NORTH CAROLINA REGISTER

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NORTH CAROLINA REGISTER
Publication Schedule for January 2014 – December 2014

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

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EXPLANATION OF THE PUBLICATION SCHEDULE

This Publication Schedule is prepared by the Office of Administrative Hearings as a public service and the computation of time periods are not to be deemed binding or controlling. Time is computed according to 26 NCAC 2C .0302 and the Rules of Civil Procedure, Rule 6.

GENERAL

The North Carolina Register shall be published twice a month and contains the following information submitted for publication by a state agency:

(1) temporary rules;
(2) 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.

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NOTICE OF RULE MAKING PROCEEDINGS AND PUBLIC HEARING

NORTH CAROLINA BUILDING CODE COUNCIL

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

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

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

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

Public Hearing: Tuesday, *December 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 January 16, 2015.*

Statement of Subject Matter:

1. Request by Ken Szymanski, representing the Apartment Association of North Carolina, to amend the 2011 NEC, Article 230.2 (B). The proposed amendment is as follows:

230.2 (B) Special Occupancies. By special permission, additional services shall be permitted for ~~either~~ any of the following:
(1) Multiple-occupancy buildings where there is no available space for service equipment accessible to all occupants
(2) A single building or other structure sufficiently large to make two or more services necessary
(3) Multiple service locations are allowed in R-2 four story and less buildings with each service location limited to 6 disconnects and separated by at least 50 feet

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 standardize a common interpretation allowing multiple service locations on R-2 buildings of four stories or less.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with a small decrease in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

2. Request by Amy Musser, representing Vandemusser Design, PLLC, to amend the 2012 NC Energy Conservation Code, Table 405.5.2(1). The proposed amendment is as follows:

TABLE 405.5.2(1)
SPECIFICATIONS FOR THE STANDARD REFERENCE AND PROPOSED DESIGNS
(Air exchange rate and Mechanical ventilation components only)

BUILDING COMPONENT	STANDARD REFERENCE DESIGN	PROPOSED DESIGN
Air exchange rate	~~Specific leakage area (SLA)d = 0.00028 or 5 ACH50.~~ 5 ACH50 The mechanical ventilation rate shall be in addition to the air leakage rate and the same as in the proposed design, but no greater than continuous operation at 0.01 x CFA + 7.5 (N_{br} + 1) where: CFA = conditioned floor area N_{br} = number of bedrooms Energy recovery shall not be assumed for mechanical ventilation.	For residences that are not tested, the same as the standard reference design. For tested residences, the measured air exchange rate. [e] The mechanical ventilation rate shall be in addition to the air leakage rate and shall be as proposed. [f]

Mechanical ventilation	None, except where mechanical ventilation is specified by the proposed design, in which case: Annual vent fan energy use: kWh/yr = 0.03942 x CFA + 29.565 X (N_{br} + 1) where: CFA = conditioned floor area N_{br} = number of bedrooms	As proposed

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – This proposal will prevent homes that meet the Code using Section 405 performance path from being penalized for using whole house ventilation, which is a good building science 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.

3. Request by Larry Gill, representing IPEX USA LLC, to amend the 2012 NC Fuel Gas Code, Section 502.1. The proposed amendment is as follows:

502.1 General. All vents, except as provided in Section 503.7, shall be *listed* and *labeled*. Type B and BW vents shall be tested in accordance with UL 441. Type L vents shall be tested in accordance with UL 641. Vents for Category II, ~~and~~ III and IV appliances shall be tested in accordance with UL 1738. ~~Plastic vents for Category IV appliances shall not be required to be *listed* and *labeled* where such vents are as specified by the *appliance* manufacturer and are installed in accordance with the *appliance* manufacturer's installation instructions.~~

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 acknowledge recent changes to UL 1738 that allow plastic venting materials including PP, PVC and CPVC to be tested and listed to the standard.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with a small increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

4. Request by Gary Phillips, representing VIM Products, to amend the 2012 NC Plumbing Code, Section 417.5.2. The proposed amendment is as follows:

417.5.2.6 Liquid-type, trowel-applied, load-bearing, bonded waterproof materials. Liquid-type, trowel-applied, load-bearing, bonded waterproof materials shall meet the requirements of ANSI A118.10 and shall be applied in accordance with the manufacturer's instructions.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – This proposal is to add the 2012 IPC Section 417.5.2.6 that provides for prescriptive acceptance of liquid-type shower lining material.
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 Jonathan P. Leonard, representing Charlotte Fire Department, to amend the 2012 NC Fire Code, Chapter 2 DEFINITIONS & Section 310. The proposed amendment is as follows:

CHAPTER 2
DEFINITIONS

SMOKING LOUNGE. An enclosed facility in any building or room within a building closed in by a roof and four walls with appropriate openings for ingress and egress, used for the purpose of smoking.

SMOKING. Shall include any of the following: (1) the combustion of any cigar, cigarette, pipe, or any similar article, using any form of tobacco or other combustible substance in any form, or (2) the holding or carrying of a lighted cigar, cigarette, pipe or any other lighted smoking device, or (3) emitting or exhaling the smoke directly from a cigar, cigarette, pipe, hookah pipe or any other lighted smoking device.

310.9 Smoking Lounges shall comply with all of the following:
1. Adequate ventilation is required to prevent the accumulation of carbon monoxide. Locations shall comply with the North Carolina Mechanical Code Table 403.3.

2. A mechanical exhaust hood system shall be installed in preparation areas used for the lighting of coals, charcoal or other cooking mediums.
3. A 2-A: 20-B:C type fire extinguisher shall be installed adjacent to the area where coals are prepared.
4. Coals shall not be lit with portable type flaming devices or torches.
5. Coals removed from the preparation area shall be placed in a ceramic, metal, or other non-combustible container. All devices used to transfer coals to the hookah pipe shall be of non-combustible material. Hookah pipes shall not be moved with burning coal or other lit material in place.
6. Hookah pipes shall be securely fastened in place to prevent overturning.
7. Used coals shall not be discarded in such a manner that could cause ignition of combustible materials. Used coals shall be removed and placed into a sealed metal or ceramic container with a lid.
8. All combustible decorative materials shall be flame resistant, this includes; curtains, tablecloths, upholstery, and materials hung from the ceiling and walls.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – This proposal is due to a recent increased use of hookah pipes in smoking bars and lounges to address proper safety procedures for the handling of pipes and charcoal.
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 Wayne Hamilton, representing the NC Fire Service Code Revision Committee, to amend the 2012 NC Fire Code, Section 605.11. The proposed amendment is as follows:

Add new NC Fire Code section as follows:

605.11 Solar photovoltaic power systems. Solar photovoltaic power systems shall be installed in accordance with Sections 605.11.1 through 605.11.2, the *International Building Code* and NFPA 70.

605.11.1 Access and pathways. Roof access, pathways, and spacing requirements shall be provided in accordance with Sections 605.11.1.1 through 605.11.1.3.3.

Exceptions:
1. Detached, non-habitable Group U structures including, but not limited to, parking shade structures, carports, solar trellises, and similar structures.
2. Roof access, pathways and spacing requirements need not be provided where the fire chief has determined that rooftop operations will not be employed.

605.11.1.1 Roof access points. Roof access points shall be located in areas that do not require the placement of ground ladders over openings such as windows or doors, and located at strong points of building construction in locations where the access point does not conflict with overhead obstructions such as tree limbs, wires or signs.

605.11.1.2 Solar photovoltaic systems for Group R-3 buildings. Solar photovoltaic systems for Group R-3 buildings shall comply with Sections 605.11.1.2.1 through 605.11.1.2.5.
Exception: These requirements shall not apply to one and two family dwelling and townhomes.

605.11.1.2.1 Size of solar photovoltaic array. Each photovoltaic array shall be limited to 150 feet (45 720 mm) by 150 feet (45 720 mm). Multiple arrays shall be separated by a 3-foot-wide (914 mm) clear access pathway.

605.11.1.2.2 Hip roof layouts. Panels and modules installed on Group R-3 buildings with hip roof layouts shall be located in a manner that provides a 3-foot-wide (914 mm) clear access pathway from the eave to the ridge on each roof slope where panels and modules are located. The access pathway shall be at a location on the building capable of supporting the fire fighters accessing the roof.
Exception: These requirements shall not apply to roofs with slopes of two units vertical in 12 units horizontal (2:12) or less.

605.11.1.2.3 Single-ridge roofs. Panels and modules installed on Group R-3 buildings with a single ridge shall be located in a manner that provides two, 3-foot-wide (914 mm) access pathways from the eave to the ridge on each roof slope where panels and modules are located.
Exception: This requirement shall not apply to roofs with slopes of two units vertical in 12 units horizontal (2:12) or less.

605.11.1.2.4 Roofs with hips and valleys. Panels and modules installed on Group R-3 buildings with roof hips and valleys shall not be located closer than 18 inches (457 mm) to a hip or a valley where panels/modules are to be placed on both sides of a hip or valley. Where panels are to be located on only one side of a hip or valley that is of equal length, the panels shall be permitted to be placed directly adjacent to the hip or valley.
Exception: These requirements shall not apply to roofs with slopes of two units vertical in 12 units horizontal (2:12) or less.

605.11.1.2.5 Allowance for smoke ventilation operations. Panels and modules installed on Group R-3 buildings shall be located not less than 3 feet (914 mm) from the ridge in order to allow for fire department smoke ventilation operations.
Exception: Panels and modules shall be permitted to be located up to the roof ridge where an alternative ventilation method *approved* by the fire chief has been provided or where the fire chief has determined vertical ventilation techniques will not be employed.

605.11.1.3 Other than Group R-3 buildings. Access to systems for buildings, other than those containing Group R-3 occupancies, shall be provided in accordance with Sections 605.11.1.3.1 through 605.11.1.3.3.
Exception: Where it is determined by the fire code official that the roof configuration is similar to that of a Group R-3 occupancy, the residential access and ventilation requirements in Sections 605.11.1.2.1 through 605.11.1.2.5 shall be permitted to be used.

605.11.1.3.1 Access. There shall be a minimum 6 foot-wide (1829 mm) clear perimeter around the edges of the roof.
Exception: Where either axis of the building is 250 feet (76 200 mm) or less, the clear perimeter around the edges of the roof shall be permitted to be reduced to a minimum 4 foot wide (1290 mm).

605.11.1.3.2 Pathways. The solar installation shall be designed to provide designated pathways. The pathways shall meet the following requirements:
1. The pathway shall be over areas capable of supporting fire fighters accessing the roof.
2. The centerline axis pathways shall be provided in both axes of the roof. Centerline axis pathways shall run where the roof structure is capable of supporting fire fighters accessing the roof.
3. Pathways shall be a straight line not less than 4 feet (1290 mm) clear to roof standpipes or ventilation hatches.
4. Pathways shall provide not less than 4 feet (1290 mm) clear around roof access hatch with not less than one singular pathway not less than 4 feet (1290 mm) clear to a parapet or roof edge.

605.11.1.3.3 Smoke ventilation. The solar installation shall be designed to meet the following requirements:
1. Arrays shall not be greater than 150 feet (45 720 mm) by 150 feet (45 720 mm) in distance in either axis in order to create opportunities for fire department smoke ventilation operations.
2. Smoke ventilation options between array sections shall be one of the following:
2.1 A pathway 8 feet (2438 mm) or greater in width.
2.2 A 4-foot (1290 mm) or greater in width pathway and bordering roof skylights or gravity-operated dropout smoke and heat vents on not less than one side.
2.3 A 4-foot (1290 mm) or greater in width pathway and bordering all sides of non-gravity-operated dropout smoke and heat vents.
2.4 A 4-foot (1290 mm) or greater in width pathway and bordering 4-foot by 8-foot (1290 mm by 2438 mm) "venting cutouts" every 20 feet (6096 mm) on alternating sides of the pathway.

605.11.2 Ground-mounted photovoltaic arrays. Ground-mounted photovoltaic arrays shall comply with Section 605.11 and this section. Setback requirements shall not apply to ground-mounted, free-standing photovoltaic arrays. A clear, brush-free area of 10 feet (3048 mm) shall be required for ground-mounted photovoltaic arrays.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is March 1, 2015.
Reason Given – This proposal from the 2015 IFC Section 605.11 addresses the placement, proper installation and potential hazards of PV arrays installed on building roofs.
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 Michael Rettie, representing the Orange County Inspections Department, to amend the 2012 NC Residential Code, Section R302.6, TABLE R302.6, & the NC Mechanical Code, Section 603.7. The proposed amendment is as follows:

R302.6 Dwelling and finished habitable space /garage fire separation. The garage shall be separated as required by TABLE R302.6. Openings in garage walls shall comply with Section R302.5. This provision does not apply to garage walls that are perpendicular to the adjacent *dwelling unit* wall.

TABLE R302.6

FINISHED HABITABLE, DWELLING/GARAGE SEPARATION

SEPARATION	MATERIAL
From the residence and attics	Not less than ½-inch gypsum board or equivalent applied to the garage side
From all habitable rooms above the garage	Not less than 5/8-inch Type X gypsum board or equivalent
Structure(s) supporting floor/ceiling assemblies used for separation required by this section	Not less than ½-inch gypsum board or equivalent
Garages located less than 3 feet from a dwelling unit on the same lot	Not less than ½-inch gypsum board or equivalent applied to the interior side of exterior walls that are within this area

603.7 Rigid duct penetrations. Ducts in a private garage and ducts penetrating the walls or ceilings separating a *dwelling* unit or finished habitable space from a private garage shall be continuous and constructed of a minimum 26 gage [0.0187 inch (0.4712 mm)] galvanized sheet metal or other approved noncombustible material and shall not have openings into the garage…

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 require separation for finished habitable spaces in detached garages. These spaces are often used as playrooms, offices, "man-caves", "bonus rooms" and bedrooms.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with a small increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

8. Request by David Smith, representing the NC Residential Ad-hoc Committee, to amend the 2012 NC Residential Code, Section R311.7.1. The proposed amendment is as follows:

R311.7.1 Width. Stairways shall not be less than 36 inches (914 mm) in clear width at all points above the permitted handrail height and below the required headroom height. Handrails shall not project more than 4.5 inches (114 mm) on either side of the stairway and the minimum clear width of the stairway at and below the handrail height, including treads and landings, shall not be less than 31½ inches (787 mm) where a handrail is installed on one side and 27 inches (698 mm) where handrails are provided on both sides.
Exceptions:
1. The width of spiral stairways shall be in accordance with Section R311.7.9.1.
2. Stairways not required for egress may be as narrow as 26 inches.

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 allows for stairways that are not required for egress to be as narrow as 26 inches to be consistent with the 2015 NC Existing Building 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.

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

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

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

TITLE 04 – DEPARTMENT OF COMMERCE

Notice *is hereby given in accordance with G.S. 150B-21.2 that the NC Industrial Commission intends to adopt the rules cited as 04 NCAC 10J .0102, .0103 and amend the rules cited as 04 NCAC 10J .0101, .0102.*

Link to agency website pursuant to G.S. 150B-19.1(c): *http://www.ic.nc.gov/ProposedNCICMedicalFeeScheduleRules.html*

Proposed Effective Date: *April 1, 2015 – 04 NCAC 10J .0101, .0102, .0103; and July 1, 2015 – 04 NCAC 10J .0102*

Public Hearing:
Date: *December 17, 2014*
Time: *2:00 p.m.*
Location: *Dobbs Building, Room 2173, 430 N. Salisbury Street, Raleigh, NC 27603*

Reason for Proposed Action: *The Industrial Commission has proposed these four rules to fulfill its statutory duty to periodically review the schedule of fees charged for medical treatment in workers' compensation cases and to make revisions if necessary. The revisions reflected in the proposed rules are intended to ensure that injured workers are provided the standard of services and care intended by the Workers' Compensation Act, that health care providers receive reasonable reimbursement for services, and that medical costs are adequately contained. The Industrial Commission was directed in S.L. 2013-410, s. 33.(a) to base its physician and hospital fee schedules on "the applicable Medicare payment methodologies." The proposed rules are intended to carry out this legislative mandate. There are two versions of Rule 04 NCAC 10J .0102 in order to move the physician and hospital fee schedules out of Rule 04 NCAC 10J .0101 and keep the current physician fee schedule in place until July 1, 2015. The April 1, 2015 version of Rule 04 NCAC 10J .0102 is essentially Paragraphs (b) and (c) of the current Rule 04 NCAC 10J .0101. As required by G.S. 97-26(b), the following is a summary of the data and information sources reviewed by the Commission in determining the applicable fee schedule rates for hospitals and ambulatory surgery centers. Rates were calculated to fall in the estimated median range of workers' compensation fee schedules nationally, based on data available from the following studies and data sources:*
(1) NORTH CAROLINA WORKERS COMPENSATION INSURANCE: A WHITE PAPER REVIEWING MEDICAL COSTS AND MEDICAL FEE REGULATIONS, prepared for the National Foundation for Unemployment Compensation and Workers' Compensation; prepared by Philip S. Borba, Ph.D. and Robert K. Briscoe, WCP, Milliman, Inc.; May 23, 2013.
(2) CompScope Medical Benchmarks, 15th Edition, for North Carolina, published by the Workers' Compensation Research Institute, August 2014.
(3) North Carolina Hospital Association/Optum Group Health survey data, June 2013 and July 2014.
(4) Review of states' fee schedule structures, nationally and regionally.

Comments may be submitted to: *Meredith Henderson, 4333 Mail Service Center, Raleigh, NC 27699-4333; phone (919) 807-2575; fax (919) 715-0282; email meredith.henderson@ic.nc.gov*

Comment period ends: *January 16, 2015*

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**

*****These rules were exempted from the fiscal note requirement of G.S. 150B-21.4 in S.L. 2013-410, s. 33.(a)(3).**

CHAPTER 10 – INDUSTRIAL COMMISSION

SUBCHAPTER 10J – FEES FOR MEDICAL COMPENSATION

SECTION .0100 – FEES FOR MEDICAL COMPENSATION

04 NCAC 10J .0101 GENERAL PROVISIONS

(a) ~~The Commission adopted and published a Medical Fee Schedule, pursuant to the provisions of G.S. 97-26(a), setting maximum amounts, except for hospital fees pursuant to G.S. 97-26(b), that may be paid for medical, surgical, nursing, dental, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.~~ Pursuant to G.S. 97-26, the Commission adopts a Medical Fee Schedule composed of maximum amounts, reimbursement rates, and payment guidelines. The amounts and reimbursement rates prescribed in the applicable published Medical Fee Schedule shall govern and apply according to G.S. 97-26(c). The Medical Fee Schedule is available on the Commission's website at http://www.ic.nc.gov/ncic/pages/feesched.asp and in hardcopy at the offices of the Commission as set forth in 04 NCAC 10A .0101.

~~(b) The Commission's Medical Fee Schedule contains maximum allowed amounts for medical services provided pursuant to Chapter 97 of the General Statutes. The Medical Fee Schedule utilizes 1995 through the present, Current Procedural Terminology (CPT) codes adopted by the American Medical Association, Healthcare Common Procedure Coding Systems (HCPCS) codes, and jurisdiction specific codes. A listing of the maximum allowable amount for each code is available on the Commission's website at http://www.ic.nc.gov/ncic/pages/feesched.asp and in hardcopy at the offices of the Commission as set forth in 04 NCAC 10A .0101.~~

~~(c) The following methodology provides the basis for the Commission's Medical Fee Schedule:~~

~~(1) CPT codes for General Medicine are based on 1995 North Carolina Medicare values multiplied by 1.58, except for CPT codes 99201 99205 and 99211 99215, which are based on 1995 Medicare values multiplied by 2.05.~~

~~(2) CPT codes for Physical Medicine are based on 1995 North Carolina Medicare values multiplied by 1.36.~~

~~(3) CPT codes for Radiology are based on 1995 North Carolina Medicare values multiplied by 1.96.~~

~~(4) CPT codes for Surgery are based on 1995 North Carolina Medicare values multiplied by 2.06.~~

~~(d) The Commission's Hospital Fee Schedule, adopted pursuant to G.S. 97-26(b), provides for payment as follows:~~

~~(1) Inpatient hospital fees: Inpatient services are reimbursed based on a Diagnostic Related Groupings (DRG) methodology. The Hospital Fee Schedule utilizes the 2001 Diagnostic Related Groupings adopted by the State Health Plan. Each DRG amount is based on the amount that the State Health Plan had in effect for the same DRG on June 30, 2001.~~

~~DRG amounts are further subject to the following payment band that establishes maximum and minimum payment amounts:~~

~~(A) The maximum payment is 100 percent of the hospital's itemized charges.~~

~~(B) For hospitals other than critical access hospitals, the minimum payment is 75 percent of the hospital's itemized charges. Effective February 1, 2013, the minimum payment rate is the amount provided for under Subparagraph (5) below, subject to adjustment on April 1, 2013 as provided therein.~~

~~(C) For critical access hospitals, the minimum payment is 77.07 percent of the hospital's itemized charges. Effective February 1, 2013, the minimum payment rate is the amount provided for under Subparagraph (5) below, subject to adjustment on April 1, 2013 as provided therein.~~

~~(2) Outpatient hospital fees: Outpatient services are reimbursed based on the hospital's actual charges as billed on the UB-04 claim form, subject to the following percentage discounts:~~

~~(A) For hospitals other than critical access hospitals, the payment shall be 79 percent of the hospital's billed charges. Effective February 1, 2013, the payment is the amount provided for under Subparagraph (5) below, subject to adjustment on April 1, 2013 as provided therein.~~

~~(B) For critical access hospitals, the payment shall be 87 percent of the hospital's billed charges. For purposes of the hospital fee schedule, critical access hospitals are those hospitals designated as such pursuant to federal law (42 CFR 485.601 et seq.). Effective February 1, 2013, the critical access hospital's payment is the amount provided for under Subparagraph (5) below, subject to adjustment on April 1, 2013 as provided therein.~~

~~(3) Ambulatory surgery fees: Ambulatory surgery center services are reimbursed at 79 percent of billed charges. Effective February 1, 2013, the ambulatory surgery center services are reimbursed at the amount provided for under Subparagraph (5) below, subject to adjustment on April 1, 2013 as provided therein.~~

~~(4) Other rates: If a provider has agreed under contract with the insurer or managed care organization to accept a different amount or reimbursement methodology, that amount or methodology establishes the applicable fee.~~

~~(5) Payment levels frozen and reduced pending study of new fee schedule: Effective February 1, 2013, inpatient and outpatient payments for each hospital and the payments for each ambulatory surgery center shall be set at the payment rates in effect for those facilities as of June 30, 2012. Effective April 1, 2013, those rates shall then be reduced as follows:~~

~~(A) Hospital outpatient and ambulatory surgery: The rate in effect as of that date shall be reduced by 15 percent.~~

~~(B) Hospital inpatient: The minimum payment rate in effect as of that date shall be reduced by 10 percent.~~

~~(6) Effective April 1, 2013, implants shall be paid at no greater than invoice cost plus 28 percent.~~

~~(e)~~(b) Insurers and managed care organizations, or administrators on their behalf, may review and reimburse charges for all medical compensation, including medical, hospital, and dental fees, without submitting the charges to the Commission for review and approval.

~~(f)~~(c) A provider of medical compensation shall submit its ~~statement~~ bill for services within 75 days of the rendition of the service, or if treatment is longer, within 30 days after the end of the month during which multiple treatments were provided. However, in cases where liability is initially denied but subsequently admitted or determined by the Commission, the time for submission of medical bills shall run from the time the health care provider received notice of the admission or determination of liability. Within 30 days of receipt of the ~~statement,~~ bill, the employer, carrier, or managed care organization, or administrator on its behalf, shall pay ~~or submit the statement to the Commission for approval~~ the bill or send the provider written objections to the ~~statement.~~ bill. If an employer, carrier, administrator, or managed care organization disputes a portion of the provider's bill, the employer, carrier, administrator, or managed care organization, shall pay the uncontested portion of the bill and shall resolve disputes regarding the balance of the charges through its contractual arrangement or through the Commission.

~~(g)~~(d) Pursuant to G.S. 97-18(i), when the 10 percent addition to the bill is uncontested, payment shall be made to the provider without notifying or seeking approval from the Commission. When the 10 percent addition to the bill is contested, any party may request a hearing by the Commission pursuant to G.S. 97-83 and G.S. 97-84.

~~(h)~~(e) When the responsible party seeks an audit of hospital charges, and has paid the hospital charges in full, the payee hospital, upon request, shall provide reasonable access and copies of appropriate records, without charge or fee, to the person(s) chosen by the payor to review and audit the records.

~~(i)~~(f) The responsible employer, carrier, managed care organization, or administrator shall pay the ~~statements~~ bills of medical compensation providers to whom the employee has been referred by the treating physician authorized by the insurance carrier for the compensable injury or body part, unless the physician has been requested to obtain authorization for referrals or tests; provided that compliance with the request shall not unreasonably delay the treatment or service to be rendered to the employee.

~~(j)~~(g) Employees are entitled to reimbursement for sick travel when the travel is medically necessary and the mileage is 20 or more miles, round trip, at the business standard mileage rate set by the Internal Revenue Service per mile of travel and the actual cost of tolls paid. Employees are entitled to lodging and meal expenses, at a rate to be established for state employees by the North Carolina Director of Budget, when it is medically necessary that the employee stay overnight at a location away from the employee's usual place of residence. Employees are entitled to reimbursement for the costs of parking or a vehicle for hire, when the costs are medically necessary, at the actual costs of the expenses.

~~(k)~~(h) Any employer, carrier or administrator denying a claim in which medical care has previously been authorized is responsible for all costs incurred prior to the date notice of denial is provided to each health care provider to whom authorization has been previously given.

Authority G.S. 97-18(i); 97-25; 97-25.6; 97-26; 97-80(a); 138-6; S.L. 2013-410.

04 NCAC 10J .0102 FEES FOR PROFESSIONAL SERVICES (Proposed Eff. APRIL 1, 2015)

(a) The Commission's Medical Fee Schedule contains maximum allowed amounts for professional medical services provided pursuant to Chapter 97 of the General Statutes. The Medical Fee Schedule utilizes 1995 through the present, Current Procedural Terminology ("CPT") codes adopted by the American Medical Association, Healthcare Common Procedure Coding Systems ("HCPCS") codes, and jurisdiction-specific codes. A listing of the maximum allowable amount for each code is available in the Medical Fee Schedule on the Commission's website at http://www.ic.nc.gov/ncic/pages/feesched.asp and in hardcopy at the offices of the Commission as set forth in 04 NCAC 10A .0101.

(b) The following methodology provides the basis for the Commission's Medical Fee Schedule:

(1) CPT codes for General Medicine are based on 1995 North Carolina Medicare values multiplied by 1.58, except for CPT codes 99201-99205 and 99211-99215, which are based on 1995 Medicare values multiplied by 2.05.

(2) CPT codes for Physical Medicine are based on 1995 North Carolina Medicare values multiplied by 1.36.

(3) CPT codes for Radiology are based on 1995 North Carolina Medicare values multiplied by 1.96.

(4) CPT codes for Surgery are based on 1995 North Carolina Medicare values multiplied by 2.06.

Authority G.S. 97-25; 97-26; 97-80(a).

04 NCAC 10J .0102 FEES FOR PROFESSIONAL SERVICES (Proposed Eff. JULY 1, 2015)

~~(a) The Commission's Medical Fee Schedule contains maximum allowed amounts for medical services provided pursuant to Chapter 97 of the General Statutes. The Medical Fee Schedule utilizes 1995 through the present, Current Procedural Terminology (CPT) codes adopted by the American Medical Association, Healthcare Common Procedure Coding Systems (HCPCS) codes, and jurisdiction specific codes. A listing of the maximum allowable amount for each code is available on the Commission's website at http://www.ic.nc.gov/ncic/pages/feesched.asp and in hardcopy at the offices of the Commission as set forth in 04 NCAC 10A .0101.~~

~~(b) The following methodology provides the basis for the Commission's Medical Fee Schedule:~~

~~(1) CPT codes for General Medicine are based on 1995 North Carolina Medicare values multiplied by 1.58, except for CPT codes 99201 99205 and 99211 99215, which are based on 1995 Medicare values multiplied by 2.05.~~

~~(2) CPT codes for Physical Medicine are based on 1995 North Carolina Medicare values multiplied by 1.36.~~

~~(3) CPT codes for Radiology are based on 1995 North Carolina Medicare values multiplied by 1.96.~~

~~(4) CPT codes for Surgery are based on 1995 North Carolina Medicare values multiplied by 2.06.~~

(a) Except where otherwise provided, maximum allowable amounts payable to health care providers for professional services are based on the current year's Medicare Part B Fee Schedule for North Carolina as published by the Centers for Medicare & Medicaid Services ("CMS") ("the Medicare base amount"), including subsequent versions and editions.

(b) The schedule of maximum reimbursement rates for professional services is as follows:

(1) Evaluation & management services are 140 percent of the Medicare base amount;

(2) Physical medicine services are 140 percent of the Medicare base amount;

(3) Emergency medicine services are 169 percent of the Medicare base amount;

(4) Neurology services are 153 percent of the Medicare base amount;

(5) Pain management services are 163 percent of the Medicare base amount;

(6) Radiology services are 195 percent of the Medicare base amount;

(7) Major surgery services are 195 percent of the Medicare base amount;

(8) All other professional services are 150 percent of the Medicare base amount.

