

NORTH CAROLINA REGISTER

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March 16, 2015

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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:	270 th 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
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30:12	12/15/15	11/20/15	12/30/15	02/15/16	02/22/16	04/01/16	05/2016	09/10/16

EXPLANATION OF THE PUBLICATION SCHEDULE

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

GENERAL

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

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

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

FILING DEADLINES

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

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

NOTICE OF TEXT

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

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

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

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



State of North Carolina

PAT McCrory
GOVERNOR

January 26, 2015

EXECUTIVE ORDER NO. 64

EMERGENCY RELIEF FOR THE NORTHEAST REGION OF THE UNITED STATES THAT IS BEING IMPACTED BY A MAJOR WINTER STORM

WHEREAS, due to the anticipated impact and disaster associated with the expected major winter storm in the Northeastern region of the United States, vehicles bearing equipment, supplies and those used to restore utility services to relieve the damage to those states need to be moved on the interstate highways of North Carolina; and

WHEREAS, I hereby declare that a state of emergency as defined in N.C.G.S. § 166A-19.3(6) and N.C.G.S. § 166A-19.3(19) exists for the purposes of responding to the anticipated impact of the major winter storm. The emergency area as defined in N.C.G.S. § 166A-19.3(7) and N.C.G.S. § 166A-19.20(b) are States located in the Northeastern region of the United States.

WHEREAS, under the provisions of N.C.G.S. § 166A-19.30(b)(3) the Governor, with the concurrence of the Council of State, may regulate and control the flow of vehicular traffic and the operation of transportation services; and

WHEREAS, with the concurrence of the Council of State, I have found that vehicles bearing equipment, supplies and engaged in restoring utility services to relieve the emergency area must adhere to the registration requirements of N.C.G.S. § 20-86.1 and 20-382, fuel tax requirements of N.C.G.S. § 105-449.47, and the size and weight requirements of N.C.G.S. §§ 20-116 and 20-118. I have further found that citizens in the emergency area may suffer losses and will likely suffer further widespread damage within the meaning of N.C.G.S. § 166A-19.3(3) and N.C.G.S. § 166A-19.21(b) and;

WHEREAS, the prompt restoration of utility services to citizens is essential to their safety and well-being; and

WHEREAS, 49 CFR § 390.23 allows the Governor of a state to suspend the rules and regulations under 49 CFR Parts 390-399 for up to 30 days if the Governor determines that an emergency condition exists; and

WHEREAS, under N.C.G.S. § 166A-19.70, the Governor may declare that the health, safety, or economic well-being of persons or property requires that the maximum hours of service for drivers prescribed by N.C.G.S. § 20-381 should be waived for persons transporting essential fuels, food, water, and medical supplies, and for the restoration of utility services.

Section 1.

The Department of Public Safety in conjunction with the North Carolina Department of Transportation shall waive the maximum hours of service for drivers prescribed by the Department of Public Safety pursuant to N.C.G.S. § 20-381.

Section 2.

The Department of Public Safety in conjunction with the North Carolina Department of Transportation shall waive certain size and weight restrictions and penalties arising under N.C.G.S. §§ 20-116, 20-118, 20-119 and certain registration requirements and penalties arising under N.C.G.S. §§ 20-86.1, 20-382, 105-449.47, and 105-449.49 for the vehicles transporting equipment, supplies and engaged in restoring utility services in order to relieve the emergency area as described herein.

Section 3.

Notwithstanding the waivers set forth above, size and weight restrictions and penalties have not been waived under the following conditions:

- a. When the vehicle weight exceeds the maximum gross weight criteria established by the manufacturer (GVWR) or 90,000 pounds gross weight, whichever is less.
- b. When the tandem axle weight exceeds 42,000 pounds and the single axle weight exceeds 22,000 pounds.
- c. When a vehicle and vehicle combination exceeds 12 feet in width and a total overall vehicle combination length of 75 feet from bumper to bumper.

Vehicles and vehicle combinations subject to exemptions or permits by authority of this Executive Order shall not be exempt from the requirement of having a yellow banner on the front and rear measuring a total length of 7 feet by 18 inches bearing the legend "Oversized Load" in 10 inch black letters 1.5 inches wide and red flags measuring 18 inches square to be displayed on all sides at the widest point of the load. In addition, when operating between sunset and sunrise, a certified escort shall be required for loads exceeding 8 feet 6 inches in width.

Section 4.

Vehicles referenced under Sections 2 and 3 shall be exempt from the following registration requirements:

- a. The \$50.00 fee listed in N.C.G.S. § 105-449.49 for a temporary trip permit is waived for the vehicles described above. No quarterly fuel tax is required because the exception in N.C.G.S. § 105-449.45(a)(1) applies.
- b. The registration requirements under N.C.G.S. § 20-382.1 concerning intrastate and interstate for-hire authority is waived; however, vehicles shall maintain the required limits of insurance as required.
- c. Non-participants in North Carolina's International Registration Plan will be permitted into North Carolina in accordance with the exemptions identified by this Executive Order.

Section 5.

The size and weight exemption for vehicles will only be allowed on all North Carolina Interstate Highways.

Section 6.

The waiver of regulations under Title 49 of the Code of Federal Regulations (Federal Motor Carrier Safety Regulations) does not apply to the CDL and Insurance Requirements. This waiver shall be in effect for 30 days or the duration of the emergency, whichever is less.

Section 7.

The North Carolina State Highway Patrol shall enforce the conditions set forth in Sections 1 through 6 of this Executive Order in a manner which will implement these provisions without endangering motorists in North Carolina.

Section 8.

Upon request by law enforcement officers, exempted vehicles must produce documentation sufficient to establish their loads are for relief efforts associated with transporting equipment, supplies and restoring utility services.

Section 9.

This Order shall not apply on posted bridges pursuant to N.C.G.S. § 136-72 and light traffic roads pursuant to N.C.G.S. § 20-118.

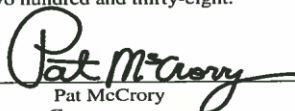
Section 10.

This Executive Order does not prohibit or restrict lawfully possessed firearms or ammunition or impose any limitation on the consumption, transportation, sale or purchase of alcoholic beverages as provided in N.C.G.S. § 166A-19.30(c).

Section 11.

This Executive Order is effective immediately and shall remain in effect for thirty (30) days or the duration of the emergency, whichever is less.

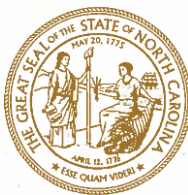
IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this 26th day of January in the year of our Lord two thousand and fifteen, and of the Independence of the United States of America the two hundred and thirty-eight.


Pat McCrory
Governor

ATTEST:


Elaine F. Marshall
Secretary of State





State of North Carolina

PAT McCRORY
GOVERNOR

January 29, 2015

EXECUTIVE ORDER NO. 65

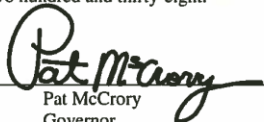
NOTICE OF TERMINATION OF EXECUTIVE ORDER 64

WHEREAS, Executive Order No. 64, issued on January 26, 2015 declared a state of emergency and waived certain safety, size and weight regulations on vehicles traveling through North Carolina to expedite utility restoration for a major winter storm in the northeastern United States.

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

Pursuant to N.C.G.S § 166A-19.20(c) the state of emergency and waiver that was declared by Executive Order 64 is hereby terminated immediately.

