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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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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

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EXPLANATION OF THE PUBLICATION SCHEDULE

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

GENERAL

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

(1) temporary rules;
(2) text of proposed rules;
(3) text of permanent rules approved by the Rules Review Commission;
(4) emergency rules
(5) Executive Orders of the Governor;
(6) final decision letters from the U.S. Attorney General concerning changes in laws affecting voting in a jurisdiction subject of Section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H; and
(7) other information the Codifier of Rules determines to be helpful to the public.

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

FILING DEADLINES

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

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

NOTICE OF TEXT

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

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

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

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

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NOTICE OF RULE MAKING PROCEEDINGS AND PUBLIC HEARING

NORTH CAROLINA BUILDING CODE COUNCIL

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

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

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

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

Public Hearing: Tuesday, *March 10, 2015, 9:00AM, NCSU McKimmon Center, 1101 Gorman Street, Raleigh, NC 27606. Comments on both the proposed rule and any fiscal impact will be accepted.*

Comment Procedures: *Written comments may be sent to Barry Gupton, Secretary, NC Building Code Council, NC Department of Insurance, 322 Chapanoke Road, Suite 200, Raleigh, NC 27603. Comments on both the proposed rule and any fiscal impact will be accepted. Comment period expires on April 17, 2015.*

Statement of Subject Matter:

1a. Request by Paul Coats, PE, CBO, to amend the 2012 NC Building Code, Sections 602.4. The proposed amendment is as follows:

Add a definition in Chapter 2:
[BS] CROSS-LAMINATED TIMBER. A prefabricated engineered wood product consisting of not less than three layers of solid-sawn lumber or *structural composite lumber* where the adjacent layers are cross oriented and bonded with structural adhesive to form a solid wood element.

Revise as follows:
602.4 Type IV. Type IV construction (Heavy Timber, HT) is that type of construction in which the exterior walls are of noncombustible materials and the interior building elements are of solid or laminated wood without concealed spaces. The details of Type IV construction shall comply with the provisions of this section and Section 2304.10. ~~*Fire-retardant-treated wood* framing~~ Exterior walls complying with Section ~~2303.2~~ 602.4.1 or 602.4.2 shall be ~~permitted within exterior wall assemblies with a 2-hour rating or less~~permitted. Minimum solid sawn nominal dimensions are required for structures built using Type IV construction (HT). For glued-laminated members, the equivalent net finished width and depths corresponding to the minimum nominal width and depths of solid sawn lumber are required as specified in Table 602.4. *Cross-laminated timber* (CLT) dimensions used in this section are actual dimensions.

602.4.1 Fire-retardant-treated wood in exterior wall. Fire-retardant wood framing complying with Section 2303.2 shall be permitted within exterior wall assemblies with a 2-hour rating or less.

602.4.2 Cross-laminated timber in exterior walls. Cross-laminated timber complying with Section 2303.1.4 shall be permitted within exterior wall assemblies with a 2-hour rating or less, provided the exterior surface of the cross-laminated timber is protected by one of the following:
1. Fire-retardant-treated wood sheathing complying with Section 2303.2 and not less than 15/32 inch (12 mm) thick;
2. Gypsum board not less than ½ inch (12.7 mm) thick; or
3. A noncombustible material

~~**602.4.1**~~ **602.4.3 Columns.** *(no change, only renumbering)*

~~**602.4.2**~~ **602.4.4 Floor framing.** *(no change, only renumbering)*

~~**602.4.3**~~ **602.4.5 Roof framing.** *(no change, only renumbering)*

~~**602.4.4**~~ **602.4.6 Floors.** *(no change, only renumbering)*

602.4.6.1 Cross-laminated timber floors. Cross-laminated timber shall be not less than 4 inches (102 mm) in thickness. Cross-laminated timber shall be continuous from support to support and mechanically fastened to one another. Cross-laminated timber shall be permitted to be connected to walls without a shrinkage gap providing swelling or shrinking is considered in the design. Corbelling of masonry walls under the floor shall be permitted to be used.

~~602.4.5~~ **602.4.7 Roofs.** Roofs shall be without concealed spaces and wood roof decks shall be sawn or glued-laminated, splined or tongue-and-groove plank, not less than 2 inches (51 mm) nominal in thickness~~,~~ ; 11/8-inch-thick (32 mm) wood structural panel (exterior glue)~~,~~ ; ~~or of~~ planks not less than 3 inches (76 mm) nominal in width, set on edge close together and laid as required for floors~~.~~ ; or cross-laminated timber. Other types of decking shall be permitted to be used if providing equivalent *fire resistance* and structural properties.
Cross-laminated timber roofs shall be not less than 3 inches (76 mm) nominal in thickness and shall be continuous from support to support and mechanically fastened to one another.

~~602.4.6~~ **602.4.8 Partitions and walls.** Partitions and walls shall comply with Section 602.4.8.1 or 602.4.8.2.

602.4.8.1 Interior walls and partitions. Interior walls and p~~P~~artitions shall be of solid wood construction formed by not less than two layers of 1-inch (25 mm) matched boards or laminated construction 4 inches (102 mm) thick, or of 1-hour fire-resistance-rated construction.

602.4.8.2 Exterior walls. Exterior walls shall be one of the following:
1. Noncombustible materials
2. Not less than 6 inches (152 mm) in thickness and constructed of one of the following:
2.1 Fire-retardant-treated wood in accordance with Section 2303.2 and complying with Section 602.4.1.
2.2 Cross-laminated timber complying with Section 602.4.2.

~~602.4.7~~ **602.4.9 Exterior structural members.** *(no change, only renumbering)*

2302.1 Definitions.

Insert as follows:
CROSS-LAMINATED TIMBER. A prefabricated engineered wood product consisting of not less than three layers of solid-sawn lumber or *structural composite lumber* where the adjacent layers are cross oriented and bonded with structural adhesive to form a solid wood element.

Revise as follows:
2303.1.4 Structural glued cross-laminated timber. Cross-laminated timbers shall be manufactured and identified in accordance with ANSI/APA PRG 320.

~~2303.1.4~~ **2303.1.5 Wood structural panels.** *(no change, only renumbering)*

(Renumber subsequent sections accordingly)

Add to Chapter 35 under APA:
ANSI/APA PRG 320-2012 Standard for Performance-rated Cross Laminated Timber ……2303.1.4

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – The purpose of this amendment is in response to increased interest in the use of cross-laminated timber in projects in North Carolina. These provisions have been approved by the International Code Council for the 2015 IBC and IRC.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

1b. Request by Paul Coats, PE, CBO, to amend the 2012 NC Residential Code, Sections R502, R602, and R802. . The proposed amendment is as follows:

Add a definition in Chapter 2:
CROSS-LAMINATED TIMBER. A prefabricated engineered wood product consisting of not less than three layers of solid-sawn lumber or *structural composite lumber* where the adjacent layers are cross oriented and bonded with structural adhesive to form a solid wood element.

Revise as follows:
R502.1.6 Cross-laminated timber. Cross-laminated timber shall be manufactured and identified as required by ANSI/APA PRG 320.

Revise as follows:
R502.8.2 Engineered wood products. Cuts, notches and holes bored in trusses, structural glue-laminated members, cross-laminated timber members or I-joists are prohibited except where permitted by the manufacturer's recommendations or where the effects of such alterations are specifically considered in the design of the member by a *registered design professional.*

Revise as follows:
R602.1.3 Cross-laminated timber. Cross-laminated timber shall be manufactured and identified as required by ANSI/APA PRB 320.

~~**R602.1.3**~~ **R602.1.4Structural log members.** *(no change, only renumbering)*

Revise as follows:
R802.1.5 Cross-laminated timber. Cross-laminated timber shall be manufactured and identified as required by ANSI/APA PRB 320.

~~**R802.1.5**~~ **R802.1.6 Structural log members.** *(no change, only renumbering)*

Revise as follows:
R802.7.2 Engineered wood products. Cuts, notches and holes bored in trusses, structural composite lumber, structural glue-laminated, cross-laminated timber members or I-joists are prohibited except where permitted by the manufacturer's recommendations or where the effects of such alterations are specifically considered in the design of the member by a *registered design professional*.

Add to Chapter 44 under APA:
ANSI/APA PRG 320-2012 Standard for Performance-rated Cross Laminated Timber……R502.1.6, R602.1.3, R802.1.5

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – The purpose of this amendment is in response to increased interest in the use of cross-laminated timber in projects in North Carolina. These provisions have been approved by the International Code Council for the 2015 IBC and IRC.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

2. Request by Paul Coats, PE, CBO, to amend the 2012 NC Energy Conservation Code, TABLE 502.1.2. The proposed amendment is as follows:

TABLE 502.1.2
BUILDING ENVELOPE REQUIREMENTS OPAQUE ELEMENT, MAXIMUM U-FACTORS

Climate Zone	3		4		5	
	All Other	Group R	All Other	Group R	All Other	Group R
Roofs						
Insulation entirely above deck	U-0.039	U-0.039	U-0.032	U-0.032	U-0.032	U-0.032
Metal buildings (with R-5 thermal blocks[a])	U-0.041	U-0.041	U-0.035	U-0.035	U-0.035	U-0.035
Attic and other	U-0.027	U-0.041	U-0.021	U-0.021	U-0.021	U-0.021
Walls, Above Grade						
Mass	U-0.123	U-0.104	U-0.104	U-0.090	U-0.090	U-0.060
Metal Building	U-0.072	U-0.050	U-0.060	U-0.050	U-0.050	U-0.050
Metal framed	U-0.064	U-0.064	~~U-0.055~~ U-0.064	~~U-0.049~~ U-0.064	~~U-0.049~~ U-0.064	~~U-0.043~~ U-0.064
Wood framed and other	U-0.064	~~U-0.051~~ U-0.064	~~U-0.051~~ U-0.064	~~U-0.045~~ U-0.064	~~U-0.045~~ U-0.064	~~U-0.041~~ U-0.064
Walls, Below Grade						
Below-grade wall[a]	C-0.119	C-0.119	C-0.119	C-0.092	C-0.119	C-0.092
Floors						
Mass	U-0.064	U-0.064	U-0.057	U-0.051	U-0.057	U-0.051
Joist/Framing	U-0.033	U-0.033	U-0.027	U-0.027	U-0.027	U-0.027
Slab-on-Grade Floors						

Unheated slabs	F-0.730	F-0.540	F-0.520	F-0.520	F-0.520	F-0.510
Heated slabs	F-0.860	F-0.860	F-0.688	F-0.688	F-0.688	F-0.688

a. When heated slabs are placed below-grade, below grade walls must meet the *F*-factor requirements for perimeter insulation according to the heated slab-on-grade construction.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – This purpose of this proposal is to adjust U-values for steel and wood frame walls for consistency. These provisions have been approved by the International Code Council for the 2015 IECC.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with a small decrease in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

3. Request by Richard Strickland, representing NCDOI-Engineering, to amend the 2012 NC Fire Prevention Code, Section 106. The proposed amendment is as follows:

SECTION 106
INSPECTIONS

In order to preserve and protect public health and safety and to satisfy the requirements of General Statute 153A-364 and General Statute 160A-424, political subdivisions assuming inspection duties, as set out in General Statute 153A-351 and General Statute 160A-411, shall have a periodic inspection schedule for the purpose of identifying activities and conditions in buildings, structures and premises that pose dangers of fire, explosion or related hazards. Such inspection schedule shall be approved by the local governing body and shall be submitted to the Office of State Fire Marshal of the Department of Insurance. In no case shall inspections be conducted less frequently than described in the schedule below:

Once every year	Hazardous, institutional, high-rise assembly except those noted below, and Residential except one- and two family dwellings and only interior common areas of dwelling units of multi-family occupancies.
	<u>New and existing lodging establishments (hotels, motels, bed and breakfast homes and inns, tourist homes, and extended stay lodging establishments for the installation and maintenance of carbon monoxide alarms and/or detectors in accordance with G.S. 143-138(b2).</u>
Once every two years	Industrial and educational (except public schools).
Once every three years	Assembly occupancies with an occupant load less than 100, business, mercantile, storage, churches, synagogues, and miscellaneous Group U occupancies.

Frequency rates for inspections of occupancies as mandated by the North Carolina General Statutes shall supersede this schedule. Nothing in this section is intended to prevent a jurisdiction from conducting more frequent inspections than the schedule listed above or the schedule filed with the Office of State Fire Marshal of the Department of Insurance.

On unattended or vacant structures, the fire code official shall affix a letter on the premises in a conspicuous place at or near the entrance to such premises requesting an inspection in accordance with this section. This order of notice shall be mailed by registered or certified mail with return receipt requested, to the last known address of the owner, occupant or both. If the owner, occupant or both shall fail to respond to said notice within 10 calendar days, these actions by the fire code official shall be deemed to constitute an inspection in accordance with this section.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is August 1, 2015.
Reason Given – This proposal is to satisfy the requirements of SL2014-120, Section 22(c)(3) to modify the minimum fire inspection schedule to include the inspection of new and existing lodging establishments for CO alarms and detectors.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

4. Request by Richard Strickland, representing NCDOI-Engineering, to amend the 2012 NC Fire Prevention (and Building) Code. The proposed amendment is as follows:

<u>Delete Section 908.7 and add Section 915</u>

<u>SECTION 915</u>
<u>CARBON MONOXIDE DETECTION</u>

915.1 General. Carbon monoxide detection shall be installed in new buildings in accordance with Sections 915.1.1 through 915.6.~~Carbon monoxide detection shall be installed in existing buildings in accordance with Section 1103.9.~~

915.1.1 Where required. Carbon monoxide detection shall be provided in Group I-1, I-2, I-4 and R occupancies and in classrooms in Group E occupancies in the locations specified in Section 915.2 where any of the conditions in Sections 915.1.2 through 915.1.6 exist.

915.1.2 Fuel-burning appliances and fuel-burning fireplaces. Carbon monoxide detection shall be provided in dwelling units, sleeping units and classrooms that contain a fuel-burning appliance or a fuel-burning fireplace.

915.1.3 Forced air furnaces. Carbon monoxide detection shall be provided in dwelling units, sleeping units and classrooms served by a fuel-burning, forced air furnace.
Exception: Carbon monoxide detection shall not be required in dwelling units, sleeping units and classrooms where carbon monoxide detection is provided in the first room or area served by each main duct leaving the furnace, and the carbon monoxide alarm signals are automatically transmitted to an approved location.

915.1.4 Fuel-burning appliances outside of dwelling units, sleeping units and classrooms. Carbon monoxide detection shall be provided in dwelling units, sleeping units and classrooms located in buildings that contain fuel-burning appliances or fuel-burning fireplaces.
Exceptions:
1. Carbon monoxide detection shall not be required in dwelling units, sleeping units and classrooms if there are no communicating openings between the fuel-burning appliance or fuel-burning fireplace and the dwelling unit, sleeping unit or classroom.
2. Carbon monoxide detection shall not be required in dwelling units, sleeping units and classrooms if carbon monoxide detection is provided in one of the following locations:
2.1 In an approved location between the fuel-burning appliance or fuel-burning fireplace and the dwelling unit, sleeping unit or classroom.
2.2 On the ceiling of the room containing the fuel-burning appliance or fuel-burning fireplace.

915.1.5 Private garages. Carbon monoxide detection shall be provided in dwelling units, sleeping units and classrooms in buildings with attached private garages.
Exceptions:
1. Carbon monoxide detection shall not be required where there are no communicating openings between the private garage and the dwelling unit, sleeping unit or classroom.
2. Carbon monoxide detection shall not be required in dwelling units, sleeping units and classrooms located more than one story above or below a private garage.
3. Carbon monoxide detection shall not be required where the private garage connects to the building through an open-ended corridor.
4. Where carbon monoxide detection is provided in an approved location between openings to a private garage and dwelling units, sleeping units or classrooms, carbon monoxide detection shall not be required in the dwelling units, sleeping units or classrooms.

915.1.6 Exempt garages. For determining compliance with Section 915.1.5, an open parking garage complying with Section 406.5 of the International Building Code or an enclosed parking garage complying with Section 406.6 of the International Building Code shall not be considered a private garage.

915.2 Locations. Where required by Section 915.1.1, carbon monoxide detection shall be installed in the locations specified in Sections 915.2.1 through 915.2.3.

915.2.1 Dwelling units. Carbon monoxide detection shall be installed in dwelling units outside of each separate sleeping area in the immediate vicinity of the bedrooms. Where a fuel-burning appliance is located within a bedroom or its attached bathroom, carbon monoxide detection shall be installed within the bedroom.

915.2.2 Sleeping units. Carbon monoxide detection shall be installed in sleeping units.
Exception: Carbon monoxide detection shall be allowed to be installed outside of each separate sleeping area in the immediate vicinity of the sleeping unit where the sleeping unit or its attached bathroom does not contain a fuel-burning appliance and is not served by a forced air furnace.

915.2.3 Group E occupancies. Carbon monoxide detection shall be installed in classrooms in Group E occupancies. Carbon monoxide alarm signals shall be automatically transmitted to an on-site location that is staffed by school personnel.
Exception: Carbon monoxide alarm signals shall not be required to be automatically transmitted to an on-site location that it staffed by school personnel in Group E occupancies with an occupant load of 30 or less.

915.3 Detection equipment. Carbon monoxide detection required by Sections 915.1 through 915.2.3 shall be provided by carbon monoxide alarms complying with Section 915.4 or with carbon monoxide detection systems complying with Section 915.5.

915.4 Carbon monoxide alarms. Carbon monoxide alarms shall comply with Sections 915.4.1 through 915.4.3.

915.4.1 Power source. Carbon monoxide alarms shall receive their primary power from the building wiring where such wiring is served from a commercial source, and when primary power is interrupted, shall receive power from a battery. Wiring shall be permanent and without a disconnecting switch other than that required for overcurrent protection.
Exception: Where installed in buildings without commercial power, battery-powered carbon monoxide alarms shall be an acceptable alternative.

915.4.2 Listings. Carbon monoxide alarms shall be listed in accordance with UL 2034.

915.4.3 Combination alarms. Combination carbon monoxide/smoke alarms shall be an acceptable alternative to carbon monoxide alarms. Combination carbon monoxide/smoke alarms shall be listed in accordance with UL 2034 and UL 217.

915.5 Carbon monoxide detection systems. Carbon monoxide detection systems shall be an acceptable alternative to carbon monoxide alarms and shall comply with Sections 915.5.1 through 915.5.3.

915.5.1 General. Carbon monoxide detection systems shall comply with NFPA 720. Carbon monoxide detectors shall be listed in accordance with UL 2075.

915.5.2 Locations. Carbon monoxide detectors shall be installed in the locations specified in Section 915.2. These locations supersede the locations specified in NFPA 720.

915.5.3 Combination detectors. Combination carbon monoxide/smoke detectors installed in carbon monoxide detection systems shall be an acceptable alternative to carbon monoxide detectors, provided they are listed in accordance with UL 2075 and UL 268.

915.6 Maintenance. Carbon monoxide alarms and carbon monoxide detection systems shall be maintained in accordance with NFPA 720. Carbon monoxide alarms and carbon monoxide detectors that become inoperable or begin producing end-of-life signals shall be replaced.

Add the following definition to:

SECTION 202
GENERAL DEFINITIONS

[B] PRIVATE GARAGE. A building or portion of a building in which motor vehicles used by the tenants of the building or buildings on the premises are stored or kept, without provisions for repairing or servicing such vehicles for profit.

Revise Chapter 47 as follows:

NFPA 720 – ~~09~~ 12

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is August 1, 2015.
Reason Given – This proposal is to satisfy the requirements of SL2014-120, Section 22(c)(3) to modify the minimum fire inspection schedule to include the inspection of new and existing lodging establishments for CO alarms and detectors.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

5. Request by Jerry Fraker, City of Raleigh, to amend the 2012 NC Plumbing Code, Section 715.1. The proposed amendment is as follows:

715.1 Sewage backflow. ~~Where the flood level rims of plumbing fixtures are~~ Where plumbing fixtures are installed on a floor with a finished floor elevation below the elevation of the manhole cover of the next upstream manhole in the *public sewer*, such fixtures shall be protected by a backwater valve installed in the *building drain*, *branch* of the *building drain* or horizontal *branch* serving such fixtures. ~~Plumbing fixtures having flood level rims above the~~ Plumbing fixtures installed on a floor with a finished floor elevation above the elevation of the manhole cover of the next upstream manhole in the *public sewer* shall not discharge through a backwater valve.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – This proposal is add protection for fixtures by changing the flood level from the fixture rim to the floor level. This provision has been approved by the International Code Council for the 2015 IPC.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

6. Request by Ron George, CPD, President, Plumb-Tech Design & Consulting Services, LLC, on behalf of Wavin, HEPVO, to amend the 2012 NC Plumbing Code, Sections 1002.1, 1002.3, 1002.4, & Chapter 13 REFERENCED STANDARDS. The proposed amendment is as follows:

1002.1 Fixture traps. Each plumbing fixture shall be separately trapped by a liquid-seal trap, except as otherwise permitted by this code. The vertical distance from the fixture outlet to the trap weir shall not exceed 24 inches (610 mm), and the horizontal distance shall not exceed 30 inches (762 mm) measured from the centerline of the fixture outlet to the centerline of the inlet of the trap. The height of a clothes washer standpipe above a trap shall conform to Section 802.4. A fixture shall not be double trapped.
Exceptions:
1. This section shall not apply to fixtures with integral traps.
2. A combination plumbing fixture or up to three similar fixtures is permitted to be installed on one trap, provided that one compartment is not more than 6 inches (152 mm) deeper than the other compartment and the waste outlets are not more than 30 inches (762 mm) apart.
3. A grease interceptor intended to serve as a fixture trap in accordance with the manufacturer's installation instructions shall be permitted to serve as the trap for a single fixture or a combination sink of not more than three compartments where the vertical distance from the fixture outlet to the inlet of the interceptor does not exceed 30 inches (762 mm) and the *developed length* of the waste pipe from the most upstream fixture outlet to the inlet of the interceptor does not exceed 60 inches (1524 mm).
4. The connection of a laundry tray complying with Section 802.4.
5. In 1 and 2 family applications or in residential applications, devices that comply with ASME A112.18.8-2009 "In-Line Sanitary Waste Valves for Plumbing Drainage Systems" shall not be required to have a liquid seal.
6. Devices conforming to ASME A112.18.8 shall be used on fixture drains 1½ inches in diameter and smaller.

1002.3 Prohibited traps. The following types of traps are prohibited:
1. Traps that depend on moving parts to maintain the seal.
2. Bell traps.
3. Crown-vented traps.
4. Traps not integral with a fixture and that depend on interior partitions for the seal, except those traps constructed of an *approved* material that is resistant to corrosion and degradation.
5. "S" traps.
6. Drum traps.
Exceptions:
1. Drum traps used as solids interceptors and drum traps serving chemical waste systems shall not be prohibited.
2. In residential applications or in 1 and 2 family dwellings, devices that comply with ASME A112.18.8-2009 "In-Line Sanitary Waste Valves for Plumbing Drainage Systems" shall be permitted.

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

Approved Means of Maintaining Trap Seals. Approved means of maintaining trap seals include the following, but are not limited to the methods cited:
1. A listed trap seal primer conforming to ASSE 1018 and ASSE 1044.
2. A hose bibb or bibbs within the same room.
3. Drainage from an untrapped lavatory discharging to the tailpiece of those fixture traps which require priming. All fixtures shall be in the same room and on the same floor level as the trap primer.
4. Barrier type floor drain trap seal protection devices meeting ASSE Standard 1072.
5. Deep seal p-trap.
6. Devices conforming to ASME A112.18.8 "In-Line Sanitary Waste Valves for Plumbing Drainage Systems."

CHAPTER 13: REFERENCED STANDARDS

Standard Reference Number A112.18.8—2009
Title In-Line Sanitary Waste Valves for Plumbing Drainage Systems
Referenced in Code Section Number 1002.1, 1002.3, 1002.4

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – This proposal is to allow products conforming to a new consensus plumbing industry standard. These devices provide another option to traps that are subject to freezing or evaporation.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

7. Request by Jerry Fraker, City of Raleigh, to amend the 2012 NC Plumbing Code, Section 606.1. The proposed amendment is to require full open valves within each tenant space:

Motion/Second/Denied – No further action will be taken on this item.
Reason Given – This proposal will add additional cost without substantial benefit, especially in renovations to existing buildings.
Fiscal Statement – A fiscal note has not been prepared.

8. Request by Terry Cromer, to amend the 2011 NC Electrical Code, Article 300.9. The proposed amendment is as follows:

300.9 Raceways in Wet Locations Above Grade. Where raceways are installed in wet locations above grade, the interior of these raceways shall be considered a wet location~~. Insulated conductors and cables installed in raceways in wet locations above grade shall comply with 310.10(C)~~ unless all fittings and enclosures are approved for outdoors. Where condensation is known to be a problem the requirements of 300.7(A) shall apply.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – This proposal is to recognize the interior of enclosures with listed "rain-tight" fittings as dry locations.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

9. Request by Leon Skinner, NCEBC Ad Hoc Committee Chair, to amend the 2012 NC Existing Building Code, Section 202, 403.7, 703.2, 1203.13 and 1401.2.6. The proposed amendment is as follows:

Add the following definition:

SECTION 202
GENERAL DEFINITIONS

[B] PRIVATE GARAGE. A building or portion of a building in which motor vehicles used by the tenants of the building or buildings on the premises are stored or kept, without provisions for repairing or servicing such vehicles for profit.

SECTION 403.7
CARBON MONOXIDE DETECTION

403.7.1 General. Carbon monoxide detection shall be installed in new buildings in accordance with Sections 403.7.1 through 403.7.6.

403.7.1.1 Where required. Carbon monoxide detection shall be provided in Group I-1, I-2, I-4 and R occupancies and in classrooms in Group E occupancies in the locations specified in Section 403.7.2 where any of the conditions in Sections 403.7.1.2 through 403.7.1.6 exist.

403.7.1.2 Fuel-burning appliances and fuel-burning fireplaces. Carbon monoxide detection shall be provided in dwelling units, sleeping units and classrooms that contain a fuel-burning appliance or a fuel-burning fireplace.

403.7.1.3 Forced air furnaces. Carbon monoxide detection shall be provided in dwelling units, sleeping units and classrooms served by a fuel-burning, forced air furnace.
Exception: Carbon monoxide detection shall not be required in dwelling units, sleeping units and classrooms where carbon monoxide detection is provided in the first room or area served by each main duct leaving the furnace, and the carbon monoxide alarm signals are automatically transmitted to an approved location.

403.7.1.4 Fuel-burning appliances outside of dwelling units, sleeping units and classrooms. Carbon monoxide detection shall be provided in dwelling units, sleeping units and classrooms located in buildings that contain fuel-burning appliances or fuel-burning fireplaces.

Exceptions:

1. Carbon monoxide detection shall not be required in dwelling units, sleeping units and classrooms if there are no communicating openings between the fuel-burning appliance or fuel-burning fireplace and the dwelling unit, sleeping unit or classroom.
2. Carbon monoxide detection shall not be required in dwelling units, sleeping units and classrooms if carbon monoxide detection is provided in one of the following locations:

2.1 In an approved location between the fuel-burning appliance or fuel-burning fireplace and the dwelling unit, sleeping unit or classroom.

2.2 On the ceiling of the room containing the fuel-burning appliance or fuel-burning fireplace.

403.7.1.5 Private garages. Carbon monoxide detection shall be provided in dwelling units, sleeping units and classrooms in buildings with attached private garages.

Exceptions:

1. Carbon monoxide detection shall not be required where there are no communicating openings between the private garage and the dwelling unit, sleeping unit or classroom.
2. Carbon monoxide detection shall not be required in dwelling units, sleeping units and classrooms located more than one story above or below a private garage.
3. Carbon monoxide detection shall not be required where the private garage connects to the building through an open-ended corridor.
4. Where carbon monoxide detection is provided in an approved location between openings to a private garage and dwelling units, sleeping units or classrooms, carbon monoxide detection shall not be required in the dwelling units, sleeping units or classrooms.

403.7.1.6 Exempt garages. For determining compliance with Section 403.7.1.5, an open parking garage complying with Section 406.5 of the International Building Code or an enclosed parking garage complying with Section 406.6 of the International Building Code shall not be considered a private garage.

403.7.2 Locations. Where required by Section 403.7.1.1, carbon monoxide detection shall be installed in the locations specified in Sections 403.7.2.1 through 403.7.2.3.

403.7.2.1 Dwelling units. Carbon monoxide detection shall be installed in dwelling units outside of each separate sleeping area in the immediate vicinity of the bedrooms. Where a fuel-burning appliance is located within a bedroom or its attached bathroom, carbon monoxide detection shall be installed within the bedroom.

403.7.2.2 Sleeping units. Carbon monoxide detection shall be installed in sleeping units.

Exception: Carbon monoxide detection shall be allowed to be installed outside of each separate sleeping area in the immediate vicinity of the sleeping unit where the sleeping unit or its attached bathroom does not contain a fuel-burning appliance and is not served by a forced air furnace.

403.7.2.3 Group E occupancies. Carbon monoxide detection shall be installed in classrooms in Group E occupancies. Carbon monoxide alarm signals shall be automatically transmitted to an on-site location that is staffed by school personnel.

Exception: Carbon monoxide alarm signals shall not be required to be automatically transmitted to an on-site location that it staffed by school personnel in Group E occupancies with an occupant load of 30 or less.

403.7.3 Detection equipment. Carbon monoxide detection required by Sections 403.7.1 through 403.7.2.3 shall be provided by carbon monoxide alarms complying with Section 403.7.4 or with carbon monoxide detection systems complying with Section 403.7.5.

403.7.4 Carbon monoxide alarms. Carbon monoxide alarms shall comply with Sections 403.7.4.1 through 403.7.4.3.

403.7.4.1 Power source. Carbon monoxide alarms shall receive their primary power from the building wiring where such wiring is served from a commercial source, and when primary power is interrupted, shall receive power from a battery. Wiring shall be permanent and without a disconnecting switch other than that required for overcurrent protection.

Exception: Where installed in buildings without commercial power, battery-powered carbon monoxide alarms shall be an acceptable alternative.

403.7.4.2 Listings. Carbon monoxide alarms shall be listed in accordance with UL 2034.

403.7.4.3 Combination alarms. Combination carbon monoxide/smoke alarms shall be an acceptable alternative to carbon monoxide alarms. Combination carbon monoxide/smoke alarms shall be listed in accordance with UL 2034 and UL 217.

403.7.5 Carbon monoxide detection systems. Carbon monoxide detection systems shall be an acceptable alternative to carbon monoxide alarms and shall comply with Sections 403.7.5.1 through 403.7.5.3.

403.7.5.1 General. Carbon monoxide detection systems shall comply with NFPA 720. Carbon monoxide detectors shall be listed in accordance with UL 2075.

403.7.5.2 Locations. Carbon monoxide detectors shall be installed in the locations specified in Section 403.7.2. These locations supersede the locations specified in NFPA 720.

403.7.5.3 Combination detectors. Combination carbon monoxide/smoke detectors installed in carbon monoxide detection systems shall be an acceptable alternative to carbon monoxide detectors, provided they are listed in accordance with UL 2075 and UL 268.

403.7.6 Maintenance. Carbon monoxide alarms and carbon monoxide detection systems shall be maintained in accordance with NFPA 720. Carbon monoxide alarms and carbon monoxide detectors that become inoperable or begin producing end-of-life signals shall be replaced.

Add Section to Chapter 7

703.2 Carbon monoxide detection. Carbon monoxide detection shall be installed in accordance with Section 403.7.

Add Section to Chapter 12

1203.13 Carbon monoxide detection. Group I-1, I-2, I-4 and R occupancies and in classrooms in Group E occupancies shall be provided with carbon monoxide detection in accordance with Section 403.7.