(c) Anesthesia services shall be paid at no more than the following rates:

(1) When provided by an anesthesiologist, the allowable amount is three dollars and eighty-eight cents ($3.88) per minute up to and including 60 minutes, and two dollars and five cents ($2.05) per minute beyond 60 minutes.

(2) When provided by a certified registered nurse anesthetist, the allowable amount is two dollars and fifty-five cents ($2.55) per minute up to and including 60 minutes, and one dollar and fifty-five cents ($1.55) per minute beyond 60 minutes.

(d) The maximum allowable amount for an assistant at surgery is 20 percent of the amount payable for the surgical procedure.

(e) Using the Medicare base amounts and maximum reimbursement rates in the Paragraphs above, the Commission will publish annually an official Professional Fee Schedule Table listing allowable amounts for individual professional services in accordance with this fee schedule. The Professional Fee Schedule Table, including all subsequent versions and editions, is incorporated by reference. The allowable amounts contained in the Professional Fee Schedule Table will take effect January 1 of each year. The Professional Fee Schedule Table is available on the Commission's website at http://www.ic.nc.gov/ncic/pages/feesched.asp and in hardcopy at the offices of the Commission as set forth in Rule 04 NCAC 10A .0101.

(f) Maximum allowable amounts for durable medical equipment and supplies ("DME") provided in the context of professional services are 100 percent of those rates established for North Carolina in the Durable Medical Equipment, Prosthetics, Orthotics, and Supplies ("DMEPOS") Fee Schedule published by CMS. The Commission will publish once annually to its website an official DME Fee Schedule Table listing allowable amounts for individual items and services in accordance with this fee schedule. The DME Fee Schedule Table, including all subsequent versions and editions, is incorporated by reference. The allowable amounts contained in the DME Fee Schedule Table will take effect January 1 of each year. The DME Fee Schedule Table is available on the Commission's website at http://www.ic.nc.gov/ncic/pages/feesched.asp and in hardcopy at the offices of the Commission as set forth in Rule 04 NCAC 10A .0101.

(g) Maximum allowable amounts for clinical laboratory services are 150 percent of those rates established for North Carolina in the Clinical Diagnostic Laboratory Fee Schedule published by CMS. The Commission will publish once annually to its website an official Clinical Laboratory Fee Schedule Table listing allowable amounts for individual items and services in accordance with this fee schedule. The Clinical Laboratory Fee Schedule Table, including all subsequent versions and editions, is incorporated by reference. The allowable amounts contained in the Clinical Laboratory Fee Schedule Table will take effect January 1 of each year. The Clinical Laboratory Fee Schedule Table is available on the Commission's website at http://www.ic.nc.gov/ncic/pages/feesched.asp and in hardcopy at the offices of the Commission as set forth in Rule 04 NCAC 10A .0101.

(h) The following licensed health care providers may provide professional services in workers' compensation cases subject to

physician supervision and other scope of practice requirements and limitations under North Carolina law:

(1) Certified registered nurse anesthetists;
(2) Anesthesiologist assistants;
(3) Nurse practitioners;
(4) Physician assistants;
(5) Certified nurse midwives;
(6) Clinical nurse specialists.

Services rendered by these providers are subject to the schedule of maximum fees for professional services as provided in this Rule.

Authority G.S. 97-25; 97-26; 97-80(a); S.L. 2013-410.

04 NCAC 10J .0103 FEES FOR INSTITUTIONAL SERVICES

(a) Except where otherwise provided, maximum allowable amounts for inpatient and outpatient institutional services are based on the current federal fiscal year's facility-specific Medicare rate established for each institutional facility by the Centers for Medicare & Medicaid Services ("CMS"). "Facility-specific" rate means the all inclusive amount for a claims payment that Medicare would make, but excludes pass-through payments.

(b) The schedule of maximum reimbursement rates for hospital inpatient institutional services is as follows:

(1) Beginning April 1, 2015, 190 percent of the hospital's Medicare facility-specific amount;
(2) Beginning January 1, 2016, 180 percent of the hospital's Medicare facility-specific amount;
(3) Beginning January 1, 2017, 160 percent of the hospital's Medicare facility-specific amount.

(c) The schedule of maximum reimbursement rates for hospital outpatient institutional services is as follows:

(1) Beginning April 1, 2015, 220 percent of the hospital's Medicare facility-specific amount;
(2) Beginning January 1, 2016, 210 percent of the hospital's Medicare facility-specific amount;
(3) Beginning January 1, 2017, 200 percent of the hospital's Medicare facility-specific amount.

(d) Notwithstanding the Paragraphs (a) through (c) of this Rule, maximum allowable amounts for institutional services provided by critical access hospitals ("CAH"), as defined by the CMS, are based on the Medicare inpatient per diem rates and outpatient claims payment amounts allowed by CMS for each CAH facility.

(e) The schedule of maximum reimbursement rates for inpatient institutional services provided by CAHs is as follows:

(1) Beginning April 1, 2015, 200 percent of the hospital's Medicare CAH per diem amount;
(2) Beginning January 1, 2016, 190 percent of the hospital's Medicare CAH per diem amount;
(3) Beginning January 1, 2017, 170 percent of the hospital's Medicare CAH per diem amount.

(f) The schedule of maximum reimbursement rates for outpatient institutional services provided by CAHs is as follows:

(1) Beginning April 1, 2015, 230 percent of the hospital's Medicare CAH claims payment amount;
(2) Beginning January 1, 2016, 220 percent of the hospital's Medicare CAH claims payment amount;
(3) Beginning January 1, 2017, 210 percent of the hospital's Medicare CAH claims payment amount.

(g) Notwithstanding Paragraphs (a) through (f) of this Rule, the maximum allowable amounts for institutional services provided by ambulatory surgical centers ("ASC") are based on the Medicare ASC reimbursement amount determined by applying the most recently adopted and effective Medicare Payment System Policies for Services Furnished in Ambulatory Surgical Centers and Outpatient Prospective Payment System reimbursement formula and factors as published annually in the Federal Register ("the Medicare ASC facility-specific amount"). Reimbursement shall be based on the fully implemented payment amount as in Addendum AA, Final ASC Covered Surgical Procedures for CY 2014 and Addendum BB Final ASC Covered Ancillary Services Integral to Covered Surgical Procedures for 2014, published in the December 10, 2013 publication of the Federal Register, or its successor.

(h) The schedule of maximum reimbursement rates for institutional services provided by ambulatory surgical centers is as follows:

(1) Beginning April 1, 2015, 220 percent of the Medicare ASC facility-specific amount;
(2) Beginning January 1, 2016, 210 percent of the Medicare ASC facility-specific amount;
(3) Beginning January 1, 2017, 200 percent of the Medicare ASC facility-specific amount.

(i) If the facility-specific Medicare payment includes an outlier payment, the sum of the facility-specific reimbursement amount and the applicable outlier payment amount shall be multiplied by the applicable percentages set out in Paragraphs (b), (c), (e), (f), and (h) of this Rule.

(j) Charges for professional services provided at an institutional facility shall be paid pursuant to the applicable fee schedules in Rule .0102 of this Section.

(k) If the billed charges are less than the maximum allowable amount for a Diagnostic Related Grouping ("DRG") payment pursuant to the fee schedule provisions of this Rule, the insurer or managed care organization shall pay no more than the billed charges.

(l) For specialty facilities paid outside Medicare's inpatient and outpatient Prospective Payment System, the payment shall be determined using Medicare's payment methodology for those specialized facilities multiplied by the inpatient institutional acute care percentages set out in Paragraphs (b) and (c) of this Rule.

Authority G.S. 97-25; 97-26; 97-80(a); S.L. 2013-410.

TITLE 13 – DEPARTMENT OF LABOR

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Department of Labor intends to amend the rules cited as 13 NCAC 13 .0101, .0203, .0205, .0210, .0213, .0303, 13 NCAC 15 .0307, and repeal the rule cited as 13 NCAC 07F .0206.*

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.nclabor.com/*

Proposed Effective Date: *March 1, 2015*

Public Hearing:
Date: *December 2, 2014*
Time: *10:00 a.m.*
Location: *North Carolina Department of Labor, 4 West Edenton St, Raleigh, NC 27601*

Reason for Proposed Action:
13 NCAC 13 .0101 *- Amend Item (45) to clarify that " Shop Inspections" includes nuclear shops where fabrication or material supply is done by the holder of an ASME N type certificate.*
13 NCAC 13 .0203, .0205, .0210, .0212, and .0303 *- The North Carolina Department of Labor's Boiler and Pressure Vessel Bureau is a fully receipt supported Bureau. Fees associated with inspections of boilers and pressure vessels have not changed since 2006, however, operating costs have increased since that time. A modest increase in these fees is now necessary to sustain operations and help achieve a balanced budget while continuing to perform statutory duties.*
13 NCAC 15 .0307 *- The North Carolina Department of Labor's Elevator and Amusement Device Division inspects approximately 24,000 elevators and escalators per year. Of that total, a significant number are cited for non-compliance issues that have no bearing on or do not compromise the safety of the general public. The current rule requiring re-inspection is an inefficient use of Elevator and Amusement Devise bureau personnel and resources. The proposed rule amendment eliminates the requirement for re-inspection of devices that are cited for non-compliance issues that have no bearing on or do not compromise the safety of the general public. It establishes a process for the owner of a regulated device to notify the Elevator and Amusement Device bureau that non-compliance has been corrected. The change also establishes payment of a follow-up inspection fee if the owner fails to provide notice of abatement and a follow-up inspection is required to determine status of abatement.*
13 NCAC 07F .0206 *- Amendments to Federal Code 29 CFR 1926 (c)(1)(i), recently adopted verbatim by the North Carolina Department of Labor, are more stringent than the administrative rule. Therefore the administrative rule is unnecessary and should be repealed.*

Comments may be submitted to: *Karissa Sluss, NC Department of Labor, 1101 Mail Service Center, Raleigh, NC 27699-1101; phone (919) 733-7885; fax (919) 733-4235; email karissa.sluss@labor.nc.gov.*

Comment period ends: *January 16, 2015*

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

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

CHAPTER 07 – OFFICE OF OCCUPATIONAL SAFETY AND HEALTH

SUBCHAPTER 07F - STANDARDS

SECTION .0200 – CONSTRUCTION STANDARDS

13 NCAC 07F .0206 POWER TRANSMISSION AND DISTRIBUTION

~~Subpart V Power Transmission and Distribution 1926.950(c)(1)(i) is rewritten to read as follows: "(i) The employee is insulated or guarded from the energized part (insulating gloves or insulating gloves with sleeves rated for the voltage involved shall be considered insulation of the employee only with regard to the energized part upon which work is being performed), or"~~

Authority G.S. 95-131; 150B-21.6.

CHAPTER 13 - BOILER AND PRESSURE VESSEL

SECTION .0100 - DEFINITIONS

13 NCAC 13 .0101 DEFINITIONS

The following definitions apply throughout the rules in this Chapter and shall be construed as controlling in case of any conflict with the definitions contained in ANSI/NB-23 National Board Inspection Code Parts 2 and 3, The American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code, or The North Carolina State Building Code:

(1) "Accepted Design and Construction Code" means the Boiler and Pressure Vessel Code of the American Society of Mechanical

Engineers (ASME Code), or a comparable code with standards that the Chief Inspector determines to be as safe as the ASME Code.

(2) "Appurtenance" means any control, fitting, appliance or device attached to or working in conjunction with the boiler proper or pressure vessel.

(3) "ASME Code" means the Boiler and Pressure Vessel Code of the American Society of Mechanical Engineers.

(4) "Audit" means activities, other than those identified as certificate inspections, conducted by the Chief Inspector or his designee. These activities include, in part:

(a) reviews and surveys for ASME and National Board stamp issuance and renewal;

(b) audits conducted on an authorized inspector at the location of a manufacturer or repair organization as may be required by the ASME Code, National Board Inspection Code, or National Board Rules for Commissioned Inspectors; and

(c) audits pursuant to evaluation for the issuance of North Carolina Specials.

(5) "Automatically fired boiler" means a boiler that cycles automatically in response to a control system and which does not require a constant attendant for the purpose of introducing fuel into the combustion chamber or to control electrical input.

(6) "Authorized Inspection Agency" means an organization employing commissioned inspectors including the following:

(a) the Department of Labor, Boiler Safety Bureau;

(b) an inspection agency of an insurance company licensed to write boiler and pressure vessel insurance; or

(c) an owner-user inspection agency that meets the requirements of G.S. 95-69.15.

(7) "Authorized inspector" means an employee of an Authorized Inspection Agency who is commissioned by the National Board and this State, holds an appropriate endorsement on his/her National Board Commission, and inspects as the third party inspector in ASME Code manufacturing facilities.

(8) "Boiler," as defined in G.S. 95-69.9(b), includes the following types of boilers:

(a) "Exhibition boiler" means a historical or antique boiler which generates steam or hot water for the purposes of entertaining or educating the public or is used for demonstrations, tourist travel or exhibitions. This term includes steam tractors, threshers, steam powered sawmills, and similar usages;

(b) "High pressure boiler" means a boiler in which steam or other vapor is generated at a pressure of more than 15 psig, or water is heated to a temperature greater than 250°F and a pressure greater than 160 psig for use external to itself. High pressure boilers include the following:

(i) Electric boilers;

(ii) Miniature boilers;

(iii) High temperature water boilers; and

(iv) High temperature liquid boilers (other than water).

(c) "Low pressure boiler" means a boiler in which steam or other vapor is generated at a pressure of not more than 15 psig, or water is heated to a temperature not greater than 250°F and a pressure not greater than 160 psig, including the following:

(i) "Hot water heating boiler" means a low pressure boiler that supplies heated water that is returned to the boiler from a piping system and is used normally for building heat applications (hydronic boiler);

(ii) "Hot water supply boiler" means a low pressure boiler that furnishes hot water to be used externally to itself (domestic water boiler); and

(iii) "Steam heating boiler" means a low pressure boiler that generates steam to be used normally for building heat applications.

(d) "Model hobby boiler" means a boiler which generates steam, whether stationary or mobile, where the boiler does not exceed 20 square feet heating surface, a shell diameter of 16 inches, a volume of 5 cubic feet and a pressure not exceeding 150 psig and is used for the purpose of entertainment or exhibiting steam technology; and

(e) "Water heater" means a closed vessel in which water is heated by the combustion of fuel, by electricity, or by any other source and withdrawn for potable use external to the system at pressures not exceeding 160 psig and temperatures not exceeding 210°F.

(9) "Boiler blowoff" means that system associated with the rapid draining of boiler water to remove concentrated solids which have accumulated as a natural result of steam generation. This term also applies to the blowoff for other boiler appurtenances, such as the low-water fuel cutoff.

(10) "Boiler proper" or "pressure vessel" means the internal mechanism, shell, and heads of a boiler or pressure vessel terminating at:
- (a) the first circumferential joint for welded end connections;
- (b) the face of the first flange in bolted flange connections; or
- (c) the first threaded joint in threaded connections.

(11) "Bureau" means the Boiler Safety Bureau of the North Carolina Department of Labor.

(12) "Certificate inspection" means an inspection, the report of which is used by the Chief Inspector as justification for issuing, withholding or revoking the inspection certificate. The term certificate inspection also applies to the external inspection conducted in accordance with this Chapter whether or not a certificate is intended to be issued as a result of the inspection.

(13) "Condemned boiler or pressure vessel" means a boiler or pressure vessel:
- (a) that has been found not to comply with G.S. Chapter 95, Article 7A, or this Chapter;
- (b) that constitutes a menace to public safety; and
- (c) that cannot be repaired or altered so as to comply with G.S. Chapter 95, Article 7A, and this Chapter.

(14) "Coil type watertube boiler" means a boiler having no steam space, such as a steam drum, whereby the heat transfer portion of the water containing space consists only of a coil of pipe or tubing.

(15) "Commissioned inspector" means an employee of an Authorized Inspection Agency that is commissioned by the National Board and the State of North Carolina and who is charged with conducting in-service inspections of pressure equipment and inspecting repairs or alterations to that equipment.

(16) "Defect" means any deterioration to the pressure equipment affecting the integrity of the pressure boundary or its supports. Defects may be cracks, corrosion, erosion, bags, bulges, blisters, leaks, broken parts integral to the pressure boundary such as stays, or other flaws identified by NDE or visual inspection.

(17) "Deficiency" means any violation of the Uniform Boiler and Pressure Vessel Act or this Chapter or identified defects.

(18) "Design criteria" means accepted design and construction code requirements relating to the mode of design and construction of a boiler or pressure vessel.

(19) "External inspection" means an inspection of the external surfaces and appurtenances of a boiler or pressure vessel. An external inspection may entail the "shutting down" of a boiler or pressure vessel while it is in operation, including inspection of internal surfaces, if the inspector determines this action is warranted.

(20) "Hydropneumatic storage tank" means a pressure vessel used for storage of water at ambient temperature not to exceed 120°F and where a cushion of air is contained within the vessel.

(21) "Imminent danger" means any condition or practice in any location that a boiler or pressure vessel is being operated which is such that a danger exists, and which could reasonably be expected to cause death or serious physical harm immediately if the condition is not abated.

(22) "Insurance inspector" means the special inspector employed by an insurance company, and holding a valid North Carolina Commission and National Board Commission.

(23) "Internal inspection" means as complete an examination as can reasonably be made of the internal and external surfaces and appurtenances of a boiler or pressure vessel while it is shut down.

(24) "Maximum allowable working pressure (MAWP)" means the maximum gauge pressure as determined by employing the stress values, design rules and dimensions designated by the accepted design and construction code or as determined by the Chief Inspector in accordance with this Chapter.

(25) "Menace to public safety" means a boiler or pressure vessel that cannot be operated without a risk of injury to persons and property.

(26) "Miniature boiler" means a boiler which does not exceed any of the following:
- (a) 16 inch inside shell diameter;
- (b) 20 square feet of heating surface (does not apply to electrically fired boilers);
- (c) 5 cubic feet volume; and
- (d) 100 psig maximum allowable working pressure.

(27) "National Board Commission" means the commission issued by the National Board to those individuals who have passed the National Board commissioning examination and have otherwise fulfilled the requirements of the National Board Rules for Commissioned Inspectors.

(28) "National Board Inspection Code (NBIC)" means the ANSI/NB-23 standard published by the National Board, as adopted by the Bureau.

(29) "Nondestructive examination (NDE)" means examination methods used to verify the integrity of materials and welds in a component without damaging its structure or altering its mechanical properties. NDE may involve surface, subsurface, and volumetric examination. Visual inspection, x-rays, and ultrasound are examples of NDE.

(30) "Nonstandard boiler or pressure vessel" means:

(a) high pressure boilers contracted for or installed before December 7, 1935;

(b) heating boilers contracted for or installed before January 1, 1951;

(c) pressure vessels contracted for or installed before January 1, 1976;

(d) hydropneumatic storage tanks contracted for or installed before January 1, 1986; and

(e) boilers or pressure vessels for which the ASME Code is not intended to apply, other than those boilers and pressure vessels to which the term North Carolina Special applies.

(31) "Normal working hours" means between the hours of 6:00 AM and 6:00 PM, Monday through Friday, except for state recognized holidays established in 25 NCAC 01E .0901.

(32) "North Carolina Commission" means the commission issued by the Board, to holders of a National Board Commission, authorizing them to conduct inspections in this State.

(33) "North Carolina Special" means a boiler or pressure vessel that is not constructed under the accepted design and construction code and for which the owner/operator must apply for a special inspection certificate with the Chief Inspector.

(34) "NPS" means nominal pipe size.

(35) "Nuclear component" means the items in a nuclear power plant such as pressure vessels, piping systems, pumps, valves, and component supports.

(36) "Nuclear system" means a system comprised of nuclear components which collectively serve the purpose of producing and controlling an output of thermal energy from nuclear fuel and includes those associated systems essential to the function and overall safety of the power system.

(37) "Operating pressure" means the pressure at which a boiler or pressure vessel operates. It shall not exceed the MAWP except as shown in Section I of the ASME Code for forced flow steam generators.

(38) "Owner or user" means any person or legal entity responsible for the operation of any boiler or pressure vessel installed in this State. This term also applies to a contractor, installer, or agent of the owner or user, as applicable.

(39) "Owner-user inspector" means an individual who holds a valid North Carolina Commission and National Board Commission and is employed by a company operating pressure vessels for its own use and not for resale, and maintains an inspection program that meets the requirements of the National Board for periodic inspection of pressure vessels owned or used by that company.

(40) "Pressure piping" means piping including welded piping, external to high pressure boilers from the boiler proper to the required valve(s).

(41) "Pressure relief devices" mean the devices on boilers and pressure vessels set to open and relieve the pressure in the event of an over pressurization event, and include the following:

(a) "Non-reclosing pressure relief device" means a pressure relief device designed to remain open after operation and includes a rupture disk which is a non-reclosing pressure relief device actuated by static pressure upstream of the device and designed to function by the bursting of a pressure retaining disk; and

(b) "Pressure relief valve" means a pressure relief device that is designed to reclose and prevent the further flow of fluid after normal conditions have been restored. These devices include:

(i) "Relief valve" means an automatic pressure relief valve that is actuated by static pressure upstream of the valve which opens further with the increase in pressure over the opening pressure;

(ii) "Safety relief valve" means an automatic pressure relief valve that is actuated by static pressure upstream of the valve and characterized by full opening pop action or by opening in proportion to the increase in pressure over the opening pressure; and

(iii) "Safety valve" means an automatic pressure relief valve that is actuated by static pressure upstream of

the valve and characterized by full opening pop action.

(42) "PSIG" means pounds per square inch gauge.

(43) "Reinspection or Follow-Up Inspection" means as complete an examination as is necessary to verify that any repair or corrective action required as a result of a certificate inspection is completed.

(44) "Service vehicle" means a vehicle mounted with an air storage tank and often with other storage tanks that have oil, grease or other fluids. The purpose of the vehicle is to service vehicles and equipment in the field away from the owner's shop.

(45) "Shop inspection" means an inspection conducted by an Authorized Inspector or a Commissioned Inspector pursuant to an inspection service agreement whereby the fabrication process or the repair or alteration of a boiler or pressure vessel is observed to ensure compliance with ~~ASME~~ the ASME Code and the ~~National Board.~~ NBIC. The term shop inspection includes nuclear shop inspection where fabrication or material supply is done by the holder of an ASME N type certificate.

(46) "Special inspection" means any inspection conducted by a Deputy Inspector other than a regularly scheduled inspection. Special inspection also includes the performance of an inspection by a Deputy Inspector which requires that the inspector make a special trip to meet the needs of the individual or organization requesting the inspection, including conducting certificate inspections during hours other than normal working hours, and inspection of field repairs and alterations.

(47) "Special inspector" means a National Board commissioned inspector employed by an insurance company authorized to write boiler and pressure vessel insurance in the state of North Carolina.

(48) "Violation" means the failure to comply with the requirements of the Uniform Boiler and Pressure Vessel Act or this Chapter.

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

SECTION .0200 - ADMINISTRATION

13 NCAC 13 .0203 NORTH CAROLINA COMMISSION

(a) When requested by the employer and upon presentation of a properly completed Application for Commission as an Inspector of Boilers and Pressure Vessels, a North Carolina Commission, bearing the signature of the Commissioner, shall be issued by ~~the Board~~ The Board of Boiler and Pressure Vessel Rules (the "Board") to persons holding a valid National Board Commission who have taken and passed the examination specified in 13 NCAC 13 .0202(b).

(b) Applications for a North Carolina Commission shall be processed upon proof of a National Board Commission and payment of a ~~twenty five dollar ($25.00)~~ thirty-five dollar ($35.00) fee to the Department of Labor.

(c) North Carolina Commissions are valid through December 31, at which time the inspector's employer shall submit a renewal request letter and a ~~twenty five dollar ($25.00)~~ thirty-five dollar ($35.00) fee to the Department of Labor.

(d) The North Carolina Commission shall be returned by the employing company with notification of termination date to the Bureau within 30 days of termination of employment.

(e) A North Carolina Commission may be suspended or revoked by the Board in accordance with G.S. 95-69.13 for incompetence, untrustworthiness or falsification of any statement in an application or inspection report. The Board shall give notice of the commencement of proceedings for suspension or revocation of a commission pursuant to G.S. 150B-23. A North Carolina Commission may be suspended prior to the hearing if the Chief Inspector determines that the public health, safety or welfare requires this action. In this case, the proceedings shall be promptly commenced and determined in accordance with G.S. 150B-3. The Board's decision regarding the competency of an inspector shall be determined after consideration of the knowledge, skill, and care ordinarily possessed and employed by boiler and pressure vessel inspection personnel in good standing. Industry custom and practice shall be considered but are not determinative. Failure to conduct the inspections in accordance with this Chapter shall constitute incompetence. ~~The inspector shall be given the~~ The Board shall give the inspector opportunity to show that he is conducting his duties in a competent manner and that suspension or revocation is unwarranted. If the inspector believes that the decision of the Board is not warranted, he may file a petition for judicial review pursuant to Article 4 of Chapter 150B of the N.C. General Statutes.

Authority G.S. 95-69.11; 95-69.15.

13 NCAC 13 .0205 OWNER-USER INSPECTION AGENCY

(a) A company seeking to conduct inspections of its own pressure vessels shall file an application with the Chief Inspector and obtain approval from the Board.

(b) The company shall, in its application, designate a supervisor who shall be an engineer within its employ, who, upon approval of the application, shall:

(1) ascertain that the company's inspectors, pursuant to Rules .0202 and .0203 of this Section are issued owner-user commission cards;

(2) supervise inspections of pressure vessels and see that an inspection report, signed by the owner-user inspector, is filed at the equipment site;

(3) notify the Chief Inspector of any unsafe pressure vessel which presents a condition of imminent danger;

(4) maintain a master file of inspection records which shall be made available for examination by the Chief Inspector or his representative during business hours:
(A) identifying each pressure vessel by serial number and abbreviated description; and
(B) showing the date of the last and next scheduled inspection;
(5) on a date mutually agreed upon with the Chief Inspector, file an annual statement signed by the supervisor, showing the number of boilers and certifying that each inspection was conducted pursuant to this Chapter, accompanied by an administrative fee of ~~twenty dollars ($20.00)~~ twenty-five dollars ($25.00) per vessel.

(c) Inspection certificates are not required for pressure vessels inspected under an owner-user program.

Authority G.S. 95-69.11; 95-69.15; 95-69.16.

13 NCAC 13 .0210 SHOP INSPECTIONS AND NATIONAL BOARD R STAMP QUALIFICATION REVIEWS

(a) Shop Inspections.
(1) Manufacturers or repair firms seeking to employ the Boiler Safety Bureau to act as their Authorized Inspection Agency pursuant to the ASME Code or National Board Inspection Code, shall enter into a written agreement with the North Carolina Department of Labor, Boiler Safety Bureau for this purpose.
(2) An audit of the Deputy Inspector serving as the Authorized Inspector pursuant to Subparagraph (a)(1), of this Rule, and the contracting company in which he/she is working shall be conducted on an annual basis for non-nuclear companies and twice each year for nuclear companies. The contracting company is required to pay the audit fees required in Rule .0213 of this Section.

(b) National Board R Stamp Qualification Reviews
(1) The Chief Inspector or his designee shall conduct the qualification reviews for issuance of the National Board R symbol stamp pursuant to the National Board Inspection Code as adopted, except as provided in Subparagraph (b)(2) of this Rule.
(2) The Chief Inspector or his designee shall not conduct the qualification reviews of those companies for which the Boiler Safety Bureau provides inspection services, or those companies which specifically request the review be conducted by the National Board.
(3) A review to be conducted by the Boiler Safety Bureau shall be scheduled upon receipt of request by the National Board. ~~A deposit of twelve hundred dollars ($1,200.00) shall be made by the applying company to cover the fees and expenses incurred and shall be received by the Boiler Safety Bureau no less than 30 days prior to the subject review. This deposit will be applied to the cost of the review. Payment of the fee as required in Rule .0213 of this Section shall be the responsibility of the company being reviewed. Should an applicant not be successful in obtaining accreditation, the applicable deposit shall be paid before a new review is conducted.~~

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

13 NCAC 13 .0213 CERTIFICATE AND INSPECTION FEES

(a) A ~~thirty dollar ($30.00)~~ thirty-five dollar ($35.00) certificate and processing fee for each boiler or pressure vessel inspected by an Insurance Inspector and found to be in compliance with the rules in this Chapter shall be paid to the North Carolina Department of Labor.

