NORTH CAROLINA REGISTER

VOLUME 29 • ISSUE 13 • Pages 1599 - 1685

January 2, 2015

PUBLISHED BY
The Office of Administrative Hearings
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Contact List for Rulemaking Questions or Concerns

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

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

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Rule Review and Legal Issues

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

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	Amanda Reeder, Commission Counsel	amanda.reeder@oah.nc.gov	(919) 431-3079
	Julie Brincefield, Administrative Assistant	julie.brincefield@oah.nc.gov	(919) 431-3073
	Alexander Burgos, Paralegal	alexander.burgos@oah.nc.gov	(919) 431-3080

Fiscal Notes & Economic Analysis and Governor's Review

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

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

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

Legislative Process Concerning Rule-making

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

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

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NORTH CAROLINA REGISTER
Publication Schedule for January 2015 – December 2015

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

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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NORTH CAROLINA
State Board of Elections

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KIM WESTBROOK STRACH
Executive Director

December 5, 2014

Michael D. McKnight
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
4208 Six Forks Road, Suite 1100
Raleigh, NC 27609

Re: Request for Advisory Opinion pursuant to N.C.G.S. §163-278.23

Dear Mr. McKnight:

By letter dated November 5, 2013 and subsequent telephone conversations, you request an advisory opinion as to whether it would be permissible for a North Carolina registered lobbyist to lawfully make contributions to the Committee to Elect Republican Women (hereinafter "CERW") under N.C.G.S. §163-278.13C.

It is our determination that lobbyists are prohibited from making contributions to CERW based on N.C.G.S. §163-278.13C, which relies on definitions contained in N.C.G.S. §163-278.38Z and N.C.G.S. §163-278.6. Our reasoning is explained below.

N.C.G.S. §163-278.13C(a) states the following:

> *No lobbyist may make a contribution as defined in G.S. 163-278.6 to a candidate or candidate campaign committee as defined in G.S. 163-278.38Z when that candidate meets any of the following criteria:*
> *(1) Is a legislator as defined by G.S. 120C-100.*
> *(2) Is a public servant as defined in G.S. 138A-3(30)a. and G.S. 120C-104.*

To determine the permissibility of lobbyist contributions to CERW we must determine whether CERW meets the definition of a "candidate campaign committee" as defined in N.C.G.S. §163-278.38Z(3). N.C.G.S. §163-278.38Z(3) defines a "candidate campaign committee" to mean "any political committee organized by or under the direction of a candidate."

As stated in your letter and supported by reports filed by CERW with our office, CERW was organized by and is under the direction of candidates that meet the definition of "legislator" under N.C.G.S. §120C-100 or "public servant" under N.C.G.S. §138A-3(30)a and N.C.G.S. §120C-104. The question before us, then, is whether or not the fact that CERW was organized by and is under the direction of **more than one** candidate affects the permissibility of lobbyist contributions under N.C.G.S. §163-278.13C.

N.C.G.S. §163-278.38Z(2) defines a "candidate" to mean "any **individual** who, with respect to a public office listed in G.S. 163-278.6(18), has filed a notice of candidacy or a petition requesting to be a candidate, or has been certified as a nominee of a political party for a vacancy, or has otherwise qualified as a candidate in a manner authorized by law, or has filed a statement of organization under G.S. 163-278.7 and is required to file periodic financial disclosure statements under G.S. 163-278.9." [Emphasis Added]

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

An "individual" is defined in N.C.G.S. §163-278.6(10) to mean "a single individual or more than one individual." Thus, the fact that the CERW is organized by or under the direction of more than one candidate does not affect the permissibility of lobbyist contributions under N.C.G.S. §163-278.13C.

CERW meets the definition of a "candidate campaign committee" as defined in §163-278.38Z(3), and CERW candidates are candidates/members of the North Carolina General Assembly or North Carolina Council of State, which means they meet the criteria found in N.C.G.S. §163-278.13C(a)(1) and (a)(2). Therefore, a North Carolina registered lobbyist is not permitted to make contributions to the Committee to Elect Republican Women.

You also inquired about the applicability to the CERW of an advisory opinion dated November 13, 2007 and issued to Frank W. Folger. That advisory opinion made reference specifically to the permissibility of contributions from a lobbyist employed by a corporation to that corporation's political action committee. That advisory opinion is not relevant to the CERW, since a corporate PAC formed pursuant to N.C.G.S. §163-278.19(b) does not meet the definition of a "candidate campaign committee" found in N.C.G.S. §163-278.38Z.

This opinion is based upon the information provided in your November 5, 2013 letter, subsequent telephone conversations, and information submitted by the committee to our office. If any information should change, you should consult with our office to ensure that this opinion would still be binding. Finally, this opinion will be filed with the Codifier of Rules to be published unedited in the North Carolina Register and the North Carolina Administrative Code. If you should have any questions, please do not hesitate to contact me.

Sincerely,

Kim Westbrook Strach

aes/KWS

cc: Julian Mann III, Codifier of Rules

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

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

Carbamazepine: all oral dosage forms

Cyclosporine: all oral dosage forms

Digoxin: all oral dosage forms

Ethosuximide

Levothyroxine sodium tablets

Lithium (including all salts): all oral dosage forms Phenytoin

(including all salts): all oral dosage forms Procainamide

Theophylline (including all salts): all oral dosage forms

Warfarin sodium tablets

Tacrolimus: all oral dosage forms

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

TITLE 01 – DEPARTMENT OF ADMINISTRATION

Notice *is hereby given in accordance with G.S. 150B-21.2 that the Veterans Affairs Commission intends to amend the rules cited as 01 NCAC 26B .0104-.0106.*

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

Proposed Effective Date: *May 1, 2015*

Public Hearing:
Date: *January 20, 2015*
Time: *10:00 a.m.*
Location: *DOA Secretary's Office, 5th floor, Suite 5106, Administration Building, 116 W. Jones St., Raleigh, NC 27603*

Reason for Proposed Action: *Over the past seven months, a review of the administration of the scholarship program was conducted at the request of the Veterans Affairs Commission. Accordingly, clarifying and technical updates in the scholarship application and review process are proposed to promote efficient and effective staff utilization while maintaining the integrity, consistency and fairness of the scholarship program.*
The proposed changes address electronic submission, deadlines, application materials and process. Essays and targeted letters of recommendation (at least one of which must be from a teacher or guidance counselor) are required in place of a district service officer report of investigation and information. Disciplinary and attendance records must be included along with submission of student grade transcripts. Financial information about both the applicant and applicant's parents is sought to help determine the applicant's need for scholarship. Class I and IV scholarships will be awarded twice annually rather than on a rolling basis. Applicants are requested to submit all application materials (regardless of the class to which they apply) for timely placement in the appropriate scholarship class following certification of veteran parent's status.

Comments may be submitted to: *William Peaslee, DOA General Counsel, 1301 Mail Service Center, Raleigh, NC 27699-1301.*

Comment period ends: *March 3, 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)**
☐ **Approved by OSBM**
☒ **No fiscal note required by G.S. 150B-21.4**

CHAPTER 26 – VETERANS AFFAIRS

SUBCHAPTER 26B – VETERANS AFFAIRS COMMISSION

SECTION .0100 – GENERAL PROVISIONS

01 NCAC 26B .0104 FORMS AND INSTRUCTIONS
The following forms and instructions are used by the Veterans Affairs Commission ~~commission~~ (the "Commission" for purposes of this Subchapter):

(1) Instruction Sheet. This form describes requirements for application for scholarships administered by the Commission ~~commission~~ and tells when to apply, what forms and information to submit and where they are to be submitted.

(2) Application Form. This form requests information about the applicant including date of birth, length of residence in North Carolina, high school attended and college, university, or technical institute in North Carolina the applicant plans to attend as well as information about the veteran such as his or her present legal residence, and other information relative to the veteran's current status. Questions about accomplishments of the applicant or special honors or awards received during his or her high school career (and post-high school) are also asked.

(3) Financial Questionnaire to Accompany Application for Scholarship~~. This form contains questions about the value of real and personal property owned by the applicant's parents and income received by the parents from rental property and employment, their disabilities, if any, number of persons in the applicant's immediate family, and other information pertaining to the ability of the applicant's family to contribute to his further education. Questions about accomplishments of the applicant or special honors or awards received during his or her high school career are also asked.~~ This form contains questions about the applicant's and applicant's parents' liquid assets, liabilities, income and marital status along with information about applicant's disabilities (if any), immediate family member(s) and other information pertaining to the ability of the applicant and applicant's family to contribute to educational expenses.

(4) Essay Questionnaire to Accompany Application for Scholarship for Children of War Veterans. This form contains questions designed to elicit input from the applicant on reasons he or she should be awarded a scholarship.

(5) Recommendation Form to Accompany Application for Scholarship for Children of War Veterans. This form requests input from the applicant's recommenders regarding the length of time the recommender has known the applicant, relationship to the applicant, academic standing, disciplinary record, character (such as courage, honesty, kindness, dedication, work ethic) and potential for successful completion of college course of study. Applicants must submit two of these completed recommendation forms, at least one of which must be completed by a teacher or guidance counselor.

Authority G.S. 143B-252(4); 143B-399(4).

01 NCAC 26B .0105 WHERE TO OBTAIN FORMS

~~All forms are on file in and may be obtained from the office of the division of veterans affairs, all district offices, and county veterans service offices.~~ All forms are on file and may be obtained from the Office of the Division of Veterans Affairs or electronically.

Authority G.S. 143B-252; 143B-399.

01 NCAC 26B .0106 DELEGATION OF AUTHORITY

The Veterans Affairs Commission delegates to the Assistant Secretary for Veterans Affairs the responsibility for obtaining information and making recommendations of applications for scholarship awards which the Commission ~~commission~~ administers. The following procedure has been set by the Commission ~~commission~~ for use by the Assistant ~~assistant~~ Secretary ~~secretary~~ in reviewing applications:

(1) ~~Interested parties may obtain application for scholarship blanks from district service officer, county service officer, or the assistant secretary's office. A sheet of instructions is given to each applicant for a scholarship and assistance is available from the service officer.~~Interested parties may obtain application for scholarship blank forms and an instruction sheet from the Assistant Secretary's Office or electronically. Assistance is available from veterans service offices.

(2) ~~Completed application, together with a copy of the public record of applicant's birth, a copy of veteran's discharge or notice of separation from the armed service (if available) and letters of recommendation must be mailed to the assistant secretary's office, preferably prior to May first.~~ Completed application, together with a copy of the public record of applicant's birth, evidence of veteran's biological or adoptive relationship to applicant (which may be shown on birth certificate, court documents, payment of child support or DNA test), copy of veteran's discharge or notice of separation from the armed services (if available), authorization for release of information, financial questionnaire, most recent federal income tax return filed, high school transcript and college transcript (through junior year of high school or if already graduated for all semesters attended of high school and college), recommendations and essay submissions, must be received by the Assistant Secretary's Office on or before February 14.

(3) Upon receipt of application, the Assistant ~~assistant~~ Secretary's ~~secretary's~~ Office ~~office~~ will request necessary information from the appropriate Veterans Administration office.

(4) Upon receipt of Veterans Administration's certification, such certification, birth certificate and discharge from armed services and other information will be carefully checked to determine if eligibility requirements of the law are met. For purposes of G.S.165-20(3), applicant must be under age 25 at the time of application for scholarship which is the earlier of either:

(a) the date received in the NCDVA Assistant Secretary's Office as evidenced by NCDVA date stamp, or

(b) the US Postal Service date identification, or

(c) the processing date identification from any other federal or state recognized mail carrier system that delivers mail.

(5) If the Veterans Administration certification and other information indicates that residential requirements of the law or the necessary degree of disability is not met, the applicant and district service office ~~officer~~ will be so informed and the applicant will be offered the assistance of the service office ~~officer~~ in submitting further evidence.

~~(6) A report of information and investigation will then be requested from the district service officer. The district service officers will be instructed as to what types of information their reports should contain.~~

~~(7) Reports from district service officers will be sent to the assistant secretary's office.~~

(6)~~(8)~~ ~~The sheet of instructions which is sent to each applicant with application for scholarship forms makes it clear that each applicant is responsible for ensuring that his complete scholastic record is received at the Assistant Secretary's Office, North Carolina Division of Veterans Affairs, Raleigh, North Carolina, as soon as possible after his graduation from high school to be considered in connection with possible scholarship awards. (This applies to all types of scholarship applications.)~~ For further processing of applications, upon completion, each applicant must provide to the Assistant Secretary's Office a copy of the previous year's federal income tax return and, if male, copy of Selective Service registration acknowledgment. Also, on or before June 30, applicants must provide to the Assistant Secretary's Office a copy of their high school diploma, NCDVA-11 (Affidavit-School Declaration), letter of acceptance for the school that applicant seeks to attend, and complete scholastic record (including but not limited to list of high school and college courses taken with corresponding grades earned, cumulative weighted and unweighted grade point average, attendance and disciplinary records). The Instruction Sheet makes it clear that each applicant is responsible for ensuring the Assistant Secretary's Office receives these documents timely.

(7)~~(9)~~ In making recommendations for the awarding of scholarships in the competitive categories, the Assistant ~~assistant~~ Secretary ~~secretary~~ will consider the disability and other eligibility requirements of each application in accordance with the standards enumerated in G.S. 165-22 and make his or her recommendations to members of the Commission ~~commission~~ based on the following criteria, and importance shall attach in the order named:

(a) Need. Preference shall be given to the eligible child with the greater financial need. (In cases where the parent has considerable property, attention of the Commission ~~commission~~ shall be called to this fact, if such application is recommended for a scholarship award.)

(b) Scholastic Ability. Preference shall be given the eligible child with the higher scholastic award.

(c) Consideration shall be given to the character, reputation, industry, accomplishments, and handicaps (if any) of the eligible child.

(d) All other things being equal, the degree of service connected disability shall be given preference.

(8)~~(10)~~ Upon confirmation of the members of the Commission, ~~commission,~~ the applicant and other interested parties will be notified as to the disposition made of their application. The Assistant Secretary for Veterans Affairs is authorized to award class I and IV (unlimited scholarships) to any other applicant who meets all ~~eligiblity~~ eligibility requirements under class I or IV twice annually, on or about January 1 and July 1.~~between meetings of the commission~~. These awards are then ratified by the Commission ~~commission~~ at its next meeting.

Authority G.S. 143B-252(4); 143B-399(4); 165-22.1(a).

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Environmental Management Commission intends to amend the rules cited as 15A NCAC 02B .0227 and .0311.*

Link to agency website pursuant to G.S. 150B-19.1(c): *http://portal.ncdenr.org/web/wq/rules*

Proposed Effective Date: *November 1, 2015*

Public Hearing:
Date: *February 5, 2015*
Time: *6:30 p.m.*
Location: *USS North Carolina Battleship, 1 Battleship Road Northeast, Wilmington, NC 28401*

Reason for Proposed Action: *The Lower Cape Fear River Program has requested that a segment of the lower Cape Fear River in New Hanover and Brunswick Counties (Cape Fear River Basin) be reclassified from Class SC to Class SC Swamp (Sw). This reclassification concerns the portion of the Cape Fear River from the upstream mouth of Toomers Creek to a line*

across the river between Lilliput Creek and Snows Cut, where the Intracoastal Waterway (ICW) meets the river.
Wetlands, some developed lands, other open waters, forest lands, shrub/scrub lands and primarily Class Sw tributaries exist directly adjacent to the proposed waters. Several tidal saltwater species, including the federally endangered shortnose sturgeon and federally endangered Atlantic sturgeon, live in the subject waters. Within the subject waters, there are eight (8) existing NPDES wastewater discharges.
If the proposed reclassification and management plan become effective, then the pH standard applicable to these waters can be as low as 4.3 if caused by natural conditions, and the dissolved oxygen (DO) standard applicable to these waters can be lower than 5.0 mg/l if caused by natural conditions; currently the DO standard is 5 mg/l, and the pH standard is a range between 6.8-8.5, for the subject waters. In addition, new individual NPDES wastewater discharges and expansions of existing individual NPDES wastewater discharges in the subject waters would have to meet specific effluent limits for oxygen consuming wastes. For such domestic facilities, effluent limits of 5 mg/l for BOD_5, 1 mg/l for ammonia, and 6 mg/l for DO would apply. For industrial discharges, site-specific best available technology on a case-by-case basis would be utilized to determine the limits for BOD_5, ammonia and DO. For new individual NPDES wastewater facilities and expansions of existing individual NPDES wastewater discharges, the management plan would also include consideration of seasonal effluent limits on a case-by-case basis, and the following stipulation: Any new or expanded permitted pollutant discharge of oxygen consuming waste shall not cause the DO of the receiving water to drop more than 0.1 mg/l below the modeled in-stream DO at total permitted capacity.
The proposed management plan is consistent with the current permitting policy for new individual NPDES wastewater discharges and expansions of existing individual NPDES wastewater discharges to the subject waters. There are currently no known planned new individual NPDES wastewater discharges and one (1) planned expansion of an existing individual NPDES wastewater discharge in the subject waters, which already meets the proposal's requirements. The proposed water quality management plan in conjunction with the Sw designation provides a path forward for the subject waters' dischargers, and thus for local communities, for future planning purposes. Finally, it is unknown how the Sw standards will affect the current DO and pH impairment status of these waters.

Comments may be submitted to: *Elizabeth Kountis, DENR/DWR Planning Section, 1611 Mail Service Center, Raleigh, NC 27699-1611, phone (919) 807-6418, fax (919) 807-6497, email elizabeth.kountis@ncdenr.gov*

Comment period ends: *March 3, 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)**
☐ **Approved by OSBM**
☒ **No fiscal note required by G.S. 150B-21.4**

CHAPTER 02 – ENVIRONMENTAL MANAGEMENT

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 .0227 WATER QUALITY MANAGEMENT PLANS

(a) In implementing the water quality standards to protect the existing uses [as defined by Rule .0202 of this Section] of the waters of the state or the water quality which supports those uses, the Commission shall develop water quality management plans on a priority basis to attain, maintain or enhance water quality throughout the state. Additional specific actions deemed necessary by the Commission to protect the water quality or the existing uses of the waters of the state shall be specified in Paragraph (b) of this Rule. These actions may include anything within the powers of the Commission. The Commission may also consider local actions which have been taken to protect a waterbody in determining the appropriate protection options to be incorporated into the water quality management plan.
(b) All waters determined by the Commission to be protected by a water quality management plan are listed with specific actions as follows:

(1) The Lockwoods Folly River Area (Lumber River Basin), which includes all waters of the lower Lockwoods Folly River in an area extending north from the Intracoastal Waterway to a line extending from Genoes Point to Mullet Creek, shall be protected by the specific actions described in ~~Subparagraphs (1) through (5) of this Paragraph~~. Parts (A) through (E) of this Subparagraph.

~~(1)~~(A) New development activities within 575' of the mean high water line

which require a Sedimentation Erosion Control Plan or a CAMA major development permit must comply with the low density option of the coastal Stormwater Runoff Disposal Rules [as specified in 15A NCAC 02H .1005(2)(a)].

~~(2)~~(B) New or expanded NPDES permits shall be issued only for non-domestic, non-industrial process type discharges (such as non-industrial process cooling or seafood processing discharges). A public hearing is mandatory for any proposed (new or expanded) NPDES permit to this protected area.

~~(3)~~(C) New non-discharge permits shall be required to meet reduced loading rates and increased buffer zones, to be determined on a case-by-case basis.

~~(4)~~(D) New or expanded marinas must be located in upland basin areas.

~~(5)~~(E) No dredge or fill activities shall be allowed where significant shellfish or submerged aquatic vegetation bed resources occur, except for maintenance dredging, such as that required to maintain access to existing channels and facilities located within the protected area or maintenance dredging for activities such as agriculture.

(2) A part of the Cape Fear River (Cape Fear River Basin) comprised of a section of 18-(71) from upstream mouth of Toomers Creek to a line across the river between Lilliput Creek and Snows Cut shall be protected by the Class SC Sw standards as well as the following site-specific action: All new individual NPDES wastewater discharges and expansions of existing NPDES wastewater discharges shall be required to provide treatment for oxygen consuming wastes as described in Parts (A) through (C) of this Subparagraph.

(A) Effluent limitations shall be as follows: BOD_5 = 5 mg/l, NH_3-N = 1 mg/l and DO = 6 mg/l, or site-specific best available technology on a case-by-case basis for industrial discharges.

(B) Seasonal effluent limits for oxygen consuming wastes will be considered on a case-by-case basis in accordance with Rule .0404 of this Subchapter.

(C) Any new or expanded permitted pollutant discharge of oxygen consuming waste shall not cause the dissolved oxygen of the receiving water to drop more than 0.1 mg/l below the modeled in-stream dissolved oxygen at total permitted capacity.

Authority G.S. 143-214.1; 143-215.8A.

SECTION .0300 – ASSIGNMENT OF STREAM CLASSIFICATIONS

15A NCAC 02B .0311 CAPE FEAR RIVER BASIN

(a) Effective February 1, 1976, the adopted classifications assigned to the waters within the Cape Fear River Basin are set forth in the Cape Fear River Basin Schedule of Classifications and Water Quality Standards, which may be inspected at the following places:

(1) the Internet at http://portal.ncdenr.org/web/wq/ps/csu/rules; and http://h2o.enr.state.nc.us/csu/; and

(2) the North Carolina Department of Environment and Natural Resources:

(A) Winston-Salem Regional Office
585 Waughtown Street
Winston-Salem, North Carolina

(B) Fayetteville Regional Office
225 Green Street
Systel Building Suite 714
Fayetteville, North Carolina

(C) Raleigh Regional Office
3800 Barrett Drive
Raleigh, North Carolina

(D) Washington Regional Office
943 Washington Square Mall
Washington, North Carolina

(E) Wilmington Regional Office
127 Cardinal Drive Extension
Wilmington, North Carolina

(F) Division of Water Quality
Central Office
512 North Salisbury Street
Raleigh, North Carolina.

(b) The Cape Fear River Basin Schedule of Classification and Water Quality Standards was amended effective:

(1) March 1, 1977;
(2) December 13, 1979;
(3) December 14, 1980;
(4) August 9, 1981;
(5) April 1, 1982;
(6) December 1, 1983;
(7) January 1, 1985;
(8) August 1, 1985;
(9) December 1, 1985;
(10) February 1, 1986;
(11) July 1, 1987;
(12) October 1, 1987;
(13) March 1, 1988;
(14) August 1, 1990.