Add Section to Chapter 14

1401.2.6 Carbon monoxide detection. Group R occupancies and in classrooms in Group E occupancies shall be provided with carbon monoxide detection in accordance with Section 403.7.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – The purpose of this amendment is to address recent legislation and adopted Building and Fire Code changes concerning carbon monoxide detection. This amendment will address requirements for carbon monoxide detection in existing buildings that undergo an alteration.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

10. Request by Leon Skinner, NCEBC Ad Hoc Committee Chair, to amend the 2012 NC Existing Building Code, Section 403, 404, 603 and 703. The proposed amendment is as follows:

Add Section to Chapter 4

403.6.1 Smoke alarms in one-and two-family dwellings and townhouses. Detached one-and two-family dwellings and townhouses shall be provided with smoke alarms installed in accordance with Section 804.4.1.
404.6 Smoke alarms. Smoke alarms shall be provided and installed in accordance with Section 804.4.

Add Section to Chapter 6

603.2 Smoke alarms. Smoke alarms shall be provided and installed in accordance with Section 804.4.

Add Section to Chapter 7

703.3 Smoke alarms. Smoke alarms shall be provided and installed in accordance with Section 804.4.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – The purpose of this amendment is to address smoke alarm requirements in buildings undergoing a repair or low level alteration. The language is similar to the smoke alarm requirements in the NC Residential Code for repairs and alterations.

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

11. Request by Ralph Euchner, NC Building Code Council, to amend the 2012 NC Fuel Gas Code, Section 310.1.1. The proposed amendment is as follows:

310.1.1 CSST. Corrugated stainless steel tubing (CSST) gas *piping* systems shall be bonded to the electrical service grounding electrode system ~~at the point where the gas service enters the building~~. The bonding jumper shall be not smaller than 6 AWG copper wire or equivalent.
CSST with an arc-resistant jacket listed by an approved agency for installation without the direct bonding, as prescribed in this section, shall be installed in accordance with Section 310.1 and the manufacturer's installation instructions.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – The use of an arc-resistant jacket is an alternate method of protection against electrical arcing damage caused by high voltage transient events, such as a nearby lightning strike. An arc-resistant jacket does not rely on direct bonding to the grounding electrode system to reduce or eliminate damage from electrical arcing.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

12. Request by David Smith, Residential and Energy Committees, to amend the 2012 NC Energy Conservation Code, Tables 402.1.1 & 402.1.3 and Sections 402.3.5 & 402.5; and the 2012 NC Residential Code, Tables N1102.1 & N1102.1.2 and Sections N1102.3.5 & N1102.5. The proposed amendment is as follows:

For the 2012 NCECC, Chapter 4, modify Table 402.1.1 as follows:

TABLE 402.1.1
INSULATION AND FENESTRATION REQUIREMENTS BY COMPONENTa

CLIMATE ZONE	FENESTRATION U-FACTOR b, l	SKYLIGHTb U-FACTOR	GLAZED FENESTRATION SHGC b,e, m	CEILING R-VALUEk	WOOD FRAME WALL R-VALUE e	MASS WALL R-VALUEi	FLOOR R-VALUE	BASEMENTc WALL R-VALUE	SLABd R-VALUE & DEPTH	CRAWL SPACEc WALL R-VALUE
3	0.35	0.65	0.30	30	13	5/10	19	$10/13_f$	0	5/13
4	0.35	0.60	0.30	38 or 30 cont. j	15, 13+2.5h	5/10	19	10/13	10	10/13
5	0.35	0.60	NR	38 or 30 cont. j	19, 13+5, or 15+3eh	13/17	30_g	10/13	10	10/13

l. In addition to the exemption in Section 402.3.3, a maximum of two glazed fenestration product assemblies having a U-factor no greater than 0.55 shall be permitted to be substituted for minimum code compliant fenestration product assemblies without penalty.
m. In addition to the exemption in Section 402.3.3, a maximum of two glazed fenestration product assemblies having a SHGC no greater than 0.70 shall be permitted to be substituted for minimum code compliant fenestration product assemblies without penalty.

For the 2012 NCECC, Chapter 4, modify Table 402.1.3 as follows:

TABLE 402.1.3
EQUIVALENT U-FACTORSa

CLIMATE ZONE	FENESTRATION U-FACTOR e	SKYLIGHT U-FACTOR	CEILING U-FACTOR	FRAME WALL U-FACTOR	MASS WALL $U\text{-FACTOR}_b$	FLOOR U-FACTOR	BASEMENT WALL $U\text{-FACTOR}_d$	CRAWL SPACE WALL $U\text{-FACTOR}_c$
3	0.35	0.65	0.035	0.082	0.141	0.047	0.059	0.136
4	0.35	0.60	0.030	0.077	0.141	0.047	0.059	0.065
5	0.35	0.60	0.030	0.061	0.082	0.033	0.059	0.065

e. A maximum of two glazed fenestration product assemblies having a U-factor no greater than 0.55 and a SHGC no greater than 0.70 shall be permitted to be substituted for minimum code compliant fenestration product assemblies without penalty. When applying this note and using the REScheck "UA Trade-off" compliance method, to allow continued use of the software, the applicable fenestration products shall be modeled as meeting the U-factor of 0.35 and the SHGC of 0.30, as applicable, but the fenestration products actual U-factor and actual SHGC shall be noted in the comments section of the software for documentation of application of this note to the

applicable products. Compliance for these substitute products shall be verified compared to the allowed substituted maximum U-value requirement and maximum SHGC requirement, as applicable.

For the 2012 NCECC, Chapter 4, add an exception to:

402.3.5 Thermally isolated conditioned sunroom U-factor and SHGC. The maximum fenestration U-factor shall be 0.40 and the maximum skylight *U*-factor shall be 0.75. Sunrooms with cooling systems shall have a maximum fenestration SHGC of 0.40 for all glazing.

New windows and doors separating the sunroom from conditioned space shall meet the building thermal envelope requirements. Sunroom additions shall maintain thermal isolation; and shall be served by a separate heating or cooling system, or be thermostatically controlled as a separate zone of the existing system.

Exception: A maximum of two glazed fenestration product assemblies having a U-factor no greater than 0.55 and, when cooling is provided, a SHGC no greater than 0.70 shall be permitted to be substituted for minimum code compliant fenestration product assemblies without penalty.

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

Exception: A maximum of two glazed fenestration product assemblies having a U-factor no greater than 0.55 and a SHGC no greater than 0.70 shall be permitted to be substituted for minimum code compliant fenestration product assemblies without penalty.

For the 2012 NC Residential Code, Chapter 11, modify Table N1102.1as follows:

TABLE N1102.1
INSULATION AND FENESTRATION REQUIREMENTS BY COMPONENTa

CLIMATE ZONE	**FENESTRATION U-FACTOR b, l**	SKYLIGHT b U-FACTOR	**GLAZED FENESTRATION SHGC b,e, m**	CEILING R-VALUEk	WOOD FRAME WALL R-VALUE e	MASS WALL R-VALUEi	FLOOR R-VALUE	BASEMENTc WALL R-VALUE	SLABd R-VALUE & DEPTH	CRAWL SPACEc WALL R-VALUE
3	0.35	0.65	0.30	30	13	5/10	19	$10/13_f$	0	5/13
4	0.35	0.60	0.30	38 or 30 cont. j	15, $13+2.5^h$	5/10	19	10/13	10	10/13
5	0.35	0.60	NR	38 or 30 cont. j	19, 13+5, or $15+3^{eh}$	13/17	30_g	10/13	10	10/13

l. In addition to the exemption in Section N1102.3.3, a maximum of two glazed fenestration product assemblies having a U-factor no greater than 0.55 shall be permitted to be substituted for minimum code compliant fenestration product assemblies without penalty.

m. In addition to the exemption in Section N1102.3.3, a maximum of two glazed fenestration product assemblies having a SHGC no greater than 0.70 shall be permitted to be substituted for minimum code compliant fenestration product assemblies without penalty.

For the 2012 NC Residential Code, Chapter 11, modify Table N1102.1.2 as follows:

TABLE N1102.1.2
EQUIVALENT U-FACTORSa

CLIMATE ZONE	FENESTRATION U-FACTOR e	SKYLIGHT U-FACTOR	CEILING U-FACTOR	FRAME WALL U-FACTOR	MASS WALL $U\text{-FACTOR}_b$	FLOOR U-FACTOR	BASEMENT WALL $U\text{-FACTOR}_d$	CRAWL SPACE WALL $U\text{-FACTOR}_c$
3	0.35	0.65	0.035	0.082	0.141	0.047	0.059	0.136
4	0.35	0.60	0.030	0.077	0.141	0.047	0.059	0.065
5	0.35	0.60	0.030	0.061	0.082	0.033	0.059	0.065

e. A maximum of two glazed fenestration product assemblies having a U-factor no greater than 0.55 and a SHGC no greater than 0.70 shall be permitted to be substituted for minimum code compliant fenestration product assemblies without penalty. When applying this note and using the REScheck "UA Trade-off" compliance method, to allow continued use of the software, the applicable fenestration products shall be modeled as meeting the U-factor of 0.35 and the SHGC of 0.30, as applicable, but the fenestration products actual U-factor and actual SHGC shall be noted in the comments section of the software for documentation of application of this note to the

applicable products. Compliance for these substitute products shall be verified compared to the allowed substituted maximum U-value requirement and maximum SHGC requirement, as applicable.

For the 2012 NC Residential Code, add an exception to:

N1102.3.5 Thermally isolated conditioned sunroom *U*-factor and SHGC. The maximum fenestration *U*-factor shall be 0.40 and the maximum skylight *U*-factor shall be 0.75. Sunrooms with cooling systems shall have a maximum fenestration SHGC of 0.40 for all glazing.
New windows and doors separating the sunroom from conditioned space shall meet the building thermal envelope requirements. Sunroom additions shall maintain thermal isolation; and shall be served by a separate heating or cooling system, or be thermostatically controlled as a separate zone of the existing system.
Exception: A maximum of two glazed fenestration product assemblies having a U-factor no greater than 0.55 and, when cooling is provided, a SHGC no greater than 0.70 shall be permitted to be substituted for minimum code compliant fenestration product assemblies without penalty.

N1102.5 Maximum fenestration *U*-factor and SHGC. The area-weighted average maximum fenestration *U*-factor permitted using trade-offs from Section 1102.1.3 shall be 0.40. Maximum skylight *U*-factors shall be 0.65 in zones 4 and 5 and 0.60 in zone 3.
Exception: A maximum of two glazed fenestration product assemblies having a U-factor no greater than 0.55 and a SHGC no greater than 0.70 shall be permitted to be substituted for minimum code compliant fenestration product assemblies without penalty.

Motion/Second/Approved – The request was granted. The proposed effective date of this rule is January 1, 2016.
Reason Given – This purpose of this amendment is to allow flexibility for glazed fenestration code compliance to accommodate actual or potential field problems without additional burden and cost to permit holders.
Fiscal Statement – This rule is anticipated to provide equivalent compliance with no net decrease/increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

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

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

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

TITLE 02 – DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

Notice *is hereby given in accordance with G.S. 150B-21.2 that the NC Pesticide Board intends to adopt the rules cited as 02 NCAC 09L .0509 and .1109 and amend the rules cited as 02 NCAC 09L .0504, .0505, .0507, .0522, .1102-.1104, and .1108.*

Link to agency website pursuant to G.S. 150B-19.1(c): *http://www.ncagr.gov/AdministrativeRule/ProposedRules/index.htm*

Proposed Effective Date: *June 1, 2015*

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice)*: *Any person may request a public hearing on the proposed rules by submitting a request in writing no later than March 3, 2015 to James W. Burnette, Jr., Secretary, NC Pesticide Board, 1090 Mail Service Center, Raleigh, NC 27699-1090.*

Reason for Proposed Action: *The US EPA determined that all of the soil fumigants meet the criteria for restricted use. Therefore, EPA has reclassified metam sodium, metam potassium and dazomet, which had not been restricted, as a restricted use pesticides. As required by updated soil fumigant product labels, certified commercial and private applicators must successfully complete an EPA-approved training program covering the new soil fumigant provisions. This training must be completed every three years, and requires that the applicator pass a comprehensive examination on each of the soil fumigants. EPA requirements containing the provision that applicators who are certified in a soil fumigation category or subcategory in a state and the state's program has been approved by EPS, do not have to complete the EPA soil fumigant training/examination program. By adopting these soil and media fumigation rules, applicators in North Carolina will continue to have access to necessary soil fumigants without having to periodically undergo a national "one size fits all" training program and examination, which contain much information which is not relevant to our state's climate, cropping practices and pesticide application practices. These rules will enable the NC Pesticide Board to ensure that North Carolina fumigators are trained and qualified under information relevant to our state and actual production needs and practices. As long as the applicator maintains continuing certification training requirements established by the Pesticide Board, such applicators will not be required to retest every three years.*

Comments may be submitted to: *James Burnette, Jr., 1090 Mail Service Center, Raleigh, NC 27699-1090, phone (919) 733-3556, email james.burnette@ncagr.gov*

Comment period ends: *April 17, 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 09 - FOOD AND DRUG PROTECTION DIVISION

SUBCHAPTER 09L - PESTICIDE SECTION

SECTION .0500 - PESTICIDE LICENSES

02 NCAC 09L .0504 DEFINITIONS

The following definitions apply to 02 NCAC 09L .0505 -- Classifications, 02 NCAC 09L .0506 -- Governmental Workers, and 02 NCAC 09L .0507 -- Categories of Consultants:

(1) "Agricultural pest control":

(a) Plant. Includes pesticide applicators using or supervising the use of pesticides in production of agricultural crops, including without limiting the foregoing, tobacco, peanuts, cotton, feed grains, soybeans and forage; vegetables; small fruits; tree fruits and nuts; as well as on grasslands and non-crop agricultural lands;

(b) Animal. Includes pesticide applicators using or supervising the use of pesticides on animals, including without limiting the foregoing, beef cattle, dairy cattle, swine, sheep, horses, goats, poultry, and livestock, and to places on or in which animals are confined. Doctors of veterinary medicine engaged in the business of applying pesticides for hire, publicly holding themselves out as pesticide applicators or engaged in large-scale use of pesticides are included in this category.

(2) "Forest pest control" includes pesticide applicators using or supervising the use of pesticides in forests, forest nurseries, and forest seed-producing areas.

(3) "Ornamental and turf pest control" includes pesticide applicators using or supervising the use of pesticides to control pests in the maintenance and production of ornamental trees, shrubs, flowers, and turf.

(4) "Seed treatment" includes pesticide applicators using or supervising the use of pesticides on seeds.

(5) "Aquatic pest control" includes pesticide applicators using or supervising the use of any pesticide purposefully applied to standing or running water, excluding applicators engaged in public health related activities included in Category (7) of this Rule.

(6) "Right-of-way pest control" includes pesticide applicators using or supervising the use of pesticides in the maintenance of public roads, electric powerlines, pipelines, railway rights-of-way or other similar areas.

(7) "Public health pest control" includes primarily, but is not limited to, state, federal, or other governmental employees using or supervising the use of pesticides in public health programs for the management and control of pests having medical and public health importance.

(8) "Regulatory pest control" includes state, federal, or other governmental employees who use or supervise the use of pesticides in the control of regulated pests.

(9) "Demonstration and research pest control" includes the following:

(a) individuals who demonstrate to the public the proper use and techniques of application of pesticides or supervise such demonstration; and

(b) persons who, on conducting field research with pesticides, use or supervise the use of pesticides. Included in the first group are such persons as extension specialists and county agents, commercial representatives demonstrating pesticide products, and those individuals demonstrating methods used in public programs. The second group includes state, federal, commercial and other persons conducting field research on or utilizing pesticides.

(10) "Wood treatment" includes pesticide applicators using or supervising the use of restricted use pesticides in wood preservation and wood products treatment.

(11) "Soil and growing media fumigation pest control" includes individuals using or supervising the use of any fumigant pesticide injected or applied to soils or media. This category excludes fumigation of raw agricultural commodities and all structural fumigation such as:

(a) boxcars;

(b) warehouses;

(c) tractor trailers; and

(d) grain bins.

(12) "Growing media" means a substance or substances through which roots grow, extract water and nutrients.

Authority G.S. 143-452(d); 143-460(29); 143-460(33).

02 NCAC 09L .0505 CLASSIFICATIONS

The following classifications and subclassifications are hereby established for the licensing of pesticide applicators:

(1) pesticide applicators and public operators utilizing ground equipment:

(a) agricultural pest control:

(i) plant,

(ii) animal;

(b) forest pest control;

(c) ornamental and turf pest control;

(d) aquatic pest control;

(e) right-of-way pest control;

(f) public health pest control;

(g) regulatory pest control;

(h) demonstration and research pest control:

(i) agricultural pest control:

(A) plant,

(B) animal;

(ii) forest pest control;

(iii) ornamental and turf pest control;

(iv) aquatic pest control;

(v) right-of-way pest control;

(vi) public health pest control;

(vii) regulatory pest control;

(viii) seed treatment;

(ix) wood treatment;

(x) soil and growing media fumigation pest control;

(i) seed treatment;
(j) wood treatment;
(k) soil and growing media fumigation pest control;

(2) pesticide applicators and public operators utilizing aerial equipment:
(a) agricultural pest control: plant;
(b) forest pest control;
(c) ornamental and turf pest control;
(d) aquatic pest control;
(e) right-of-way pest control;
(f) public health pest control;
(g) regulatory pest control;
(h) demonstration and research pest control:
(i) agricultural pest control: plant;
(ii) forest pest control;
(iii) ornamental and turf pest control;
(iv) aquatic pest control;
(v) right-of-way pest control;
(vi) public health pest control;
(vii) regulatory pest control.

Authority G.S. 143-452(d); 143-460(29),(33).

02 NCAC 09L .0507 CATEGORIES OF CONSULTANTS

Each person acting as a pest control consultant as defined in the North Carolina Pesticide Law of 1971 is required to be licensed. The categories requiring a license may include but are not limited to the following:

(1) agricultural pest control:
(a) plant,
(b) animal;
(2) forest pest control;
(3) ornamental and turf pest control;
(4) aquatic pest control;
(5) right-of-way pest control;
(6) public health pest control;
(7) regulatory pest control;
(8) seed treatment;
(9) wood ~~treatment.~~ treatment; and
(10) soil and growing media fumigation pest control.

Authority G.S. 143-455; 143-460(27).

02 NCAC 09L .0522 RECERTIFICATION OPTIONS

(a) Completion of approved Continuing Certification Credit Requirements in the pest control category in which the individual is certified and desires to retain certification. A Continuing Certification Credit is defined as one hour of approved Continuing Certification Training. Continuing Certification Training must be approved by the Board and such training may consist of grower meetings, seminars, short courses, or other presentations taught by extension pesticide personnel, or other privately or publicly sponsored training organizations approved by the Board. Continuing Certification Credit Requirements for each pest control category are as follows:

(1)	aquatic per 5-year period	6	credits
(2)	public health per 5-year period	6	credits
(3)	forest per 5-year period	6	credits
(4)	right-of-way per 5-year period	4	credits
(5)	regulatory per 5-year period	6	credits
(6)	ag pest-animal per 5-year period	6	credits
(7)	ornamental and turf per 5-year period	10	credits
(8)	seed treatment per 5-year period	3	credits
(9)	ag pest-plant per 5-year period	10	credits
(10)	demonstration and research per 5-year period	10	credits

The Continuing Certification Credits required may consist of any combination of credits divided between training in the primary categories (1) through (9) of this Rule and training in demonstration and research.

(11)	aerial credits per 2-year period	4

The Continuing Certification Credits required must include one credit obtained through training in aerial methods.

(12)	wood treatment credits per 5-year period	4
(13)	soil and growing media fumigation credits per 5-year period	3

The Continuing Certification Credits established for each ground application pest control category must be obtained in at least two years of the five-year period.

(b) Participation in one training session conducted by extension pesticide personnel, or other approved organizations, during the recertification period, and satisfactory passing of a written comprehensive examination administered by the North Carolina Department of Agriculture personnel at the conclusion of training.

(c) Satisfactory passing of a written comprehensive examination administered by North Carolina Department of Agriculture personnel and based on training materials which have been approved by the Board.

Authority G.S. 143-437(1); 143-440(b); 143-453(c)(2); 143-455(d).

02 NCAC 09L .0529 SOIL AND GROWING MEDIA FUMIGATION EXAMINATION WAVER

Prior to January 1, 2017, any pesticide applicator licensed in the classifications agricultural pest control: plant, forest pet control, or ornamental and turf pest control who applies for the soil fumigation classification, and has completed the EPA-sponsored soil fumigation training or the North Carolina In-State Soil Fumigation Training Option, shall be eligible to receive the soil

fumigation classification without having to pass the written examination.

Authority G.S. 143-453(b).

SECTION .1100 - PRIVATE PESTICIDE APPLICATOR CERTIFICATION

02 NCAC 09L .1102 DEFINITIONS

(a) Certified applicator-any individual who is certified to use or supervise the use of any restricted use pesticide.

(b) Private pesticide applicator-a person who uses or supervises the use of any restricted use pesticide under the following conditions:

(1) for the purpose of producing any agricultural commodity on property owned or rented by him or his employer, or

(2) if applied without compensation other than the trading of personal services between producers of agricultural commodities on the property of another person.

(c) Private pesticide applicator certification standards review-a comprehensive training session designed to advance a private pesticide applicator's practical knowledge in areas such as the pest problems and pest control practices associated with agricultural operations; proper storage, use, handling, and disposal of pesticides and their containers; labels and labeling information; local environmental situations that must be considered during application to avoid contamination; recognition of poisoning symptoms and procedures to follow in case of a pesticide accident; protective clothing, equipment, and other appropriate worker protection standards; appropriate federal and state pesticide laws and regulations and the applicator's related legal responsibility; current agricultural production-related pesticide technology; and sources of advice and guidance necessary for the safe and proper use of each pesticide related to his/her certification. These training sessions will be taught by Cooperative Extension Service pesticide training agents or other individuals approved by the Board.

(d) Continuing certification credit-one hour of continuing certification training. Continuing certification training must be approved by the Board. Such training may be offered during grower meetings, seminars, short courses, or other Board-approved presentations taught by Cooperative Extension Service pesticide training agents, or other privately or publicly sponsored training organizations. Private applicators may also earn continuing certification credits by attending approved training sessions for which credit has been assigned in the following commercial categories:

(1) aquatic;

(2) agricultural pest - animal;

(3) agricultural pest - plant;

(4) ornamentals and turf;

(5) forest; ~~and~~

(6) seed ~~treatment,~~ treatment; and

(7) soil and growing media fumigation.

as defined in 02 NCAC 09L .0505(1)(a) through ~~(1)(h).~~ (1)(k).

Authority G.S. 143-440.

02 NCAC 09L .1103 CERTIFICATION EXAMINATION

(a) Beginning on October 1, 2002, an applicant for an initial private pesticide applicator's certification must demonstrate by written examination his/her knowledge of pesticides, their usefulness and their hazards; his/her competence to act as a private pesticide applicator; and his/her knowledge of the laws and rules governing the use and application of pesticides by private pesticide applicators. Passing grade shall be 70 percent or more.

(b) Any applicant for initial certification in any private applicator certification subclass shall first become certified as a private pesticide applicator. Prior to January 1, 2017, any certified private applicator who applies for the soil fumigation subclass certification and has completed the EPA-sponsored soil fumigation training or the North Carolina In-State Soil Fumigation Training Option, shall be eligible to receive the soil fumigation subclass certification without having to pass written soil and growing media fumigation examination.

(c) Beginning on January 1, 2017, the passing grade on the soil and growing media fumigation examination, and the agricultural commodity fumigation examination shall be seventy percent or more.

Authority G.S. 143-440.

02 NCAC 09L .1104 SINGLE PURCHASE EMERGENCY CERTIFICATION PERMIT

(a) For emergency certification of any applicant who has not previously been certified and did not anticipate need for a restricted use pesticide, a 10-day permit can be issued by his resident county agricultural extension service pesticide coordinator authorizing the purchase and use of one restricted use pesticide for one application to a crop or site. Prior to issuance of the permit the resident county agricultural extension service pesticide coordinator shall:

(1) provide the applicant with a training manual and information relative to obtaining full private pesticide applicator certification, and

(2) discuss with the applicant proper use of the restricted use pesticide.

(b) If the individual requires further use of restricted use pesticides, he must complete one of the certification options explained in Rule .1103 of this Section.

(c) The agricultural extension service pesticide coordinator shall keep a copy of the permit provided by the North Carolina Department of Agriculture which contains the following information:

(1) name and address of the applicant,

(2) name and amount of restricted use pesticide,

(3) crop or site to be treated, and

(4) date the permit was issued.

Copies of the permits will be available for review on an as-needed basis by the North Carolina Department of Agriculture.

(d) A single purchase emergency certification permit shall not be issued for fumigants.

Authority G.S. 143-440.

02 NCAC 09L .1108 TERM OF CERTIFICATION; RECERTIFICATION

(a) The term of certification shall be for a period of three years.

(b) In order to be recertified as a private pesticide applicator without a written examination, a person must complete two hours of private pesticide applicator certification standards review, plus two continuing certification credit hours, as defined in 02 NCAC 09L .1102(d).

(c) A private pesticide applicator certified in the subclass of soil and growing media fumigation or agricultural commodity fumigation shall earn one hour of continuing certification credit specific to each applicable subclass to retain the subclass certification.

Authority G.S. 143-440.

02 NCAC 09L .1109 CERTIFICATION OF PRIVATE APPLICATORS

The following subclassifications are hereby established for the certification of private pesticide applicators:

(1) Soil and growing media fumigation – private pesticide applicators utilizing ground equipment applying restricted use fumigants to property they own or lease, their employer's property, or applied without compensation other than the trading of personal services between producers of agricultural commodities on the property of another person.

(2) Agricultural commodity fumigation – private pesticide applicators applying restricted use fumigants to agricultural commodities on property they own or lease, their employer's property, or applied without compensation other than the trading of personal services between producers of agricultural commodities on the property of another person.

Authority G.S. 143-453(b).

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***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Commissioner of Agriculture intends to amend the rule cited as 02 NCAC 09M .0101.*

Link to agency website pursuant to G.S. 150B-19.1(c): *http://www.ncagr.gov/AdministrativeRules/ProposedRules/index.htm*

Proposed Effective Date: *June 1, 2015*

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice)*: *Any person may request a public hearing on the proposed rule by submitting a request in writing no later than March 3, 2015, to Christina Waggett, Rulemaking Coordinator, NC Department of Agriculture, 1001 Mail Service Center, Raleigh, NC 27699-1001.*

Reason for Proposed Action: *This amendment addresses a change in the Federal Food Drug and Cosmetic Act that provides for the establishment, registration and regulation of voluntary outsourcing facilities that are engaged in the compounding of sterile drugs.*

Comments may be submitted to: *Christina Waggett, 1001 Mail Service Center, Raleigh, NC 27699-1001, phone (919) 707-3008, email Christina.waggett@ncagr.gov*

Comment period ends: *April 17, 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 09 – FOOD AND DRUG PROTECTION

SUBCHAPTER 09M - DRUGS

02 NCAC 09M .0101 MANUFACTURER REGISTRATION

(a) Every person doing business in North Carolina and operating as a prescription drug manufacturer, outsourcing facility, repackager or wholesaler shall submit a completed prescription drug registration form to the department. A separate registration form shall be submitted for each establishment operating in the State of North Carolina. Each registration form shall be signed by the owner or individual in charge.

(b) A fee of five hundred dollars ($500.00) for ~~manufacturers,~~ manufacturers, outsourcing facilities, or repackagers and a fee of three hundred fifty dollars ($350.00) for wholesalers shall be submitted with each registration or renewal form.

(c) On or before December 31 of each year, every person registered in accordance with Paragraph (a) of this Rule shall submit a renewal form furnished by the division.

(d) Prescription Drug Registration Forms may be obtained from the Food and Drug Protection Division.
(e) "Outsourcing facility" is defined as a facility at a single geographic location or address that is engaged in the compounding of sterile drugs, has elected to register as an outsourcing facility with the Food & Drug Administration, and complies with the requirements as provided in 21 USC 353b; exemptions provided by 21 USC 353b(a) with respect to labeling, new drug registration and distribution supply chain requirements shall also apply to compounded drugs distributed in North Carolina by an outsourcing facility.

Authority G.S. 106-140.1.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Commission for Public Health intends to amend the rules cited as 10A NCAC 46 .0201 and repeal the rule cited as 10A NCAC 46 .0212.*

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

Proposed Effective Date: *June 1, 2015*

Public Hearing:
Date: *March 6, 2015*
Time: *10:00 a.m.*
Location: *Cardinal Room, 5605 Six Forks Road, Raleigh, NC*

Reason for Proposed Action: *Per Session Law 2011-145, the Commission for Public Health no longer has statutory authority to regulate milk sanitation. The rule making authority has been transferred to the Board of Agriculture and the Department of Agriculture is responsible for the milk sanitation program. Therefore, the Commission for Public Health can no longer require local health departments to provide milk sanitation as a mandated public health service.*

Comments may be submitted to: *Chris Hoke, JD, 1931 Mail Service Center, Raleigh, NC 27699-1931, phone (919) 707-5006, email chris.hoke@dhhs.nc.gov*

Comment period ends: *April 17, 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 46 – LOCAL STANDARDS

SECTION .0200 - STANDARDS FOR LOCAL HEALTH DEPARTMENTS

10A NCAC 46 .0201 MANDATED SERVICES
The following is a list of mandated services required to be provided in every county of this state. The local health department shall provide or ensure the provision of these services:

(1) Adult Health;
(2) Home Health;
(3) Dental Public Health;
(4) Food, Lodging and Institutional Sanitation;
(5) Individual On-Site Water Supply;
(6) Sanitary Sewage Collection, Treatment and Disposal;
~~(7) Grade A Milk Sanitation;~~
(7)~~(8)~~ Communicable Disease Control;
(8)~~(9)~~ Vital Records Registration;
(9)~~(10)~~ Maternal Health;
(10)~~(11)~~ Child Health;
(11)~~(12)~~ Family Planning;
(12)~~(13)~~ Public Health Laboratory Support.

Authority G.S. 130A-9.

10A NCAC 46 .0212 GRADE A MILK SANITATION
~~(a) A local health department shall provide or certify the availability of grade "A" milk sanitation services within the jurisdiction of the local health department. A local health department shall establish, implement, and maintain written policies which shall include:~~

~~(1) When applicable, the frequency of inspections for grade "A" milk sanitation activities, with the following being the minimum:~~

~~Type of Activity~~	~~Frequency~~
~~Bulk milk tank trucks~~	~~1/year~~

~~Commingled raw milk samples (plant origin)~~	~~4/six months~~
~~Cooling water samples~~	~~1/six months~~
~~Dairy farm inspections~~	~~1/six months~~
~~Farm well water samples when repaired~~	~~1/year or sampled~~
~~Hauler certifications~~	~~1/two years~~
~~Individual producer raw milk samples (farm origin)~~	~~4/six months~~
~~Pasteurized milk samples~~	~~Each product 4/six months~~
~~Pasteurization plant equipment tests~~	~~1/three months~~
~~Pasteurization plant inspections~~	~~1/three months~~
~~Temperature checks and inspection of retail storage facilities~~	~~During each sanitation inspection of restaurants, meat markets, etc.~~

~~(2) Provision for laboratory analysis by a certified milk analyst.~~

~~(3) Provisions for investigating complaints and suspected outbreaks of illness associated with milk and milk products. Corrective actions shall be taken in cases of valid complaints and confirmed outbreaks of illness.~~

~~(4) Provisions for keeping records of activities described in Paragraphs (a)(1) and (2) of this Rule.~~

~~(b) A local health department shall establish, implement, and maintain written policies for the provision or orientation and in service training for sanitarians. The policies shall include:~~

~~(1) The following minimum requirements for milk sanitarians;~~

~~(A) Initial field training for newly employed sanitarians;~~

~~(B) CDC Homestudy Course 3010-G or it equivalent as approved by the Division of Public Health;~~

~~(C) North Carolina State University Food Protection Short Course or its equivalent as approved by the Division of Public Health; and~~

~~(D) Registration by the Board of Sanitarian Examiners.~~

~~(2) Provisions for counties which carry out milk plant inspection activities to have representation at the FDA Course 302, "Milk Pasteurization Controls and Tests", when it is offered within the state. Counties which carry out dairy farm inspection activities shall have representation at each North Carolina State University "Dairy Fieldman and Sanitarians Conference".~~

Authority G.S. 130A-9.