(b) An inspection and certificate fee shall be paid to the North Carolina Department of Labor for each boiler or pressure vessel inspected by a Deputy Inspector as follows:

Boilers - An inspection of a boiler where the heating surface is:	External Inspection	Internal Inspection
Less than 500 sq. ft.	~~$45.00~~ $50.00	~~$80.00~~ $85.00
500 or more sq. ft. but less than 5000 sq. ft.	~~$110.00~~ $120.00	~~$225.00~~ $235.00
5000 or more sq. ft.	~~$300.00~~ $330.00	~~$500.00~~$600.00
Cast iron boilers	~~$45.00~~ $50.00	~~$75.00~~ $80.00
Locomotive boilers (Antique Exhibition/Show)	N/A	~~$75.00~~$150.00
Exhibition boilers (Antique Exhibition/Show)	N/A	~~$45.00~~$50.00
Hobby boilers	N/A	~~$30.00~~$35.00

Pressure Vessels - An inspection of a pressure vessel, other than a heat exchanger, where the product of measurement in feet of the diameter or width, multiplied by its length is:	External Inspection	Internal Inspection
Less than 20	~~$35.00~~$40.00	~~$40.00~~$45.00
20 or more but less than 50	~~$45.00~~$50.00	~~$55.00~~$60.00
50 or more but less than 70	~~$75.00~~$85.00	~~$125.00~~$135.00

70 or more	~~$125.00~~$135.00	~~$180.00~~$190.00
Heat Exchangers - An inspection of a heat exchanger, where the heating surface is:		
Less than 500 sq. ft.	External Inspection	
500 or more sq. ft. but less than 1000 sq. ft.	$45.00	
1000 or more sq. ft. but less than 2000 sq. ft.	~~$55.00~~$60.00	
2000 or more sq. ft. but less than 3000 sq. ft.	~~$85.00~~$90.00	
3000	~~$125.00~~$130.00	
	~~$175.00~~$180.00	

(c) In addition to the ~~base~~ fees established in Paragraph (b) of this Rule herein, a fee of ~~eighty five dollars ($85.00)~~ ninety dollars ($90.00) per hour, including travel time, plus each expense allowed by G.S. 138-6 and 138-7 and the standards and criteria established thereto by the Director of the Budget, at the applicable state rate shall be paid to the North Carolina Department of Labor for each special inspection as defined by ~~13 NCAC 13 .0101(43)~~ 13 NCAC 13 .0101(46) and for all inspections performed outside of normal working hours as defined by 13 NCAC 13 .0101(31).

(d) A fee of ~~three hundred dollars ($300.00)~~ Three-hundred fifty dollars ($350.00) per one-half day (four hours) or any part of one-half day or ~~five hundred dollars ($500.00)~~ five-hundred sixty-dollars ($560.00) for one day (four to eight hours) plus, in either case, each expense allowed by G.S. 138-6 and 138-7 and the standards and criteria established thereto by the Director of the Budget, at the applicable state rate shall be paid to the North Carolina Department of Labor for each shop inspection as defined by 13 NCAC 13 .0101(42).

(e) A fee of ~~three hundred fifty dollars ($350.00)~~ four hundred dollars ($400.00) per one-half day (four hours) or any part of one-half day or ~~five hundred sixty dollars ($560.00)~~ six hundred ten dollars ($610.00) for one day (four to eight hours), plus, in either case, each expense allowed by G.S. 138-6 and 138-7 and the standards and criteria established thereto by the Director of the Budget, at the applicable state rate shall be paid to the North Carolina Department of Labor for each nuclear ~~inspection.~~ shop inspection as defined by 13 NCAC 13 .0101(45).

(f) A fee of ~~four hundred dollars ($400.00)~~ four hundred fifty dollars ($450.00) per one-half day (four hours) or any part of one-half day or ~~six hundred forty dollars ($640.00)~~ six hundred ninety dollars ($690.00) for one day (four to eight hours), plus, in either case, each expense allowed by G.S. 138-6 and 138-7 and the standards and criteria established thereto by the Director of the Budget, at the applicable state rate shall be paid to the North Carolina Department of Labor for ~~audits.~~ audits as defined by 13 NCAC 13 .0101(4).

~~(g) Fees for regularly scheduled inspections and audits conducted by the Chief Inspector or a Deputy Inspector outside of normal working hours or that exceed eight hours per inspection visit shall include an additional fifty dollar ($50.00) fee per hour in addition to the normal inspection or audit fee.~~

~~(h) Printed information derived from the database for boilers and pressure vessels maintained by the Division, is available for public scrutiny. Charges for providing this service shall be payable upon receipt of invoice to the North Carolina Department of Labor. Charges for this service are as follows:~~

~~(1) Requests for database information for which the Division has created the information selection criteria and printout format for its own use, and which can be furnished without the need for special programming will be furnished to the requester at the actual cost of reproducing the record.~~

~~(2) Requests for database information which requires special selection criteria or printout format, and which requires the need for special programming services to derive the requested information or format, will be furnished for seventy five dollars ($75.00) plus twenty five cents ($0.25) per page.~~

~~(i) Copies of inspection reports or other inspection records may be provided upon written request to the requester at the actual cost of reproducing the record.~~

Authority G.S. 95-69.11.

13 NCAC 13 .0303 INSPECTIONS REVEALING DEFICIENCIES

(a) The owner or user shall complete any required repairs or corrective action and request an additional inspection within 60 days of the inspection, except in cases where the boiler or pressure vessel is removed from service, in which case the owner or user shall send in written confirmation, signed by the owner or user, that use of the boiler or pressure vessel has been discontinued and that the boiler or pressure vessel has been removed from the source of energy.

(b) Upon notification by the inspector of a boiler or pressure vessel for which continued operation creates a condition of imminent danger, the Chief Inspector shall determine if the recommendations of the inspector are valid, and if so, he shall notify the owner or user by the most expedient means possible, followed by written notification within 15 days stating that the use of the boiler or pressure vessel shall be discontinued immediately.

(c) The owner or user may continue operation of the boiler or pressure vessel, including those boilers or pressure vessels which are condemned, during the 60 day period, except that this provision shall not apply to boilers and pressure vessels after verbal notification by the Chief Inspector to the owner or user that a condition of imminent danger exists.

(d) After completion of any required repairs or corrective action, the boiler or pressure vessel shall be reinspected to the extent necessary to verify satisfactory completion of the required repairs or corrective action.

(e) For each reinspection or follow-up inspection conducted by Deputy Inspectors, a fee of ~~thirty five dollars ($35.00)~~ forty dollars ($40.00) shall be paid to the North Carolina Department of Labor.

Authority G.S. 95-69.11.

13 NCAC 15 .0307 MAINTENANCE AND PERIODIC INSPECTIONS AND TESTS

(a) Inspections and Tests. Devices and equipment shall be subject to maintenance and periodic inspections and tests in accordance with the requirements of the applicable code as adopted in Section 2.23 of the A17.1 - American National Standard Safety Code for Elevators and Escalators. Special equipment shall be subject to periodic and to maintenance inspections and tests as may be required by the Director to ensure safe operation.

(b) Inspections.

(1) Advance Notice. Inspections shall be accomplished without advance notice, except where the Director determines that advance notice of an inspection is necessary to complete the inspection.

(2) Inspection Report Forms. The inspector shall note findings of his inspection and tests on the inspection report form.

(c) Certificate of Operation Issuance.

(1) Closing Conference. After the inspections and tests of the equipment prescribed in this Rule, the inspector shall, when possible, hold a closing conference with the owner or his representative.

(2) Approval. When the inspector has determined that the equipment is in compliance with the rules in this ~~Section~~ Chapter and all applicable law, the inspector may reissue the certificate of operation.

(3) ~~Denial.~~ Violations creating unsafe conditions. When the inspector has determined the equipment is not in compliance with the regulations of this Chapter and all applicable law, and that the non-compliance creates an unsafe condition that exposes the public to an unsafe condition likely to result in serious personal injury or property damage the inspector shall immediately order, in writing, that the use of the equipment be stopped until such time as it is determined that the equipment has been made safe for use by the public. The inspector shall provide the owner or his representative with a description of all violations and necessary repairs.

~~(4) Abatement. In the event of a reissuance denial, the inspector may issue an abatement permit which shall be valid for a period not exceeding 60 days.~~

~~(5)~~(A) Notice. ~~When the equipment is brought into compliance,~~ After an inspector has issued a written order which stops or limits the use of the equipment the owner or his representative shall notify the Division in ~~writing.~~writing when the equipment is brought into compliance with the regulations of this Chapter and all applicable law.

~~(6)~~(B) Reinspection. After ~~a certificate reissuance denial,~~ receipt of written notice from the owner or his representative that the equipment has been brought into compliance with the regulations of this Chapter and all applicable law, an inspector shall ~~always~~ reinspect to determine if all violations have been corrected and necessary repairs have been made and the equipment is in compliance with the rules in this Chapter and all applicable law.

(4) Violations not creating unsafe conditions. When the inspector has determined the equipment is not in compliance with the regulations of this Chapter and all applicable law, and that the non-compliance does not create an unsafe condition which is exposing the public to an unsafe condition likely to result in serious personal injury or property damage, the inspector shall provide the owner or his representative with a description of all violations and necessary repairs.

(A) Corrective action. The owner or his representative shall have 60 days from receipt of written notice of all violations and necessary repairs to comply with the regulations of this Chapter and all applicable law, correct violations and complete necessary repairs.

(B) Notice. The owner or his representative shall notify the Division in writing within 60 days of receiving written notification of the violations and necessary repairs that the equipment has been brought into compliance with the regulations of this Chapter and all applicable law.

(C) Follow-up Inspection. If the owner or his representative fails to provide notice of abatement as required by Part (B) of this Subparagraph, and an inspection is required to determine status of abatement, then the owner or his representative shall pay a follow-up inspection fee of two hundred dollars ($200.00).

(d) Tests. Periodic tests required by the A17.1 - American National Standard Safety Code for Elevators and Escalators shall be performed in the presence of an elevator inspector whenever possible. In the absence of an inspector, a signed copy of the test report shall be sent to the Director of the Division without delay. The report shall be signed by the person conducting such tests.

Authority G.S. 95-110.5.

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

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Rule-making Agency: *NC Social Services Commission*

Rule Citation: *10A NCAC 71W .0905*

Effective Date: *November 1, 2014*

Date Approved by the Rules Review Commission: *October 16, 2014*

Reason for Action: *The effective date of a recent act of the General Assembly. Cite: Session Law 2014-115, effective August 11, 2014. The Division of Social Services adhered to the notice and hearing requirements for adoption of the rule. The rule was published to the Office of Administrative Hearings website on August 29, 2014. The public hearing was held on September 5, 2014. Comment period began August 29, 2014 and ended on September 22, 2014. Session Law 2014-115 requires the adoption of rules for implementation of Session Law 2013-417, HB 392, Part II, Section 4 no later than October 31, 2014.*

CHAPTER 71 – ADULT AND FAMILY SUPPORT

SUBCHAPTER 71W – GENERAL PROGRAM ADMINISTRATION

SECTION .0900 – TRANSITIONAL CHILD CARE

10A NCAC 71W .0905 DRUG TESTING

~~[(a) The county director shall require] drug screening [of all applicants and recipients,] and testing if there is reasonable suspicion that an [applicant or recipient] individual is engaged in the illegal use of controlled substances, will be conducted as a condition of eligibility for receiving Work First Program assistance, [subject to the exemptions in G.S.108A-29.1(a) and (h). The county director shall require that] each applicant or recipient shall receive a written [notice, developed by the Division of Social Services, about drug screening and testing.], when there is a reasonable suspicion is a condition of eligibility for Work First Program Assistance.~~

~~(d)[(b) Reasonable suspicion may [shall only] be established by utilizing the following methods:~~

~~(1) A criminal record check conducted under G.S. 114-19.34; that discloses a conviction, arrest, or outstanding warrant relating to illegal controlled substances within the three years prior to the date the criminal record check is conducted.~~

~~(2) A determination by a qualified professional in substance abuse or a physician certified by the American Society of Addiction Medicine; [or] that an individual is addicted to illegal controlled substances.~~

~~(3) A screening tool [The Drug Abuse Screening Test (DAST)] relating to the abuse of illegal controlled [substances.] that yields a result indicating that the applicant or recipient may be engaged in the illegal use of controlled substances.~~

~~(4) Other screening methods, as determined by the Department.~~

~~(b)(c)~~ The county director shall require a basic five panel drug test for applicants and recipients of Work First Family Assistance where there is a reasonable suspicion the applicant or recipient ~~individual~~ is engaged in the illegal use of controlled substances. ~~will be required.~~ The drug test shall ~~will~~ identify the ~~following illegal use and/or controlled substances~~ illegal use of the following controlled substances:

(1)~~(a)~~ cannabinoids;
(2)~~(b)~~ cocaine;
(3)~~(c)~~ methamphetamines/Amphetamines;
(4)~~(d)~~ opiates; and
(5)~~(e)~~ phencyclidine.

~~(2) The results of drug tests will remain confidential and will not be released to law enforcement.~~

~~(c) All applicants or recipients who are included in the financial assistance unit, including both parents in two-parent households and any teen parent who is emancipated pursuant to Article 35 of Chapter 7B, shall comply with the requirements of this rule. The following are exempt from drug testing and screening:~~

~~(1) Child Only cases~~
~~(2) Dependent children under the age of 18.~~

~~(e) Each applicant or recipient shall receive written notice that drug screening and testing is a condition of eligibility for Work First Program assistance.~~

~~(f)(g)[(d) The county director shall]require that each applicant or recipient being tested shall sign a written acknowledgment that he or she has received and understood the drug testing notice [in accordance with provisions 108-29.1A] and advice developed by the Division of Social Services. [The county director shall require that] each applicant or recipient shall be advised before drug testing he or she may inform the agent administering the test of any prescription or over the counter medication he or she is taking.~~

~~(h)[(e) The county director shall] advise each applicant or recipient who tests positive for an illegal use of controlled substance or illegal use of a controlled substance shall be~~

advised that he or she has the right to take one or more additional tests at the applicant's or recipient's expense.

(1) at;

(2) at a testing facility approved by the Department or county department of social services and

(3) within seven days of the applicant or recipient receiving notice of the results of the original drug test.

(i)[(f) The county director shall require that] each applicant or recipient who tests positive for an illegal controlled substance or illegal use of a controlled substance shall:

[(1)] be provided with [receive] information regarding substance abuse, substance abuse counseling and substance abuse treatment options; including a list of substance abuse treatment programs that may be available to the individual.

[(2) be ineligible to receive Work First benefits subject to the reinstatement provisions in G.S. 108A 29.1] [(b) (b1) and (b2).] for one year from the date of the positive drug test. The individual shall be eligible after one year.

(3) be eligible prior to one year if one of the following applies:

(a) each applicant or recipient deemed ineligible may reapply after 30 days from the date of the positive drug test if the applicant or recipient can document successful completion of or current satisfactory participation in a substance abuse treatment program offered by a provider in (1) above and licensed by the Department. The applicant who reapplies after the successful completion of a substance abuse program shall pass a drug test. The cost of any drug testing and substance abuse program shall be the responsibility of the person being tested; or

(b) each applicant or recipient deemed ineligible may reapply after the expiration of 30 days from the date of the positive drug test if a qualified professional in substance abuse or a physician certified by the American Society of Addiction Medicine determines substance abuse treatment is not appropriate, and the applicant or recipient has passed a subsequent drug test. The cost of any drug testing is the responsibility of the person being tested.

(c) An applicant or recipient who reapplies for Work First Program assistance under (a) or (b) above may reapply one time only.

(4) If the applicant or recipient has any subsequent positive drug tests, the individual shall be ineligible for Work First Program benefits for three years from the date of the subsequent positive drug tests unless the individual reapplies pursuant to subsection (i)(3) of this rule.

(j) The applicant or recipient shall be responsible for providing verification of the drug testing results from a testing facility approved by the Department or county department of social services.

(k) The Department shall cooperate with qualified professionals in substance abuse, a physician certified by the American Society of Addiction Medicine, drug testing facility or other area mental health authorities to determine:

(1) if a substance abuse program is not appropriate for the individual; or

(2) the individual has passed or failed a drug test; and/or

(3) a statewide listing of approved substance abuse treatment facilities

(4) the successful completion of or satisfactory participation in a substance abuse treatment program.

History Note: *Authority G.S. 108A-29.1; 143B-153;* *Temporary Adoption Eff. November 1, 2014.*

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Rule-making Agency: *Environmental Management Commission*

Rule Citation: *15A NCAC 02B .0295*

Effective Date: *October 24, 2014*

Date Approved by the Rules Review Commission: *October 16, 2014*

Reason for Action: *The effective date of a recent act of the General Assembly. Cite: S.L. 2014-95, effective October 1, 2014. This rule adoption is authorized by Section 2 of S.L. 2014-95, which states that the Environmental Management Commission shall adopt a "Mitigation Program Requirements for the Protection and Maintenance of Riparian Buffers" rule, pursuant to G.S. 150B-21.1, no later than October 1, 2014.*

CHAPTER 02 – ENVIRONMENTAL MANAGEMENT COMMISSION

SUBCHAPTER 02B – SURFACE WATER AND WETLAND STANDARDS

SECTION .0200 – CLASSIFICATIONS AND WATER QUALITY STANDARDS APPLICABLE TO SURFACE WATERS AND WETLANDS OF NORTH CAROLINA

15A NCAC 02B .0295 MITIGATION PROGRAM REQUIREMENTS FOR PROTECTION AND MAINTENANCE OF RIPARIAN BUFFERS

(a) PURPOSE. The purpose of this Rule is to set forth the mitigation requirements that apply to applicants listed in Subparagraphs (1) and (2) of this Paragraph and to set forth requirements for buffer mitigation providers. Buffer mitigation is required when one of the following applies:

(1) The applicant has received an authorization certificate for impacts that cannot be avoided or practicably minimized pursuant to Rules ~~15A NCAC 02B~~ .0233, ~~15A NCAC 02B~~ .0243, ~~15A NCAC 02B~~ .0250, ~~15A NCAC 02B~~ .0259, ~~15A NCAC 02B~~ .0267 or ~~15A NCAC 02B~~ .0607 of this Subchapter; or

(2) The applicant has received a variance pursuant to Rules~~15A NCAC 02B~~ .0233, ~~15A NCAC 02B~~ .0243, ~~15A NCAC 02B~~ .0250, ~~15A NCAC 02B~~ .0259, ~~15A NCAC 02B~~ .0267 or ~~15A NCAC 02B~~ .0607 of this Subchapter and is required to perform mitigation as a condition of a variance approval.

(b) DEFINITIONS. For the purpose of this Rule, these terms shall be defined as follows:

(1) "Authority" means either the Division or a local government that has been delegated or designated pursuant to Rules .0233, .0243, .0250, .0259, .0267 or .0607 of this Subchapter to implement the riparian buffer program.

(2) "Division" means the Division of Water Resources of the North Carolina Department of Environment and Natural Resources.

(3) "Enhancement Site" means a riparian zone site characterized by conditions between that of a restoration site and a preservation site such that the establishment of woody stems (i.e., tree or shrub species) will maximize nutrient removal and other buffer functions.

(4) "Hydrologic Area" means the Watershed Boundary Dataset (WBD), located at http://data.nconemap.com/geoportal/catalog/search/resource/details.page?uuid={16A42F31-6DC7-4EC3-88A9-03E6B7D55653} using the eight-digit Hydrologic Unit Code (HUC) prepared by the United States Geological Survey.

(5) "Locational Ratio" means the mitigation ratio applied to the mitigation requirements based on the location of the mitigation site relative to the impact site as set forth in Paragraph (f).

(6) "Monitoring period" means the length of time specified in the approved mitigation plan during which monitoring of vegetation success and other anticipated benefits to the adjacent water as listed in the authorization certification is done.

(7) "Non-wasting endowment" means a fund that generates enough interest to cover the cost of the long term monitoring and maintenance.

(8) "Outer Coastal Plain" means the portion of the state shown as the Middle Atlantic Coastal Plain (63) on Griffith, et al. (2002) "Ecoregions of North and South Carolina." Reston, VA, United States Geological Survey available at no cost at http://www.epa.gov/wed/pages/ecoregions/ncsc_eco.htm.

(9) "Preservation Site" means riparian zone sites that are characterized by a natural forest consisting of the forest strata and diversity of species appropriate for the Omernik Level III ecoregion.

(10) "Restoration Site" means riparian zone sites that are characterized by an absence of trees and by a lack of dense growth of smaller woody stems (i.e., shrubs or saplings) or sites that are characterized by scattered individual trees such that the tree canopy is less than 25 percent of the cover and by a lack of dense growth of smaller woody stems (i.e., shrubs or saplings).

(11) "Riparian buffer mitigation unit" means a unit representing a credit of riparian buffer mitigation that offsets one square foot of riparian buffer impact.

(12) "Riparian wetland" means a wetland that is found in one or more of the following landscape positions:

(A) in a geomorphic floodplain;

(B) in a natural topographic crenulation;

(C) contiguous with an open water equal to or greater than 20 acres in size; or

(D) subject to tidal flow regimes excluding salt/brackish marsh wetlands.

(13) "Urban" means an area that is designated as an urbanized area under the most recent federal decennial census available at no cost at http://www.census.gov/ or within the corporate limits of a municipality.

(14) "Zonal Ratio" means the mitigation ratio applied to impact amounts in the respective zones of the riparian buffer as set forth in Paragraph ~~(e).~~ (e) of this Rule.

(c) APPLICATION REQUIREMENTS, MITIGATION SITE REQUIREMENTS AND MITIGATION OPTIONS. Any applicant who seeks approval to impact riparian buffers covered under this Rule who is required by Paragraph (a) shall submit to the Division a written mitigation proposal that calculates the required area of mitigation and describes the area and location of each type of proposed mitigation. The applicant shall not impact buffers until the Division ~~has approved~~ approves the mitigation plan ~~by issuance of~~ and issues written authorization. For all options except payment of a fee under Paragraphs (j) or (k) of this Rule, the proposal shall include a commitment to ~~provide~~ provide:

(1) a perpetual conservation easement or similar legal protection mechanism to ensure perpetual

stewardship that protects the mitigation site's nutrient removal and other water quality ~~functions,~~ functions;

(2) a commitment to provide a non-wasting endowment or other financial mechanism for perpetual stewardship and ~~protection,~~ protection; and

(3) a commitment to provide a completion bond that is payable to the Division sufficient to ensure that land or easement purchase, construction, ~~monitoring~~ monitoring, and maintenance are completed.

For each mitigation site, the Division shall identify functional criteria to measure the anticipated benefits of the mitigation to the adjacent water. The Division shall issue a mitigation determination that specifies the area, ~~type~~ type, and location of mitigation and the water quality benefits to be provided by the mitigation site. The mitigation determination issued according to this Rule shall be included as an attachment to the authorization certification. The applicant may propose any of the following types of mitigation and shall provide a written demonstration of practicality that takes into account the relative cost and availability of potential options, as well as information addressing all requirements associated with the option proposed:

(1) ~~Applicant provided~~ Applicant-provided riparian buffer restoration or enhancement pursuant to Paragraph (i) of this Rule;

(2) Payment of a compensatory mitigation fee to a mitigation bank if buffer credits are available pursuant to Paragraph (j) of this Rule or payment of a compensatory mitigation fee to the Riparian Buffer Restoration Fund pursuant to Paragraph (k) of this Rule. Payment ~~must~~ shall conform to the requirements of G.S. 143-214.20;

(3) Donation of real property or of an interest in real property pursuant to Paragraph (l) of this Rule; or

(4) Alternative buffer mitigation options pursuant to Paragraph (m) of this Rule.

(d) AREA OF IMPACT. The authority shall determine the area of impact in square feet to each zone of the proposed riparian buffer impact by adding the following:

(1) The area of the footprint of the use impacting the riparian buffer;

(2) The area of the boundary of any clearing and grading activities within the riparian buffer necessary to accommodate the use; and

(3) The area of any ongoing maintenance corridors within the riparian buffer associated with the use.

The authority shall deduct from this total the area of any wetlands that are subject to and compliant with riparian wetland mitigation requirements under 15A NCAC 02H .0506 and are located within the proposed riparian buffer impact area.

(e) AREA OF MITIGATION REQUIRED ON ZONAL MITIGATION RATIOS. The authority shall determine the required area of mitigation for each zone by applying each of the following ratios to the area of impact calculated under Paragraph (d) of this Rule:

Basin/Watershed	Zone 1 Ratio	Zone 2 Ratio
Neuse River Basin (15A NCAC 02B .0233)	3:1	1.5:1
Catawba River Basin (15A NCAC 02B .0243)	2:1	1.5:1
Randleman Lake Watershed (15A NCAC 02B .0250)	3:1	1.5:1
Tar-Pamlico River Basin (15A NCAC 02B .0259)	3:1	1.5:1
Jordan Lake Watershed (15A NCAC 02B .0267)	3:1	1.5:1
Goose Creek Watershed (15A NCAC 02B .0607)	3:1[A]	

[A] The Goose Creek Watershed does not have a Zone 1 and Zone 2. The mitigation ratio in the Goose Creek Watershed is 3:1 for the entire buffer.

(f) AREA OF MITIGATION REQUIRED ON LOCATIONAL MITIGATION RATIOS. The applicant ~~must~~ shall use the following locational ratios as applicable based on location of the proposed mitigation site relative to that of the proposed impact site. Locational ratios shall be as follows:

Location	Ratio
Within the 12-digit HUC[A]	0.75:1
Within the eight-digit HUC[B]	1:1
In the adjacent eight-digit HUC[B,C]	2:1

[A] Except within the Randleman Lake Watershed. Within the Randleman Lake Watershed the ratio is 1:1.

[B] Except as provided in Paragraph (g) of this Rule.

[C] To use mitigation in the adjacent eight-digit HUC, the applicant shall describe why buffer mitigation within the eight-digit HUC is not practical for the project.

(g) GEOGRAPHIC RESTRICTIONS ON LOCATION OF MITIGATION. Mitigation shall be performed in the same river basin ~~in which~~ where the impact is located with the following additional specifications:

(1) In the following cases, mitigation shall be performed in the same watershed in which the impact is located:

(A) Falls Lake Watershed, as defined in Rule ~~15A NCAC 02B~~ .0275 of this Section;

(B) Goose Creek Watershed, as defined in Rule ~~15A NCAC 02B~~ .0601 of this Subchapter;

(C) Randleman Lake Water Supply Watershed, as defined in Rule ~~15A NCAC 02B~~ .0248 of this Section;

(D) Each subwatershed of the Jordan Lake watershed, as defined in Rule

~~15A NCAC 02B~~ .0262 of this Section; and

(E) Other watersheds as specified in riparian buffer protection rules adopted by the Commission.

(2) Buffer mitigation for impacts within watersheds with riparian buffer rules that also have federally listed threatened or endangered aquatic species may be done within other watersheds with the same federally listed threatened or endangered aquatic species as long as the impacts are in the same river basin and same Omernik Level III ecoregion available at no cost at http://www.epa.gov/wed/pages/ecoregions/level_iii_iv.htm as the mitigation site.

(h) RIPARIAN BUFFER MITIGATION UNITS. Mitigation activities shall generate riparian buffer mitigation units as follows:

Mitigation Activity	Square Feet of Mitigation Buffer	Riparian Buffer Mitigation Units Generated
Restoration	1	1
Enhancement	2	1
Preservation on Non-Subject Urban Streams	3	1
Preservation on Subject Urban Streams	3	1
Preservation on Non-Subject Rural Streams	5	1
Preservation on Subject Rural Streams	10	1

(i) RIPARIAN BUFFER RESTORATION OR ENHANCEMENT. Division staff shall make an on-site determination as to whether a potential mitigation site qualifies as a restoration or enhancement site ~~based on the applicable definition~~ as defined in Paragraph (b) of this Rule. Riparian buffer restoration or enhancement sites shall meet the following requirements:

(1) Buffer restoration or enhancement may be proposed as follows:

Urban Areas	
Buffer width (ft)	Proposed Percentage of Full Credit
Less than 20	0 %
20-29	75 %
30-100	100 %
101-200 A	50 % [A]

Non-Urban Areas	
Buffer width (ft)	Proposed Percentage of Full Credit
Less than 20	0 %
20-29	0 %
30-100	100 %
101-200 [A]	50 % [A]

[A] The area of the mitigation site beyond 100 linear feet from the top of bank shall comprise no more than 10 percent of the total area of mitigation.

(2) The location of the restoration or enhancement shall comply with the requirements of Paragraphs (e), ~~(f)~~ (f), and (g) of this ~~Rule and in~~ Rule. In the Catawba watershed, buffer mitigation may be done along the lake shoreline as well as along intermittent and perennial stream channels throughout the watershed.

(3) Diffuse flow of runoff shall be maintained in the riparian buffer. Any existing impervious cover or stormwater conveyances such as ditches, ~~pipes~~ pipes, or drain tiles shall be eliminated and the flow converted to diffuse flow. If elimination of existing stormwater conveyances is not feasible, then the applicant or mitigation provider shall provide a delineation of the watershed draining to the stormwater outfall and the percentage of the total drainage treated by the riparian buffer for Division approval; the Division may reduce credit ~~may be reduced~~ proportionally.