(c) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective June 1, 1988 as follows:

(1) Cane Creek [Index No. 16-21-(1)] from source to a point 0.5 mile north of N.C. Hwy. 54 (Cane Reservoir Dam) including the Cane Creek Reservoir and all tributaries has been reclassified from Class WS-III to WS-I.

(2) Morgan Creek [Index No. 16-41-1-(1)] to the University Lake dam including University Lake and all tributaries has been reclassified from Class WS-III to WS-I.

(d) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective July 1, 1988 by the reclassification of Crane Creek (Crains Creek) [Index No. 18-23-16-(1)] from source to mouth of Beaver Creek including all tributaries from C to WS-III.

(e) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective January 1, 1990 as follows:

(1) Intracoastal Waterway (Index No. 18-87) from southern edge of White Oak River Basin to western end of Permuda Island (a line from Morris Landing to Atlantic Ocean), from the eastern mouth of Old Topsail Creek to the southwestern shore of Howe Creek and from the southwest mouth of Shinn Creek to channel marker No. 153 including all tributaries except the King Creek Restricted Area, Hardison Creek, Old Topsail Creek, Mill Creek, Futch Creek and Pages Creek were reclassified from Class SA to Class SA ORW.

(2) Topsail Sound and Middle Sound ORW Area which includes all waters between the Barrier Islands and the Intracoastal Waterway located between a line running from the western most shore of Mason Inlet to the southwestern shore of Howe Creek and a line running from the western shore of New Topsail Inlet to the eastern mouth of Old Topsail Creek was reclassified from Class SA to Class SA ORW.

(3) Masonboro Sound ORW Area which includes all waters between the Barrier Islands and the mainland from a line running from the southwest mouth of Shinn Creek at the Intracoastal Waterway to the southern shore of Masonboro Inlet and a line running from the Intracoastal Waterway Channel marker No. 153 to the southside of the Carolina Beach Inlet was reclassified from Class SA to Class SA ORW.

(f) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective January 1, 1990 as follows: Big Alamance Creek [Index No. 16-19-(1)] from source to Lake Mackintosh Dam including all tributaries has been reclassified from Class WS-III NSW to Class WS-II NSW.

(g) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective August 3, 1992 with the reclassification of all water supply waters (waters with a primary classification of WS-I, WS-II or WS-III). These waters were reclassified to WS-I, WS-II, WS-III, WS-IV or WS-V as defined in the revised water supply protection rules, (15A NCAC 02B .0100, .0200 and .0300) which became effective on August 3, 1992. In some cases, streams with primary classifications other than WS were reclassified to a WS classification due to their proximity and linkage to water supply waters. In other cases, waters were reclassified from a WS classification to an alternate appropriate primary classification after being identified as downstream of a water supply intake or identified as not being used for water supply purposes.

(h) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective June 1, 1994 as follows:

(1) The Black River from its source to the Cape Fear River [Index Nos. 18-68-(0.5), 18-68-(3.5) and 18-65-(11.5)] was reclassified from Classes C Sw and C Sw HQW to Class C Sw ORW.

(2) The South River from Big Swamp to the Black River [Index Nos. 18-68-12-(0.5) and 18-68-12(11.5)] was reclassified from Classes C Sw and C Sw HQW to Class C Sw ORW.

(3) Six Runs Creek from Quewhiffle Swamp to the Black River [Index No. 18-68-2] was reclassified from Class C Sw to Class C Sw ORW.

(i) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective September 1, 1994 with the reclassification of the Deep River [Index No. 17-(36.5)] from the Town of Gulf-Goldston water supply intake to US highway 421 including associated tributaries from Class C to Classes C, WS-IV and WS-IV CA.

(j) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective August 1, 1998 with the revision to the primary classification for portions of the Deep River [Index No. 17-(28.5)] from Class WS-IV to Class WS-V, Deep River [Index No. 17-(41.5)] from Class WS-IV to Class C, and the Cape Fear River [Index 18-(10.5)] from Class WS-IV to Class WS-V.

(k) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective April 1, 1999 with the reclassification of Buckhorn Creek (Harris Lake)[Index No. 18-7-(3)] from the backwaters of Harris Lake to the Dam at Harris Lake from Class C to Class WS-V.

(l) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective April 1, 1999 with the reclassification of the Deep River [Index No. 17-(4)] from the dam at Oakdale-Cotton Mills, Inc. to the dam at Randleman Reservoir (located 1.6 mile upstream of U.S. Hwy 220 Business), and including tributaries from Class C and Class B to Class WS-IV and Class WS-IV & B. Streams within the Randleman Reservoir Critical Area have been reclassified to WS-IV CA. The Critical Area for a WS-IV reservoir is defined as 0.5 mile and draining to the normal pool elevation of the reservoir. All waters within the Randleman Reservoir Water Supply Watershed are within a designated Critical Water Supply Watershed and are subject to a special management strategy specified in 15A NCAC 02B .0248.

(m) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective August 1, 2002 as follows:

(1) Mill Creek [Index Nos. 18-23-11-(1), 18-23-11-(2), 18-23-11-3, 18-23-11-(5)] from its source to the Little River, including all tributaries was reclassified from Class WS-III NSW and Class WS-III B NSW to Class WS-III NSW HQW@ and Class WS-III B NSW HQW@.

(2) McDeed's Creek [Index Nos. 18-23-11-4, 18-23-11-4-1] from its source to Mill Creek, including all tributaries was reclassified from Class WS III NSW and Class WS-III B NSW to Class WS-III NSW HQW@ and Class WS-III B NSW HQW@.

The "@" symbol as used in this Paragraph means that if the governing municipality has deemed that a development is covered under a "5/70 provision" as described in Rule 15A NCAC 02B .0215(3)(b)(i)(E) (Fresh Surface Water Quality Standards for Class WS-III Waters), then that development is not subject to the stormwater requirements as described in rule 15A NCAC 02H .1006 (Stormwater Requirements: High Quality Waters).

(n) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective November 1, 2004 as follows:

(1) the portion of Rocky River [Index Number 17-43-(1)] from a point 0.3 mile upstream of Town of Siler City upper reservoir dam to a point 0.3 mile downstream of Lacy Creek from WS-III to WS-III CA.

(2) the portion of Rocky River [Index Number 17-43-(8)] from dam at lower water supply reservoir for Town of Siler City to a point 65 feet below dam (site of proposed dam) from C to WS-III CA.

(3) the portion of Mud Lick Creek (Index No. 17-43-6) from a point 0.4 mile upstream of Chatham County SR 1355 to Town of Siler City lower water supply reservoir from WS-III to WS-III CA.

(4) the portion of Lacy Creek (17-43-7) from a point 0.6 mile downstream of Chatham County SR 1362 to Town of Siler City lower water supply reservoir from WS-III to WS-III CA.

(o) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective November 1, 2007 with the reclassifications listed below, and the North Carolina Division of Water Quality maintains a Geographic Information Systems data layer of these UWLs.

(1) Military Ocean Terminal Sunny Point Pools, all on the eastern shore of the Cape Fear River [Index No. 18-(71)] were reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.

(2) Salters Lake Bay near Salters Lake [Index No. 18-44-4] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.

(3) Jones Lake Bay near Jones Lake [Index No. 18-46-7-1] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.

(4) Weymouth Woods Sandhill Seep near Mill Creek [18-23-11-(1)] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.

(5) Fly Trap Savanna near Cape Fear River [Index No. 18-(71)] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.

(6) Lily Pond near Cape Fear River [Index No. 18-(71)] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.

(7) Grassy Pond near Cape Fear River [Index No. 18-(71)] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.

(8) The Neck Savanna near Sandy Run Swamp [Index No. 18-74-33-2] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.

(9) Bower's Bog near Mill Creek [Index No. 18-23-11-(1)] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.

(10) Bushy Lake near Turnbull Creek [Index No. 18-46] was reclassified to Class WL UWL as defined in 15A NCAC 02B .0101.

(p) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective January 1, 2009 as follows:

(1) the portion of Cape Fear River [Index No. 18-(26)] (including tributaries) from Smithfield Packing Company's intake, located approximately 2 miles upstream of County Road 1316, to a point 0.5 miles upstream of Smithfield Packing Company's intake from Class C to Class WS-IV CA.

(2) the portion of Cape Fear River [Index No.18-(26)] (including tributaries) from a point 0.5 miles upstream of Smithfield Packing Company's intake to a point 1 mile upstream of Grays Creek from Class C to Class WS-IV.

(q) The schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective August 11, 2009 with the reclassification of all Class C NSW waters and all Class B NSW waters upstream of the dam at B. Everett Jordan Reservoir from Class C NSW and Class B NSW to Class WS-V NSW and Class WS-V & B NSW, respectively. All waters within the B. Everett Jordan Reservoir Watershed are within a designated Critical Water Supply Watershed and are subject to a special management strategy specified in 15A NCAC 02B .0262 through .0273.

(r) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective September 1, 2009 with the reclassification of a portion of the Haw River [Index No. 16-(28.5)] from the Town of Pittsboro water supply intake, which is located approximately 0.15 mile west of U.S. 15/501, to a point 0.5 mile upstream of the Town of Pittsboro water supply intake from Class WS-IV to Class WS-IV CA.

(s) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective March 1, 2012 with the reclassification of the portion of the Haw River [Index No. 16-(1)] from the City of Greensboro's intake, located approximately 650 feet upstream of Guilford County 2712, to a point 0.5 miles upstream of the intake from Class WS-V NSW to Class WS-IV CA NSW, and the portion of the Haw River [Index No. 16-(1)] from a point 0.5 miles upstream of the intake to a point 0.6 miles downstream of U.S. Route 29 from Class WS-V NSW to Class WS-IV NSW.

(t) The Schedule of Classifications and Water Quality Standards for the Cape Fear River Basin was amended effective November 1, 2015 with the reclassification of a section of 18-(71) from upstream mouth of Toomers Creek to a line across the river between Lilliput Creek and Snows Cut from Class SC to Class SC Sw. A site-specific management strategy is outlined in 15A NCAC 02B .0227.

Authority G.S. 143-214.1; 143-215.1; 143-215.3(a)(1).

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

Rules approved by the Rules Review Commission at its meeting on November 20, 2014.

		REGISTER CITATION TO THE NOTICE OF TEXT
AGRICULTURE, BOARD OF		
Alcoholic Beverages	02 NCAC 20B .0413*	29:02 NCR
CHILD CARE COMMISSION		
Infectious and Contagious Diseases	10A NCAC 09 .0804*	28:19 NCR
Safe Procedures	10A NCAC 09 .1003*	28:19 NCR
Transportation Requirements	10A NCAC 09 .1723*	28:19 NCR
Inclusion/Exclusion Requirements	10A NCAC 09 .2404*	28:19 NCR
CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION		
Responsibilities of the School Director	12 NCAC 09B .0202*	28:24 NCR
ENVIRONMENT AND NATURAL RESOURCES, DEPARTMENT OF		
Fee Schedule	15A NCAC 28 .0302*	29:03 NCR
REVENUE, DEPARTMENT OF		
Continuing Education Requirement of County Assessors	17 NCAC 10 .0504*	n/a G.S. 150B-1(d)(4)
HEARING AID DEALERS AND FITTERS BOARD		
Submission of Applications and Fees	21 NCAC 22A .0503*	29:04 NCR
Communication of Results of Examinations	21 NCAC 22F .0107*	29:04 NCR
Review of Examination	21 NCAC 22F .0108*	29:04 NCR
Appeals and CE Program Modification	21 NCAC 22F .0206*	29:04 NCR
Change of Address	21 NCAC 22I .0114*	29:04 NCR

TITLE 02 – DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

02 NCAC 20B .0413 ALCOHOLIC BEVERAGES

(a) The possession, sale, or consumption of any alcoholic beverage shall be in compliance with the state alcoholic beverage control laws set forth in G.S. 18B and rules set forth in 04 NCAC 02.

(b) The sampling or sale of alcoholic beverages at an event on the State Fair property shall require approval by the State Fair Manager or his or her designee in negotiation and at the time of the signing of the contract to rent the premises. In making this determination, the State Fair Manager shall consider the following factors:

(1) the nature of the event;
(2) the time of the event;
(3) the number of attendees at the event;
(4) the age of the attendees at the event;
(5) prior history of the event;
(6) other events on State Fair property at that time;
(7) security needed and available at the time of the event; and
(8) the health, safety and welfare of all patrons on State Fair property.

History Note: Authority G.S. 106-503;
Eff. February 1, 1976;
Amended Eff. December 1, 2014; October 1, 1993; December 1, 1991; January 1, 1991; October 1, 1989.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

10A NCAC 09 .0804 INFECTIOUS AND CONTAGIOUS DISEASES

(a) Centers may provide care for a mildly ill child who has a Fahrenheit temperature of less than 100 degrees axillary, or 101 degrees orally, and who remains capable of participating in routine group activities; and the child shall not have any of the following:

(1) the sudden onset of diarrhea characterized by an increased number of bowel movements compared to the child's normal pattern and with increased stool water;
(2) two or more episodes of vomiting within a 12 hour period;
(3) a red eye with white or yellow eye discharge, until 24 hours after treatment has started;
(4) scabies or lice;
(5) known chicken pox or a rash suggestive of chicken pox;
(6) tuberculosis, until a health professional states that the child is not infectious;
(7) strep throat, until 24 hours after treatment has started;
(8) pertussis, until five days after treatment has started;
(9) hepatitis A virus infection, until one week after onset of illness or jaundice;
(10) impetigo, until 24 hours after treatment has started; or
(11) a physician's or other health professional's written order that the child be separated from other children.

(b) Centers that choose to provide care for mildly ill children shall:

(1) follow all procedures to prevent the spread of communicable diseases described in 15A NCAC 18A .2800, "Sanitation of Child Care Centers", as adopted by the Commission for Public Health;
(2) separate from the other children any child who becomes ill while in care or who is suspected of having a communicable disease or condition other than as described in Paragraph (a) of this Rule until the child leaves the center;
(3) notify all parents at enrollment that the center will be providing care for mildly ill children;
(4) notify the parent of any child who becomes ill or who is suspected of being ill with a communicable condition other than as described in Paragraph (a) of this Rule that the child is ill and shall leave the center;
(5) notify the parent of any sick child in care if the child's condition worsens while the child is in care.

History Note: Authority G.S. 110-91(1); 143B-168.3;
Eff. January 1, 1986;
Amended Eff. December 1, 2014; July 1, 1998; November 1, 1991; November 1, 1989.

10A NCAC 09 .1003 SAFE PROCEDURES

(a) The driver or other adult in the vehicle shall assure that all children are transferred to a responsible person who is indicated on the child's application as specified in Rule .0801(a)(4) of this Chapter or as authorized by the parent.
(b) Each center shall establish safe procedures for pick-up and delivery of children. These procedures shall be communicated to parents, and a copy shall be posted in the center where they can be seen by the parents. Centers licensed for three to 12 children located in a residence are not required to post these procedures.
(c) A first-aid kit shall be located in each vehicle used on a regular basis to transport children. The first-aid kit shall be firmly mounted or secured if kept in the passenger compartment.
(d) For each child being transported, emergency and identifying information shall be in the vehicle.
(e) The driver shall:

(1) be 21 years old or a licensed bus driver;
(2) have a valid driver's license of the type required under North Carolina Motor Vehicle Law for the vehicle being driven or comparable license from the state in which the driver resides; and
(3) have no convictions of Driving While Impaired (DWI) or any other impaired driving offense within the previous three years.

(f) Each person in the vehicle shall be seated in the manufacturer's designated areas. No child shall ride in the load carrying area or floor of a vehicle.
(g) Children shall not be left in a vehicle unattended by an adult.
(h) Children shall be loaded and unloaded from curbside or in a safe, off-street area, out of the flow of traffic, so that they are protected from all traffic hazards.
(i) Before children are transported, written permission from a parent shall be obtained that shall include when and where the child is to be transported, expected time of departure and arrival, and the transportation provider.
(j) Parents may give standing permission, valid for up to 12 months, for routine transport of children to and from the center.
(k) When children are transported, staff in each vehicle shall have a functioning cellular telephone or other functioning two-way voice communication device with them for use in an emergency. Staff shall not use cellular telephones or other functioning two-way voice communication devices except in the case of an emergency and only when the vehicle is parked in a safe location.
(l) For routine transport of children to and from the center, staff shall have a list of the children being transported. Staff

members shall use this list to check attendance as children board the vehicle and as they depart the vehicle. A list of all children being transported shall also be available at the center.

History Note: Authority G.S. 110-85; 110-91; 110-91(13); 143B-168.3;
Eff. January 1, 1986;
Amended Eff. December 1, 2014; November 1, 2007; July 1, 1998; October 1, 1991; January 1, 1987.

10A NCAC 09 .1723 TRANSPORTATION REQUIREMENTS

To assure the safety of children whenever they are transported, the operator, or any other transportation provider, shall:

(1) have written permission from a parent to transport his or her child and notify the parent when and where the child is to be transported, and who the transportation provider will be;
(2) ensure that all children regardless of age or location in the vehicle shall be restrained by individual seat belts or child restraint devices. Only one person shall occupy each seat belt or child restraint device;
(3) be at least 18 years old, and have a valid driver's license of the type required under the North Carolina Motor Vehicle Law for the vehicle being driven, or comparable license from the state in which the driver resides, and no convictions of Driving While Impaired (DWI), or any other impaired driving offense, within the last three years;
(4) ensure that each child is seated in a manufacturer's designated area;
(5) ensure that a child shall not occupy the front seat if the vehicle has an operational passenger side airbag;
(6) never leave children in a vehicle unattended by an adult;
(7) have emergency and identification information about each child in the vehicle whenever children are being transported; and
(8) not use a cellular telephone or other functioning two-way voice communication device except in the case of an emergency and only when the vehicle is parked in a safe location.

History Note: Authority G.S. 110-91; 110-91(13); 143B-168.3;
Eff. July 1, 1998;
Amended Eff. December 1, 2014; April 1, 2003.

10A NCAC 09 .2404 INCLUSION/EXCLUSION REQUIREMENTS

(a) Centers may enroll mildly ill children over three months of age who meet the following inclusion criteria:

(1) Centers may enroll children with Level One symptoms as follows:
(A) children who meet the guidelines for attendance in 10A NCAC 09 .0804, except that they are unable to participate fully in routine group activities and are in need of increased rest time or less vigorous activities; or
(B) children with fever controlled with medication of 101º or less axillary or 102° or less orally;
(2) Centers may enroll children with Level Two symptoms as follows:
(A) inability to participate in much group activity while requiring extra sleep, clear liquids, light meals, and passive activities such as stories, videos or music, as determined by a health care professional;
(B) fever controlled with medication of 103° maximum orally, or 102° maximum axillary, with a health care professional's written screening;
(C) vomiting fewer than three times in any eight hour period, without signs of dehydration;
(D) diarrhea without signs of dehydration and without blood or mucus in the stool, fewer than five times in any eight hour period; or
(E) with written approval from a child's physician and preadmission screening by an on-site health care professional prior to the current day's attendance unless excluded by Subparagraphs (b)(1), (2), (3), (4), (6), or (7) of this Rule.

(b) Any child exhibiting the following symptoms shall be excluded from any care:

(1) temperature unresponsive to control measures;
(2) undiagnosed or unidentified rash;
(3) respiratory distress as evidenced by an increased respiratory rate and unresponsiveness to treatment, flaring nostrils, labored breathing, or intercostal retractions;
(4) major change in condition requiring further care or evaluation;
(5) contagious diseases required to be reported to the health department, except as provided in Part (a)(2)(E) of this Rule;
(6) other conditions as determined by a health care professional or onsite administrator; or
(7) mental status.

(c) Once admitted, children shall be assessed and evaluated at least every four hours, or more frequently if warranted based on medication administration or medical treatment, to determine if symptoms continue to meet inclusion criteria.

History Note: Authority G.S. 110-88(11); 143B-168.3;
Eff. April 1, 2003;
Amended Eff. December 1, 2014.

TITLE 12 – DEPARTMENT OF JUSTICE

12 NCAC 09B .0202 RESPONSIBILITIES OF THE SCHOOL DIRECTOR

(a) In planning, developing, coordinating, and delivering each Commission-certified criminal justice training course, the School Director shall:

(1) Formalize and schedule the course curriculum in accordance with the curriculum standards established in this Subchapter;

(2) Select and schedule instructors who are certified by the Commission;

(3) Provide each instructor with a current Commission course outline and all necessary additional information concerning the instructor's duties and responsibilities;

(4) Notify each instructor that he or she shall comply with the Basic Law Enforcement Training Course Management Guide and provide him or her access to the most current version of the Course Management Guide;

(5) Review each instructor's lesson plans and other instructional materials for conformance to Commission standards and to minimize repetition and duplication of subject matter;

(6) Arrange for the availability of appropriate audiovisual aids and materials, publications, facilities, and equipment for training in all topic areas;

(7) Develop, adopt, reproduce, and distribute any supplemental rules and requirements determined by the school to be necessary or appropriate for:

(A) effective course delivery;

(B) establishing responsibilities and obligations of agencies or departments employing or sponsoring course trainees; and

(C) regulating trainee participation and demeanor, ensuring trainee attendance, and maintaining performance records;

(8) If appropriate, recommend housing and dining facilities for trainees;

(9) Administer the course delivery in accordance with Commission procedures and standards, give consideration to advisory guidelines issued by the Commission, and ensure that the training offered is safe and effective;

(10) Maintain direct supervision, direction, and control over the performance of all persons to whom any portion of the planning, development, presentation, or administration of a course has been delegated. The comprehensive final examination shall be administered by the Criminal Justice Education and Training Standards Commission; and

(11) Report the completion of each presentation of a Commission-certified criminal justice training course to the Commission.

(12) All forms required for submission to the Commission are located on the Agency's website: http://www.ncdoj.gov/About-DOJ/Law-Enforcement-Training-and-Standards/Criminal-Justice-Education-and-Training-Standards/Forms-and-Publications.aspx.