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***Notice** is hereby given in accordance with G.S. 150B-21.2 that the NC Social Services Commission intends to adopt the rules cited as 10A NCAC 73A .0101-.0108.*

Link to agency website pursuant to G.S. 150B-19.1(c): *http://ncdhhs.gov/dss/sscommission/index.htm*

Proposed Effective Date: *June 1, 2015*

Public Hearing:
Date: *April 15, 2015*
Time: *10:00 a.m.*
Location: *North Carolina Division of Social Services, McBryde Building Room 151, 820 South Boylan Avenue, Raleigh, NC 27603*

Reason for Proposed Action: *Session Law 2013-417 (HB 392) Section 4, as amended by Session Law 2014-115, requires a drug test to screen each applicant for or recipient of Work First Program assistance for whom there is a reasonable suspicion that the individual is engaged in the illegal use of controlled substances. Permanent rules must be adopted to fully implement this new eligibility requirement. The proposed permanent rules are to replace the temporary rule codified as 10A NCAC 71W .0905.*

Comments may be submitted to: *Carlotta Dixon, Section Chief, Program Compliance Section, 820 Boylan Avenue, McBryde Building, Raleigh, NC 27603, phone (919) 527-6421, fax (919) 334-1198, email Carlotta.Dixon@dhhs.nc.gov.*

Comment period ends: *April 17, 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 73 – CONTROLLED SUBSTANCES

SECTION .0100 - GENERAL

10A NCAC 73A .0101 SCOPE AND PURPOSE

Public Law 104-193, Personal Responsibility and Work Opportunity Reconciliation Act of 1996 prohibits the provision of Temporary Assistance for Needy Families assistance to individuals who have a drug related felony conviction occurring on or after August 22, 1996. The purpose of the rules in this Subchapter is to set forth requirements for the substance use screening and drug testing of Work First Program applicants and recipients.

Authority G.S. 108A-25.2; 108A-29.1; 143B-153.

10A NCAC 73A .0102 DEFINITIONS

The following definitions apply to this Chapter;

(1) "Controlled substance" means a drug, substance or immediate precursor as defined by G.S. 90-87(5).
(2) "Drug test" means the production and submission of a biochemical assay by an applicant or recipient for chemical analysis to detect illegal use of drugs. Such chemical analysis shall meet the requirements of the Controlled Substance Examination Regulation Act, G.S. 95, Article 20.
(3) "Illegal use of drugs" means the unlawful use of controlled substances.
(4) "Intentional Program Violation" means any action by a Work First applicant or recipient to knowingly, willfully, and with deceitful intent, make a verbal or written false statement to obtain or attempt to obtain benefits for which they are not eligible, or hide or withhold information to obtain benefits for which they are not eligible.
(5) "Reasonable suspicion" means a sufficient basis to believe the illegal use of a controlled substance may have occurred, and such reasonable suspicion shall be established only by one of the following:
(a) a score of three or above on the verbal screening questionnaire, the Drug Abuse Screening Test (DAST-10), or
(b) a criminal conviction relating to an illegal controlled substance within the past three years.
(6) "Substance use screening" means a verbal questionnaire approved by the Division of Social Services to determine a potential for a substance use disorder.
(7) "Applicant or recipient" for the purposes of drug testing shall not mean:
(a) a child only case, or
(b) a dependent child under age 18.

Authority G.S. 108A-29.1; 143B-153.

10A NCAC 73A .0103 DRUG TESTING

The county director shall require a basic five panel drug test for applicants and recipients of Work First Family Assistance where there is a reasonable suspicion the applicant or recipient is engaged in the illegal use of controlled substances. The drug test shall identify the illegal use of the following controlled substances:

(1) cannabinoids;
(2) cocaine;
(3) methamphetamines/amphetamines;
(4) opiates; and
(5) phencyclidine.

Authority G.S. 108A-29.1; 143B-153.

10A NCAC 73A .0104 DRUG TESTING REQUIREMENTS

(a) The Drug Abuse Screening Test (DAST-10) shall be completed as a condition of eligibility for the Work First program by the following:

(1) an applicant or recipient of the Work First Program; or
(2) an applicant or recipient, who has been previously disqualified because of an Intentional Program Violation;

(b) If the applicant or recipient refuses to complete the DAST-10 the entire household unit shall be ineligible for cash assistance.
(c) If reasonable suspicion exists, the individual shall submit to a drug test at the Division of Social Services' expense with the Division of Social Services' contracted vendor, as required by G.S. 108-29.1.
(d) If an applicant or recipient declines to submit to the drug test or fails to complete the drug test the entire household unit shall be ineligible for cash assistance.
(e) If there is evidence that an applicant or recipient substitutes, adulterates or tampers with the drug testing the entire household unit shall be ineligible for cash assistance.

Authority G.S. 108A-29.1; 143B-153.

10A NCAC 73A .0105 TECHNIQUES AND METHODS

(a) The analysis of drug test specimens shall be conducted by a laboratory licensed by the NC Department of Health and Human Services and certified by the Substance Abuse and Mental Health Services Administration (SAMHSA).

(b) Controlled substances or metabolites of a controlled substance shall be tested and analyzed using approved analytical techniques or methods, as follows:

(1) immunoassay;
(2) thin-layer chromatography;
(3) gas chromatography;
(4) mass spectroscopy;
(5) high performance liquid chromatography; or
(6) spectroscopy.

(c) Results of the drug test analysis shall be expressed as equivalent to nanograms by weight of a controlled substance or metabolite, or a controlled substance per milliliter.

(d) The drug test threshold values shall meet the cutoff levels contained in the Mandatory Guidelines for Federal Workplace Drug Testing Programs as adopted by SAMHSA and identified in the chart below.

Initial Test Analyte	**Initial Test Cutoff Concentration**	**Confirmatory Test Analyte**	**Confirmatory Test Cutoff Concentration**
Marijuana Metabolites	50 ng/mL	THCA1	15 ng/mL
Cocaine Metabolites	150 ng/mL	Benzoylecgonine	100 ng/mL
Amphetamines AMP/MAMP	500 ng/mL	Amphetamine Methamphetamine	250 ng/mL 250 ng/mL
Opiate Metabolites Codeine/Morphine	2000 ng/mL	Codeine Morphine	2000 ng/mL 2000 ng/mL
Phencyclidine	25 ng/mL	Phencyclidine	25 ng/mL

Authority G.S. 108A-29.1; 143B-153.

10A NCAC 73A .0106 CONFIDENTIALITY

(a) A drug test given under this Section shall be confidential and consistent with the HIPAA Privacy Rule appearing in 45 CFR Sections 160 and State Law.

(b) The drug test results, medical history, or medications taken by the individual shall be a confidential record unless its disclosure is otherwise authorized by law or by written consent from the applicant or recipient.

(c) The county departments of social services shall implement administrative, physical and technical safeguards to avoid unauthorized use or disclosure of drug test results.

Authority G.S. 108A-29.1; 143B-153.

10A NCAC 73A .0107 REASONABLE ACCOMMODATION

(a) Reasonable accommodations shall be provided to allow individuals with disabilities to comply with the drug testing requirement in accordance with the American Disability Act of 1990, as amended in 2008 (P.L. 110-328).

(b) An individual who fails to complete the drug test within 12 business days of the referral date and provides documentation of an incapacity may receive additional time to complete the drug test.

Authority G.S. 108A-29.1; 143B-153.

10A NCAC 73A .0108 NOTICES

(a) At application and at redetermination of eligibility for cash assistance, each household shall receive notice of the rights and responsibilities, and consequences for drug testing.

(b) At the time of testing and upon receipt of a confirmed positive drug test result, the individual shall be notified of the rights and responsibilities and consequences for a retest.

(c) Upon receipt of a confirmed positive test result, the county department of social services shall refer the individual to a qualified professional in substance abuse as defined in Rule 10A NCAC 27G .0104(19).

Authority G.S. 108A-29.1; 143B-153.

TITLE 12 – DEPARTMENT OF JUSTICE

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the NC Justice Academy intends to amend the rule cited as 12 NCAC 06A .0603.*

Link to agency website pursuant to G.S. 150B-19.1(c): *http://ncja.ncdoj.gov/*

Proposed Effective Date: *June 1, 2015*

Public Hearing:
Date: *March 23, 2015*
Time: *9:30 a.m.*
Location: *LRC 12, NCJA Salemburg Campus, 200 W. College St., Salemburg, NC*

Reason for Proposed Action: *The Academy believes that students should maintain custody of their weapons and ammunition at all times. Presently, officers are required to place weapons and ammunition in their vehicles instead of their dorm rooms.*

Comments may be submitted to: *Mark Strickland, Director of The North Carolina Justice Academy, NC Justice Academy PO Box 99, Salemburg, NC 28385*

Comment period ends: *April 17, 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 06 – NORTH CAROLINA JUSTICE ACADEMY

SUBCHAPTER 06A – ORGANIZATION AND RULES

SECTION .0600 – STUDENT CONDUCT

12 NCAC 06A .0603 FIREARMS
All students shall secure firearms and ammunition in a manner such that they are inaccessible to non-certified law enforcement officers. ~~Students shall not keep firearms and ammunition in dorm rooms.~~

Authority G.S. 17D-1; 17D-2.

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 adopt the rule cited as 15A NCAC 02B .0295.*

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

Proposed Effective Date: *September 1, 2015*

Public Hearing:
Date: *March 12, 2015*
Time: *6:00 p.m.*
Location: *Ground Floor Hearing Room, Archdale Building, 512 N. Salisbury Street, Raleigh, NC 27604-1170*

Reason for Proposed Action: *Adoption of permanent rule to replace the temporary rule pursuant to G.S. 150B-21.1(d)(5). The strikethroughs and underlining are based on the temporary rule as it exists in the Administrative Code.*

Comments may be submitted to: *Sue Homewood, Division of Water Resources, 450 W. Hanes Mill Rd, Suite 300, Winston Salem, NC 27105, phone (336) 776-9693, email sue.homewood@ncdenr.gov*

Comment period ends: *April 17, 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 – ENVIROMENTAL 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 .0295 MITIGATION PROGRAM REQUIREMENTS FOR PROTECTION AND MAINTENANCE OF RIPARIAN BUFFERS
(a) PURPOSE. The purpose of this Rule is to set forth the mitigation requirements that apply to applicants listed in ~~Subparagraphs (1) and (2) of this~~ Paragraph (c) of this Rule and to set forth requirements for buffer mitigation providers. ~~Buffer mitigation is required when one of the following applies:~~

~~(1) The applicant has received an authorization certificate for impacts that cannot be avoided or practicably minimized pursuant to Rules .0233,~~

~~.0243, .0250, .0259, .0267 or .0607 of this Subchapter; or~~

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

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

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

(2) "Compensatory Buffer Mitigation Bank" means a buffer mitigation site created by a mitigation provider and approved for mitigation credit by the Division through execution of a mitigation banking instrument.

~~(2)~~(3) "Division" means the Division of Water Resources of the North Carolina Department of Environment and Natural Resources.

~~(3)~~(4) "Enhancement Site" means a riparian zone site characterized by conditions between that of a restoration site and a preservation site such that the establishment of woody stems (i.e., tree or shrub species) will maximize nutrient removal and other buffer functions.

~~(4)~~(5) "Hydrologic Area" means the Watershed Boundary Dataset (WBD), located at no cost at http://data.nconemap.com/geoportal/catalog/search/resource/details.page?uuid={16A42F31-6DC7-4EC3-88A9-03E6B7D55653} using the eight-digit Hydrologic Unit Code (HUC) prepared by the United States Geological Survey.

~~(5)~~(6) "Locational Ratio" means the mitigation ratio applied to the mitigation requirements based on the location of the mitigation site relative to the impact site as set forth in Paragraph (f).

(7) "Mitigation banking instrument" means the legal document for the establishment, operation, and use of a mitigation bank.

~~(6)~~(8) "Monitoring period" means the length of time specified in the approved mitigation plan during which monitoring of vegetation success and other anticipated benefits to the adjacent water as listed in the ~~authorization certification~~ mitigation approval is done.

~~(7)~~(9) "Non-wasting endowment" means a fund that generates enough interest to cover the cost of the long term monitoring and maintenance.

~~(8)~~(10) "Outer Coastal Plain" means the portion of the state shown as the Middle Atlantic Coastal Plain (63) on Griffith, et al. (2002) "Ecoregions of North and South Carolina." Reston, VA, United States Geological Survey available at no cost at http://www.epa.gov/wed/pages/ecoregions/ncsc_eco.htm.

~~(9)~~(11) "Preservation Site" means riparian zone sites that are characterized by a natural forest consisting of the forest strata and diversity of species appropriate for the Omernik Level III ~~ecoregion.~~ecoregion available at no cost at http://www.epa.gov/wed/pages/ecoregions/level_iii_iv.htm.

~~(10)~~(12) "Restoration Site" means riparian zone sites that are characterized by an absence of trees and by a lack of dense growth of smaller woody stems (i.e., shrubs or saplings) or sites that are characterized by scattered individual trees such that the tree canopy is less than 25 percent of the cover and by a lack of dense growth of smaller woody stems (i.e., shrubs or saplings).

~~(11)~~(13) "Riparian buffer mitigation unit" means a unit representing a credit of riparian buffer mitigation that offsets one square foot of riparian buffer impact.

~~(12)~~(14) "Riparian wetland" means a wetland that is found in one or more of the following landscape positions:

(A) in a geomorphic floodplain;

(B) in a natural topographic crenulation;

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

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

~~(13)~~(15) "Urban" means an area that is designated as an urbanized area under the most recent federal decennial census available at no cost at http://www.census.gov/ or within the corporate limits of a municipality.

~~(14)~~(16) "Zonal Ratio" means the mitigation ratio applied to impact amounts in the respective zones of the riparian buffer as set forth in Paragraph (e) of this Rule.

(c) MITIGATION REQUIREMENTS. ~~APPLICATION REQUIREMENTS, MITIGATION SITE REQUIREMENTS AND MITIGATION OPTIONS.~~ Buffer mitigation is required when one of the following applies:

(1) The applicant has received an authorization certificate for impacts pursuant to Rules .0233, .0243, .0250, .0259, .0267 or .0607 of this Subchapter and is required to perform mitigation as a condition of the authorization certificate; or

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

Any applicant ~~who seeks approval to impact riparian buffers~~ covered under this ~~Rule who is required by~~ Paragraph ~~(a)~~ shall submit to the ~~Division~~ Authority a written mitigation proposal that calculates the required area of mitigation and describes the area and location of each type of proposed mitigation. The applicant

shall not impact buffers until the ~~Division~~ Authority approves the mitigation plan and issues written ~~authorization.~~approval. ~~For all options except payment of a fee under Paragraphs (j) or (k) of this Rule, the proposal shall include a commitment to provide:~~

~~(1) a perpetual conservation easement or similar legal protection mechanism to ensure perpetual stewardship that protects the mitigation site's nutrient removal and other water quality functions;~~

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

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

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

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

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

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

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

(d) AREA OF IMPACT. The ~~authority~~ Authority shall determine the area of impact in square feet to each ~~zone~~ Zone as defined by the applicable riparian buffer Rules .0233, .0243, .0250, .0259, .0267, or .0607 of this Subchapter of the proposed riparian buffer ~~impact~~ by adding the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) Falls Lake Watershed, as defined in Rule .0275 of this Section;

(B) Goose Creek Watershed, as defined in Rule .0601 of this Subchapter;

(C) Randleman Lake Water Supply Watershed, as defined in Rule .0248 of this Section;

(D) Each subwatershed of the Jordan Lake watershed, as defined in Rule .0262 of this Section; and

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

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

(h) MITIGATION OPTIONS FOR APPLICANTS. The applicant may propose any of the following types of mitigation and shall provide a written demonstration of practicality that takes into account the relative cost and availability of potential options, as well as information addressing all requirements associated with the option proposed:

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

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

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

(4) Alternative buffer mitigation options pursuant to Paragraph (o) of this Rule; or

(5) Other buffer mitigation options when approved by the Environmental Management Commission as a condition of a variance approval.

Riparian buffer restoration or enhancement is required with an area at least equal to the footprint of the buffer impact, and the remaining mitigation resulting from the application of the zonal mitigation ratios in Paragraph (e) and locational mitigation ratios in Paragraph (f) may be met through other mitigation options.

~~(h) RIPARIAN BUFFER MITIGATION UNITS. Mitigation activities shall generate riparian buffer mitigation units as follows:Mitigation Activity~~	~~Square Feet of~~	
~~Mitigation Buffer~~	~~Riparian Buffer~~	
~~Mitigation Units Generated~~		
~~Restoration~~	~~1~~	~~1~~
~~Enhancement~~	~~2~~	~~1~~
~~Preservation on Non-Subject Urban Streams~~	~~3~~	~~1~~
~~Preservation on Subject Urban Streams~~	~~3~~	~~1~~

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

(1) The compensatory buffer mitigation bank from which credits are purchased shall have available riparian buffer credits approved by the Division;

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

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

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

(k) DONATION OF PROPERTY. Applicants who choose to satisfy their mitigation requirement by donating real property or an interest in real property to fully or partially offset an approved payment into the Riparian Buffer Restoration Fund pursuant to Paragraph (j) of this Rule shall do so in accordance with 15A NCAC 02R .0403.

(l) MITIGATION SITE REQUIREMENTS FOR APPLICANTS AND MITIGATION PROVIDERS. For each mitigation site proposed by an applicant or mitigation provider under Paragraphs (n) or (o) of this Rule, the Authority shall identify functional criteria to measure the anticipated benefits of the mitigation to the adjacent water. The Authority shall issue a mitigation determination that specifies the area, type, and location of mitigation and the water quality benefits to be provided by the mitigation site. All mitigation proposals shall meet the following criteria:

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

(2) The mitigation proposal shall include a commitment to provide:

(A) a perpetual conservation easement or similar preservation mechanism to ensure perpetual stewardship that protects the mitigation site's nutrient removal and other water quality functions;

(B) a non-wasting endowment or other dedicated financial surety to provide for the perpetual land management and maintenance of lands or structures; and

(C) financial assurance in the form of a completion bond, credit insurance, letter of credit, escrow, or other vehicle acceptable to the Authority payable to, or for the benefit of, the Authority in an amount sufficient to ensure that the property is secured in fee title or by easement, and that planting or construction, monitoring and maintenance are completed as necessary to meet success criteria as specified in the approved mitigation plan. This financial assurance obligation shall not apply to the NC Ecosystem Enhancement Program.

(3) Diffuse flow of runoff shall be maintained in the riparian buffer. Any existing impervious cover or stormwater conveyances such as ditches, pipes, or drain tiles shall be eliminated and the flow converted to diffuse flow. If the applicant or mitigation provider determines that elimination of existing stormwater conveyances is not feasible, then they shall include a justification and shall provide a delineation of the watershed draining to the stormwater outfall and the percentage of the total drainage by area treated by the riparian buffer with the mitigation plan specified in Paragraph (n) or Paragraph (o) of this Rule for Authority approval. During mitigation plan review and approval the Division may reduce credit proportionally.

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

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

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

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

(5) The applicant or mitigation provider shall provide a site specific credit/debit ledger to the Authority at regular intervals as specified in the mitigation plan approval or Mitigation Banking Instrument once credits are established and until they are exhausted.

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

(7) Buffer mitigation credit, nutrient offset credit, wetland mitigation credit, and stream mitigation credit shall be accounted for in accordance with the following:

(A) Buffer mitigation used for buffer mitigation credit shall not be used for nutrient offset credits;

(B) Buffer mitigation credit shall not be generated within wetlands that provide wetland mitigation credit required by 15A NCAC 02H .0506; and

(C) Buffer mitigation credit may be generated on stream mitigation sites as long as the width of the restored or enhanced riparian buffer meets the requirements of Subparagraph (n)(1) of this Rule.

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

Mitigation Activity	Square Feet of Mitigation Buffer	Riparian Buffer Mitigation Units Generated
Restoration Site	1	1
Enhancement Site	2	1

Preservation Site on Non-Subject Urban Streams	3	1
Preservation Site on Subject Urban Streams	3	1
Preservation Site on Non-Subject Rural Streams	5	1
Preservation Site on Subject Rural Streams	10	1

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

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

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

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

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

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

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

~~(4)~~(2) The applicant or mitigation provider shall submit to the Authority a restoration or enhancement plan for written approval. ~~by the Division.~~ The restoration or enhancement plan shall demonstrate compliance with the requirements of ~~Subparagraphs (1) through (3) of~~ this Paragraph and Paragraphs (l) and (m) and shall also contain the following: ~~following in addition to the elements required in Paragraph (c) of this Rule:~~

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

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

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

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

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

~~(5)~~(3) Within one year after the ~~Division has approved the restoration or enhancement~~ Authority approval of the mitigation plan, the applicant or mitigation provider shall present documentation to the ~~Division~~ Authority that the riparian buffer has been restored or enhanced unless the ~~Division~~ Authority agrees in writing prior to that date to a longer time period. ~~period due to the necessity for a longer construction period.~~

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

~~(7)~~(4) The applicant or mitigation provider shall submit written annual reports for a period of five years after the restoration or enhancement has been conducted ~~showing~~ showing:

(A) ~~that~~ the survival of the trees or tree and shrub species ~~planted~~ planted;

(B) whether the vegetation of the site is expected to meet ~~are meeting~~ success ~~criteria~~ criteria; and

(C) that diffuse flow through the riparian buffer has been maintained.

The applicant or mitigation provider shall replace trees or shrubs and restore diffuse flow if needed during that five-year period. If the Authority determines that the objectives identified in this Paragraph have not been achieved at the end of the five-year monitoring period the Authority may require additional ~~Additional~~ years of monitoring. ~~monitoring may be required if the objectives under Paragraph (i) have not been achieved at the end of the five-year monitoring period.~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~(F) The property shall not contain structures or materials that present health or safety concerns to the general public. If wells, septic, water, or sewer~~

connections exist, they shall be filled, remediated or closed at owner's expense in accordance with state and local health and safety regulations before the interest is transferred. Sewer connections in Zone 2 may be allowed for projects in accordance with Part (m)(2)(E) of this Rule;

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

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

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

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

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

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

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

(C) A current property survey performed in accordance with the procedures of the North Carolina Department of Administration, State Property Office as identified by the State Board of Registration for Professional Engineers and Land Surveyors as set forth in 21 NCAC 56 .1600.

(D) A current appraisal of the value of the property performed in accordance with the procedures of the North Carolina Department of Administration, State Property Office as identified by the Appraisal Board as set forth in 21 NCAC 57A .0501; and

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

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

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

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

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

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

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

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

~~(A)~~(1) Coastal Headwater Stream Mitigation. Wooded buffers planted along Outer Coastal Plain headwater stream mitigation sites may also be approved as riparian buffer mitigation credit ~~as long as~~ if the site meets all applicable requirements of Paragraph ~~(i)~~(n) of this Rule. In addition, all success criteria ~~including woody species, stem density, diffuse flow, and stream success criteria~~ specified in the approval of the stream mitigation site by the Division ~~in any required written approval of the site~~ shall be met. The area of the buffer shall be measured perpendicular to the length of the valley being restored. The area within the proposed buffer mitigation site shall not also be used as wetland mitigation. The applicant or mitigation provider shall monitor the site for at least five years from the date of planting ~~by providing~~ and provide annual reports for written Division approval.

~~(B)~~(2) Buffer Restoration and Enhancement on Non-Subject Streams. Restoration or enhancement of buffers may be conducted on intermittent or perennial streams that are not subject to the applicable riparian buffer ~~rules.~~ Rules .0233, .0243, .0250, .0259, .0267, .0607 of this Subchapter. These streams shall be confirmed as intermittent or perennial streams by Division staff certified per G.S. 143-214.25A using the Division publication, Methodology for Identification of Intermittent and Perennial Streams and Their Origins (v.4.11, 2010) available at no cost at http://portal.ncdenr.org/web/wq/swp/ws/401/waterresources/streamdeterminations. The proposal shall meet all applicable requirements of Paragraph ~~(i)~~(n) of this Rule.

~~(C)~~(3) Preservation of Buffer on Non-subject streams. Preservation of buffers on intermittent or perennial streams that are not subject to the applicable riparian buffer ~~rules~~ Rules .0233, .0243, .0250, .0259, .0267, .0607 of this Subchapter may be proposed in order to permanently protect the buffer from cutting, clearing, filling, grading, and similar activities that would affect the functioning of the buffer. These streams shall be confirmed as intermittent or perennial streams by Division staff certified per G.S. 143-214.25A using the Division publication, Methodology for Identification of Intermittent and Perennial Streams and Their Origins (v.4.11, 2010). The preservation site shall meet the requirements of Subparagraph (n)(1) of this Rule and the requirements set forth in 15A NCAC 02R .0403(c)(7), (8), and (11). ~~Subparagraphs (i)(1), (i)(3), (i)(6) and Parts (l)(3)(D), (E), (F), (H) and (J) of this Rule. Preservation shall be proposed only when restoration or enhancement with an area at least equal to the footprint of the buffer impact has been proposed.~~

~~(D)~~(4) Preservation of Buffers on Subject Streams. Buffer preservation may be proposed on streams that are subject to the applicable riparian buffer Rules .0233, .0243, .0250, .0259, .0267, .0607 of this Subchapter in order to permanently protect the buffer from cutting, clearing, filling, grading, and similar activities that would affect the functioning of the buffer beyond the protection afforded by the existing buffer rules on sites that meet the definition of a preservation site. ~~site along streams, estuaries, or ponds that are subject to buffer rules.~~ The preservation site shall meet the requirements of Subparagraph (n)(1) of this Rule and the requirements set forth in 15A NCAC 02R .0403(c)(7), (8), and (11). ~~Subparagraphs (i)(1), (i)(3), (i)(6) and Parts (l)(3)(D), (E), (F), (H) and (J) of this Rule. Preservation shall be proposed only when restoration or enhancement of an area at least equal to the footprint of the buffer impact has been proposed.~~

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

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

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

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

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

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

~~(F)~~(5) Enhancement of grazing areas adjacent to streams. Buffer credit at a 2:1 ratio shall be available for an applicant or mitigation provider who proposes permanent exclusion of grazing livestock that otherwise degrade the stream and riparian zone through trampling, grazing, or waste deposition by fencing the livestock out of the stream and its adjacent buffer. The applicant or mitigation provider shall provide an enhancement plan as set forth in Paragraph ~~(i).~~(n). The applicant or mitigation provider shall demonstrate that grazing was the predominant land use since the effective date of the applicable buffer rule.

~~(G)~~(6) Mitigation on ephemeral channels. For purposes of riparian buffer mitigation as described in this Part, an "ephemeral channel" is defined as a natural channel exhibiting discernible banks within a topographic crenulation (V-shaped contour lines) indicative of natural drainage on the 1:24,000 scale (7.5 minute) quadrangle topographic map prepared by the U.S. Geologic Survey, or as seen on digital elevation models with contours developed from the most recent available LiDAR ~~data.~~ data available at no cost at http://www.ncfloodmaps.com/lidar.com.

Ephemeral channels only flow for a short period of time after precipitation in the immediate area and do not have periods of base flow sustained by groundwater discharge. The applicant or mitigation provider shall provide a delineation of the watershed draining to the ephemeral channel. The entire area proposed for mitigation shall be within the contributing drainage area to the ephemeral channel. The ephemeral channel shall be directly connected to an intermittent or perennial stream and contiguous with the rest of the mitigation site protected under a perpetual conservation easement. The area of the mitigation site on ephemeral channels shall comprise no more than 25 percent of the total area of buffer mitigation. The proposal shall meet all applicable requirements of Paragraph ~~(i)~~(n) of this Rule for restoration or enhancement. The proposal shall meet all applicable requirements of ~~Part (m)(2)(C)~~ Subparagraph (o)(3) or (o)(4) of this Rule for preservation.

~~(H)~~(7) Restoration and Enhancement on Ditches. For purposes of riparian buffer mitigation as described in this Part, a "ditch" is defined as a man-made channel other than a modified natural stream that was constructed for drainage purposes. To be used for mitigation, a ditch shall meet all of the following criteria:

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

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

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

~~(iv)~~(D) be between one and three feet in depth; and

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

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

~~(3)~~(8) ~~ALTERNATIVE BUFFER STORMWATER TREATMENT OPTIONS~~ Stormwater Treatment Options. All stormwater treatment options shall meet the following requirements:

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

~~(B)~~(A) Structural measures already required by other local, state or federal rule or permit cannot be used as alternative buffer ~~mitigation,~~ mitigation credit, except to the extent such measure(s) exceed the requirements of such rule or permit. Stormwater Best Management Practices (BMPs), including bioretention facilities, constructed wetlands, infiltration devices and sand filter are all potentially approvable (BMPs) by the Division for alternative buffer ~~mitigation.~~ mitigation credit. Other BMPs may be approved only if they meet the nutrient removal levels outlined in Part ~~(3)(C)~~(8)(B) of this Subparagraph. Existing or planned BMPs for a local, state, or federal rule or permit may be retrofitted or expanded to improve their nutrient removal if this level of treatment would not be required by other local,

state, or federal rules. In this case, the predicted increase in nutrient removal may be counted toward alternative buffer ~~mitigation;~~ mitigation credit;

~~(C)~~(B) Minimum treatment levels: Any structural BMP shall provide at least 30 percent total nitrogen and 35 percent total phosphorus removal as demonstrated by a scientific and engineering literature review as approved by the Division. The mitigation proposal shall demonstrate that the proposed alternative removes an equal or greater annual mass load of nutrients to surface waters as the buffer impact authorized in the authorization certificate or variance, following the calculation of impact and mitigation areas pursuant to Paragraphs (d), (e), and (f) of this Rule. To estimate the rate of nutrient removal of the impacted buffer, the applicant or mitigation provider shall use the NC Division of Water Quality – Methodology and Calculation for determining nutrient reductions associated with Riparian Buffer Establishment available at no cost at http://portal.ncdenr.org/c/document_library/get_file?uuid=55c3758f-5e27-46cf-8237-47f890d9329a&groupId=38364. ~~a method previously approved by the Division.~~ The applicant or mitigation provider may propose an alternative method of estimating the rate of nutrient removal for consideration and review by the Division;

~~(D)~~(C) All proposed structural BMPs shall follow the Division's 2009 Stormwater Best Management Practice Design Manual available at no cost at http://portal.ncdenr.org/web/lr/bmp-manual. If a specific proposed structural BMP is not addressed in this Manual, the applicant or mitigation provider shall follow Chapter 20 in this Manual for approval;

~~(E)~~(D) All structural options are required to have Division approved operation and maintenance plans;

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

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

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

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

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

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

~~(4)~~(9) CASE-BY-CASE APPROVAL FOR OTHER ALTERNATIVE BUFFER MITIGATION OPTIONS. Other alternative riparian buffer mitigation options may be ~~considered by~~ submitted to the Division for review and recommendation to the Environmental Management Commission on a case-by-case basis as long as the options otherwise meet the requirements of this Rule. Prior to recommendation to the Environmental Management Commission the Division shall

issue a ~~after 30 day~~ 30-calendar day public notice through the Division's ~~Water Quality Certification~~ Mailing List in accordance with 15A NCAC 02H .0503.~~0503 as long as the options otherwise meet the requirements of this Rule~~. Division staff shall present recommendations including comments received during the public notice period to the Environmental Management Commission for a final decision with respect to any proposal for other alternative buffer mitigation options not ~~specified~~ described in this Rule.