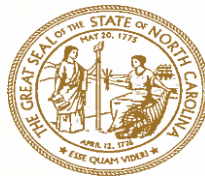
IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this 29th day of January in the year of our Lord two thousand and fifteen, and of the Independence of the United States of America the two hundred and thirty-eight.


Pat McCrory
Governor

ATTEST:


Elaine F. Marshall
Secretary of State





State of North Carolina

PAT McCrORY

GOVERNOR

February 16, 2015

EXECUTIVE ORDER NO. 66

DECLARATION OF A STATE OF EMERGENCY

BY THE GOVERNOR OF THE STATE OF NORTH CAROLINA

Section 1.

I hereby declare that a state of emergency as defined in N.C.G.S. §§ 166A-19.3(6) and 166A-19.3(19) exists in the State of North Carolina due to a winter storm. The emergency area as defined in N.C.G.S. §§ 166A-19.3(7) and N.C.G.S. 166A-19.20(b) is the State of North Carolina.

Section 2.

I order all state and local government entities and agencies to cooperate in the implementation of the provisions of this declaration and the provisions of the North Carolina Emergency Operations Plan.

Section 3.

I delegate to Frank L. Perry, the Secretary of Public Safety, or his designee, all power and authority granted to me and required of me by Article 1A of Chapter 166A of the General Statutes for the purpose of implementing the State's Emergency Operations Plan and deploying the State Emergency Response Team to take the appropriate actions as is necessary to promote and secure the safety and protection of the populace in North Carolina.

Section 4.

Further, Secretary Perry, as chief coordinating officer for the State of North Carolina, shall exercise the powers prescribed in N.C.G.S. § 143B-602.

Section 5.

I further direct Secretary Perry or his designee, to seek assistance from agencies of the United States Government as may be needed to meet the emergency and seek

reimbursement for costs incurred by the State of North Carolina in responding to this emergency.

Section 6.

I hereby order this declaration: (a) to be distributed to the news media and other organizations calculated to bring its contents to the attention of the general public; (b) unless the circumstances of the state of emergency prevent or impede, to be promptly filed with the Secretary of Public Safety, the Secretary of State, and the clerks of superior court in the counties to which it applies; and (c) to be distributed to others as necessary to assure proper implementation of this declaration.

Section 7.

This declaration does not prohibit or restrict lawfully possessed firearms or ammunition or impose any limitation on the consumption, transportation, sale or purchase of alcoholic beverages as provided in N.C.G.S. § 166A-19.30(c).

Section 8.

Pursuant to N.C.G.S. § 166A-19.23, this declaration triggers the prohibition against excessive pricing as provided in N.C.G.S. §§ 75-37 and 75-38 in the declared emergency area.

Section 9.

This declaration is effective immediately and shall remain in effect until rescinded.

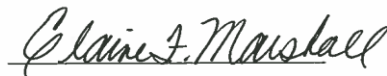
IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this sixteenth day of February in the year of our Lord two thousand and fifteen, and of the Independence of the United States of America the two hundred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



Pat McCrory

Governor

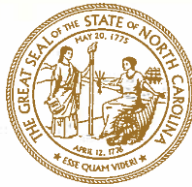
ATTEST:



Elaine F. Marshall

Secretary of State





State of North Carolina

PAT McCRORY
GOVERNOR

February 16, 2015

EXECUTIVE ORDER NO. 67

TEMPORARY SUSPENSION OF MOTOR VEHICLE REGULATIONS TO ENSURE RESTORATION OF UTILITY SERVICES AND TRANSPORTING ESSENTIALS

WHEREAS, due to the approach of a winter storm, vehicles bearing equipment and supplies for utility restoration and debris removal, carrying essentials such as food and medicine, transporting livestock and poultry and feed for livestock and poultry need to be moved on the highways of North Carolina; and

WHEREAS, I have declared that a state of emergency as defined in N.C.G.S. §§ 166A-19.3(6) and 166A-19.3(19) exists in North Carolina due to the likely impact of the winter storm; and

WHEREAS, the prompt restoration of utility services and uninterrupted supply of electricity, gasoline and other essentials in commerce to citizens of North Carolina is essential to their safety and well-being; and

WHEREAS, under the provisions of N.C.G.S. § 166A-19.30(b)(3) the Governor, with the concurrence of the Council of State, may regulate and control the flow of vehicular traffic and the operation of transportation services; and

WHEREAS, with the concurrence of the Council of State, I have found that vehicles bearing equipment and supplies for utility restoration, carrying essentials and for debris removal must adhere to the registration requirements of N.C.G.S. § 20-86.1 and 20-382, fuel tax requirements of N.C.G.S. § 105-449.47, and the size and weight requirements of N.C.G.S. §§ 20-116, 20-118, and 20-119. I have further found that citizens in this state may suffer imminent widespread damage within the meaning of N.C.G.S. § 166A-19.3(3) and N.C.G.S. § 166A-19.21(b); and

WHEREAS, pursuant to N.C.G.S. § 166A-19.70(g) on the recommendation of the Commissioner of Agriculture, upon a finding that there is an imminent threat of severe economic loss of livestock or poultry, the Governor shall direct the Department of Public Safety to temporarily suspend weighing those vehicles used to transport livestock and poultry and feed for livestock and poultry; and

WHEREAS, 49 CFR § 390.23 allows the Governor of a state to suspend the rules and regulations under 49 CFR Parts 390-399 for up to 30 days if the Governor determines that an emergency condition exists; and

WHEREAS, under N.C.G.S. § 166A-19.70, the Governor may declare that the health, safety, or economic well-being of persons or property requires that the maximum hours of service for drivers prescribed by N.C.G.S. § 20-381 should be waived for persons transporting essential

fuels, food, water, medical supplies, debris removal, feed for livestock and poultry, transporting livestock and poultry and for vehicles used in the restoration of utility services.

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

Section 1.

The Department of Public Safety in conjunction with the North Carolina Department of Transportation shall waive the maximum hours of service for drivers prescribed by the Department of Public Safety pursuant to N.C.G.S. § 20-381.

Section 2.

The Department of Public Safety in conjunction with the Department of Transportation shall waive certain size and weight restrictions and penalties arising under N.C.G.S. §§ 20-116, 20-118, and 20-119. This order also waives certain registration requirements and penalties arising under N.C.G.S. §§ 20-86.1, 20-382, 105-449.47, and 105-449.49 for vehicles transporting equipment and supplies for the restoration of utility services, carrying essentials, and for equipment for any debris removal. The Department of Public Safety shall suspend weighing pursuant to N.C.G.S. § 20-118.1 vehicles used to transport livestock and poultry and carrying livestock and poultry feed in the emergency area.

Section 3.

Notwithstanding the waivers set forth above, size and weight restrictions and penalties have not been waived under the following conditions:

- a. When the vehicle weight exceeds the maximum gross weight criteria established by the manufacturer (GVWR) or 90,000 pounds gross weight, whichever is less.
- b. When the tandem axle weight exceeds 42,000 pounds and the single axle weight exceeds 22,000 pounds.
- c. When a vehicle and vehicle combination exceeds 12 feet in width and a total overall vehicle combination length of 75 feet from bumper to bumper.
- d. Vehicles and vehicle combinations subject to exemptions or permits by authority of this Executive Order shall not be exempt from the requirement of having a yellow banner on the front and rear measuring a total length of 7 feet by 18 inches bearing the legend "Oversized Load" in 10 inch black letters 1.5 inches wide and red flags measuring 18 inches square to be displayed on all sides at the widest point of the load. In addition, when operating between sunset and sunrise, a certified escort shall be required for loads exceeding 8 feet 6 inches in width.