(b) In addition to Paragraph (a) of this Rule, in planning, developing, coordinating, and delivering each Commission-certified Basic Law Enforcement Training Course, the School Director shall:

(1) Deliver training in accordance with the most current version of the Basic Law Enforcement Training Course Management Guide as published by the North Carolina Justice Academy;

(2) Schedule course presentation to include 12 hours of instruction each week during consecutive calendar weeks, except that there may be as many as three one-week breaks until course requirements are completed;

(3) Schedule only specialized instructors certified by the Commission to teach those high-liability areas as specified in Rule .0304(a) of this Subchapter as either the lead instructor or as assistant instructors or role players;

(4) With the exception of the First Responder, Physical Fitness, Explosives and Hazardous Materials, and topical areas outlined in Rule .0304(a) of this Subchapter, schedule one specialized instructor certified by the Commission for each six trainees while actively engaged in a practical performance exercise;

(5) Schedule one specialized instructor certified by the Commission for each eight trainees while actively engaged in a practical performance exercise in the topical area "Subject Control Arrest Techniques;"

(6) Schedule no single individual to instruct more than 35 percent of the total hours of the curriculum during any one delivery of the Basic Law Enforcement Training Course presentation;

(7) Not less than 15 days before commencing delivery of the Basic Law Enforcement Training Course, submit to the Commission a Pre-Delivery Report of Training Course Presentation as set out in 12 NCAC 09C .0211. The Pre-Delivery Report (Form F-10A) shall indicate a requested date and location for the administration of the state comprehensive exam, and include the following attachments:

(A) a course schedule showing arrangement of topical presentations and proposed instructional assignments; and

(B) a copy of any rules and requirements for the school. A copy of such rules shall also be given to each trainee and to the executive officer of each trainee's employing or sponsoring agency or department at the time the trainee enrolls in the course;

(8) Monitor, or designate an instructor certified by the Commission to monitor, a presentation of each instructor once during each three year certification period in each topic taught by the instructor and prepare a written evaluation on the instructor's performance and suitability for subsequent instructional assignments. The observations shall be of sufficient duration to ensure that the instructor is using the Instructional System Design model, and that the delivery is objective based, documented by, and consistent with a Commission-approved lesson plan. For each topic area, the School Director's evaluation shall be based upon the course delivery observations, the instructor's use of the approved lesson plan, and the results of the student evaluations of the instructor. For probationary instructors, the evaluations conducted by another instructor shall be prepared on the Criminal Justice Instructor Evaluation (Form F-16), and forwarded to the Commission. Based on this evaluation, the School Director shall recommend approval or denial of requests for General Instructor Certification. For all other instructors, these evaluations shall be prepared on the Criminal Justice Instructor Evaluation (Form F-16), be kept on file by the school for a period of three years, and shall be made available for inspection by a representative of the Commission upon request. In the event the evaluation of an instructor indicates that his or her performance was less than acceptable, the School Director shall forward a copy of the evaluation to the Commission. Any instructor who is evaluating the instructional presentation of another instructor shall hold certification in the same instructional topic area as that for which the instructor is being evaluated;

(9) Administer or designate a staff person to administer appropriate tests during course delivery:

(A) to determine and record the level of trainee comprehension and retention of instructional subject- matter;

(B) to provide a basis for a final determination or recommendation regarding the minimum degree of knowledge and skill of each trainee to function as an inexperienced law enforcement officer; and

(C) to determine subject or topic areas of deficiency for the application of Rule .0405(a)(3) of this Subchapter; and

(10) Not more than 10 days after the conclusion of a school's offering of Basic Law Enforcement Training, submit to the Commission a Post-Delivery Report of Training Course Presentation (Form F-10B) that shall include:

(A) a "Student Course Completion" form for each individual enrolled on the day of orientation; and

(B) a "Certification and Test Score Release" form.

(c) In addition to Paragraph (a) of this Rule, in planning, developing, coordinating, and delivering each Commission-certified "Criminal Justice Instructor Training Course," the School Director shall:

(1) Schedule course presentation to include 40 hours of instruction each week during consecutive calendar weeks until course requirements are completed;

(2) Schedule at least one evaluator for each six trainees, as follows:

(A) no evaluator shall be assigned more than six trainees during a course delivery;

(B) each evaluator, as well as the instructors, shall have completed a Commission-certified instructor training course or an equivalent instructor training course utilizing the Instructional Systems Design model, an international model with applications in education, military training, and private enterprise; and

(C) each instructor and evaluator shall document successful participation in a program presented by the North Carolina Justice Academy for purposes of familiarization and supplementation relevant to delivery of the instructor training course and trainee evaluation;

(3) Not fewer than 30 days before commencing delivery of the course, submit to the Commission a Pre-Delivery Report of Training Course Presentation [Form F-10A(ITC)]with the following attachments:

(A) a course schedule showing arrangement of topical presentations and proposed instructional assignments;

(B) the names and last four digits of the social security numbers of all instructors and evaluators; and

(C) a copy of any rules, and requirements for the school; and

(4) Not more than 10 days after course completion, submit to the Commission a Post-Delivery Report [Form F-10B(ITC)] containing the following:

(A) class enrollment roster;

(B) a course schedule with designation of instructors and evaluators utilized in delivery;

(C) scores recorded for each trainee on the 80 minute skill presentation; and

(D) designation of trainees who completed the course in its entirety and whom the School Director finds to be competent to instruct.

(d) In addition to Paragraph (a) of this Rule, in planning, developing, coordinating, and delivering each Commission-certified radar, radar and time-distance, time-distance, or lidar speed measurement operator training course or re-certification course, the School Director shall:

(1) select and schedule speed measurement instrument instructors who are certified by the Commission as instructors for the specific speed measurement instruments in which the trainees are to receive instruction as follows:

(A) provide to the instructor the Commission form(s) for motor skill examination on each trainee;

(B) require the instructor to complete the motor skill examination form on each trainee indicating the level of proficiency obtained on each specific instrument; and

(C) require each instructor to sign each individual form and submit the original to the School Director;

(2) not fewer than 30 days before the scheduled starting date, submit to the Director of the Standards Division a Pre-Delivery Report of Speed Measuring Instrument Course Presentation [Form F-10A (SMI)] that shall contain a period of course delivery including the proposed starting date, course location, requested date and location for the administration of the state exam, and the number of trainees to be trained on each type of approved speed measurement instrument. The Director of the Standards Division shall review the request and notify the School Director within thirty business days if the request is approved or denied; and

(3) upon completing delivery of the Commission-certified course, and not more than 10 days after the conclusion of a school's offering of a certified radar, radar and time-distance, time-distance, or lidar speed measurement operator training course or re-certification course, the School Director shall notify the Commission regarding the progress and achievements of each trainee by submitting a Post-Delivery Report of Training Course Presentation [Form F-10B (SMI)]. This report shall include the original motor-skill examination form(s) completed and signed by the certified instructor responsible for administering the motor-skill examination to the respective trainee.

History Note: Authority G.S. 17C-6;
Eff. January 1, 1981;
Amended Eff. November 1, 1981;
Readopted w/change Eff. July 1, 1982;
Amended Eff. January 1, 2015; June 1, 2013; April 1, 2009; November 1, 2007; January 1, 2006; May 1, 2004; August 1, 2000; January 1, 1996; November 1, 1993; December 1, 1987; January 1, 1985.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

15A NCAC 28 .0302 FEE SCHEDULE

(a) The following schedule of fees governs admission to the North Carolina Aquariums:

(1)	Roanoke Island:	
	Adult, ages 13 and over	$10.95
	Senior, ages 62 and over	$9.95
	Child, ages 3 through 12	$8.95
	Military	$9.95
(2)	Fort Fisher:	
	Adult, ages 13 and over	$10.95
	Senior, ages 62 and over	$9.95
	Child, ages 3 through 12	$8.95
	Military	$9.95
(3)	Pine Knoll Shores:	
	Adult, ages 13 and over	$10.95
	Senior, ages 62 and over	$9.95
	Child, ages 3 through 12	$8.95
	Military	$9.95

(b) Free admission to the North Carolina Aquariums on Roanoke Island, at Pine Knoll Shores and at Fort Fisher shall be offered to the following groups:

(1) Aquarium Society Members;

(2) Preregistered North Carolina School groups;

(3) Association of Zoos and Aquariums' reciprocals; and

(4) Children under the age of three.

Free admission shall be offered to everyone on the following holidays: Martin Luther King, Jr.'s Birthday and Veteran's Day.

(c) The following schedule of fees governs admission on the educational fishing piers of the North Carolina Aquariums:

(1)	Daily Fishing Pass	$12.00
	(maximum 24 hour period, two rods maximum;	
	(Ages 13 and over)	$2.00
	for each additional rod)	

(2)	Youth Fishing Pass (maximum 24 hour period, two rods maximum; (Ages 12 and under) for each additional rod)	$6.00 $1.00
(3)	Pin-Rig Fishing addition to fishing pass fee per day (live bait fishing)	$3.00
(4)	Three-Day Fishing Pass (any three days in a seven day period from date (Ages 13 and over) purchased, two rod maximum; per day for each additional rod)	$30.00 $2.00
(5)	Youth Three-Day Fishing Pass (any three days in a seven day period from date (Ages 12 and under) purchased, two rod maximum; per day for each additional rod)	$15.00 $2.00
(6)	Seven-Day Fishing Pass (any seven days in a one month period from (Ages 13 and over) date purchased, two rod maximum; per day for each additional rod)	$65.00 $2.00
(7)	Youth Seven-Day Fishing Pass (any seven days in a one month period from (Ages 12 and under) date purchased, two rod maximum; per day for each additional rod)	$32.50 $2.00
(8)	Sightseeing Pass (unlimited sightseeing for date of purchase) (Ages 13 and over)	$2.00
(9)	Youth Sightseeing Pass (unlimited sightseeing for date of purchase) (Ages 12 and under)	$1.00

History Note: Authority G.S. 143B-289.41(b); 143B-289.44; Eff. March 1, 2004;
Amended Eff. September 1, 2011; January 1, 2011; April 1, 2010; January 1, 2006;
Transferred and Recodified from 15A NCAC 01R .0101 Eff. August 1, 2007;
Temporary Amendment Eff. February 28, 2014;
Amended Eff. December 1, 2014.

TITLE 17 – DEPARTMENT OF REVENUE

17 NCAC 10 .0504 CERTIFICATION REQUIREMENTS FOR COUNTY ASSESSORS

(a) Except for persons deemed to be qualified as county assessors under G.S. 105-294, every person serving as county assessor after July 1, 1983, shall, within two years after appointment, achieve a passing grade in the four courses listed in Paragraph (b) of this Rule and then achieve a passing grade on a comprehensive examination administered by the Department of Revenue. Persons who do not meet these requirements shall not be eligible for reappointment.

(b) The following courses shall be required for county assessors:

(1) The Fundamental of Property Tax Listing and Assessing;
(2) International Association of Assessing Officers (IAAO) Course 101 – The Fundamental of Real Property Appraisal;
(3) Personal Property Appraisal and Assessment – Department of Revenue; and
(4) Tax Administration in North Carolina – Department of Revenue.

(c) The comprehensive examination for county assessors consists of multiple choice and true or false questions. The examination is designed to test the assessor's knowledge of the listing, appraisal, and assessment requirements of the Machinery Act (G.S. 105-271 et seq.), and the theories and procedures involved in the appraisal of real property and personal property. A passing grade shall be 70 percent correct.

History Note: Authority G.S. 105-262; 105-289(d); 105-294(b)(c);
Eff. August 1, 1984;
Amended Eff. January 1, 2015; June 1, 2007; July 1, 2000; July 1, 1993.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 22 – HEARING AID DEALERS AND FITTERS BOARD

21 NCAC 22A .0503 SUBMISSION OF APPLICATIONS AND FEES

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

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

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

(d) No later than 14 days after an apprentice has held a valid apprentice registration certificate for 365 days, the apprentice shall make application to take the next scheduled licensing examination. All apprentices shall reapply for a license by examination within the time prescribed in Paragraph (c) of this Rule each time they take and fail to pass the licensing examination.
(e) No later than 20 days after the date printed on the Official Notice of Examination Results, a registered apprentice who failed to pass the qualifying examination shall make application to renew the apprentice certificate or the sponsor shall submit written notice to the Board that the apprenticeship is being terminated by the current expiration date of the certificate.
(f) The Board shall deny a late duly made application, except as set forth in Paragraph (c) of this Rule.
(g) In computing the time stated in the rules of this Chapter, the day of the act or event shall not be included. The last day of the period shall be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or a legal holiday.

History Note: Authority G.S. 25-3-506; 93D-3(c); 93D-5; 93D-9;
Eff. April 23, 1976;
Amended Eff. August 1, 2012; February 1, 1996; January 1, 1992; May 1, 1988;
Recodified from 21 NCAC 22F .0103 Eff. May 1, 2013;
Amended Eff. December 1, 2014; September 1, 2013.

21 NCAC 22F .0107 COMMUNICATION OF RESULTS OF EXAMINATIONS
(a) The office of the Board shall issue written notification concerning the applicant's performance on the qualifying examination to each registered applicant by mailing exam results to the mailing address provided by the applicant.
(b) A copy of the applicant's exam results shall be mailed to the applicant's Registered Sponsor at the mailing address on file with the Board at the same time the results are mailed to the applicant.
(c) The deadline for the Board to mail exam results shall be 30 days after the examination.
(d) The written notification shall be titled "Official Notice of Examination Results" with the date of the notice printed below the title.

History Note: Authority G.S. 93B-8; 93D-3(c);
Eff. April 23, 1976;
Amended Eff. December 1, 2014; September 1, 2013; June 1, 2012; February 1, 1996; May 1, 1988.

21 NCAC 22F .0108 REVIEW OF EXAMINATION
(a) As set forth in G.S. 93B-8(c) each registered applicant who takes and does not pass the qualifying examination shall be granted an opportunity to review the failed portion of the examination that is in the custody and control of the Board in the presence of a representative of the Board, upon written request from the applicant.
(b) An applicant shall make a written request by completing the electronic form available on the Board website. The written request shall include the applicant's name and Exam ID number, contact phone number, e-mail address, and dates available for a review appointment.
(c) The deadline to request an exam review shall be 20 days after the date printed on the Official Notice of Examination Results.
(d) The Board shall conduct exam reviews at the Board's office by appointment.

History Note: Authority G.S. 93B-8; 93D-3(c);
Eff. April 23, 1976;
Amended Eff. December 1, 2014; October 1, 2013; February 1, 1996; January 1, 1992; May 1, 1988.

21 NCAC 22F .0206 APPEALS AND CE PROGRAM MODIFICATION
(a) Only the initial applicant shall possess the right to appeal the decision of the Board. The applicant's appeal shall include a written statement and any supplemental documentation to support the appeal. The appeal shall be submitted prior to the end of the CEU Accrual Period for the program. The Board shall review the appeal using Rule 21 NCAC 22F .0205 to determine program approval. The Board shall respond in writing to the applicant within 30 days. An applicant who is not satisfied with the Board decision after the appeal may request an administrative hearing in accordance with 21 NCAC 22L .0103.
(b) The program sponsor shall submit documentation to the Board within 30 days after the CE completion date regarding any modifications to a program approved by the Board, and shall notify program participants that approved CEU credit is subject to change due to modifications in the agenda.
(c) The program sponsor shall write all program modifications in the appropriate section on the Report of Attendance and sign the form in the area designated for CE Program modifications if any session of an approved CE program is modified after publication of the program announcement or after submission of the program application to the Board.
(d) The Board may modify its approval of sessions and the CEU credit allowed when a program is changed after receiving Board approval. The Board shall update the program status on the website to reflect CEU credit changes.
(e) The program applicant shall submit a new program application if:
(1) the Board approved a CE Program for multiple dates and the content or duration of the CE Program changes after one or more of the approved program dates have occurred. The remaining program dates shall constitute a new CE Program; or
(2) the program sponsor offers a pre-approved CE Program on additional dates. The additional date(s) shall constitute a new CE Program, unless the program sponsor notifies the Board within 20 days of the canceled CE Program's date that a different date has been substituted.

History Note: Authority G.S. 93D-3(c); 93D-11;
Eff. September 1, 2013;
Amended Eff. December 1, 2014.

21 NCAC 22I .0114 CHANGE OF ADDRESS

All individuals regulated by the Board shall provide the Board with current address information by completing the online address change form available on the Board's website (www.nchalb.org) within 14 days of any change in mailing address or name and street address of any business within the State of North Carolina. Failure to do so may result in disciplinary action after proper notice and hearing.

History Note: Authority G.S. 93D-3(c); 93D-10; 93D-13
Eff. April 23, 1976;
Amended Eff. February 1, 1996; May 1, 1988;
Recodified from 21 NCAC 22F .0118 Eff. May 1, 2013;
Amended Eff. December 1, 2014.

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

OFFICE OF ADMINISTRATIVE HEARINGS

Chief Administrative Law Judge
JULIAN MANN, III

Senior Administrative Law Judge
FRED G. MORRISON JR.

ADMINISTRATIVE LAW JUDGES

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

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STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF WAKE	**13 REV 18654**

MIDREX TECHNOLOGIES, INC.,	)	
Petitioner,	)	
v.	)	**FINAL DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**
N.C. DEPARTMENT OF REVENUE,	)	
Respondent.	)	

THIS MATTER came on to be heard before the undersigned Administrative Law Judge, Craig Croom, on July 7, 2014 in Raleigh North Carolina, for consideration of Petitioner's Motion for Summary Judgment and Respondent's Motion for Summary Judgment. Having considered the respective submissions of the parties and matters of record proper for consideration of this pending motion, the undersigned concludes that there is no genuine issue of material fact and that, therefore, summary judgment in favor of Respondent is appropriate.

APPEARANCES

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ISSUE

Whether Petitioner was engaged in business as a building or construction contractor and therefore entitled to utilize the single-factor apportionment methodology for excluded corporations set forth in N.C. Gen. Stat. § 105-130.4(r) to determine its North Carolina corporate income and franchise tax liability during the Period at Issue?

PROCEDURAL HISTORY

On 30 August 2013, Respondent, North Carolina Department of Revenue ("Department"), issued a Notice of Final Determination ("Final Determination") denying Petitioner's claim for refund of North Carolina corporate income and franchise taxes for tax years 2005 through 2008 ("Period at Issue"). Pursuant to N.C. Gen. Stat. §§ 105-105-241.15 and 150B-23(a), Petitioner, Midrex Technologies, Inc. ("Midrex"), filed a Petition for Contested Case Hearing ("Petition") in the Office of Administrative Hearings ("OAH") on 25 October 2013 challenging the Final Determination. Subsequent to filing the Petition, Petitioner and Respondent each filed a motion for summary judgment (collectively "Motions") along with various other items of supporting documentation, including memorandums, affidavits, and depositions. On 7 July 2014, the parties appeared in the OAH and the Court heard oral arguments on the Motions. Upon consideration of the pleadings, exhibits, memorandums of law filed by the parties, and other matters of record, including the Petition and Final Determination, as well as having heard the arguments of counsel, the undersigned finds that this matter is ripe for disposition.

UNCONTROVERTED FACTS

I. BACKGROUND OF MIDREX

1. Midrex was initially formed as a division within the Midland-Ross Corporation to exploit the market potential of what is currently known as the Midrex Direct Reduction Process ("Midrex Process"). Midrex is headquartered in Charlotte, North Carolina.

2. The Midrex Process converts iron ore into direct reduced iron ("DRI"), a premium iron used as an alternative feed for steel and is utilized in a facility or module known as a Midrex Plant. This process is patented and has remained virtually unchanged for the past 40 years.

3. A Midrex Plant can take one to two years to design and is comprised of various parts and components (*e.g.*, a furnace, heat recovery flute). A Midrex Plant is designed at Midrex's Charlotte office. A Midrex Plant either utilizes natural gas or coal as its source for running the Midrex Process.

4. In 1983, Midrex was acquired by Kobe Steel Ltd. ("Kobe"). Upon purchasing the company, Kobe became the owner of the patents and proprietary rights associated with the Midrex Process and granted Midrex a license to utilize the Midrex Process. Kobe has also granted similar licenses to two other companies, Siemens VAI ("VAI") and SMS Siemag.

5. The company employs "30 people . . . in [its Research and Development] center" that work on the "technology portion" of a Midrex Plant, as well as individuals in its "very large purchasing group that purchases a lot of equipment for [plants]" and a "large number of engineers designing" the various aspects of the plant. *30(b)(6) Deposition of Midrex (David R.*

Hamilton as designated representative), p. 36-37. Midrex's capital investments consist of computers, software, and its Research and Development facility. *Id.* at 70.

6. Midrex admits that its "primary business is selling . . . plants" *Id. at* 36.

7. During the Period at Issue, Midrex was involved in the following Midrex Plant sales:

- Nu-Iron
- LGOK
- LION
- Al-Tuwairqi
- Acindar
- Shaeed
- MND
- Hassed
- Qasco

II. MIDREX'S BUSINESS ACTIVITIES AND OPERATIONS

8. Midrex essentially operates in three primary business segments: (a) Engineering Services and Procurement Services, (b) Midrex Plant Sales (which encompasses Advisory/Field Services), and (c) After Market Sales.

A. Engineering Services and Procurement Services

9. Midrex's engineering services primarily revolve around designing the systems and components of a Midrex Plant. Examples of the specific types of design work associated with a Midrex Plant include:

- Designing refractory linings for gas based equipment, furnaces, ductwork, and heating exchange equipment;
- Designing gas based equipment, furnaces, ductwork, and heating exchange equipment; and
- Designing systems and equipment associated with the design and construction of DRI plants and new technology innovation

10. During the Period at Issue, Midrex's engineering services were performed by individuals in its Engineering division who held job titles such as "Refractory Specialists," "Equipment Specialists," "Mechanical Engineers" and "Mechanical Designers.

11. The Engineering division was comprised of groups representing various engineering disciplines (*e.g.*, civil, mechanical, process, electrical/instrumentation).

12. Midrex's procurement services consisted of procuring non-proprietary and proprietary equipment associated with the Midrex Plant and were performed, in part, by individuals in its Procurement and Logistics division.

13. The Procurement and Logistics division also included the following two positions: Site Manager and Construction Manager.

14. The Site Manager was the person at the Midrex Plant site that handled the relationship with the purchaser of the Midrex Plant ("the Client") by keeping them apprised of issues or problems arising on a Midrex Plant site, which included any need for the Client to take corrective action or measures. Furthermore, the Site Manager coordinated the site, communicated with customers and workers and was responsible for all related on-site activities required for construction.

15. The Construction Manager was generally responsible "for *all related activities* required for the construction of large industrial plants in both foreign and domestic locations." *See* Appendix to Respondent's Memorandum in Support of Motion for Summary Judgment ("Appendix"), Tab 6 at MID-08666 (position description for "Construction Manager"). Added around 2007, Midrex created the position, in part, due to their clients' expectations regarding Midrex's involvement in the sale of a Midrex Plant. The person currently serving in the Construction Manager position is functioning in the field as Site Manager.