(4) The applicant or mitigation provider shall submit to the Authority a restoration or enhancement plan for written approval by the Division. The restoration or enhancement plan shall demonstrate compliance with the requirements of Subparagraphs (1) through (3) of this Paragraph and shall contain the following in addition to the elements required in Paragraph (c) of this Rule:

(A) A map of the proposed restoration or enhancement site;

(B) A vegetation plan that shall include a minimum of four native hardwood tree species or four native hardwood tree and native shrub species, where no one species is greater than 50 percent of established stems, established at a density sufficient to provide 260 stems per acre at the completion of monitoring. Native volunteer species may be included to meet performance standards. The Division may approve alternative vegetation plans upon consideration of ~~factors~~ factors, including site wetness and plant availability to meet the requirements of this Part;

(C) A grading plan (if applicable). The site shall be graded in a manner to ensure diffuse flow through the entire riparian buffer;

(D) A schedule for implementation, including a fertilization and herbicide plan if applicable; and

(E) A monitoring plan, including monitoring of vegetative success and other anticipated benefits to the adjacent water as listed in the ~~Authorization Certification.~~ authorization certification.

(5) Within one year after the Division has approved the restoration or enhancement plan, the applicant or mitigation provider shall present documentation to the Division that the riparian buffer has been restored or enhanced unless the Division agrees in writing to a longer time period due to the necessity for a longer construction period.

(6) The mitigation area shall be placed under a perpetual conservation easement or similar legal protection mechanism to provide for protection of the property's nutrient removal and other water quality functions.

(7) The applicant or mitigation provider shall submit written annual reports for a period of five years after the restoration or enhancement has been conducted showing that the trees or tree and shrub species planted are meeting success criteria and that diffuse flow through the riparian buffer has been maintained. The applicant or mitigation provider shall replace trees or shrubs and restore diffuse flow if needed during that five-year period. Additional years of monitoring may be required if the objectives under Paragraph (i) have not been achieved at the end of the five-year monitoring period.

(8) The mitigation provider shall provide a site specific credit/debit ledger to the Division at regular intervals once credits are established and until they are exhausted.

(9) The mitigation provider shall provide a ~~A~~ completion bond that is payable to the Division sufficient to ensure that land purchase, construction, ~~monitoring~~ monitoring, and maintenance are completed. A non-wasting endowment or other financial mechanism for perpetual maintenance and protection ~~must~~ shall be provided.

(j) PURCHASE OF BUFFER MITIGATION CREDITS FROM A PRIVATE OR PUBLIC MITIGATION BANK. Applicants who choose to satisfy some or all of their mitigation by purchasing mitigation credits from a private or public mitigation bank shall meet the following requirements:

(1) The mitigation bank from which credits are purchased is listed on the Division's webpage (http://portal.ncdenr.org/web/wq/swp/ws/401) and ~~shall have~~ has available riparian buffer credits;

(2) The mitigation bank from which credits are purchased shall be located as described in Paragraphs (e), ~~(f)~~ (f), and (g) of this Rule; and

(3) After receiving a mitigation acceptance letter from the mitigation provider, proof of payment for the credits shall be provided to the Division prior to any activity that results in the removal or degradation of the protected riparian buffer.

(k) PAYMENT TO THE RIPARIAN BUFFER RESTORATION FUND. Applicants who choose to satisfy some or all of their mitigation determination by paying a compensatory mitigation fee to the Riparian Buffer Restoration Fund shall meet the requirements of ~~15A NCAC 02B~~ Rule .0269 of this Section. ~~(Riparian Buffer Mitigation Fees to the NC Ecosystem Enhancement Program).~~ Payment made to the NC Ecosystem Enhancement Program (the Program) shall be contingent upon acceptance of the payment ~~to~~ by the Program. The Program shall consider their financial, ~~temporal~~ temporal, and technical ability ~~of the Program~~ to satisfy the mitigation request ~~shall be considered~~ to determine whether ~~the Program~~ they shall accept or deny the request.

(l) DONATION OF PROPERTY. Applicants who choose to satisfy their mitigation determination by donating real property or an interest in real property to fully or partially offset an approved payment into the Riparian Buffer Restoration Fund pursuant to Paragraph (k) of this Rule shall meet the following requirements:

(1) The value of the property interest shall be determined by an appraisal performed in accordance with Part (l)(4)(D) of this Rule. The donation shall satisfy the mitigation determination if the appraised value of the donated property interest is equal to or greater than the required fee. If the appraised value of the donated property interest is less than the required fee calculated pursuant to ~~15A NCAC 02B~~ Rule .0269 of this Section, the applicant shall pay the remaining balance due.

(2) The donation of real property interests shall be granted in perpetuity.

(3) Donation of real property interests to satisfy the full or partial payments under Paragraph (k) shall be accepted only if such property meets ~~all of~~ the following requirements:

(A) The property shall be suitable for restoration or enhancement to successfully produce viable riparian buffer compensatory mitigation credits in accordance with Paragraph (i) of this Rule or the property shall be suitable for preservation to successfully produce viable riparian buffer compensatory mitigation credits in accordance with Part (m)(2)(C) of this Rule;

(B) The property shall be located in an area where the Program ~~can~~ may reasonably utilize the credits, based on historical or projected use, to

offset compensatory mitigation requirements;

(C) The estimated cost of restoring or enhancing and maintaining the property shall not exceed the projected mitigation credit value of the property minus land acquisition costs, except where the applicant supplies additional funds acceptable to the Program for restoration or enhancement and maintenance of the buffer;

(D) The property shall not contain any building, structure, object, site, or district that is listed in the National Register of Historic Places established pursuant to Public Law 89-665, 16 U.S.C. 470 as amended;

(E) The property shall not contain any hazardous substance or solid waste such that water quality ~~could~~ may be adversely impacted, unless the hazardous substance or solid waste can be properly remediated before the interest is transferred;

(F) The property shall not contain structures or materials that present health or safety concerns to the general public. If wells, septic, ~~water~~ water, or sewer connections exist, they shall be filled, remediated or closed at owner's expense in accordance with state and local health and safety regulations before the interest is transferred. Sewer connections in Zone 2 may be allowed for projects in accordance with Part (m)(2)(E) of this Rule;

(G) The property and adjacent properties shall not have prior, current, or known future land use that ~~would~~ may jeopardize the functions of the compensatory mitigation;

(H) The property shall not have any encumbrances or conditions that are inconsistent with the requirements of this ~~rule~~ Rule or purposes of ~~the buffer rules~~ Rules .0233, .0243, .0250, .0259, .0267 or .0607 of this Subchapter;

(I) Fee simple title to the property or a perpetual conservation easement on the property shall be donated to the State of North Carolina, a local ~~government~~ government, or a qualified holder under N.C. General Statute 121-34 et seq. and 26 USC 170(h) of the Internal Revenue Code as approved by the Department and the donee; and

(J) The donation shall be accompanied by a non-wasting endowment or other financial mechanism for perpetual maintenance and protection sufficient to ensure perpetual long-term monitoring and ~~maintenance,~~ maintenance. ~~except that where~~ However, when a local government has donated a perpetual conservation easement and ~~has~~ entered into a binding intergovernmental agreement with the Program to manage and protect the property consistent with the terms of the perpetual conservation easement, ~~such~~ that local government shall not be required to provide a non-wasting endowment.

(4) At the expense of the applicant or donor, the following information shall be submitted to the Program with any proposal for donations or dedications of interest in real property:

(A) Documentation that the property meets the requirements ~~laid out in~~ of Subparagraph (l)(3) of this Rule;

(B) A US Geological Survey 1:24,000 (7.5 minute) scale topographic map, county tax map, USDA Natural Resource Conservation Service County Soil Survey Map, and county road map showing the location of the property to be ~~donated~~ donated, along with information on existing site conditions, vegetation types, presence of existing ~~structures~~ structures, and easements;

(C) A current property survey performed in accordance with the procedures of the North Carolina Department of Administration, State Property Office as identified by the State Board of Registration for Professional Engineers and Land Surveyors ~~in "Standards of Practice for Land Surveying in North Carolina. " Copies may be obtained from the North Carolina State Board of Registration for Professional Engineers and Land Surveyors, 3620 Six Forks Road, Suite 300, Raleigh, North Carolina 27609;~~ as set forth in 21 NCAC 56 .1600.

(D) A current appraisal of the value of the property performed in accordance with the procedures of the North Carolina Department of Administration, State Property Office

as identified by the Appraisal Board ~~in the "Uniform Standards of Professional North Carolina Appraisal Practice. Practice" Copies may be obtained from the Appraisal Foundation, Publications Department, P.O. Box 96734, Washington, D.C. 20090-6734;~~ as set forth in 21 NCAC 57A .0501; and

(E) A complete attorney's report on title with a title commitment for policy in the name of the State of North Carolina in the dollar amount of the appraised value.

(m) ALTERNATIVE BUFFER MITIGATION OPTIONS. Some or all of a buffer mitigation requirement may be met through any of the alternative mitigation options described in this Paragraph. Any proposal for alternative mitigation shall ~~meet, in addition to~~ meet the requirements of Paragraphs (c), (e), ~~(f)~~ (f), and (g) of this Rule, the requirements set out in the named Subparagraph addressing that ~~option~~ option, ~~as well as~~ and the following requirements:

(1) Any proposal for alternative mitigation shall be provided in writing to the Division and shall meet the following content and procedural requirements for approval by the Division:

(A) Projects that have been constructed and are within the required monitoring period on the effective date of this Rule are eligible for use as alternative buffer mitigation. Projects that have completed monitoring and ~~have been~~ released by the Division on or before the effective date of this Rule are eligible for use as alternative buffer mitigation for a period of ~~ten~~ 10 years from the effective date of this Rule;

(B) The mitigation area shall be placed under a perpetual conservation easement or similar legal protection mechanism to provide for protection of the property's nutrient removal and other water quality functions; and

(C) A completion bond ~~that is~~ payable to the Division sufficient to ensure that land purchase, construction, ~~monitoring~~ monitoring, and maintenance are completed.

(D) A non-wasting endowment or other financial mechanism for perpetual maintenance and protection ~~must~~ shall be provided.

(2) ALTERNATIVE BUFFER MITIGATION – NON-STRUCTURAL, VEGETATIVE OPTIONS

(A) Coastal Headwater Stream Mitigation. Wooded buffers planted along Outer Coastal Plain headwater stream mitigation sites ~~can~~ may be approved as riparian buffer mitigation as long as the site meets all applicable requirements of Paragraph (i) of this Rule. In addition, all success criteria including woody species, stem density, diffuse ~~flow~~ flow, and stream success criteria specified by the Division in any required written approval of the site ~~must~~ shall be met. The area of the buffer shall be measured perpendicular to the length of the valley being restored. The area within the proposed buffer mitigation shall not also be used as wetland mitigation. ~~Monitoring of~~ The mitigation provider shall monitor the site ~~must be~~ for at least five years from the date of planting by providing annual reports for written Division approval.

(B) Buffer Restoration and Enhancement on Non-Subject Streams. Restoration or enhancement of buffers may be conducted on intermittent or perennial streams that are not subject to riparian buffer rules. These streams shall be confirmed as intermittent or perennial streams by Division staff using the Division publication, Methodology for Identification of Intermittent and Perennial Streams and Their Origins (v.4.11, 2010) available at no cost at http://portal.ncdenr.org/web/wq/swp/ws/401/waterresources/streamdeterminations. The proposal shall meet all applicable requirements of Paragraph (i) of this Rule.

(C) Preservation of Buffer on Non-subject streams. Preservation of buffers on intermittent or perennial streams that are not subject to riparian buffer rules may be proposed in order to ~~protect~~ permanently protect the buffer from cutting, clearing, ~~filling~~ filling, ~~and grading~~ grading, and similar activities that would affect the functioning of the buffer. These streams shall be confirmed as intermittent or perennial streams by Division staff using the Division publication, Methodology for Identification of Intermittent and Perennial Streams and Their Origins (v.4.11, 2010). The preservation site shall meet the requirements of ~~Subparagraph~~ Subparagraphs (i)(1), (i)(3), (i)(6) and Parts (l)(3)(D), (E), (F), (H) and (J) of this Rule.

Preservation shall be proposed only when restoration or enhancement with an area at least equal to the footprint of the buffer impact has been proposed.

(D) Preservation of Buffers on Subject Streams. Buffer preservation may be proposed in order to permanently protect the buffer from cutting, clearing, ~~filling~~ filling, ~~and~~ ~~grading~~ grading, and similar activities that would affect the functioning of the buffer ~~above and~~ beyond the protection afforded by the existing buffer rules on sites that meet the definition of a preservation site along streams, ~~estuaries~~ estuaries, or ponds that are subject to buffer rules. The preservation site shall meet the requirements of ~~Subparagraph~~ Subparagraphs (i)(1), (i)(3), (i)(6) and ~~Part~~ Parts (l)(3)(D), (E), (F), (H) and (J) of this Rule. Preservation shall be proposed only when restoration or enhancement ~~with~~ of an area at least equal to the footprint of the buffer impact has been proposed.

(E) Sewer easement within the buffer. If the proposed mitigation site contains a sewer easement in Zone 1, that portion of the sewer easement within Zone 1 is not suitable for buffer mitigation. If the proposed mitigation site contains a sewer easement in Zone 2, the portion of the sewer easement in Zone 2 may be suitable for buffer mitigation ~~if~~ if:

(i) the applicant or mitigation provider restores or enhances the forested buffer in Zone 1 adjacent to the sewer ~~easement,~~ easement;

(ii) the sewer easement is at least 30 feet ~~wide,~~ wide;

(iii) the sewer easement is required to be maintained in a condition ~~which~~ that meets the vegetative requirements of the collection system ~~permit,~~ permit; and

(iv) diffuse flow is provided across the entire buffer width.

The proposal shall meet all applicable requirements of Paragraph (i) of this Rule for restoration or enhancement. The proposal shall meet all applicable requirements of Part (m)(2)(C) of this Rule for preservation.

(F) Enhancement of grazing areas adjacent to streams. Buffer credit at a 2:1 ratio shall be available for an applicant or mitigation provider who proposes permanent exclusion of grazing livestock that otherwise degrade the stream and riparian zone through trampling, ~~grazing~~ grazing, or waste deposition by fencing the livestock out of the stream and its adjacent buffer. The applicant or mitigation provider shall provide an enhancement plan ~~to the standards identified~~ as set forth in Paragraph (i). The applicant or mitigation provider shall demonstrate that grazing was the predominant land use since the effective date of the applicable buffer rule.

(G) Mitigation on ephemeral channels. For purposes of riparian buffer mitigation as described in this Part, an ~~ephemeral channel~~ "ephemeral channel" is defined as a natural channel exhibiting discernible banks within a topographic crenulation (V-shaped contour lines) indicative of natural drainage on the 1:24,000 scale (7.5 minute) quadrangle topographic map prepared by the U.S. Geologic ~~Survey~~ Survey, or as seen on digital elevation models with contours developed from the most recent available LiDAR data. Ephemeral channels only flow for a short period of time after precipitation in the immediate area and do not have periods of base flow sustained by groundwater discharge. The applicant or mitigation provider shall provide a delineation of the watershed draining to the ephemeral channel. The entire area proposed for mitigation ~~must~~ shall be within the contributing drainage area to the ephemeral channel. The ephemeral channel ~~must~~ shall be directly connected to an intermittent or perennial stream and contiguous with the rest of the mitigation site protected under a perpetual conservation easement. The area of the mitigation site on ephemeral channels shall comprise no more than 25 percent of the total area of mitigation. The proposal shall meet all applicable requirements of Paragraph (i) of this Rule for restoration or enhancement. The

proposal shall meet all applicable requirements of Part (m)(2)(C) of this Rule for preservation.

(H) Restoration and Enhancement on Ditches. For purposes of riparian buffer mitigation as described in this Part, a ~~ditch~~ "ditch" is defined as a man-made channel other than a modified natural stream that was constructed for drainage purposes. To be used for mitigation, a ditch ~~must~~ shall meet all of the following criteria:

(i) ~~the ditch must~~ be directly connected with and draining towards an intermittent or perennial stream;

(ii) ~~the ditch must~~ be contiguous with the rest of the mitigation site protected under a perpetual conservation easement;

(iii) stormwater runoff from overland flow ~~must~~ shall drain towards the ditch;

(iv) ~~the ditch must~~ be between ~~1~~ one and ~~3~~ three feet in depth; and

(v) the entire length of the ditch ~~must~~ shall have been in place prior to the effective date of the applicable buffer rule.

The width of the restored or enhanced area shall not be less than 30 feet and shall not exceed 50 feet for crediting purposes. The applicant or mitigation provider shall provide a delineation of the watershed draining to the ditch. The watershed draining to the ditch shall be at least four times larger than the restored or enhanced area along the ditch. The perpetual conservation easement ~~must~~ shall include the ditch and the confluence of the ditch with the intermittent or perennial stream, and provide language that prohibits future maintenance of the ditch. The proposal shall meet all applicable requirements of Paragraph (i) of this Rule for restoration or enhancement.

(3) ALTERNATIVE BUFFER STORMWATER TREATMENT OPTIONS.

(A) For all structural options: Riparian buffer restoration or enhancement is required with an area at least equal to the footprint of the buffer impact, and the remaining mitigation resulting from the multipliers ~~can~~ may be met through structural options;

(B) Structural measures already required by other local, state or federal rule or permit cannot be used as alternative buffer mitigation, except to the extent such measure(s) exceed the requirements of such rule or permit. Stormwater Best Management Practices (BMPs), including bioretention facilities, constructed wetlands, infiltration devices and sand filter are all potentially approvable (BMPs) for alternative buffer mitigation. Other BMPs may be approved only if they meet the nutrient removal levels outlined in Part (3)(C) of this Subparagraph. Existing or planned BMPs for a local, ~~state~~ state, or federal rule or permit may be retrofitted or expanded to improve their nutrient removal if this level of treatment would not be required by other local, ~~state~~ state, or federal rules. In this case, the predicted increase in nutrient removal may be counted toward alternative buffer mitigation;

(C) Minimum treatment levels: Any structural BMP shall provide at least 30 percent total nitrogen and 35 percent total phosphorus removal as demonstrated by a scientific and engineering literature review as approved by the Division. The mitigation proposal shall demonstrate that the proposed alternative removes an equal or greater annual mass load of nutrients to surface waters as the buffer impact authorized in the authorization certificate or variance, following the calculation of impact and mitigation areas pursuant to Paragraphs (d), ~~(e)~~ (e), and (f) of this Rule. To estimate the rate of nutrient removal of the impacted buffer, the applicant or mitigation provider shall use a method previously approved by the Division. ~~Alternatively, the~~ The applicant or mitigation provider may propose an alternative method of estimating the rate of nutrient removal for consideration and review by the Division;

(D) All proposed structural BMPs shall follow the Division's 2009 Stormwater Best Management Practice Design Manual available at no cost at

http://portal.ncdenr.org/web/lr/bmp-manual. If a specific proposed structural BMP is not addressed in this Manual, the applicant or mitigation provider shall follow Chapter 20 in this Manual for approval;

(E) ~~An~~ All structural options are required to have Division approved operation and maintenance ~~plan~~ plans; ~~is required to be approved by the Division for all structural options;~~

(F) ~~Continuous~~ All structural options are required to have continuous and perpetual maintenance ~~is required for all structural options~~ and shall follow the Division's 2009 Stormwater Best Management Practice Design Manual;

(G) Upon completion of construction, the designer for the type of BMP installed ~~must~~ shall certify that the system was inspected during construction and that the BMP was constructed in substantial conformity with plans and specifications approved by the Division;

(H) Removal and replacement of structural options: If a structural option is proposed to be removed and cannot be replaced ~~on site,~~ on-site, then a structural or non-structural measure of equal or better nutrient removal capacity in a location as specified by Paragraph (f) and (g) of this Rule shall be constructed as a ~~replacement~~ replacement; ~~with the location as specified by Paragraph (f) and (g) of this Rule;~~

(I) Renovation or repair of structural options: If a structural option must be renovated or repaired, it shall be renovated to provide equal or better nutrient removal capacity than as originally designed;

(J) Structural options as well as their operation and maintenance are the responsibility of the landowner or easement holder unless the Division ~~agrees in writing to operation and maintenance by another responsible party.~~ gives written approval for another responsible party to operate and maintain them. Structural options shall be located in recorded drainage easements for the purposes of operation and maintenance and shall have recorded access easements to the nearest public right-of-way. These easements shall be granted in favor of the party responsible for operating and maintaining the structure, with a note that operation and maintenance is the responsibility of the landowner, easement holder or other responsible party; and

(K) Bonding and endowment. A completion bond ~~that is~~ payable to the Division sufficient to ensure that land purchase, construction, ~~monitoring~~ monitoring, and maintenance are completed and a non-wasting endowment or other financial mechanism for perpetual maintenance and protection ~~must~~ shall be provided.

(4) OTHER ALTERNATIVE BUFFER MITIGATION OPTIONS. Other riparian buffer mitigation options may be considered by the Division on a case-by-case basis after 30-day public notice through the Division's Water Quality Certification Mailing List in accordance with 15A NCAC 02H .0503 as long as the options otherwise meet the requirements of this Rule. Division staff shall present recommendations to the Environmental Management Commission for a final decision with respect to any proposal for alternative buffer mitigation options not specified in this Rule.

(n) ACCOUNTING FOR BUFFER CREDIT, NUTRIENT OFFSET CREDIT AND STREAM MITIGATION CREDIT. Buffer mitigation credit, nutrient offset credit, wetland mitigation ~~credit~~ credit, and stream mitigation credit shall be accounted for in accordance with the following:

(1) Buffer mitigation ~~that is~~ used for buffer mitigation credit ~~cannot~~ shall not be used for nutrient offset credits;

(2) Buffer mitigation or nutrient offset credit ~~cannot~~ shall not be generated within wetlands that provide wetland mitigation credit required by 15A NCAC 02H .0506; and

(3) Either buffer mitigation or nutrient offset credit may be generated on stream mitigation sites as long as the width of the restored or enhanced riparian buffer meets the requirements of Subparagraph (i)(1).

History Note: Authority 143-214.1; 143-214.5; 143-214.7; 143-214.20; 143-215.3(a)(1); 143-215.6A; 143-215.6B; 143-215.6C; 143-215.8A; 143-215.8B; 143-282(c); 143B-282(d); S.L. 1998-221; S.L. 1999-329, s. 7.1; S.L. 2001-418, s. 4.(a); S.L. 2003-340, s. 5; S.L. 2005-190; S.L. 2006-259; S.L. 2009-337; S.L. 2009-486; S.L. 2014-95;
Temporary Adoption Eff. October 24, 2014.

This Section contains information for the meeting of the Rules Review Commission on October 16, 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	Stephanie Simpson (2nd Vice Chair)
Jay Hemphill	Jeanette Doran
Faylene Whitaker	Ralph A. Walker
	Anna Baird Choi

COMMISSION COUNSEL

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

RULES REVIEW COMMISSION MEETING DATES

November 20, 2014	December 18, 2014
January 15, 2015	February 19, 2015

RULES REVIEW COMMISSION MEETING
MINUTES
October 16, 2014

The Rules Review Commission met on Thursday, October 16, 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, Jay Hemphill, Jeff Hyde, Stephanie Simpson, and Ralph Walker.

Staff members present were: Commission counsels Abigail Hammond and Amanda Reeder; and Julie Brincefield, Alex Burgos, and Dana Vojtko.

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

Chief Administrative Law Judge for the OAH, the Honorable Julian Mann III, addressed the Commission.

Judge Mann presented Senior Administrative Law Judge Fred Morrison with his 45 year service award.

Judge Morrison addressed the Commission.

Chairman Currin introduced Campbell Law School student Mary Jane Richardson.

Chairman Currin read the notice required by G.S. 138A-15(e) and reminded the Commission members that they have a duty to avoid conflicts of interest and the appearances of conflicts.

APPROVAL OF MINUTES

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

FOLLOW-UP MATTERS

Board of Dental Examiners – 21 NCAC 16D .0104, .0106; 16E .0103, .0104. All rules were unanimously approved with the following exception: Rule 21 NCAC 16D .0106 was withdrawn at the request of the agency.

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

LOG OF FILINGS (PERMANENT RULES)

Board of Agriculture

The Commission extended the period of review on Rule 02 NCAC 20B .0413 rule in accordance with G.S. 150B-21.13. The Commission extended the period of review to allow the North Carolina Board of Agriculture additional time to review staff's Request for Technical Changes.

Industrial Commission

All rules were unanimously approved.

Medical Care Commission

All rules were unanimously approved.

Criminal Justice Education and Training Standards Commission

Trevor Allen with the agency introduced Merrily Cheek, the new rulemaking coordinator for the agency.

All rules were unanimously approved.

Irrigation Contractors Licensing Board

All rules were withdrawn at the request of the agency.

NC Medical Board/Perfusion Advisory Committee

21 NCAC 32V .0102 was unanimously approved.

TEMPORARY RULES

Social Services Commission

David Locklear with the agency addressed the Commission.
Sharon Moore with the agency addressed the Commission.
Sarah Preston with the ACLU addressed the Commission.

10A NCAC 71W .0905 was approved, with Commissioner Hemphill opposed.

Environmental Management Commission

15A NCAC 02B .0295 was unanimously approved.

EXISTING RULES REVIEW

Environmental Management Commission

15A NCAC 02B, 02H, 02T, 02U – The Commission unanimously approved the reports as submitted by the agency.

COMMISSION BUSINESS

The Commission discussed holding a special meeting in December for consideration of the proposed rules of the Mining and Energy Commission. The Commission voted to hold the special meeting on Wednesday, December 17, 2014, in addition to the regularly scheduled meeting on Thursday, December 18, 2014. On both days, the meeting will convene at 9:00 a.m.

The meeting adjourned at 12:18 p.m.

The next regularly scheduled meeting of the Commission is Thursday, November 20th 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

October 2014

Rules Review Commission
Meeting
Please **Print** Legibly

Name	Agency
Jerrod Pearce	Social Serv. Commission
Sharon/Sharon D Moore	DSS/DPHHS
David Locklear	DSS/DHHS
Starlen Scott Robbins	DMH/DD/SAS-DHHS
Joel Turner	Hedrick Gardner for NC Ind. Comm.
Meredith Henderson	NC Industrial Commission
Sue Homewood	NCDENR/DWR
Gary Kreiser	DENR DWR
Jennifer Everett	DENR
Tammy Nance	NCIC
Nadine Pfeiffer	DHSR
Diana Barbry	DHSR
Chris Cauley	DHSR
Neal Conley	NCLBGC
Ryan Boyce	NCIC
Trevor Allen	CSETS
Merily Cheek	
Karen Smith	NCIC
Lisa Martin	NC HBA
Bridget Warren	Hedrick Gardner for NCIC
Mary Jane Richardson	Student - Campbell Law

Rules Review Commission Meeting
Please **Print** Legibly

* October 2014 *

Name	Agency
Nancy Hemphill	NC Medical Board
Sarah Preston	ACLU-NC
Beverly Sperati	NC DHSR
Harlen Scott Rich	DMHDDSAS
Nan Conley	NCLBGC

LIST OF APPROVED PERMANENT RULES
October 16, 2014 Meeting

INDUSTRIAL COMMISSION

Discovery	04 NCAC 10A .0605
Medical Motions and Emergency Medical Motions	04 NCAC 10A .0609A
Review by the Full Commission	04 NCAC 10A .0701
Review of Administrative Decisions	04 NCAC 10A .0702
Vocational Rehabilitation Services and Return to Work	04 NCAC 10C .0109
Hearing Costs or Fees	04 NCAC 10E .0202
Fees Set by the Commission	04 NCAC 10E .0203
Form 21 - Agreement for Compensation for Disability	04 NCAC 10L .0101
Supplemental Agreement as to Payment of Compensation	04 NCAC 10L .0102
Form 26A - Employer's Admission of Employee's Right to Pe...	04 NCAC 10L .0103

MEDICAL CARE COMMISSION

Itemized Charges	10A NCAC 13B .3110
Required Policies, Rules, and Regulations	10A NCAC 13B .3502
Requirements for Issuance of a License	10A NCAC 13C .0202
Itemized Charges	10A NCAC 13C .0205
Governing Authority	10A NCAC 13C .0301
Preservation of Medical Records	10A NCAC 13D .2402
Use of Nurse Practitioners and physician Assistants	10A NCAC 13D .2503

CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

Responsibilities of the School Director	12 NCAC 09B .0202
Basic Law Enforcement Training	12 NCAC 09B .0205
Criminal Justice Instructor Training	12 NCAC 09B .0209
Specialized Firearms Instruction Training	12 NCAC 09B .0226
Specialized Driver Instructor Training	12 NCAC 09B .0227
Specialized Subject Control Arrest Techniques Instructor ...	12 NCAC 09B .0232
Specialized Physical Fitness Instructor Training	12 NCAC 09B .0233
General Instructor Certification	12 NCAC 09B .0302
Specialized Instructor Certification	12 NCAC 09B .0304
Time Requirement for Completion of Training	12 NCAC 09B .0401
Evaluation for Training Waiver	12 NCAC 09B .0403
Comprehensive Written Examination - Basic Law Enforcement...	12 NCAC 09B .0406
Comprehensive Written Examination - Basic SMI Certification	12 NCAC 09B .0408
Comprehensive Written Exam - Instructor Training	12 NCAC 09B .0413
Comprehensive Written Exam - Specialized Instructor Training	12 NCAC 09B .0414
Satisfaction of Minimum Training - SMI Instructor	12 NCAC 09B .0416
Pre-Delivery Report of Training Course Presentation	12 NCAC 09C .0211
Reports of Training Course Presentation and Completion	12 NCAC 09C .0403
Minimum Training Specifications: Annual In-Service Training	12 NCAC 09E .0105
Topical Areas	12 NCAC 09F .0102
General Instructor Certification	12 NCAC 09G .0308

Comprehensive Written Exam - Instructor Training	12	NCAC 09G	.0314
Instructor Training	12	NCAC 09G	.0414

DENTAL EXAMINERS, BOARD OF

Application	21	NCAC 16D	.0104
Application	21	NCAC 16E	.0103
Examination	21	NCAC 16E	.0104

NC MEDICAL BOARD/PERFUSION ADVISORY COMMITTEE

Definitions	21	NCAC 32V	.0102

RRC DETERMINATION PERIODIC RULE REVIEW
October 16, 2014
Necessary with Substantive Public Interest

Environmental Management Commission

15A NCAC 02B .0101	15A NCAC 02B .0237	15A NCAC 02B .0280
15A NCAC 02B .0103	15A NCAC 02B .0238	15A NCAC 02B .0281
15A NCAC 02B .0104	15A NCAC 02B .0239	15A NCAC 02B .0282
15A NCAC 02B .0106	15A NCAC 02B .0240	15A NCAC 02B .0301
15A NCAC 02B .0108	15A NCAC 02B .0241	15A NCAC 02B .0302
15A NCAC 02B .0110	15A NCAC 02B .0242	15A NCAC 02B .0303
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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

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STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF MONTGOMERY	13 DHR 18668
DAVID LEGRAND, Petitioner, v. NC DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, HEALTH CARE PERSONNEL REGISTRY, Respondent.	**FINAL DECISION**

This contested case was heard before the undersigned, Julian Mann III, Chief Administrative Law Judge, on February 24, 2014 and February 25, 2014 in the Office of Administrative Hearings, Guilford County Courthouse, in High Point, North Carolina.