Section 4.

Vehicles referenced under Sections 2 and 3 shall be exempt from the following registration requirements:

- a. The \$50.00 fee listed in N.C.G.S. § 105-449.49 for a temporary trip permit is waived for the vehicles described above. No quarterly fuel tax is required because the exception in N.C.G.S. § 105-449.45(a)(1) applies.
- b. The registration requirements under N.C.G.S. § 20-382.1 concerning intrastate and interstate for-hire authority is waived; however, vehicles shall maintain the required limits of insurance as required.
- c. Non-participants in North Carolina's International Registration Plan will be permitted into North Carolina in accordance with the exemptions identified by this Executive Order.

Section 5.

The size and weight exemption for vehicles will be allowed on all routes designated by the North Carolina Department of Transportation, except those routes designated as light traffic roads under N.C.G.S. § 20-118. This order shall not be in effect on bridges posted pursuant to N.C.G.S. § 136-72.

Section 6.

The waiver of regulations under Title 49 of the Code of Federal Regulations (Federal Motor Carrier Safety Regulations) does not apply to the CDL and Insurance Requirements. This waiver shall be in effect for 30 days or the duration of the emergency, whichever is less.

Section 7.

The North Carolina State Highway Patrol shall enforce the conditions set forth in Sections 1 through 6 of this Executive Order in a manner which will implement these provisions without endangering motorists in North Carolina.

Section 8.

Upon request by law enforcement officers, exempted vehicles must produce documentation sufficient to establish their loads are being used for bearing equipment and supplies for utility restoration, debris removal, carrying essentials in commerce, carrying feed for livestock and poultry, or transporting livestock and poultry in the State of North Carolina.

Section 9.

This Executive Order does not prohibit or restrict lawfully possessed firearms or ammunition or impose any limitation on the consumption, transportation, sale or purchase of alcoholic beverages as provided in N.C.G.S. § 166A-19.30(c).

Section 10.

Pursuant to N.C.G.S. § 166A-19.23, this declaration triggers the prohibition against excessive pricing as provided in N.C.G.S. §§ 75-37 and 75-38 in the declared emergency area.

Section 11.

This Executive Order is effective immediately and shall remain in effect for thirty (30) days or the duration of the emergency, whichever is less.

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


Pat McCrory
Governor

ATTEST:


Elaine F. Marshall
Secretary of State





State of North Carolina

PAT McCrORY
GOVERNOR

February 18, 2015

EXECUTIVE ORDER No. 68

NOTICE OF TERMINATION OF EXECUTIVE ORDERS

WHEREAS, Executive Order No. 66, issued on February 16, 2015, declared a state of emergency in the State of North Carolina due to a major winter storm; and

WHEREAS, Executive Order No. 67 issued on February 16, 2015, waived the maximum hours of service for drivers transporting supplies and equipment for utility restoration and essentials in commerce, and with the concurrence of the Council of State temporarily suspended size and weight restrictions on vehicles used for utility restoration and carrying essentials on the interstate and intrastate highways due to anticipated damage and impacts from the winter storm. In addition, the order also directed the Department of Public Safety to suspend weighing those vehicles used to transport livestock and poultry and feed for livestock and poultry.

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

Pursuant to N.C.G.S. § 166A-19.20(c) the state of emergency that was declared by Executive Order 66 was terminated on February 17, 2015 at 5:00 p.m.

Executive Order 67 is hereby terminated at 11:59 p.m. on February 23, 2015.

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


Pat McCrory
Governor

ATTEST:


Elaine F. Marshall
Secretary of State





State of North Carolina

PAT McCrory
GOVERNOR

February 23, 2015

EXECUTIVE ORDER No. 69

**TEMPORARY SUSPENSION OF MOTOR VEHICLE REGULATIONS
TO ENSURE ADEQUATE FUEL SUPPLIES THROUGHOUT THE STATE**

WHEREAS, the uninterrupted supply of fuel oil, diesel oil, gasoline, kerosene, propane, and liquid petroleum gas to residential and commercial establishments is an essential need of the public during the winter, and any interruption in the delivery of those fuels threatens the public welfare; and

WHEREAS, the periods of extreme cold weather this month have increased the demand for those heating fuels, and severe weather conditions have hindered the uninterrupted delivery of those fuels to residential and commercial customers, thereby justifying an exemption from 49 CFR Part 395 (Federal Motor Carrier Safety Regulations); and

WHEREAS, 49 CFR § 390.23 allows the Governor of a state to suspend the rules and regulations under 49 CFR Parts 390-399 for up to 30 days if the Governor determines that an emergency condition exists; and

WHEREAS, under N.C.G.S. §§ 166A-19.3(6) and 166A-19.70, the Governor may declare that the health, safety, or economic well-being of persons or property in this State require that the maximum hours of service for drivers prescribed by N.C.G.S. § 20-381 be waived for persons transporting essential fuels.

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

Section 1.

The Department of Public Safety, in conjunction with the North Carolina Department of Transportation, shall waive the maximum hours of service for drivers prescribed by the Department of Public Safety pursuant to N.C.G.S. § 20-381.

Section 2.

Notwithstanding the waiver set forth above, size and weight restrictions and penalties are not waived.

Section 3.

The waiver of regulations under 49 CFR Part 395 (Federal Motor Carrier Safety Regulations) does not apply to the commercial drivers' licenses and insurance requirements.

Section 4.

The North Carolina State Highway Patrol shall enforce the conditions set forth in Sections 1, 2, and 3 of this Executive Order in a manner which will implement this rule without endangering motorists in North Carolina.

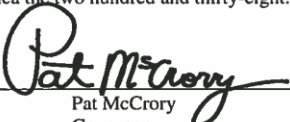
Section 5.

Upon request by law enforcement officers, exempted vehicles must produce documentation sufficient to establish their loads are being used for relief efforts associated with the cold weather.

Section 6.

This Executive Order is effective immediately and shall remain in effect for thirty (30) days or the duration of the emergency, whichever is less.

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


Pat McCrory
Governor

ATTEST:


Elaine F. Marshall
Secretary of State
Chief Deputy



**NORTH CAROLINA DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND HEALTH DIVISION
RALEIGH, NORTH CAROLINA**

**Order 2013-V-01
Plastic Packaging, Inc.
Permanent Variance**

Order:

In accordance with N.C. Gen. Stat. § 95-132 and 13 NCAC 07A .0700, Plastic Packaging, Inc. is hereby granted permission: to use a combination of lock-out/tag-out procedures, insulating blankets, personal protective equipment, qualified persons and employee training in lieu of moving an existing 24-inch wide, belt-driven, box conveyor located at a height 32 inches from the floor, which runs along a wall and has a number of electrical devices (circuit breaker panels and disconnect switches) located on the wall above the conveyor. Unless the variance is granted, the location of the conveyor system below the electrical devices is in violation of OSH General Industry Standard, 29 CFR 1910.303(g)(1)(i)[C]. 29 CFR 1910 is adopted by the Commissioner, as required by N.C. Gen. Stat. § 95-131, through incorporating 29 CFR 1910 by reference into the North Carolina Administrative Code at 13 NCAC 07F .0101. This permission is limited to the Plastic Packaging, Inc. site located at 1246 Main Ave SE Hickory, NC, and only applies to the situations and areas of the facility that are specifically described and identified in the variance application.