(B) Midrex Plant Sales

16. As a licensee of the Midrex Process, Midrex is authorized to design and sale a Midrex Plant, "huge part of [Midrex's] business." *30(b)(6) Deposition of Midrex (David R. Hamilton as Designated Representative)*, p. 73.

17. In order to define the terms and conditions of the sale of equipment and services for a particular Midrex Plant project, Midrex entered into contractual agreements. ("Plant Sale Contracts").[1] During the Period at Issue, the parties to the Plant Sale Contracts included Midrex, the Client, and, at times, Kobe and VAI.

18. The Plant Sale Contracts included terms relating to the technical specifications for the Midrex Plant, payment terms, and warranties provisions. The contracts also included terms specifically delineating the scope of work to be performed by the parties to the contract.

19. Midrex's scope of work under the Plant Sale Contracts did not include the actual construction, erection, and installation of the systems and components associated with the Midrex Plants. These tasks fell within the scope of work for the Client or an entity other than Midrex, such as Kobe or VAI.

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[1] For purposes of this Final Decision, the term "Plant Sale Contract" includes agreements for the purchase of equipment and services and for the provision of field services (*e.g.*, Advisory Services Agreements, Technical Assistance Agreements).

20. To fulfil their obligations under the Plant Sale Contracts relating to the construction, erection, and installation of the systems and components associated with the Midrex Plants, the Client, or an entity other than Midrex, hired construction contractors and laborers to complete such tasks. The construction contractors had their own offices on the Midrex Plant site, supervision, and quality control people.

21. Midrex's core scope of work in any Plant Sale Contract consisted of the provision of the following services: (a) Engineering, *see supra*; (b) Procurement of equipment, *see supra*, and (c) Advisory/Field Services.

22. Midrex's field services generally involved the provision of technical advice, within specified limitations, relating to the construction, commissioning, training, and start-up of a Midrex Plant. The scope of the field services Midrex provided on any given project was set out in the Plant Sale Contracts. Among the types of field services provided by Midrex included:

- Interpretation and explanation of drawings, bills of material, specifications and other technical data;
- Providing advice to the Client or his contractor in developing and updating a construction sequence schedule for the orderly assembly and erection of the plant;
- Timely field inspection of the material, equipment, and workmanship after its arrival on the job site; and
- Providing advice relating to the commissioning of a Midrex Plant.

23. Generally, the Plant Sale Contracts often refer to field service personnel as "Construction Advisors" or "Commissioning Advisors." In addition to Midrex personnel, other vendors were also on site to provide field services during the construction of a Midrex Plant relating to the equipment they supplied for the project.

24. Twenty-five to thirty percent of Midrex's field services are provided by its "in-house" employees located within the Engineering and Procurement and Logistics divisions. *30(b)(6) Deposition of Midrex (Paul L. Carter, Jr. as Designated Representative*), p. 31. The remainder of Midrex's field services are performed by contractors hired by Midrex and sent to the Midrex Plant Site. The majority of the contractors have a background in engineering.

25. Generally, the majority of Midrex's field service personnel were on site towards the middle of a Midrex Plant project term and performed field services related to the commissioning of the plant. The exact number of field service personnel provided by Midrex for a particular Midrex Plant project, as well as when they are needed on site, is specifically addressed in the Plant Sale Contracts.

26. In the course of performing field services, Midrex field service personnel were called upon to provide hand-on assistance to the laborers hired by the Client or an entity other than

Midrex. Nonetheless, per the Plant Sale Contract, the Client or the contractor was ultimately "responsible to provide direct craft supervision of all work performed, in order to achieve the schedule and quality control." *30(b)(6) Deposition of Midrex (Donald R. Lyles as Designated Representative)*, p. 104; *Appendix*, Tab 22 at MID-05264. The Plant Sale Contracts further provided that the advice rendered by Midrex's field service personnel did "not relieve the Client or his Contractor(s) of their responsibilities to perform the work as per the drawing and/or specifications" rendered by Midrex in the course of designing the Midrex Plant. *Id.* at 104; *see also, e.g., Appendix*, Tab 22 at MID-05264; Tab 25 at MID-04085.

(C) After Market Sales

27. Midrex's aftermarket sales activities include the provision of additional equipment and parts relating to the operation of an existing Midrex Plant.

IV. REFUND CLAIM FOR THE PERIOD AT ISSUE

28. During the Period at Issue, Midrex filed a series of North Carolina C Corporation Tax Returns ("State Tax Returns") with the Department. Among those filed were Midrex's original returns for tax years 2005 through 2007 (collectively "Original Returns"). On the Original Returns, Midrex did not apportion its State franchise or corporate income tax, but instead, filed as a 100% domestic corporation.

29. After filing the Original Returns, Midrex filed its original tax year 2008 State Tax Return and amended its tax years 2005 through 2007 State Tax Returns apportioning its State franchise and income tax using the Standard Three-Factor Apportionment Formula (collectively "Three-Factor Apportionment Returns"). Midrex filed Three-Factor Apportionment Returns after coming to the realization that it was allowed to apportion for State corporate income and franchise tax purposes with the assistance of KPMG, Midrex's accounting firm.

30. Subsequent to filing the Three-Factor Apportionment Returns, Midrex once again filed another set of amended State Tax Returns for tax years 2005 through 2008. Forming the basis of the refund claim at issue in this contested case, these amended returns were filed "to recompute the apportionment formula under the methodology applicable to excluded corporations" (collectively "Excluded Corporation Amended Returns"). *See 30(b)(6) Deposition of Midrex (David R. Hamilton as Designated Representative)*, pp. 29-30.

31. Midrex filed the Excluded Corporation Amended Returns after KPMG alerted Midrex that it believed Midrex was an excluded corporation. KPMG's conclusion was based on its determination that Midrex was engaged in business as a building or construction contractor.

32. Since filing the Excluded Corporation Amended Returns, Midrex has not filed any State Tax Returns with the Department apportioning its State corporate income or franchise tax liability as an excluded corporation.

33. On all of its State Tax Returns filed during the Period at Issue, Midrex utilized a NAICS code of "541330." Midrex assigned itself the NAICS code 541330 after reviewing the NAICS manual and taking into consideration its business activities, including the field services it provides pursuant to the Plant Sale Contracts. Midrex continues to utilize the "541330" NAICS code on its State Tax Returns filed with the Department since the Period at Issue. NAICS code 541330 does not fall within the construction sector of NAICS.

34. In a Stipulation dated 7 March 2014, the parties stipulated that, if Petitioner was an excluded corporation during the Period at Issue, Petitioner would be entitled to a refund of State corporate income and franchise taxes in the amount of $3,303,736. The parties further stipulated that, if Petitioner was not an excluded corporation, Petitioner would not be entitled to any refund of State corporate income and franchise taxes for the Period at Issue.

CONCLUSIONS OF LAW

1. A petitioner in an administrative contested case proceeding bears the burden of proving its entitlement to relief from an agency's decision. *See Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res.*, 361 N.C. 531, 648 S.E.2d 830 (2007) (recognizing that a "petitioner had the burden of proof in OAH contested cases").

2. In contested tax cases involving the Department's denial of a State tax refund claim, a petitioner satisfies its burden in the OAH by alleging sufficient facts to demonstrate the invalidity of the tax and its entitlement to a refund. *See Railway Express Agency, Inc. v. Maxwell*, 199 N.C. 637, 642, 155 S.E. 553, 555 (1930) ("the burden is on him who seeks the recovery of a tax already paid to establish those facts which show its invalidity") (*quoting Compania General v. Collector*, 279 U.S. 306, 310 (1929)).

3. Pursuant to N.C. Gen. Stat. § 150B-34, the Court is required to issue a "final decision or order" deciding the contested case. In doing so, the Court is authorized "to grant summary judgment . . . that disposes of all issues in the contested case." N.C. Gen. Stat. § 150B-34(e).

4. "Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Delhaize Am., Inc. v. Lay*, __ N.C. App. __, __, 731 S.E.2d 486, 490 (2012).

5. Corporations doing business in North Carolina are subject to the franchise and corporate income taxes imposed under Articles 3 and 4, respectively, of the North Carolina Revenue Act ("Act"), N.C. Gen. Stat. § 105-1, *et. seq.* While State franchise taxes are measured by "the total amount of [a corporation's] issued and outstanding capital stock, surplus and undivided profits (collectively "Capital Stock Base"), N.C. Gen. Stat. § 105-122(b), the State corporate income tax is levied on the State net income of a C-corporation. N.C. Gen. Stat. § 105-130.3. A corporation that has income from sources both within and outside the State must allocate and

apportion its Capital Stock Base and State net income in accordance with the provisions of the N.C. Gen. Stat. §§ 105-122(c1)(1) and 105-130.4.

6. The standard apportionment formula is set forth in N.C. Gen. Stat. §105-130.4(i), and requires, in part, corporations *other than excluded corporations* to apportion its net income by utilizing an apportionment formula consisting of the following factors: property, payroll and sales (collectively "Standard Three-Factor Apportionment Formula").

7. The apportionment provision for excluded corporations is set forth in N.C. Gen. Stat. §105-130.4(r). Unlike the Standard-Three Factor Apportionment Formula, the apportionment formula for an excluded corporation consists of *only* one factor, sales ("Single-Factor Apportionment Formula"). *See* N.C. Gen. Stat. §105-130.4(r).

8. Under the Act, an excluded corporation is:

> [A]ny corporation *engaged in business as a building or construction contractor*, a securities dealer, or a loan company or a corporation that receives more than fifty percent (50%) of its ordinary gross income from intangible property.

N.C. Gen. Stat. §105-130.4(a)(4) (emphasis added).

9. "It is the duty of the Secretary [of Revenue] to interpret all laws administered by the Secretary. N.C. Gen. Stat. § 105-264. Interpretation of these laws shall be consistent with the applicable rules and is prima facie correct. *Id.* Furthermore, these laws are interpreted by publishing a bulletin. Taxpayers are entitled to rely upon the interpretation. The Secretary of Revenue published the following during the Period at Issue: Franchise Tax, Corporate Income Tax, Privilege Tax, Insurance Premium Tax and Excise Tax Rules and Bulletins Taxable Years 2005 & 2006 and 2007 & 2008 (collectively "Bulletins")..

10. In the Bulletins, Respondent interpreted the phrase "building or construction contractor" for purposes of N.C. Gen. Stat. § 105-130.4(a)(4) as follows:

> A building or construction contractor is a business so classified in the North American Industry Classification System (NAICS) published by the Federal Office of Management and Budget.

11. Promulgated by the U.S. Office of Management and Budget, NAICS is a self-identification industry classification system that groups establishments into industries based on the similarities of their production process. As recognized by the North Carolina Court of Appeals, NAICS classifications are based on *primary business activity*:

12. In recognition of the fact that many business entities are engaged in multiple activities, the NAICS guidelines provide that an establishment is classified to an industry when its *primary*

activity meets the definition for that industry. *N.C. Dep't of Revenue v. Bill Davis Racing*, 201 N.C. App. 35, 50, 684 S.E.2d 914, 925 (2009).

13. A business entity's "primary activity" is signified by the "principal product or group of products produced or distributed, or services rendered," which in turn is determined by looking at factors such as capital investments, revenue, and employment. *Id.* at 51, 684 S.E.2d at 925.

14. Sector 23 of NAICS, entitled "Construction", is comprised of "*establishments primarily engaged in the construction of buildings or engineering projects (e.g., highways and utility systems).*" *Appendix,* Tab 14, p. 169 (emphasis added). Thus, the *"[a]ctivities of this sector are erecting buildings and other structures (including additions); heavy construction other than buildings*; and alterations, reconstruction, *installation*, and maintenance and repairs." *Id.* at 17 (emphasis added). In determining whether business activities are those that fall within the NAICS construction sector, contracts play a critical role as NAICS specifically notes that "[p]roduction responsibilities for establishments in [Sector 23] are usually specified in (1) contracts with the owners of construction projects (prime contracts) or (2) contracts with other construction establishments (subcontracts)." *Id.* at 169.

15. Pursuant to N.C. Gen. Stat. 105-130.4(a)(4), an excluded corporation includes a corporation "engaged in business as a building or construction contractor." The use of the phrase "engaged in business" contemplates a determination of a corporation's primary business activity. *See State Farm Mut. Auto. Ins. Co. v. Seeba*, 433 S.E.2d 414, 416 (Ga. Ct. App. July 6, 1993) (internal citations and quotations omitted) (recognizing that the "general rule of law [is] that the words 'engage in business' imply an element of continuity or habitual practice[.]" and, that ordinarily "the word 'business' is that which occupies the time, attention and labor . . . for the purpose of livelihood or profit."); *PIC Oil Co. v. Grisham*, 702 P.2d 28, 30 (Okla. April 30, 1985) (citing the corporation's *primary business* when determining whether it was "engaged in the business" of a particular industry for purposes of a statute) .

16. Consistent with N.C. Gen. Stat. § 105-130.4(a)(4), Respondent's interpretation utilizes NAICS, a classification system based on primary business, for purposes of determining whether a corporation is a building or construction contractor. *See* Bulletins. When addressing issues of statutory construction, as required in this contested case, Respondent's interpretation contained in the Bulletin is "strongly persuasive." *Polaroid v. Offerman*, 349 N.C. 290, 301, 507 S.E.2d 284, 293 (1998).

17. The North Carolina Supreme Court has recognized that "[t]he construction adopted by the administrators who execute and administer a law in question is one consideration where an issue of statutory construction arises." *Id.* By law, such constructions are presumed to be "prima facie correct." N.C. Gen. Stat. § 105-264. In this case, the presumption of correction of Respondent's interpretation of N.C. Gen. Stat. § 105-130.4(a)(4) is even stronger given the General Assembly's failure to amend the statute in light of Respondent's long-standing interpretation, which it became fully aware of in December 2013.

18. Because the "legislature is always presumed to act with full knowledge of prior and existing law," and has made no revisions to the statutory language of N.C. Gen. Stat. §§ 105-130.4(a)(4), it is proper for the Court "to assume that it is satisfied with the interpretation" of N.C. Gen. Stat. § 105-130.4(a)(4) reflected in Respondent's Bulletins. *Polaroid*, 349 N.C. at 303, 507 S.E.2d at 294.

19. Applying NAICS, the undersigned concludes that Midrex's business activities, primary or otherwise, do not fall within the NAICS construction sector and Midrex was therefore not engaged in business as a building or construction contractor within the meaning of N.C. Gen. Stat. § 105-130.4(a)(4) during the Period at Issue.

20. "Building or construction contractor" is not defined in the Act. "Undefined words are accorded their plain meaning so long as it is reasonable to do so" *Polaroid*, 349 N.C. at 297, 507 S.E.2d at 290. Applying the natural and ordinary meaning of "building or construction contractor", the undersigned reaches a similar conclusion regarding Midrex's failure to be engaged in business as a building or construction contractor within the meaning of N.C. Gen. Stat. § 105-130.4(a)(4) during the Period at Issue even without giving consideration to Respondent's interpretation utilizing NAICS.

DECISION

For the foregoing reasons, the undersigned concludes Petitioner is not entitled to any refund of State corporate income and franchise taxes during the Period at Issue as it was not engaged in business as a building or construction contractor and is therefore not entitled to utilize the single-factor apportionment methodology for excluded corporations set forth in N.C. Gen. Stat. § 105-130.4(r). Accordingly, the undersigned GRANTS the Motion for Summary Judgment filed by Respondent and DENIES the Motion for Summary Judgment filed by Petitioner.

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 Wake County. **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.

IT IS SO ORDERED.

This the 10th day of October, 2014.

Craig Croom
Administrative Law Judge

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
10/17/2014 10:22 AM

STATE OF NORTH CAROLINA

COUNTY OF BUNCOMBE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14DHR00187

ANDREA SCHULLER PETITIONER, V. DEPARTMENT OF HEALTH AND HUMAN SERVICES RESPONDENT.	**FINAL DECISION**

A contested hearing was held in this matter on August 4, 2014, at the Haywood County Courthouse, in Waynesville, North Carolina, before the Honorable J. Randall May, Administrative Law Judge. Petitioner Andrea Schuller appeared pro se. Respondent N.C. Department of Health and Human Services was represented by Thomas Royer, Assistant Attorney General.

Judge May explained that Petitioner has the burden of proof in this matter, but informed Petitioner that since Petitioner is pro se and unaccustomed to the hearing process, Judge May would request that Respondent put on its evidence first.

ISSUE

Did Respondent properly deny Petitioner's request to have her name removed from the North Carolina Health Care Personnel Registry?

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

FINDINGS OF FACT

1. Petitioner worked as a certified nursing assistant from 2000 - 2012.

2. On January 10, 2008, Respondent sent Petitioner a letter by certified mail notifying her that Respondent had investigated and substantiated an allegation that Petitioner had neglected a resident of Black Mountain Center in Black Mountain, North Carolina.

3. Delivery of the January 10, 2008 letter was attempted three (3) times, but ultimately the letter was returned to Respondent as unclaimed and unable to forward.

4. On February 22, 2008 Petitioner's name was placed on the North Carolina Health Care Personnel Registry based upon a finding of resident neglect.

5. Petitioner submitted a request to Respondent to have her name removed from the registry, which Respondent received on May 6, 2009.

6. On May 7, 2009, Respondent sent Petitioner a letter notifying Petitioner that "[t]o have the substantiated neglect finding considered for removal, [petitioner] must provide certain documents in order for [Respondent] to begin a review of the request."

7. On June 22, 2012, Petitioner requested by telephone that Respondent provide her with a copy of the letter listing the required documents to have the finding of resident neglect removed from the North Carolina Health Care Personnel Registry.

8. On May 16, 2013, Respondent sent Petitioner a letter notifying her that consideration of her request for removal of the neglect finding was unable to continue until she provided all documents previously requested, and that still outstanding was Petitioner's current state criminal record check.

9. On December 11, 2013, Respondent sent Petitioner a letter notifying her that she had not met the state requirements allowing for removal of the neglect finding because additional incidents of neglect were found in her employment history; therefore, the finding of resident neglect would remain on the Health Care Personnel Registry. Respondent also notified Petitioner of her right to contest this decision by filing a petition for a contested hearing with the Office of Administrative Hearings.

10. At the hearing of this matter, Respondent called Petitioner and Debra Hockaday, Health Care Personnel Registry Investigator. Ms. Hockaday testified that she had been the person in charge of reviewing Petitioner's request. In her testimony, Ms. Hockaday explained the process outlined above and the reason why Respondent had denied Petitioner's request.

11. Both Ms. Hockaday's testimony and documentary evidence submitted by Respondent specified that Petitioner's request to have her name removed from the Health Care Personnel Registry was denied because there is a pattern of neglect in her employment

history. Respondent cited two written warnings issued to Petitioner while she was working at Black Mountain Center, and a corrective action which took place while Petitioner was employed by Asheville Healthcare Center.

12. The first warning involved an incident where Petitioner failed to prepare a snack according to a resident's prescribed diet order and failed to supervise the resident in a way that prevented the resident from choking.

13. The second warning involved an incident where Petitioner tied a resident's brief causing an indentation in the resident's hip.

14. The corrective action cited involved an instance where Petitioner failed to get assistance in transferring a dependent resident to bed.

15. Respondent also cited an incident involving Petitioner, for which she was terminated; but this incident did not involve resident neglect, and the undersigned does not find that it is relevant to the inquiry.

16. After Respondent had finished presenting evidence, Petitioner called two witnesses to testify on her behalf. Both of these witnesses were credible and assisted the finder of fact. The first witness ("Witness I") supervised Petitioner during the time that she had worked for Asheville Healthcare Center. Witness I testified that she was always glad when Petitioner was assigned to her hall; that Petitioner always did her job properly; that the residents liked Petitioner; and that Witness I did not know Petitioner to abuse or neglect residents.

17. Petitioner called a second witness ("Witness II") as a character witness. Petitioner had lived with Witness II to get away from her now-ex-husband who had been abusive. Witness II testified that she had some knowledge about Petitioner as a caretaker because Petitioner had helped her take care of her elderly mother. Witness II testified that Petitioner was very helpful to her as her mother's health deteriorated. Witness II stated that Petitioner used her skills as a certified nursing assistant in helping her care for her mother, including helping her to bathe her mother; prepare her mother's food and ensure proper nutrition; and that Petitioner provided emotional support to her during that time.

18. Witness II also testified that from her interactions with Petitioner during that time, she could tell how much she cared about the residents in her care. Witness II testified that at that time, Petitioner was working for Asheville Healthcare Center and that Petitioner held the residents in very high regard. Petitioner had pictures of residents and went to visit residents, when she was not scheduled to work, to celebrate birthdays and other milestones. Witness II stated that she knew Petitioner was a very hard worker and cared personally for the residents in her care. Witness II stated that Petitioner was very devoted to residents and was a woman of good character and ethics. Witness II testified that she did not have much information about Petitioner during the time that she worked at Black Mountain Center, except that she was very young—a teenager.

CONCLUSIONS OF LAW

1. North Carolina General Statutes § 131E-256(a) provides that "[t]he Department shall establish and maintain a health care personnel registry containing the names of all health care personnel working in health care facilities in North Carolina who have [b]een subject to findings by the Department of [n]eglect or abuse of a resident in a health care facility . . . ."

2. North Carolina General Statutes § 131E-256(i) provides that "the Department shall establish a procedure to permit health care personnel to petition the Department to have his or her name removed from the registry upon a determination that: (1) The employment and personal history of the health care personnel does not reflect a pattern of abusive behavior or neglect; (1a) The health care personnel's name was added to the registry for a single finding of neglect; (2) The neglect involved in the original finding was a singular occurrence; and (3) The petition for removal is submitted after the expiration of the one-year period which began on the date the petitioner's name was added to the registry under subdivision (1) of subsection (a) of this section."

3. The evidence and testimony presented does not support a finding that Petitioner's employment and personal history reflect a pattern of neglect. Although Respondent points to incidents where Petitioner received warnings and a corrective action, the majority of the evidence supports a finding that Petitioner provided high quality care to the residents in her charge. Further, the evidence indicates that Petitioner was a valued employee who cared a great deal about the residents she attended. Petitioner had, on occasion, made mistakes and those mistakes were noted in her employment record; however, her overall performance as a certified nursing assistant was positive. She presented as a most credible witness.