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

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

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

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

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

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***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Commission for Public Health intends to adopt the rule cited as 15A NCAC 18C .1539.*

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

Proposed Effective Date: *July 1, 2015*

Public Hearing:
Date: *March 3, 2015*
Time: *1:00 p.m.*
Location: *Ground Floor Hearing Room, Archdale Bldg., 512 N. Salisbury Street, Raleigh, NC 27604-1170*

Reason for Proposed Action: *The federal government recently revised the 1989 Total Coliform Rule to strengthen public protection from bacteriological contamination in drinking water. These changes conform to the Safe Drinking Water Act provision that requires any revision to "maintain, or provide for greater protection of the health of persons." As a result, EPA amended the National Primary Drinking Water Regulations - 40 CFR Parts 141 and 142 - to distinguish between the compliance dates of the current federal rule and the new, revised rule. The Public Water Supply Section (PWS Section) initially adopted the 1989 Total Coliform Rule requirements in Rules .1534 and .1535 of the Rules Governing Public Water Systems (which can be found in subchapter 15A NCAC 18C), effective January 1, 1991. These rules reference the federal rules 40 CFR 141.21, 141.52 and 141.63. The federal rules specify that systems must comply with the provisions of new Subpart Y beginning April 1, 2016. Therefore, North Carolina must now adopt the new federal rule (40 CFR 141, Subpart Y – Revised Total Coliform Rule) in order to maintain the primary enforcement responsibility over the Total Coliform Rule in the state of North Carolina. Were the State not to adopt the federal rule, public water systems would be subject to the rule under federal enforcement by EPA.*

Comments may be submitted to: *Linda Raynor, 1634 Mail Service Center, Raleigh, NC 27699-1634, phone (919) 707-9095, email Linda.Raynor@ncdenr.gov.*

Comment period ends: *April 17, 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 18 – ENVIRONMENTAL HEALTH

SUBCHAPTER 18C – WATER SUPPLIES

SECTION .1500 – WATER QUALITY STANDARDS

15A NCAC 18C .1539 REVISED TOTAL COLIFORM RULE

The provisions of 40 C.F.R. 141, Subpart Y - Revised Total Coliform Rule are hereby incorporated by reference including any

subsequent amendments and editions. Copies are available for public inspection as set forth in Rule .0102 of this Subchapter.

Authority G.S. 130A-315.

TITLE 21 - OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 08 – CERTIFIED PUBLIC ACCOUNTANT EXAMINERS

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the NC State Board of CPA Examiners intends to amend the rule cited as 21 NCAC 08G .0409.*

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

Proposed Effective Date: *July 1, 2015*

Public Hearing:
Date: *March 18, 2015*
Time: *1:00 p.m.*
Location: *NC State Board of CPA Examiners, 1101 Oberlin Road, Suite 104, Raleigh, NC 27605*

Reason for Proposed Action: *The purpose of the rule-making is to amend the rule regarding the length of a contact hour for credit for continuing professional education (CPE) for licensees of the Board.*

Comments may be submitted to: *Robert N. Brooks, NC State Board of CPA Examiners, 1101 Oberlin Road, Suite 104, Raleigh, NC 27605, phone (919) 733-1425, fax (919) 733-4209, email rbrooks@nccpaboard.gov.*

Comment period ends: *April 17, 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**

SUBCHAPTER 08G - CONTINUING PROFESSIONAL EDUCATION (CPE)

SECTION .0400 - CPE REQUIREMENTS

21 NCAC 08G .0409 COMPUTATION OF CPE CREDITS

(a) Group Courses: Non-College. CPE credit for a group course that is not part of a college curriculum shall be given based on contact hours. A contact hour shall be 50 minutes of ~~instruction. One half credit~~ instruction and one-half contact hour shall be equal to 25 minutes of instruction. ~~after the first credit hour has been earned in a formal learning activity.~~ For example, a group course lasting 100 minutes shall be two contact hours equaling two CPE credits. A group course lasting 75 minutes shall be one and one-half contact hours equaling one and one-half CPE credits. A group course lasting 25 minutes shall be one-half contact hour and equal to one-half CPE credit. When individual segments of a group course are less than 50 minutes, the sum of the individual segments shall be added to determine the number of contact hours. For example, five 30-minute presentations shall be 150 minutes, which shall be three contact hours and three CPE credits. No credit shall be allowed for a segment unless the participant completes the entire segment. Internet based programs shall employ a monitoring mechanism to verify that participants are participating during the duration of the course. No credit shall be allowed for a group course having fewer than 25 minutes of course instruction.

(b) Completing a College Course. CPE credit for completing a college course in the college curriculum shall be granted based on the number of credit hours the college gives the CPA for completing the course. One semester hour of college credit shall be 15 CPE credits; one quarter hour of college credit shall be 10 CPE credits; and one continuing education unit shall be 10 CPE credits. No CPE credit shall be given to a CPA who audits a college course.

(c) Self Study. CPE credit for a self-study course shall be given based on the average number of contact hours needed to complete the course. The average completion time shall be allowed for CPE credit. A sponsor ~~must~~ shall determine on the basis of pre-tests or NASBA word count formula the average number of contact hours of course material it takes to complete a course. A contact hour shall be 50 minutes and one-half contact hour shall be 25 minutes of course material. No self-study course may contain fewer than 25 minutes of course material.

(d) Instructing a CPE Course. CPE credit for teaching or presenting a CPE course for CPAs shall be given based on the number of contact hours spent in preparing and presenting the course. No more than 50 percent of the CPE credits required for a year shall be credits for preparing for and presenting CPE courses. CPE credit for preparing or presenting a course shall be allowed

only once a year for a course presented more than once in the same year by the same CPA.
(e) Authoring a Publication. CPE credit for published articles and books shall be given based on the number of contact hours the CPA spent writing the article or book. No more than 25 percent of a CPA's required CPE credits for a year shall be credits for published articles or books. An article written for a CPA's client or business newsletter shall not receive CPE credit.
(f) Instructing a Graduate Level College Course. CPE credit for instructing a graduate level college course shall be given based on the number of credit hours the college gives a student for successfully completing the course, using the calculation set forth in Paragraph (b) of this Rule. Credit shall not be given for instructing a course in which there is credit given towards an undergraduate degree.
(g) No more than 50 percent of the CPE credits required for a year shall be credits claimed under Paragraph (d) and (f) of this Rule.

Authority G.S. 93-12(8b).

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CHAPTER 46 – BOARD OF PHARMACY

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Pharmacy intends to amend the rule cited as 21 NCAC 46 .3301.*

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

Proposed Effective Date: *July 1, 2015*

Public Hearing:
Date: *May 12, 2015*
Time: *9:00 a.m.*
Location: *North Carolina Board of Pharmacy, 6015 Farrington Road, Suite 201, Chapel Hill, NC 27517*

Reason for Proposed Action: *The Board proposes amending the technician registration statue to improve conformity to the statutory requirements of G.S. 90-85.15A, including those adopted in Session Law 2013-379.*

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

Comment period ends: *May 12, 2015, 9:00 a.m.*

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

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

SECTION .3300 - REGISTRATION OF A PHARMACY TECHNICIAN

21 NCAC 46 .3301 REGISTRATION
(a) Following initial registration with the Board, registration of a pharmacy technician shall be renewed annually and shall expire on December 31. It shall be unlawful to work as a pharmacy technician more than 60 days after expiration of the registration without renewing the registration. A registration expired for more than 60 days due to non-renewal shall be reinstated only if the applicant meets the requirements of~~pursuant to~~ 21 NCAC 46 .1612.
(b) The current registration of a pharmacy technician shall be ~~readily~~ available for inspection by agents of the Board.
~~(c) The training program described in G.S. 90-85.15A(b) is not required for students enrolled in a community college pharmacy technician program.~~
~~(d)~~(c) ~~Volunteer pharmacy~~ Pharmacy technicians ~~providing~~ who provide services solely at ~~a facility which has a pharmacy permit designated as~~ a free clinic as defined in G.S. 90-85.44shall register with the Board and complete the training program described in G.S. 90-85.15A,~~90-85.15A(b)~~ but are exempt from the pharmacy technician registration fee.~~need not register with the Board.~~
~~(e)~~(d) A pharmacist may not supervise more than two pharmacy technicians unless the additional pharmacy technicians have passed a national pharmacy technician certification examination administered by a provider whose examination assesses the ability of the technicians to function in accordance with G.S. 90-85.3(q2) and approved by the Board according to these standards.

Authority G.S. 90-85.6; 90-85.15A.

This Section contains information for the meeting of the Rules Review Commission on January 15, 2015 at 1711 New Hope Church Road, RRC Commission Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-431-3000. Anyone wishing to address the Commission should notify the RRC staff and the agency no later than 5:00 p.m. of the 2nd business day before the meeting. Please refer to RRC rules codified in 26 NCAC 05.

RULES REVIEW COMMISSION MEMBERS

Appointed by Senate	**Appointed by House**
Jeff Hyde (1st Vice Chair)	Garth Dunklin (Chair)
Margaret Currin	Stephanie Simpson (2nd Vice Chair)
Jay Hemphill	Anna Baird Choi
Faylene Whitaker	Jeanette Doran
	Ralph A. Walker

COMMISSION COUNSEL

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

RULES REVIEW COMMISSION MEETING DATES

February 19, 2015	March 19, 2015
April 16, 2015	May 21, 2015

RULES REVIEW COMMISSION MEETING
MINUTES
January 15, 2015

The Rules Review Commission met on Thursday, January 15, 2015, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Anna Choi, Margaret Currin, Jeanette Doran, Garth Dunklin, Jay Hemphill, Jeff Hyde, Stephanie Simpson, Ralph Walker, and Faylene Whitaker.

Staff members present were Commission Counsels Abigail Hammond, Amber Cronk May, and Amanda Reeder, as well as support staff members Julie Brincefield and Alex Burgos.

The meeting was called to order at 9:59 a.m. with Chairman Currin presiding.

Chairman Currin introduced the new General Counsel to the Office of Administrative Hearings, Bill Culpepper.

Chairman Currin introduced a new Administrative Law Judge to the Office of Administrative Hearings, Phil Berger, Jr.

Chairman Currin introduced OAH Extern Ryan Niland.

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

APPROVAL OF MINUTES

Chairman Currin asked for any discussion, comments, or corrections concerning the minutes of the December 17, 2014 meeting. There were none and the minutes were approved as distributed.

FOLLOW UP MATTERS

Division of Mental Health

The agency had not responded in accordance with G.S. 150B-21.1(b1) or (b2). There was no action for the Commission to take at the meeting.
Commissioner Doran was not present during the discussion or vote on these rules.

Environmental Management Commission

15A NCAC 02H .1030 was unanimously approved.
Commissioner Doran was not present during the discussion or vote on the rule.

Mining and Energy Commission
All rules were unanimously approved, with the exception of rules 15A NCAC 05H .0804 and .1704, which were withdrawn by the agency.

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

Commissioner Doran was not present during the discussion or vote on these rules.

Board of Landscape Architects
The Commission voted to extend the period of review to allow the Board additional time to finalize changes to the rules.

Prior to the review of the rules from the Board of Landscape Architects, Commissioner Whitaker recused herself and did not participate in any discussion or vote concerning these rules because of possible conflict with her garden center business.

Jeff Gray, the agency's attorney and rulemaking coordinator, addressed the Commission.

LOG OF FILINGS (PERMANENT RULES)
Department of Commerce – Credit Union Division
The Commission voted to extend the period of the review to allow the agency additional time to finalize changes to the rules.

Prior to the review of the rules from the Department of Commerce-Credit Union Division, Commissioner Doran recused herself and did not participate in any discussion or vote concerning these rules because she is employed with the Department of Commerce. Commissioner Doran was not present during the discussion or vote on the rules.

Prior to the review of the rules from the Department of Commerce-Credit Union Division, Commissioner Hemphill recused himself and did not participate in any discussion or vote concerning these rules because of a potential conflict of interest.

Division of Health Service Regulation
All rules were unanimously approved.
Commissioner Doran was not present during the discussion or vote on the rules.

Department of State Treasurer
All rules were unanimously approved.
Commissioner Doran was not present during the discussion or vote on the rules.

Hearing Aid Dealers and Fitters Board
21 NCAC 22F .0105 was unanimously approved.
Commissioner Doran was not present during the discussion or vote on the rule.

The Commission took a break from 11:11 a.m. to 11:23 p.m.

Board of Physical Therapy Examiners
All rules were approved with the following exception:

21 NCAC 48C .0104 – The Commission voted against staff's recommendation to approve the rule with Commissioners Choi, Currin, and Hyde voting in favor; and Commissioners Doran, Dunklin, Hemphill, Simpson, Walker, and Whitaker voting against. The Commission objected to this rule based upon lack of statutory authority.

Thomas Mitchell, Sharon DeMocker, Mary C. Majebe, Eric Buckley, Nancy Davison, Ashley Perkinson, Ann Christian, and Ed Gaskins addressed the Commission speaking against the rule.
John Silverstein, Stephen Feldman, Mary Hannah, and David Reed addressed the Commission speaking in favor of the rule.

Board of Refrigeration Examiners
21 NCAC 60 .0214 was unanimously approved.

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

Commissioners Doran, Walker, and Whitaker were not present during the discussion and vote on the rule.

Office of Administrative Hearings
26 NCAC 03 .0118 was unanimously approved.

Commissioner Choi presented the review for the rule.

EXISTING RULES REVIEW

Board of Agriculture
02 NCAC 09B – The Commission unanimously approved the report as submitted by the agency.

02 NCAC 09C – The Commission unanimously approved the report as submitted by the agency.

02 NCAC 09D – The Commission unanimously approved the report as submitted by the agency.

02 NCAC 09E – The Commission unanimously approved the report as submitted by the agency.

02 NCAC 09F – The Commission unanimously approved the report as submitted by the agency.

02 NCAC 09G – The Commission unanimously approved the report as submitted by the agency.

02 NCAC 09H – The Commission unanimously approved the report as submitted by the agency.

02 NCAC 09J – The Commission unanimously approved the report as submitted by the agency.

02 NCAC 09K – The Commission unanimously approved the report as submitted by the agency.

02 NCAC 09M – The Commission unanimously approved the report as submitted by the agency.

02 NCAC 09N – The Commission unanimously approved the report as submitted by the agency.

02 NCAC 09O – The Commission unanimously approved the report as submitted by the agency.

02 NCAC 38 – The Commission unanimously approved the report as submitted by the agency.

02 NCAC 43F – The Commission unanimously approved the report as submitted by the agency.

02 NCAC 51 – The Commission unanimously approved the report as submitted by the agency.

02 NCAC 52A – The Commission unanimously approved the report as submitted by the agency.

02 NCAC 52K – The Commission unanimously approved the report as submitted by the agency.

02 NCAC 54 – The Commission unanimously approved the report as submitted by the agency.
Commissioners Choi, Dunklin, and Hemphill were not present and did not participate in the vote for these reports.

Medical Care Commission
10A NCAC 13A – The Commission unanimously approved the report as submitted by the agency.

10A NCAC 13D – The Commission unanimously approved the report as submitted by the agency.

Division of Health Service Regulation
10A NCAC 14I – The Commission unanimously approved the report as submitted by the agency.

Department of Environment and Natural Resources

15A NCAC 01F – The Commission unanimously approved the report as submitted by the agency.

Board of Employee Assistance Professionals
As this report was not scheduled for review at the January meeting, it was reviewed at the end of the regularly scheduled business.

The Board requested a waiver for an extension of time to file their report pursuant to G.S. 150B-21.3A and 26 NCAC 05 .0211

The Commission approved the waiver request, with Commissioner Doran opposed.

Barden Culbreth with the agency addressed the Commission.

The Commission rescheduled the date of review for the report for 21 NCAC 11 pursuant to Rule 26 NCAC 05 .0204.

The Commission will review the Board's report at its July 2015 meeting.

2015 STATE MEDICAL FACILITIES PLAN
The Commission found that the Department of Health and Human Services and the State Health Coordinating Council complied with G.S. 131E-176(25) in the adoption of the 2015 Plan.

COMMISSION BUSINESS
The Commission's Bylaws require that elections be held at the January meeting. The following members were elected as officers:

Garth Dunklin was elected Chairman.

Jeff Hyde was elected 1st Vice-Chairman.

Stephanie Simpson re-elected 2nd Vice-Chairman.

At 1:45 p.m., Chairman Dunklin ended the public meeting of the Rules Review Commission and called the meeting into closed session pursuant to G.S 143-318.11 to discuss the lawsuit filed by the State Board of Education against the Rules Review Commission.
The Commission came out of closed session at 2:43 p.m.
The meeting adjourned at 2:50 p.m.

The next regularly scheduled meeting of the Commission is scheduled for Thursday, February 19th at 10:00 a.m.

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

Respectfully Submitted,

_____
Julie Brincefield, Administrative Assistant

Minutes approved by the Rules Review Commission:

_____
Margaret Currin, Chair

JANUARY 2015

Rules Review Commission
Meeting
Please **Print** Legibly

Name	Agency
Christina Duerr Reid	NCAAOM
Eric Raymond Buckley	NCAAOM
Tina Hlabse	NCDACS
Derek Usgner	NC DA + CS
Ann Christian	NCALB
Ashley Parkinson	Parkinson Law
James Hash	Everett Gaskins Hancock LLP
Ed Gaskins	" " " "
Kathy Arney	NCBPTE
Jennifer Everett	DENR
David Reed	NCBPTE
William H. Potts Sr, Jr	NCPTA
Katherine Marciniak	DEMLR
Walt Haven	DEMLR
Ryan Channell	DEMLR
Jeff Gray	Board of Landscape Architect
Sharon DeMocker, MD	Sharon DeMocker Family Medicine
Jamie Norkett	Jamie Lewyer
Nadine Pfeffer	DHSR
Chris Helmstetter	NCAHCM
Benj Massey IV R	N.C. Board of Physical Therapy Examiners

JANUARY 2015

Rules Review Commission
Meeting
Please **Print** Legibly

Name	Agency
Ryan Niland	OAH - Intern
ANA-LAURA DIAZ	DST - COUNSEL
JOHN SLWERSTEIN	NCBPTE
Betsy Vetter	American Heart Association
Nancy Davison	NCAAOM - PT&LAc
Debbie Rahan	NCPTA
Bradley Bennett	NCDENR
DAVID Edwards	NCPTA
Mary Kay Hannah	NCPTA
Stephen Feldman	NCPTA / Ellis & Winters
Jim Mizell	NCCA
Kristin Gordon	Law Student
Lynne Berry	NC Div. of Aging

JANUARY 2015

Rules Review Commission
Meeting
Please **Print** Legibly

Name	Agency
Robert Josey	DENR
Mary C. Mull	Parish Transitions
Starleen Scott Robbins	DMH/DD/SAS
Barden Culbreth	NCEAP
Beverly Sperroff	NCDHHS

LIST OF APPROVED PERMANENT RULES
January 15, 2015 Meeting

HHS - HEALTH SERVICE REGULATION, DIVISION OF

Definitions	10A NCAC 14L .0101
Stoke Center Designation	10A NCAC 14L .0201

ENVIRONMENTAL MANAGEMENT COMMISSION

Stormwater Requirements: Oil and Gas Exploration and Prod...	15A NCAC 02H .1030

MINING AND ENERGY COMMISSION

Completeness and Request for Additional Information	15A NCAC 05H .0704
Permit Conditions	15A NCAC 05H .1308
Permit Modifications	15A NCAC 05H .1310
Disturbed Land Bond	15A NCAC 05H .1404
Environmental Damage Bond	15A NCAC 05H .1405
Inspection and Approval of Reclamation for Bond Release r...	15A NCAC 05H .1406
Bond Forfeiture Procedures	15A NCAC 05H .1407
Variance for Setbacks	15A NCAC 05H .1603
Well Stimulation Requirements	15A NCAC 05H .1613
Request for Investigation of Water Supply	15A NCAC 05H .1804
Surface Water Source Documentation	15A NCAC 05H .1902
Groundwater Source Documentation	15A NCAC 05H .1903
Exploration and Production Waste Disposal	15A NCAC 05H .2003

STATE TREASURER, DEPARTMENT OF

Description of the Program	20 NCAC 01G .0101
Definitions	20 NCAC 01G .0102
Principles of Accounting and Valuation	20 NCAC 01G .0103
Accounting for Exchanges	20 NCAC 01G .0104
Allocation of Management Costs	20 NCAC 01G .0105
Consolidation of Existing Investments of Participants	20 NCAC 01G .0106
Mergers of Additional Investment Portfolios	20 NCAC 01G .0107
Loans Between Investment Funds	20 NCAC 01G .0108
Delegation of Authority	20 NCAC 01G .0109
General	20 NCAC 01G .0201
Eligible Investments	20 NCAC 01G .0202
Eligible Participants	20 NCAC 01G .0203
Allocation of Income to Participants	20 NCAC 01G .0204
Voluntary Deposits for Investments	20 NCAC 01G .0207
General	20 NCAC 01G .0301
Eligible Investments	20 NCAC 01G .0302
Eligible Participants	20 NCAC 01G .0303
Allocation of Income to Participants	20 NCAC 01G .0304
Valuation of Ownership Units	20 NCAC 01G .0305
Purchase of Ownership Units	20 NCAC 01G .0306

Redemption of Ownership Units	20	NCAC 01G .0307
General	20	NCAC 01G .0401
Eligible Investments	20	NCAC 01G .0402
Eligible Participants	20	NCAC 01G .0403
Allocation of Income to Participants	20	NCAC 01G .0404
Valuation of Ownership Units	20	NCAC 01G .0405
Purchase of Ownership Units	20	NCAC 01G .0406
Redemption of Ownership Units	20	NCAC 01G .0407
Responsibility of Equity Investment Advisory Committee	20	NCAC 01G .0408
Rebalancing of Ownership	20	NCAC 01G .0409
General	20	NCAC 01G .0501
Eligible Investments	20	NCAC 01G .0502
Eligible Participants	20	NCAC 01G .0503
Allocation of Income to Participants	20	NCAC 01G .0504
Valuation of Ownership Units	20	NCAC 01G .0505
Purchase of Ownership Units	20	NCAC 01G .0506
Redemption of Ownership Units	20	NCAC 01G .0507
Rebalancing of Ownership	20	NCAC 01G .0508
General Information	20	NCAC 01H .0101
Definition of Terms	20	NCAC 01H .0102
Minimum Standards	20	NCAC 01H .0103
Delegation of Authority	20	NCAC 01H .0104
Requirements for the RFP	20	NCAC 01H .0201
Issuance of the RFP	20	NCAC 01H .0202
Contract Period: Termination of Trustee	20	NCAC 01H .0203
Termination for Cause	20	NCAC 01H .0204
Availability of Records	20	NCAC 01H .0205
Establishment of Individual Accounts	20	NCAC 01H .0301
Eligible Securities: Case Deposits	20	NCAC 01H .0302
Deposit of Cash or Securities	20	NCAC 01H .0303
Substitution of Securities	20	NCAC 01H .0304
Required Reporting	20	NCAC 01H .0305
Withdrawal of Cash or Securities	20	NCAC 01H .0306
Fees	20	NCAC 01H .0307
Notification of Default	20	NCAC 01H .0401
Sale of Securities After Default	20	NCAC 01H .0402

HEARING AID DEALERS AND FITTERS BOARD

Passing Examination	21	NCAC 22F .0105

PHYSICAL THERAPY EXAMINERS, BOARD OF

Membership of Board	21	NCAC 48A .0103
Exemptions	21	NCAC 48B .0104
Responsibilities	21	NCAC 48C .0102
Retaking Examination	21	NCAC 48D .0109
Foreign-Trained Physical Therapist Applicant by Examination	21	NCAC 48E .0110

Foreign-Trained Physical Therapist by Endorsement	21	NCAC 48E	.0111
Foreign-Trained Physical Therapist Assistant Applicant	21	NCAC 48E	.0112
Criminal History	21	NCAC 48E	.0113
Continuing Competence Activities	21	NCAC 48G	.0109
Evidence of Compliance	21	NCAC 48G	.0110
Complaints and Investigations	21	NCAC 48G	.0504
Subpoenas	21	NCAC 48G	.0512
Prohibited Actions	21	NCAC 48G	.0601
Definitions	21	NCAC 48G	.0701
Programs	21	NCAC 48G	.0702
Information of Impairment	21	NCAC 48G	.0703
Confidentiality	21	NCAC 48G	.0704
Reports	21	NCAC 48G	.0705
Program Standards	21	NCAC 48G	.0706
REFRIGERATION EXAMINERS, BOARD OF			
Licensure for Military-Trained Applicant; Licensure for M...	21	NCAC 60	.0214
ADMINISTRATIVE HEARINGS, OFFICE OF			
Continuances	26	NCAC 03	.0118

RRC DETERMINATION
PERIODIC RULE REVIEW
January 15, 2015
Necessary with Substantive Public Interest

Agriculture, Board of
02 NCAC 09C .0501
02 NCAC 09C .0502
02 NCAC 09C .0503
02 NCAC 09C .0504
02 NCAC 09C .0505
02 NCAC 09C .0506
02 NCAC 09C .0507
02 NCAC 09C .0601
02 NCAC 09C .0701
02 NCAC 09C .0702
02 NCAC 09C .0703
02 NCAC 09E .0102
02 NCAC 09E .0103
02 NCAC 09G .0101
02 NCAC 09G .0103
02 NCAC 09G .2001
02 NCAC 09G .2002
02 NCAC 09G .2003
02 NCAC 09G .2004
02 NCAC 09G .2005
02 NCAC 09G .2006
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02 NCAC 09G .2008
02 NCAC 09G .2009
02 NCAC 09G .2010
02 NCAC 09H .0109
02 NCAC 09J .0101
02 NCAC 09J .0102
02 NCAC 09K .0101
02 NCAC 09K .0102
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02 NCAC 09K .0112
02 NCAC 09K .0113
02 NCAC 09K .0114
02 NCAC 09K .0201
02 NCAC 09K .0202
02 NCAC 09K .0203
02 NCAC 09K .0204
02 NCAC 09K .0205
02 NCAC 09K .0206
02 NCAC 09K .0207
02 NCAC 09K .0208
02 NCAC 09K .0209
02 NCAC 09K .0210
02 NCAC 09K .0211
02 NCAC 09K .0212
02 NCAC 09K .0213
02 NCAC 09K .0214
02 NCAC 09O .0101
02 NCAC 09O .0102
02 NCAC 09O .0103
02 NCAC 09O .0104
02 NCAC 09O .0105
02 NCAC 09O .0106
02 NCAC 09O .0107
02 NCAC 38 .0201
02 NCAC 38 .0202
02 NCAC 38 .0301
02 NCAC 38 .0401
02 NCAC 38 .0504
02 NCAC 38 .0601
02 NCAC 38 .0604
02 NCAC 38 .0701

Medical Care Commission
10A NCAC 13D .2001
10A NCAC 13D .2210
10A NCAC 13D .2303
10A NCAC 13D .2402
10A NCAC 13D .2503
10A NCAC 13D .3201

RRC DETERMINATION
PERIODIC RULE REVIEW
January 15, 2015
Necessary without Substantive Public Interest

Agriculture, Board of
02 NCAC 09B .0116
02 NCAC 09B .0133
02 NCAC 09C .0301
02 NCAC 09C .0302
02 NCAC 09C .0303
02 NCAC 09C .0304
02 NCAC 09C .0305
02 NCAC 09C .0306
02 NCAC 09C .0307
02 NCAC 09C .0308
02 NCAC 09D .0101
02 NCAC 09D .0102
02 NCAC 09D .0103
02 NCAC 09D .0104
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02 NCAC 09D .0106
02 NCAC 09D .0107
02 NCAC 09E .0101
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02 NCAC 09E .0110
02 NCAC 09E .0111
02 NCAC 09E .0113
02 NCAC 09E .0115
02 NCAC 09F .0101
02 NCAC 09F .0102
02 NCAC 09F .0103
02 NCAC 09F .0201
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02 NCAC 09F .0306
02 NCAC 09M .0101
02 NCAC 09M .0103
02 NCAC 09N .0101
02 NCAC 38 .0101
02 NCAC 38 .0102
02 NCAC 38 .0203
02 NCAC 38 .0204
02 NCAC 38 .0205
02 NCAC 38 .0501
02 NCAC 38 .0502
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02 NCAC 38 .0702
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02 NCAC 38 .0704
02 NCAC 38 .0705
02 NCAC 38 .0801
02 NCAC 38 .0802
02 NCAC 38 .0803
02 NCAC 38 .0804
02 NCAC 43F .0101
02 NCAC 43F .0102
02 NCAC 43F .0103
02 NCAC 43F .0104
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02 NCAC 43F .0109
02 NCAC 43F .0110
02 NCAC 43F .0111
02 NCAC 51 .0201
02 NCAC 51 .0203
02 NCAC 52A .0101
02 NCAC 52A .0102
02 NCAC 52A .0103
02 NCAC 52A .0104
02 NCAC 52A .0106
02 NCAC 52A .0107
02 NCAC 52A .0110
02 NCAC 52A .0111
02 NCAC 52A .0112
02 NCAC 52K .0101
02 NCAC 52K .0102
02 NCAC 52K .0201
02 NCAC 52K .0301
02 NCAC 52K .0302
02 NCAC 52K .0401
02 NCAC 52K .0402
02 NCAC 52K .0403
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02 NCAC 52K .0406
02 NCAC 52K .0407
02 NCAC 52K .0501
02 NCAC 52K .0502
02 NCAC 52K .0601
02 NCAC 52K .0602
02 NCAC 52K .0603
02 NCAC 52K .0604
02 NCAC 52K .0701
02 NCAC 52K .0702

Medical Care Commission
10A NCAC 13A .0101
10A NCAC 13A .0201
10A NCAC 13A .0202
10A NCAC 13A .0203
10A NCAC 13D .2101
10A NCAC 13D .2102
10A NCAC 13D .2103
10A NCAC 13D .2104
10A NCAC 13D .2105
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PERIODIC RULE REVIEW
January 15, 2015
Unnecessary

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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
Phil Berger, Jr.
J. Randolph Ward

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Maretta L Brewington v. Sampson County Department of Social Services	14 OSP 07608	12/19/14	
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Kacey Suo v. Department of Revenue	14 REV 02878	10/14/14	
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Cheryl A. Tatum v. Department of Secretary of State	13 SOS 18521	06/09/14	29:09 NCR 1176
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Anthony Garrard v. Secretary of State's Office	14 SOS 03403	08/22/14	
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STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 DHR 12594

Timothy John Murray Petitioner vs Department of Health and Human Services Division of Health Service Regulation Respondent	**DECISION**

THIS MATTER came for hearing on remand from Superior Court before the undersigned, Craig Croom, Administrative Law Judge, on October 17, 2014 in Court Room A of the Office of Administrative Hearings in Raleigh, North Carolina. This matter was originally heard before, J. Webster, Administrative Law Judge, on February 29, 2012 in the Office of Administrative Hearings. On June 15, 2014 Judge Webster upheld the Health Care Personnel's decision to substantiate the allegation of neglect, and place Petitioner's name on the Health Care Personnel Registry. On August 17, 2012 Director of the Division of Health Service Regulation issued The Final Agency Decision whereby he adopted the findings of fact and conclusions of law issued by ALJ Webster in the June 15, 2012 decision. On March 11-12, 2014 this matter came before Superior Court Judge Robert H. Hobgood on a Petition for Judicial Review. On April 17, 2014 Judge Hobgood remanded the case to the Office of Administrative Hearings to allow for additional testimony from J.R., the parents of J.R., and Vernita Dotson.

APPEARANCES

For Respondent: Candace Hoffman
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North Carolina Department of Justice
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Raleigh, North Carolina 27602

For Petitioner: Gregory Conner
Connor Law Group
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Raleigh, North Carolina 27607

PROCEDURAL BACKGROUND

1. On or about October 17, 2011, the Petitioner herein filed a Petition for Contested Case Hearing in the Office of Administrative Hearings alleging he had been falsely accused of physically abusing a client by the name of J.R. at his place of employment, A Small Miracle.

Petitioner was notified of the entry of his name by certified mail on or about September 27, 2011. The Petition was timely.

