served as a social worker, was promoted several times and eventually became the director of the Department of Social Services in 2005.

3. Petitioner served as director until she was fired in 2011. Her annual salary was $63,000.

4. While Petitioner was employed as director, Respondent was actively investigating an abuse and neglect case involving a toddler, Aubrey Littlejohn.

5. Aubrey Littlejohn died while she was still a client of Respondent.

6. While Petitioner served as director, and in response to the child's death, law enforcement officials executed a search warrant at Respondent's principal place of business.

7. In response to the death of Aubrey Littlejohn, the Swain County Sheriff's Department and the State Bureau of Investigation initiated a criminal investigation of the Swain County Department of Social Services.

8. Aubrey Littlejohn's death raised suspicion among the members of Respondent's Board; of notable concern was the possible mishandling of case documents by employees of the Department of Social Services.

9. On March 28, 2011, Respondent's Board held a meeting to discuss the Aubrey Littlejohn case and investigation. The meeting consisted of both open and closed sessions.

10. Petitioner attended the meeting on March 28, 2011.

11. At the March 28, 2011, meeting, Petitioner was orally informed that she was being placed on investigative leave with pay. The reason given for Petitioner's placement on leave was that the Board wanted to conduct an investigation into the death of Aubrey Littlejohn and the Respondent's and Petitioner's conduct in connection therewith. Petitioner was instructed to turn in her keys, turn in her cell phone, go home, and not to have any contact with any agency member about any agency business.

12. Respondent confirmed Petitioner's placement on investigative leave by letter dated March 31, 2011.

13. The March 31, 2011, letter indicated that Petitioner was being investigated. There was no indication of any reason for the investigation.

14. The letter also contained the following directive reiterating the prior oral instruction:

> Please refrain from conducting any business associated with the Swain County Department of Social Services, from attending any meetings or functions on behalf of the Swain County Department of Social Services, and from making any business-related communication with any member(s) of the Swain County Department of Social Services' Staff. Your failure to comply with these requests shall result in further action taken by the Board, up to an including disciplinary action.

15. During the hearing, Respondent presented the witness testimony of Thomas Decker, former member of Respondent's Board, who testified that the Board was concerned that Petitioner might interfere with the investigation and/or intimidate other employees regarding the investigation.

16. Mr. Decker indicated that the board felt that it was appropriate to have someone other than Petitioner investigating the matter.

17. Respondent sent Petitioner written notice of an extension of the investigatory leave on May 23, 2011. In this letter the Board offered that Petitioner was being investigated for "allegations of job performance or personal conduct deficiencies."

18. While on leave, Petitioner made a phone call to Talmage Lee Jones, a manager at the Department of Social Services. The phone call was made on April 30, 2011.

19. While on leave, Petitioner made two additional phone calls to Talmage Lee Jones on April 14, 2011.

20. During the conversation that took place on April 30, 2011, Petitioner discussed the agency's attorney, Justin Greene, and how he had "turned against [them]." The comments were made in response to the Aubrey Littlejohn case and developments of which Petitioner had become aware.

21. During the first call on April 14, 2011, Petitioner discussed an article in a local newspaper, the Smoky Mountain Times, regarding her family members and the benefits that they received by virtue of Petitioner's extraordinary assistance.

22. Petitioner's assistance to her family members in securing their benefits went above and beyond that which is typically administered when an individual seeks benefits from the Department of Social Services.

23. Petitioner had been investigated for these transactions by previous board members and no disciplinary action was taken.

24. Petitioner also acknowledged, during the phone call, the Agency's directive not to discuss business related issues with other employees of the Department of Social Services.

25. During the second April 14, 2011, phone call from Petitioner to Talmage Lee Jones, Petitioner questioned Mr. Jones as to whether he had spoken with Sheila Sutton, an agency employee, with respect to the accounts from which Petitioner's family members' benefits were drawn.

26. Mr. Jones indicated to Petitioner that the phone calls made him feel uneasy and that he did not want to be involved in the situation.