4. Notably, the same supervisor who signed the corrective action cited by Respondent, sent a letter to Respondent which stated that:

> [Petitioner] was a dedicated and dependable CNA, she frequently volunteered to do extra duties or stay beyond her regular scheduled [sic]. [Petitioner's] residents never once complained about any poor treatment or poor care. Some of her residents would ask for her by name to take care of them. When [Petitioner] was no longer employed at Asheville Health Care a family member requested her to continue to provide one to one for their loved one and she did for several months. Not one time did I have to counsel or reprimand [Petitioner] for any abuse or neglect to the residents in her care. She showed compassion, caring, and giving to the residents. [Petitioner] got along well with her other coworkers and the charge nursing.

5. Other previous employers corroborated this evidence, providing positive letters of recommendation on her behalf. Both the letters and the testimony of witnesses indicated that Petitioner was dependable and compassionate. Employers consistently commented that residents liked her and that she had a strong work ethic. Employers

also commented on Petitioner's willingness to volunteer her time and went above and beyond what was required of her.

6. Petitioner presented compelling evidence to show that Respondent's position was improper, erroneous, arbitrary, and capricious.

FINAL DECISION

The Respondent's decision to deny Petitioner's request to have her name removed from the North Carolina Health Care Personnel Registry is REVERSED.

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 17th day of October, 2014.

J. Randall May
Administrative Law Judge

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STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 14 DOJ 00527
WILLIAM BUCHANAN BURGESS, Petitioner, v. NORTH CAROLINA SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION, Respondent.	**PROPOSAL FOR DECISION**

In accordance with N.C. General Statute 150B-40(e), Respondent requested the designation of an Administrative Law Judge to preside at a N.C. General Statute 150B, Article 3A contested case hearing of this matter. Based upon Respondent's request, Administrative Law Judge Melissa Owens Lassiter was assigned to hear this contested case in Raleigh, North Carolina. On June 2, 2014, the undersigned heard this contested case in Raleigh, North Carolina. At the conclusion of all evidence, the undersigned ruled for Petitioner.

APPEARANCES

For Petitioner: T. Allen Swaim, Jr., Swaim Law, PLLC, Attorney at Law, PO Box 770, Wendell, NC 27591

For Respondent: Matthew L. Boyatt, and William P. Hart, Assistant Attorney General, NC Department of Justice, 9001 Mail Service Center, Raleigh, NC 27699-9001

ISSUES

1. Did Petitioner commit the offense of Making Harassing Phone Calls in violation of N.C. Gen. Stat. § 14-196 during the approximate time period of April 25, 2013 through May 13, 2013?

2. Did Petitioner commit the offense of Cyber-Stalking in violation of N.C. Gen. Stat. § 14-196.3 during the approximate time period of April 25, 2013 through May 13, 2013?

3. Did Petitioner commit the offense of Assault On A Female in violation of N.C. Gen. Stat. § 14-33(c)(2) on or about August 2011?

4. If Petitioner committed one or more of the foregoing offenses, whether extenuating circumstances exist?

5. The appropriate sanction, if any, which the Commission should impose against Petitioner's justice officer certification?

STATUTES AND RULES AT ISSUE

N.C. General Statute § 150B-40
N.C. Gen. Stat. § 14-196
N.C. Gen. Stat. § 14-196.3
N.C. Gen. Stat. § 14-33(c)(2)

FINDINGS OF FACT

Procedural Background

1. By letter dated December 23, 2013, Respondent notified Petitioner that Respondent's Probable Cause Committee had found probable cause exists to revoke Petitioner's justice officer certification based upon facts and circumstances that Petitioner had committed the following offenses between April 25, 2013 and May 13, 2013:

a. Class B misdemeanor offense of "Harassing Phone Calls" in violation of N.C. Gen. Stat. § 14-196 by repeatedly telephoning his estranged wife, Lisa Burgess, for the purpose of abusing, annoying, threatening, terrifying, harassing, and embarrassing Ms. Burgess.

b. Class B misdemeanor offense of "Cyber-stalking" in violation of N.C. Gen. Stat. § 14-196.3 by repeatedly sending text messages to his estranged wife, Lisa Burgess, for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing Ms. Burgess.

c. Class B misdemeanor offense of "Assault on a Female" in violation of N.C. Gen. Stat. § 14-33(c) by pushing Lisa Burgess down on the bed and holding her down by pushing on her chest and shoulders.

(Rasp Ex 1)

2. Petitioner timely requested an administrative hearing from Respondent, and Respondent thereafter requested the assignment of an Administrative Law Judge to hear this contested case.

Adjudicated Facts

3. Both parties are properly before this Administrate Law Judge, in that jurisdiction and venue are proper, and both parties received Notice of Hearing.

4. Respondent is authorized by Chapter 17E of the North Carolina General Statues, and Title 12 of the North Carolina Administrative Code, Subchapter 10B, to certify justice officers and to revoke, deny, or suspend such certification.

5. 12 NCAC 10B .0204(d)(1) provides:

> The Commission may revoke, suspend or deny the certification of a justice officer when the Commission finds that the . . . certified officer has committed or been convicted of . . . a crime or unlawful act defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor and which occurred after the date of appointment.

6. When the Commission suspends, revokes, or denies the certification of a justice officer for commission or conviction of offenses as specified in 12 NCAC 10B .0204(d)(1), the period of sanction shall be "not less than five years." 12 NCAC 10B .0205(2)(a). However, following an administrative hearing, the Commission may reduce or suspend this five-year period of sanction, or substitute a period of probation in lieu of revocation or suspension, if extenuating circumstances brought out at the administrative hearing warrant such action. 12 NCAC 10B .0205(2)

7. Violations of N.C. Gen. Stat. § 14-196 (annoying or harassing by repeated telephoning), N.C. Gen. Stat. § 14-196.3 (cyber-stalking), and N.C. Gen. Stat. § 14-33(c)(2) (assault on a female) are all classified as Class B misdemeanor offenses under Respondent's rules. Although the Commission has found probable cause to believe Petitioner has "committed" each of these offenses, Petitioner was not criminally charged with any of them in connection with the events at issue.

8. Petitioner was a police officer with the Angier Police Department from 1990 to 1993, and was a police officer with Clayton Police Department from 1993 to 1996. On or about August 19, 1996, Petitioner was appointed as a Deputy Sheriff with the Wake County Sheriff's Office. Petitioner has been certified as a justice officer with Respondent since that time.

9. Petitioner and Lisa Burgess were married for 9 years, after having dated for one year. Petitioner and Ms. Burgess had one child, a 5 year old son. Ms. Burgess had two children, 19 and 11 years old respectively, from former marriages. At the relevant time, Lisa Burgess was approximately 5'4" to 5'-5" tall, weighing 145 pounds, while Petitioner was 6'2" tall, weighing 230 pounds.

10 In August of 2011, Petitioner caught Lisa passionately kissing, and in an intimate embrace with, another woman at a friend's birthday party. He was upset and

embarrassed. At home, Petitioner and Lisa discussed the incident. Lisa screamed in Petitioner's face, flailed her arms, and advanced on Petitioner. Petitioner placed his hands on Lisa's shoulders, pushed her down on the bed, and held Lisa down on the bed. Petitioner intended to calm Lisa down. Petitioner and Lisa talked about the kissing incident. He forgave her for kissing another woman, and she forgave him for holding her down on the bed. The day after the incident, Petitioner and Lisa told Petitioner's mother, Judy Burgess, about their fight, and that Petitioner pushed Lisa.

11. In April 2013, Petitioner returned vacation, and noticed that his wife was not as affectionate or talkative with him. He asked Lisa what was wrong, and offered to move to his mother's house for two days, and then get back together with her to talk. After Petitioner moved to his mother's home, he didn't hear from Lisa. Petitioner and Lisa had a very good marriage for a long time, and they usually talked two to three times a day.

12. On April 25, 2013, Petitioner began calling his wife repeatedly, but Lisa wouldn't take his calls. Petitioner talked with Lisa on the phone two times, but never raised his voice. He admitted that he was insistent with Lisa. Petitioner didn't want their son to grow up in a divorced home. He wanted to keep his marriage and family together. He explained at hearing that he didn't intend to harass Lisa with the phone calls. During this time, Petitioner also sent numerous texts to Lisa telling her he loved her, and asking her to please talk with him.

13. On or about May 11, 2013, Petitioner went out with friends, and drank two beers. He was upset about his relationship with his wife. Around 2:00 am on May 12, 2013, Petitioner went to his home. He didn't intend to cause harm or expect to find Lisa with someone. After walking around his home, Petitioner discovered Lisa was not home. Petitioner knew Lisa Burgess was having an affair, but he wanted to talk with her. He thought, but didn't know for sure, that Lisa was with another man that night. Petitioner's 18 year old step-daughter, Katie, was asleep in her bed. Katie did not know where her mother was located. Katie called her mother on the telephone. Petitioner raised his voice when talking to Lisa, asking her, "Where are you at?" Lisa Burgess told Petitioner that it was none his business where she was, and hung up.

14. Shortly thereafter, Lisa Burgess exited a vehicle outside a local bar in Knightdale, NC, and approached two Knightdale police officers. She told the police that she was afraid her husband would hurt her, and gave Petitioner's name to the police. The Knightdale police officers called the Raleigh Police Department regarding Lisa Burgess' statement.

15. Five to ten minutes later, a police officer arrived at Petitioner's home, and knocked on the front door. Petitioner told the officer that he wanted to see his wife, and suspected she was seeing someone. Petitioner was obviously upset. In a commanding voice, Petitioner told the officers to bring Lisa home. After speaking with Lisa Burgess, a police officer told Katie that he would take her to her mother. Petitioner told the officer, "No, she's not." Petitioner indicated that he used his "command" tone of voice,

which is an elevated tone that he was taught to use in a stressful situation. Petitioner stared at the police officer for several seconds, but calmed down. Petitioner apologized to the officer for raising his voice. The police officer did not issue an arrest warrant to Petitioner. After that, Petitioner called the Wake County Sheriff, and described what happened. The Sheriff sent two sergeants to take Petitioner home because he was upset.

16. On May 21, 2013, Petitioner and his wife Lisa Burgess entered into a Consent Domestic Violence Protective Order (DVPO) against Petitioner in Wake County District Court (file number 13CVD5645). Judge Jennifer Green approved such Order.

17. A short time thereafter, Petitioner retrieved personal items from his home, accompanied by 3 friends. Approximately one week later, Knightdale police officers saw Petitioner's car parked at the town park. Petitioner had parked at the Knightdale Park to go running. Petitioner parked his car at the park and ran on a regular basis. The town park was located approximately ¾ of a mile from the marital residence. The Knightdale police took dogs to walk around Petitioner's home, and called the magistrate. The magistrate said that Petitioner violated the DVPO (50B) Order by retrieving property from the marital home one week ago. However, the District Attorney chose not to prosecute Petitioner, and said Petitioner had not violated the DVPO (50B) Order since a Deputy Sheriff is on duty all the time.

18. On June 6, 2013, Petitioner resigned from his job with Wake County Sheriff's Department. Petitioner resigned because he couldn't give the "right time" to his job and because of the stress with his wife. Petitioner planned to return to the Sheriff's office once he got his life back together. The Sheriff told Petitioner that he wanted to hire Petitioner back, but his hands were tied because of Respondent's Probable Cause Committee's finding. (Resp. Ex. 1) On or about November 13, 2013, Ms. Burgess requested the DVPO be set aside, citing that "volatile situation is much improved . . . no problems in the preceding month." (Resp. Ex. 3) By Order dated December 16, 2013, Judge Jennifer Green set aside the DVPO, noting that Petitioner and Ms. Burgess "have not had any further problems. . . . Defendant has attended counseling." (Resp. Ex. 4)

19. Petitioner attended pastoral counselling for two weeks in December 2013.

20. Judy Burgess testified at the administrative hearing on Petitioner's behalf. During the relevant time period discussed above, Detective Jeff Moore called Judy Burgess and told her he was investigating Petitioner for Lisa. Moore also called Judy Burgess two-three days before this hearing, and told her that Monday was "D day."

CONCLUSION OF LAW

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

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

3. 12 NCAC 10B .0204(d)(1) provides in pertinent part:

(d) The Commission may revoke, suspend or deny the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer has committed or been convicted of:

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

4. N.C.G.S. § 14-196 provides:

(a) It shall be unlawful for any person:

(3) To telephone another repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person at the called number;

5. N.C.G.S. § 14-196.3 states:

(b) It is unlawful for a person to:

(2) Electronically mail or electronically communicate to another repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying, harassing, or embarrassing any person.

6. At hearing, Respondent failed to present any evidence of the total number of phone calls or the substance of those phone calls that Petitioner made to his wife to "harass" her, other than the one 2:00 am call. Similarly, Respondent failed to present any evidence of the total number of texts Petitioner sent to his wife or the substance of those texts during the subject time period. One harassing phone call to your wife, who isn't at home at 2:00 a.m., and asking her "Where are you?" is not sufficient to constitute harassment under N.C.G. S. 14-196. Both misdemeanor offenses of "Harassing Phone Calls" or "Cyber-stalking" have a common element of Mens Rea. In this case, a preponderance of the evidence showed that Petitioner did not telephone his wife nor send her text messages "for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing" her. Instead, the preponderance of evidence showed that Petitioner phoned or texted his wife from April 25, 2013 through May 13, 2013, because he loved her, and wanted for them to get back together as man and wife, and resume

their marriage. For the foregoing reasons, Petitioner did not commit the misdemeanor offense of "Harassing Phone Calls" in violation of N.C.G.S. §14-196, and did not commit the misdemeanor offense of "Cyberstalking" in violation of N.C.G.S. §14-196.3.

7. N.C.G.S. § 14-33 provides:

> (c) Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:
>
> (2) Assaults a female, he being a male person at least 18 years of age;

8. An assault is an intentional offer or attempt by force or violence to do injury to the person of another. *State v. Thompson*, 27 N.C. App. 576, 219 S.E. 2d 566 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 800 (1976) Conviction of misdemeanor assault requires proof of infliction of or attempt to inflict serious injury. *State v. Malloy*, 53 N.C. App. 369, 280 S.E.2d 640 (1981)

9. In this case, while Respondent's probable cause committee found probable cause existed to prove Petitioner committed the act of "Assault on a Female" in August of 2011, the preponderance of the evidence at this hearing proved that Petitioner was defending himself after his wife advanced on him while screaming in his face and flailing her arms. Petitioner admitted that he pushed his wife down on the bed, and restrained her to calm her down. There was no evidence at hearing to rebut Petitioner's testimony about this incident, to show that Petitioner attempted to inflict serious injury on Lisa Burgess during that argument, or to show that Lisa Burgess was injured by Petitioner during such argument. For the foregoing reasons, Petitioner did not commit an "Assault on a Female" in violation in N.C.G.S. § 14-33(c)(2).

10. Following an administrative hearing, the Commission may reduce or suspend this five-year period of sanction, or substitute a period of probation in lieu of revocation or suspension, if extenuating circumstances brought out at the administrative hearing warrant such action. 12 NCAC 10B .0205(2)

11. Even if Respondent finds that Petitioner committed an "Assault on a Female," the undersigned finds that the above-referenced circumstances justify extenuating circumstances sufficient to warrant a lesser sanction, such as probation, be imposed against Petitioner.

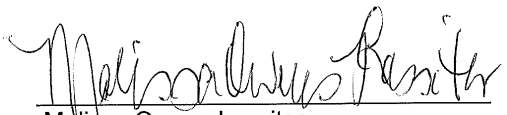
PROPOSAL FOR DECISION

NOW, THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the undersigned recommends that Respondent **ISSUE** Petitioner's justice officer certification.

NOTICE AND ORDER

The North Carolina Sheriffs' Education and Training Standards Commission will make the Final Decision in this contested case. That agency is required to give each party an opportunity to file exceptions to this Proposal for Decision, to submit proposed Findings of Fact and to present oral and written arguments to the agency pursuant to N.C. Gen. Stat. § 150B-40(e). In accordance with N.C. Gen. Stat. § 150B-36(b), that agency shall also serve a copy of the Final Decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, North Carolina, 27699-6714.

This 2nd day of September, 2014



Melissa Owens Lassiter
Administrative Law Judge

STATE OF NORTH CAROLINA		**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF TYRRELL		**14 DOJ 00529**
KENNETH LEE BRYANT, JR.,	)	
Petitioner,	)	
v.	)	**PROPOSAL FOR DECISION**
N.C. CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION,	)	
Respondent.	)	

This case came on for hearing on June 16, 2014, before the Honorable Julian Mann III, Chief Administrative Law Judge, in Elizabeth City, North Carolina. This case was heard after Respondent requested, pursuant to N.C.G.S. § 150B-40(e), designation of an Administrative Law Judge to preside at the hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

APPEARANCES

Petitioner: Kenneth Lee Bryant, Jr., Petitioner *pro se*
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Columbia, North Carolina 27925

Respondent: Matthew L. Boyatt
Assistant Attorney General
Attorney for Respondent
Department of Justice
Law Enforcement Liaison Section
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ISSUE

Is Respondent's proposed suspension of Petitioner's correctional officer certification, based upon Petitioner having been convicted of misdemeanor cruelty to animals, supported by a preponderance of the evidence?

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 Chief Administrative Law Judge makes the following FINDINGS OF FACT.

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

FINDINGS OF FACT

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received Notice of Hearing, and Petitioner received the written notification of the proposed suspension of his correctional officer certification through a letter mailed by Respondent on December 11, 2013. (Respondent's Exhibit 2)

2. Petitioner requested an administrative hearing after receiving the above-referenced Proposed Suspension of Correctional Officer Certification letter dated December 11, 2013.

3. The North Carolina Criminal Justice Education and Training Standards Commission (hereinafter the "Commission") has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 09G, to certify corrections officers and to revoke, suspend, or deny such certification.

4. 12 NCAC 09G.0504(b)(3) provides that the Commission may suspend or revoke the certification of a corrections officer when the Commission finds that the certified officer has committed or been convicted of a misdemeanor as defined in 12 NCAC 09G.0102, after the initial date of certification.

5. According to the classifications found in 12 NCAC 09G.0102(9)(ddd), cruelty to animals, in violation of North Carolina General Statute § 14-360, constitutes a misdemeanor pursuant to the Commission's Rules.

6. 12 NCAC 09G.0505(b) provides that when the Commission suspends or denies the certification of a corrections officer pursuant to 12NCAC09G.0504, the period of sanction shall be not less than three (3) years; however, the Commission may either reduce or suspend the period of sanction under this Rule or substitute a period of probation in lieu of suspension of certification following an administrative hearing, where the cause of sanction is commission or conviction of a misdemeanor as defined in 12 NCAC 09G.0102 .

7. Petitioner was awarded his General Certification from the Commission on or about April 26, 2011. (Respondent's Exhibit 1)

8. Petitioner worked as a correctional officer at Hyde Correctional Institution for approximately four (4) years. Petitioner's duties included supervising and transferring inmates, in addition to supervising the mess hall and other common areas of Hyde Correctional Institution.

9. On October 1, 2012, a Chowan County Grand Jury returned a True Bill of Indictment, charging Petitioner with felony cruelty to animals for the felonious killing of a lab mix belonging to Tiffany Bell. On August 27, 2013, Petitioner appeared in Criminal Superior Court in Chowan County before the Honorable Jerry R. Tillett. At that time, Petitioner entered an Alford plea to the reduced charge of misdemeanor cruelty to animals in violation of North Carolina General Statute § 14-360(a), in case number 12CRS000289. (Respondent's Exhibit 6, Attachment A)

10. Petitioner does not deny that he stands convicted of misdemeanor cruelty to animals in violation of North Carolina General Statute § 14-360, as set out in the Judgment introduced into the record at the hearing of this matter. *See* 12CRS000289. (Respondent's Exhibit 7)

11. On or about April 30, 2012, Petitioner was at his girlfriend's house in Chowan County. Petitioner was working outside and his son was also outside playing. Petitioner's pit bull was chained to a tree. Petitioner testified that a lab mix entered onto the property and began to attack his pit bull. According to Petitioner, the lab mix began to "whip up" on Petitioner's pit bull. Petitioner attempted to run the lab mix off, but the dog would not leave the property.

12. Petitioner also testified that the lab mix then began to approach his son in an aggressive manner. Petitioner was able to get his son onto the front porch of his girlfriend's house and away from harm. At that time, Petitioner decided to retrieve his rifle from within his girlfriend's home. Petitioner entered the home and retrieved his Remington 30-06 rifle from the bedroom. Petitioner then returned outside and approached the lab. Petitioner was close enough to the lab that he did not have to use the scope on the 30-06. Petitioner shot and killed the lab.

13. Petitioner made no attempt to call the police or animal control prior to shooting the lab. Petitioner could have called for assistance since he and his son were safely on the front porch of the house. Petitioner testified that he killed the dog as he believed the lab was a threat to his son.

14. Petitioner's employer initiated an investigation into potential misconduct by Petitioner for the killing of the lab. Petitioner was required to provide his employer with a written statement regarding the events of April 30, 2012. In that written statement, Petitioner makes no mention of the lab attacking his pit bull. Furthermore, Petitioner fails to mention that this dog approached his son in an aggressive manner. (Respondent's Exhibit 4)

15. Petitioner was terminated from Hyde County Correctional Institution for conduct

unbecoming of a sworn corrections officer. The basis of this finding by his employer was Petitioner's conduct on April 30, 2012, wherein Petitioner shot and killed the lab that entered onto the property of his girlfriend.

16. Petitioner exhibited poor judgment and conduct unbecoming of a sworn corrections officer when he killed Ms. Bell's lab mix.

17. Several months after Petitioner killed the lab, he was charged in an unrelated matter with the crime of communicating threats. Petitioner admitted that the warrant alleged that Petitioner threatened to shoot and kill the complainant's dog. Petitioner denies making this threat. Petitioner and his girlfriend were walking by a neighbor's house when a woman began to yell profanities towards them. Petitioner continued to walk, but his girlfriend lagged behind and continued to have words with the woman. This resulted in cross warrants being issued, wherein Petitioner was accused of threatening to kill the woman's dog.

18. Although the communicating threats charge against Petitioner was ultimately dismissed, Petitioner was charged with an offense wherein the alleged threat involved the killing of another dog.

19. Petitioner has been convicted of the misdemeanor offense of cruelty to animals in violation of N.C.G.S. § 14-360(a), and that this conviction occurred after Petitioner received certification from Respondent. Respondent's proposed suspension of Petitioner's correctional officer's certification is supported by a preponderance of the evidence presented at the administrative hearing.

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 hearing in this matter. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

2. The North Carolina Criminal Justice Education and Training Standards Commission has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 09G, to certify corrections officers and to revoke, suspend, or deny such certification.