Discussion:

Plastic Packaging, Inc. is a commercial printing manufacturer, producing flexographic printing and converting solvent based inks with computerized controls. The facility is a 180,000-square-foot operation containing printing presses, laminators, slitting machines, bag machines and pouch machines. Products are printed, laminated, slit and converted prior to delivery to customers. Plastic Packaging, Inc. has another facility located in Forest City, N.C., which is not included in this variance request.

On December 18, 2013, Plastic Packaging, Inc. filed with the Commissioner of the North Carolina Department of Labor an application in accordance with N.C. Gen. Stat. § 95-132 for a permanent variance. The application was for a permanent variance from the requirements of Occupational Safety and Health General Industry Standard, 29 CFR 1910.303(g)(1), which requires a minimal working clearance distance around electrical equipment 600 volts, nominal or less, which was adopted by reference by the North Carolina Department of Labor at 13 NCAC 07F .0101. It was determined that the conditions for which Plastic Packaging, Inc. was requesting a variance, corresponded more specifically to subparagraph 29 CFR 1910.303(g)(1)(i)[C].

A Notice of Application for a Permanent Variance was published in the March 3, 2014 edition of the *N.C. Register* (Volume 28, Issue 17) allowing all interested parties to comment on the proposed variance application. The Notice of Application for a Permanent Variance was also posted at Plastic Packaging, Inc.'s place of business for a prescribed period of time in order to give affected employees notice of the variance application and an opportunity to participate in any applicable hearing. The North Carolina Department of Labor did not receive any comments or hearing requests regarding Plastic Packaging, Inc.'s variance application.

Approval of the variance application will allow Plastic Packaging, Inc. to use a combination of lock-out/tag-out procedures, insulating blankets, personal protective equipment, qualified persons and employee training in lieu of moving an existing 24-inch wide, belt-driven, box conveyor located at a height 32 inches from the floor, which runs along a wall and has a number of electrical devices (circuit breaker panels and disconnect switches) located on the wall above the conveyor. Unless the variance is granted, the location of the conveyor system below the electrical devices is in violation of OSH General Industry Standard, 29 CFR 1910.303(g)(1)(i)[C]. 29 CFR 1910 is adopted by the Commissioner, as required by N.C. Gen. Stat. § 95-131, through incorporating 29 CFR 1910 by reference into the North Carolina Administrative Code at 13 NCAC 07F .0101.

Plastic Packaging, Inc. has demonstrated by a preponderance of evidence that the conditions, practices, means, methods, operations, and processes proposed to be used by Plastic Packaging, Inc., along with the additional conditions set forth below, will provide employment and employment conditions to Plastic Packaging, Inc. employees which are as safe and healthful as those that would prevail if Plastic Packaging, Inc. was required to comply with the current standards set forth in 29 CFR 1910.303(g)(1)(i)[C].

Therefore, based upon the information provided, the Commissioner of the North Carolina Department of Labor believes that with strict adherence to the information/procedures contained in the Application for Permanent Variance dated December 9, 2013, and the additional provisions, which are listed below, that Plastic Packaging, Inc. will provide employment and a place of employment to its employees which are as safe and healthful as those which would prevail if it had complied with the standard.

Conditions:

This Order is contingent upon Plastic Packaging, Inc.'s adoption, utilization and compliance with the practices, means, methods, operations, and processes set forth in the Application for Permanent Variance, dated December 9, 2013, and additional provisions, all of which are listed below.

From the Application for Permanent Variance:

- (1) Before accessing the wall-mounted electrical devices, authorized employees have been instructed to:
 - a. De-energize the conveyor system and place under the control of lock-out/tag-out;
 - b. Place an electrically insulating blanket over the conveyor in front of the electrical device being accessed; and
 - c. Utilize all the personal protective equipment required by the company's Electrical Safe Work Practices procedures to finish accessing and working on the electrical device.

Additional Provisions:

- (1) On the floor beneath the electrical equipment, Plastic Packaging, Inc. will demarcate the required depth and width of working space on the floor (36-inch depth by 30-inch width, at a minimum) to continue to ensure the space is kept clear of all items except the conveyor and items travelling on the conveyor.
- (2) Plastic Packaging, Inc. will use a lock-out/tag-out program specific to locking out the conveyor before beginning work inside any of the electric equipment located above the conveyor. Note: Currently, to lock-out the conveyor, the locks will be placed at circuits 8, 10 and 12 in the electrical panel box located in the shipping department on the floor below.
- (3) In accordance with 29 CFR 1910.147, qualified and affected employees will be trained on the lock-out/tag-out procedure specific to the conveyor. Each qualified employee shall be evaluated annually on this same procedure.
- (4) Plastic Packaging, Inc. will store the electrically insulated blankets in an area not to exceed 15 feet from the conveyor to allow technicians easy and quick access when necessary.
- (5) The permanent variance will only be for Plastic Packaging, Inc., located at 1246 Main Avenue S.E., Hickory, N.C. and applies only to the situation and area of the facility ("Bag Department") described and identified in the variance application dated December 9, 2013.
- (6) The OSH Division may visit the site at any time with or without notice, and as needed or requested, to review records, procedures and interview employees with regard to the lock-out/tag-out program (in particular, procedure specific to the conveyor), panel boxes and other electric equipment located above the conveyor, and the conveyor. If a discrepancy in any of the variance conditions set forth in this report is identified by OSH Division personnel, the variance may be revoked.

- (7) In the event that changes are made to the equipment or work area covered by this variance, Plastic Packaging, Inc. will notify the OSH Division. In the event that the equipment or work area, which is covered by this variance, is upgraded, remodeled or re-built, Plastic Packaging, Inc. will attempt to eliminate the conditions that require the need for the permanent variance.

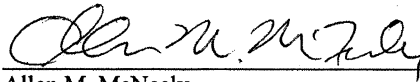
Action:

To that end, Plastic Packaging, Inc.'s request for a permanent variance from Occupational Safety and Health General Industry Standard, 29 CFR 1910.303(g)(1), more specifically, subparagraph 29 CFR 1910.303(g)(1)(i)[C], is hereby granted, provided Plastic Packaging, Inc. strictly complies with the information provided to NCDOL OSH in the December 9, 2013 Application for Permanent Variance and the additional conditions outlined in this Order.

This Order shall remain in effect until or unless modified or revoked upon application by an affected employer, affected employee(s), or by the Commissioner on her own motion, in the manner prescribed for its issuance under N.C. Gen. Stat. § 95-132 and 13 NCAC 07A .0709(a)(2) at any time after six months from its issuance.

Approved and effective,

This the 13TH day of February 2015.



Allen M. McNeely
Director, Occupational Safety and Health Division
North Carolina Department of Labor

Notice of Application to modify existing Innovative Approval of a Wastewater System for On-site Subsurface Use

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

Application by: Dave Lentz
Infiltrator Systems, Inc. PO
Box 768
Old Saybrook, CT 06475

For: Request to manufacture polypropylene Arc & Arc 36 LP chambers and consolidation of Infiltrator Systems, Inc.
existing Innovative Approvals IWWS-1993-02-R14, IWWS-1997-02-R11, IWWS-2010-01-R2, and IWWS-2011-1-R1

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

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

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

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

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Medical Care Commission intends to adopt the rules cited as 10A NCAC 13B .2101, .2102; 13C .0206, and amend the rule cited as 10A NCAC 13C .0103.

Link to agency website pursuant to G.S. 150B-19.1(c):
<http://www.ncdhhs.gov/dhsr/ruleactions.html>

Proposed Effective Date: September 1, 2015

Public Hearing:

Date: May 6, 2015

Time: 10:00 a.m.