APPEARANCES

For Petitioner: David LeGrand
Pro Se
PO Box 1022
Mount Gilead, NC 27306

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

ISSUE

Whether Respondent deprived Petitioner of property; otherwise substantially prejudiced Petitioner's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by rule or law when Respondent substantiated the allegation that on or about September 1, 2013 David LeGrand, a Health Care Personnel, abused L.J. by confining a resident in a closet resulting in mental anguish, and neglected L.J by failing to follow the person centered plan for a resident during a behavior and confined the resident in a locked closet resulting in mental anguish.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 131E-256
N.C. Gen. Stat. §150B-23
42 CFR § 488.301
10A N.C.A.C. 13O.0101

EXHIBITS

Respondent's exhibits 1-24 were admitted into evidence.

WITNESSES

For Respondent: Sabrina Clark
Letisha Calloway
Genita McBride
Barry Thomas Owen
Kathy Moshman

For Petitioner: David LeGrand

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

FINDINGS OF FACT

1. At all times relevant Petitioner, David LeGrand, was employed as a Health Care Personnel working for Monarch-Myrtlewood ("Myrtlewood") Group Home, a health care facility in Mount Gilead, North Carolina and therefore subject to N.C. Gen. Stat. § 131E-256. (T. pp. 13; Resp. Exh. 7)

2. Petitioner completed all required training related to his job responsibilities as a behavior specialist. Petitioner initialed and signed the job description for behavior specialist at Myrtlewood, which included "supporting people who have been identified as highly aggressive." Petitioner signed a Certification of Completion for Myrtlewood's Orientation. As part of the orientation, Petitioner attended recertification training on the Prevention and Alternatives to Restrictive Interventions, where he learned skills for assessing individual risks

for escalating behavior and communication strategies for diffusing and de-escalating potentially dangerous behavior. Petitioner received training about abuse, neglect and exploitation. (T. pp. 20-34; Resp. Exhs. 1, 2, 3)

3. Petitioner was trained on reporting abuse, neglect and exploitation, and Petitioner understood that this was part of his duties as an employee of Myrtlewood. (T. pp. 33; Resp. Exh. 3)

4. Petitioner worked at Myrtlewood on September 1, 2013 from 8:00 am to 8:00 pm, during the time of the incident with L.J. Grace Thompson ("Thompson"), Barry Owens ("Owens"), and Leshaunda Horne ("Horne"), worked at Myrtlewood on September 1, 2013. (T. pp. 13-14; Resp. Exh. 5)

5. L.J. was 44 years old at the time of the incident. L.J has an I.Q. of 36, has Severe Mental Retardation and Autism, and operates at the level of a 5 year old. Although L.J is verbal, she rarely ever speaks. (T. pp. 104-113; Resp. Exh. 18)

6. In the Behavior/Life Skills plan for L.J. staff are to verbally redirect her when she is having an inappropriate behavior. It is documented in her behavior plan that L.J. will have inappropriate behaviors often, but responds well to redirection. All of the staff working on September 1, 2013 were aware and had been trained on L.J.'s Behavior Skills plan. (Resp. Exh. 18, 19, 23)

7. Petitioner was generally assigned to B.G., and was assigned to work with B.G. on September 1, 2013. (T. p. 21; Resp. Exh. 5)

8. On June 27, 2012, Petitioner received person specific training on L.J. (Resp. Exh. 23)

9. On the morning of September 1, 2013, L.J was exhibiting a high incidence of inappropriate behaviors. L.J. walked around in inappropriate night clothes and had continuously fouled her room. When L.J. left her room she was redirected several times to return to her room and put on a house coat. L.J. walked in and out of rooms and picked up and rearranged items. Staff continuously redirected her throughout the day. (T. pp. 15-18, 134; Resp. Exhs. 5, 13, 14, 15)

10. After lunchtime Thompson called for Petitioner to come assist her in picking up L.J. from the floor in the hallway. Petitioner assisted Thompson by lifting L.J. off of the floor. Petitioner told L.J. that if she did not start behaving she would get a visit from a witch. (T. pp. 18-19, 28; Resp. Exhs. 4, 10)

11. Later that afternoon L.J. was confined in a hallway closet. When L.J. would say the word "bed," L.J. was let out of the closet. Petitioner and others employed scare tactics to get L.J. to behave. (Resp. Exh. 7)

12. Owens reported hearing yelling, and heard L.J. say "let me out." Owens was in the living room at the time, and did not and could not physically see the incident. (T. p. 142; Resp. Exhs. 6, 14)

13. In the afternoon of September 1, 2013, Horne reported seeing Petitioner put on a Halloween mask, and say to L.J. "If you don't stop cutting up and going to the trash can, the boogie man is going to get you." This Halloween mask is regularly kept in the record room. Another Halloween mask known as the "wig" was found in B.G.'s room. Petitioner is regularly assigned to B.G. (Resp. Exhs. 8, 15, 22)

14. Owens attempted to send an email about the incident to Brian Stone, ("Stone") Operations Director, but the message did not reach Stone. After his shift ended on September 1, 2013' Owens called Peggy Tehune, the owner and operator of Monarch, the parent company for Myyrtlewood, and reported the incidents with L.J. (T. p. 139; Resp. Exh. 17)

15. Sabrina Clark ("Clark") a Qualified Professional, Letisha Calloway ("Calloway") a Qualified Professional, and Genita McBride ("McBride") an Operations Manager with Monarch, were all called on the night of September 1, 2013 to report to Myrtlewood and conduct an investigation concerning the incident that occurred with L.J. (T. pp. 61-63, 92-93, 117-119; Resp. Exh. 16)

16. Clark, Calloway and McBride interviewed Petitioner, Thompson, Owens and Horne at Myrtlewood on the night of September 1, 2013. Each member of staff was directed to write a statement accounting for the day's events, and then each was questioned about the incident. (T. pp. 64-89; Resp. Exhs. 5, 6, 7, 8, 9)

17. While being interviewed by Clark, Calloway and McBride, Petitioner admitted that he used the witch "scare tactic" with resident L.J. sometime before lunch. Petitioner went on to say that some of the staff use the term "witch" to calm L.J. down. Petitioner denied having any knowledge of a Halloween mask, or of confining L.J. in a closet. (Resp. Exh. 5)

18. During Thompson's facility interview on September 1, 2013, she reported that all staff on duty that day knew L.J. had been confined in the closet. Thompson alleged that after lunch she and David put L.J. in the closet for a few seconds to scare her, because she was exhibiting inappropriate behaviors. Petitioner, in his testimony and interview specifically denied Thompson's allegations. Thompson was not present at the hearing, and she did not testify. (T. pp 235, 274-275; Resp. Exhs. 7, 13)

19. A mask was found by Calloway and McBride in the record room, and a second mask was found in the dresser drawer of B.G.'s room. Petitioner was assigned to B.G. (T. p.107; Resp. Exh. 9)

20. On September 2, 2013 Richard Evers ("Evers") of Montgomery County Adult Protective Services was notified of the incident. (Resp. Exh. 9, 22)

21. After the facility investigation was completed, Calloway recommended Petitioner be terminated, and substantiated the allegation of abuse. Petitioner, Thompson, and Horne were all terminated from employment with Myrtlewood. (T. p. 98; Resp. Exhs. 9, 10)

22. The Health Care Personnel Registry Investigation's Branch ("HCPRIB") investigates allegations of abuse, neglect and other allegations against health care personnel in health care facilities. If the allegation is substantiated, the employee will be placed on the Registry. The HCPRIB covers most health care facilities in North Carolina that provide patient care. Accordingly, health care personnel at Myrtlewood are covered by the Registry. (T. pp. 166-167)

23. Kathy Moshman ("Moshman") was employed as an investigator for the HCPRIB. She is charged with investigating allegations against health care personnel in the south central region of North Carolina. Accordingly, Myrtlewood was in her region and she received and investigated the complaint that Petitioner had abused and neglected Resident L.J. (T. p. 166)

24. As part of the investigation against Petitioner, Moshman interviewed Petitioner, Thompson, Horne, Calloway, Clark and McBride. She also reviewed the resident's records and took into account the internal investigation conducted by the facility. (T. pp. 171, 176-178; Resp. Exhs. 1-7 and 9-16)

25. On November 19, 2013, Moshman interviewed Petitioner at the Montgomery County Library. Petitioner admitted to Moshman that other staff at the facility had informed him L.J. had a fear of witches. Petitioner also admitted that scaring a resident was not an acceptable method to redirect a resident. Petitioner did say that he mentioned to L.J. that she might get a visit from a witch, but he did not believe this was threatening. Petitioner denied ever seeing either of the Halloween masks that were found in the facility. (Resp. Exh. 13)

26. On November 13, 2013, Moshman interviewed Owens at Myrtlewood. Owens reported that he saw and heard resident L.J. exhibiting behaviors all day on September 1, 2013. He reported "hearing" someone holding the door shut while L.J. was in the closet. Owens also told Moshman he heard both the Petitioner and Thompson refer to the Halloween mask while talking with L.J. (T. p. 171; Resp. Exh. 14)

27. On December 10, 2013, Moshman interviewed Horne over the phone. Horne informed Moshman that L.J.'s behaviors reached a level on September 1, 2013, where staff should have called the home manager of Myrtlewood. Horne also admitted that she should have called the home manager when she saw Petitioner put the Halloween mask on, and tell L.J. the boogeyman would come get her. Horne confirmed that she knew about L.J.'s Behavior plan, and had read it. (T. p. 171; Resp. Exh. 15)

28. On November 13, 2013, Moshman attempted to interview resident L.J., but L.J. was non-responsive to questioning and mimicked phrases back to Moshman. (Resp. Exh. 19)

29. On November 14, 2013, Moshman spoke to Evers regarding his investigation into

the incident with Petitioner. Evers informed Moshman he did start an investigation into the incident, but because the facility had already fired the individuals involved it was unsubstantiated. Evers told Moshman that he spoke with L.J.'s father and sister who confirmed she had had a fear of masks and Halloween costumes her whole life, and that the facility was aware of this. (T. p. 184; Resp. Exh. 20)

30. Moshman used a reasonable person standard to determine that confining L.J. in the closet resulted in mental anguish. A reasonable person standard is used when determining whether a resident who is nonverbal or unable to express themselves, has suffered mental anguish or pain. It is not necessary that signs of physical abuse be found on the resident, the mere threat to someone with severely diminish capacity is enough to cause that resident mental anguish. (T. pp. 181, 188-190; *Allen v. NCDHHS,* 155 N.C. App. 77, 85, 88; 575 S.E.2d 565, 570, 572 (2002).

31. Neglect is defined as "a failure to provide goods and services necessary to avoid physical harm, mental anguish or mental illness." Moshman testified Petitioner neglected resident L.J. of Myrtlewood by putting on a witch's mask to frighten L.G. as a means to redirect L.G. (Resp. Exh. 23) (T. pp. 202, 203)

32. Petitioner was notified by letter that a finding of neglect and a finding of abuse would be listed against his name in the Health Care Personnel Registry ("HCPR"). Petitioner was further notified of his right to appeal. (Resp. Exh. 24)

33. Petitioner denies threatening resident L.J. and indicated that he never confined the resident in a closet. (T. p.41-43, 53; Resp. Exhs. 5, 13)

Based upon the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to chapters 131E and 150B of the North Carolina General Statutes.

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

3. The North Carolina Department of Health and Human Services, Division of Health Service Regulation, Health Care Personnel Registry Section is required by N.C. Gen. Stat. § 131E-256 to maintain a Registry that contains the names of all health care personnel and nurse aides working in health care facilities who are subject to a finding by the Department that they abused or neglected a resident in a health care facility.

4. As a health care personnel working in a health care facility, Petitioner is subject to the provisions of N.C. Gen. Stat. § 131E-256.

5. Monarch-Myrtlewood of Mount Gilead is a health care facility as defined in N.C. Gen. Stat. § 131E-255(c) and N.C. Gen. Stat. § 131E-256(b).

6. "Abuse" is the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish. 10A N.C.A.C. 13O.0101, 42 CFR § 488.301.

7. On or about September 1, 2013, the evidence is insufficient to conclude by the preponderance of the evidence that Petitioner abused a resident (L.J.) by confining the resident in a closet resulting in mental anguish.

8. "Neglect" is defined as "a failure to provide goods and services necessary to avoid physical harm, mental anguish or mental illness." 10A N.C.A.C. 13O.0101, 42 CFR § 488.301.

9. On or about September 1, 2013, Petitioner neglected a resident (L.J) by failing to follow the person centered plan for the resident during a behavior in attempting to redirect L.J. by scaring or frightening L.G. by talking about witches and putting on a witch's mask.

10. Respondent's decision to substantiate the allegation of neglect against the Petitioner is supported by a preponderance of the evidence. Therefore, Respondent did not deprive Petitioner of property; otherwise substantially prejudice Petitioner's rights; exceed its authority or jurisdiction; act erroneously; fail to use proper procedure; act arbitrarily or capriciously; or fail to act as required by rule or law by placing a substantiated finding of neglect against Petitioner's name on the Health Care Personnel Registry. A substantiation of abuse is not justified as not proven by the preponderance of the evidence.

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that Respondent's decision to place a finding of neglect, but not abuse, at Petitioner's name on the Health Care Personnel Registry should be **UPHELD**.

NOTICE

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the**

petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. In conformity with the Office of Administrative Hearings rule 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, date on the Certificate of Service attached to this Final Decision. N.C. **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.** 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 1st day of August, 2014.

Julian Mann III
Chief Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF FORSYTH

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 EDC 11604

Isaac F. Pitts, Jr. Petitioner, v. North Carolina Department of Public Instruction Respondent.	**FINAL DECISION**

This matter came on to be heard before Administrative Law Judge Beecher R. Gray on October 4, 2013, in High Point, North Carolina. In a consent order issued on January 8, 2014, the parties stipulated that the matter would be reassigned to Administrative Law Judge Craig Croom following Administrative Law Judge Gray's appointment as a Special Superior Court Judge for the State of North Carolina. Thereafter, this matter came on for a second day of hearing before Administrative Law Judge Craig Croom on February 19, 2014, in Raleigh, North Carolina. Both parties filed Proposed Final Decisions on June 9, 2014.

APPEARANCES

For the Petitioner:
Stephon J. Bowens
Bowens Law, PLLC
3434 Edwards Mill Rd., Ste 112-254
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For the Respondent:
Tiffany Y. Lucas
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ISSUE

Whether Petitioner was improperly denied a North Carolina teaching license?

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 115-296

16 N.C.A.C. 6C .0305
16 N.C.A.C. 6C .0312
16 N.C.A.C. 6C .0602

WITNESSES

For Petitioner: Isaac Pitts
John Simon

For Respondent: June Atkinson
Katie Cornetto
Jim Kirkpatrick

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: Exhibits 1 – 2

For Respondent: Exhibits 1 – 5

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

FINDINGS OF FACT

1. Petitioner applied for a license to teach in North Carolina on or about January 31, 2013. On his license application, Petitioner indicated that he had been convicted of a crime other than a minor traffic violation. (Resp. Exhibit 2)

2. Upon request from the Department of Public Instruction (DPI) for a written explanation of the "incident[s]" resulting in criminal conviction and court documents indicating the disposition of the criminal case, Petitioner submitted a brief statement to DPI in which he indicated that he had "resolved all legal obligation to the State of North Carolina…by serving an active sentence and completing all probation stipulations." Petitioner also submitted a six-page criminal background check to DPI. (Resp. Exhibit 2)

3. On January 20, 1984, Petitioner pled guilty to two misdemeanor breaking/entering charges in case numbers 83CR074075 and 83CR074076 for offenses that occurred on October 27, 1983. (Resp. Exhibit 2)

4. On December 4, 1984, Petitioner pled guilty to three misdemeanor trespass without a license charges in case numbers 84CR048871, 84CR048872 and 84CR048875 for offenses that occurred on November 8, 1984. (Resp. Exhibit 2)

5. On July 5, 2000, Petitioner pled guilty to five felony common law robbery charges in case numbers 90CRS033648, 90CRS033649, 90CRS033650, 90CRS033651 and 90CRS033736. (Resp. Exhibit 2).

6. On July 5, 2000, Petitioner pled guilty to a felony attempted common law robbery charge in case number 90CRS033737. (Resp. Exhibit 2).

7. Petitioner was over the age of 18 at the time of the commission of each of the offenses set forth in paragraphs 3-6 above. (T. p. 310).

8. Petitioner was called in to be interviewed by the Superintendent's Ethics Advisory Committee on or about March 15, 2013 to discuss his teaching license application. The Superintendent's Ethics Committee is made up of professional educators appointed by Superintendent June Atkinson to review applications for a teaching license where the applicant has indicated he or she has a prior conviction and/or has had a license revoked or suspended. (T. p. 8).

9. Petitioner was interviewed by members of the Ethics Committee regarding the circumstances surrounding his arrests and criminal convictions. (T. pp. 12-17) Petitioner admitted during the interview that he had pled guilty to charges of breaking and entering and robbery, and that he had served approximately three years in prison as a result of his criminal convictions. When questioned by the Ethics Committee, Petitioner was unable to recall in detail the circumstances surrounding each and every incident resulting in his arrest and conviction. (T. p.18) Petitioner did not have a copy of the criminal background check document before him; therefore he could not recall all the details of each incident. (T. pp. 304, 307, 312, 314-318).

10. Petitioner further admitted in the interview before this Ethics Committee that he was using illegal drugs and alcohol during the time he committed the crimes for which he pled guilty. Petitioner abused marijuana and alcohol, and he became addicted to narcotics. Petitioner committed robberies to support his drug habit. Petitioner received drug counseling while in prison, and he was able to overcome his addiction. (Resp. Exhibit 3; T. pp. 310-311, 314-316).

11. Tanya Turner, Petitioner's principal, spoke to the Ethics Committee in support of the Petitioner's request for a teaching license. (T. pp. 19, 91).

12. Petitioner provided Respondent with six strong letters of recommendations from two high school principals for whom he had worked, a state legislator and a former chairman of the Forsyth County Board of Education, a head basketball coach and a parent. (Pet. Exhibit 5).

13. After reviewing the documents and information presented by the Petitioner and Ms. Turner, the Ethics Committee deliberated and voted unanimously to recommend to Dr. June

Atkinson, the Superintendent of Public Instruction, that Petitioner's application for a teaching license be denied. (Resp. Exhibit 3; T. pp. 20-22, 96).

14. Katie Cornetto, in-house counsel to the SBE, delivered the recommendation to the Superintendent of Public Instruction, who agreed with the Ethics Committee's recommendation that Petitioner should not be granted a teaching license. (T. p. 21).

15. Petitioner appealed the decision not to grant him a teaching license to the Office of Administrative Hearings (OAH).

16. At the hearing in this matter, Jim Kirkpatrick, a 15-year teacher and a member of the Ethics Committee that interviewed the Petitioner, testified. His recommendation to deny the Petitioner a teaching license was based on various factors including the Petitioner's extensive criminal history; the nature of the crimes committed by the Petitioner; the Petitioner's age when he committed the crimes; the Petitioner's substance abuse history and the impact those factors have on the Petitioner's ability to be a role model for students. (T. pp. 82-87).

17. The Superintendent of Public Instruction also testified at the hearing in this matter. Dr. Atkinson based her decision to deny the Petitioner a teaching license on various factors including the Petitioner's past addiction to cocaine, the nature of the crimes that the Petitioner committed, and the prison time that the Petitioner served. Dr. Atkinson relied heavily on the professional judgment of her appointed advisory committee who had met the Petitioner in person and asked him questions about his criminal background, past misconduct, and his pending application for licensure. Dr. Atkinson indicated that there is no hard-and-fast rule regarding whether a convicted felon can ever get a teaching license in North Carolina, but that each case must be considered on its own merits on a case-by-case basis. Dr. Atkinson took into account multiple factors when considering Petitioner's application, giving great weight to the recommendation of the panel that interviewed the Petitioner and considered all the information and documentation presented by the Petitioner. Ultimately, Dr. Atkinson concluded that the Petitioner's application for a license should be denied in light of all the circumstances presented, both positive and negative, and in her professional judgment. (T. pp. 213-216; 244-245; 251, 262, 269, 272-273).

18. Petitioner also had his present employer, Simon Johnson, testify on his behalf. Simon Johnson is Executive Director of Quality Education Academy. Mr. Johnson indicated that the public charter school would not have signed-off on his application if they did not believe he was prepared to educate young people consistent with the expectations of the high moral standards established for the teaching profession. (T. Vol. II, p 441).

19. Petitioner has multiple convictions in North Carolina for breaking and entering, common law robbery and attempted robbery from approximately 1983 to 2000. Petitioner served an approximately 3-year prison term in the State of North Carolina.

20. Petitioner admitted at the hearing in this matter that he committed robbery in Ohio. As a result, he served approximately 7 years in prison in Ohio before being brought to North Carolina to serve time for offenses previously committed in this state. Petitioner failed to

disclose to the Ethics Advisory Committee that he had committed robbery in the state of Ohio and served a 7-year prison term there. Petitioner also failed to submit any documentation to the Respondent regarding the robbery and prison time in Ohio. Petitioner was addicted to cocaine during the time he committed robberies in North Carolina and Ohio. (Resp. Exhibit 5; T. pp. 331-338).

21. In this case, Petitioner sought a temporary lateral entry teacher's license for the 2013-14 school year. If approved, Petitioner would be allowed to teach U.S. History and Social Studies while he prepares to take the required state exam within the required time. Petitioner is currently employed as a high school basketball coach for Quality Education Academy. (T. Vol. II, p 382). Petitioner serves as the head basketball coach, facilities manager, and as a substitute teacher at Quality Education Academy and is actively educating students. (T. Vol. II, p 444). Petitioner has been employed by Quality Education Academy in some capacity since 2008. Prior to employment with Quality Education Academy, Petitioner was employed by the Forsyth County School System from 2003 through 2008 as an assistant basketball coach and teacher assistant. As a condition of employment with Forsyth County Schools, Petitioner consented to random drug testing during the five year period of employment for which he never failed. (T. Vol. II, p 181 -182).

22. Petitioner met all the requirements of 16 NCAC 6C .0305 for lateral entry. He has a bachelor's degree in Sociology from a regionally accredited school, has been recommended for lateral entry by a public charter school, and maintained a minimum grade point average above 2.5. (T. Vol. II, p 177 -178).

23. Respondent presented evidence at the hearing that the primary reason for the denial was that Petitioner violated 16 NCAC 6C .0312(a)(3) and (a)(8). (T. Vol. p 24, and T. Vol. II, p 228).

CONCLUSIONS OF LAW

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

2. In order to be eligible for a lateral entry license, a person shall have a bachelor's degree in the license area from a regionally-accredited IHE, be recommended for a lateral entry license by the employing LEA, and have had a minimum cumulative grade point average of at least a 2.5. 16 NCAC 6C 0305(b).

3. The burden is on Petitioner to demonstrate, by a preponderance of the evidence that the Respondent erred in denying his request for a teaching license. *Peace v. Employment Sec. Comm'n,* 349 N.C. 315, 507 S.E.2d 272 (1988).

4. Teachers are required in this State to maintain the highest level of ethical and moral standards and to serve as a positive role model for children. 16 N.C.A.C. 6C .0602(b)(2); *Faulkner v. New Bern-Craven Bd. of Educ.*, 311 N.C. 42, 59, 316 S.E.2d 281, 291 (1984).

5. As our Supreme Court observed in *Faulkner*:

> Our inquiry focuses on the intent of the legislature with specific application to teachers who are entrusted with the care of small children and adolescents. We do not hesitate to conclude that these men and women are intended by parents, citizenry, and lawmakers alike to serve as good examples for their young charges. *Their character and conduct may be expected to be above those of the average individual not working in so sensitive a relationship as that of teacher to pupil.* It is not inappropriate or unreasonable to hold our teachers to a *higher standard of personal conduct*, given the youthful ideals they are supposed to foster and elevate.
>
> *Id.* (emphasis added)

6. The State Board of Education may revoke or deny a teaching license for conviction of a crime, including a plea of guilty to a crime, if there is a reasonable and adverse relationship between the underlying crime and the continuing ability of the person to perform any of his/her professional functions in an effective manner. 16 N.C.A.C. 6C 0312(a)(3). The State Board of Education may also revoke or deny a teaching license for any illegal, unethical or lascivious conduct if there is an adverse relationship between that conduct and the continuing ability of the person to be an effective teacher. 16 N.C.A.C. 6C 0312(a)(8).

7. Petitioner's criminal convictions and other illegal, unethical and/or lascivious conduct bear a "reasonable and adverse relationship" to the Petitioner's ability to perform his professional duties in an effective manner.

8. The undersigned commends Petitioner for his effort to rehabilitate himself and become a productive member of our society. Furthermore, I applaud petitioner for his desire to serve our youth. However, Petitioner's past criminal behavior is not consistent with the high standards of conduct expected of teachers in this State. Petitioner can serve our youth in other capacities. He can impress upon our youth how his past has prevented him from achieving his dream of being a teacher. He can instill in our youth the need to avoid drugs and make good decisions in order to achieve their dreams.

9. While Petitioner meets the basic requirements of 16 NCAC 6C .0305(b), Petitioner's past behavior does not demonstrate the high standard of integrity, character and conduct expected of teachers in this State. Parents are entitled to have their children entrusted to individuals of the highest moral character, personal conduct, and professional ethics. Because of special concerns for the safety and welfare of children, a person convicted of seven robberies resulting in two stints in prison totaling ten years simply does not meet the threshold requirement demanded by communities and parents. While time has passed, the number and serious nature of the crimes are significant. School teachers are expected to be examples and role models for

our children. Furthermore, Petitioner's failure to make full disclosure of his felony conviction history and related prison time in Ohio to the Respondent, which is charged with issuing teaching licenses in this State, further demonstrates that the Petitioner does not meet the "role model" standard required to receive a North Carolina teaching license.

10. Respondent did not substantially prejudice Petitioner's rights. Respondent did not exceed its authority, did not act erroneously, did not fail to use proper procedure, did not act arbitrarily or capriciously, or did not fail to act as required by law or rule in denying Petitioner a license to teach in North Carolina.

10. Petitioner has not met his burden by a preponderance of the evidence that Respondent erred in denying his request for a teaching license.

DECISION

The Petitioner has not met his burden of proof by the preponderance of the evidence and therefore the denial of his teaching license is **UPHELD.**

NOTICE

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

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition an all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 23rd day of July, 2014.

Craig Croom
Administrative Law Judge

STATE OF NORTH CAROLINA COUNTY OF NEW HANOVER	Filed 2014 JUL 22 PM 12:17	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 13 EDC 20059

Office of Administrative Hearings

CATHERINE HELGESEN, Petitioner, v. NC DEPARTMENT OF PUBLIC INSTRUCTION LICENSURE SECTION, Respondent.	)	**FINAL DECISION**

The contested case of Catherine Helgesen, Petitioner herein, was heard before Senior Administrative Law Judge Fred G. Morrison Jr. on April 14, 2014, in Surf City, North Carolina.

APPEARANCES

PETITIONER: Catherine Helgesen, *pro se*
6400 Purple Martin Court
Wilmington, NC 28411

RESPONDENT: Tiffany Y. Lucas
Assistant Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, NC 27699

ISSUE

Whether the Respondent wrongfully denied Petitioner's request for salary credit for "non-teaching" work experience based upon her prior experience as a principal/financial & tax advisor at Fisher & Company and as a human resources/accounting manager at Wilmington Orthopaedic Group.