3. 12 NCAC 09G.0504 provides that:

> b) The Commission may .....suspend, revoke or deny the certification of a corrections officer when the Commission finds that the applicant for certification or the certified officer:
>
> (3) has committed or been convicted of a misdemeanor as defined in 12NCAC09G.0102 after certification[.]

4. Pursuant to 12 NCAC 09G.0102 (2)(c), convicted or conviction includes "a plea of no contest, nolo contendere, or the equivalent."

5. Misdemeanor cruelty to animals in violation of N.C.G.S. § 14-360(a) constitutes a misdemeanor under the Commission's Rules pursuant to 12 NCAC 09G .0102(9) (ddd).

6. 12 NCAC 09G .0505(b)(1) provides that when the Commission suspends or denies the certification of a corrections officer pursuant to 12NCAC09G.0504, the period of sanction shall be not less than three (3) years; however, the Commission may either reduce or suspend the period of sanction.... or substitute a period of probation in lieu of suspension of certification following an administrating hearing, where the cause of sanction is: (1) the commission or conviction of a misdemeanor as defined in 12NCAC09G.0102.

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

8. Respondent has met its burden of proof in the case at bar. The evidence presented at the administrative hearing establishes that Petitioner was convicted of the misdemeanor offense of cruelty to animals in violation of N.C.G.S. § 14-360(a) on August 27, 2013. Pursuant to 12 NCAC 09G.0102(2)(c) and 12NCAC09G.0102(9)(ddd) of the Commission's Rules, Petitioner's Alford plea and subsequent adjudication of guilt constitutes a misdemeanor conviction. This criminal conviction occurred after Petitioner's certification through the Commission on April 26, 2011. Respondent's proposed suspension of Petitioner's certification is therefore supported by a preponderance of the evidence presented at the administrative hearing.

9. In mitigation of Petitioner's conduct is his belief that his child was threatened by a stray and trespassing lab-mix dog. The lab-mix attacked Petitioner's dog. Petitioner's dog was not free to retreat. Although the Petitioner removed his son from immediate danger, a future encounter between this dog and/or his son was foreseeable. In aggravation of Petitioner's conduct was the continuation of this conflict with an adjoining neighbor arising out of the same or similar incident. This second incident resulted in additional criminal charges. This second incident demonstrates poor judgment on the part of Petitioner.

PROPOSAL FOR DECISION

NOW, THEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned recommends Respondent suspend Petitioner's correctional officer certification for a period of three (3) years based upon Petitioner's misdemeanor cruelty to animals conviction, which occurred after Petitioner received certification through the Commission. The Commission has the authority to issue a lesser sanction, in its discretion. However, Petitioner's unbecoming conduct, as set out in greater detail above, warrant some period of active suspension. The undersigned proposes that taken into account the totality of the circumstance, that Petitioner's certification be suspended for a period of three years but that all

but 30 days of said suspension be stayed, and that Petitioner's certification be restored after a period of 30 days following the entry of Respondent's final decision as a lesser sanction to be imposed against Petitioner.

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this Proposal for Decision, to submit proposed Findings of Fact and to present oral and written arguments to the agency. N.C.G.S. § 150B-40(e).

The agency that will make the final decision in this contested case is the North Carolina Criminal Justice Education and Training Standards Commission.

This the 9th day of October, 2014.

Julian Mann III
Chief Administrative Law Judge

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
10/31/2014 3:25 PM

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 DOJ 01202

CURTIS CANTY, Petitioner, v. NC CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION, Respondent.	**PROPOSAL FOR DECISION**

This case came on for hearing on July 2, 2014 before Administrative Law Judge Donald W. Overby in Raleigh, North Carolina. This case was heard after Respondent requested, pursuant to N.C.G.S. § 150B-40(e), designation of an Administrative Law Judge to preside at the hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

APPEARANCES

Petitioner: Mikael R. Gross
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Respondent: Lauren Tally Earnhardt
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ISSUES

Did Respondent properly deny Petitioner's law enforcement officer certification because Petitioner failed to meet or maintain one of the minimum employment standards in that Petitioner lacked the good moral character required for every criminal justice officer?

Did Respondent properly deny Petitioner's law enforcement officer certification because Petitioner committed the Class B misdemeanor offense of "Gifts and Favors Regulated"?

BURDEN OF PROOF

The question of which party has the burden of proof has been raised by Respondent as a separate issue which will be addressed below.

WITNESSES

Petitioner called no witnesses.

Respondent called Mr. Richard Squires, Deputy Director of the Criminal Justice Standards Division of the N.C. Department of Justice to testify. Additionally, Respondent called Alan Fields, retired Assistant Director for the Division of Alcohol Law Enforcement of the N.C. Department of Public Safety to testify.

STATUTES AND RULES APPLICABLE TO THE CONTESTED CASE

1. The General Statues applicable to this matter are:
   a. G.S. 17C-10
   b. G.S. 133-32

2. The Rules Applicable to this matter are:
   a. 12 NCAC 09A .0103(23)(b)
   b. 12 NCAC 09A .0204(b)(2)
   c. 12 NCAC 09A .0204(c)
   d. 12 NCAC 09A .0205(b)(1)
   e. 12 NCAC 09A .0205(b)(2)
   f. 12 NCAC 09A .0205(c)(2)
   g. 12 NCAC 09A .0100
   h. 12 NCAC 09B .0101(3)

FINDINGS OF FACT

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received notice of hearing, and that the Petitioner received by certified mail, the Proposed Denial of Justice Officer's Certification letter, mailed by Respondent, the North Carolina Criminal Justice Education and Training Standards Commission (hereinafter "The Commission"), on December 30, 2013.

2. The Commission has the authority granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9, to certify justice officers and to deny, revoke, or suspend such certification.

3. Petitioner was employed as the General Manager of the City of Asheville's ABC Board from August 2004 until his resignation in September of 2011. While working as the Asheville ABC General Manager in 2008, Petitioner successfully completed BLET.

4. Petitioner was awarded certification as a law enforcement officer on May 2, 2008 with Asheville ABC Law Enforcement. He was a sworn ABC officer but received no additional salary. Petitioner was separated from Asheville ABC on September 27, 2011 after his resignation.

5. Asheville ABC Law Enforcement Chief Bottego noted on the F5B(LE) form that Petitioner's resignation "had nothing to do with any law enforcement duties, which were minimal."

6. Thereafter, Petitioner was employed by the Eastern Band of Cherokee Indians ABC Commission as the General Manager for the tribal ABC Commission. Petitioner applied for a position with the Cherokee Police Department as a law enforcement officer completing his application and appointment forms on September 19, 2012.

7. Although Petitioner finished his application and appropriate forms in September 2012, Respondent did not receive the Report of Appointment/Application for Certification Form from the Cherokee Indian Police Department on Petitioner's behalf until January 17, 2013. The form was signed and dated by a Captain with the Cherokee Indian Police Department on January 10, 2013.

8. Because the length of time between Petitioner's separation from Asheville ABC and the application for certification from Cherokee Indian Police is more than one year, Petitioner is not a lateral transfer and is, therefore, considered an applicant for certification purposes.

9. Respondent subsequently required Petitioner to submit additional forms for verification and required the submission of a new appointment form by the Cherokee Police Chief for the appointment of Petitioner as a probationary law enforcement officer with the Cherokee Police Department. The request for more information had no effect on the effective date of the submission of his application to Respondent.

10. During the application process, Petitioner was found to have no criminal record, a negative drug test, a psychological evaluation reflected no concerns, and a background investigation revealed no conduct that would disqualify Petitioner from holding a law enforcement certification.

11. Upon receipt of the Report of Appointment from Cherokee Indian Police Department, Richard Squires, an investigator for Respondent, looked into why Petitioner separated from Asheville ABC. Squires learned that Petitioner resigned in September 2011 following an ALE Internal Affairs Investigations and, therefore, requested all material and reports surrounding Petitioner's separation. ALE provided a summary of the Investigation performed by Alan Fields along with supporting documents.

12. Based on his investigation, Squires prepared a memorandum summarizing his findings. This memorandum was presented to the Probable Cause Committee on November 20, 2013.

13. Respondent gave Petitioner notice of its concerns on November 1, 2013 and scheduled a Probable Cause hearing for November 20, 2013. Petitioner and his counsel were both present at the Probable Cause meeting and were able to speak to the Committee and present evidence.

14. The Probable Cause Committee found probable cause to believe Petitioner committed the Class B misdemeanor offense of "Gifts and Favors Regulated" and that he lacks the good moral character required of all sworn law enforcement officers. Petitioner was notified of this finding by a Proposed Denial of Justice Officer's Certification letter, mailed by Respondent through certified mail on December 30, 2013.

RESPONDENT'S INVESTIGATION

15. Mr. Squires was Respondent's first witness. He explained the administrative process of the Training and Standards Division in support of Respondent's mission.

16. Squires initiated the investigation into Petitioner when he received evidence that a report existed that alleged Petitioner had engaged in conduct that may disqualify Petitioner from holding a law enforcement officer certification.

17. The information Squires received was based almost if not entirely on an investigative report by Assistant Director Alan Fields which was conducted at the request of the NC ABC Commission Administrator, Michael Herring, and based on anonymous complaints. The anonymous complaints received included allegations of Petitioner "receiving things of value such as free meals by representatives of liquor distillers, liquor suppliers, and brokers." (Respondent's Exhibit 1, pg. 2)

18. Squires conducted no independent investigation, but stated that he had spoken with Fields and requested a copy of Fields' report.

19. After reading the report, Squires recommended that Petitioner be taken before the Respondent's Probable Cause Committee to answer for the alleged violations.

20. Squires did not independently corroborate any information in the report and spoke substantively only to the dates of appointment and separation of Petitioner's employment with law enforcement agencies.

21. Retired ALE Agent Alan Fields was called as a witness by Respondent. Fields conducted the investigation into Petitioner based on an anonymous complaint alleging improprieties by Petitioner. Fields interviewed liquor vendor representatives, employees at the Asheville ABC Board, and Petitioner. Fields also reviewed documents and business records from liquor distillers, liquor suppliers, and the Asheville ABC Board.

22. Agent Fields contends that from the information he received Petitioner received gifts of substantial value including, but not limited to meals, Carolina Panthers tickets, and charity event tickets from members of the liquor industry. ABC Administrative Code 04 NCAC 2T. 0711

provides that it is a violation for any industry member to provide anything of value either directly or indirectly to any retail permittee, or the owner of the premises on which the business of a retailer is conducted. It is also a violation of 04 NCAC 2T. 0711 for any retail permittee to accept from any industry member any item of value. Although Petitioner, as a local ABC General Manager, did not set the price for individual liquor bottles sold at any store, he was in charge of determining which types of liquor would be sold at each Asheville ABC Store and decided how much of each product would be available. Petitioner could also control shelf space and the display of the various products.

23. ABC Commission Rule 04 NCAC 02T. 0901 provides that distiller representatives shall not give liquor, including samples, or anything of value to local ABC board members or employees, which includes store managers and general managers at any time. Local ABC board members or employees, including store managers and general managers, shall not accept gifts, either directly or indirectly from any representatives.

24. Pursuant to ABC Law and Rules of the N.C. ABC Commission, Petitioner can receive gifts such as caps, shirts, and other items from wholesalers in the liquor industry.

25. Pursuant to the rules of the N.C. ABC Commission, it is not improper for employees of an ABC Board to accept liquor in the form of "added value" packages, so long as the liquor was placed with other liquor in the ABC Stores to enhance the sales or act as inducements.

26. Agent Fields opined that the Rules of the ABC Commission are clear and have always been clear that employees of local ABC boards, including general managers, are prohibited from taking items of value from members of the liquor industry. While that may be true to a degree, Agent Fields acknowledged that from time to time in the past the Commission has given authority for member organizations or individuals to do various and sundry events that were prohibited by law. It is difficult to expect some within an organization to toe the line with strict and rigid enforcement, when the controlling and governing body not only turns a blind eye, but actively engages in the same conduct which violates North Carolina law.

RECEIVING GIFTS OR FAVORS

27. Petitioner contends that Respondent failed to prove that Petitioner received various and sundry improper gifts and/or favors from representatives of the liquor industry. It is true that there is no direct evidence of Petitioner's state of mind when going to various events sponsored by distillers and/or their representatives; there seldom is direct evidence in such instances. Likewise, there is a lack of direct evidence that Petitioner actually attended many of the meals, that he knew who was paying for the meals, that he actually received gifts, or that he knew the source of the gifts.

28. A blanket objection to the introduction of evidence offered at the outset of the trial does not effectively address the myriad of evidentiary problems that may arise in the course of the trial. Some evidence might be admissible but given little to no weight; or alternatively some evidence might be admitted over an objection. It was suggested to the Petitioner that a specific objection should be raised during the course of the trial to anything he felt was objectionable.

29. Petitioner was interviewed by Agent Fields, where he admitted to accompanying liquor vender representatives to meals where they "discussed business" and the representative would pay for Petitioner's meals. Petitioner accepted payment for 25 meals by various liquor vender representatives between January 2008 and September 2009. At least 5 of these meals were provided and paid for directly by distillers. When presented with a list of the 25 meals, Petitioner stated he "recognized a lot of these" and eventually admitted to attending all of the meals detailed in the list. Petitioner admitted liquor vendor representatives provided him complimentary admission tickets to Carolina Panthers football games on at least 4 different occasions between October 2006 and October 2009. Petitioner, along with members of his family, or members of his staff, attended the various Panthers games. Petitioner also admitted to accepting tickets to a "Chris Paul Weekend" charity event in September of 2008 which he provided to his son who ultimately attended. Petitioner did not reimburse any member of the liquor industry for any of the items of value provided to him.

30. Of particular interest is the fact that the NC ABC Commission itself apparently approved of the Chris Paul charity event, in effect waiving any prohibitive conduct that involved the liquor industry. The Commission does not have the authority to waive statutory prohibitions.

31. The fact that Petitioner "received" gifts such as the tickets to football games and then gave them away is of no consequence. What he did with the "gifts" after receiving them does not matter.

32. Petitioner offered no evidence to rebut or deny his admissions made to Agent Fields.

33. A memorandum issued in 1996 by Michael Herring, Administrator of the Commission, to all local ABC Boards to inform the boards that local ABC Boards and their employees were not to accept gifts or things of value is of no probative value. It was issued many years before Petitioner assumed his position with Asheville ABC, there is no evidence he ever saw or was provided a copy of that particular memo. That memo also states that while it may not be prudent to accept unsolicited meals and incidentals, it acknowledges that it had been an accepted practice to do so.

34. While there is some evidence that the NC ABC Commission may have engaged in irregular treatment of one entity as compared to another and thereby given disparate treatment, the Commission is not on trial in this contested case. This hearing is about the Petitioner's actions and whether or not he will be recertified as a law enforcement officer.

35. Agent Fields stated that in years before 2010, many of the practices were fairly common which are complained about against Petitioner here.

36. Likewise, evidence from Agent Fields that many other employees at the Asheville ABC Board had allegedly received unlawful gifts and members of the liquor industry admitted to violations, some of which would have been criminal law violations, Agent Fields did not seek to prosecute anyone other than Petitioner. It is very interesting to note; however, the rather

significant number of people interviewed who admitted to violations and the only person attempted to be prosecuted criminally is Petitioner. Law enforcement officers exercise "discretion" daily, but this superficially seems to be abusive of that discretion; however, selective prosecution is not the issue here.

37. Buncombe County District Attorney, Ron Moore refused to prosecute Petitioner.

N.C. GEN. STAT. § 133-32 REQUIREMENTS

38. The only evidence offered by Respondent that general managers or others in supervisory positions might enter into the preparing of plans, specifications, or estimates for public contracts; or the awarding or administering of public contracts; or inspecting or supervising construction authorized by a contract pursuant to N.C. Gen. Stat. § 133-32 was offered by Agent Fields. There was no evidence as to how he may have gained that knowledge.

39. There was no evidence offered to show that Petitioner engaged in the preparing of plans, specifications, or estimates for public contracts; or the awarding or administering of public contracts; or inspecting or supervising construction authorized by a contract pursuant to N.C. Gen. Stat. § 133-32.

40. Although the Asheville ABC Board built two ABC stores during Petitioner's employment as general manager, there was no evidence that Petitioner was responsible for any of the preparation, oversight, or issuance requirements of the contracts as set forth in N.C. Gen. Stat. § 133-32.

41. Pursuant to N.C. Gen. Stat. § 18B-801, the opening, construction, and closing or moving of ABC stores is an authority delegated only to the members of the local ABC Board who were appointed by the appointing authority.

42. In addition, before an ABC store may be built or moved by a local ABC Board, the Alcohol Law Enforcement Section of the N.C. Department of Public Safety must conduct an ABC Store Investigation and the N.C. ABC Commission must approve all locations and plans for local ABC stores.

CREDIT CARD USE

43. Respondent contends that Petitioner improperly used a credit card issued to him by the Asheville ABC Board on a number of occasions from 2005-2010, as shown by Respondent's Exhibit 1 on pages 164 through 177.

44. Respondent's letter dated December 30, 2013 is the document which begins the process of this Article 3A contested case. That letter sets forth all of the grounds upon which the Respondent is proposing to take action. It is the notice to the Petitioner of what he is confronted with.

45. The issue of improper use of the credit card was the basis for allegations that Petitioner had committed a felony; however, no probable cause was found for those allegations. It appears that Respondent is attempting to boot strap those same allegations to show a lack of good moral character.

46. Respondent's determination letter dated December 30, 2013, specifically states that the foundation for suspending or revoking his law enforcement officer recertification for lack of good moral conduct is based on the allegations that he took things of value in violation of N.C. Gen. Stat. § 133-32.

47. The letter dated December 30, 2013 makes no mention of improper use of a credit card issued to Petitioner by the Asheville ABC Board. From the very specific allegations set out in the letter, not even an inference can be drawn that Petitioner improperly used that credit card.

48. Although the actions taken by Petitioner in the alleged improper use of the credit card are perhaps very concerning, Petitioner was not on notice that he would have to address that issue. It is therefore not necessary to address the substance of the purported evidence of the credit card use.

CONCLUSIONS OF LAW

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

2. To the extent that certain portions of the foregoing Findings of Fact constituted mixed issues of laws and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law.

BURDEN OF PROOF

3. Respondent has raised the issue of burden of proof and that the burden has shifted to the Petitioner. Since the issue of burden of proof bears heavily on the outcome of this case, the issue of burden of proof will be discussed fairly at length.

4. Respondent contends that Petitioner's break in service in excess of 12 months has caused Petitioner to lose any property interest he has in his certification and therefore, that the burden of proof somehow shifts. That assumption is incorrect on several bases.

5. Respondent is correct in that Petitioner's failure to meet the 12 month cut-off does indeed change his status in the reapplication, but it does not totally negate his ability to contest the Respondent's action. The change is from Petitioner being a lateral transfer to being a probationary certification.

6. 12 NCAC 09A .0204(b) states that "The Commission may suspend, revoke or deny the

certification of a criminal justice officer . . . ." Thereafter is a specific listing of sixteen enumerated means by which an applicant could have failed to meet a standard and thus been facing the possibility that his or her certification would be suspended or revoked or denied. Several of those means listed are specific to new applicants who have not been previously certified. Certainly the Petitioner would be in no worse position than one who has never been certified. Petitioner did not lose any property rights in his ability to be certified by Respondent.

7. Respondent's letter of December 30, 2013 informs Petitioner that probable cause had been found to either suspend or deny his certification. The letter is captioned and the text states the alternative "suspend or deny." There is nothing in the letter which even remotely infers that a lapse in 12 consecutive months affects what the Probable Cause Committee was considering. The 12 months only affects how he would have been re-certified; not if he would be recertified.

8. Respondent relies on a series of cases which have ruled on the burden of proof in cases in Chapter 150B, Article 3, including particularly Overcash v. N.C. Dep't of Env't &Natural Res., 179 N.C. App 697, 635 S.E.2d 442, rev. denied 361 N.C. 220, 642 S.E.2d 445 (2007); Britthaven, Inc. v. N.C. Dep't of Human Res., 118 N.C. App. 379, 455 S.E.2d 455, disc. review denied, 341 N.C. 418, 461 S.E.2d 754 (1995); and Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res., 176 N.C. App. 594, 627 S.E.2d326 (2006).

9. All of these cases decide the issue of burden of proof according to Article 3 of Chapter 150B of the North Carolina General Statutes—not on Article 3A. This instant case is brought pursuant to Article 3A.

10. From its inception, the North Carolina Administrative Procedures Act, N.C. Gen. Stat. Chapter § 150B, has contained two separate and distinct sets of administrative hearings provisions. The manner in which a contested case is commenced and conducted varies depending on which set of provisions applies. Article 3A of the Act governs, among other things, occupational licensing agencies, including Respondent herein. *See* John Aycock McLendon, Jr., Contested Case Hearings Under the North Carolina Administrative Procedure Act: 1985 Rewrite Contains Dual System of Administrative Adjudication, 64 N.C. L. Rev. 852, 857-58 (1986).

11. In the almost thirty years since its inception, the APA has contained these two separate and distinct provisions for administrative hearings. Although many similarities exist, they are decidedly different. Throughout the APA's history, the General Assembly has had the ability to change this process, making one type of procedure, but has not. Therefore, the distinction between the two is important and must be acknowledged.

12. Article 3 of the NC APA applies to administrative hearings conducted by OAH before an administrative law judge, while Article 3A applies to "other administrative hearings" which are conducted by state agencies enumerated in § 150B-38(a). Each article contains separate provisions governing all aspects of the administrative hearings to which they apply. Homoly v. N. Carolina State Bd. of Dental Examiners, 121 N.C. App. 695, 697, 468 S.E.2d 481, 483 (1996).

13. Unlike Article 3, Article 3A does not require that a petition be filed to commence a

contested case. Article 3A simply provides that in N.C. Gen Stat. 150B-38(b) "prior to any agency action in a contested case, the agency shall give the parties in the case an opportunity for a hearing." In Article 3A, the Agency initiates the process, not a petitioner. Generally in Article 3A cases, the petitioner does not file any responsive pleadings at all, which is quite different from Article 3 cases. *See* McLendon, 64 N.C. L. Rev. 852, 859-60 (1986).

14. A critical distinction between Article 3 and Article 3A contested cases is that in Article 3 cases, the agency has already taken an action that is adverse to the interests of the petitioner and the petitioner thus files the contested case petition. In Article 3A contested cases, the agency is proposing to take an action and the agency decision will be made based upon the Article 3A contested case. In Article 3A cases, the agency decision has not yet been made.