Location: Dorothea Dix Campus, Brown Building, Room 104, 801 Biggs Drive, Raleigh, NC 27603

Reason for Proposed Action: *The proposed amendments and adoptions of rules in Chapters 10A NCAC 13B Licensing of Hospitals and 10A NCAC 13C Licensing of Ambulatory Surgical Facilities are in response to enactment of Session Law 2013-382, Part X. Transparency in Health Care Costs and Part XII. Fair Health Care Facility Billing and Collections Practices, which became effective on October 1, 2013, revised August 7, 2014. This act requires the N.C. Medical Care Commission (MCC) to adopt rules to ensure the provisions of this act are properly implemented and the required cost data is submitted quarterly to the Department of Health and Human Services (DHHS) in a uniform manner for the 100 most frequently reported DRGs for hospital inpatients, 20 most common ambulatory surgical procedures and 20 most common imaging procedures for hospital outpatient settings and ambulatory surgery facilities. In response, temporary rules in Chapters 10A NCAC 13B and 10A NCAC 13C were adopted by the MCC, and became effective December 31, 2014.*

This proposed rule action is part of the process of making these permanent rules replace the temporary rules prior to the expiration 270 days from publication in the NC Register on 12/15/2014. These rules reflect a revision of the temporary rules by requiring the submission of annual data quarterly, as a means to improve cost comparison for the citizens of N.C.

Comments may be submitted to: Nadine Pfeiffer, 2701 Mail Service Center, Raleigh, NC 27699-2701, email DHSR.RulesCoordinator@dhhs.nc.gov

Comment period ends: May 15, 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 13 – NC MEDICAL CARE COMMISSION

SUBCHAPTER 13B - LICENSING OF HOSPITALS

SECTION .2100 – TRANSPARENCY IN HEALTH CARE COSTS

10A NCAC 13B .2101 DEFINITIONS

In addition to the terms defined in G.S. 131E-214.13, the following terms shall apply throughout this Section, unless text indicates to the contrary:

- (1) "Current Procedural Terminology (CPT)" means a medical code set developed by the American Medical Association.
- (2) "Diagnostic related group (DRG)" means a system to classify hospital cases assigned by a grouper program based on ICD (International Classification of Diseases) diagnoses, procedures, patient's age, sex, discharge status, and the presence of complications or comorbidities.
- (3) "Department" means the North Carolina Department of Health and Human Services.
- (4) "Financial assistance" means a policy, including charity care, describing how the

organization will provide assistance at its hospital(s) and any other facilities. Financial assistance includes free or discounted health services provided to persons who meet the organization's criteria for financial assistance and are unable to pay for all or a portion of the services. Financial assistance does not include:

- (a) bad debt;
 - (b) uncollectable charges that the organization recorded as revenue but wrote off due to a patient's failure to pay;
 - (c) the cost of providing such care to the patients in Sub-Item (4)(b) of this Rule; or
 - (d) the difference between the cost of care provided under Medicare or other government programs, and the revenue derived therefrom.
- (5) "Healthcare Common Procedure Coding System (HCPCS)" means a three-tiered medical code set consisting of Level I, II and III services and contains the CPT code set in Level I.

Authority G.S. 131E-214.13; S.L. 2013-382, s.10.1; S.L. 2013-382, s.13.1; S.L. 2014-100, s. 12G.2.

10A NCAC 13B .2102 REPORTING REQUIREMENTS

(a) The Department shall establish the lists of the statewide 100 most frequently reported DRGs, 20 most common outpatient imaging procedures, and 20 most common outpatient surgical procedures performed in the hospital setting to be used for reporting the data required in Paragraphs (c) through (e) of this Rule. The lists shall be determined annually based upon data provided by the certified statewide data processor. The Department shall make the lists available on its website. The methodology to be used by the certified statewide data processor for determining the lists shall be based on the data collected from all licensed facilities in the state in accordance with G.S. 131E-214.2 as follows:

- (1) the 100 most frequently reported DRGs shall be based upon all hospital's discharge data that has been assigned a DRG based on the Centers for Medicare and Medicaid Services grouper for each patient record, then selecting the top 100 to be provided to the Department;
- (2) the 20 most common imaging procedures shall be based upon all outpatient data for both hospitals and ambulatory surgical facilities and represent all occurrences of the diagnostic radiology imaging codes section of the CPT codes, then selecting the top 20 to be provided to the Department; and
- (3) the 20 most common outpatient surgical procedures shall be based upon the primary procedure code from the ambulatory surgical facilities and represent all occurrences of the surgical codes section of the CPT codes, then

selecting the top 20 to be provided to the Department.

(b) All information required by Paragraphs (a), (c) and (d) of this Rule shall be posted on the Department's website at: <http://www.ncdhhs.gov/dhsr/ahc> and may be accessed at no cost.

(c) In accordance with G.S. 131E-214.13 and quarterly per year, all licensed hospitals shall report the data required in Paragraph (e) of this Rule related to the statewide 100 most frequently reported DRGs to the certified statewide data processor in a format provided by the certified statewide processor. Commencing September 30, 2015, a rolling four quarters data report shall be submitted that includes all sites operated by the licensed hospital. Each report shall be for the period ending three months prior to the due date of the report.

(d) In accordance with G.S. 131E-214.13 and quarterly per year, all licensed hospitals shall report the data required in Paragraph (e) of this Rule related to the statewide 20 most common outpatient imaging procedures and the statewide 20 most common outpatient surgical procedures to the certified statewide data processor in a format provided by the certified statewide processor. This report shall include the related primary CPT and HCPCS codes. Commencing September 30, 2015, a rolling four quarters data report shall be submitted that includes all sites operated by the licensed hospital. Each report shall be for the period ending three months prior to the due date of the report.

(e) The reports as described in Paragraphs (c) and (d) of this Rule shall be specific to each reporting hospital and shall include:

- (1) the average gross charge for each DRG, CPT code, or procedure for all payer sources;
- (2) the average negotiated settlement on the amount that will be charged for each DRG, CPT code, or procedure as required for patients defined in Subparagraph (e)(1) of this Rule. The average negotiated settlement shall be calculated using the average amount charged all patients eligible for the hospital's financial assistance policy, including self-pay patients;
- (3) the amount of Medicaid reimbursement for each DRG, CPT code, or procedure, including all supplemental payments to and from the hospital;
- (4) the amount of Medicare reimbursement for each DRG, CPT code, or procedure; and
- (5) on behalf of patients who are covered by a Department of Insurance licensed third-party and teachers and State employees, the lowest, average, and highest amount of payments made for each DRG, CPT code, or procedure by each of the hospital's top five largest health insurers.
 - (A) each hospital shall determine its five largest health insurers based on the dollar volume of payments received from those insurers;
 - (B) the lowest amount of payment shall be reported as the lowest payment from each of the five insurers on the DRG, CPT code, or procedure;
 - (C) the average amount of payment shall be reported as the arithmetic average

- of each of the five health insurers payment amounts;
- (D) the highest amount of payment shall be reported as the highest payment from each of the five insurers on the DRG, CPT code, or procedure; and
- (E) the identity of the top five largest health insurers shall be redacted prior to submission.

(f) The data reported, as defined in Paragraphs (c) through (e) of this Rule, shall reflect the payments received from patients and health insurers for all closed accounts. For the purpose of this Rule, "closed accounts" are patient accounts with a zero balance at the end of the data reporting period.

(g) A minimum of three data elements shall be required for reporting under Paragraphs (c) and (d) of this Rule.