APPLICABLE STATUTES AND POLICIES

N.C.G.S. § 115C-296(a)
NC State Board of Education Policy TCP-A-006

WITNESSES

For Petitioner: Stephen L. DeBiasi
Catherine Helgesen
Allyson Redd

For Respondent: Arasi Adkins
Jennifer Curtis
Christy Layne
Susan Ruiz
Carol Vandenbergh

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: Exhibits 1 through 18

For Respondent: Exhibits 1, 2, 5 through 10

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

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

FINDINGS OF FACT

1. N.C. General Statute § 115C-296(a) provides, in pertinent part, as follows:

> The State Board of Education shall have entire control of licensing all applicants for teaching positions in all public elementary and high schools of North Carolina; and it shall prescribe the rules and regulations for the renewal and extension of all licenses and shall determine and fix the salary for each grade and type of license which it authorizes.

N.C. Gen. Stat. § 115C-296(a)

2. Pursuant to its authority to "determine and fix the salary for each grade and type of license which it authorizes," the State Board of Education has adopted policy TCP-A-006, entitled "Policies Related to Experience/Degree Credit for Salary Purposes."

3. The policy recognizes that educators employed by the North Carolina public schools may be awarded salary credit for past non-teaching work experience.

4. In order to be eligible to receive salary credit for past non-teaching work experience, the past work experience must be relevant.

5. Specifically, TCP-A-006 provides, in pertinent part, as follows:

> 'Relevant non-teaching work experience' shall be defined as professional work experience in public or private sectors that is directly related to an individual's area of licensure and work assignment.
>
> One year of experience credit can be awarded for every year of full-time relevant non-teaching work experience completed after the individual earned a bachelor's degree.
>
> N.C. State Board of Education Policy TCP-A-006, section 6.20

6. Petitioner is employed by the New Hanover County Schools as a sixth-grade mathematics teacher. She holds a bachelor's degree in commerce and a master's degree in Middle Grades Mathematics Education. Petitioner is licensed to teach sixth- through ninth-grade mathematics.

7. In August 2013, Petitioner – through her employing school system – requested salary credit from the North Carolina Department of Public Instruction Licensure Section (hereinafter DPI) for 13 years of past non-teaching work experience: 7 years of work experience at Fisher & Company and 6 years of work experience at Wilmington Orthopaedic Group. At the time, Petitioner was licensed in middle grades mathematics. Petitioner's teaching assignment at the time of her request was sixth-grade mathematics. DPI denied Petitioner's request for salary credit for 13 years of non-teaching work experience.

8. Two DPI employees testified at the hearing. Susan Ruiz, Director of Licensure, and Christy Lane, a licensure specialist, testified that licensure specialists are trained under the direction of supervisors for approximately six to nine months on how to review and evaluate an applicant's request for a license, including requests for a license with credit for past non-teaching work experience. They further testified that licensure specialists consult with other specialists, supervisors within the Licensure Section, and/or DPI curriculum consultants when they have questions about the degree of relatedness, if any, between a particular work experience and a licensure subject area.

9. Ms. Layne testified regarding the analysis that she and other licensure specialists undertake when determining whether to grant or deny an applicant's request for non-teaching work experience credit. Ms. Layne testified that the licensure specialists determine the degree of relatedness between the work experience set forth in the job description provided by the applicant and the applicant's area of licensure and teaching assignment. She further testified that

DPI adheres to the State Board of Education's policy, which states that the work experience and the area of licensure and teaching assignment must be directly related.

10. Ms. Ruiz testified that DPI's goal is to apply the policy regarding credit for past non-teaching work experience consistently and to grant credit for past non-teaching work experience whenever possible within the confines of the law and the policy promulgated by the State Board of Education.

11. Licensure staff who reviewed Petitioner's request in this case determined that Petitioner's non-teaching work experience as a principal/financial & tax advisor at an accounting firm and as an HR/accounting manager for an orthopedic group was not "directly related" to her area of licensure and her teaching assignment. Therefore, request for past non-teaching work experience credit was denied.

12. Following this initial denial, Petitioner, through her employer, New Hanover County Schools, and pursuant to the State Board of Education policy TCP-A-006, requested a review of Respondent's Licensure Section staff's decision by the Appeals Panel for Non-Teaching Work Experience Credit.

13. The Appeals Panel consists of independent professional educators, none of whom is employed by the State Board of Education or DPI. The Appeals Panel considers appeals of requests for past non-teaching work experience and graduate salary credit. Members include local school system personnel administrators, faculty from institutions of higher education, and representatives from professional teacher organizations. The Appeals Panel was created to give another level of review in the process and to permit teachers another opportunity to submit information in an objective forum.

14. The Appeals Panel unanimously voted to deny Petitioner's appeal, stating Petitioner's non-teaching work experience was not "directly related" to her area of licensure and teaching assignment.

15. The Panel's conclusion that Petitioner's past work experience as an accountant (CPA) is not directly related to her licensure area and work assignment is consistent with analogous cases considered by the Panel in the past in which middle grades math teachers requested credit for past work experience in the area of accounting. In those prior instances, the Panel denied the request, but full details of those cases were not presented at this hearing.

16. Petitioner disagrees with DPI's determination that her past non-teaching work experience is not "directly related" to her area of licensure and teaching assignment.

17. Two members of the Appeals Panel testified at the hearing of this matter: Carol Vandenbergh and Arasi Adkins. Both Ms. Vandenbergh and Ms. Adkins served on the Panel that considered Petitioner's request for credit for her past non-teaching work experience. They testified that they carefully reviewed all of the materials submitted by Petitioner in support of her request for credit for her past non-teaching work experience but that they ultimately concluded there was not a direct relationship between Petitioner's past work experience as an accountant

(CPA) and her current position as a middle grades mathematics teacher teaching sixth- and seventh-grade math classes.

18. Ms. Vandenbergh, Executive Director at Professional Educators of North Carolina and a former high school math teacher, testified that, in her estimation, Petitioner failed to demonstrate a "substantial connection" between her past jobs as an accountant and the standard course of study for middle school mathematics. "Substantial" is not mentioned as a requirement in State Board of Education Policy TCP-A-006.

19. Likewise, Ms. Adkins, Executive Director of Human Resources at the Chapel Hill-Carrboro City Schools System and former Director of Staffing and Licensure in the Alamance-Burlington Schools System, testified that, in her opinion, although there were certainly aspects of Petitioner's past work experience that were math-related, based on the descriptions of past experience submitted by Petitioner, "there was not enough of a correlation that it was *directly* related." Ms. Adkins testified that following review of the documentation submitted by Petitioner, the Panel discussed how the majority of Petitioner's past work experience was more closely correlated to business and managerial functions as opposed to the mathematical skills taught in middle school mathematics. The Panel concluded that the past work experience was not "directly related" to Petitioner's area of licensure and current teaching assignment.

20. Ms. Layne, the licensure specialist, and Ms. Ruiz, her supervisor, both testified that there is no written criteria or procedure for determining if non-teaching work experience is "directly related" to a teaching assignment. The policy is subjectively applied on a case-by-case basis. The applicant's job description is used to determine significant connections in conjunction with consultation with other staff, historical documents, curriculum specialists, and supervisors.

21. Ms. Lucas, Assistant Attorney General, stated in a March 21, 2014, letter to Ms. Helgesen that "the term 'directly related' is not defined in State Board Policy TCP-A-006, entitled *Policies Related to Experience/Degree Credit for Salary Purposes*; however, it is understood by DPI licensure staff and by members of the Experience Credit Appeals Panel based on training and years of experience in applying the Policy. Simply stated, there is no precise formula for determining whether one's past non-teaching work experience is 'directly related' to a teacher's area of licensure and teaching assignment." Whether an applicant's past non-teaching work experience is "directly related" has to be determined on a case-by-case basis by reviewing concomitantly the applicant's job descriptions and the course standards. Panel members must look beyond job titles and in depth at the job descriptions alongside the teacher's area of licensure and teaching assignment to determine whether a direct relationship exists.

22. Ms. Layne testified that she facilitated the Appeals Panel meeting. She provided copies of all documents submitted by the Petitioner. Ms. Layne was present at the meeting when the Petitioner's appeal was considered, but she did not cast a vote.

23. Ms. Layne testified that there was no agenda and that no minutes were taken at the Appeals Panel meeting, as this is not standard protocol.

24. Petitioner asked for an explanation as to why the Appeals Panel determined that her work experience was not directly related to her teaching assignment. In addition to there being no minutes, Ms. Layne had no recollection of the discussion at the meeting.

25. Ms. Vandenbergh, who served as a member of the Appeals Panel for Petitioner's appeal, was present at the meeting but had no recollection of the discussion regarding the case. She could not explain why the Appeals Panel determined that Petitioner's work experience was not directly related to her teaching assignment.

26. Ms. Adkins, who served as a member of the Appeals Panel for Petitioner's appeal, was present at the meeting and had some recollection of the specifics of Petitioner's appeal. Ms. Adkins determined that about one-quarter of the duties of one of Petitioner's job descriptions was directly related to Petitioner's math teaching assignment.

27. Respondent provided a copy of a spreadsheet entitled "Non-Teaching Work Experience Decisions" prepared by one of the Panel members. The decision for Petitioner's appeal stated "denied – job entailed elementary level math." The panel member who prepared this document was not present at the hearing. Ms. Layne and Ms. Vandenbergh did not know what the notation meant.

28. At this hearing, Petitioner offered testimony from witnesses and documentation to support her contention that there is a direct relationship between her past non-teaching work experience and her current math teaching assignment. The evidence presented at this hearing was not included in Petitioner's packet that was used by the Appeals Panel to make its decision.

29. Petitioner testified that she did not include in her appeals packet all the documents she had in her possession to support her appeal because there was not much guidance on what the Appeals Panel wanted her to submit for her appeal. She introduced her additional supporting documents and testimony during this hearing.

30. The Standard Course of Study for teaching mathematics in North Carolina follows the Common Core State Standards for Mathematics. These standards provide eight standards for mathematical practice, which direct that students develop skills in the processes and proficiencies for understanding the content of math and not just learning procedures. Teaching mathematics is deeply grounded in understanding the "why" of it all. That is one of the core purposes of the Common Core Math Standards. Teaching students to reason about the "why" of mathematics requires knowledge of the subject beyond the content, as directed by NC Teaching Standard III. Petitioner's work experience has provided solid ground in reasoning practices and the ability to explain and teach in meaningful ways.

31. Petitioner provided evidence in a document from the American Institute of Certified Public Accountants regarding skills and competencies possessed by certified public accountants (CPAs). The document emphasizes that the work of CPAs is deeply grounded not only in the technical skills of adding, subtracting, multiplying, and dividing numbers, but also in making sense of numbers and data, analyzing, and finding patterns and relationships. CPAs must be able to apply concepts in practice and communicate financial information in a meaningful way.

Furthermore, "[r]eliance placed on the expertise of CPAs … calls for depth of analysis, rigor and understanding not necessarily expected in other professions."

32. Petitioner requested seven years of salary credit for past non-teaching work experience at Fisher & Company.

33. The Fisher & Company job description includes such tasks as review of general ledger activity, reconciliation and adjustment of records, financial statement preparation, revenue and cost variance analysis, tax preparation of annual income tax returns, and preparation of quarterly and annual payroll tax reporting forms.

34. The Summary of the Fisher & Company job description states, "Business and personal financial consultant for business owners and high net worth individual clients. Responsible for financial and tax management aspects of large client base."

35. The Sixth-Grade Common Core State Standards for Mathematics, which detail what should be taught to and understood by sixth-grade mathematics students, include writing, interpreting, and using expressions and equations; computing fluently with multi-digit numbers and finding common factors and multiples; developing understanding of statistical thinking; applying and extending previous understandings of arithmetic to algebraic expressions; reasoning about and solving one-variable equations and inequalities; representing and analyzing quantitative relationships between dependent and independent variables; and developing understanding of statistical variability.

36. The Sixth-Grade Common Core State Standards for Mathematics also make numerous references to solving "real-world" problems.

37. Ms. Cindy Alexander, a Licensure Specialist at New Hanover County Schools, stated in an August 29, 2013, letter supporting Petitioner's appeal for salary credit for past non-teaching work experience that there are three instructional shifts for the Common Core State Standards for Mathematics: Focus, Coherence, and Rigor. She stated that "Rigor has three aspects: conceptual understanding, procedural skill and fluency, and application" and that "Ms. Helgesen's background as an accountant will be beneficial because she understands authentic mathematical applications. More importantly, she will be able to demonstrate the real life aspects of Rigor. Each Domain has a standard which calls for real life application."

38. The Seventh-Grade Common Core State Standards for Mathematics, which detail what should be taught to and understood by seventh-grade mathematics students, include developing understanding of operations with rational numbers and working with expressions and linear equations; analyzing proportional relationships and using them to solve real-world and mathematical problems; solving real-life and mathematic problems using numerical and algebraic expressions and equations; and investigating chance processes and developing, using, and evaluating probability models.

39. The Eighth-Grade Common Core State Standards for Mathematics, which detail what should be taught to and understood by eighth-grade mathematics students, include knowing

that there are numbers that are not rational, and approximating them as rational numbers; defining, evaluating, and comparing functions; and using functions to model relationships between quantities.

40. The Sixth-, Seventh-, and Eight-Grade Standards' Mathematical Practices include making sense of problems and persevering in solving them; reasoning abstractly and quantitatively; modeling with mathematics; using appropriate tools strategically; attending to precision; and looking for and expressing regularity in repeated reasoning.

41. The North Carolina Professional Teaching Standards Commission, Standard III, states that "[t]eachers bring a richness and depth of understanding to their classrooms by knowing their subjects beyond the content they are expected to teach." Furthermore, to make instruction relevant, "[t]eachers help their students understand the relationship between the *North Carolina Standard Course of Study* and 21st Century content which includes global awareness; *financial, economic, business and entrepreneurial literacy*; civic literacy; and health awareness" (emphasis added).

42. Petitioner's tasks at Fisher & Company are directly related to Petitioner's area of licensure and teaching assignment.

43. Petitioner requested six years of salary credit for past non-teaching work experience at Wilmington Orthopaedic Group.

44. The Wilmington Orthopaedic Group job description includes such tasks as developing and planning department objectives; performing all general accounting functions; reviewing accounts payable requests including matching invoice to purchase requests and receiving reports and checking for correct account numbers and dollar amounts; researching and resolving invoicing issues with vendors; processing cash disbursements weekly; overseeing cash management functions and directing and monitoring internal financial control programs for appropriate segregation of duties; analyzing expenditures, developing financing strategies and evaluating financial impact of capital/major purchase decisions; administering physician salary plan; working with Administrator to define human resources goals and objectives; developing, implementing, and maintaining human resources policies and objectives; developing, implementing, and maintaining compensation and benefits of the practice; developing, implementing, and maintaining performance management program for all employees; communicating with all employees to define and clarify human resources policies and procedures; preparing and distributing monthly newsletter; obtaining feedback from employees, including conducting exit interviews with employees who resign or retire; working with Administrator to define staffing plans; identifying areas of training and development for managers and staff; maintaining personnel record-keeping; working with managers to guarantee a safe and secure working environment; and participating in professional development activities.

45. The "Specific Skills" listed in the Wilmington Orthopaedic Group job description include strength in analyzing financial data; in-depth knowledge of principles and practices of human resources; and ability to interface and maintain effective relationships with all departments, managers, and employees.

46. The "Department" listed on the Wilmington Orthopaedic Group job description is "Administration," and the "Education and Other Requirements" states that a Bachelor degree in finance or accounting is required, but a Certified Public Accountant (CPA) designation is only preferred.

47. Petitioner's tasks at Wilmington Orthopaedic Group are not as directly related to Petitioner's area of licensure and teaching assignment as those at Fisher & Company. They are related more to human resources functions than to middle grades mathematics.

48. Ms. Allyson Redd, who testified as a witness for Petitioner at this hearing, is a Math Instructional Coach and Curriculum Support Specialist at Myrtle Grove Middle School, where Petitioner is employed as a sixth-grade math teacher. She has nine years of experience teaching middle grades math.

49. Petitioner was hired by Myrtle Grove Middle School in August 2013. She was chosen over three other candidates who were experienced math teachers but did not have accounting backgrounds. Ms. Redd testified that Petitioner was viewed as the strongest candidate because of her background as an accountant.

50. Ms. Redd testified that North Carolina follows the Common Core State Standards for Math as its Standard Course of Study in public schools.

51. The accounting model has as its foundation the concept of debits and credits, otherwise referred to as positive and negative numbers. Common Core Standard number 6.NS.5 states:

> Understand that positive and negative numbers are used together to describe quantities having opposite directions or values (e.g., temperature above/below zero, elevation above/below sea level, credits/debits, positive/negative electric charge); use positive and negative numbers to represent quantities in real-world contexts, explaining the meaning of 0 in each situation.

52. Ms. Redd testified that positive and negative numbers are first introduced to students in sixth grade and not in elementary math classes.

53. The Common Core Standards bring in "rigor" as an instructional shift not previously present in mathematics teaching standards. This shift is the real world connection to math procedures and concepts. It is also referred to as the "why" of math.

54. Ms. Redd testified that the math skills and knowledge possessed by Petitioner far outweighed her own when she was a first-year math teacher. It took several years for Ms. Redd to learn the math concepts and teach them before she truly understood them. She did not have a math background prior to teaching math. The courses she took in college for her teaching degree were focused on creating lessons around math concepts, not on understanding the math itself.

55. Ms. Redd opined that Petitioner's past non-teaching work experience is directly related to her position as a middle school math teacher.

CONCLUSIONS OF LAW

1. Petitioner bears the burden of proving the claims alleged in the Petition by a preponderance of the evidence. *Peace v. Employment Sec. Comm'n.*, 349 N.C. 315, 507 S.E.2d 272 (1998).

2. The State Board of Education has the constitutional power "to supervise and administer the free public school system and the educational funds provided for its support." N.C. Const. Art. IX § 5. This power includes the power to "regulate the grade [and] salary ... of teachers." *Guthrie v. Taylor*, 279 N.C. 703, 709, 185 S.E.2d 193, 198 (1971), *cert. denied*, 406 U.S. 920, 32 L.Ed.2d 119 (1972). The State Board has the specific duty "to certify and regulate the grade and salary of teachers and other school employees." N.C. Gen. Stat. § 115C-12(9)a; *Guthrie* at 711.

3. Finally, the State Board has the statutory authority to "determine and fix the salary for each grade and type of certificate which it authorizes ... ." G.S. 115C-296(a).

4. The intent of the State Board of Education in adopting TCP-A-006 was to recognize prior non-teaching work experience that directly supported the subject area to which a teacher was assigned and licensed to teach.

5. In this case, Petitioner has met her burden of demonstrating that Respondent deprived her of property or otherwise substantially prejudiced her rights and that Respondent exceeded its authority, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in denying Petitioner's request for seven years of salary credit for her past non-teaching work experience at Fisher & Company.

6. Petitioner has not met her burden of demonstrating that Respondent deprived her of property or otherwise substantially prejudiced her rights and that Respondent exceeded its authority, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in denying Petitioner's request for six years of salary credit for her past non-teaching work experience at Wilmington Orthopaedic Group.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned renders the following:

DECISION

Respondent's decision to deny Petitioner's request for approval of 13 years of salary credit for past non-teaching work experience should be reversed and Petitioner should be granted salary credit for 7 years of past non-teaching work experience.

NOTICE

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

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 22nd day of July, 2014.

Fred G. Morrison Jr.
Senior Administrative Law Judge

STATE OF NORTH CAROLINA		IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF RUTHERFORD		13 OSP 13014
Mary S. Hardin, Petitioner, vs. NC Dept of Public Safety, Respondent.	)))))	**FINAL DECISION**

The contested case of Mary S. Hardin, Petitioner herein, was heard before Administrative Law Judge Selina M. Brooks on February 11, 24 and 25, 2014, in Rutherford County and Cleveland County, respectively.

APPEARANCES

PETITIONER: John W. Gresham
Tin Fulton Walker & Owen
301 East Park Avenue
Charlotte, North Carolina 28203

Micah L. Cooper
Joshua B. Farmer
Tomblin Farmer & Morris
PO Box 632
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RESPONDENT: Tamika L. Henderson
Assistant Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27609

PROTECTIVE ORDER

A protective order was entered on consent by the Undersigned on October 2, 2013.

PREHEARING MOTIONS

At the call of this contested case for hearing, Respondent made an oral **Motion To Strike** the Petitioner's witness list filed on February 10, 2014. The Undersigned denied the motion and directed that certain witnesses testify at a later time to allow Respondent sufficient time to prepare for their testimony. (T. pp. 6-13)

Respondent filed a **Motion In Limine** on January 28, 2014. Petitioner did not file a written response and, instead, submitted case decisions for consideration at the hearing. After hearing oral argument, the motion was denied. (T. pp. 14-19)

Petitioner made an oral **Motion To Sequester** the witnesses. The motion was granted. (T. p. 19)

WITNESSES

The following witnesses testified for the Petitioner:

Mary Hardin,
Douglas Lee MacDonald
Clarence Jake Seawright
Ramona Kay Rhodes Hall
Karel Ann Reynolds
Gary Hamrick
Samuel Ray Dotson
David Robert Mitchell

The following witnesses testified for the Respondent:

Mary Hardin
Roger Walter Moon
Clinton Nicholas Gailie
Kathy Jane Hampton
Shayne McGinnis Dotson
Robert Allen Reed

EXHIBITS

Petitioner's exhibits ("P. Exs.") 1-22 were admitted into evidence. Respondent's exhibits ("R. Exs.")1-30 were admitted into evidence.

PARTY REPRESENTATIVES

The Petitioner's party representative was Petitioner, Mary Hardin. The Respondent's party representative was Keith Whitener.

ISSUES

1. Whether Respondent had just cause to demote Petitioner?

2. Whether Respondent demoted the Petitioner due to her religious affiliation with the Word of Faith Fellowship Church?

BURDEN OF PROOF

1. Respondent bears the burden of proof that there was just cause to demote Petitioner.

2. Petitioner bears the burden of proof that her demotion was based on religious discrimination.

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

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

FINDINGS OF FACT

1. Petitioner commenced her employment with the North Carolina Department of Public Safety ("NCDPS") in 1995 as a Correctional Officer at Rutherford Correctional Center ("Rutherford Correctional"). In 1999, Petitioner started working as a Programs Assistant I until she was promoted to a Programs Assistant II. In 2008, Petitioner was promoted to a Programs Supervisor. (R. Ex. 24; P. Ex. 1, p. 11).

2. In 2010, Petitioner was promoted to Programs Director. (R. Ex. 24; P. Ex. 1, pp. 12-13). As Programs Director, she supervised the Programs Supervisor, the case managers, the medical staff and the processing assistant. (T. pp. 31, 281) She also would oversee community volunteers. (T. p. 70)

3. Community volunteers enter Rutherford Correctional for different reasons and some would escort inmates into the community for religious services, AA or NA meetings. (T. p. 70)

4. At the time of her promotion in 2010, Petitioner was a member of Word of Faith Fellowship Church ("Word of Faith"). (T. p. 30).

5. Word of Faith is a fully racially integrated nondenominational Christian Pentecostal Church located in Rutherfordton, North Carolina. (T. p. 491; P. Ex. 11).

6. Word of Faith has received local, national and international attention related to some of their religious practices. Since the 1980s, false rumors have circulated about the church throughout the community. (T. pp. 476-77, 493-95, 500-02; P. Ex. 11, exh. F)

7. Karel Reynolds is a minister of Word of Faith and principal of the Word of Faith School. The school is highly recognized and sends a high proportion of its graduates to college. She also is an adjunct faculty member at Cleveland County Community College and Isothermal Community College. (T. pp. 490-92)

8. Ms. Reynolds testified concerning the false rumors about Word of Faith such as that it is a cult, that it takes members' paychecks, and that during services church members throw up in buckets. (T. pp. 493-94)

9. Additionally, Ms. Reynolds described her experience with those who describe members of the Word of Faith as "woofers", derived from an acronym of the church's name, "WOFF". She and her children have been subjected on numerous occasions to people who will jeer "woofer" and "bark like dogs" at them. (T. pp. 474-477)

10. Word of Faith members have been volunteering at Rutherford Correctional through the church's prison ministry since at least 1986. (T. p. 443) Word of Faith pastor Douglas MacDonald has worked in the church's prison ministry for 26 years, has worked with three Superintendents at Rutherford Correctional, and has regularly ministered in five prisons in the area during that time. (T. pp. 430-31; P. Ex. 8) Respondent has honored Pastor MacDonald with the Volunteer Of The Year Award. (T. p. 432)

11. Word of Faith has never been denied access to Rutherford Correctional and has received the same access to the prison as other churches. (T. p. 192). The church provides a lot of community activity at the prison. (T. p. 537)

12. Former inmate Clarence Seawright testified concerning his association with Word of Faith and his relationship with church members. When he first started attending services, he was not interested in church membership and let it be known that he did not want to be touched or hugged. His wishes were respected. Since his release from prison in 2012, he has lived in Asheville, North Carolina, moved to Georgia, and with assistance of Word of Faith members is in the process of relocating to Marion, North Carolina. (T. pp. 460-68, 487-88)

13. After hearing the testimony, observing the demeanor and weighing the credibility of Pastor MacDonald, Ramona Hall, Karel Reynolds, Inmate Seawright and Petitioner, the Undersigned finds as fact that: Word of Faith is committed to long-term ministry to prison inmates during their incarceration and after their release into the community; and the negative publicity directed at Word of Faith has resulted in false rumors in the community and harassment of its members.

14. During the course of performing her duties as Programs Director, Petitioner would routinely invite her co-workers and inmates to attend Word of Faith. (T. pp. 113-15, 268, 538) She wanted her coworkers to see what actually happens at a Word of Faith service but no one accepted the personal invitation. (T. p. 155) In their official capacity, Programs staff would visit a Word of Faith service to confirm that inmates were where they were supposed to be and with the appropriate person. (T. pp. 157-58)

15. Petitioner would initiate conversations with coworkers about the practices of Word of Faith and her personal life. (T. pp. 40, 307-08) She would discuss her religious practices, such as "shouting out" demons, and sometimes coworkers would respond in jest. At the time that the comments were made, Petitioner did not indicate that she was offended by this response. (T. pp. 114-15, 173, 285, 323, 366-67, 503, 513-15, 532 & 538).

16. Around the time of her promotion to Programs Director, Petitioner had retrieved her brother's two minor children from foster care in Virginia and was involved in litigation with her sister-in-law over their custody. Petitioner was also dealing with personal medical issues. (T. pp. 167-68, 331)

17. Petitioner did not make a smooth transition into her role as Programs Director. (P. Ex. 1, p. 15) She was overwhelmed in her personal life and by her new supervisory responsibilities. (T. p. 34; R. Ex. 24, pp. 15-17).

18. On January 27, 2011, Petitioner met with Superintendent Reed concerning her job performance as Programs Director. He suggested that Petitioner take time to shadow the Programs Director at another prison and made a TAP (The Appraisal Process) entry in January 2011, encouraging Petitioner to separate her personal life and her work life. (T. pp. 35-37, 328-31; R. Ex. 4) Petitioner recognizes that he was making an effort to assist her. (R. Ex. 24, p. 16)

19. In early 2011, Petitioner was attending a Programs staff meeting in Superintendent Reed's office. Ryan Brawley asked, "What's this Word of Faith I keep hearing about?" (T. p. 366) Shayne Dotson replied that she had heard it was "a cult" and they "take your paycheck." Petitioner responded that these statements were not true. (T. pp. 140-41, 303-04). Superintendent Reed did not admonish those who were repeating rumors about the Word of Faith. (T. pp. 141-42)

20. In June 2011, an inmate filed a grievance against Petitioner, alleging that she was retaliating against him because he stopped attending church services at Word of Faith. (T. pp. 42-45, 333).

21. When Petitioner learned about the grievance, she had the inmate brought to her office and she questioned him about it. (T. pp. 40, 333).

22. Superintendent Reed considered issuing a written warning for interfering with the grievance process, but instead issued Petitioner a "Coaching" about her behavior and made an "unsatisfactory" TAP entry in her employment file on June 13, 2011. (R. Ex. 5; T. pp. 41, 334).

23. Petitioner was aware that she would be given an opportunity to respond to the inmate's allegations and accepts responsibility that it was poor judgment to question the inmate about the grievance. (T. pp. 41, 45)

24. The Undersigned finds as fact that Petitioner accepts personal responsibility for her actions that resulted in the Coaching.

25. The Undersigned finds as fact that Petitioner was not issued a Coaching because of her religious beliefs or membership in the Word of Faith.

26. In October or November of 2011, Ryan Brawley received a document titled "Word of Faith Fellowship Do's and Don'ts" from a non-employee volunteer. He showed the document to at least one other employee, Gary Hamrick. (T. pp. 507-511)

27. Mr. Brawley gave the document to Assistant Superintendent Sam Dotson who put it in his desk drawer. (T. pp. 521-23, 526; R. Ex. 29, p. 8; P. Ex. 19).

28. While he was out of the office at lunch, Petitioner went into Mr. Dotson's office without permission, took the document from his desk and made copies of it. (T. p. 595; R. Ex. 24, pp. 71-72).