27. Kim Cunningham, an agency employee, received a phone call from Petitioner on June 5, 2011, during which Petitioner questioned how an agency board member had obtained the phone numbers of her family members.

28. During the June 5, 2011, conversation Petitioner again acknowledged that she was not supposed to be contacting agency employees to discuss business.

29. Petitioner asked Ms. Cunningham specific questions as to whether certain individuals had been in attendance at meetings related to the Aubrey Littlejohn case.

30. Ms. Sheila Sutton, agency eligibility administrator, received a phone call from Petitioner on March 30, 2011.

31. During the March 30, 2011, phone call Petitioner asked Ms. Sutton questions related to the Aubrey Littlejohn case and investigation.

32. Petitioner testified at hearing that she was aware of the meaning of the term "business of Department of Social Services."

33. Petitioner admitted that when she made the calls to Mr. Jones and Ms. Cunningham she was aware that she was not supposed to be contacting them regarding agency business.

34. The Board met with Petitioner in a closed session on June 6, 2011.

35. At this meeting, the Board concluded that it would hold a pre-disciplinary conference for dismissal of Petitioner on June 21, 2011.

36. On June 8, 2011, Petitioner received a notice of pre-disciplinary conference to be held on June 21, 2011, by letter dated June 7, 2011.

37. The notice of pre-disciplinary conference stated the following reasons for the proposed dismissal of Petitioner:

> The Board has scheduled this pre-disciplinary conference for dismissal to discuss your failure to pursue your Masters of Social Work degree as requested by the Board and agreed upon by you following your appointment as agency director, your receipt of a travel stipend while simultaneously using a county vehicle for personal use, your conduct and procedure in administering agency programs that benefitted your immediate family, and your failure to comply with the Board's directive of March 31, 2011 that you refrain from making business-related telephone calls to agency staff while on investigative leave.

38. Petitioner was given the opportunity to respond to the evidence against her, but was not afforded the opportunity to present witnesses or have an attorney present at the pre-disciplinary conference.

39. A pre-disciplinary conference was held on June 21, 2011.

40. On June 23, 2011, Petitioner received a letter dated June 22, 2011, that informed Petitioner that she was being terminated from her position as Director of Swain County Department of Social Services.

41. The reasons given for Petitioner's dismissal in the June 22, 2011, letter included:

    1) Failing to comply with the Board's directive of March 31, 2011 that you refrain from making business related telephone calls to agency staff while placed on investigative status leave.
    2) For your conduct and procedure in administering agency programs that benefitted your immediate family.

42. The dismissal letter was defective because it did not provide specific details concerning the reasons for dismissal (dates, times, people contacted). This procedural violation was corrected on January 3, 2012, when Respondent specifically informed Petitioner of the forbidden telephone calls she had made.

43. Petitioner was afforded the right to appeal the decision.

44. Petitioner appealed the decision and Respondent denied the appeal.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this action. Petitioner timely filed her petition for contested case hearing pursuant to N.C. Gen. Stat. § 150B-23. The parties received proper notice of the hearing in the matter.

2. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law.

3. A court need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, *aff'd*, 335 N.C. 234, 436 S.E.2d 588 (1993).

4. At the time of the termination of her employment, Petitioner was subject to the State Personnel Act in accord with N.C. Gen. Stat. § 126-5. The Petitioner was a "career state employee" as defined by N.C. Gen. Stat. § 126-1.1 and is subject to and governed by the provisions of the State Personnel Act, codified at N.C. Gen. Stat. § 126-1 *et seq*. The Petitioner's claim is that Respondent lacked just cause to dismiss her for one or more alleged acts outlined in her dismissal notification.

5. N.C. Gen. Stat. § 126-35 only permits disciplinary action against career state employees for "just cause." Although "just cause" is not defined in the statute, the words are to be accorded their ordinary meaning. *Amanini v. Dep't of Human Resources*, 114 N.C. App. 668, 443 S.E.2d 114 (1994) (defining "just cause" as, among other things, good or adequate reason).