2. A Notice of Contested Case and Assignment pursuant to N.C. Gen. Stat. §150B-23, 33(b)(4) was entered on October 26, 2011 by the Honorable Julian Mann, III, Chief Administrative Law Judge. An Order for Prehearing Statement and a Scheduling Order were also entered on this date.

3. Notice of Hearing was filed on or about January 25, 2012 giving notice that the instant case was set for hearing on February 29, 2012 at 1:30 p.m. at the Office of Administrative Hearings, Raleigh, North Carolina. During the hearing, Petitioner and Respondent presented to the Court testimony of witnesses and exhibits.

4. On June 15th, 2012 Judge Webster issued an Order upholding the Respondent's decision to place a finding of abuse at Petitioner's name on the Health Care Personnel Registry.

5. On September 17, 2012, Petitioner appealed by filing a Petition for Judicial Review and Injunctive Relief with the Wake County Clerk of Superior Court pursuant to N.C. GEN. STAT. §150B-43; and an amended petition was filed on or about September 18, 2012.

6. Notice of Hearing was filed on or about December 10, 2013 giving notice that the instant case was set for hearing in Superior Court on March 11, 2014 in the Wake County Superior Court, Raleigh, North Carolina. During the hearing before Judge Hobgood, Petitioner and Respondent presented to the Court testimony of witnesses and exhibits.

7. On April 17, 2014 Judge Hobgood ordered in Petitioner's favor and ordered the case sent back to Judge Webster for additional findings of fact pursuant to N.C. GEN. STAT. §150B-49 related to inadmissible hearsay and "[a] significant and material issue of fact that has not been resolved is the strength of the touching of J.R's face: To wit, did it leave a red or pink mark?"

8. Notice of Hearing was filed on or about September 23, 2014 giving notice that the instant case was set for hearing on October 17, 2014 at the Office of Administrative Hearings, Raleigh, North Carolina. During the hearing, Petitioner and Respondent presented to the Court additional testimony of witnesses and exhibits.

ISSUE

Whether Respondent otherwise substantially prejudiced Petitioner's rights and acted erroneously when Respondent substantiated the allegation that on or about September 15, 2011, Timothy John Murray, a Health Care Personnel, abused a resident (J.R.) by slapping the resident's face resulting in physical injury to the resident?

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 131E-256

N.C. Gen. Stat. §150B-2
42 CFR § 488.301
10A N.C.A.C. 13O.010

EXHIBITS

Respondent's exhibits 1-25 were admitted into the record.
Petitioner's exhibit I was admitted into the record.

WITNESSES

For Respondent:	Timothy John Murray
	Nicole Layden
	Sol Weiner
For Petitioner:	Joseph Rothengast

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

FINDINGS OF FACT

1. At all times relevant to this matter Petitioner, Timothy John Murray, was employed as a Habilitation Technician working for A Small Miracle, Inc. in Raleigh, North Carolina and therefore subject to N.C. Gen. Stat. § 131E-256. (T. pp. 8-9; Resp. Ex. 3)

2. Petitioner completed all required training related to his job responsibilities. He received instruction on recipient's rights and specific training for Resident J.R. (T. pp. 20-27; Resp. Exs. 1, 2, 4, 6, 7, 8)

3. Petitioner initialed and signed the employer's Abuse, Neglect, Exploitation and Rights Restriction Policy. Petitioner knows that A Small Miracle, Inc. has a zero tolerance policy for abuse and that slapping a resident is abuse. (T. pp. 23-26; Resp. Exs. 5-6, 17)

4. On or about September 15, 2011, Petitioner slapped Resident J.R. of A Small Miracle, Inc. across his face.(T. p. 15; Resp. Ex. 24)

5. Resident J.R. was 35 years old at the time of the incident. He is a white male with mild mental retardation, cerebral palsy, seizure disorder and depression. (Resp. Exs. 15-16)

6. Petitioner was with Resident J.R. on September 15, 2011 at A Small Miracle, Inc. Resident J.R. worked at A Small Miracle performing tasks such as taking out the trash, wiping tables and doorknobs with sanitizing clothes, and cleaning the bathroom. (T. pp. 11-12; Resp. Ex. 11)

7. After Resident J.R. displayed a bad attitude at work, Petitioner drove J.R. home early on September 15, 2011. Petitioner's supervisors previously instructed him that he should no longer accept a bad attitude from J.R. while at work. (T. pp. 11-12; Resp. Ex. 11)

8. During the drive home, Resident J.R. was unresponsive as Petitioner attempted to discuss J.R.'s behavior while at work. Petitioner became angry with Resident J.R. and used his hand to make physical contact with J.R. on the cheek. Resident J.R. immediately whipped his head around and glared at the Petitioner. Upon arriving at his home, Resident J.R. refused to speak with Petitioner. (T p. 15, 19; Resp. Exs. 9, 11)

9. The afternoon of September 15, 2011 J.R. called his father Joseph Rothengast ("Rothengast"), and told his father that the Petitioner slapped him in the face. Rothengast testified that he believed that TJ slapped his son, and that he believed the action was inappropriate. (Vol. II. T. pp. 14-16, 24; Pet. Exh. 1)

10. Later on September 15, 2011, Resident J.R. sent an email to Nicole Layden, a Qualified Professional with A Small Miracle, Inc. The email stated that Petitioner had hit J.R. earlier that day on the way home from work. In addition, Resident J.R. claimed that Petitioner dumped him out of his wheelchair twice over the course of the last month. (Resp. Ex. 19-20). The undersigned will consider this email and its content for the limited purpose of effect on Ms. Layden and her subsequent actions.

11. Petitioner did not intentionally dump Resident J.R. from his wheelchair. One instance involved J.R. attempting to strike Petitioner. Resident J.R. attempted to stand in his wheelchair to strike, but fell while doing so. Petitioner claims that J.R. fell out of his wheelchair on a different occasion by moving unexpectedly while being assisted by Petitioner. Petitioner admitted that neither incident was reported to his supervisors. (T. p. 107, 111)

12. Upon receipt of the email from Resident J.R., Nicole Layden ("Layden") began an investigation into the allegation of abuse. She first called Resident J.R. to discuss the allegation against Petitioner in detail. (Vol. II. T. p. 33, 37-38; Resp. Ex. 19-20)

13. Layden also spoke with Petitioner by phone on September 15, 2011. Petitioner told Layden that he tried to get J.R.'s attention in the car and did so by hitting the left side of his face. He admitted that he made contact with J.R. harder and more forcefully that he should have, but did not realize this until after the incident. At this time, Petitioner was informed that he was suspended from his job at A Small Miracle, Inc. until further notice. (T. pp. 39-40; Resp. Ex. 18)

14. On September 19, 2011, Petitioner met with Layden and Beth Gaul ("Gaul"),

another employee of A Small Miracle, Inc., to discuss the incident involving Resident J.R. At this meeting, Petitioner once again admitted that he forcefully touched J.R.'s face. Petitioner was presented with a Termination Notice that outlined the reasons for his termination and cited the applicable policies that were violated. Petitioner signed the Termination Notice. (T. pp. 41-42; Resp. Ex.12, 17)

15. During the September 19, 2011 meeting, Petitioner presented Layden and Gaul with a typed statement entitled "General Observations – J.R.'s Stubborn Streak." Throughout the statement, Petitioner explained the slapping incident in addition to the two separate incidents in which J.R. fell out of his wheelchair. With respect to the incident, Petitioner admitted that his contact with Resident J.R. was "harder" than he expected and was "definitely not appropriate." (Resp. Ex. 9)

16. On September 16, 2011, Layden filled out the Employee Corrective Action Report. She sent the 24-Hour Initial Report and the 5-Working Day Report to the Health Care Personnel Registry ("HCPR") documenting the investigation. (T. p. 63; Resp. Exs. 11-12; 41-44)

17. The HCPR investigates allegations of abuse, neglect and other allegations against health care personnel in health care facilities. If an allegation is substantiated, the employee will be listed in the Registry. The HCPR covers most licensed facility in North Carolina that provides patient care. Accordingly, health care personnel at A Small Miracle, Inc. are covered by the Registry. (T. pp. 77-79)

18. At all times relevant to this incident, Sol Weiner ("Weiner") was employed as an investigator for the HCPR. He was charged with investigating allegations against health care personnel in the central region of North Carolina. Accordingly, A Small Miracle, Inc. was in his region and he received the complaint that Petitioner abused Resident J.R. (T. p. 80)

19. After the complaint against Petitioner was received, Weiner determined it needed further investigation. As part of the investigation, Weiner interviewed Petitioner, Layden, and Resident J.R. He also reviewed the resident's records and the internal investigation conducted by the facility. (T. p. 82; Resp. Exs. 9, 10, 12, 15, 16, 18, 19, 20)

20. On October 25, 2011, Weiner interviewed Layden. She stated she was first made aware of the incident by the September 15, 2011 email from Resident J.R. claiming that he was struck by Petitioner. Layden indicated that she believed that Petitioner was too forceful when he "tapped" the face of J.R. (T. pp. 86-87; Resp. Ex. 21)

21. Weiner also interviewed Resident J.R. on October 25, 2011. J.R. had trouble forming words and was anxious to discuss the incident. (T. pp. 83-86; Resp. Exs. 22-23)

22. On November 10, 2011, Weiner interviewed Petitioner. Petitioner indicated that on September 15, 2011, Resident J.R. had gotten "under his skin" and that "in that split second I decided it was time for [Resident J.R.] to pay attention to me." After admitting to making contact with Resident J.R.'s face, Petitioner described his action as "one of those stupidest things that I've ever done." (T. pp. 87-89; Resp. Ex. 11)

23. Weiner took Petitioner's statement into consideration and viewed all the information together including the facility statements, the HCPR statements, and the documentation. Weiner concluded that Petitioner abused Resident J.R. In formulating his conclusion, Weiner strongly considered the Petitioner's typed statement to Layden where he admitted that he was culpable in the "slapping" incident. Weiner wrote an investigation report which documented his conclusion. (T. pp. 90-93 Resp. Exs. 9, 24)

24. Petitioner was notified by letter that a finding of abuse would be listed against his name in the Health Care Personnel Registry. Petitioner was further notified of his right to appeal. (T. pp. 94-95; Resp. Ex. 25)

25. On remand, Resident J.R. was present at the hearing, but he did not testify.

CONCLUSIONS OF LAW

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

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

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

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

5. A Small Miracle, Inc. of Raleigh is a health care facility as defined in N.C. Gen. Stat. § 131E-255(c) and N.C. Gen. Stat. § 131E-256(b).

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

7. In *Allen v. NC DHHS-Division of Facility Services,* 155 N.C. App. 77, 85, 573 S.E.2d 565, 570 (2002) the court stated:

> Our obligation is to protect the health and safety of every resident, including those that are incapable of perception or are unable to express themselves. This presumes that instances of abuse of any resident, whether cognizant or not, cause physical harm, pain or mental anguish.

8. Hearsay is a statement, other than one made by a declarant while testifying at a hearing, offered to prove the truth of the matter asserted. N.C. Gen. Stat. § 8C-1, Rule 801 (c). Hearsay is not admissible unless subject to an exception. N.C. Gen. Stat. § 8C-1, Rule 802.

9. On or about September 15, 2011, Petitioner slapped a resident (Resident J.R.) on the face. The undersigned cannot consider inadmissible hearsay from Resident J.R. concerning "resulting physical harm, pain, or mental anguish". Therefore, "resulting physical harm, pain, or mental anguish" has not been shown.

10. Respondent's decision to substantiate this allegation of abuse against the Petitioner is not supported by a preponderance of the evidence. Therefore, Respondent did substantially prejudice Petitioner's rights, act erroneously, arbitrarily or capriciously by placing a substantiated finding of abuse against Petitioner's name on the Health Care Personnel Registry.

11. Petitioner has the burden of proving Respondent failed to act as required by law or rule when Respondent substantiated the allegation that Petitioner abused resident JR at A Small Miracle of Raleigh and entered a finding of neglect by Petitioner's name in the Health Care Personnel Registry. *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 704 (2006). Petitioner has met his burden.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that Respondent's decision to place a finding of abuse at Petitioner's name on the Health Care Personnel Registry, should be **REVERSED**.

NOTICE

The Agency that will make the final decision in this contested case is the North Carolina Department of Health and Human Resources, Division of Health Service Regulation. The Agency is required to give each party an opportunity to file exceptions to the recommended decision and to present written arguments to those in the Agency who will make the final decision. N.C. Gen. Stat. § 150-36(a). The Agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.In accordance with N.C. Gen. Stat. § 150B-36 the Agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

This the 19th day of December, 2014.

Craig Croom
Administrative Law Judge

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
11/19/2014 8:45 AM

STATE OF NORTH CAROLINA

COUNTY OF BLADEN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11DOJ04831

DERRICK WAYNE KNOX, PETITIONER, V. NC CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION, RESPONDENT.	

STATE OF NORTH CAROLINA

COUNTY OF BERTIE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11DOJ09478

DERRICK WAYNE KNOX, PETITIONER, V. NC CRIMINAL SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION, RESPONDENT.	

PROPOSAL FOR DECISION

THIS CONSOLIDATED CASE WAS HEARD on April 15-16, 2014 by Administrative Law Judge J. Randall May in Fayetteville, N.C.

APPEARANCES OF COUNSEL

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Counsel for Respondent

ISSUES

1. Whether Petitioner's justice officer certification should be denied based upon the allegation that Petitioner lacks sufficient good moral character to serve as a justice officer?

A) Whether Petitioner has good moral character?

2. Whether Petitioner's justice officer certification should be denied based upon the allegation that Petitioner committed felonious assault, misdemeanor assault, kidnapping, unlawful restraint or kidnapping?

A) Whether all elements of the charges were established with substantial evidence?

FINDINGS OF FACT

Based upon careful consideration of the sworn testimony of the witnesses who testified at the hearing, the exhibits admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following findings of fact. In making these findings of fact, the undersigned has weighed all of the evidence, or the lack thereof, and has assessed the credibility and believability of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witnesses, any interests, biases or prejudices the witness may have, the opportunity of the witnesses to see, hear, know or remember the facts or occurrences about which the witnesses testified, and whether the testimony of the witnesses are reasonable and consistent with other believable evidence in the case.

INTRODUCTION AND BACKGROUND

1. Respondents seek to deny Petitioner Derrick Knox a law enforcement certification. Probable cause was found that Petitioner had violated Respondent's good moral character rule and a number of other alleged offenses. These alleged offenses arose from Petitioner's service as a law enforcement officer or deputy sheriff for the Town of Robersonville, the Town of Bethel, the Town of Edenton and the Green County Sheriff. Petitioner had been charged with alleged criminal offenses for assault and felonious assault inflicting serious injury; however, all of those charges were dismissed. Petitioner was charged with assault on a female in 1994 which initially resulted in a prayer for judgment continued but later was dismissed. The undersigned has considered the evidence admitted in support of the allegations and Knox's responses and has attempted to weigh them singularly and then cumulatively.

TRIAL TESTIMONY

Edenton-Stepney

2. The first witness called by Respondent was Jay Fortenbery, the Chief of Police with the Town of Edenton since 2009. T26 Based on the criminal charges against Knox from

the State Bureau of Investigation, Chief Fortenbery had an internal affairs investigation began and he utilized Officer Michael Paul of the Rocky Mount Police Department to conduct the investigation. T31 The matter being examined were the allegations of excessive force regarding Mr. Stepney and Thomas Dale. T33

3. The allegations from Stepney and Dale were previously investigated by the prior Chief, who was Chief Bonner. T369 Chief Bonner exonerated Knox following his interviews. T369 Prior to Chief Fortenbery's arrival in Edenton, Chief Greg Bonner had served as the Chief, for many years as its long term chief. T80-81 Chief Bonner had been a respected Chief for a long time. T81 Chief Fortenbery did not confer with or interview with Chief Bonner about his knowledge regarding the matters involving Knox. T82 Chief Bonner stayed on with the Department as a reserve officer for several years. T83

4. Mr. Paul was given access to personnel files including Knox's personnel file and he was provided the SBI case file for purposes of his review. T85 Chief Fortenbery testified that Mr. Paul of the Rocky Mount Police Department "had access to the entire SBI case file. He had access to the files at the Edenton Police Department . . ." T33

5. There was no court order that authorized Mr. Paul to review the SBI file and there was no court order that authorized Mr. Paul to review Derrick Knox's personnel file. T86

6. Officer Paul of the Rocky Mount Police Department was not a sworn officer for the Town of Edenton and was not given any sort of special appointment by the Mayor or City Council. T84-85

7. Officer Knox observed Deshannon Stepney in violation of the terms of a judicial release order (T52); Stepney fled and Officer Knox chased him on foot and apprehended Stepney.

8. Chief Fortenbery had an "opinion" that Knox hit Mr. Stepney in the back of the head with a pistol. T51 However, there was no meaningful evidence, direct or circumstantial, to establish that Knox struck Mr. Stepney in the head, as Mr. Stepney was not called to testify and there was no evidence to support the contention, it was a "bare bones" contention.

9. There was no evidence offered pertaining to the weapon as to whether there was any blood, hair fragments or otherwise provided any corroborative effect to the "opinion" that Mr. Stepney was struck in the head by a gun. T51 Mr. Stepney was arrested because of a violation of the release order. T52

10. Chief Fortenbery acknowledged that Mr. Paul did not interview Mr. Stepney, and that he, Chief Fortenbery, did not interview Mr. Stepney. T86-87

11. Chief Fortenbery acknowledged that his officers in Edenton shared with him that Mr. Stepney was known to be a member of the Crips gang, that Edenton officers knew him as a drug dealer including a dealer for the distributer of crack cocaine and that Mr. Stepney was

known for hanging around in Town in areas that are known for narcotics distribution. T87 Mr. Stepney was known for loitering in those areas. T87

12. Chief Fortenbery was asked whether Mr. Stepney is a person that lacks credibility and truthfulness and he responded by indicating: "I don't know if he lacks credibility and truthfulness." T88 Chief Fortenbery claimed to not know if Stepney lacked credibility or truthfulness despite the fact that Chief Fortenbery's officers knew Stepney to be a member of the Crips gang, that he was known to be a drug dealer, including the distribution of crack cocaine and that Mr. Stepney was known for hanging around in Town in the areas that were known for narcotics distribution. T87 Chief Fortenbery acknowledged that Mr. Stepney had a quite extensive criminal history for many years. T88

13. Chief Fortenbery talked to Stepney about three weeks prior to trial. T88 Chief Fortenbery testified that Stepney wanted to come testify at trial but Stepney would not give Chief Fortenbery his phone number but he said he would get back in touch with Chief Fortenbery, but he did not. T89

14. Chief Fortenbery did not recall whether Stepney was asked to take a polygraph. T90

15. With regard to Mr. Stepney, Chief Fortenbery acknowledged that there were jail personnel who observed Mr. Stepney, who indicated that Mr. Stepney did not need any medical attention. Chief Fortenbery acknowledged that with the determination made that he did not need medical attention, that it could be hard to say that Mr. Stepney suffered a serious medical injury. T95 For purposes of the charge of felonious assault inflicting serious injury, the admission from Chief Fortenbery negates that element of proof. There was no other medical evidence to support this element.

16. Loitering is an offense in Edenton. T96 If someone is loitering on a corner, it can be appropriate for law enforcement officers to conduct an inquiry. T96

17. Chief Fortenbery learned that Judge Cole had issued an order in court that made very specific restrictions on Mr. Stepney's release. T96 Chief Fortenbery could not recall that Officer Paul had interviewed Judge Cole about his order. T97 No one on behalf of the Department interviewed Judge Cole about the order. T97 It was unclear what difference this would have made regarding Knox's arrest of Stepney.

18. Chief Fortenbery acknowledged that violation of a judge's order is a potential serious offense and is considered contempt of court and it can be a criminal offense. T97 Chief Fortenbery acknowledged that Knox observed a possible act of contempt of court in his presence. T97-98

19. Chief Fortenbery acknowledged that at the time that Knox made some sort of statement to the news media, that it was after Knox had been criminally charged, that Knox had retained counsel to assist him with the charge and it was public knowledge that Knox had been charged. T99

20. Chief Fortenbery acknowledged that in Knox's statement to the press that he did not either attack the chief or say anything about him, the Edenton Police Department or the City of Edenton. T100 Chief Fortenbery recalled that it was something indicating that there is something wrong with Stepney or the investigation. T100

21. Chief Fortenbery was asked about inquiries regarding Knox either from Lt. Pamela Ayers of the East Carolina University Police Department or anyone else by way of his work performance and whether the Chief response regarding Knox's work performance "above average?" T104 Chief Fortenbery indicated that it probably could have been him that indicated that Knox had above average work performance in terms of arrests and things like that. T104-105

22. When asked about whether he said to Lt. Ayers or anybody else at East Carolina that Knox was good officer generally, Chief Fortenbery responded "generally yeah, in the time I worked with him. . ." Chief Fortenbery further explained: "yeah, I didn't have any issues really with Derrick. He was a hard working officer, came to work on time, and he did - - he did those things well. Yes." T105

23. Chief Fortenbery indicated that Derrick Knox never disrespected him as a supervisor. T105 Chief Fortenbery indicated that Knox appeared to be studious when he was at work. T105-106 Knox had a professional demeanor. T106

24. Chief Fortenbery acknowledged that Knox had filed a grievance or wrote a letter complaining about the management of the police department, in a prior grievance. T106

25. Chief Fortenbery acknowledged that Exhibit 19, the Edenton Police Department Professional Standards Report, was authored by Officer Paul and Chief Fortenbery did not write it. T107

26. Chief Fortenbery acknowledged from Petitioner's Exhibit 14, the Edenton Police Department Career Criminal list, that the first person listed in that report is Deshannon Kentay Stepney. T116 Chief Fortenbery testified that based on those reports, that he deemed Stepney to be a career criminal, and that the cases criminal list report is true and accurate. T116

27. Chief Fortenbery acknowledged that Stepney's flight and running from Knox could be very dangerous. T118

Edenton-Dale

28. Chief Fortenbery testified, after examining and referencing page 3 of Exhibit 19, that the Thomas Dale incident occurred back in 2006 and that it involved a traffic check point in the town of Edenton. T39-41 Mr. Dale had been called to the scene after his friends were arrested and cited for underage drinking; they needed a ride, and Dale came to pick them up along with another person. Dale was told to leave the scene, and some words exchanged between him and Knox. T40 Knox informed Dale that he was under arrest and Dale responded "I'm not under arrest . . ." Dale would not get out of the car in response to Knox. T41

29. Chief Fortenbery and Mr. Paul did not interview Mr. Dale. T91

30. The fact that the Edenton re-investigation did not interview either Mr. Dale or Mr. Stepney raises legitimate and serious questions about the completeness of the re-investigation. A serious allegation necessitates a serious investigation. As purported victims and material witnesses, a complete investigation would warrant complete interviews of Stepney and Dale.

31. When Chief Fortenbery was asked how the charge brought by Knox against Mr. Dale was resolved in court, Chief Fortenbery testified "I think he pled guilty to it or it was dismissed. One of those two I can't recall exactly." T92 Chief Fortenbery testified that "I think" that Mr. Dale pled guilty to what he was charged with, resist, obstruct and delay." T92

32. Chief Fortenbery was aware that Mr. Dale apologized for his conduct toward Knox at the station and at court. T92 Chief Fortenbery acknowledged that Mr. Dale indicated that he had been wrong in his behaviors and apologized. T92

33. Chief Fortenbery acknowledged that from observing the video tape, that Mr. Dale, for a considerable period of time in the vehicle, refused to get out of the vehicle upon request and command by Knox. T93 Chief Fortenbery acknowledged that Mr. Dale was non-compliant with the request by Knox for a while. T93 Chief Fortenbery acknowledged learning that Knox told Mr. Dale very clearly that Dale was delaying Knox in checking the license at the roadside. T93 Chief Fortenbery acknowledged that if someone delays an officer in checking licenses while roadside, that is a basis for a criminal offense and is an obstruct or delay. T94

34. Chief Fortenbery acknowledged that the charge brought by Knox against Mr. Dale was "probably appropriate." T94

Bethel – Vance Stanley Testimony

35. The next witness called by Respondent was Vance Stanley who was employed as the Chief of Police in the Town of Bethel. T122 He came to be the Chief in Bethel when the former Chief of Police was arrested by the Federal Bureau of Investigation for selling drugs and guns out of the Bethel evidence locker. T123

36. Mr. Stanley served as a Lieutenant and Assistant Chief of Police for Bethel, which had between eight or nine officers. T125-126

37. Stanley testified that Knox was issued a warning allegedly for leaving the Town of Bethel unsecured on official business on January 17, 2003. T129 When Stanley was questioned about the particulars of the written warning, he qualified many of his answers such as when he indicated that "no one was left on the street in Town to the best of my recollection." T130 When explaining a policy that Knox allegedly violated, Stanley testified that "we have a policy of remaining on duty. . ." T135 Stanley testified that "we weren't allowed to leave town to the best of my knowledge." T136 When Stanley was questioned as to whether or not Knox was the only one on duty, he responded "I believe so, but I can't be hundred percent sure." T130

38. Stanley was questioned about Respondent's Exhibit 22, a written document, that he indicated "was a verbal warning issued to Knox for violating a directive given to him regarding the use of voice recordings . . ." T131

39. On February 20, 2003, Knox allegedly failed to utilize a recorder on a call. T133 Stanley indicated that the agency started using those voice recorders in December, 2002. T133 When asked whether other officers were having a hard time remembering to turn them on, Stanley responded that "I do think we had to warn several people to do that." T133

40. Stanley testified about Respondent's Exhibit 23, a citizen complaint form, whereby he indicated "I don't recall a whole lot about, to be honest with you. It was an issue where it involved an accident with - - mechanic in Town and I think the complaint had to do with how he was treated. He - - he claimed he was treated unfairly by Knox. I can't remember the exact details of it." T137 The Court sustained the objection to Exhibit 23 and further testimony about it. T137

41. Lt. Stanley's memory was very sparse about this matter. T138 When asked about if there was any counseling involving the complaint, Stanley responded that "I can't recall seems like there was a verbal warning about it but I can't be one hundred percent sure." T138 This Court observed on the record that Stanley "really doesn't have a recollection of it." T140

42. Respondent's Exhibit 26 was identified as a write-up for violations of policy on October 1, 2003. T146 This write-up was that he had used poor judgment and when he was dispatched to barking dogs, there was no report done on that matter. T146-147 Stanley did not know what disciplinary action if any was imposed. T147

43. Respondent's Exhibit 27 was a write up against Knox for having failed to complete traffic stop reports on May 12, 2004. T148

44. Respondent's Exhibit 28 was a write up of Knox as a result of Knox not filling out a form that was involved in getting departmental identifications made. T149

45. Respondent's Exhibit 29 was a write up of Knox where Knox had not turned on his recorder for a matter on March 15, 2005. T150 Stanley was not aware of any disciplinary action regarding that write up. T150

46. Respondent's Exhibit 30 and 30A was a list of incidents that Knox was written up for, and Stanley testified that "I'm not familiar with this." T150

47. Respondent's Exhibit 31, the list of write ups that Knox had, was prepared by former Chief Reginald Roberts. T157 Former Chief Roberts was the Chief that was engaging in drug dealing from the Department and stealing evidence who went to federal prison. T158-159

48. Respondent's Exhibit 5 is Knox's first form F5-B, report of separation from the Bethel Police Department. The stated reason for separation was dismissal and the reason was for alleged insubordination. T160-161 Respondent's Exhibit 5A was an additional F-5B report of

separation form for Knox where the reason for separation was listed as resignation. T161 Exhibit 5A demonstrated that the agency would consider Knox for re-appointment and would recommend Knox's employment elsewhere as a criminal justice officer. T162

49. Stanley acknowledged that he had to write up other officers for insubordination in getting all their work done and their reports properly done. T166

50. Stanley acknowledged that he observed that there were times when Knox was a hard working officer. T169 Stanley indicated that there were times when Knox was a good officer. T169

51. Stanley admitted that "it may have been personal between the two of us" in referring to the dispute with Knox. T170

52. During Stanley's period of supervision of Knox, he did not file any complaint with the Training & Standards Commission regarding any of his contentions. T171

53. Lt. Jerome Cox was referenced by Stanley in connection with some of the alleged performance issues regarding Knox; Cox was also indicted with the Chief of Police and went to federal prison as well. T171-172

54. With regard to the personnel files, Stanley did not maintain those files, rather those were maintained by the Chief of Police. T172

55. Stanley acknowledged that there was no hearing provided where Knox had an opportunity to contest any of the allegations against him and tell his side of the dispute. T175 There was never a hearing regarding any of the allegations against Knox. T175

56. Regarding the allegation involving failing to complete the sheet for purposes of departmental identifications, Stanley couldn't say if that was willful or accidental. T179

57. Stanley agreed that the textbook definition of insubordination is a willful violation of a clear order by an authorized supervisor. T179

58. With regard to Respondent's Exhibit 29, and the issue of Knox's alleged failure to turn the tape recorder in that incident, Stanley could not indicate whether that was willful or inadvertent. T179

59. For the contention in Exhibit 22 that Knox did not turn on the recorder on February 20, 2003, Stanley could not say whether it was willful or not. T180

60. With regard to Respondent's Exhibit 26, involving barking dogs, Stanley could not indicate whether or not that report was not done willfully or inadvertently. T181

61. Stanley explained that later when the Town Manager in Bethel became involved, it was obvious that the Town Manager did not want Knox fired. T182

62. Most of the allegations of defective work performance in Bethel were conclusory and lacked detail and specificity. None of those allegations rise to the level of a lack of good moral character.

Robersonville – Darrell Knox

63. The next witness called was Darrell Knox, Chief of Police of Robersonville. T187 Officer Derrick Knox worked for the Robersonville Police Department for approximately three months in 2002. T187

64. When Chief Knox was asked what type of officer that Derrick Knox was, he indicated that "he complained a lot and wouldn't quite follow orders like he should." T190 Chief Knox explained that Derrick Knox "wanted to know a lot of times why we've got to do something a certain way. And I told him that's the way it is." T193

65. Chief Knox explained that "I believe sometimes you had to work by yourself if you were short of help. And he questioned about how dangerous it was working by yourself. We had - - it was during the summer time, and you have a lot of parties, a couple of little small clubs. People out cooking out, having 50 or 100 head in the yard, drinking, raising cane, you know. He kinda questioned some of the calls like that. They were kinda of dangerous to go by yourself." T194

66. When Chief Knox was asked if there was any other issues that he had with Knox, Chief Knox explained: "well, the safety of vehicles. And he quit one night because he said the cars was not - - they were not in shape enough for him to drive." T196 Knox indicated that he smelled some fumes in the police car. T196 Knox explained that when he resigned, that he told Chief Knox that he "I can't work under that condition with that type of vehicle; it endangers my safety." T196

67. When Chief Knox was asked about if Knox did have some good dedication, Chief Knox responded "Yes. I think he wanted more out the job than what me or the Town . . . was expecting back, as in equipment and security in things." T201 Chief Knox described that "it seem like he [Knox] was thinking ahead of everything." T202 Chief Knox explained that Knox had been questioning things that he thought might have been potentially dangerous. T202

68. As to the police car, Knox felt like it wasn't safe to drive it like it was. T202-203 When Chief Knox was asked if there was exhaust actually coming in vents of the police vehicle, Chief Knox responded "I never checked." T203 Chief Knox explained that they "kept on using that police car until it wore it down to where we sold it for $300.00." T203 Chief Knox explained that "we're not used to a whole lot of fancy, you know." T203

69. Chief Knox indicated that he thought that Knox was saying that the fumes were seeping up in the floor of the police car. T204 When Chief Knox was asked would he acknowledge that could be a safety hazard, he indicated that "it could be." T204 Chief Knox further explained: "but if you went ten years back, the cars was - - they were a safety [inaudible] when I was there." The Chief explained that car [with seeping exhaust fumes] "was one of the

better cars that they ever had at the time." T204 Knox's resignation, under these circumstances was properly within his discretion. His resignation clearly does not indicate any lack of good moral character.