15. In Article 3A cases, OAH, through an ALJ, is to sit and preside over the hearing in the place of the agency, and makes a "proposal for decision" back to the agency. N.C. Gen. Stat. § 150B-40. At the time of the initiation of the process the agency has not yet made a final decision which is the springboard for commencing a contested case under Article 3. This distinction is even more significant now that OAH has final decision making in Article 3 cases.

16. That a distinction exists between Article 3 and Article 3A cases is made clear in N.C. Gen. Stat. § 150B-40: "The provisions of this Article, rather than the provisions of Article 3, shall govern a contested case in which the agency requests an administrative law judge from the Office of Administrative Hearings." (Emphasis added)

17. Any attempt to use the standards of Article 3 within an Article 3A proceeding is without merit.

18. Article 3 and Article 3A both contain provisions which are the same or very similar, such as provisions governing venue, conduct of hearing, depositions and discovery, evidence, and designation and power of ALJ or presiding officer. Homoly v. N. Carolina State Bd. of Dental Examiners, 121 N.C. App. 695, 696, 468 S.E.2d 481, 482 (1996).

19. Again, if the legislature had intended Article 3 provisions to be read into Article 3A, it would not have been necessary to include the same or similar provisions in each article. Clearly, the legislature intended each article to fully govern the administrative hearings to which each applies without overlap. Homoly p. 698.

20. There are also distinctions between the two. Article 3 provides for mediated settlement conferences while Article 3A does not. Article 3A provides a party who has been served with a notice of hearing the opportunity to file a written response with the agency prior to hearing, while Article 3 does not provide parties with a similar opportunity. If Article 3 applied to hearings before agencies listed in Article 3A, these and other provisions would conflict. Homoly p. 698.

21. N.C. Gen. Stat. § 150B-40(e) provides that "[w]hen a majority of an agency is unable or elects not to hear a contested case," the agency is to apply to the OAH for designation of an ALJ. In such case, "[t]he provisions of [Article 3A], rather than the provisions of Article 3, shall

govern a contested case...." N.C. Gen. Stat. § 150B-40(e). If the legislature had intended Article 3 to apply to Article 3A hearings and procedure, it would not have been necessary to include language that Article 3A provisions rather than Article 3 provisions apply when an Article 3A agency requests an ALJ to conduct an agency hearing. Homoly p. 698-99.

22. Article 3, a general provision, applies to all administrative agency hearings not covered by Article 3A. Those agencies covered under Article 3A are specifically listed in N.C. Gen. Stat. § 150B-38(a). "It is a well established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, [over] sections which are general in their application." *Utilities Comm. v. Electric Membership Corp.,* 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969) (citing *Utilities Comm. v. Coach Co.,* 236 N.C. 583, 73 S.E.2d 562). In this case, hearings conducted by Respondent are governed exclusively by the specific provisions of Article 3A, rather than the general provisions of Article 3 of the NC APA. Homoly p. 698-99.

23. Thus, the contested case provisions of Article 3 do not apply to Article 3A agencies and the same is true conversely. Homoly p. 699.

24. Article 3 is entitled "Administrative Hearings," and governs administrative hearings which are conducted by the Office of Administrative Hearings (OAH) and are heard by an administrative law judge (ALJ). Article 3A of the NC APA is entitled "Other Administrative Hearings," and governs hearings involving specifically identified agencies. Homoly p. 696

25. N.C. Gen. Stat. § 150B-38(h) provides "Every agency shall adopt rules governing the conduct of hearings that are consistent with the provisions of this Article." The article which is referred to is Article 3A.

26. Respondent's rule for the administrative hearings is found at 12 NCAC 09A .0107. That rule specifically states that an administrative hearing in contested cases "shall be governed by procedures set out in Article 3A of G.S. 150B." (Emphasis added).

27. The rule 12 NCAC 09A .0107 goes on to say that the "rules establishing procedures for contested case. . . contained in Title 26, Chapter 3 of the North Carolina Administrative Code are hereby incorporated by reference." Many of the rules contained within Title 26, Chapter 3 of the NCAC are not consistent with Article 3A, but are in line with Article 3 hearings. To the degree that the rules are inconsistent with N. C. Gen. Stat. § 150B Article 3A, those rules shall not apply to hearings conducted under Article 3A. The dictates of the statute are paramount and shall control.

28. The rule 12 NCAC 09A .0107 also attempts to draft the powers and duties given to the Administrative law Judges in Title 26, Chapter 3 of the NCAC to the conduct of an Article 3A hearing. The powers of the presiding officer are enumerated in N. C. Gen. Stat. § 150B-40. The provisions within the statute are paramount and therefore 12 NCAC 09A .0107(d) is void.

29. In Peace v. Employment Sec. Comm'n of N. Carolina, the North Carolina State Supreme Court addressed the burden of proof. Although Peace is an Article 3 case, the discussion of

burden of proof is instructive in this instant case. The Supreme Court recognizes that neither the North Carolina Constitution nor the North Carolina General Assembly has specifically addressed the proper allocation of the burden of proof in "just cause" termination cases. This instant case is not a "just cause" case, but likewise neither the Constitution nor the General Assembly has addressed the burden of proof in Article 3A cases.

30. Peace states:

> In the absence of state constitutional or statutory direction, the appropriate burden of proof must be "judicially allocated on considerations of policy, fairness and common sense." 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 37 (4th ed.1993). Two general rules guide the allocation of the burden of proof outside the criminal context: (1) the burden rests on the party who asserts the affirmative, in substance rather than form; and (2) the burden rests on the party with peculiar knowledge of the facts and circumstances. *Id.*
>
> Peace v. Employment Sec. Comm'n of N. Carolina, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998).

31. Applying these general principles to this contested case, with "considerations of policy, fairness and common sense," the Respondent should bear the burden of proof in an action in which the Respondent has investigated a license/certificate holder or applicant and based on that investigation wants to take some action against that license/certification.

32. Historically, in Article 3A hearings, a license or certification is considered "property or rights" such that entitle the applicant or holder to a contested case hearing pursuant to Article 3A. When a license or certification is at issue, whoever is trying to take that license or certificate away has the burden of proof.

33. N.C. Gen. Stat. § 150B-40 provides that the "hearings shall be conducted in a fair and impartial manner" and that the presiding officer, including the ALJ, may "regulate the course of the hearings." That statutory provision allows the presiding officer to dictate who has the burden of proof, which has always been the agency. In this very case, the Respondent was asked to put on its evidence first and did so without any question of who had the burden of proof. The issue of burden of proof has not previously been raised with this ALJ in Article 3A hearings, and the Respondent has always assumed the burden. Even in this case the argument seems to rest on the asserted position that the Petitioner somehow lost any property right he may have had and thus the burden of proof changed. Stated differently, but for the asserted loss of property right, the Respondent would still have the burden of proof.

34. Based upon the foregoing, the Respondent bears the burden of proof in this Article 3A hearing.

FACTUAL ISSUES

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

36. 12 NCAC 09A .0204(b)(3)(A) states that:

> (b) The Commission may suspend, revoke or deny the certification of a criminal justice officer when the Commission finds that the applicant for certification or the certified officer:
>
> (3) has committed or been convicted of:
>
> (A) a criminal offense or unlawful act defined in 12 NCAC09A .0103 as a Class B misdemeanor

37. N.C. Gen. Stat. §133-32(a) is listed as a Class B misdemeanor in Respondent's Class B misdemeanor manual.

38. N.C. Gen. Stat. §133-32(a) states:

> (a) It shall be unlawful for any contractor, subcontractor, or supplier who:
>
> (1) Has a contract with a governmental agency; or
> (2) Has performed under such a contract within the past year; or
> (3) Anticipates bidding on such a contract in the future
>
> to make gifts or to give favors to any officer or employee of a governmental agency who is charged with the duty of:
>
> (1) Preparing plans, specifications, or estimates for public contract; or
> (2) Awarding or administering public contracts; or
> (3) Inspecting or supervising construction.
>
> It shall also be unlawful for any officer or employee of a governmental agency who is charged with the duty of:
>
> (1) Preparing plans, specifications, or estimates for public contracts; or
> (2) Awarding or administering public contracts; or
> (3) Inspecting or supervising construction
>
> willfully to receive or accept any such gift or favor.

39. The evidence establishes that Petitioner accepted gifts and favors. These gifts and favors were accepted by Petitioner while he was employed by the Asheville ABC Board, a State governmental agency, and while Petitioner was acting in his official capacity for that governmental agency. Petitioner used his position as General Manager for a local ABC Board to obtain numerous gifts of significant value for himself, his family, and his staff.

40. Respondent failed to prove that Petitioner was responsible for the preparing of plans, specifications, or estimates for public contracts; or the awarding or administering of public contracts; or inspecting or supervising construction or otherwise as required in order to violate N.C. Gen. Stat. § 133-32.

41. Therefore, Respondent failed to prove that Petitioner committed a Class B misdemeanor as defined in 12 NCAC 09A .0103. Petitioner was not convicted of a Class B misdemeanor as defined in 12 NCAC 09A .0103

42. 12 NCAC 09B .0101(3) states that: Every criminal justice officer employed by an agency in North Carolina shall:

> (3) be of good moral character pursuant to G.S.17C-10 and as determined by a thorough background investigation[.]

43. A preponderance of the evidence offered at the hearing establishes Petitioner lacks the good moral character required of all law enforcement officers. Petitioner demonstrates a pattern of unethical conduct. Evidence shows Petitioner accepted items of value (meals, NFL tickets, liquor) from members of the liquor industry from 2008-2010. Petitioner's pattern of conduct is clearly unacceptable. Petitioner abused his authority to the detriment of the public.

44. Petitioner failed to follow North Carolina General Statutes and the ABC Administrative Code. He also did not require his employees or the liquor industry representatives who interacted with him to follow North Carolina law or the ABC Administrative Code. The character required of a law enforcement officer is more than just not breaking the written law; it is the capacity to make the right choices when those around him or her are making the wrong ones.

45. North Carolina case law provides that "[g]ood moral character is honesty, fairness and respect for the rights of others and for the laws of the state and nation." In re Willis, 288 N.C. at 10, 215 S.E.2d at 776 (1975). A lack of good moral character can be shown where the findings viewed as a whole reveal a pattern of conduct "that permeates the applicant's character and could seriously undermine public confidence . . ." In re Legg, 325 N.C. 658, 675, 386 S.E.2d 174, 183 (1989). The evidence presented at the administrative hearing demonstrates Petitioner does not possess the good moral character within the meaning of In re Willis and Respondent's Administrative Code.

46. 12 NCAC 09C .0306(a)(4) provides:

> (a) A law enforcement officer with general certification from either the Criminal Justice Education and Training Standards Commission or the Sheriffs' Education and Training Standards Commission may transfer from one law enforcement agency to another law enforcement agency with less than a 12 month break in law enforcement service. Prior to employing the officer, the employing agency shall:
>
> . . .
>
> (4) notify the Commission, by submitting a Report of Appointment, that the officer is being employed and stating the date on which employment will commence.

47. Because Petitioner had a break in law enforcement service of more than 12 months, he had to reapply for certification, was considered an applicant, and had to do additional training as required under 12 NCAC 09B .0402. Petitioner and the Cherokee Indian Police Department's failure to comply with 12 NCAC 09C .0306(a)(4) means that Petitioner is not a lateral transfer and his certification has lapsed. This has no effect on whether or not the Petitioner may be recertified, but only that he will be required to be recertified in a probationary status.

48. The information leading to this investigation and hearing was initiated in June of 2010, for matters occurring on or before that date. Although the investigative report was made a public record by providing copies of the report to the District Attorney of Buncombe County, the N.C. ABC Commission, and ultimately to the *Asheville Citizen Times* newspaper, there was nothing about Petitioner's law enforcement certification to prompt an investigation by this Respondent.

49. The report was available and accessible to the Respondent for three years before the Respondent decided to take action and to which the Respondent stated it had no duty to act until Petitioner applied for an appointment to be a sworn law enforcement officer again, although petitioner continued to hold his law enforcement officer certification.

50. At the time Respondent acted on the information, all of the allegations were a minimum of three years old, and some of the information as much as six years old. Since August of 2010, no allegation of wrong doing has been made and no evidence was entered to show that Petitioner had not rehabilitated his moral character. (See *Scroggs v. North Carolina Criminal Justice Educ. and Training Standards Comm'n.*, 400 S.E.2d 742, 101 N.C. App. 699 (N.C. App., 1991)).

51. According to 12 NCA 09A .0204, the revocation, suspension, or denial is discretionary. According to 12 NCA 09A .0205(c)(2) the period of time is mandatory once it is determined that revocation, suspension, or denial is appropriate.

52. Based on the facts and circumstances of this case, taking into account the seriousness of the offenses, the age of the alleged violations, the evidence of selective prosecution, the evidence of disparate treatment by the ABC Commission itself, the fact that there is no further evidence of wrong-doing by Petitioner in the intervening years, and the fact that Petitioner will be recertified on a probationary status, denial of certification for an indefinite period of time would not be appropriate.

PROPOSAL FOR DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned recommends that Petitioner's certification as a law enforcement officer be **GRANTED** on a probationary status as allowed by law.

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this Proposal for Decision, to submit proposed Findings of Fact, and to present oral and written arguments to the agency. N.C.G.S. § 150B-40(e).

The agency that will make the final decision in this contested case is the North Carolina Criminal Justice Education and Training Standards Commission.

IT IS SO ORDERED.

This the 31st day of October, 2014

Donald W. Overby
Administrative Law Judge

STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF BRUNSWICK	14 DOJ 01601

ROBIN CIERPIOT, PETITIONER,	
v.	**PROPOSAL FOR DECISION**
NORTH CAROLINA SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION, RESPONDENT.	

Pursuant to N.C. Gen. Stat. §150B-40(e), Respondent requested designation of an Administrative Law Judge to preside at the hearing of a contested case on this matter under Article 3A, Chapter 150B of the North Carolina General Statutes. On August 18, 2014, the Administrative Law Judge Melissa Owens Lassiter heard this contested case in Bolivia, North Carolina. On September 29, 2014, Respondent filed a Draft Proposal for Decision with the Office of Administrative Hearings.

APPEARANCES

Petitioner: Robin Cierpiot, Pro Se
94 Stone Furrow Trail
Leland, North Carolina 28451

Respondent: Matthew L Boyatt
Assistant Attorney General
North Carolina Department of Justice
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Raleigh, North Carolina 27699-9001

ISSUE

Whether Respondent's Probable Cause Committee acted properly in denying Petitioner's justice officer certification application for being convicted of twelve separate counts of "Simple Worthless Check," for making a material misrepresentation to Respondent by failing to list five 1993 worthless check charges on her 2008 Brunswick County Emergency Services application with Respondent, and for failing to notify Respondent, within five business days that she was charged with the criminal offense of "Simple Worthless Check" on June 5, 2008?

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: Character Letters

For Respondent: 1 - 13

FINDINGS OF FACT

Certification Application

1. On or about January 14, 2008, Petitioner began employment with Brunswick County 911 as a telecommunicator. (Resp Exh 3) At that time, the Brunswick County 911 telecommunicators worked under the supervision of Brunswick County Emergency Services Center, and were not required to be certified by Respondent under 12 NCAC 10B .0401(b).

2. In 2008, the usual practice of the Brunswick County 911 Services Center was for 911 Operations Manager Stacey Stevens and Director Tom Rogers to handle all 911 employees' paperwork for certification with Respondent. That is, the employee would complete the required paperwork for Respondent, and Stevens would submit the certification application information to Respondent on that employee's behalf. (Kimberly Lewis and Petitioner's testimony)

3. On or about May 22, 2008, Petitioner chose to complete, and signed a justice officer certification application, Form F-3 Personal History Statement, to apply for certification with Respondent through the Brunswick County Emergency Services. Petitioner obtained three local criminal record checks which showed pending Onslow County "Simple Worthless Check" charges, of which Petitioner was previously unaware, and Brunswick County "Simple Worthless Check" convictions which Petitioner had paid restitution. In completing her Form F-3, Petitioner listed the 1997 Onslow County worthless check convictions, and Brunswick County worthless check pending charges on her Form F-3.

4. Petitioner informed Stevens of her 1997 Onslow County worthless check convictions, and her Brunswick County worthless check pending charges, and showed Stevens the completed paperwork such convictions and charges. Ms. Stevens advised Petitioner to take care of the pending charges with the magistrate, and provide her with the receipts and/or paperwork after resolving such charges.

5. Stevens also advised Petitioner not to list any of her worthless check convictions on her Form F-3 (Resp Exh 10), because Petitioner had taken care of, or paid restitution, for those charges to the magistrate, and was not convicted in a court setting.

6. Question No. 47 of the Form F-3 asked Petitioner to disclose whether she had ever been arrested or otherwise charged with a criminal offense, and if so, to provide the offense charges, the charging law enforcement agency, date of the offense,

and disposition of the matter. The instructions provided that if any doubt exists in the applicant's mind about whether she was charged criminally, she should answer "yes."

7. Based on Ms. Stephens' instruction, Petitioner omitted her "Simple Worthless Check" convictions and charges in answering questions No. 47 and 53 on her Form F-3. Petitioner submitted that Form F-3 to Stevens, and assumed Stevens would submit such paperwork to Respondent in accordance with that agency's practice at that time. Stevens submitted Petitioner's initial application packet, along with Petitioner's Form F-3, to Respondent for certification. (Resp Exh 3)

8. Petitioner signed her F-3 before a Notary, affirming that her answers in her Form F-3 were true and complete. The F-3 certification cautioned that any misstatement or omission could result in Respondent denying Petitioner's certification, and that Petitioner had a continuing duty to update all information contained in the Form F-3. When Petitioner answered question no. 47, she had been convicted of five "Simple Worthless Check" offenses in Onslow County under Robin Walcott, Petitioner's maiden name. (Resp Exh 3)

9. On May 29, 2008, Respondent received Petitioner's initial application packet from the Brunswick County 911 Emergency Services Center, including Petitioner's Form F-3, a Report of Appointment form, and criminal records checks showing Petitioner's four pending Brunswick County "Simple Worthless Check" charges, and three 1997 Onslow County "Simple Worthless Check" convictions.

10. Subsequently, Stevens informed Petitioner that an AOC criminal record check showed she had another worthless check charge in Brunswick County. Stevens told Petitioner to pay the fines, and bring Stevens the receipts showing Petitioner had paid restitution.

11. On June 5, 2008, Petitioner was served with that "Simple Worthless Check" charge, offense date of 8/20/2007, in Brunswick County.

12. On July 31, 2008, Respondent received another Report of Appointment Form for Petitioner from Brunswick County 911 Director Tom Rogers. Petitioner had signed the Report of Appointment form on July 24, 2008, after being served with the 8/20/2007 "Simple Worthless Check" charge on June 5, 2008.

13. On August 5, 2008, Petitioner pled guilty to the 8/20/2007 "Simple Worthless Check" charge, and to four pending "Simple Worthless Check" charges in Brunswick County, and paid restitution on all such charges.

14. Additional criminal record checks revealed Petitioner had five worthless check convictions in Onslow County from 1993 and 1995. By letter dated October 3, 2008, Respondent sent a letter to Petitioner, at Petitioner's known mailing address, requesting additional missing information for her certification application, including an explanation why Petitioner failed to list those offenses on her Personal History Statement, Form F-3. Respondent's documentation showed that a Deputy Sheriff

served this letter on Petitioner on November 3, 2008. (Resp. Exh. 13)

15. On November 12, 2008, Respondent received an updated Personal History Statement from Petitioner listing all twelve worthless check convictions. (Resp Exh 3, p. 3)

16. In 2008, Respondent made no decision regarding Petitioner's certification status. By letter dated February 15, 2010, and sent to Brunswick County 911 Director Tom Rogers, Respondent advised Rogers that Petitioner's certification application continued to lack information in five areas.

17. In 2010, Respondent received additional information regarding Petitioner's certification. Respondent reserved ruling on Petitioner's certification, and held her application in a "pending" status until 2013 as her application still lacked certain required information.

18. As of July 1, 2013, the Brunswick County 911 telecommunicators were transferred under the leadership of the Brunswick County Sheriff's Office. Once certification became mandatory for Brunswick County 911 employees, all 911 telecommunicators were required to complete an updated Form F-3, pass the CVSA, and complete a personal history background.

19. After the Brunswick County Sheriff's Office began managing the 911 Communications Services Center, Petitioner learned of all pending charges that Respondent had against Petitioner. The Sheriff's office gave Petitioner copies of her certification file, including all the correspondence between Respondent and Stacey Stevens and Tom Rogers. That was the first time Petitioner had seen the paperwork regarding her certification, or knew there was problem with her certification. In an undated letter to Respondent, Petitioner informed Respondent that her agency had discovered numerous issues with incorrect paperwork, lost paperwork, no records on file for training and other issues after Stacey Stevens left the 911 agency. (Resp. Exh. 2)

20. By letter dated December 23, 2013, Respondent's Probable Cause Committee denied Petitioner's justice officer certification application for being convicted of the following twelve misdemeanor worthless check offenses:

Brunswick County

a. 2000CR 057037 Simple Worthless Check on 8/05/2008 – Guilty
b. 2000CR 057038 Simple Worthless Check on 8/05/2008 – Guilty
c. 2000CR 057039 Simple Worthless Check on 8/05/2008 – Guilty
d. 2008CR 050355 Simple Worthless Check on 8/05/2008 – Guilty

Onslow County

e. 1997CR 002957 Simple Worthless Check on 3/14/1997 – Guilty

f. 1997CR 012661 Simple Worthless Check on 8/04/1997 – Guilty
g. 1993CR 018398 Simple Worthless Check on 12/05/1993 – Guilty
h. 1993CR 019368 Simple Worthless Check on 12/051993 – Guilty
i. 1995CR 019503 Simple Worthless Check on 11/11/1993 – Guilty
j. 1993CR 019504 Simple Worthless Check on 11/11/1993 – Guilty
k. 1993CR 019505 Simple Worthless Check on 11/11/1993 - Guilty

Brunswick County

l. 2008CR 052804 Simple Worthless Check on 8/05/2008 – Guilty

Simple Worthless Check Convictions

21. At hearing, Petitioner admitted that she pled guilty, and was convicted of the above-cited twelve "Simple Worthless Check" offenses from 1993 through 2000. Petitioner admitted to writing five worthless checks in 1993 after being transferred with her job to Jacksonville NC, and trying to support herself during her first time moving away from home. She admitted writing four worthless checks in 2000 after she had separated from her husband, and was trying to support herself and her child without any support. Petitioner wrote two worthless checks in 2007, while trying to take care of her father, herself, and her child after her father had gotten a DWI shortly after her mother had passed away. These were difficult times, and Petitioner had to float checks to feed her family. She didn't mean to bounce any checks.