29. When Mr. Dotson returned to his office, another employee returned to him the last page of the document which had been found in the photocopy machine. (T. pp. 523-524)

30. Petitioner was Mr. Brawley's supervisor and was responsible for his performance appraisals and gave him "good to outstanding TAP entries". (T. p. 540)

31. Mr. Dotson did not believe that Mr. Brawley needed to be disciplined because he didn't bring the document to the prison and because he did the right thing by bringing the document to him. (T. pp. 526, 535).

32. Mr. Dotson did not seek to admonish the non-employee volunteer for bringing the document into the prison. (T. p. 526)

33. Superintendent Reed heard about this document in early 2012, sometime after he had conversations with employees about not discussing Word of Faith except for work-related reasons. (T. p. 382-83)

34. Shayne Dotson recalls that in October 2011, Superintendent Reed told staff to be careful about what they said about Word of Faith. (T. 319-21)

35. On October 26, 2011, Superintendent Reed asked Petitioner for a status update regarding the Chaplain Appreciation Luncheon and called the other Programs staff into his office to discuss the arrangements for the luncheon. As Programs Director the luncheon was Petitioner's responsibility. (T. pp. 46-48, 335, 370-371 & 578).

36. Petitioner became angry during that meeting over a discussion about who was doing different aspects of the luncheon preparations, slammed the door and demanded a resignation form.

She used profanity in the presence of co-workers and an inmate, and also informed a subordinate employee that "I was mad enough to crawl across the table and punch him in the face." (T. pp. 48-49, 144-52).

37. Superintendent Reed understood that this statement was not a threat. (T. p. 392)

38. Petitioner understands that using profanity in the presence of an inmate violates Respondent's Policy "Personal Dealing with Offenders". (T. pp. 52, 339; R. Ex. 7.)

39. Petitioner takes personal responsibility for her actions and recognizes that her actions were in poor judgment. (T. p. 55)

40. Roger Moon, the Western Region Prison Director, assigned Christopher Hunt, Western Regional Training Coordinator, to investigate the incident. (P. Ex. 7; R. Ex. 25)

41. During the investigation by Mr. Hunt, Petitioner alleged that while she was attending a meeting in Superintendent Reed's office she received a telephone call from Pastor MacDonald. When she greeted him, Sam Dotson stated that her chastity belt must be going off, cupped his hands and said "we have penetration in section 7." (T. p. 194) Petitioner had not reported this comment. (T. p. 194-96)

42. Mr. Dotson testified that there had been an ongoing joke between him and Petitioner concerning "an alarm on her chastity belt." Petitioner had informed him that she was not interested in having a sexual relationship with anyone and that hers was "under lock and key." After he realized that his comments offended her, Mr. Dotson apologized to Petitioner. (P. Ex. 3; R. Ex. 29; T. pp. 532-35, 596-597).

43. During the investigation by Mr. Hunt, Petitioner complained about allegedly derogatory comments made by Shayne Dotson at the meeting in Superintendent Reed's office in early 2011. (T. p. 176, 198-199)

44. On October 27, 2011, the report by Mr. Hunt acknowledged that Petitioner had complained to him about the "[c]oarse" comments being made about Word of Faith. The report concludes that the statement made by Petitioner about being mad enough to punch Superintendent Reed in the face was not a statement that she "truly" intended to "strike Mr. Reed." The report also concludes that a part of Petitioner's anger may have been a result of past comments made toward Ms. Hardin about her church. Mr. Hunt states that Superintendent Reed "acknowledged verbally that negative comments or jokes have been made toward Ms. Hardin in the past about the Church. He stated that nearly six months ago, he had met with all non-uniform staff and instructed them to no longer make any comments regarding the church unless it was work related and factual." The report concludes that "[t]his was not done formally but considering the sensitivity of the matter, it may be an option management should consider." (P. Ex. 7 p. 7; R. Ex. 25, p. 4)

45. Mr. Hunt reported that when he interviewed Petitioner that she stated her desire to apologize

to Superintendent Reed for her actions. Mr. Hunt was present at a meeting between Petitioner and Superintendent Reed, felt it was positive, and noted that they sat together "during the Chaplain's luncheon which showed staff that there was unity among the management team at Rutherford Correctional." (P. Ex. 6; R. Ex. 25, p. 4)

46. Petitioner was issued the first written warning on November 10, 2011 for unacceptable personal conduct because she used profanity and stated to another employee that she felt like punching Superintendent Reed. (R. Ex. 6; P. Ex. 7, pps. 1-3; T. p. 56)

47. Petitioner concedes that the November 10, 2011 written warning was not issued because of her Christian faith or her affiliation with Word of Faith. (T. p. 56).

48. The Undersigned finds as fact that the first written warning was not issued because of Petitioner's religious beliefs or membership in the Word of Faith.

49. Superintendent Reed first learned that Petitioner felt that she was being discriminated against when he received Mr. Hunt's investigation report. He then spoke individually to each non-uniformed staff member and directed them not to discuss Word of Faith or any other church unless it was factual or work-related. (T. p. 368)

50. Region Director Moon reviewed Mr. Hunt's investigation report, but he didn't think he needed to take any action. (T. p. 226)

51. In October 2011, David Mitchell, Operations Manager for the Western Region, Division of Prisons, attended a fundraising dinner where Petitioner was present. Petitioner alleges that he asked her about the use of concubines at her church. (T. pp. 154, 159; R. Ex. 29) Petitioner never reported this allegation to anyone at the NCDPS. (T. p. 179).

52. Mr. Mitchell did not definitively deny using the word "concubine", but did participate in a general discussion at the table concerning different aspects of Word of Faith in which Petitioner explained the church's practices concerning church members' personal relationships such as dating. (T. pp. 547-550)

53. During the summer of 2012, a local pastor of another church complained that Word of Faith was given preferential treatment at Rutherford Correctional by management which included Petitioner, but an investigation did not support that allegation. (T. pp. 155-157, 179-80, 555-61)

54. In August of 2012, Region Director Mitchell investigated an allegation that Petitioner was telling inmates that Word of Faith offers new suits and white Bibles. (R. Ex. 29). As a result of the investigation, he directed that if Word of Faith donated suits to the prison that the suits be made available to all inmates not just those attending services at Word of Faith. (T. p. 559).

55. Petitioner was aware that in the past her brother had been friends with an inmate and that her

sister was friends with the inmate's stepmother. (T. p. 603). Several years prior, Petitioner had attended the same church as the inmate's father, Tanners Grove Methodist Church. (T. pp. 615-16; R. Ex. 10) She did not report her connection to the inmate to anyone at NCDPS. (R. Ex. 7; T. pp. 60-61, 350)

56. In August of 2012, Petitioner learned that this inmate was being transferred out of Rutherford Correctional based on an allegation that he had threatened to harm a local attorney in Rutherfordton who feared for his life and that of his family. (T. pp. 59, 62-63, 341). Petitioner was aware of this information as a result of her employment at the prison. (T. pp. 62, 63-64).

57. An inmate informant had alerted authorities about the alleged plot and an FBI investigation was underway. (R. Ex. 8; T. p. 64).

58. Inmates are not told when or where they are being transferred because of safety concerns. (T. p. 349)

59. In order to investigate the threat, Superintendent Reed reviewed the inmate's telephone transcripts. A call between the inmate and his father disclosed that Petitioner had told the inmate's father the reasons for the inmate's transfer and that the allegations were made by an inmate informant. (T. pp. 342-344, 347; R. Ex. 8). Petitioner also shared the information with her brother and sister. (T. pp. 66, 599, 602-06; R. Ex. 9).

60. During this investigation, Petitioner submitted a written statement dated August 20, 2012 which states that her sister is the one who spoke to the inmate's father, repeating what Petitioner had said to her. (R. Ex. 9)

61. In a second written statement dated August 22, 2012, Petitioner stated that she advised the inmate never to tell anyone about his relationship and connection to her family member. (R. Ex. 10).

62. Petitioner concedes that her actions could have compromised the FBI investigation and had the potential to place the life of the inmate informant in danger. Petitioner further acknowledges that her actions compromised the security of the prison . (T. p. 64).

63. Petitioner testified that she understood that it was poor judgment to share the information with her sister, brother and the inmate's family. (T. p. 66).

64. Petitioner had been trained and was familiar with Respondent's policy prohibiting an employee from personal contact with an inmate's family member. (T. pp. 58-59; R. Ex. 7)

65. On August 30, 2012, Petitioner was issued a second written warning for unacceptable personal conduct for the communication of sensitive and confidential information to an inmate's family member. (T. pp. 64-65; R. Ex. 11).

66. Petitioner accepts responsibility for the second warning. (T. pp. 67, 70; R. Ex. 24, pp. 40-41)

67. The Undersigned finds as fact that Petitioner was not issued the second written warning because of her religious beliefs or her membership in Word of Faith.

68. Petitioner testified that she made a verbal complaint to Superintendent Reed after the second written warning, complaining about comments his administrative assistant, Shayne Dotson, made at different times concerning Word of Faith. Petitioner testified that Ms. Dotson's comments were in response to Petitioner's comments about Word of Faith. (T. pp. 198-200)

69. In the fall of 2012, Word of Faith members who were approved by Respondent as community volunteers escorted up to 23 inmates from Rutherford Correctional to Word of Faith services. (T. pp. 71, 433).

70. During this time, Word of Faith received threats from unknown individuals in the community, was receiving substantial media attention, and some people were picketing outside the church. (T. p. 433).

71. Petitioner suggested to Superintendent Reed that inmate visits to Word of Faith may need to be suspended because of the threats and because there was the possibility of inmates being photographed by public media at the church. (T. pp. 71, 362-64)

72. Superintendent Reed discussed the situation with Pastor MacDonald who agreed that it would be best to curtail the visits for the security of the inmates. (T. pp. 433-434)

73. The church sought to maintain contact with the inmates who had attended Word of Faith in two ways. One was to request a weekly service so that up to six Word of Faith members could conduct a Bible study at Rutherford Correctional. The request was approved by Superintendent Reed on November 2, 2012. (R. Ex. 26; T. pp. 72, 360).

74. In November 2012, during a discussion concerning the Bible Study, Petitioner alleges that Superintendent Reed stated about Word of Faith, "I do not want to upset anyone and have them throwing up in buckets." (T. p. 139; R. Ex. 29). Superintendent Reed denies making the comment. (T. p. 373).

75. Pastor MacDonald also thought that the church member who had a relationship with an inmate could visit him in the prison. (T. 436; P. Ex. 8)

76. As Programs Director, Petitioner was responsible for overseeing community volunteers and community leave sponsors who enter the prison for different reasons. (T. p. 70).

77. Pastor MacDonald obtained approximately 50 blank visitor applications for the Word of Faith members who had worked with the inmates. After Word of Faith members completed the forms, he personally took the forms to the prison. (T. p. 436; P. Ex. 8)

78. Petitioner did not advise Pastor MacDonald about Respondent's visitation policy that inmates are only allowed 18 individuals on their visitation list. (R. Ex. 12-13) Petitioner told Pastor MacDonald to complete the forms and return them at one time to Ms. Hampton. (T. pp. 81-82)

79. Pastor MacDonald did not ask all of the inmates who had been to Word of Faith if they wanted Word of Faith members to visit. (T. pp. 446-47) He made the blank application forms available at the church building for any members to complete. (T. p. 485) He personally delivered the completed forms to the Programs office. (T. p. 82)

80. Ms. Hampton knew that the applications were supposed to be mailed to the prison by the applicants, but she entered the applications into the computer because Petitioner was her supervisor and had informed her that the applications needed to be entered into the computer so that Word of Faith members could visit the inmates since they were not being allowed to go to church services at Word of Faith. (T. pp. 81-83, 99, 299).

81. Ms. Hampton enters applications on the computer and does not have the ability to approve them. She was not disciplined because she acted under the guidance of her supervisor. (T. pp. 255, 364-65)

82. Petitioner was familiar with Respondent's Prisons Policy, Chapter D Section .0200 titled Visitation Policy and Procedure which requires that inmates send blank applications to people they wish to visit with them while in prison. The completed application must be returned to the facility head where the inmate is housed by USPS mail. The completed applications must be approved by the facility head or his designee. (T. pp. 73-75; R. Ex. 12-13).

83. By providing visitation applications to Word of Faith members, Petitioner violated Respondent's visitation policy. (T. p. 103).

84. Respondent has a separate process whereby clergy and/or spiritual advisors can be placed on an inmate's visitation list. (T. p. 103).

85. Petitioner knew that she was violating Respondent's Visitation Policy by approving applications that had not been received through the USPS mail and excuses her actions because of a staff shortage. (T. pp. 589, 597-98, 612; R. Exs. 28 & 30)

86. After Petitioner approved the completed applications, she called the inmates to her office and told them that the Word of Faith applicant was an approved visitor. (T. pp. 84-87, 135; R. Ex. 18)

87. Petitioner was in a position of authority over the inmates at the prison and as Programs Director she had control over inmate privileges such as work release. (T. pp. 97, 272-73).

88. Inmate Clinton Gailie testified that Petitioner called him to her office and informed him that

two men had been added to his visitors list. Inmate Gailie knew one of the men but did not know the other. Inmate Gailie had not requested that the men be added to his list nor did he want them on his list. He testified that he did not feel comfortable telling Petitioner that he did not want the Word of Faith members added to his visitation list. One of the Word of Faith members placed on Gailie's visitation list later attempted to visit him and he refused the visit. (T. pp. 269-71).

89. Petitioner testified that Inmate Gailie "appeared to be happy" that a Word of Faith member would visit him." (T. p. 138)

90. Superintendent Reed had issued a memo naming individuals, including Petitioner, authorized to sign as his designee in his absence. The memo identifies ten subordinates by name and title, and lists them by order within the supervisory chain of command. The memo does not limit this signatory authority to the highest ranking person present at the time. Instead, the memo authorizes all ten subordinate employees "to sign as Superintendent's designee in my absence." (T. pp. 75-79, 350-53, 377; R. Ex. 14) He did not have a discussion with his subordinates about this memo or how it was to be understood. (T. p. 353)

91. Superintendent Reed testified that Petitioner has approved visitation applications in the past and "[t]here is nothing that says she can't." (T. p. 356)

92. Petitioner testified that in the past she had approved applications but in that situation the inmates had initiated the process. (T. pp. 101, 123-24 & 185-86; P. Ex. 14).

93. At the time Petitioner approved the applications, Word of Faith was approved to have a Bible study at the prison beginning the next day. Petitioner sent an email to various personnel at Rutherford Correctional on November 2, 2012, informing them of the approval and providing the names of the five Word of Faith members who would be coming. (R. Ex. 26)

94. On November 22, 2012, Superintendent Reed sent an email to Petitioner and other personnel informing them that there had been issues concerning who was attending the Bible Study and that only Word of Faith members listed in Petitioner's November 2, 2012 email would be admitted. (T. pp. 94-95, 361; R. Ex. 26).

95. Sergeant Vallecillo informed Superintendent Reed that inmates had complained to him that Petitioner had placed unwanted individuals from Word of Faith on their visitation list. Superintendent Reed initiated an investigation. (T. pp. 110, 353; R. Ex. 16).

96. Superintendent Reed printed the visitation list for the visitor applications approved by Petitioner and then personally met with the inmates. Every inmate confirmed that Petitioner called him to her office and told him that the visitor had been approved. Only one inmate wanted the Word of Faith visitor. (T. p. 354)

97. During the investigation, Petitioner was allowed an opportunity to supply a written statement. (R. Ex. 16; T. p. 110). Petitioner was timely provided notice of a predisciplinary conference

and a predisciplinary conference was held on December 12, 2012. (T. p. 111; P. Exs.15 & 19). During the conference, Petitioner was given the opportunity to speak and to submit a written statement. (R. Ex. 18; P. Ex. 18; T. pp. 359-60)

98. After this investigation, Superintendent Reed requested leniency in discipline for Petitioner because she was "likable", had worked there a long time, and has custody of her brother's children. (T. pp. 370, 375)

99. After the predisciplinary conference, a summary as well as Petitioner's response were sent to Roger Moon, Western Region Director, Division of Prisons for the Department of Public Safety. Region Director Moon reviewed the summary, Petitioner's responses and statements made during the pre-disciplinary conference, her two active written warnings and her years of service. (T. pp. 291-21)

100. Region Director Moon recommended that Petitioner be demoted with a fifteen percent reduction in pay and transferred to Marion Correctional Center. (P. Ex. 17; R. Ex. 16, 17 & 19, 221-22).

101. The Undersigned finds as fact that Region Director Moon did not make the recommendation to demote Hardin due to her religious affiliation or membership in Word of Faith.

102. On December 13, 2012, Deputy Director Lee approved the decision to demote the Petitioner. (R. Ex. 20).

103. On January 17, 2013, Petitioner was demoted for Unacceptable Personal Conduct for violating the Inmate Visitation Policy, Chapter D .0200-.0202 (B) by giving the blank visitor applications to a local volunteer and by accepting the completed applications from the volunteer. Petitioner was demoted from Program Director I, pay grade 67, to Correctional Officer, pay grade 62, which represented a fifteen percent reduction in salary and transfer to Marion Correctional Center on the same day. (P. Ex. 17; R. Ex. 21).

104. Petitioner appealed her demotion to the Employees Relations Committee and was given an opportunity to present evidence. The Employees Relations Committee affirmed Petitioner's demotion. (T. pp. 119, 588; R. Ex. 28).

105. Petitioner further appealed by filing a Petition For Contested Case Hearing with the Office of Administrative Hearings, alleging demotion without just cause based upon religious discrimination. A contested case hearing was held before the Undersigned.

106. After hearing the testimony, observing demeanor and weighing the credibility of Christopher Hunt, Allen Reed, David Mitchell and Roger Moon, the Undersigned finds as fact that the Word of Faith's community service at Rutherford Correction is valued by Respondent and that Petitioner is a valued employee of the NCDPS.

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

CONCLUSIONS OF LAW

1. All parties are properly before this Administrative Law Judge and jurisdiction and venue are proper. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

2. Petitioner has been continuously employed as a State employee since 1995. At the time of her demotion, she 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. Because Petitioner has alleged that Respondent lacked just cause for her demotion and religious discrimination, the Office of Administrative Hearings has jurisdiction to hear her appeal and issue the final decision in this matter.

4. Pursuant to N.C. Gen. Stat. § 126-35(d), in an appeal of a disciplinary action, the employer bears the burden of proving that "just cause" existed for the disciplinary action.

5. 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 "the willful violation of known or written work rules." 25 NCAC 1J.0614(7); 25 N.C.A.C. 1J.0614(8)(a) & (d).

6. The demotion letter specified that Petitioner was being demoted for unacceptable personal conduct.

7. At the time of the demotion letter, Petitioner's two prior written warnings were still active disciplinary actions. 25 N.C.A.C. 1J .0614(6)(c).

8. Petitioner received notification of a pre-disciplinary conference by letter dated December 11, 2012.

9. Petitioner attended the pre-disciplinary conference and was allowed an opportunity to respond on December 12, 2012.

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

11. It is well settled that judgment should be rendered in favor of the State agency when the evidence presented establishes that the employee committed at least one of the acts for which he/she was disciplined. *Hilliard v. Dept. of Correction*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).

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

> This passage instructs us to consider the specific discipline imposed as well as the facts and circumstances of each case to determine whether the discipline imposed was "just." Based on this language, and the authorities relied upon by the Supreme Court, we hold that a commensurate discipline approach applies in North Carolina. (Citing *N.C. Dep't of Env't & Natural Resources. v. Carroll*, 358 N.C. 649, 666, 599 S.E.2d 888, 898 (2004)) The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based "upon an examination of the facts and circumstances of each individual case." (Internal cites omitted)
>
> *Warren v. North Carolina Dep't of Crime Control & Public Safety, N. Carolina Highway Patrol*, 726 S.E.2d 920, 924-925 (N.C. Ct. App. 2012) *review denied*, 735 S.E.2d 175 (N.C. 2012).

13. The preponderance of evidence showed that Petitioner did engage in the conduct alleged by her employer. Respondent demonstrated with credible and substantial evidence that Petitioner's conduct willfully violated known or written work rules. A willful violation of known or written rules occurs when an employee "willfully takes an action which violates the rule and does not require that the employee intend [the] conduct to violate the work rule." *Teague v. N.C. Department of Correction*, 177 N.C. App. 215, 222, 628 S.E.2d 395, 400 (2006) citing *Hilliard v. N.C. Department of Correction*, 173 N.C.App. 594, 620 S.E.2d 14, 17 (2005). Her conduct fell within a category of unacceptable personal conduct which gave just cause for the disciplinary action taken.

14. Respondent met its burden of proof and established by substantial evidence in the record that it had just cause to demote Petitioner for unacceptable personal conduct. For the reasons stated in the pre-disciplinary conference notice and the demotion letter.

15. Pursuant to N.C. Gen. Stat. §§ 126-34.1(a)(2)(a) and 126-36 (2012), a State employee may challenge any employment action, including a demotion, that she believed was motivated by religious beliefs or other types of illegal discrimination on the part of the employing State agency.

16. In reviewing claims arising under N.C. Gen. Stat. §§ 126-34.1(a)(2)(a) and 126-36, courts "look to federal decisions for guidance in establishing evidentiary standards and the principles of law ...." *N.C. Dept. of Correction v. Hodge*, 99 N.C. App. 602, 610, 394 S.E.2d 285, 289

(1990). "[T]he ultimate purpose" of N.C. Gen. Stat. §§ 126-34.1(a)(2)(a) and 126-36 and Title VII of the Civil Rights Act of 1964 are "the same; that is the elimination of discriminatory practices in employment." *N.C. Dept. of Correction v. Gibson*, 308 N.C. 131, 141, 301 S.E.2d 78, 85 (1983). Therefore, the law governing Title VII claims also governs claims under N.C. Gen. Stat. §§ 126-34.1(a)(2)(a) and 126-36. *Gibson.*, 308 N.C. at 136-137, 301 S.E.2d at 82.

17. The Fourth Circuit United States Court of Appeals recognizes two theories under which an employee may assert a claim for religious discrimination: disparate treatment based on religion and failure to accommodate religious beliefs. *See Chalmers v. Tulon co., 101 F.3d 1012, 1017 (4th Cir. 1996).* Here, Petitioner does not assert a failure to accommodate. Rather, she argues she was disciplined due to her religious affiliation. Accordingly, Petitioner may prove a disparate treatment claim by demonstrating, "that the employer treated [her] differently than other employees because of [her] religious beliefs." *Id.*

18. The claim may be established either by direct evidence or by use of the burden shifting scheme articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, (1973). The Undersigned finds no direct evidence of discrimination. Direct evidence of discrimination includes "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." *Hill,* 354 F.3d at 284–85 (quoting *Fuller v. Phipps,* 67 F.3d 1137, 1142 (4th Cir.1995)). Discriminatory or derogatory remarks may constitute direct evidence of discrimination; however, "[the remarks] cannot be stray or isolated and '[u]nless the remarks upon which plaintiff relies were related to the employment decision in question, they cannot be evidence of [discrimination].' " *Brinkley v. Harbour Recreation Club,* 180 F.3d 598, 608 (4th Cir.1999) (quoting *McCarthy v. Kemper Life Ins. Cos.,* 924 F.2d 683, 686 (7th Cir.1991)), *abrogated on other grounds by Baird ex rel. Baird v. Rose,* 192 F.3d 462, 470 n. 8 (4th Cir.1999).

19. The allegations Petitioner has made against her co-workers cannot constitute direct evidence of discrimination. She has failed to show a nexus between the comments and the decision to demote her. *See* EEOC v. Clay Printing, 955 F.2d 936, 942-943 (4th Cir.1992) *(when comments are used to support allegations of discrimination, plaintiff must demonstrate the nexus between the comments and the discriminatory action).*

20. There is no evidence that the decision-makers were motivated by religious animus to demote Petitioner. *See Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3rd 277 (4th Cir. 2004) (racial animus co-workers cannot be imputed to decision-makers, summary judgment appropriate where employee failed to demonstrate racial animus of decision-makers).

21. Therefore, Petitioner must proceed to demonstrate a disparate treatment claim under the burden shifting scheme. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, (1973). *Area Mental Health v. Speed*, 69 N.C. App. 247, 253-254, 317 S.E.2d 22, 25, *cert. denied*, 312 N.C. 81, 321 S.E.2d 893 (1984). The evidentiary burdens placed on the employee under this theory mirror those placed on employees alleging employment discrimination based on race or sex. Accordingly, a plaintiff-employee, alleging disparate treatment with respect to demotion in this instance, must establish her job performance was satisfactory and provide indirect

evidence whose cumulative probative force supports a reasonable inference that the demotion was discriminatory. *Lawrence v. Mars, Inc. , 955 F.2d 902, 905-06(4th Cir.), cert. denied, 506 U.S. 823, 113 S.Ct. 76, 121 L.Ed.2d 40 (1992).* Under this scheme, the Petitioner could satisfy this burden by presenting evidence that the employer treated the employee more harshly than other employees of a different religion, or no religion, who had engaged in similar conduct. *See Moore v. City of Charlotte, 754 F.2d 1100, 1105-06(4th Cir.), cert. denied, 472 U.S. 1021, 105 S.Ct. 3489, 87 L.Ed.2d 623 (1985).* If the employee presents such evidence, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions towards the employee. *Id.* at 1105. The employee is then required to show that the employer's proffered reason is pretextual, and that the employer's conduct towards her was actually motivated by illegal considerations. At all times, the ultimate burden of persuasion lies with the employee. *Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093-94, 67 L.Ed. 2d 207(1981).*

22. Petitioner is unable to establish a prima facie case under this scheme. At the time of her demotion she had two active written warnings, and she failed to present evidence that any employee engaged in similar conduct and was treated more favorably. The other two employees tangentially involved in violation of the visitation policy were her subordinates acting at her direction. She did not offer any evidence as to the religious affiliations or lack thereof of those two employees she alleges were treated more favorably than she. The substantial evidence in the record also established conclusively that the Petitioner was not demoted because of her religious affiliation. Petitioner failed to establish a prima facie case of religious discrimination.

23. If the Petitioner had established a prima facie case of religious discrimination, the Respondent established through substantial evidence in the record that the Respondent had legitimate non-discriminatory reasons for the decision to demote the Petitioner. The substantial evidence in the record established that Petitioner had two active written warnings and willfully violated Respondent's visitation policy. Petitioner did not offer any evidence to rebut that proffered basis for her termination.

24. The Undersigned concludes that Petitioner's evidence is insufficient to establish an actionable claim based on religion or religious affiliation. There is no evidence that Petitioner was demoted due to her religion or religious affiliation.

25. Based upon the foregoing, there is sufficient evidence in the record to support Respondent's demotion of Petitioner for unacceptable personal conduct. Petitioner's conduct was conduct for which no reasonable person should expect to receive prior written warning, and conduct unbecoming a state employee that is detrimental to the agency's service.

On the basis of the above-noted Findings of Fact and Conclusions of Law, the Undersigned makes the following:

DECISION

The Undersigned hereby decides that Respondent had just cause for Petitioner's demotion and that Respondent was not improperly motivated by Petitioner's religion and religious affiliation. Therefore, Respondent's decision for this disciplinary action per N.C. Gen. Stat. § 126-35 is AFFIRMED.

NOTICE

This Final Decision is issued under the authority of N.C.G.S. § 150B-34. Pursuant to N.C.G.S. § 126-34.02, any party wishing to appeal the Final Decision of the Administrative Law Judge may commence such appeal by filing a Notice of Appeal with the North Carolina Court of Appeals as provided in N.C.G.S. § 7A-29 (a). The appeal shall be taken within 30 days of receipt of the written notice of final decision. A notice of appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing.

This the 10th day of July, 2014.

Selina M. Brooks
Administrative Law Judge

STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF WAKE	13 OSP 19827

CAROLYN COLLINS, Petitioner,	)	
v.	)	**FINAL DECISION**
NC DEPARTMENT OF PUBLIC SAFETY, Respondent.	)	

The contested case of Carolyn Collins, Petitioner herein, was heard before Administrative Law Judge Craig Croom on April 21-22, 2014 at the Office of Administrative Hearings in Raleigh, North Carolina. Both parties submitted Proposed Final Decisions on May 27, 2014.

APPEARANCES

PETITIONER: Michael C. Byrne
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150 Fayetteville Street, Suite 1130
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RESPONDENT: Tamika L. Henderson
Yvonne Ricci
Assistant Attorneys General
N.C. Department of Justice
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WITNESSES

Petitioner did not call any witnesses.

The following witnesses testified for the Respondent:

Carolyn Collins
George Clark
Jerry Michael Frazier
Anne Precythe

EXHIBITS

Respondent's exhibits ("R. Exs.") 1 - 4 and 6 - 20 were admitted into evidence.

PARTY REPRESENTATIVES

The Petitioner's party representative was Petitioner, Carolyn Collins. The Respondent's party representative was Anne L. Precythe.

ISSUES

1. Whether Respondent had just cause on the grounds of gross inefficiency and unacceptable personal conduct to dismiss the Petitioner?