70. Chief Knox indicated that when Knox resigned, that it was over the fumes in the police car. T205 Chief Knox never filed a complaint against Knox with the Training & Standards Commission. T205

71. Prior to being hired at the Robersonville Police Department, Knox went through a pre-employment assessment Dr. Kurt Luedtke, a professional psychologist. T207 Chief Knox acknowledged that it was a pretty good report and Knox was presented as very favorable candidate for law enforcement service. T208 Chief Knox found Dr. Luedtke's reports to be accurate and helpful. T208

Vidant Company Police Chief Randal Walston

72. The next witness called was Randal White Walston, who is the Chief of Police for Vidant Company Police headquartered in Windsor, North Carolina. T220. Chief Walston has served in that capacity as Chief since 2007. T220 Vidant is a police department for a health care system in eastern North Carolina. T221 Chief Walston has served in law enforcement for about 22 years. T221

73. Knox served under Chief Walston's command previously as a patrol officer. T222 Chief Walston observed Knox performing his duties and he "always performed exceptionally well." T222 Chief Walston explained that Knox "was very well liked while he was working with our department. He had never received any complaints. He was respectful and professional. He was always very particular about the way he dressed, his appearance, and very professional in all of his interactions." T223

74. Chief Walston heard "nothing but good reports" about Knox. Chief Walston never questioned his honesty or integrity. T223 Chief Walston never had an occasion to impose any type of disciplinary action upon Knox. T223 Chief Walston explained: "I have a very high regard for Knox. I have never known him to be in any unethical situations or dealing. I've never known him to be - - to misrepresent the truth or to intentional do something that would be unethical or illegal . . . he is of good character." T224

74. Knox resigned his position with the Vidant Police Department when there were rumors that there may be criminal charges coming. T225 Knox was not asked to resign rather he resigned out of respect for the Chief. T225 Chief Walston recalled that Knox had resigned from the Robersonville Police Department because he had been asked to drive a patrol car that was unsafe. T229

Vidant Company Police Sergeant Christopher Emory

75. The next witness called for the Petitioner was Christopher Emory, a Sergeant serving with the Vidant Medical Center in Greenville, North Carolina. T241 Emory served as a

Sergeant with the Vidant police agency for three years and prior to that in other positions for ten years. T242 Emory has known Knox for approximately 12 years and served with him at Vidant for a while. T242 Emory observed Knox on the job including when Knox served with the Edenton Police Department. T243

76. Emory testified that Knox was known through the law enforcement community as "an officer's officer." T244 Emory explained that Knox was "very much very professional . . . I never once saw him act unprofessional towards anyone." T244 Emory has never known Knox to be anything other than honest and trustworthy. T244

77. Emory has heard other members of the community in Windsor speak about Knox. T245 Emory explained: "throughout the whole community, Derrick Knox and his entire family is known for nothing but good things." T245

Deputy Director Diane Konopka

78. The next witness called was Diane Konopka, who is the Deputy Director for the Sheriff's Standards Commission. T251 In 2011, the Commission proposed to deny Knox's application for certification. Respondent's Exhibit 1. T252 When Knox applied for certification, his sponsor was the Bertie County Sheriff's Office, when he applied in June, 2010. T253

79. Ms. Konopka testified that there was an error discovered in connection with the work of the Probable Cause Committee. T256 Konopka testified that the 1994 assault charge was not found by the Committee because they did not have evidence at that time and it should not have been included in the probable cause notification. T256

SBI Agent Brown

80. The next witness for Respondent was Walter Brown, an agent with the State Bureau of Investigation. T275 Mr. Brown described the scope of the investigation assigned to him suggesting that Knox was alleged to have used excessive force against Quantay Jernigan, Lonnie Wilson, Kentay Stepney, Ivy Bassnight, Terrence Copeland and Shakir Archer. T281

81. Brown confirmed that all of the criminal charges against Knox were dismissed. T291 Other than Stepney and Knox, Brown was unable to recall any of the other persons that he indicated he interviewed. T297 Brown acknowledged that when conducting an investigation where a law enforcement officer is a suspect, that investigator's would want to very carefully evaluate the history and credibility of the accuser as well as the witnesses. T298

82. Brown recalled talking to Chief Bonner of the Edenton Police Department as part of his investigation. T299 Brown was aware that Bonner had conducted an inquiry about allegations against Knox. T299 Bonner shared with Brown that he did not find any violations by Knox. T299-300

83. Brown testified that Stepney had a long criminal history. T303

84. Brown indicated of the six individuals who were complainants, Knox had initiated criminal charges against each of those six or someone with the Edenton Police Department did. T304-305

85. Brown testified that the first person listed in the career criminal's list from the Edenton Police Department is Deshannon Stepney. T306-307

86. Each of the six individuals who made complaints regarding Knox resided in or immediately around the Town of Edenton, a small town. T307 When Brown was asked if it was determined that each of those six individuals were known to be affiliated with the Crips gang, whether or not that was a shock him, he responded "no, it wouldn't." T307

87. Brown testified that the scope of his investigation was whether excessive force was used and whether Knox used his gun or some other object to strike Stepney in the head. T309 Brown testified that whether Stepney was "a Crip or not or blood or not a most wanted in Edenton would not be the scope of my investigation." T309

88. Brown acknowledged the involvement of the court order that regulated the behavior of Stepney. T310 Brown testified nobody interviewed the judge that issued the court to learn to learn more about the order, its intent, its scope and purpose or who should have made an arrest for a violation of the judge's order. T310

89. Brown indicated that the allegation that Stepney was struck in the head did not come from Stepney, rather it came from Lassiter. T311 Brown testified that the relationship between Lassiter and Stepney was not explored. T311

90. Brown acknowledged that he did not consider a broader examination of possible criminal gang activity and possible retaliation against Knox because of enforcement activities against gang members in the Town of Edenton. T313 Brown testified that whether Stepney was "a gang member or not was not relevant to my investigation." T314

91. None of the prosecutors have ever brought any criminal charges to trial against Knox. T315

92. Stepney was not transported for any medical evaluation or treatment following his encounter with Knox. T316

93. Stepney had an extensive criminal history according to Agent Brown. T317

94. Of the six individuals who were purported accusers of Knox, there was never any grand jury finding or any charge made against Knox relating to allegations Quantay Jernigan. T321 There was never any grand jury determination or any charge brought against Knox as result of the contentions of Lonnie Wilson. T322 There was never any grand jury determination or charge brought against Knox based upon contentions by Ivy Basnight, Terrance Copeland or Shakir Archer. T322

95. Agent Brown testified that Stepney told him that he sold drugs. T323

Francis Russell, Character Witness

96. The next witness called by the Petitioner was Francis Russell, who was the next door neighbor of Knox for several years in Windsor. T328 Russell knew Knox for seven or eight years as a next door neighbor. T329

97. Russell found Knox to be a respectable young man. T331 Russell described Knox as being very friendly and an accommodating man. T331

98. Russell described himself and his wife as being somewhat handicapped and that Knox would come over and shovel the driveways during the winter and he would help mow the grass. T332 Russell described Knox as being "very communal and friendly." T332

99. Knox was held in high regard in his other neighbors there and he never anybody else say anything contrary against Knox. T332

100. Russell observed Knox to a good family man in that he seemed to have good family relations and that he was a "model father when his child was born." T333 Russell observed Knox doing things with his child that appeared to be favorable. T333

Officer Derrick Knox

101. Knox testified. T357 Knox is 43 years old and lives in Windsor. T357 He has been married for 14 years and has a 9 year old son. T357-358

102. T358 Knox is currently employed with Sandoz Pharmaceuticals in Wilson, North Carolina, where he serves in process quality assurance, which is part of the quality engineering department. T358 Knox has been employed with Sandoz Pharmaceuticals for approximately four years. T358

103. Knox attends church regularly when he can. Knox served in the United States Armed Services in the Army and served as a United States Calvary Scout in reconnaissance. T359 Knox is a combat Veteran having served in Desert Storm and he earned an honorable discharge. T359 Knox earned the Army Commendation Medal. T360

104. Knox earned a degree in Criminal Justice Administration from Mt. Olive College. T361 Knox attended Nash Community College and completed the basic law enforcement education curriculum in 2001. T362

105. Knox earned his law enforcement certification and subsequently earned an intermediate level certification. T362 Knox earned an instructor certification for 2012-2015. T363

106. Knox was administered an oath of office for Deputy Sheriff in Bertie County on June 8, 2010. T364

107. Knox has served in law enforcement for close to seven years and has very much enjoyed his law enforcement service. T365 Knox has never been disciplined in connection with his law enforcement certification. T365

108. Knox was charged with assault with a deadly weapon inflicting serious injury, which was dismissed. T366 The date of incident that gave rise to the alleged to felony charge was in September 2006. T366 Knox was criminally charged in February, 2009, for that alleged offense from September, 2006. T366

109. Knox was also charged with simple assault arising out of an encounter with Mr. Thomas Dale with the alleged date of offense being July, 2007. T367 Knox was later criminally charged for that in February, 2009. T367

110. As result of his encounter with Dale, Knox charged him with resist, delay and obstruct and Dale was found guilty of that offense. T368 Dale gave Knox several apologies both before and after court. T368

111. Knox was able to successfully serve as a law enforcement officer under Chief Greg Bonner's command and enjoyed a good professional working relationship with him. T368 Chief Bonner did not impose any significant discipline upon Knox in connection with his law enforcement service. T368-369

112. As result of allegations from Stepney, Bonner interviewed Knox regarding what happened. T369 Bonner exonerated Knox of the allegations by Stepney. T369

113. Later after Chief Bonner's retirement and Chief Fortenbery took over command of the police department, Chief Fortenbery began an additional inquiry into the matter involving Stepney. T370

114. The flight by Stepney occurred between 7:30 p.m. and 8:00 p.m. on a Sunday night in late September. T370 Stepney was observed within the Town of Edenton loitering in an area where loitering is not permitted. T371

115. When Knox saw Stepney, he remembered the court order issued five days prior to the occasion when Knox saw Stepney on the street. Knox had been in District Court where Judge Cole issued the order. T371-372

116. Knox mistakenly understood what Judge Cole said in open court to be a court order. The Clerk's office had forwarded a copy of the Judge's release order to the Edenton Police Department for each officer to have with them. The release order provided that Stepney was to be immediately picked up. T374

117. Knox testified that the official court order was the basis of his law enforcement action in investigating Stepney. T374 Knox explained that they have had the same orders issued for other individuals before and officers have picked up individuals under these same orders without any questions being asked. T374

118. The practice that Knox described of picking up individuals with those court orders was not materially different and was conducted by the Edenton Police Department and the Sheriff's Department. T375

119 On the occasion in question, Stepney fled from Knox. In the chase, Knox ultimately grabbed Stepney by the braids of his hair. T377 Knox was trying to get the handcuffs on Stepney as Stepney was moving underneath him. Stepney was trying to push himself up. T378 That is when another individual approached Knox from behind, Anthony Lassiter. T378 Knox had had dealings with Lassiter when Lassiter had been arrested for shooting someone point blank in the face. T378

120. Lassiter was approaching in a threatening manner and Knox felt concerned for his safety. T378 Knox displayed his service weapon. T378 Knox was trying to keep Stepney on the ground as Lassiter kept charging towards him. T379 Knox pulled out his weapon and pointed it at Lassiter, and Lassiter then retreated back to the street. T379

121. Knox carried a Berretta, a 92-F, 9mm pistol. T380 That handgun is not used to strike anyone and would be dangerous for the officer to strike anyone with that weapon. T380

122. When they got to the police department, Stepney was sitting in a chair and Stepney said that he was bleeding. T381 Office Knox then put some gloves on and checked his neck and saw a little red spot that looked like a finger prick of blood had dried. T381 Knox observed that there was a braid hanging, which was still in the rubber band, which had been pulled out from his head. T381

123. Knox mistakenly believed, based upon his training, education , and experience that his actions in attempting to apprehend Stepney were a proper part of his law enforcement duties. T383 Part of his reasoning in that regard was based upon the practice of having similarly apprehended others for release orders issued by other judges. T383 This practice or convention of Knox and possibly the law enforcement officers in Chowan County seems contrary to the training he should have had.

124. When Knox similarly apprehended others pursuant to the same type of court orders, his conduct has never been challenged by any supervisor, law enforcement officer or prosecutor. T383

125. There is a common practice in the in Edenton District for officers to arrest defendants who violate release orders pursuant to the directive of judges. T464 Every law enforcement agency in Chowan County did this. T465 The Edenton Police Department started getting orders for arrest only after the internal investigation involving Derrick Knox. T465

Policy changes took place while Knox was suspended such that officers began to get orders for arrest for violation of release orders. T465

126. Knox made an inquiry by a computer search to determine further information about Stepney and he found that Stepney had such an account. T384 Knox was the gang investigator for the Edenton Police Department, and therefore already had a file on the Crips and Bloods. T384 Stepney was already in the gang file from other officers that have conducted field interviews and had made arrest. T384

127. Knox discovered evidence on Stepney's Myspace account that contained an indicia of gang activity which included photographs of holding assault weapons, a blue bandana draped on his left side which is indicative of the Crips gang; Stepney has the local Crips gang tattoo, CCF, on his body; he has other gang related tattoos and on his Myspace account "Crip for life." T384-385

128. When Knox dealt with Stepney, he used the minimum quantity of force that was necessary and appropriate under the circumstances. T385 When Knox discussed his use of force with Chief Bonner, Chief Bonner had "no problem with it." T385

129. As to the encounter with Thomas Dale, the Edenton Police Department and the N.C. Alcohol Law Enforcement Agency were conducting a license check point. T386

130. Dale inquired if Petitioner was Derrick Knox and he replied yes; Dale replied that "I've got something for your ass." T388 Knox suggested that Dale go ahead and leave. T388 Dale and the others with him remained in that area shouting obscenities and derogatory comments at Knox. T388

131. Dale's actions obstructed Knox's ability to continue with the license check. T388 Knox again told Dale he needed to go ahead and leave. T389 Dale again stayed in the same location and continued shouting obscenities saying they were going to get Knox fired and Knox kept telling them to leave. T389 Knox afforded them every opportunity to leave and they refused to leave. T389

132. A lady that came through the traffic stop over heard one of the really nasty and vulgar remarks. T390 When Knox again told them to leave, Dale responded by asking "what was I going to do about it." T390 Knox responded by saying that if they didn't leave now that he was going to arrest him for delaying Knox. T390 At that point, the ALE Agent walked over and stated: "let's get them out of the car because they are not going to leave." T390

133. Knox then requested Dale to get out of the car and he refused; Knox asked him a couple more times and then informed him he was under arrest. T390 Dale responded that he was not under arrest and that Knox did not have any right to arrest him. T390

134. Dale continued to refuse to get out of the vehicle and then he grabbed the steering wheel with both hands and locked his arms. T391 Knox told him that if he did not get out of the car that he was going to tase him. T391 Dale responded that: "that taser ain't shit." T391 Knox

removed the cap from the taser and did a spark test to let him see that it was working and he reholstered. T391 Dale was asked one more time to get out the car and he refused again. T391

135. Knox grabbed Dale's wrist and eventually was able to pull him out of the car. T391 Dale would not allow Knox to handcuff him. T392 Knox gave him a warning that if he did not put his hands behind his back that he was going to tase him. T392 Knox tased him with a drive stun tase. T392 The taser was effective in bringing Dale into compliance. T392

136. Dale requested and was afforded a meeting with Chief Bonner. T393 After Chief Bonner heard both accounts, he did not initiate any disciplinary action against Knox. T394

137. Exhibit 11 was the charge brought against Knox by the SBI regarding Dale, which was a simple assault charge that was dismissed. T396

138. Petitioner's Exhibit 12, including the photographs of Stepney, were admitted. T406

139. Knox was employed with the Green County Sheriff's Department in 2002. T419 Prior to having obtained the position, he had been submitting other applications to other law enforcement employers. T420

140. After Knox was employed with Green County, there was an inquiry of the Sheriff's Department from another prospective employer. T420 The Sheriff became upset with Knox regarding the other application. T420 The Sheriff had received a call from the North Myrtle Beach Public Safety Department inquiry about Knox as an employment reference. T421 The Sheriff had become very upset. T421 Consequently, Knox decided to resign and wrote a letter of resignation. T421

141. Knox was next employed with Robersonville in 2002. T422 With regard to the malfunctioning police vehicle, Knox was told by the mechanic when he picked the car up, that he should not be driving the vehicle because it has an exhaust leak. T423 The exhaust leak had made Knox sick giving him a headache and causing him to vomit. T423

142. Knox inquired of the Chief about whether he could drive another vehicle because they had other vehicles. T423 The Chief responded to Knox by indicating "don't you know how to roll the damn the window down." T423 Knox then resigned as result of that safety hazard. T424

143. Knox explained how some of the things that he encountered in Robersonville were somewhat inconsistent with his expectations from his professional law enforcement training and BLET. T424 Knox had been trained in BLET to be particular cognizant of officer safety. T425 Knox was asked about the Chief's concerns that he was asking a lot of questions. T425 Knox explained that he did ask a lot of questions but that he was rookie officer, that he did not know much and he was trying to learn and gain information. T425 Knox did not ask any questions designed to be disrespectful. T425

144. Knox was next employed with the Bethel Police Department from October 2002 to April 2005. T425 While serving at the Bethel Police Department, he made some observations with what appeared to be possible improprieties. T427 Knox learned that a lot of the evidence that was needed in court was missing. T427 A lot of the drugs were not in the evidence and money was missing. T427 Knox spoke to Agent Dwight Ransom of the State Bureau of Investigation about it. T427

145. Knox observed that the Chief and the Lieutenant were coming in and out late at night dressed in all black. T428 People on the street began indicating that the Chief and the Lieutenant were selling drugs. T428 Knox gathered some evidence and went and met with the Mayor. T428

146. Knox explained the allegation that he was at the Country Mart Store leaving the Town of Bethel unsecured. T429-430 Knox explained that when transporting someone to the jail, the Chief would let them stop at that store on the way back into Town, because Bethel had no stores open past 10:00 p.m. T430 Knox's action in stopping at the store on that occasion was consistent with what he understood to be an accepted practice as every officer did it. T430 Management officials and the Chief did as well. T430

147. Knox explained the occasion when he was alleged to have not utilized his voice recorder. T431-432 Knox was serving a paper on the matter in question. T431 Knox was never intentionally insubordinate to any supervisor. T431

148. Knox explained the incident in question that arose from Exhibit 23. T432 An individual had backed his car into the porch of a house and left. Someone called and reported it and Knox went and investigated it and did not then cite him. T433 The Chief and the Lieutenant later indicated that Knox probably should charge him. Knox issued the citations and the person became mad about the citations. T433

149. Knox explained the incident involving Exhibit 25. T433 A citizen called about someone lying in the bushes and Knox went over there to assist the rescue squad to the person out of the bushes who was very intoxicated. T433 He assaulted one of the rescue squad members, who asked Knox to remove him from the scene because the crowd was drawing around them. T434 The person became combative again and assaulted someone of the rescue personnel at the police department. T434 The rescue squad personnel asked Knox to try to help restrain him and they could not get him to cooperate. T434 Knox gave him several warnings that he was going to be sprayed and the individual did not comply and was sprayed. T434

150. With regard to Exhibit 26, from October 1, 2003, Knox never saw that warning. T435 That situation arose out of a complaint that someone had made about barking dogs and that the problem was not resolved and the person told the Chief. T436

151. Exhibit 27 involves a matter from May 10 and 11, 2004, regarding completing traffic stop reports that Knox allegedly failed to do prior to May 10. T437 Knox had to leave earlier on that day and when he arrived the next day, the warning was waiting for him. Knox was not in any way willfully insubordinate. T438

152. Exhibit 28 involved Knox's failure to list his height and a weight on a departmental form. Knox was called and he drove back to the police department to include his height and weight on the form, and they still wrote him up for the inadvertent failure of not including the height and weight on the form. T439 Knox did not understand that there was another page to be addressed. T439

153. Knox addressed the F-5A Form which appears in Exhibit 5 and 5A. T442 The Chief referred to the Town Manager and when he had the discussions with the Town Manager, the Manager was more concerned about the conversation had with the Mayor about the illegal activity. T443

154. Petitioner's Exhibit 8, the official psychological assessment in Knox's personnel file was admitted into evidence. T449 That assessment provided that Knox possessed many positive traits that suggest the suitability of Knox to be a police officer.

155. On the occasion when Knox used pepper spray, the assault on rescue squad personnel involved, the person was "kicking and punching and actually spit on one of the EMS workers." 451

156. There is a common practice in the in Edenton District for officers to arrest defendants who violate release orders pursuant to the directive of judges. T464 Every law enforcement agency in Chowan County did this. T465 The Edenton Police Department started getting orders for arrest only after the internal investigation involving Derrick Knox. T465 Policy changes took place while Knox was suspended such that officers began to get orders for arrest for violation of release orders. T465 If this were the case it would seem to corroborate the Knox version.

157. Knox was pursuing Stepney for an investigative stop and also charged him with resist, delay and obstruct. T465

158. Ms. Peeden was Knox's girlfriend for approximately three years. T483-484 There was an alleged assault on a female charge against Knox on January 8, 1995. T484 Knox went to see her to get some of things back from her, and after she left work, they had a discussion. T484 They were arguing and went into Peeden's mother's house and Knox walked outside to leave. T484-485 Knox was charged but did not assault her. T486

159. Knox understood that if he would do some community service, that the matter would be dismissed. T486 When he inquired about doing it in Myrtle Beach or South Carolina, that offer was withdrawn because the prosecutor advised he could not do that and Knox was already living in South Carolina. T486 The prosecutor then advised that he could give him a PJC, which he indicated "it's like a dismissal." T487 The case was later dismissed by the Pitt County District Attorney. Knox indicated that if it was a dismissal, he would take it. T487 It was not until years later that the PJC was explained to Knox, by one of the attorney's in BLET that taught him. T487

160. Knox has not any time given his consent for the Town of Edenton or the Town of Bethel, in any way publically or otherwise to release his confidential personnel records. T523

161. The next witness called was Darren Loftin, who is the Operations Manager for Sandoz Pharmaceuticals. T409 Loftin has worked with Knox for about three years. T411 Loftin has found Knox to be a good, cooperative colleague employee when he has needed help or assistance. T412

162. Loftin has observed Knox's work performance to have been appropriate and good. T413 Loftin described Knox as very respectful. T414 Knox generally gets along well with colleague employees and has been respectful to his supervisors. T414 His supervisors hold him in high regard. T414 When Loftin was asked about Knox's traits for honesty, integrity and truthfulness, Loftin testified that Knox has a "high caliber" of honesty. T414

163. With regard to the assault charge from 1994, Ms. Peeden was not called to testify. There was not any substantial evidence that an assault ever occurred. The matter was initially resolved by a PJC, which Knox understood and was told was a dismissal. T487 Many years later, a dismissal was entered by the District Attorney of Pitt County.

Additional Findings of Fact

164. There is insufficient evidence that Knox committed any of the alleged offenses.

165. Knox did not act with any criminal intent or malice.

166. Knox is a person of good moral character.

167. Knox was not willfully insubordinate in Bethel. There was no evidence that Knox committed misconduct when he resigned from the Green County Sheriff's Department.

168. The instances of conduct in Bethel, Robersonville, and the Green County Sheriff's Office do not rise to the level required for a rule violation for a lack of good moral character.

169. There is no proper factual basis to deny Knox a law enforcement certification.

EXHIBIT SUMMARY

170. Appropriate consideration and weight has been given to all admitted exhibits by both parties.

PETITIONER'S EXHIBITS

171. Petitioner's Exhibit 1 is Petitioner's oath of office as a Deputy Sheriff in Bertie County which was executed on June 8, 2010.

172. Exhibit 2 included Petitioner's certification documents consisting of Petitioner's intermediate law enforcement certification, executed on November 5, 2008, Petitioner's Criminal Justice Instructor certification for the period March 17, 2012 through March 12, 2015 and Petitioner's instructor certification effective March 17, 2012 through March 17, 2015.

173. Petitioner's Exhibit 3 consists of some of Petitioner's military records including his honorable discharge from the United States Army, which certifies that Petitioner was "awarded as a testimonial of Honest and Faithful Service." Exhibit 3 also included Petitioner's "Army Commendation Medal" for "exceptional meritorious service . . . as part of Operation Desert Storm and the liberation of Kuwait . . . Knox's dedication during this effort is in keeping with the finest traditions of military services . . ." Petitioner's Exhibit 3 also included Petitioner's certificate of discharge which identified declarations, medals, badges, citations and campaign ribbons awarded consisting of the Army Service Ribbon, Army lapel button, National Defense Service ribbon, marksman expert, and Southeast Asia service medal with two bronze stars.

174. Petitioner's Exhibit 4 is Petitioner's diploma, a Bachelor of Science degree in Criminal Justice Administration awarded by Mt. Olive College in 2010.

175. Petitioner's Exhibit 5 consisted of several certifications for law enforcement training including Petitioner's BLET training in 2001, his diploma for successful completion of the Criminal Justice Instructor Training Program at Wilson Community College, training recertification certificate from TASER International executed on August 1, 2008 and several other training certificates from Pitt Community College.

176. Petitioner's Exhibit 7 is a reference letter from Officer Wilson of the Edenton Police Department, where he made observations about Knox's performance and conduct as a law enforcement officer employed by the Town of Edenton.

177. Petitioner's Exhibit 8 is a report of pre-employment police psychological assessment prepared by Dr. Kurt Luedtke of the Waynesboro Family Clinic in Goldsboro. Dr. Luedtke made a number of positive observations including that Petitioner's Knox produced a nearly "picture perfect" profile on one of the psychological test, and that there were other favorable conclusions appropriately fit for law enforcement service.

178. Petitioner's Exhibit 9 consisted of Department of Corrections records regarding Deshannon Stepney.

179. Petitioner's Exhibit 11 is a notice of dismissal in case number 09 CR 050080 where Knox was alleged to have committed a simple assault.

180. Petitioner's Exhibit 12 includes several photographs of Mr. Deshannon Stepney.

181. Petitioner's Exhibit 14 is a copy of a list prepared by the Edenton Police Department of "career criminals."

RESPONDENT'S EXHIBITS

182. Respondent's Exhibit 1 is the notification of probable cause issued to Petitioner's Knox as the Commission's basis to deny Knox's certification as a law enforcement officer. This notice set forth the charges against Knox which included that Knox allegedly committed or has been convicted of a felony, an alleged offense of assault with a deadly weapon inflicting serious injury. This allegation alleged occurred on September 24, 2006 by alleging that Petitioner assaulted Deshannon Stepney with a gun and that Petitioner kidnaped Mr. Stepney and subjected Mr. Stepney to a felonious restraint.

183. The notification of probable cause further charged that Petitioner had committed a Class B Misdemeanor, and alleged that Knox committed a misdemeanor of false imprisonment when he allegedly unlawfully restrained Deshannon Stepney.

184. The notification of probable cause further alleged that Petitioner had committed four or more crimes or unlawful acts. This charge was predicated upon the alleged assault and alleged false imprisonment against Mr. Stepney on September 24, 2006, and that Petitioner was allegedly convicted of drinking beer /wine while driving in 1994, that Petitioner allegedly committed a simple assault on July 13, 2007 by striking Thomas Allen Dale Jr. by tasing Mr. Dale, and that Petitioner allegedly committed an assault with a deadly weapon on July 22,1994, and that Petitioner allegedly committed assault on a female in 1995 involving Ms. Nancy Peeden. The notification of probable cause further alleged a violation of a lack of good moral character.

185. Respondent's Exhibit 3 is a copy of an F-5 form issued by the Green County Sheriff's Office and executed on March 6, 2002. Respondent's Exhibit 3A is a letter dated March 7, 2002 regarding the report of separation submitted by the Green County Sheriff's Office.

186. Respondent's Exhibit 4 is a report of separation from the Robersonville Police Department executed on September 29, 2002, denominating resignation as the basis of separation.

187. Respondent's Exhibit 5 is a report of separation of Knox from the Bethel Police Department executed on April 5, 2005, indicating that Knox was dismissed from the Bethel Police Department.

188. Respondent's Exhibit 5A is a report of separation of Knox from the Bethel Police Department executed on April 29, 2005, which indicated the reason for separation of Knox's employment as being *resignation*. In this report of separation, the Chief of Police indicated that the Bethel Police Department would consider Knox for reappointment and that it would recommend employment elsewhere of Knox as a criminal justice officer.

189. Respondent's Exhibit 6 is a report of separation of Knox from the Edenton Police Department, which was executed on June 24, 2009 and denoted his separation as a dismissal.

190. Respondent's Exhibit 7 is a letter issued by William Morgan, Chief of Police Administrator for the Town of Roper, which was dated February 20, 2014 and noted as received by the Commission on February 24, 2014, advising that the Town of Roper was no longer interested in hiring/certifying Mr. Knox as an auxiliary police officer.

191. Respondent's Exhibit 7A is a letter dated April 10, 2014 from Mayor Sanders of the Town of Roper indicating that the Town of Roper was no longer interested in hiring Knox as an auxiliary police officer.

192. Respondent's Exhibit 8 is a letter from Sheriff John Holley of Bertie County dated April 9, 2014 indicating that he does not intend to hire Mr. Knox.

193. Respondent's Exhibit 8A is a report of separation for Knox from the Bertie County Sheriff's Office separating Knox as a part time deputy for the Bertie County Sheriff's Office executed on April 9, 2014.

194. Respondent's Exhibit 10 is Petitioner's personal history statement, executed on March 11, 2002.

195. Respondent's Exhibit 11 is Petitioner's personal history statement executed on May 19, 2005.

196. Respondent's Exhibit 12 is Petitioner's personal history statement, executed on February 22, 2005.

197. Respondent's Exhibit 13 is Petitioner's personal history statement, executed on October 13, 2010. This document includes an attached three page supplement statement whereby Knox explains the five matters.

198. Respondent's Exhibit 14 is a memorandum addressed to members of a committee whereby Knox provided a six page statement, apparently addressed to the Probable Cause Committee of the Sheriff's Commission. Knox explained the charges that had been brought against him.

199. Respondent's Exhibit 15 is a "statement of charges" prepared by Derrick Knox whereby he explained the criminal charges previously lodged against him.

200. Respondent's Exhibit 16 is a statement prepared by Knox in reference to charges of assault, assault on female and communicating threats that arose in 1994-1995.

201. Respondent's Exhibit 18 is a complainant information form of the Edenton Police Department Professional Standards investigation.

202. Respondent's Exhibit 19 is a "complaint report" from the Edenton Police Department.

203. Respondent's Exhibit 20 is a memorandum from Chief Fortenbery of the Edenton Police Department terminating the employment Knox.

204. Respondent's Exhibit 21 is a written warning issued to Knox in 2003 when he was employed with the Town of Bethel.

205. Respondent's Exhibit 22 purports to be a verbal warning for Knox in 2003 with the Bethel Police Department.

206. Respondent's Exhibit 25 is a use of force report from 2003.

207. Respondent's Exhibit 26 is a document prepared for Knox by the Bethel Police Department on October 1, 2003, that was not executed by Knox.

208. Respondent's Exhibit 27 is a document dated May 12, 2004 imposing disciplinary action on Knox in the form of a one day suspension.

209. Respondent's Exhibit 28 is a documented dated September 17, 2004 addressed to Petitioner's Knox alleging insubordination.

210. Respondent's Exhibit 29 is a document dated March 28, 2005 addressed Knox identifying an alleged violation relating to wearing and utilizing recorders.

211. Respondent's Exhibit 30 is a document denominated "citizens written complaints" which identified three incidents.

212. Respondent's Exhibit 30A is an untitled document listing purported "violations" but without any factual explanation.

213. Respondent's Exhibit 31 was a letter dated April 5, 2005, addressed to Knox, which was a summary of alleged violations. The document relieves Knox of his duties as a police officer with the Bethel Department. The document was executed by Stanley indicating that Knox refused to sign the document on April 4, 2005 even though the document was dated as apparently being prepared on April 5, 2005.