Material Misrepresentation

22. At hearing, Petitioner acknowledged, and took full responsibility for failing to list the 1997 Onslow County "Simple Worthless Check" convictions, and pending Brunswick County "Simple Worthless Check" charges on the Form F-3 in May of 2008. She explained how initially, she listed these convictions and pending charges on her Form F-3 in 2008. However, after Operations Manager Stevens reviewed Petitioner's Form F-3, Stevens advised Petitioner that she did not have any criminal convictions to list, because she had not been convicted in a court setting, and had paid restitution to the magistrate for such charges. Based on Stevens' statement, Petitioner did not list the "Simple Worthless check" convictions on her Form F-3 that she gave to Stevens.

23. On or after May 22, 2008, Ms. Stevens submitted Petitioner's certification application, along with Petitioner's AOC criminal record checks, to Respondent on Petitioner's behalf. (Resp Exh 10)

24. Petitioner did not intentionally fail to disclose any criminal convictions or pending criminal on her May 22, 2008 Form F-3 in order to deceive, defraud or misrepresent her criminal history to Respondent. However, she trusted Ms. Stevens, and relied on her advice not to list such charges and convictions on her Form F-3. Petitioner now knows she should have listed all criminal charges and convictions on the Form F-3.

Failure to Notify of Criminal Charges

25. On June 5, 2008, Petitioner was served and charged with a "Simple Worthless Check" with offense date of 8/20/07. This was fourteen days after Petitioner signed her Form F-3 on May 22, 2008. Petitioner never reported this offense to Respondent.

26. At hearing, Respondent's Deputy Director, Diane Konopka, opined that all applicants for telecommunicator certification are required to report all criminal charges to Respondent pursuant to 12 NCAC 10B .-301(a)(7). All applicants for certification are taught the five day reporting requirement contained in 12 NCAC 10B .0301(a)(7) during the orientation block of the Telecommunicator Officer Certification Course. Petitioner completed the Certification Course on April 4, 2008, and scored a 90% on the orientation block of training. (Resp Exh 7)

27. Ms. Konopka contacted Brunswick County Emergency Services and asked if that agency advised applicants they are to report criminal charges to Respondent's Division staff. By letter dated July 26, 2013, Stacey Stevens advised Respondent that her agency explained the original application process to each applicant and made each applicant aware of the requirements printed on the signature page of the required paperwork. She advised that "local policy also dictates notification of any charges by all employees." (Resp Exh 9)

28. On October 14, 2013, Ms. Stevens resigned as the Brunswick County 911 Operations Manager after being questioned about several employees' files and training paperwork not being turned into Respondent, and being incomplete. (Petitioner's Response to Respondent's Interrogatories)

29. At hearing, Petitioner denied failing to notify Respondent, within 5 days of being charged on June 5, 2008, for writing a worthless check (offense date 8/20/07). She explained that Operations Manager Stevens advised Petitioner of the "Simple Worthless Check" charge (offense date 8/20/07), and advised Petitioner to pay the fines and bring her the paid receipts. On August 5, 2008, Petitioner pled guilty to the 8/20/07 offense, paid restitution on that charge, and gave all her paperwork and receipts to Ms. Stevens to turn into Respondent. Petitioner trusted Ms. Stevens would report the new worthless check offense to Respondent in accordance with her agency's practice. Petitioner also thought Ms. Stevens had reported the matter to Respondent on her behalf, as that was the usual practice at the 911 Emergency Services Center.

Character Letters

30. Without objection from Respondent, Petitioner introduced six letters into evidence attesting to Petitioner's character. Brunswick County Sheriff John W Ingram opined that Petitioner is a very reliable and efficient worker in all areas of her supervisory position, does not complain about work, is well-respected, and well-liked by her coworkers. Ingram opined that Petitioner is of good moral character, and a phenomenal employee. He is happy to have her working for him.

31. Brunswick Communications Directors Lt. Todd Coring described Petitioner as a hard, dedicated, and loyal worker who knows her job, is very professional and dependable, and volunteers to work overtime without delay or complaint.

32. Brunswick Communications Director Kimberly Lewis noted that Petitioner is an instrumental part of her team who is well-liked, and an asset to their agency. Petitioner strives to instill her exceptional work ethic in the new employees she trains.

33. Petitioner's shift supervisor, Jonathan R Talley opined that Petitioner is of good moral character and is very organized, efficient, and extremely competent.

34. Alisha Beth Sue-Craft has worked with Petitioner for three years, and knows that Petitioner is very good at her job. She described how Petitioner has the patience of Job, and is very loyal. Sue-Craft explained that Petitioner paid for the worthless checks she wrote, and accepted fault for writing the worthless checks. She opined that the person(s) handling Petitioner's and other employees' certification paperwork in 2008 [Stacey Stevens] lacked good management skills.

35. In 2011, Sue-Craft completed her own sheriff's standards packet with Ms. Stevens' help. Sue-Craft was given all types of excuse when she questioned Stevens about her own paperwork. She explained that Petitioner and the 911 employees trusted their manager, Ms. Stevens, and Stevens failed.

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings in that the Office of Administrative Hearings has subject matter and personal jurisdiction in this matter, and each party received proper notice of hearing.

2. Pursuant to 12 NCAC 10B .0204(d), Respondent may revoke, suspend or deny the certification of a justice officer when the Commission finds that the applicant for certification or the certified officer has committed or been convicted of:

> (5) Any combination of four or more crimes or unlawful acts defined in 12 NCAC 10B .0103(10)(a) as a Class A misdemeanor or defined in 12 NCAC 10B .0103(10)(b) as a Class B misdemeanor regardless of the date of commission or conviction.

3. Pursuant to 12 NCAC 10B .0103(2), "convicted" or "conviction" means and includes, for purposes of this Chapter, the entry of a (A) guilty plea, (B) a verdict or finding of guilt by a jury, judge, magistrate, or other duly constituted, established, and recognized adjudicating body, tribunal, or official, either civilian or military, (C) a plea of no contest, nolo contendre, or the equivalent.

4. 12 NCAC 10B .0103 defines "Class A misdemeanor" as an act committed or omitted in violation of any common law, duly enacted ordinance or criminal statute of

this state, which is not classified as a Class B misdemeanor pursuant to Sub-item(10)(b) of this Rule. 12 NCAC 10B .0103 defines a "Class B misdemeanor" as an act committed or omitted in violation of any common law, criminal statute, or criminal traffic code of this state which is classified as a Class B Misdemeanor, as set forth in the "Class B Misdemeanor Manual" published by the North Carolina Department of Justice.

5. Pursuant to 12 NCAC 10B .0205(3)(d), when Respondent Commission denies a justice officer certification, the period of sanction shall be for an infinite period, but continuing so long as the stated deficiency, infraction, or impairment continues to exist, where the cause of sanction is commission or conviction of offenses as specified in 12 NCAC 10B .0204(d)(5).

Violation of 12 NCAC 10B .0204(a)(5)

6. The undisputed evidence at hearing proved that Petitioner was convicted of twelve separate "Simple Worthless Check" offenses in violation of N.C. Gen. Stat. § 14-107 from 1993 through 2000. Petitioner's fourth and subsequent worthless check offenses are considered Class B misdemeanors, as defined in the "Class B Misdemeanor Manual" published by the North Carolina Department of Justice. Based upon the combination of three Class A misdemeanor convictions of "Simple Worthless Check" in violation of N.C. Gen. Stat. § 14-107(d)(1), and nine Class B misdemeanor convictions of "Simple Worthless Check," Petitioner failed to comply with Respondent's rule at 12 NCAC 10B .0204(d)(5). Petitioner's application for certification application is therefore subject to denial for an indefinite period pursuant to 12 NCAC 10B .0204(d)(5).

7. Pursuant to 12 NCAC 10B .0205(3)(e), Respondent may either reduce or suspend the periods of sanction where the denial of certification is based on Subparagraph .0204(d)(5), or substitute a period of probation in lieu of revocation, suspension, or denial following an administrative hearing. Respondent may use its authority to reduce or suspend the period of sanction when extenuating circumstances brought out at the administrative hearing warrant such a reduction or suspension.

8. In this case, Petitioner presented extenuating circumstances sufficient for Respondent to justify substituting a period of probation for violating 12 NCAC 10B .0205(a)(5), in lieu of denying of Petitioner's justice officer application for certification .

Material Misrepresentation

9. 12 NCAC 10B .0204(c)(1) and (2) provides:

> (c) The Commission may revoke, deny, or suspend the certification of a justice officer when the Commission finds that the applicant for certification or certified justice officer:
>
> (1) Has knowingly made a material misrepresentation of any

information required for certification or accreditation from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission. This Subparagraph also applies to obtaining or attempting to obtain in-service firearms requalification as required by 12 NCAC 10B .2000 and .2100;

(2) Has knowingly and designedly by any means of false pretense, deception, fraud, misrepresentation or cheating whatsoever, obtained or attempted to obtain credit, training or certification from the Commission or the North Carolina Criminal Justice Education and Training Standards Commission. This Subparagraph also applies to obtaining or attempting to obtain in-service firearms requalification as required by 12 NCAC 10B .2000 and .2100;

10. The evidence at hearing failed to establish that Petitioner intentionally misrepresented and falsified her criminal background on her initial Form F-3 in order to misrepresent, deceive, or defraud Respondent about her criminal background.

a. The preponderance of the evidence showed that the normal practice of Brunswick County 911 telecommunicators in 2008 was for a telecommunicator to complete the Form F-3, and give it to Operations Manager Stacey Stevens, who would mail all required certification documents to Respondent for that employee. Petitioner and other employees relied upon Ms. Stevens for her advice on those certification matters, and trusted Stevens would mail their certification application documents to Respondent. Yet, Brunswick County 911 discovered numerous issues with incorrect paperwork, lost paperwork, and no records on file for training after Stacey Stevens left the 911 agency.

b. In 2008, Petitioner listed the "Simple Worthless Check" charges, that she knew about, on her Form F-3 before talking with Ms. Stevens. After talking with Stevens, Petitioner relied on Stevens' statement that Petitioner did not need to list her charges or convictions on the F-3, because she was not convicted in a court setting, and had paid restitution to the magistrate on such charges. Only after reviewing the Form F-3 with Ms. Stevens, did Petitioner omit her "Simple Worthless Check" charges or convictions on the 2008 Form F-3.

c. When Petitioner's certification application was sent to Respondent in 2008, Petitioner attached her criminal background checks, listing her worthless check convictions and pending charges to Petitioner's May 22, 2008 certification application. Attaching her criminal record checks to her certification application showed Petitioner was not trying to deceive or misrepresent her criminal background to Respondent. In November 2008, Petitioner sent an updated Form F-3 to Respondent listing all of her "Simple Worthless Check" convictions. Based on the foregoing, Petitioner did not violate 12 NCAC 10B .0204(c)(1) and (2)

Failure to Notify

11. 12 NCAC 10B .0301 Minimum Standards for Justice Officers states in part:

(a) Every justice officer employed or certified in North Carolina shall:

. . .

(7) make the following notifications:
(A) within five business days, notify the Standards Division and the appointing department head in writing of all criminal offenses with which the officer is charged. This

12. 12 NCAC 10B .0401 Certification of Personnel states:

(a) . . every person performing the duties of a telecommunicator as defined in 12 NCAC 10B .0103(15) and who is under the direct supervision and control of the Sheriff, shall meet the certification requirements of this Subchapter.

(b) Every person performing the duties of a telecommunicator as defined in 12 NCAC 10B .0103(15) who is not under the direct supervision and control of the Sheriff, may be appointed to the Division by the employing entity for purposes of obtaining certification; and if so appointed, shall meet the requirements of this Subchapter.

13. In this case, Respondent's Probable Cause Committee found probable cause to deny Petitioner's justice officer certification, because Petitioner failed to notify Respondent within 5 business days that she had been charged and served with a "Simple Worthless Check" offense (offense date 8/20/07) on June 5, 2008. At that time, the Brunswick County 911 Emergency Services Center was not under the leadership of the Brunswick County Sheriff's office, and thus, the 911 telecommunicators were not required to be certified by Respondent. Although Petitioner had been apprised of the duty to report criminal charges against her, under 12 NCAC 10B. 0301(a)(7), Petitioner failed to report such charge to Respondent.

14. Petitioner reported the 8/20/07 "Simple Worthless Check" charge to the 911 Operations Manager Stacey Stevens, and relied upon Stevens to report such charge to Respondent, based on the normal reporting practice of the 911 Center in 2008.

15. At hearing, Petitioner presented six character letters, ranging from coworkers to supervisors, to Brunswick County Sheriff Ingram, establishing her professionalism, good work ethic, and good reputation as a telecommunicator within Brunswick County. Petitioner also appeared to be a sincere and credible witness who accepted responsibility for her past mistakes.

16. There is sufficient evidence to deny Petitioner's justice officer certification application for violating the 5 day reporting requirement in 12 NCAC 10B .0301. However, given the extenuating circumstances presented by Petitioner at hearing, including her reliance on an employee who was not performing her job, the circumstances surrounding Petitioner's application for certification justify Respondent imposing a lesser sanction than denying Petitioner's certification.

PROPOSAL FOR DECISION

Based on the foregoing facts and Conclusions of Law, the undersigned proposes Respondent **DENY** Petitioner's justice officer certification for a specified time period for violating 12 NCAC 10B .0204(d)(5) and 12 NCAC 10B .0301(a)(7). However, Petitioner presented extenuating circumstances at the administrative hearing to support Respondent exercising its authority under 12 NCAC 10B .0205(3)(e) to substitute a probationary certification period, in lieu of a denial of Petitioner's certification.

NOTICE

The North Carolina Sheriffs' Education and Training Standards Commission will make the Final Decision in this contested case. That agency is required to give each party an opportunity to file exceptions to this Proposal for Decision, to submit proposed Findings of Fact and to present oral and written arguments to the agency pursuant to N.C. Gen. Stat. § 150B-40(e). In accordance with N.C. Gen. Stat. § 150B-36(b), each agency shall also serve a copy of the Final Decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, North Carolina, 27699-6714.

This 3rd day of October, 2014.

Melissa Owens Lassiter
Administrative Law Judge

STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF WAKE	**14 DOJ 02725**
PHILLIP CHARLES FORD,	
Petitioner,	
v.	**PROPOSAL FOR DECISION**
NORTH CAROLINA CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION,	
Respondent	

This case came on for hearing on August 29, 2014 before Administrative Law Judge Craig Croom in Fayetteville, North Carolina. This case was heard after Respondent requested, pursuant to N.C. Gen. Stat. § 150B-40(e), designation of an Administrative Law Judge to preside at the hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

APPEARANCES

Petitioner: Parisa Houshmandpour
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Respondent: Lauren Tally Earnhardt
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ISSUES

Does substantial evidence exist to suspend Petitioner's correctional officer certification for the commission of the "DAC Misdemeanor" offense of Injury to Personal Property greater than $200?

STATUTES AND RULES AT ISSUE

N.C. Gen. Stat. § 14-160
12 NCAC 09G .0102
12 NCAC 09G .0102(9)(u)
12 NCAC 09G .0504(b)(3)
12 NCAC 09G .0505(b)(1)

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following FINDINGS OF FACT.

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

FINDINGS OF FACT

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received notice of hearing, and that the Petitioner received by certified mail, the Proposed Suspension of Correctional Officer Certification letter, mailed by Respondent, the North Carolina Criminal Justice Education and Training Standards Commission (hereinafter "the Commission"), on March 13, 2014. (Respondent's Exhibit 2)

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

3. Petitioner was awarded probationary correctional officer certification by Respondent on September 24, 2012 and received general correctional officer certification on September 24, 2013. (Respondent's Exhibit 1)

4. Petitioner is employed as a correctional officer with the North Carolina Department of Corrections, Harnett Correctional Institution.

5. Kevin Wallace, an investigator with Respondent since January 2013, testified at the hearing. On January 15, 2013, Respondent received a Report of Arrest memo from North Carolina Department of Public Safety indicating on December 24, 2012, Petitioner was arrested and charged with "Injury to Personal Property" in violation of N.C.G.S. § 14-160. The warrant for arrest indicates Petitioner unlawfully and willfully did wantonly injure clothing, shoes, school supplies, the personal property of Lorraine Nyakinyua and that the damage caused was in excess

of $200.00.

6. On January 3, 2014, Mr. Wallace received a certified true copy of the disposition in Petitioners' case. The judgment showed that Petitioner pled not guilty to "Injury to Personal Property" and was found guilty as charged on April 23, 2013 in front of a Wake County District Court Judge. Mr. Wallace also received a document titled "Criminal Domestic Violence PJC Contract" from the Wake County Clerk of Court. The document is signed by Petitioner and has the charge of "Injury to Personal Property" on the top and contains the following agreement; "I understand that I have pled guilty or have been found guilty of the charges listed above. I agree to attend and successfully complete an educational program or programs for the express purpose of learning to be non-abusive. I understand if I am unable to successfully complete any aspect of this agreement, the State will pray judgment and the Court shall enter judgment against me." The agreement also indicates Petitioner will successfully complete an abuser treatment program, the Safechild program and will not threaten, harass, or assault Lorraine Nyakinyua or her son. The PJC compliance date was scheduled for April 23, 2014 and as of this hearing Petitioner still stands convicted of the "Injury to Personal Property."

7. Raleigh Police Officer Nathan A. Jackson testified at the hearing. Officer Jackson was on duty as a patrol officer on December 22, 2012 and around 8:45 a.m. was called to Lorraine Naykinyua's apartment on Walnut Creek Parkway in Raleigh, North Carolina. Officer Jackson spoke with Ms. Naykinyua who explained that she had worked over night the previous night and when she arrived back at her apartment that morning she noticed her apartment had been damaged. Ms. Naykinyua appeared upset. Officer Jackson investigated the two bedroom apartment and found kitchen trash dumped on the living room floor, and a liquid all over the couch and the floor in the living room. The couch and carpet were wet to the touch. Ms. Naykinyua found her son's book bag and a large trash bag containing her clothing and some of her son's clothing in the apartment dumpster. The book bag was dark in color and full of completely wet school books. Officer Jackson also found some of Lorraine's clothing including shoes, and a bra, submerged in the apartment toilet. The total damage to the property was estimated by Officer Jackson to be over two hundred dollars ($200.00). Officer Jackson determined there was no forced entry into the apartment and that Ms. Naykinyua had been living there with her 8 year old son and her boyfriend, Petitioner. Almost all of Petitioner's personal items were no longer in the apartment. Officer Jackson made multiple attempts to contact Petitioner by phone to get his side of the story, but was unsuccessful. Officer Jackson did not determine any other location where Petitioner was living. Officer Jackson then went to the Magistrate and received a warrant charging Petitioner with Injury to Personal Property of more than $200.00.

8. Lorraine Naykinyua was served two subpoenas by Respondent to testify at the hearing but did not appear. Officer Jackson was aware of Ms. Naykinyua's previous testimony under oath at the district court criminal trial where Petitioner was found guilty of "Injury to Personal Property." Petitioner was present at the trial and was able to cross examine Ms. Naykinyua about her testimony. Ms. Naykinyua was declared an unavailable witness under Rule 804(a)(5) of the North Carolina Rules of Evidence, and her former testimony was recounted by Officer Jackson and admitted under Rule 804(b)(1) of the North Carolina Rules of Evidence. Officer Jackson was surprised by Ms. Naykinyua's testimony because, while it was consistent

with what she told him at the scene, she arrived and left the district courtroom with Petitioner. Ms. Naykinyua testified in Wake County District Court that she and Petitioner had an argument over rent earlier on December 21, 2012. When she left for her overnight shift everything seemed fine and Petitioner was at the apartment they shared together. However, when she arrived home from work on the morning of December 22, 2012, she found her apartment and personal property damaged. Ms. Naykinyua testified that Petitioner was the only one other than herself who had a key to the apartment.

9. Petitioner did not testify at the hearing. He did not call any witnesses to testify on his behalf or offer any exhibits. The evidence at trial is uncontroverted.

CONCLUSIONS OF LAW

1. The parties are properly before the undersigned Administrative Law Judge and jurisdiction and venue are proper.

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

3. 12 NCAC 09G .0504(b)(3) provides that the North Carolina Criminal Justice Education and Training Standards Commission may, based on the evidence for each case, suspend, revoke, or deny the certification of a corrections officer when the Commission finds that the applicant for certification or the certified officer: (3) has committed or been convicted of a misdemeanor as defined in 12 NCAC 09G .0102 after certification.

4. 12 NCAC 09G .0505(b)(1) provides that when the North Carolina Criminal Justice Education and Training Standards Commission suspends or denies the certification of a corrections officer for the commission of a misdemeanor, the period of sanction shall be not less than three years, however, the Commission may either reduce or suspend the period of sanction or substitute a period of probation in lieu of suspension of certification.

5. Injury to Personal Property greater than $200.00 in violation of N.C. Gen .Stat. § 14-160 is a DAC misdemeanor as defined in 12 NCAC 09G. 0102(9)(u).

6. N.C. Gen. Stat. §14-160 states that if any person shall wantonly and willfully injure the personal property of another, causing damage in an amount in excess of two hundred dollars ($200.00), he shall be guilty of a Class 1 misdemeanor.

7. 12 NCAC 09G .0102(9)(u) defines "Misdemeanor" for corrections officers means those criminal offenses not classified under the laws, statutes, or ordinances as felonies. Misdemeanor offenses for corrections officers are classified by the Commission as follows: (u) willful and wanton injury to personal property greater than two hundred dollars ($200.00).

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

9. Respondent has the burden of proof in the case at bar. Respondent shall show by a preponderance of evidence that Petitioner committed the offense of Injury to Personal Property greater than $200.00. While Officer Jackson estimated the damage to be over two hundred dollars ($200.00), we have no basis of knowledge to rely on this estimate. Therefore, Respondent has failed to meet its burden of showing damage in excess of two hundred dollars ($200.00).

PROPOSAL FOR DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned finds that Respondent has failed to show by a preponderance of evidence that Petitioner committed the offense of Injury to Personal Property greater than $200.00.

NOTICE

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

The agency that will make the final decision in this contested case is the North Carolina Criminal Justice Education and Training Standards Commission.

This the 14th day of November, 2014.

Craig Croom
Administrative Law Judge