PRE-TRIAL MOTIONS

Petitioner made a Motion to Exclude Witnesses pursuant to N.C. Gen. Stat. 8C-1, Rule 615 and 26 NCAC 03 .0121. The Undersigned granted Petitioner's Motion to Exclude Witnesses.

Petitioner made a pre-trial motion pursuant to N.C.G.S.126-35(a) asking the Court to exclude evidence of Petitioner's active prior written warning. Specifically, Petitioner contended that Respondent could not introduce evidence of any fact that was not included in the dismissal letter. Petitioner argued that anything not specifically mentioned in the dismissal letter must be excluded.

Respondent argued that the written warning was relevant to determine the level of discipline which was appropriate. Moreover, Respondent asserted that the pre-disciplinary conference notification specifically referenced the prior written warning to which Petitioner had notice and an opportunity to respond. However, the dismissal letter did not specifically reference the prior written warning. The Undersigned ruled that it would only consider facts referenced in the dismissal letter. Therefore, the undersigned excluded all evidence of Petitioner's active prior written warning.

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 and Conclusions of Law. In making the Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the

testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

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

FINDINGS OF FACT

Petitioner's Employment History and Training

1. Carolyn Collins commenced her employment with the North Carolina Department of Public Safety ("Respondent") in 1994 as a Clerk/Typist III. (R. Ex.8). In 2001, she became a Probation/Parole Officer. (Transcript ("T.") p. 234). She eventually became a Probation Parole Officer II in 2004. At the time of her termination, she served as a Probation Parole Officer II in Bladen County, North Carolina.

2. Petitioner has served in certified positions since 2001 while employed with Respondent. These positions require certification by the North Carolina Criminal Justice Training and Standards Commission. (T. p. 34). Certified probation parole officers have the power to arrest. (T. p. 234).

3. Petitioner was required to attend annual in-service training in order to maintain her certification. Petitioner attended and successfully completed arrest search and seizure class on March 16, 2011. (T. pp. 34 - 35; R. Ex. 1).

4. Petitioner attended basic training on June 15, 2001 and was taught Respondent's proper arrest procedure in class. (T. p. 36). Moreover, Petitioner conceded that she had been trained on Respondent's arrest policy found in the Respondent's Policy and Procedure manual Chapter E, Section .0400. (T. pp.47-48; R. Ex. 9).

5. Petitioner received the essential job functions for her position as a Probation Parole Officer II and was able to perform those essential job functions. (T. p.36). "Essential Job Functions 3" is the "[a]bility to arrest, search and transport offenders and locate absconders using approved methods." (R. Ex. 2).

6. Prior to 2012, warrants for post release supervision/parole violations went to the Chief Probation/Parole Officer. The Chief Probation/Parole Officer would assign the service of these warrants for arrest to a Surveillance Officer. Petitioner was not involved in this arrest process, except for paperwork after the offender was taken into custody.

7. In 2012, warrants for post release supervision/parole went to the Probation/Parole Officer II, the position held by Petitioner. The Probation/Parole Officer II had to serve the warrant or ensure that another officer served the warrant.

8. Petitioner has made no more than two arrests in her career as a Probation/Parole Officer.

The January 2, 2013 Incident

9. On January 2, 2013, Petitioner had a post release supervision/parole warrant for the arrest of Jeffrey Lewis ("the offender") under her supervision. (T. p. 37).

10. Prior to January 2, 2013, Petitioner had supervised the offender for the previous three months and met with him three times.

11. Petitioner originally didn't recall when she received the warrant or the supervision classification of Offender during her testimony at this hearing. (T. p. 37). However, she later stated she had the warrant in her possession prior to the day the offender arrived at her office. (T. p. 40). The offender was classified as Level I. (T. p. 199). An offender classified as Level I has the highest level of supervision. (T. p. 200).

12. Petitioner maintained during her testimony that the warrant was issued because the offender had missed office visits. (T. p. 39).

13. Petitioner informed a co-worker and relatively new probation/parole officer, Probation/Parole Officer George Clark, that she intended to arrest the offender and would like his assistance. She further testified that she told Officer Clark that she would call and let him know when she needed his assistance with the arrest. (T. p. 39). However, once the offender arrived in the office, she made eye contact with Officer Clark and nodded in consent that this was the offender. (T. p. 39). She never verbally conveyed to Officer Clark that the offender had arrived and she needed his assistance with the arrest. (T. p. 40).

14. Petitioner retrieved the offender's file and took the offender to her office. (T. p. 42). She never informed Officer Clark that she was initiating the arrest process. (T. p. 42). Petitioner's normal procedure was to engage the offender by asking him questions about how he was doing and "what have you been up to?" (T. p. 43).

15. Petitioner informed the offender that she had a warrant for his arrest. (T. p. 43). Prior to informing the offender about the warrant for his arrest, Petitioner did not call Officer Clark for assistance. (T. p. 42). She did not handcuff the offender. (T. p.43).

16. The offender asked the Petitioner if he could leave to smoke a cigarette because the jail was non-smoking. Petitioner allowed the offender to leave to smoke a cigarette. (T. p. 45). Based on her experience, Petitioner believed allowing the offender to smoke would be the best way to handle him at that time. (T. p. 45).

17. The offender left to smoke and never returned. (T. p. 45). Petitioner did not have a reason for not handcuffing the offender when she notified him that he was under arrest. (T. p.46).

18. In her statement, Petitioner stated that she informed the offender in the office that she had reported his pending charges to the Post Release Supervision and Parole Commission ("Commission") and the Commission had issued a warrant for his arrest. (R. Ex. 3; R. Ex. 8).

However, during her testimony, she could not recall whether the offender had pending charges or the underlying conviction(s) for the offender being on post-release supervision. (T. p. 47).

19. Petitioner and Officer Clark searched for the offender but were unable to locate him. The offender was arrested a month later and was accused of two counts of first-degree attempted murder, possession of a firearm by a known felon and going armed to the terror of the public. (T. p. 49; R. Ex. 17).

The Investigation

20. Michael Frazier is the Judicial District Manager for District 13. He supervises the Probation/Parole officers in Brunswick, Columbus, and Bladen County. (T. p. 191).

21. Mr. Frazier received an alert regarding a serious incident report related to the offender that absconded from the Petitioner's office. (T. p. 193). When an offender under the supervision of a Probation/Parole Officer is charged with one of the designated serious crimes, an alert is sent to the NCDPS system that a serious incident has occurred. (T. p. 193).

22. Frazier notified the Chief Probation/Parole Officer in Bladen County to have the Petitioner gather as much information as she could about the incident and the offender, so that he could advise the chain of command on the particulars of what occurred which caused the serious crime alert. (T. p. 193).

23. As a result of the alert and resulting serious crime report, Frazier completed an audit of the case. The audit revealed that Petitioner received an arrest warrant for the offender from the Commission on December 28, 2012. The offender came to Petitioner's office on January 2, 2013. After notifying the offender that he was under arrest, Petitioner allowed him to leave the building to smoke a cigarette. (R. Ex. 8). The offender was not captured until February 2, 2013. (R. Ex. 8). The offender was charged with two counts of attempted First-Degree Murder, Possession of Firearm by Felon and Going Armed to the Terror of the Public. These offenses were alleged to have occurred on February 9, 2013. (R. Ex. 8). As a result of the case audit, Frazier was then ordered to conduct an internal investigation. (T. p. 194).

24. Frazier conducted an internal investigation which included interviewing and obtaining written statements from Officer Clark and Petitioner. (T. p. 194). At the completion of the investigation, Frazier drafted a written investigation report and submitted the report up his chain of command. (T. pp. 194-195; R. Ex. 8).

25. Frazier's investigation reported that Petitioner violated NCDPS' arrest policy when she allowed the offender to leave in the middle of the process of conducting the arrest. (T. p. 195). Specifically, Frazier testified that once Petitioner informed the offender she had a warrant for his arrest, Petitioner failed to follow NCDPS arrest procedure which included handcuffing the offender. (T. p. 198; R. Ex. 9).

26. Frazier did not find any mitigating factors. (T. pp. 216, 225).

Petitioner's Dismissal

27. Petitioner was notified by letter dated June 18, 2013, that Respondent intended to hold a pre-disciplinary conference. (R. Ex. 11).

28. The pre-disciplinary conference was held on June 20, 2013. The pre-disciplinary conference letter was read to the Petitioner, and she was given an opportunity to respond to the allegations contained therein. The pre-disciplinary conference letter referenced Petitioner's prior active written warning. (R. Exs. 12 - 13).

29. Ann Precythe ("Director Precythe") is the Director of Community Supervision for respondent, Adult Correction and Juvenile Justice Court Services. She is responsible for overseeing administrative and field operations for the adult offender population of 105,000 offenders and the juvenile justice court services population of 10,500 in North Carolina. She also oversees 2,500 employees and 500 juvenile justice court services employees. (T. p. 297). Director Precythe previously served as probation/parole officer for ten (10) years. (T. p. 297).

30. Director Precythe is the final decision maker for employee disciplinary decisions for Probation/Parole officers like the Petitioner. (T. p. 299).

31. On June 28, 2013, Director Precythe received a dismissal package regarding Carolyn Collins which included a recommendation that Petitioner be terminated. (R. Exs. 15 - 16).

32. Director Precythe reviewed the Final Recommendation from Diane Isaacs, draft letter recommending dismissal, recommendation for disciplined (signed at the disciplinary conference), pre-disciplinary conference acknowledgement form, the pre-disciplinary conference notification letter, the investigation summary materials and a copy of the internal investigation and all supporting documentation including the written statements. (T. p. 301 - 305; R. Ex. 16).

33. Director Precythe reviewed all the information available to her. Based on her review, Petitioner's conduct on January 2, 2013 warranted dismissal. Director Precythe stated the act of placing an offender under arrest is one of the most dangerous and serious responsibilities that every probation/parole officer has and should never be taken lightly. (T. p. 308).

34. Respondent trains officers on the arrest process and it is the officer's responsibility to execute arrests. If an officer is not comfortable making arrests, the officer should ask for assistance. (T. p. 308).

35. Petitioner placed herself as well as her co-workers and the public in danger by not following the appropriate arrest procedure (T. p. 308).

36. Director Precythe took into consideration that during the investigation Petitioner maintained that she had in fact properly followed the arrest policy. (T. pp. 314 - 315).

37. Petitioner used poor judgment in allowing the offender to leave to smoke a cigarette especially given the over ten (10) years of experience that the Petitioner had within community corrections. In spite of years of training, Petitioner failed to properly plan for the arrest of the offender and properly implement Respondent's arrest procedure. (T. p. 317 - 318).

38. Director Precythe took into account information in Petitioner's employment history that was not alleged in the dismissal letter when considering the appropriate level of discipline. (T. p. 335-7).

39. Director Precythe did not consider demotion to a non-sworn position, such as Judicial Services Coordinator, as an acceptable form of discipline due to Petitioner's past disciplinary history. (T. pp. 329 - 330). This prior disciplinary history was not specifically alleged in the dismissal letter. Therefore, the undersigned cannot consider this prior disciplinary history.

40. Director Precythe did not consider demotion to a non-sworn position, such as Judicial Services Coordinator, as an acceptable form of discipline due to the exercise of poor judgment concerning the arrest of the offender on January 2, 2013. The non-sworn position of a Judicial Services Coordinator requires the exercise of good judgment. That position monitors the unsupervised probation cases and needs to be kept on a time frame and carries the responsibility to report violations back to the court in a timely manner. (T. p. 331).

41. Director Precythe considered that Petitioner should have taken in consideration the underlying charge(s) which served as the basis for the offender's parole/post release supervision and the violations alleged for the parole/post release supervision. (T. p. 350). Failure to plan for an arrest is poor judgment by the Petitioner. (T. p. 350).

42. Petitioner was terminated on August 5, 2013 for grossly inefficient job performance and unacceptable personal conduct. The specific conduct and performance issues were listed as follows: 1) failure to follow proper procedure while attempting to arrest an Offender, 2) willful violation of known or written work rules, 3) conduct unbecoming a State employee that is detrimental to State service and 4) conduct for which no reasonable person should expect to receive prior written warning. (R. Ex. 17). Petitioner filed a grievance on August 15, 2013.

Petitioner's Credibility Issues

43. During her testimony in this hearing, Petitioner often responded "I don't recall" or was hesitant when asked questions related to the offender's violations on parole/post release supervision and his later charges. (T. p. 38). She insisted that the warrant was issued for the offender's arrest due to the offender missing office visits. (T. p. 38). She testified under questioning from her attorney that the only issue presented by the offender was his missing appointments with her. (T. p. 68). She insisted that the pending charges referenced in her written statement referenced missed office visits. (T. p. 69; T. p. 92). However, immediately prior to the questioning by her attorney she testified that she simply did not recall if the offender had pending charges but believed that he got them subsequently. (T. p. 47). However, in her

first written statement Petitioner indicated that she advised the offender that she had reported "the pending charges" to the Post release Supervision and Parole Commission and that the Commission had issued a parole/post release supervision warrant. (R. Ex. 3).

44. The undersigned considered for impeachment purposes that the warrant was issued for the offender's arrest due to a positive drug screen and pending charges. (T. p. 322). These pending charges included several counts of resisting arrest. (T. p. 206). In preparing to arrest the offender, the offender's pending charges were known or should have been known to the Petitioner as evidenced by her own written statement.

45. Petitioner indicated she had no reason to believe that the offender would flee and was surprised by his actions. (T. pp. 67, 77, 86). However, in preparing to arrest the offender, Petitioner was aware or should have been aware that the offender had been charged with resisting arrest as the information was readily available in the offender's file. (T. p. 206). Furthermore, Petitioner concedes that an officer's knowledge of an offender is relevant in how an officer effectuates NCDPS' arrest policy. (R. Ex. 3 at pg. 4).

46. Petitioner testified extensively that it was her belief that based on the "minor charges" the offender was facing he would have simply been released. (T. p. 83 - 85). She testified under questioning by her attorney that in her experience 90% of the time the offender would have simply been released and would not have resulted in the post-release supervision being revoked. (T. p. 85). However, when asked by Respondent what in her experience would happen when the offender was charged with more serious crimes such as resisting arrest and failing a drug screen the Petitioner stated, "I don't recall." (T. p. 111).

47. Petitioner testified that she did not recall what crimes the offender had been charged with after he absconded from her office. (T. p. 49). Petitioner did not recall that the offender was charged with two counts of attempted first-degree murder, possession of a firearm by a felon and going armed to the terror of the public despite those facts being noted in both her pre-disciplinary notification letter and her dismissal letter. (R. Exs. 13, 17). The fact that the Petitioner cannot recall key facts which formed the basis of her termination in such a selective manner is viewed skeptically by this Court.

48. Petitioner informed the offender that he was under arrest. Prior to allowing the offender to leave her office to smoke, Petitioner testified that the offender did not state he was "going away for a long time". (T. p. 111). However, when shown her prior written statement wherein she informed NCDPS that the offender did indeed indicate his belief that he would be going to jail for a long time, the Petitioner testified that the statement refreshed her recollection. (T. p. 113). However, when directly asked by the Court for clarification purposes if she recalled the offender saying that to her, the Petitioner stated, "So I'm not—I don't know if that something that I –that I will simply say I don't recall." (T. p. 114).

49. Petitioner testified that she provided Officer Clark with a picture of the offender and told Officer Clark what time the offender was supposed to come in for his appointment. (T. pp. 70 - 71). Petitioner testified that when the offender arrived she looked at Officer Clark's eyes to make sure he knew that this was the offender that needed to be arrested. She testified Clark

looked at her and nodded his head. (T. p. 73) However, in her first and second written statement she never stated that she showed Officer Clark a picture of the offender nor did she indicate that she made eye contact with Officer Clark and he nodded in acknowledgement. Instead in her first written statement, Petitioner stated that she informed Officer Clark to be on standby, and he was on standby waiting on her call. (R. Ex. 3). Officer Clark asked the Petitioner for a description of the offender and she never gave it to him. (T. p. 137). He also denied that Petitioner ever gave him a photograph of the offender. (T. p. 139).

50. The undersigned did consider that Petitioner often responded "I don't recall" or was hesitant when asked questions related to the offender's violations on parole/post release supervision and his later charges in determining Petitioner's credibility. While these issues of credibility did arise, the facts are undisputed that Petitioner did allow the offender to leave her office after she informed the offender that he was under arrest.

Petitioner's Contentions Regarding Arrest

51. Petitioner testified significantly under questioning from her attorney that NCDPS's arrest policy does not state when she was required to place the handcuffs on the offender. (T. p. 77). However, Petitioner later testified that based on her training she understood that NCDPS's arrest policy required her to place the offender in handcuffs once the offender could be subdued. (T. p. 121). While the arrest policy does not specifically state put the handcuffs on an offender immediately, common sense and good judgment dictates handcuffs be placed on the offender immediately in order to prevent an offender from escaping and fleeing apprehension as in the case. Once an offender is told of the arrest, all efforts should be made to handcuff the arrested offender. The Undersigned does not find Petitioner's testimony that she did not understand that the arrest policy required her to place the offender in handcuffs either immediately or as soon as possible after informing the offender that he was under arrest credible.

52. Throughout the disciplinary process and at the time of termination, Petitioner maintained that she believed that allowing the offender to leave her office to smoke a cigarette after informing him that he was under arrest was permissible under NCDPS' arrest policy. (R. Ex. 3). In fact, in her first written statement she stated, "it is my belief I did carry out properly. I feel find (sic) with the arrest properly." (R. Ex. 3 at pg. 6). Furthermore, Petitioner at that time did not believe she had placed the offender under arrest despite informing him that she had a warrant for his arrest. (R. Ex. 4 at pg. 4).

53. Petitioner admitted at this hearing that she made a mistake in effectuating the arrest process, and it was an error in judgment to allow the offender to leave her office to smoke. (T. pp. 86 - 87).

54. While these issues of credibility did arise, the facts are undisputed that Petitioner did allow the offender to leave her office after she informed the offender that he was under arrest.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case under Chapters 126 and 150B of the North Carolina General

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

2. The Office of Administrative Hearings has jurisdiction to hear her contested case and issue the final decision in this matter.

3. Petitioner was dismissed on August 5, 2013, and she filed her grievance on August 15, 2013. Grievances filed prior to August 21, 2013 are subject to the North Carolina State Personnel Act. Therefore, 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.*). Furthermore, an employer may discharge, suspend, or demote an employee for disciplinary reasons upon a showing of just cause pursuant to N.C. Gen. Stat. § 126-35.

3. 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, 393, 274 S.E.2d 256, 259 (1981).

4. Pursuant to N.C. Gen. Stat. § 126-35(d) and N.C. Gen. Stat. § 150B-29(a), Respondent has the burden of proof by a preponderance of the evidence on the issue of whether it had just cause to discharge, suspend, or demote Petitioner.

5. An employer may discipline or dismiss an employee for just cause based on unsatisfactory job performance including grossly inefficient job performance pursuant to 25 NCAC 01J .0604(b)(1) or unacceptable personal conduct to 25 NCAC 01J .0604(b)(2). 25 NCAC 01J 0604(b).

6. 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." *North Carolina Department of Environment and Natural Resources, Division of Parks and Recreation v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004).

7. The dismissal letter specified that the Petitioner was being dismissed for grossly inefficient job performance and unacceptable personal conduct.

Grossly Inefficient Job Performance

8. Employees may be disciplined or dismissed for unsatisfactory or grossly inefficient job performance upon a showing of just cause. 25 N.C.A.C 1J .0604(c). Furthermore, an employee may be dismissed for a current incident of grossly inefficient job performance without any prior disciplinary action. 25 N.C.A.C. 01J .0606(a)

9. Pursuant to 25 N.C.A.C. 1J. 0614(5), "Grossly Inefficient Job Performance"

"means a type of unsatisfactory job performance that occurs in instances in which the employee: fails to satisfactorily perform job requirements as specified in the job description, work plan, or as directed by the management of the work unit or agency; and, that failure results in

> (a) the creation of the potential for death or serious bodily injury to an employee(s) or to members of the public or to a person(s) over whom the employee has responsibility; or
>
> (b) the loss of or damage to state property or funds that result in a serious impact on the State or work unit."

10. Respondent must demonstrate that 1) Petitioner failed to perform a job requirement satisfactory and 2) that failure resulted in the creation of the potential for death or serious bodily injury. *Donoghue v. North Carolina Department of Correction*, 166 N.C. App. 612, 616, 603 S.E.2d 360, 363 (2004).

11. 25 N.C.A.C. 1J. 0614(5)(a) only requires the creation of the potential for death or serious bodily injury and does not require that actual death or serious bodily injury result. *See North Carolina Department of Correction v. McKinney*, 149 N.C. App. 605, 609, 561 S.E.2d 340, 343 (2002) (interpreting previous 25 N.C.A.C. 1J .0606).

12. One of the essential job functions for Probation/Parole Officer II, the position held by Petitioner, is the "[a]bility to arrest, search and transport offenders and locate absconders using Division approved methods.

13. The Community Corrections Policy and Procedure Manual details the procedure in Chapter E, Noncompliance, Arrest, Section .0400, pages 230 – 234 ("arrest policy"). The policy states in relevant part, "Arrest Procedure. An officer will do the following when arresting an offender:

> (a) Identify himself or herself, informing the offender that he or she is under arrest and, as promptly as is reasonable under the circumstances, inform the offender of the cause of the arrest. G.S. 15A-401(c)
> (b) Handcuff the offender;
> (c) Search the offender;
> (d) Ensure that the offender is transported to the magistrate's without unnecessary delay;"

14. The arrest policy is unambiguous. The undersigned is not persuaded by the Petitioner's contention that the policy failed to state when the handcuffs were to be placed on the offender. Petitioner's own testimony under cross-examination revealed that she understood that the offender was to be handcuffed after he was informed he was under arrest and subdued. While the arrest policy does not specifically state put the handcuffs on an offender immediately, common sense and good judgment dictate that handcuffs be placed on the offender immediately in order to prevent an offender from escaping and fleeing apprehension as in this case. Once an

offender is told of the arrest, all efforts should be made to handcuff the arrested offender. The Undersigned does not find Petitioner's testimony that she did not understand that the arrest policy required her to place the offender in handcuffs either immediately or as soon as possible after informing the offender that he was under arrest credible. Furthermore, quite simply, Petitioner violated the arrest policy by allowing the offender to leave and smoke a cigarette after the offender was told Petitioner had an arrest warrant for him. Nowhere in the policy is such action permissible.

15. Petitioner failed to perform a job requirement satisfactorily.

16. The inquiry now must turn to whether Petitioner's unsatisfactory job performance created the potential for death or serious bodily injury.

17. By allowing the offender to leave and smoke a cigarette after being told he was under arrest resulted in the creation of the potential for death or serious bodily injury to an employee(s) or to members of the public. Petitioner's failure to follow its' arrest policy created the *potential* for death or serious bodily injury.

18. While evading capture, the offender was charged with two counts of attempted first-degree murder, possession of a firearm by a felon and going armed to terror of the public. However, the offender did not need to be charged with those horrible crimes or even be convicted of them in order for Respondent to determine that Petitioner's failure to follow Respondent's arrest policy and immediately place handcuffs on the offender created the *potential* for death or serious bodily injury.

19. A career state employee may be immediately dismissed for one incident of grossly inefficient job performance without any prior disciplinary action. *Steeves v. Scotland County Board of Health*, 152 N.C. App. 400, 407 567 S.E.2d 817, 821 822 (2002). Accordingly, Respondent established that Petitioner's conduct was grossly inefficient job performance.

20. Respondent met its burden of proof that it had just cause to dismiss Petitioner for grossly inefficient job performance.

Unacceptable Personal Conduct

21. The Department of Corrections Personnel Manual, Section 6, Appendix Personal conduct, defines unacceptable personal conduct as, "[w]illful violation of known or written work rules, conduct unbecoming a State employee that is detrimental to State service, and conduct for which no reasonable person should expect to receive prior warning."

22. An employer may discipline or dismiss an employee for just cause based upon unacceptable personal conduct. 25 N.C.A.C. 1J. 0604(c). Furthermore, an employee may be dismissed for a current incident of unacceptable conduct without any prior disciplinary action. 25 N.C.A.C. 01J .0608(a)

23. Respondent has the burden of proof to show by a preponderance of the evidence that it had just cause to discipline Petitioner for unacceptable personal conduct.

24. The proper analytical approach in just cause cases dealing with unacceptable personal conduct requires a three-step analysis. The first inquiry is 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 of whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based "upon an examination of the facts and circumstances of each individual case." *Warren v. N.C. Dept. of Crime Control & Public Safety*, ____ N.C. App. ____, 726 S.E.2d 920, 925 (2012), *review dismissed, as moot*, 734 S.E.2d 867, 2012 N.C. LEXIS 1064 (2012).

Did Petitioner engage in the conduct as alleged?

25. Petitioner engaged in the conduct alleged by Respondent. She initiated the arrest of the offender. Petitioner then allowed the offender to leave to smoke a cigarette, and the offender never returned to the Petitioner's office in order to be taken into custody. Petitioner concedes she committed the conduct as alleged, and concedes she exercised poor judgment under the circumstances.

Does Petitioner's conduct fall into one of the categories of unacceptable personal conduct?

26. The next step in the *Warren* analytical process is whether the behavior falls into one of the categories of unacceptable personal conduct defined by 25 N.C.A.C. 1J. 0614(8) in relevant part:

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

27. Any one of the types of unacceptable personal conduct identified above is sufficient to constitute just cause.

28. After informing the offender she had a warrant for his arrest for violating the terms of his post release supervision/parole, Petitioner allowed the offender to leave her office and smoke a cigarette. The offender did not return to Petitioner's office. Petitioner's conduct is such for which no person should expect to receive prior warning and constitutes conduct unbecoming a state employee that is detrimental to state service.

29. Willful violation of a known or written work rule turns on whether the employee acted willfully, not whether the employee intended to break a rule. *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005) (citation omitted).

30. The arrest policy is a known, written work rule.

31. Petitioner's failure to follow the arrest policy was admittedly willful.

32. There is substantial, credible evidence in the record showing that Petitioner's failure to abide by the Respondent's arrest policy constituted conduct for which no reasonable person should expect to receive prior warning, was a willful violation of known or written work rules, and conduct unbecoming a state employee that is detrimental to state service.

33. Petitioner's conduct on January 2, 2013 constituted unacceptable personal conduct for which Respondent had just cause to discipline the Petitioner.

Did Petitioner's conduct amount to just cause for dismissal?

34. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry of whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based "upon an examination of the facts and circumstances of each individual case." *Warren*, ____ N.C. App. at ____, 726 S.E.2d at 925 (2012). The *Warren* Court refers to this process as "balancing the equities."

35. Petitioner had been working in a certified position with Respondent for over a decade. She had been trusted with the powers of arrest for twelve years. The act of arresting an offender is inherently dangerous and should never be taken lightly. Petitioner was or should have been aware that the warrant of arrest for this particular offender was issued because the offender had been recently charged with, among other things, resisting arrest. Petitioner should have been prepared for the offender to be noncompliant. Petitioner knew that the offender was on post release supervision and the underlying violent offense for which he was released from prison to post release supervision. Petitioner knew or should have known the real potential for death or serious bodily injury which was created when she informed the offender that she had a warrant for his arrest and then did not properly execute the rest of the arrest process.

36. While evading apprehension, the offender was finally apprehended by law enforcement and was charged with two counts of attempted first degree murder, possession of a firearm by a known felon, and going armed to the terror of the public.

37. Mitigating factors in the employee's conduct should also be considered in this third prong. *See Warren*, citing Roger Abrams and Dennis Nolan, TOWARD A THEORY OF "JUST CAUSE" IN EMPLOYEE DISCIPLINE CASES, 1985 Duke L.J. 594 (September 1985).

38. Petitioner insisted during the disciplinary process that based on her experience she believed that her conduct was proper and in accordance with the arrest policy. However, Petitioner admitted at this hearing that she made a mistake in effectuating the arrest process, and it was an error in judgment to allow the offender to leave her office to smoke.

39. Petitioner has been employed with Respondent since 1994. The undersigned considered that Petitioner did not regularly make arrests in her position. Petitioner made no more than two arrests during her career as a Probation/Parole Office II. While she had the power to

arrest, Petitioner did not regularly exercise that power. She relied on the Bladen County Sheriff and Surveillance Officers to make arrests prior to a change in policy in 2012.

40. Respondent considered prior disciplinary action, not included in the dismissal letter, in its decision to dismiss Petitioner. In light of the prior disciplinary action not being stated in the dismissal letter, the undersigned did not consider the prior disciplinary action.

41. Respondent had just cause to discipline the Petitioner. Petitioner did not comply with Respondent's arrest policy. Petitioner's failure to abide by the arrest policy constituted unacceptable personal conduct.

42. The ability to arrest is an essential job function for a Probation/Parole Officer II. Petitioner failed to perform this essential job function. Accordingly, the undersigned finds that there was just cause to dismiss the Petitioner for unacceptable personal conduct.

43. Respondent met its burden of proof that it had just cause to dismiss the Petitioner for unacceptable personal conduct.

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

FINAL DECISION

The undersigned Administrative Law Judge finds that Respondent's dismissal of Petitioner for just cause should be **UPHELD.**

NOTICE

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

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 11th day of July, 2014.

Craig Croom
Administrative Law Judge