(h) The information submitted in the report shall be in compliance with the federal Health Insurance Portability and Accountability Act of 1996, 45 CFR Part 164.

(i) The Department shall provide the location of each licensed hospital and all specific hospital data reported pursuant to this Rule on its website. Hospitals shall be grouped by category on the website. On each quarterly report, hospitals shall determine one category that most accurately describes the type of facility. The categories are:

- (1) "Academic Medical Center Teaching Hospital," means a hospital as defined in Policy AC-3 of the N.C. State Medical Facilities Plan. The N.C. State Medical Facilities Plan may be accessed at: <http://www.ncdhhs.gov/dhsr/ncsmfp> at no cost.
- (2) "Teaching Hospital," means a hospital that provides medical training to individuals, provided that such educational programs are accredited by the Accreditation Council for Graduated Medical Education to receive graduate medical education funds from the Centers for Medicare & Medicaid Services.
- (3) "Community Hospital," means a general acute hospital that provides diagnostic and medical treatment, either surgical or nonsurgical, to inpatients with a variety of medical conditions, and that may provide outpatient services, anatomical pathology services, diagnostic imaging services, clinical laboratory services, operating room services, and pharmacy services, that is not defined by the categories listed in this Subparagraph and Subparagraphs (i)(1), (2), or (5) of this Rule.
- (4) "Critical Access Hospital," means a hospital defined in the Centers for Medicare & Medicaid Services' State Operations Manual, Chapter 2 – The Certification Process, 2254D – Requirements for Critical Access Hospitals (Rev. 1, 05-21-04), including all subsequent updates and revisions. The manual may be accessed at the website: <http://www.cms.gov/Regulations-and->

[Guidance/Guidance/Manuals/downloads/som107ap_a_hospitals.pdf](#) at no cost.

- (5) "Mental Health Hospital," means a hospital providing psychiatric services pursuant to G.S. 131E-176(21).

Authority G.S. 131E-214.4; 131E-214.13; S.L. 2013-382, s.10.1; S.L. 2014-100, s. 12G.2;

SUBCHAPTER 13C - LICENSING OF AMBULATORY SURGICAL FACILITIES

SECTION .0100 - GENERAL

10A NCAC 13C .0103 DEFINITIONS

In addition to the terms defined in G.S. 131E-214.13, the following terms shall apply throughout ~~As used in this Subchapter,~~ unless the context clearly requires otherwise, the following terms have the meanings specified: otherwise:

- (1) "Adequate" means, when applied to various areas of services, that the services are at least satisfactory in meeting a referred to need when measured against ~~contemporary~~ professional standards of practice.
- (2) "AAAASF" means American Association for Accreditation of Ambulatory Surgery Facilities.
- (3) "AAAHC" means Accreditation Association for Ambulatory Health Care.
- (4) "Ancillary nursing personnel" means persons employed to assist registered nurses or licensed practical nurses in the care of patients.
- (5) "Anesthesiologist" means a physician whose specialized training and experience qualify him or her to administer anesthetic agents and to monitor the patient under the influence of these agents. For the purpose of ~~these Rules this Subchapter,~~ the term "anesthesiologist" shall not include podiatrists.
- (6) "Anesthetist" means a physician or dentist qualified, as defined in ~~Item-Items~~ (10) and ~~(22)(24)~~ of this Rule, to administer anesthetic agents or a registered nurse qualified, as defined in ~~Item-Items~~ ~~(22)(25)~~ and (27) of this Rule, to administer anesthesia.
- (7) "Authority ~~Having Jurisdiction~~" ~~—having jurisdiction~~ means the Division of Health Service Regulation.
- (8) "Chief executive officer" or "administrator" means a qualified person appointed by the governing authority to act in its behalf in the overall management of the facility and whose office is located in the facility.
- (9) "Current Procedural Terminology (CPT)" means a medical code set developed by the American Medical Association.
- ~~(9)(10)~~ "Dentist" means a person who holds a valid license issued by the North Carolina Board of Dental Examiners to practice dentistry.

- (11) "Department" means the North Carolina Department of Health and Human Services.
- (12) "Director of nursing" means a registered nurse who is responsible to the chief executive officer or administrator and has the authority and direct responsibility for all nursing services and nursing care for the entire facility at all times.
- (13) "Financial assistance" means a policy, including charity care, describing how the organization will provide assistance at its facility. Financial assistance includes free or discounted health services provided to persons who meet the organization's criteria for financial assistance and are unable to pay for all or a portion of the services. Financial assistance does not include:
- (a) bad debt;
 - (b) uncollectable charges that the organization recorded as revenue but wrote off due to a patient's failure to pay;
 - (c) the cost of providing such care to the patients in Sub-Item (13)(b) of this Rule; or
 - (d) the difference between the cost of care provided under Medicare or other government programs, and the revenue derived therefrom.
- (14) "Governing authority" means the individual, agency or group, agency, group, or corporation appointed, elected or otherwise designated, in which the ultimate responsibility and authority for the conduct of the ambulatory surgical facility is vested.
- (15) "Healthcare Common Procedure Coding System (HCPCS)" means a three tiered medical code set consisting of Level I, II and III services and contains the CPT code set in Level I.
- (16) "JCAHO" or "Joint Commission" means Joint Commission on Accreditation of Healthcare Organizations.
- (17) "Licensing agency" means the Department of Health and Human Services, Division of Health Service Regulation.
- (18) "Licensed practical nurse" (L.P.N.) nurse (L.P.N.) means any person licensed as such under the provisions of G.S. 90-171-G.S. 90-171.20(8).
- (19) "Nursing personnel" means registered nurses, licensed practical nurses-nurses, and ancillary nursing personnel.
- (20) "Operating room" means a room in which surgical procedures are performed.
- (21) "Patient" means a person admitted to and receiving care in a facility.
- (22) "Person" means an individual, a trust or estate, a partnership or corporation, including associations, joint stock companies and insurance companies; the state, State, or a

political subdivision or instrumentality of the state.

- (23) "Pharmacist" means a person who holds a valid license issued by the North Carolina Board of Pharmacy to practice pharmacy in accordance with G.S. 90-85-G.S. 90-85.3A.
- (24) "Physician" means a person who holds a valid license issued by the North Carolina Medical Board to practice medicine. For the purpose of carrying out these Rules, a "physician" may also mean a person holding a valid license issued by the North Carolina Board of Podiatry Examiners to practice podiatry.
- (25) "Qualified person" person, when used in connection with an occupation or position position, means a person:
- (a) who has demonstrated through relevant experience the ability to perform the required functions; or
 - (b) who has certification, registration registration, or other professional recognition.
- (26) "Recovery area" means a room used for the post anesthesia-post-anesthesia recovery of surgical patients.
- (27) "Registered nurse" means a person who holds a valid license issued by the North Carolina Board of Nursing to practice nursing as defined in G.S. 90-171-G.S. 90-171.20(7).
- (28) "Surgical suite" means an area which-that includes one or more operating rooms and one or more recovery rooms.

Authority G.S. 131E-149; 131E-214.13; S.L. 2013-382, s.10.1; S.L. 2013-382, s.13.1; S.L. 2014-100, s. 12G.2.