214. Respondent's Exhibit 32 is a notice of a probable cause meeting to be held on February 17, 2011.

215. Respondent's Exhibit 33 is a memorandum prepared by Investigator Richard Squires to members of the Probable Cause Committee of the Criminal Justice Standards Division. This memorandum summarizes information regarding Knox application for certification. This memorandum attaches approximately 85 pages of attachments consisting of various documents.

CONCLUSIONS OF LAW

1. The parties are properly before this Administrative Law Judge. Jurisdiction and venue are proper and both parties received proper notice of the hearing.

2. The North Carolina Criminal Justice and Sheriffs' Education and Training Standards Commissions (hereafter the Commission) has certain authority 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 suspend, revoke or deny certification under appropriate circumstances with valid substantial proof of a rule violation.

3. There is no factual or legal basis to conclude that Derrick Knox lacks good moral character. The totality of the evidence demonstrates that Knox is a person of good moral character.

4. Moral character is a vague and broad concept. E.g. *Jeffrey Royall v. N.C. Sheriffs' Education and Training Standards Commission,* 09 DOJ 5859; *Jonathan Mims v. North Carolina Sheriff's Education and Training Standards Commission*, 02 DOJ 1263, 2003 WL 22146102 at page 11-12 (Gray, ALJ) and cases cited therein. See *Mims* at page 11.

5. The United States Supreme Court has described the term "good moral character" as being "unusually ambiguous." In *Konigsberg v. State*, 353 U.S. 252, 262-63 (1957), the Court explained:

> The term good moral character ... is by itself ... *unusually ambiguous*. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, *can be a dangerous instrument* for arbitrary and discriminatory denial ... (emphasis added).

6. Police administrators, officers and others have considerable differences of opinion as to what constitutes good moral character. *Royall* at page 13; *Mims*, *supra.* at page 12, Conclusion of Law 12. In *Mims*, the Respondent Commission offered the testimony of someone who claimed to be knowledgeable regarding moral character; he testified that there are six components to good moral character of law enforcement officers: trustworthiness, respect, responsibility, fairness, citizenship and being a caring individual. *Mims*, page 7 at Finding of Fact 48. Applying those criteria here, the evidence demonstrates that Knox met each of those criteria and other moral character components which demonstrated Knox's good moral character.

7. While having good moral character is an ideal objective for everyone to enjoy, the lack of consistent and clear meaning of that term within the Respondent's rule, and the lack of clear enforcement standards or criteria for application of the rule, renders enforcement actions problematic and difficult. *Royall, supra* at page 14; *Mims, supra.* at page 12, Conclusion of Law 4.

8. Because of these concerns about the flexibility and vagueness of the good moral character rule, any suspension or revocation of an officer's law enforcement certification based on an allegation of a lack of good moral character should be reserved for clear and severe cases of misconduct. *Royall, supra* at 14, *Mims, supra.* at page 12 and 13.

9. Generally, isolated instances of conduct are insufficient to properly conclude that someone lacks good moral character. See *Royall, supra.; In Re Rogers*, 297 N.C. 48, 58 (1979) ("whether a person is of good moral character is seldom subject to proof by reference to one or two incidents."; *Daniel Brannon Gray v. N.C. Sheriffs Education and Training Standards Commission*, 09 DOJ 4364 (March 15, 2010; May, ALJ).

10. The disparate conduct alleged in this case is insufficient to rise to the required level of proof to establish that Knox lacks good moral character. Under *In Re Rogers*, an instance of conduct amounting to poor judgment, especially where there is no malice or bad faith, would not ordinarily rise to the high level required to reflect a lack of good moral character.

11. In *Daniel Brannon Gray v. N.C. Sheriffs Education and Training Standards Commission*, 09 DOJ 4364 (March 15, 2010; May, ALJ), the good moral character rule was interpreted. "Good moral character has been defined as 'honesty, fairness and respect for the rights of others and for the laws of state and nation.' " *Gray*, at page 18, Conclusion of Law 5, citing *In Re Willis*, 299 N.C. 1, 10 (1975). *Gray* further explained that "[g]enerally, isolated instances of conduct are insufficient to properly conclude that someone lacks good moral character. However, if especially egregious, even a single incident could suffice to find that an individual lacks good moral character in places [sic] of clear and especially severe misconduct," citing *In Re Rogers*, 297 N.C. 48, 59 (1979). Here, there is clearly no severe, egregious or clear misconduct warranting any finding of a lack of good moral character.

12. Police officers and others make occasional honest mistakes and sometimes exercise poor judgment. *Royall supra* at 15; *Andreas Dietrich v. N.C. Highway Patrol*, 2001 WL 34055881, 00 OSP 1039 (August 13, 2001, Gray, ALJ), ("Ideally, it is desired that law enforcement officers be near perfect; however, that is not a realistic standard").

13. The totality of the facts and circumstances surrounding Knox's conduct, in light of his exemplary history of good moral character and professionalism in law enforcement, does not warrant any finding that Knox lacks good moral character. The substantial evidence of Knox's very good moral character is clear and compelling. Therefore, the evidence demonstrates that there is no proper basis for denial of Knox's law enforcement certification.

14. The totality of the facts and circumstances surrounding Knox's conduct, in light of his otherwise exemplary history of good moral character and professionalism in law enforcement, do not warrant or justify denying Knox a law enforcement certification. There has been no violation of Respondent's good moral character rule.

15. The elements of the alleged offenses are set out in Jessica Smith, *North Carolina Crimes*, at (2012 7th ed.):

Assault with a Deadly Weapon Inflicting Serious Injury Elements:

A person guilty of this offense
(1) commits an assault
(2) on another
(3) with a deadly weapon *and*
(4) inflicts serious injury.

Kidnapping Elements

A person guilty of this offense

(1) (a) confines,
(b) restrains, *or*
(c) removes from one place to another

(2) a person

(3) (a) without the person's consent *or,*
(b) if the person is under 16, without consent of the person's parent or guardian,

(4) for the purpose of

(a) holding the victim as hostage,
(b) holding the victim for ransom,
(c) using the victim as a shield,
(d) facilitating the commission of a felony,
(e) facilitating flight following the commission of a felony,
(f) doing serious bodily harm to the victim or any other person,
(g) terrorizing the victim or any other person,
(h) holding the victim in involuntary servitude in violation of G.S. 14-43.12,
(i) trafficking another person in violation of G.S. 14-43.11, *or*
(j) subjecting or maintaining the victim for sexual servitude in violation of G.S. 14-43.13 *and*

(5) (a) does not release the victim in a safe place,
(b) seriously injures the victim, *or*
(c) sexually assaults the victim.

Felonious Restraint Elements

A person guilty of this offense

(1) unlawfully restrains
(2) a person
(3) (a) without the person's consent *or,*

(b) if the person is under 16, without consent of the person's parent or guardian, *and*

(4) transports the person by motor vehicle or other conveyance from the place of initial restraint.

16. There was insufficient proof of elements of each alleged charge.

17. Knox did not commit any of the alleged offenses.

18. With respect to Mr. Stepney and Mr. Dale, Knox engaged in law enforcement actions that he reasonably believed were appropriate. Knox did not commit any assault as Knox had a good faith basis to pursue and apprehend Mr. Stepney for valid law enforcement purposes. N.C.G.S. 15A-401(b) and (d) authorized the actions of Knox with regard to his action involving Dale and Stepney.

19. Mr. Stepney did not sustain any serious injury. There was a speck of blood from some hair loss that was caused by Mr. Stepney's resistance and flight. A reasonable police officer could have reasonably believed that the apprehension of Mr. Stepney was appropriate and that the suspect Stepney was not your average good citizen of Edenton, N.C. There was no kidnapping or felonious restraint of Mr. Stepney.

20. With respect to Mr. Dale, Knox did not commit an assault on Mr. Dale. Mr. Dale resisted, obstructed and delayed Knox in the performance of his duties. Mr. Dale was found guilty of that offense and he apologized to Knox. Knox had a reasonable and good faith belief to use minimum force by taser to overcome Mr. Dale's resistance.

21. With respect to the alleged assault on a female involving Ms. Peeden which allegedly occurred in 1994, Respondents did not offer evidence from Ms. Peeden. Knox did not commit an assault on a female.

22. The Supreme Court has explained that "[p]olice officers have a duty to apprehend lawbreakers." *Parish v. Hill,* 350 N.C. 231, 513 S.E.2d 547, 550 (N.C. 1999); see *State v. McMahan,* 103 N.C. 379, 9 S.E. 489 (1889). "Police must pursue crime and constrain violence, even if the undertaking itself causes violence from time to time." *Menuel v. City of Atlanta,* 25 F.3d 990, 997 (11th Cir. 1994).

23. There are special rules of law that apply to police conduct disputes. The central issue in an alleged police misconduct dispute is whether an objectively reasonable officer *could have reasonably believed* that the action taken was appropriate under the circumstances. See N.C.G.S. 15A-401(d) and the interpreting decisional law. E.g., *Turner v. City of Greenville,* 197 N.C. App. 562, 677 S.E.2d 480 (2009) (justification for police conduct depends upon based what the officer "reasonably believes . . ."); *Hunter v. Bryant,* 502 U.S. 224, 227 (1991) (could have believed standard); *Prior v. Pruett,* 550 S.E.2d 166, 168 (N.C. App. 2001)("could have believed" standard); *Pittman v. Nelms,* 87 F.3d 116, 120 (4th Cir. 1996)(could have believed standard).

24. Courts now routinely apply the "could have believed" standard in police conduct. In *Hunter v. Bryant,* 502 U.S. 224, 227 (1991), the Supreme Court adopted the "could have believed" standard, which absolves the officer of liability, if a reasonable officer could have believed [the conduct in issue] to be lawful . . ."

25. Our Court of Appeals explained that "[a]n officer of the law has the right to use such force as he may reasonably believe necessary in the proper discharge of his duties to effect an arrest ... the officer is properly left with the discretion to determine the amount of force required under the circumstances as they appear to him at the time of the arrest." *State v. Anderson*, 40 N.C. App. 318, 321, 253 S.E.2d 248 (1979).

26. An officer "has discretion to determine the amount of force required under the circumstances as they appear to him at the time he acted." *Todd v Creech*, 23 N.C. App. 537, 209 S.E.2d 293, (1974); see *Myrick v. Cooley*, 91 N.C. App. 209, 371 S.E.2d 492 (1988).

27. North Carolina common law recognizes that "an officer is presumed to be acting lawfully while in the exercise of his official duties." *State v. Anderson,* 253 S.E. 2d 48, 52 (N.C. App. 1979).

28. The reasonableness of arrest and force decisions are predicated upon what the officer on the scene perceived. E.g. *Graham v. Connor,* 490 U.S. 386, 395 (1989), which explained:

> "The reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."

29. In *Saucier v. Katz,* 533 U.S. 194, 205 (2001), the Supreme Court reaffirmed the doctrine of *mistaken beliefs,* which seems crucial to the arrest of Stepney and as an insulating defense. As *Saucier* explained:

> [P]olice officers are often forced to make split-second judgments - - in circumstances that are tense, uncertain, and rapidly evolving - - about the amount of force that is necessary in a particular situation, the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective. We set out a test that cautioned against the "20/20 vision of hindsight: in favor of deference to the judgment of reasonable officers on the scene.
>
> "If an officer reasonably, but mistakenly believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed."

30. The evaluation of use of force and arrest decisions involves an *objective* standard. *Scott v. Harris,* 550 U.S. 372, 381 (2007) ("The question we need to answer is whether Scott's actions were objectively reasonable."); *Graham v. Connor,* 490 U.S. 386, 396 (1989) ("The

reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."). Officer Knox's actions were objectively reasonable.

31. The undersigned heard the evidence regarding the alleged instances of insubordination by Officer Knox while serving at Bethel. There were several matters that were characterized in documents created by Bethel as being some type of alleged insubordination. However, the testimony of Chief Stanley in several respects acknowledged that he did not know if the conduct in question was intentional or inadvertent. In making a determination as to insubordination, a crucial determination is whether or not the failure to carry out the order was intentional or inadvertent.

32. Insubordination is defined as the "willful failure or refusal to carry out a reasonable order from an authorized supervisor." 25 N.C.A.C. 01J .0614(7). *Patrick Holmes v. Fayetteville State University*, 2014 WL 4206297, 13-OSP-18480 (Overby, ALJ). See *Mendenhall v. N.C. Department of Human Resources,* 519 N.C. App. 644, 651, 459 S.E.2d 820 (1995) (directive must be reasonable); *Thompson v. Wake County Bd. Of Education,* 31 N.C. App. 401, 424-25, 230 S.E. 2d 164 (1976), rev'd on other grounds, 292 N.C. 406, 233 S.E.1d 538 (1977). *Brandon Clay Taylor v. N.C. Department of Public Safety,* 2013 WL 8116104, 12 OSP 08465 (Elkins, ALJ, October 22, 2013).

33. Insubordination "imports a willful or intentional disregard of the lawful and reasonable instructions of the employer." See *Black's Law Dictionary* , citing *Porter v. Pepsi Cola Bottling Co.*, 247 S.C. 370, 147 S.E. 2d 620, 622 (1964).

34. Insubordination has been defined by North Carolina courts to constitute "a willful disregard of express or implied directions of the employer and a refusal to obey reasonable orders. *Thompson v. Wake County Board of Education*, 31 N.C. App. 401, 424-25 (1976). An alternative definition of insubordination is a "constant or continuing intentional refusal to obey a direct or implied order reasonable in nature and given by and with proper authority." *Lockhart v. Arapahoe*, 735 P. 2d 913, 915 (Col. 1986).

35. After hearing the evidence regarding those instances of alleged insubordination, the undersigned finds and concludes that Officer Knox was then a young and inexperienced officer, and that he was not willfully insubordinate. The matters in dispute were performance issues, involving the officer's attempt to zealously perform his duties.

36. The use of the SBI investigation file and Knox's personnel file by Officer Paul are problematic.

37. The apprehension and arrest of Stepney and Dale was in good faith and valid. The force used against Stepney and Dale was reasonable and not excessive. Knox did not commit misconduct.

38. There is no legal basis to deny Knox a law enforcement certification. There was insufficient substantial evidence to deny Knox a law enforcement certification.

30

PROPOSAL FOR DECISION

BASED UPON the foregoing findings of fact and conclusions of law, it is hereby proposed that the North Carolina Criminal Justice and Sheriffs Training and Standards Commissions find that there has been no rule violation and that there is no legitimate basis to deny Knox a law enforcement certification.

NOTICE

BEFORE THE AGENCY makes the final decision, it is required to give each party an opportunity to file exceptions to this PROPOSAL FOR DECISION, and to present written arguments to those in the agency who will make the final decision. N.C.G.S. 150B-40(e). The agencies that will make the final administrative decision in this case are the North Carolina Sheriffs' Education and Training Standards Commission and the North Carolina Criminal Justice Education and Training Standards Commission.

This the 19th day of November, 2014.

J. Randall May
Administrative Law Judge

STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF WAKE	**13 DHR 19958**
HEARTFELT ALTERNATIVES, INC.,	
Petitioner,	
v.	
ALLIANCE BEHAVIORAL HEALTHCARE, *as legally authorized contractor of and agent for* **N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES,**	**FINAL DECISION**
Respondent.	

THIS MATTER came on to be heard before the undersigned Administrative Law Judge, Augustus B. Elkins II, on May 7, 2014 in Raleigh, North Carolina. After presentation of testimony and exhibits, the record was left open for the parties' submission of materials, including but not limited to supporting briefs, and proposals after receipt of the official transcript by all parties. Mailing time was allowed for submissions including the day of mailing as well as time allowed for receipt by the Administrative Law Judge. Petitioner and Respondent filed timely materials. For good cause shown and by order of the Chief Administrative Law Judge, the Undersigned was granted an extension until October 31, 2014 to file the decision in this case.

On October 20, 2014, Respondent Alliance Behavioral Healthcare ("Alliance") filed a Motion to Reconsider Prior Motion to Dismiss Based on Subsequently Decided Authority, thereby staying the issuing of the final decision until after ruling on Alliance's motion. After consideration of Alliance's Motion to Reconsider, the documents submitted in connection with the Motion to Reconsider by both Petitioner and Respondent, and the arguments of counsel made, the Undersigned issued its Order Denying Motion to Reconsider Alliance's Motion to Dismiss on December 3, 2014.

APPEARANCES

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APPLICABLE LAW

N.C. Gen. Stat. Chapter 150B, Article 3, and N.C. Gen. Stat. Chapter 108C.

PROCEDURAL HISTORY

On December 9, 2013, Petitioner Heartfelt Alternatives, Inc. ("Petitioner" or "Heartfelt") filed a Petition for Contested Case Hearing against Alliance Behavioral Healthcare ("Respondent" or "Alliance"), as legally authorized contractor of the N.C. Department of Health and Human Services. Heartfelt contemporaneously filed a Motion for a Temporary Restraining Order and Stay of Contested Action. A Temporary Restraining Order was entered by the Undersigned on December 13, 2013, and Petitioner's Motion for Stay was scheduled for hearing on December 20, 2013. On December 18, 2013, Alliance's Motion to Dismiss for lack of subject matter jurisdiction was denied, and a written Order was entered setting forth the basis of the Office of Administrative Hearings' ("OAH") jurisdiction in this contested case. The Undersigned hereby incorporates the decision denying Alliance's Motion to Dismiss as well as the Order Denying Motion to Reconsider Alliance's Motion to Dismiss as part of this Decision to the extent they address issues related to this Tribunal's jurisdiction. A hearing was held on Heartfelt's Motion for Stay and Preliminary Injunction on December 20, 2013, and a written Order was entered granting a Stay and Preliminary Injunction. On May 15, 2014, a Revised Order Granting Motion to Stay the Contested Action was entered.

BURDEN OF PROOF

Under N.C. Gen. Stat. § 108C-12(d), Respondent has the burden of proof as to any "adverse determination." The definition of "adverse determination" includes the decision to terminate a provider from participation in the Medical Assistance program. *See* N.C. Gen. Stat. § 108C-2(1).

ISSUES

Petitioner contends the issue is whether pursuant to N.C. Gen. Stat. § 108C, Respondent Alliance Behavioral Healthcare, Inc. violated the standards of N.C. Gen. Stat. § 150B-23(a) when it denied Petitioner Heartfelt Alternatives, Inc. the ability to continue forward in the Request for Proposal Process ("RFP") created by Alliance for Intensive In-Home and Community Support Team Services provided in the Alliance Catchment Area. Heartfelt contends that Alliance's erroneous decision had the effect of terminating Heartfelt from the Medicaid program in the Alliance catchment area.

Respondent contends that the Office of Administrative Hearings lacks jurisdiction of this matter for the reasons previously considered and rejected by this Tribunal. *See* Order Denying Motion to Dismiss, entered on January 21, 2014 and Order Denying Motion to Reconsider Alliance's Motion to Dismiss entered on December 3, 2014.

Respondent contends the issue is whether Petitioner has any right to participate in the Medicaid program or the network; and if so, whether Alliance acted arbitrarily or capriciously in setting and enforcing the minimum requirement that providers had to be in good standing with other LME/MCOs at the time they submitted their responses to Alliance's RFP. Respondent contends that this matter involves the decisions by Alliance: (1) not to advance Heartfelt to stage two of Alliance's process of reviewing responses to Requests for Proposal based on Alliance's decision that Heartfelt did not meet the minimum requirements set forth in the RFPs; and (2) not offer Heartfelt a contract after the expiration of the contract in place at the time, which expired on December 31, 2013. As stated by the Undersigned at the conclusion of the preliminary injunction hearing, the issue to be decided was whether Alliance should be required to advance Heartfelt to step two of the RFP process (called "desk review").

WITNESSES

Petitioner presented the testimony of Carl Noyes

Respondent presented the testimony of William Carlyle Johnson

EXHIBITS

Petitioner's Exhibits

Exhibit No.	Description
1.	Excerpts from 1915(b)/(c) North Carolina Waiver Plan
2.	Alliance Provider Operations Manual
3.	September 18, 2013 Alliance "All Provider Meeting" PowerPoint Presentation
4.	October 8, 2013 Community Support Team ("CST") RFP Pre-Proposal Conference
5.	October 7, 2013 Intensive In-Home ("IIH") Services RFP Pre-Proposal Conference
6.	Alliance "RFPs for IIH, CST, SAIOP, and SE" Website Snapshot
7.	Alliance RFP #2013-301 for CST
8.	Alliance RFP #2013-302 for IIH
9.	Alliance RFP Selection Summary
10.	Excerpts from Heartfelt's CST Response to RFP
11.	Excerpts from Heartfelt's IIH Response to RFP
12.	Alliance "Request for Information/Request for Proposal Procedure" Website Search Results
13.	November 12, 2013 Alliance Tentative Notice of Termination

Exhibit No.	Description
14.	January 9, 2014 Recommendations of Vendors in Response to Requests for Proposals
15.	September 3, 2013 MeckLINK Tentative Notice of Termination
16.	April 2, 2014 Voluntary Consent Withdrawal from MeckLINK and Superseding of Prior Notice of Termination
17.	Excerpts from Evergreen Behavioral Management, Inc. IIHS Response to RFP
18.	December 13, 2013 Letter from Alliance to Evergreen Indicating that Evergreen's IIH Response to RFP Met Minimum Criteria for Desk Review
19.	Notice of 30(b)(6) Deposition of Respondent
20.	Transcript of 30(b)(6) Deposition of Respondent (Carlyle Johnson and Alison Rieber) (April 21, 2014)
21.	Heartfelt Document Submission to Alliance
22.	Letter dated October 16, 2013 from Alliance to Heartfelt re plan of correction follow-up visit
23.	Alliance-DHHS Contract

Respondent's Exhibits

Exhibit No.	Description
1.	Contract between Alliance and Heartfelt (plus two extensions)
2.	Alliance's RFP for Community Support Team (CST) services
3.	Alliance's RFP for Intensive In-Home (IIH) services
4.	Excerpt from Heartfelt's Response to RFP for CST (pages 31–36)
5.	Excerpt from Heartfelt's Response to RFP for IIH (pages 31–36)
6.	Alliance Provider Manual
7.	Alliance Procedure # 6029 – Selection and Retention of Providers
8.	Non-renewal letter from Alliance to Heartfelt dated November 12, 2013
11.	Attachment 1.1 B of the State Plan
13.	Deposition transcript (Dr. Carlyle Johnson and Alison Rieber)
15.	MeckLINK's termination letter to Heartfelt (September 3, 2013)
17.	Statement of money paid by Alliance to Heartfelt since January 1, 2014
18.	Settlement Agreement between Heartfelt and MeckLINK

BASED UPON careful consideration of the sworn testimony of the witness presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following Findings of Fact. In making the Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of each 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 credible evidence in the case.

FINDINGS OF FACTS

1. Petitioner Heartfelt is a provider of mental health and behavioral health services with its principal place of business in Raleigh, North Carolina. Heartfelt assists consumers, including Medicaid recipients, at home, in school and in the community in preventing, overcoming and managing functional deficits caused by mental health issues and developmental delays. Heartfelt provides Intensive In-Home ("IIH") services, Community Support Team ("CST") services, outpatient therapy, medication management, and Level III residential services.

2. In order to provide IIH services or CST services, a provider must be certified as a Critical Access Behavioral Health Agency ("CABHA"). To be certified as a CABHA, a provider was required to have a medical director, a clinical director, and training/quality management director. The CABHA had to attest to a continuum of care and comply with various other requirements. Heartfelt became a CABHA in 2010.

3. Heartfelt employs 42 staff members pursuant to this Tribunal's Stay Order. Heartfelt currently provides IIH to consumers. Heartfelt provided services to CST consumers until December 2013. Heartfelt discontinued CST services because it was unable to attract a sufficient number of patients. A PowerPoint presentation created by Alliance and subsequent Alliance communications to referral sources, which did not include Heartfelt as a CST provider, led to Heartfelt's inability to attract CST clients. Heartfelt intends to resume providing CST services if it prevails in this contested case.

4. Carl Noyes testified on behalf of Petitioner. Mr. Noyes is Heartfelt's Quality Management Director. Mr. Noyes testified as to Heartfelt's history as a provider, Heartfelt's services to Alliance consumers, and Alliance's decision to terminate Heartfelt.

5. Respondent Alliance is a multi-county area mental health, developmental disabilities, and substance abuse authority established pursuant to N.C. Gen. Stat. § 122C-115(c). Alliance is a Local Management Entity (LME), Managed Care Organization (MCO), and Prepaid Inpatient Health Plan (PIHP).

6. Pursuant to Sections 1915(b) and 1915(c) of the Social Security Act, the United States Department of Health and Human Services has waived portions of North Carolina's traditional "fee-for-service" (also known as "any willing provider") Medicaid programs and allowed them to be replaced with a managed care program ("the 1915(b)/(c) Medicaid Waiver") with closed networks of providers managed by LME/MCO/PIHPs. Under the 1915(b)/(c) Medicaid Program, the State of North Carolina has promised to offer consumers at least as much choice in individual providers as they had in the non-managed care environment.

7. Alliance is one of several entities hired as a contractor by the N.C. Department of Health and Human Services ("DHHS") to operate the 1915(b)/(c) Medicaid Program as a managed care program. Since February 1, 2013, Alliance has operated as a LME, MCO, and PIHP pursuant to the 1915 Medicaid Waiver and a contract with the North Carolina Department of Health and Human Services. Alliance manages a closed network in the following four counties: Cumberland, Durham, Johnston, and Wake. Heartfelt has provided services to

consumers in these four counties since 2007 and continued providing services to these consumers through Alliance's creation in 2013.

8. Alliance is the Department's legally authorized agent, which, acting within the scope of its authorized activities, is responsible for identifying, recruiting, vetting, contracting with, assessing, managing, reviewing, auditing, and reimbursing providers for Medicaid and State-funded mental health, substance abuse, and intellectual/developmental disability services within its catchment area pursuant to Title XIX or XXI of the Social Security Act, the North Carolina State Plan of Medical Assistance, and the waivers of the federal Medicaid Act granted by the United States Department of Health and Human Services. Alliance does not provide services, but seeks to ensure that individuals who qualify for services receive those services and supports for which they are eligible. These services are delivered by a closed network of private providers that contract with Alliance.

9. Because Alliance contracts with providers under the 1915(b)/(c) Medicaid Program, if a provider does not have a contract with Alliance, that provider cannot participate in the 1915(b)/(c) Medicaid Program that Alliance operates.

10. Alliance receives state funds for operating the closed network of providers. Alliance operates an "at risk" closed network of providers, meaning that Alliance is responsible for managing and budgeting the funds it receives to deliver Medicaid services to the enrollees and for staying within its budget. Choices have to be made by Alliance as to how many and which providers to have in its network and which services to authorize.

11. The 1915(b) Medicaid Waiver provides in Section A: Program Description; Part 1: Program Overview, Section B Delivery Systems as follows: "North Carolina's model is based on the assumption that the MH/IDD/SAS local management entities are the only organizations in North Carolina capable of managing the complex services and support needs of the specialty population at this time."

12. Dr. William Carlyle Johnson testified on behalf of Respondent. Dr. Johnson is Alliance's Director of Provider Network Development. Dr. Johnson testified as to Alliance's process for selecting and retaining providers and Alliance's decision to terminate Heartfelt.

13. Starting February 1, 2013, Alliance entered into contracts with providers pursuant to which providers were authorized to provide Medicaid services, through qualified professionals, to enrollees. Alliance and Heartfelt entered into such a contract. Heartfelt's contract (like the other provider contracts) was set to expire on December 31, 2013. Heartfelt's contract with Alliance contained no right to renewal or extension. None of the other provider contracts contained any right to a renewal or extension of said contract.

14. The contract between Alliance and DHHS/DMA permits Alliance to use a Request for Proposal process. Specifically, the contract provides that "if there is a competitive Request for Proposal, a scoring process will be developed to assess the providers' competencies specific to the requirements of the Request for Proposal, the service definition, and enrollment requirements . . ." (Contract between Alliance and DHHS/DMA, Attachment O, Section B (19) at page 94.)

15. In the fall of 2013, Alliance issued requests for proposals ("RFPs") for Medicaid services including two service programs: Intensive In-Home ("IIH") and Community Support Team ("CST"). Both IIH and CST services have to be authorized by Alliance before a provider can deliver the services and be paid for those services.

16. IIH services are for children up to the age of 21, if the services are Medicaid-funded, or 17, if the services are State-funded. IIH services are provided to consumers who have severe emotional or behavioral needs. IIH is the highest form of community-based mental health treatment. IIH is delivered by a three-person team, which includes a licensed individual as the team leader and two full-time non-licensed staff. The team works with up to eight consumers and their families. The service is available 24 hours a day, 365 days a year, in case of emergencies. CST services are similar in scope to IIH services, but CST services are provided to adults only. CST services are also delivered by a three-person team. The team typically works with about 35 to 40 adult consumers. These consumers qualify for the services based upon meeting the medical necessity criteria set forth by Medicaid.

17. Alliance's witness testified that the basis for conducting the RFP process was that Alliance had "excess capacity" and "significant concerns about quality of care." (Johnson, Tr. p. 31). Despite the testimony of Alliance's witness, Alliance communicated to providers that the purpose of the RFP was not to "right-size the network." Alliance did no study or review to determine the appropriate number of providers needed in the catchment area to serve consumers in need of services.

18. The RFPs were issued on September 30, 2013. RFP responses were due November 1, 2013, by 5:00 pm. The IIH and CST RFPs contained a section setting forth the minimum criteria to continue participation in Alliance's network. The minimum criteria required that the provider be in "good standing" with Alliance and other LME/MCOs. Alliance, in its RFP, asked providers to list sanctions, whether those sanctions were appealed, and what the status of the appeals were.

19. Alliance's RFP response review process involved four steps. Step 1 was to review whether the applicant met the minimum criteria, including the "good standing" check. Step 2 was a desk review of the applicant's written materials. Step 3 was an interview of applicants who met a certain threshold in the desk review. Step 4 was approval by Alliance's Board of Directors based upon the Step 3 interview scores. The Board of Directors selected every provider that received a passing score in the interview.

20. In the first step if providers did not meet minimum requirements, they went no further in the RFP process. If providers met the minimum requirements, Alliance offered three-month contract extensions from December 31, 2013, to March 31, 2014. In the second step if providers met minimum requirements, Alliance evaluated and scored the written proposals. Providers who achieved a certain score at desk-review went to step three.

21. Step three involved an in-person interview. Several employees of Alliance met with several employees of each provider in a question and answer session, and Alliance then evaluated and scored each provider. Depending upon the score, Providers were recommended

for either 6 month or 12 month contracts. The fourth step was evaluation and final decision by the Board of Directors of Alliance as to whether to offer 6-month or 12-month contracts.

22. Heartfelt timely submitted responses to both the IIH and CST RFPs, and Heartfelt's responses were in the proper form. The parties agree that Heartfelt was in good standing with Alliance. Heartfelt did not have any paybacks owed to Alliance and did not have any open plans of correction. Heartfelt was also in good standing with other federal and State agencies at the time the RFP responses were submitted.

23. In both responses to the RFPs, Heartfelt included the following information in response to the RFP question asking Heartfelt to explain any current or pending sanctions including information regarding if the sanction was under appeal:

> On September 3, 2013, MeckLINK notified [Heartfelt] that [its] participation with the 1915(b)/(c) Medicaid Waiver that MeckLINK operates would be terminated effective October 3, 2013. The issue revolved around the qualifications and make-up of an Intensive In Home team that MeckLINK alleges violated DMA Clinical Coverage Policy 8A. [Heartfelt] requested a reconsideration of the initial notice. On September 27, 2013, the reconsideration was denied and the termination was upheld. On October 28, 2013, [Heartfelt] filed a Petition for Contested Case Hearings challenging MeckLINK's termination.

(Pet. Exs. 10, 11).

24. Heartfelt's RFP responses explained that the status of the pending appeal of the MeckLINK termination: "At the time of submitting this Response, this matter is still pending at the Office of Administrative Hearings." (Pet. Exs. 10, 11).