6. N.C. Gen. Stat. §126-35 states that in contested cases pursuant to Chapter 150B of the General Statutes, the burden of showing that a career employee subject to the State Personnel Act was discharged, suspended, or demoted for just cause rests with the department or agency employer.

7. Administrative regulations provide two grounds for discipline or dismissal based on just cause: unsatisfactory job performance and unacceptable personal conduct. 25 NCAC 1J .0604. Unacceptable personal conduct includes, inter alia, "conduct for which no reasonable person should expect to receive prior warning," "the willful violation of known or written work rules," and "conduct unbecoming a state employee that is detrimental to state service." 25 NCAC 01J .0614. The rule also provides: "Insubordination means the willful failure or refusal to carry out a reasonable order from an authorized supervisor. Insubordination is unacceptable personal conduct for which any level of discipline, including dismissal, may be imposed without prior warning."

8. A single act of unacceptable personal conduct can constitute just cause for any discipline, up to and including dismissal. *Hilliard v. N.C. Dep't of Correction*, 173 N.C. App. at 597, 620 S.E.2d 17 (2005).

9. In determining whether a public employer has just cause to discipline its employees requires two separate inquiries: first, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for the disciplinary action taken. See *Early v. County of Durham Dept. of Social Services*, 172 N.C. App. 344, 616 S.E.2d 553 (2005) (quoting *N.C. Dep't of Env't & Natural Res v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004)).

10. Case law in North Carolina suggests there are two approaches Courts must take when deciding whether employee discipline due to "unacceptable personal conduct" was just. The determining factor of which approach to follow is whether the alleged "unacceptable personal conduct" in which the employee engaged was criminal or non-criminal. *See* In *Warren v. N.C. Dep't of Crime Control & Pub. Safety*, 726 S.E.2d 920, 924.

11. In cases in which a state employee is disciplined for "unacceptable personal conduct" that does not involve criminal conduct, the North Carolina Court of Appeals interpreted the

North Carolina Supreme Court's decision in *Carroll* as adopting a "commensurate discipline" approach. *See Warren v. N.C. Dep't of Crime Control and Pub. Safety*, 726 S.E.2d 920, 924 (N.C. App. 2012). According to *Warren*, "the proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken."

12. On multiple occasions Petitioner was insubordinate by willfully failing and refusing to carry out the reasonable order of her supervisors not to contact agency employees to discuss any business of the Swain County Department of Social Services while she was on investigatory suspension. Petitioner's insubordination constituted unacceptable personal conduct justifying her dismissal, which could be imposed without prior warning.

13. Respondent failed to comply with the procedural requirements for dismissing Petitioner from employment for unacceptable personal conduct by not providing specific written reasons/details of the forbidden telephone conversations. Respondent corrected the violation within six months, and at the hearing.

14. 25 NCAC 01B .0432(b) provides, "[f]ailure to give specific reasons for dismissal, demotion or suspension without pay shall be deemed a procedural violation. Back pay or attorney's fees, or both, may be awarded for such a period of time as the Commission determines, in its discretion, to be appropriate under all the circumstances."

15. Respondent has carried its burden of proof by the greater weight of the evidence that it had just cause to terminate Petitioner's employment.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the undersigned makes the following:

FINAL DECISION

While Petitioner's termination from employment is affirmed, Respondent shall award her six months in back pay ($31,500) and $5,320 for attorney's fees pursuant to 25 NCAC 01B .0432(b) & GS150B-33(11) which is appropriate under all the circumstances of this case.

NOTICE

THIS IS A FINAL DECISION issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statutes Chapter 150B, Article 4, any party wishing to appeal the Final Decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties.

In conformity with the Office of Administrative Hearings' Rules, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision**. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This is the 19th day of December, 2013.

Fred G. Morrison Jr.
Senior Administrative Law Judge