SECTION .0200 - LICENSING PROCEDURES

10A NCAC 13C .0206 REPORTING REQUIREMENTS

(a) The Department shall establish the lists of the statewide 20 most common outpatient imaging procedures and 20 most common outpatient surgical procedures performed in the ambulatory surgical facility setting to be used for reporting the data required in Paragraphs (c) and (d) of this Rule. The lists shall be determined annually based upon data provided by the certified statewide data processor. The lists shall be based upon data provided by the certified statewide data processor. The Department shall make the lists available on its website. The methodology to be used by the certified statewide data processor for determining the lists shall be based on the data collected from all licensed facilities in the state in accordance with G.S. 131E-214.2 as follows:

- (1) the 20 most common imaging procedures shall be based upon all outpatient data for ambulatory surgical facilities and represent all occurrences of the diagnostic radiology imaging codes section of the CPT codes, then selecting the top 20 to be provided to the Department; and

(2) the 20 most common outpatient surgical procedures shall be based upon the primary procedure code from the ambulatory surgical facilities and represent all occurrences of the surgical codes section of the CPT codes, then selecting the top 20 to be provided to the Department.

(b) All information required by this Rule shall be posted on the Department's website at: <http://www.ncdhhs.gov/dhsr/ahc> and may be accessed at no cost.

(c) In accordance with G.S. 131E-214.13 and quarterly per year, all licensed ambulatory surgical facilities shall report the data required in Paragraph (d) of this Rule related to the statewide 20 most common outpatient imaging procedures and the statewide 20 most common outpatient surgical procedures to the certified statewide data processor in a format provided by the certified statewide processor. This report shall include the related primary CPT and HCPCS codes. Commencing September 30, 2015, a rolling four quarters data report shall be submitted. Each report shall be for the period ending three months prior to the due date of the report.

(d) The report as described in Paragraph (c) of this Rule shall be specific to each reporting ambulatory surgical facility and shall include:

- (1) the average gross charge for each CPT code or procedure for all payer sources;
- (2) the average negotiated settlement on the amount that will be charged for each CPT code or procedure as required for patients defined in Subparagraph (d)(1) of this Rule. The average negotiated settlement shall be calculated using the average amount charged all patients eligible for the facility's financial assistance policy, including self-pay patients;
- (3) the amount of Medicaid reimbursement for each CPT code or procedure, including all supplemental payments to and from the ambulatory surgical facility;
- (4) the amount of Medicare reimbursement for each CPT code or procedure; and
- (5) on behalf of patients who are covered by a Department of Insurance licensed third-party and teachers and State employees, the lowest, average, and highest amount of payments made for each CPT code or procedure by each of the facility's top five largest health insurers.

(A) each ambulatory surgical facility shall determine its five largest health insurers based on the dollar volume of payments received from those insurers;

(B) the lowest amount of payment shall be reported as the lowest payment from each of the five insurers on the CPT code or procedure;

(C) the average amount of payment shall be reported as the arithmetic average of each of the five health insurers payment amounts;

(D) the highest amount of payment shall be reported as the highest payment from each of the five insurers on the CPT code or procedure; and

(E) the identity of the top five largest health insurers shall be redacted prior to submission.

(e) The data reported, as defined in Paragraphs (c) and (d) of this Rule, shall reflect the payments received from patients and health insurers for all closed accounts. For the purpose of this Rule, "closed accounts" are patient accounts with a zero balance at the end of the data reporting period.

(f) A minimum of three data elements shall be required for reporting under Paragraph (c) of this Rule.

(g) The information submitted in the report shall be in compliance with the federal Health Insurance Portability and Accountability Act of 45 CFR Part 164.

(h) The Department shall provide all specific ambulatory surgical facility data reported pursuant to this Rule on its website.

Authority G.S. 131E-147.1; 131E-214.4; 131E-214.13; S.L. 2013-382, s.10.1; S.L. 2014-100, s. 12G.2.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 30 – BOARD OF MASSAGE AND BODYWORK THERAPY

Notice is hereby given in accordance with G.S. 150B-21.3A(c)(2)g. that the Board of Massage and Bodywork Therapy intends to readopt with substantive changes the rules cited as 21 NCAC 30 .0201 and .0701.

Link to agency website pursuant to G.S. 150B-19.1(c):
<http://www.bmbt.org/pages/news.html>

Proposed Effective Date: *August 1, 2015*

Public Hearing:

Date: *April 23, 2015*

Time: *10:00 a.m.*

Location: *Wells Fargo Capital Center, 13th Floor Conference Room, 150 Fayetteville Street, Raleigh, NC 27601*

Reason for Proposed Action:

21 NCAC 30 .0201 – This rule was classified as "necessary with substantive public interest" through the "Periodic Review and Expiration of Existing Rules" process. The agency received several comments on this rule through the review process but after further discussion and clarification with the individuals who commented, determined the content of the rule did not need to be changed. The only amendment in the rule is to clarify initial application requirements.

21 NCAC 30 .0701 - This rule was classified as "necessary with substantive public interest" through the "Periodic Review and Expiration of Existing Rules" process. The agency received several comments on this rule through the process and determined

the content of the rule needs to be amended. The amendments will clarify the continuing education requirements.

Comments may be submitted to: Charles P. Wilkins, P.O. Box 2539, Raleigh, NC 27602, phone (919) 546-0050, fax (919) 833-1059, email cwilkins@bws-law.com

Comment period ends: May 15, 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

SECTION .0200 – APPLICATION FOR LICENSE

21 NCAC 30 .0201 APPLICATION AND SCOPE

Each applicant for a license as a massage and bodywork therapist shall complete an application form provided by the Board. This form shall be submitted to the Board and shall be accompanied by:

- (1) One original color photograph of the applicant taken within six months preceding the date of the application of sufficient quality for identification. The photograph shall be of the head and shoulders, passport type, two inches by two inches in size;
- (2) The proper fees, as required by Rule .0204 of this Section and G.S. 90-629.1(b);
- (3) Documentation that the applicant has earned a high school diploma or equivalent;
- (4) Documentation that the applicant is 18 years of age or older;
- (5) Documentation that the applicant has successfully completed a course of study at a school approved by the Board according to these rules and consisting of a minimum of 500 classroom hours of supervised instruction. If

the applicant attended a school which is not approved by the Board, the Board may elect to review that applicant's school and educational credentials for approval on a case-by-case basis. The documentation of such training must come from a school which is licensed by the educational licensing authority in the state, territory or country in which it operates, or is exempt by statute. In North Carolina the documentation must come from a proprietary school approved by the Board or a college-based massage program that is exempt from Board approval. The curriculum must meet or be substantially equivalent to the standards set forth in Rule .0620(2) of this Chapter;

- (6) Documentation that the applicant has achieved a passing score on a competency assessment examination administered by the Board or approved by the Board that meets generally accepted psychometric principles and standards;
- (7) Forms provided by the Board containing signed statements from ~~two~~ four persons attesting to the applicant's good moral character and adherence to ethical standards;
- (8) Fingerprint card provided by the Board and executed by an official fingerprinting agency, and
- (9) A form provided by the Board consenting to a criminal history record check by the North Carolina Department of Justice.

Authority G.S. 90-626(2); 90-629.

SECTION .0700 – CONTINUING EDUCATION

21 NCAC 30 .0701 CONTINUING EDUCATION REQUIREMENTS

(a) Pursuant to G.S. 90-632, a licensee, when renewing a license, shall document that they have completed at least 24 contact hours of approved continuing education during the immediately preceding licensure period, provided the licensure period is two years or more. If the licensure period is less than two years, but more than one year, the licensee shall document that they have completed at least 12 contact hours of approved continuing education.