25. When Heartfelt submitted its RFP responses, Heartfelt understood that it was in good standing with other LME/MCOs, including MeckLINK, because the MeckLINK termination was under appeal and not final.

26. When Heartfelt submitted its RFP responses, it understood that Alliance would consider the appeals information as relevant because Alliance specifically asked for this appeals information.

27. At the time Heartfelt responded to the RFPs, MeckLINK Behavioral Healthcare ("MeckLINK") was another LME/MCO. Heartfelt was participating in the network operated by MeckLINK. Heartfelt was only serving one consumer at the time.

28. On August 15, 2013, MeckLINK conducted an on-site review of Heartfelt. As a result of the on-site review, on September 3, 2013, MeckLINK notified Heartfelt that its participation with the 1915(b)/(c) Medicaid Program that MeckLINK operates would be terminated effective October 3, 2013. MeckLINK's notice expressly states that its decision would not have any impact on Heartfelt's status with other LME/MCOs.

29. MeckLINK's purported basis for termination related to the staffing of Heartfelt's IIH team in Mecklenburg County. The issue cited by MeckLINK occurred when a staff member resigned her position with Heartfelt, leaving only two team members instead of three. Heartfelt actively recruited a new staff member and provided MeckLINK with over 100 pages of documentation showing its efforts to hire a replacement. During the time when Heartfelt had only a two-person team, Heartfelt was only serving one consumer. At the time the MeckLINK monitoring occurred, an additional staff member had been hired and the team consisted of three clinicians.

30. A three-person IIH team can serve up to eight consumers. Typically, one team member provides direct services to the consumer. The purpose of a three-person team requirement is to ensure coverage for continuous crisis response. At no time did the Medicaid recipient served in the MeckLINK area not receive the services authorized, and there has been no allegation that quality of care was not provided by Heartfelt. The policy does not state how a provider should address a team member's departure from the agency or how quickly the team member must be replaced.

31. On June 4, 2013, Alliance conducted an onsite investigation of Heartfelt relating to the sufficiency of its IIH staffing—the identical issue raised by MeckLINK. Alliance requested that Heartfelt produce proof of good faith efforts to hire staff to fill vacancies. Heartfelt produced over 100 pages of documentation containing leadership team minutes, advertising efforts, and interview schedules. Heartfelt submitted the same documentation to Alliance that it did to MeckLINK, showing its good-faith efforts to replace the team member who resigned. After Heartfelt produced the requested information, Alliance closed the matter and did not require any further action from Heartfelt.

32. MeckLINK also alleged that one of Heartfelt's employees did not have the proper credentials to provide the service. When Alliance reviewed this individual's credentials, it determined in contradiction of MeckLINK's finding that the individual was qualified to provide the exact same service. DHHS accepted the staff member as the CABHA's clinical director, a more senior position.

33. Prior to issuing its September 3, 2013 Notice, MeckLINK had not imposed on Heartfelt any other sanction or required any plan of correction. Heartfelt requested reconsideration of the MeckLINK termination notice. MeckLINK reconsidered the decision and upheld it.

34. Heartfelt then appealed MeckLINK's decision to the OAH. At the time that Heartfelt submitted its RFP responses, the OAH had accepted the Petition for Contested Case Hearing. Heartfelt notified Alliance in its RFP responses that the MeckLINK appeal was pending at the OAH and was not final.

35. On April 2, 2014, MeckLINK and Heartfelt entered a Consent Voluntary Withdrawal. The MeckLINK Consent Voluntary Withdrawal expressly superseded and rendered ineffective any prior notice of termination issued by MeckLINK. Thus, the basis for Alliance's decision is no longer valid.

36. Alliance's RFPs required that Providers who wanted their proposals for services to be considered by Alliance needed to meet several minimum requirements. One minimum requirement required that the applicant-provider be in good standing with Alliance Behavioral Healthcare, other LME/MCOs, all applicable federal and state oversight agencies and the organizations' accrediting body.

37. On November 12, 2013, Alliance notified Heartfelt that Alliance would not consider its proposal to continue to provide CST and IIH services because Heartfelt's proposal did not meet minimal requirements for review. The purported reason for this determination was that Heartfelt was not in good standing with another LME/MCO.

38. Despite the fact that Heartfelt's RFPs explained that the MeckLINK action was not final and was currently under appeal, Alliance prohibited Heartfelt from continuing past Step 1 of the RFP response review process because Alliance contended that Heartfelt was not in good standing with another LME/MCO, MeckLINK in Mecklenburg County, North Carolina.

39. LME/MCOs define good standing in different ways. Some LME/MCOs do not consider losing a contract with another LME/MCO to affect good standing. The North Carolina Department of Health and Human Services, and its Divisions, including the Division of Medical Assistance, which oversees Medicaid services, the Division of Health Services Regulation, which oversees licensed healthcare provider facilities and agencies, and the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, which oversees behavioral health services, in North Carolina do not have a uniform definition for good standing. There was no evidence that a non-final decision of an MCO would place a provider in bad standing with any State agency.

40. Alliance's Provider Manual was available on its website, and providers were required to abide by the terms of the Provider Manual. Alliance's Provider Manual defines good standing to exclude providers who have had their contract with another LME/MCO terminated or suspended. The manual does not state Alliance's policy on good standing with other LME/MCOs if the decision by the other LME/MCO is not final.

41. Alliance's Selection and Retention of Providers policy indicates that a provider's contract would not be renewed if the provider was "not in good standing with . . . other LME/MCOs." The policy does not define good standing. This policy also does not set forth Alliance's policy if the other LME/MCO's decision is not final.

42. After MeckLINK's termination, Heartfelt was allowed to provide services in the Alliance network until the expiration of its contract with Alliance. During the term of Heartfelt's contract with Alliance, MeckLINK's notice of termination did not have any effect on Heartfelt's ability to provide services in Alliance's network.

43. Alliance admitted that Heartfelt explained in its RFP responses that MeckLINK's termination was under appeal, and Alliance understood it to be under appeal. Dr. Johnson testified that Alliance considered the MeckLINK decision to be final but admitted that Alliance did not have any discussion with MeckLINK to confirm that the decision was final.

44. Alliance did not apply MeckLINK's definition of good standing. Although Alliance asked for appeal information, Dr. Johnson testified that Alliance would have considered Heartfelt not in good standing even if MeckLINK was actively reconsidering the termination and even if MeckLINK considered its decision not to be final.

45. Although MeckLINK's decision was not final because it was pending before the Office of Administrative Hearings, Alliance did not consider Heartfelt's pending appeal of the MeckLINK termination to be even relevant.

46. An agreement between Heartfelt and MeckLINK provided in part that a settlement reached by the parties was a compromise of disputed claims and was not an admission of error by any party. MeckLINK's termination was ultimately superseded by a voluntary mutual consent withdrawal. The withdrawal contained language that the mutual consent to withdraw superseded and rendered ineffective any prior notice of termination issued by MeckLINK. Alliance did not consider this information. The fact that MeckLINK was willing to withdraw its termination is strong evidence that MeckLINK's decision was not final and was subject to change at the time Alliance made its decision that Heartfelt was not in good standing with MeckLINK.

47. Alliance overlooked certain sanctions that it issued or were issued by other LME/MCOs if those sanctions were not final.

48. The evidence demonstrated that Heartfelt's RFP disclosed an alleged overpayment action initiated by DHHS. Heartfelt had appealed that action to the OAH, and the appeal was pending at the time Heartfelt submitted its RFP responses. Alliance, however, did not consider the overpayment action when Alliance determined Heartfelt was not in good standing.

49. The evidence also demonstrated that another provider that submitted a RFP indicated that the provider had an open plan of correction, which was under appeal. That provider was allowed to move forward in the RFP process.

50. Based on the above, Alliance had no policy to determine when another LME/MCO action was "final" for the purposes of determining if a provider was in good standing with that LME/MCO.

51. Alliance inconsistently applied the definition of good standing such that at times it considered decisions that were under appeal to be final and at other times determined that decisions that were appealed were not final for the purposes of allowing a provider to move passed Step 1 of the RFP process.

52. Dr. Johnson admitted that Alliance did not have any other basis for its decision in this case other than the MeckLINK termination. Alliance did not have any evidence demonstrating that Heartfelt was not a high quality network provider or that Heartfelt was not meeting Alliance's expectations for quality. Alliance did not have any evidence that Heartfelt was not providing good outcomes for consumers, evidence-based care, or managing levels of service appropriately.

53. Attachment O of the Contract between DMA and Alliance sets forth the criteria that should be used for provider retention. The evidence shows that Heartfelt did not fail to meet any of the retention criteria set forth in Attachment O of the Alliance contract with DMA.

54. Alliance did not conduct any investigation or consider any of the reasons or facts behind MeckLINK's termination decision. Of particular note is the fact that Alliance failed to consider that it had made an identical finding involving Heartfelt and determined that the finding warranted no action.

55. Alliance's notice did not provide Heartfelt with any appeal rights. It only allowed Heartfelt to have an informal meeting with the CEO. After Alliance notified Heartfelt that it was being removed from the RFP process, Alliance's CEO met informally with Heartfelt. Alliance explained that the meeting was not a hearing and that there would not be a decision or reconsideration.

56. Dr. Johnson testified at the hearing that Alliance does not want to contract with Heartfelt for intensive-in-home. There was the belief that Alliance has sufficient providers available in its network for 2014 to provide the CST and IIH services to the enrollees in Alliance's catchment area, including the enrollees that Heartfelt served in 2013 and is currently serving. Dr. Johnson's statements were not based on any consideration of quality of care or the needs of consumers.

57. Every consumer currently being served by Heartfelt for Alliance chose to receive services from Heartfelt despite that fact that Heartfelt was obligated by the Undersigned to inform them that they were going through a legal process and may not be able to serve them in the future. If Alliance were to terminate Heartfelt from providing services, it would sever the therapeutic relationship. Mr. Noyes testified that based on his experience, these consumers may have problems with transitioning to a different provider.

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings (OAH) has jurisdiction over the parties and the subject matter of this action. Petitioner timely filed the petition for contested case hearing and the parties received proper notice of the hearing in the matter. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein as Conclusions of Law.

2. An ALJ need not make findings as to every fact which arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993).

3. N.C. Gen. Stat. § 108C-2(3) defines the term "Department" to mean DHHS and its legally authorized agents, contractors, and vendors acting within the scope of their authorized activities. The statute specifically sets forth that agents and contractors authorized to manage "any waivers of the federal Medicaid Act granted by the United States Department of Health and Human Services" are subject to the statute. N.C. Gen. Stat. § 108C-2(3). Alliance is an authorized agent and contractor of the North Carolina Department of Health and Human Services, acting within the scope of its authority pursuant to a waiver of the federal Medicaid Act. Therefore, Alliance is the Department as defined in N.C. Gen. Stat. § 108C-2.

4. In North Carolina, a decision made by the Department, including the Department's contractors, to terminate a provider from participation in the Medical Assistance Program is an "adverse determination" subject to the contested provisions of Chapter 150B. *See* N.C. Gen. Stat. §§ 108C-2(1), (3), 108C-12. Alliance's decision to terminate Heartfelt's participation in the 1915(b)/(c) Medicaid Waiver is an adverse determination subject to the contested case provisions of Chapter 150B.

5. N.C. Gen. Stat. § 108C-12(a) governs "the process used by a Medicaid provider or applicant to appeal an adverse determination made by the Department." N.C. Gen. Stat. § 108C-12(b) states that "a request for a hearing to appeal an adverse determination of the Department is a contested case subject to the provisions of Article 3 of Chapter 150B of the General Statutes."

6. An "adverse determination" is defined by the statute as a "final decision by the Department to deny, terminate, suspend, reduce, or recoup a Medicaid payment or to deny, terminate, or suspend a provider's or applicant's participation in the Medical Assistance Program." N.C. Gen. Stat. § 108C-2(1).

7. Alliance's action in this case meets the definition of an adverse determination. Heartfelt is a current participant in Alliance's network and but for Alliance's decision, which is the subject of this contested case, Heartfelt could continue to participate in the Alliance network. Because Alliance's decision terminates and denies Heartfelt's ability to participate in the Medicaid program in the four-county area in which Alliance manages all Medicaid mental health services, this decision is an adverse determination.

8. Alliance contends that Section 4 of Session Law 2013-397 (codified at N.C. Gen. Stat. § 150B-23(a3)) has the effect of removing the OAH's jurisdiction to consider provider appeals of adverse determinations by LME/MCO's. Session Law 2013-397, entitled LME/MCO Enrollee Grievances and Appeals, created a new chapter of the General Statutes, Chapter 108D. Chapter 108D sets forth the rights, responsibilities, and procedures for Medicaid enrollees to challenge managed care actions taken by an LME/MCO. N.C. Gen. Stat. § 108D-1(10); *see* 42 C.F.R. § 438.400(b). Medicaid enrollees are Medicaid recipients not providers. On its face, this session law has no applicability to provider appeals.

9. N.C. Gen. Stat. § 150B-23(a3) clarifies that the LME/MCO is directly considered an agency for the limited purpose of enrollee appeals. The fact that an LME/MCO is a State agency as defined by the APA in the case of Medicaid enrollee appeals does not impact OAH's jurisdiction to consider provider appeals under N.C. Gen. Stat. Chapter 108C. Alliance's argument that an entity must expressly meet the definition of an Agency under the APA for the

OAH to have jurisdiction over that entity is not supported by the law or the legislative history. This Tribunal has jurisdiction because Alliance is a contractor and agent of DHHS and therefore is the Department as defined by N.C. Gen. Stat. 108C-2(3).

10. The General Statutes contain numerous examples of entities that do not meet the definition of "agency" under the APA and yet are subject to the provisions of the APA. *See e.g., Avant v. Sandhills Ctr.*, 132 N.C. App. 542, 545, 513 S.E.2d 79, 82 (1999) ("[A]lthough local appointing authorities such as respondent are not 'agencies' under the APA, their employees are subject to the provisions of the State Personnel Act and may commence a contested case hearing under the APA.").

11. The Undersigned takes official notice of the recent decision by the Wake County Superior Court, sitting in an appellate capacity in *Yelverton's Enrichment Services, Inc. v. PBH*, 13-CVS-11337 (March 14, 2014). The Superior Court's decision in *Yelverton's* provides additional support for this Undersigned's conclusion that the OAH has jurisdiction to consider Heartfelt's contested case.

12. Alliance's argument that Heartfelt has no right to a hearing before the OAH because its relationship with Heartfelt is contractual in nature is not supported by *Yelverton's*. The Wake County Superior Court found that "contract provisions cannot override or negate the protections provided under North Carolina law, specifically the appeal rights set forth in N.C. Gen. Stat. Chapter 108C." *Id.* (Citing *Corbin on Contracts* § 88.7, at 595 (2011) stating "When the law confers upon an individual a right, privilege, or defense, the assumption is that the right, privilege or defense is conferred because it is in the public interest. Thus, in many cases, it is contrary to the public interest to permit the holder of the right, privilege, or defense to waive or to bargain it away. In these situations, the attempted waiver or bargain is unenforceable."); *State ex rel. Utilities Comm'n v. Carolina Water Serv., Inc. of N.C.*, 149 N.C. App. 656, 659, 562 S.E.2d 60, 63 (2002) ("When certain provisions of a contract violate the public policy of the state, however, those provisions will not be enforced by the courts.").

13. Alliance violated the standards of N.C. Gen. Stat. § 150B-23(a) by failing to move Alliance to the next step of the RFP review. MeckLINK's decision was not a final decision and was subsequently withdrawn.

14. A decision to terminate a provider's ability to provide Medicaid services cannot be based on a decision by another LME/MCO that is not a final decision. Alliance has no policy on how it treats non-final decisions by other LME/MCOs. As this case shows, decisions that are not final by their very nature are subject to change. Basing actions on decisions that are not final undermines and makes ineffective the appeal rights provided to Medicaid providers by the General Assembly in N.C. Gen. Stat., Ch. 108C.

15. Respondent acted erroneously and arbitrarily and capriciously by requesting information from the provider regarding the appeals status of a sanction and then not considering that information in its decision or prior decisions made by Alliance. Of particular note is the fact that Alliance failed to consider that it had made an identical finding involving Heartfelt and the good-faith efforts to replace a team member who resigned, and determined that the finding warranted no action.

16. Respondent acted erroneously and arbitrarily and capriciously by not considering the underlying finding for the non-final MeckLINK termination, particularly when Alliance had previously determined that finding warranted no action.

17. Respondent acted arbitrarily and capriciously by treating Heartfelt differently than other providers and by maintaining its decision even after the MeckLINK termination was superseded and rendered ineffective.

18. Respondent violated federal law by not basing its RFP decision on the Provider Enrollment and Retention criteria found in Attachment O of its contract with DMA. Although the contract does not anticipate that Heartfelt will be a third-party beneficiary, 42 C.F.R. 438.2(14) expressly requires and obligates MCOs, such as Alliance, to create and follow its retention policy. Alliance's failure to do so, therefore, violates federal law and, accordingly, N.C. Gen. Stat. § 150B-23.

19. Respondent has substantially prejudiced Petitioner's rights. Under N.C. Gen. Stat. 108C, Medicaid providers have the right to contest adverse determinations of DMA and its contractors, including Alliance pursuant to the standards set forth in the APA. If the Administrative Law Judge determines that the MCO violated the standards of N.C. Gen. Stat. § 150B-23(a) the next step is to determine if the provider rights are substantially prejudiced. To make this determination the Tribunal must look to how the provider would have been treated but for the MCO's error. The preponderance of the evidence demonstrates that but for these errors by Alliance, Heartfelt would have continued in the RFP process just as every other provider was allowed to do in this process. Heartfelt as a provider has a right to be treated in a manner similar to other providers in the Alliance Network. Respondent Alliance Behavioral Healthcare failed to do so in this case and as such, Heartfelt Alternatives, Inc's rights were substantially prejudiced.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following Final Decision.

FINAL DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. The Undersigned enters the following Final Decision based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge and expertise of the Agency with respect to facts and inferences within the specialized knowledge of the Agency.

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned determines that Respondent substantially prejudiced Petitioner's rights, and acted erroneously, acted arbitrarily and capriciously, used improper procedure, and failed to act as required by law or rule in its decision to deny Petitioner the ability to continue forward in the Request for

Proposal Process created by Alliance for Intensive In-Home and Community Support Team Services provided in the Alliance Catchment Area.

Respondent Alliance Behavioral Healthcare's decision is hereby REVERSED. Alliance is accordingly ordered to move forward with its review of Heartfelt's RFP in a complete, unbiased and fair manner.

NOTICE

THIS IS A FINAL DECISION issued under the authority of N.C. Gen. Stat. § 150B-34.

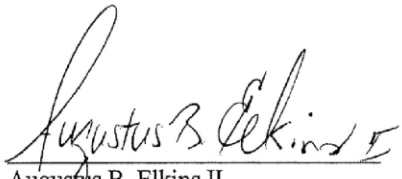
Under the provisions of North Carolina General Statutes Chapter 150B, Article 4, any party wishing to appeal the Final Decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county in which the party resides. The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties.

In conformity with the Office of Administrative Hearings' Rules, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.

Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This is the 9th day of December, 2014.



Augustus B. Elkins II
Administrative Law Judge

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
12/10/2014 8:50 AM

STATE OF NORTH CAROLINA

COUNTY OF NEW HANOVER

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13DOJ19034

JAMES BRIAN GILMORE PETITIONER, V. N C CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION RESPONDENT.	**PROPOSAL FOR DECISION**

This law enforcement certification case was heard on July 14, 2014 by Administrative Law Judge J. Randall May in Wilmington, North Carolina.

APPEARANCES OF COUNSEL

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ISSUES

1. Whether Respondent proved that Petitioner Gilmore made knowing, willful, material misrepresentations on documents relevant for law enforcement certification?

2. What sanction if any is appropriate in light of the totality of the facts and circumstances?

STATUTES/RULES AT ISSUE

N.C.G.S. 17C-10
12 NCAC 09A.0204(b)(6)

Based upon careful consideration of the sworn testimony of the witnesses who testified at the hearing, the exhibits admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following findings of fact. In making these findings of fact, the undersigned has weighed all of the evidence, or the lack thereof, and has assessed the credibility and believability of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witnesses, any interests, biases or prejudices the witness may have, the opportunity of the witnesses to see, hear, know or remember the facts or occurrences about which the witnesses testified, and whether the testimony of the witnesses are reasonable and consistent with other believable evidence in the case. A preponderance of evidence exists to show:

FINDINGS OF FACT

1. The first witness called was Sergeant Lisa Kittrell, employed with the Wilmington Police Department with 23 years of service. T7 Sergeant Kittrell met Petitioner Gilmore in the late 1990s when he was hired. T8 Sergeant Kittrell was a supervisor of Petitioner Gilmore and evaluated his performance and conduct. T8

2. Sergeant Kittrell testified that Petitioner Gilmore is "very honest, very good character. He treated people very well, with respect, did a good job when I worked with him; I was his supervisor, easy going." T9

3. Sergeant Kittrell further testified that: "I never had any trouble with him; like I said, very respectful of the public. I enjoyed working with him." T9 She further explained that "he's professional, does his job, knows his job . . . never had really any trouble with him. . ." T9 Sergeant Kittrell explained that "he makes good decisions." T10

4. The next witness called was retired Lieutenant Billy Maultsby. T12 He served for 28 years with the Wilmington Police Department and was the Chief of Staff when he retired. He served in the Internal Affairs Unit for several years. T13

5. Lt. Maultsby got to know Petitioner Gilmore in the Department and observed him performing his duties from time to time. Lt. Maultsby testified that Petitioner Gilmore is "honest." T14 They had no complaints or concerns about Petitioner Gilmore's professionalism. T15 He worked well with the public. T15

6. The next witness called was Larry Jennings. He served for 21 years with the Wilmington Police Department. T17 He served on the same platoon with Petitioner Gilmore and took calls with him. T17 - 18

7. Officer Jennings described Petitioner Gilmore as "professional." T18 He had no problems dealing with the public. T18 Petitioner Gilmore was well prepared for court. T18 Officer Jennings described Petitioner Gilmore as "extremely honest." Officer Jennings never heard anything negative regarding Petitioner Gilmore. T18

8. The next witness was Lieutenant Mary Green, who began serving with the Wilmington Police Department in 1986. T20 Lt. Green has had occasion to observe Petitioner Gilmore's conduct and performance as an officer. T21 Lt. Green has "always known Brian, since I've been here, to be very honest. He is very thorough as he can be. He treats the public well . . . he's an excellent police officer . . . if you could have a picture of a community policing officer, it would be Brian Gilmore." T21

9. Lt. Green further explained that "Brian is very honest, - - he has a lot of integrity . . . he's competent. He is professional." T21

10. The next witness called was Richard Squires, an Investigator employed with the Respondent Commission. T26 Mr. Squires testified regarding the various Commission documents that were exhibits in the case. T32 - 33

11. Mr. Squires relayed the criminal history of Petitioner Gilmore. T35 That involved a charge of possessing "natural bait trout waters" from Jackson County and a fishing without I.D. from Jackson County. T35 There was also charge of sale/give malt beverage unfortified wine to a person less than 21 in Jackson County. There was another charge, drink beer/wine while driving - - drink beer/wine while driving in Jackson County. T36

12. Petitioner received a driving while impaired charge from Alamance County, purchase/possess beer/wine under age charge in Alamance County and a hit and run of an unattended vehicle in Alamance County. T36 There was a purchase/possess beer/wine underage in Guilford County and a fishing without a license charge in Chatham County. T36

13. The next witness called was Attorney George Franklin Jones, who has served as an attorney since 1985. T56 Attorney Jones has known Officer Gilmore for approximately 15 years. T57 Mr. Jones has observed Officer Gilmore's performance and conduct. T58

14. Mr. Jones testified that "Brian Gilmore is honest. I think that he is straight forward." T59 Mr. Jones characterized Petitioner Gilmore as "exceedingly professional." T56 Petitioner Gilmore's reputation is that he is honest, straight forward and personable. T61

15. The next witness called was Captain James Varrone, of the Wilmington Police Department. Captain Varrone dealt with Petitioner Gilmore regarding the arrest for DWI in July, 2011. T64 (It should be noted that this charge, any reprisals, or the lack thereof, taken by the Wilmington Police Department are not before the undersigned for consideration.) With regard to the issues involving failing to list the criminal charges, Petitioner Gilmore had a little trouble but there was no denying that any of those charges were his. T66

16. Petitioner Gilmore was suspended from employment as result of his DWI. T72 At the time of the trial for the DWI, he was assigned and serving SE Command on patrol as a Corporal with the Wilmington Police Department but was then assigned in the downtown unit of the Wilmington Police Department. T72 The suspension was a 30 day suspension without pay for the DWI. T73

17. Captain Varrone testified that there was no disciplinary action taken against Petitioner Gilmore in connection with the omissions from the documents T73, which is the subject of this case before the Commission.

18. When Petitioner Gilmore served under Captain Varrone's supervision, he was a good, honest, effective law enforcement officer. T74 - 75

19. The next witness called was Petitioner James Brian Gilmore. T77 Petitioner Gilmore is 42 years of age, married and has three children with the ages of 11, 6 and 5. T78 Petitioner Gilmore graduated from high school in Burlington in 1990, attended Western Carolina University and graduated in 1995. T79

20. Petitioner Gilmore currently holds an advanced law enforcement certification and his certification has never been subjected to any previous punishment. T79

21. Petitioner Gilmore was charged with a DWI offense in July, 2011. T83 He pled guilty to that offense. T84 Petitioner Gilmore had been serving as a Corporal with the police department up to that time. T84 As a result of the DWI conviction, he was punished with a 30 day suspension and a demotion from Corporal back to patrol officer. T84

22. Officer Gilmore explained the criminal charges and his background. T88 - 89 With respect to the alleged offense of possess natural bait trout waters in 1995, he was aware of that but he did not know to include that on his application. T89 Officer Gilmore recalled paying the citation. T90 He did not realize necessarily that he was pleading guilty. T90 He did not consider it to be a criminal offense. T90

23. Petitioner Gilmore had a DWI charge and a collateral provisional licensee violation back in 1989. T91, Exhibit R-1 He was also cited for possession of beer while under age. T92 Petitioner Gilmore's father retained an attorney to represent him in connection with those charges. T92 Petitioner's father handled the matter for him. T92 Petitioner did not recall that there had been a DWI charge. T92

24. There was a charge in 1989 of a hit and run of an unattended vehicle. T93 Petitioner Gilmore described that he had been driving with his girlfriend and it had been sleeting; he was driving his dad's car and he lost control and hit a parked car. T94 He had called his dad, who told him to come on home; the police were called and he met with the police and they took a report and left him with a ticket. T94 The ticket was dismissed. T94

25. There was a charge of possessing beer/wine while underage in 1990. Petitioner Gilmore recalled that his father had the ticket taken care of. T95

26. Petitioner Gilmore had a ticket for fishing without a license in Chatham County in 1993. T95 Petitioner Gilmore did not remember getting this citation. T95

27. When Petitioner Gilmore executed the form F5 and form F3, he did not knowingly and intentionally exclude any information from the forms for purpose of deceiving the Commission. T97 At the time when he executed both forms, it was his intent to be truthful. T97

28. As Petitioner Gilmore reflected back to 1997 when he prepared the forms, he was not sufficiently thorough in his answers. T98

29. Petitioner Gilmore's employer requested back in 1997 that he undergo a polygraph examination and he complied with that request. T102 He met with the polygraph examiner and answered his questions to the best of his ability and completed the polygraph examination. T102 After the polygraph examination, he was offered employment. T102

30. Petitioner Gilmore explained that he did not consider some of the matters as being a crime; rather he understood them to be tickets. T118

31. Petitioner Gilmore recognized that he should have included further information on the pertinent forms, but that he did not intentionally leave that information out. T103

32. It would appear that Petitioner made material misrepresentations in 1997 on his application, required by the Respondent for certification when he completed Commission Form F-5A (LE) and Form F-3, "Personal History Statement," as to his past charges and/or convictions. However, there was no evidence to support a finding by the greater weight that this was done with the knowledge or cognitive awareness to deceive the Respondent. *See,* 12 NCAC 9A .0204(b)(6). In fact, Petitioner testified that there was no intent to deceive but that it was attributable to a lack of thoroughness on his part.

33. Petitioner's witnesses and the character and performance evidence demonstrated mitigating factors that Petitioner Gilmore is highly respected as a police officer. This evidence demonstrated that Petitioner Gilmore has very favorable character traits including that of honesty, truthfulness, integrity, professionalism and dedication to law enforcement service. Petitioner's witnesses were credible and believable.

34. Additional mitigating factors gleaned from the evidence are that the misrepresentation was made when Petitioner was in the very beginning of his career. Some seventeen (17) years of good police work have occurred since then and his chief (Ralph M. Evangelous) with full knowledge of his situation still considers him to be a "good police officer". Petitioner's. Exhibit 8. Other than the seventeen year old misrepresentations, there is nothing else before the undersigned to require action against Petitioner's certification. It is suggested that he has redeemed himself for that error in judgment.

EXHIBITS

35. Petitioner's Exhibit 1 included Petitioner's educational documents, diploma and references to training courses. T80

36. Petitioner's Exhibit 2 was some of Petitioner's recent certifications from the Criminal Justice Education Training & Standards Commission. T81

37. Petitioner's Exhibits 4, 5, 6 and 7 are copies of Petitioner's recent performance appraisals from 2009-2013. T81 Petitioner's Exhibit 4 is a performance appraisal for 2009-2010. Petitioner's Exhibit 5 is a performance appraisal for 2011. Petitioner Exhibit 6 is a performance appraisal for 2011-2012. Petitioner's Exhibit 7 is a performance appraisal for 2012-2013.

38. Petitioner's Exhibit 8 is a letter from Chief of Police Ralph Evangelous of the Wilmington Police Department. T83

39. Respondent's Exhibit 1 is a Committee memorandum dated July 30, 2013, prepared by Investigator Richard Squires for the members of the Probable Cause Committee. This Committee memorandum attached various documents relating to the charges against Petitioner Gilmore.

40. Respondent's Exhibit 2 is a letter dated September 23, 2013 from the Director of the Respondent Commission setting forth the proposed suspension of Petitioner Gilmore's law enforcement certification.

CONCLUSIONS OF LAW

1. The undersigned has jurisdiction over the parties and the subject matter.

2. The totality of the evidence before the undersigned is insufficient to establish that Petitioner knowingly violated any of the Commission's regulations.

3. The evidence failed to establish that there is sufficient evidence for the revocation or suspension of Petitioner's law enforcement certification.

4. Petitioner did not willfully make knowing material misrepresentations on relevant documents for law enforcement certification.

5. 12 NCAC 09A .0204(b)(6) provides that 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: (6) has knowingly made a material misrepresentation of any information required for certification or accreditation.

6. 12 NCAC 09A .0205(b)(4) provides that when the Commission suspends or denies the certification of a criminal justice officer, the period of sanction shall be not less than five years; however, the Commission may either reduce or suspend the period of sanction under Paragraph

(b) of this Rule or substitute a period of probation in lieu of suspension of certification following an administrative hearing, where the cause of sanction is material misrepresentation of any information required for certification.

7. A preponderance of the evidence supports the findings of fact herein. N.C.G.S. 150B-29(a) and 150B-34(a). In consideration of the admissible evidence, there is no legal basis for any adverse action against Petitioner's law enforcement certification.

PROPOSAL FOR DECISION

BASED UPON the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the undersigned recommends that the Commission exercise its power to desist from suspending or otherwise adversely affecting Petitioner's law enforcement certification. It is recommended that this Commission find that Petitioner has not committed the alleged offense with the required knowledge or animus to materially misrepresent his personal history.

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.

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addresses to the party at the latest address given by the party to the agency and a copy shall be furnished to his attorney of record. N.C.G.S. 150B-42(a). It is requested that the agency furnish a copy to the Office of Administrative Hearings.

This the 10th day of December, 2014.

J. Randall May
Administrative Law Judge