(b) For the purposes of this Section, "approved continuing education" means a course offered as follows:

- (1) by an approved provider as defined in Rule .0702; or
- ~~(2) a course approved by the National Certification Commission for Acupuncture and Oriental Medicine (NCCAOM); or~~
- ~~(3)~~ (2) a course in anatomy, physiology, ~~pathology~~ pathology, psychology, massage and bodywork therapy or business management taken at a post secondary institution of higher learning.

(c) Distance learning, as defined in Rule .0702 of this Section, shall not comprise more than 12 hours of the required continuing education hours per licensure period.

(d) Licensees shall document that they have completed at least three contact hours of continuing education in professional ethics as defined in Rule .0702 of this Section, out of the minimum of 24 hours of approved continuing education required for license renewal. This may be obtained through supervised classroom instruction or distance learning.

(e) Business management, as defined in Rule .0702 of this Section, shall not comprise more than ~~three~~eight hours of the minimum 24 hours of approved continuing education required for license renewal.

(f) Licensees shall ensure that each continuing education course for which they claim credit on their application for renewal of licensure is consistent with the definitions and requirements set forth in this Section.

(g) The Board may audit licensees at random to assure compliance with these requirements.

Authority G.S. 90-626(9); 90-632(a)(1).

Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Massage and Bodywork Therapy intends to adopt the rules cited as 21 NCAC 30 .1001-.1015 and amend the rule cited as 21 NCAC 30 .0702.

Link to agency website pursuant to G.S. 150B-19.1(c):
<http://www.bmbt.org/pages/news.html>

Proposed Effective Date: August 1, 2015

Public Hearing:

Date: April 23, 2015

Time: 10:00 a.m.

Location: Wells Fargo Capital Center, 13th Floor Conference Room, 150 Fayetteville Street, Raleigh, NC 27601

Reason for Proposed Action:

21 NCAC 30 .1001-.1015 - Pursuant to G.S. 90-626 (9), the Board has the power, duty and responsibility to adopt rules related to the approval of massage and bodywork therapy establishments. In its formative years the Board focused its attention on licensing, renewing and disciplining massage and bodywork therapists and then the approval of massage and bodywork therapy schools. The Board is now in a position to fulfill its duty to approve massage and bodywork therapy establishments. The Board will have the authority to discipline establishments that hire unlicensed persons or that offer illegal activities under the guise of massage therapy. Regulation of massage and bodywork therapy establishments will assist State and local law enforcement by identifying unlicensed establishments and will protect the public by identifying and disciplining establishments that offer illicit, illegal services.

21 NCAC 30 .0702 - These amendments are being submitted to clarify continuing education requirements.

Comments may be submitted to: Charles P. Wilkins, P.O. Box 2539, Raleigh, NC 27602, email cwilkins@bws-law.com

Comment period ends: May 15, 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

SECTION .0700 – CONTINUING EDUCATION

21 NCAC 30 .0702

CONTINUING EDUCATION

DEFINITIONS

The following definitions apply to this Section:

- (1) Continuing education. -- Learning experiences that enhance and expand the skills, knowledge, and attitudes of massage and bodywork therapists that enable them to render competent professional service to clients, the profession and the public.
- (2) Distance learning. -- Courses taken by home study that are produced by an approved provider, whether delivered by videotape, audiotape, printed materials, or computer-based means. The licensee shall demonstrate achievement of learning objectives and completion of course requirements to the provider before credit is given.
- (3) One "contact hour" of continuing education. -- At least 50 minutes of any one clock hour during which the student participates in a learning activity in the physical presence of an instructor, or in a distance learning activity designed by an approved provider. One semester credit hour at a post-secondary

institution shall be equivalent to ~~46~~ 21 contact hours.

- (4) Professional ethics. -- A system of conduct guided by principles which are intended to ensure the safe and effective practice of massage and bodywork therapy. Acceptable subject matter for required professional ethics courses may include: compliance with Practice Act and Rules of the Board, management of the client/therapist relationship, boundary functions, professional communication skills, conflict resolution, cultural diversity issues, and standards of practice.
- (5) Business management. -- Courses that enable the licensee to learn and apply business skills to create a successful professional practice.
- (6) Post secondary institution of higher learning -- A degree granting institution accredited by an accrediting agency recognized by the United States Department of Education.
- (7) Approved provider. ~~--- One that has been granted the designation of "Approved Provider for Continuing Education" by the National Certification Board for Therapeutic Massage and Bodywork (NCBTMB). One that has been approved by an entity with which the Board has reached a contractual agreement for the approval of continuing education providers and courses.~~ The provider shall have this designation when the course begins and shall maintain this designation continuously until the course is completed. The Board does not recognize any retroactive designation of provider approval. Except as herein stated, the provider shall follow all regulations set forth by its accrediting agency. The Board may also recognize a verifiable continuing education provider outside the United States or its territories that is a post-secondary institution of higher learning approved by the educational regulation authority of that foreign country.

Authority G.S. 90-26(9); 90-632.

SECTION .1000 – MASSAGE AND BODYWORK THERAPY ESTABLISHMENTS

21 NCAC 30 .1001 DEFINITIONS

In addition to the definitions set forth in G.S. 90-622(1) through (5) and Rule .0102(1) through (10) of this Chapter, the following definitions apply:

- (1) "Owner" means the person, sole proprietor, partnership, limited partnership, or corporation that operates the massage and bodywork therapy establishment.
- (2) "Massage and bodywork therapy establishment" means any duly licensed site or premises in which massage and bodywork therapy is practiced. This shall not include:

- (a) on-site massage performed at the location of the client;
 - (b) stand-alone devices, such as chairs, that are operated by the customer;
 - (c) establishments located within the confines of a hospital, nursing home, or other similar establishment or facility licensed or otherwise regulated by the Department of Health and Human Services;
 - (d) massage and bodywork therapy provided by a sole practitioner; or
 - (e) a student clinic run by a Board Approved School or a massage and bodywork therapy program offered by community colleges in North Carolina that are accredited by the Southern Association of Colleges and Schools, or massage and bodywork therapy programs offered by a degree or diploma granting college or university accredited by any accrediting agency that is recognized by the United States Department of Education and is licensed by the North Carolina Community College System or The University of North Carolina Board of Governors.
- (3) "Business name" means the name under which the owner applies for the establishment license to provide massage therapy, if different from the name of the owner.
 - (4) "Sole practitioner" means one licensed massage and bodywork therapist offering massage or bodywork therapy services from a space the licensed massage and bodywork therapist controls and from which only the licensed massage and bodywork therapist offers and provides the services.

Authority G.S. 90-626(9).

21 NCAC 30 .1002 LICENSURE OF MASSAGE AND BODYWORK THERAPY ESTABLISHMENTS

(a) Any person who wishes to operate a massage and bodywork therapy establishment shall obtain a license from the Board by submitting a Massage and Bodywork Therapy Establishment Licensure Application accompanied by:

- (1) the fee set forth in G.S. 90-628(b)(1) and (2);
- (2) proof of property damage and bodily injury liability insurance coverage;
- (3) verifications from all state licensing boards from which the owner holds or has held any health related professional license;
- (4) criminal history documentation;
- (5) ownership information, including type of ownership, name of owner, name of authorized representative, if owner is not a person, address of establishment, social security number or

- federal tax identification number, email address, phone number, and hours of operation;
- (6) previous licensure and disciplinary history; and
- (7) signature of all owners or authorized representative, if owner is not a person;

(b) The Massage and Bodywork Therapy Establishment Licensure Application and the application instructions may be obtained from the Board office at 150 Fayetteville Street, Suite 1900, Raleigh, NC 27601 or from the website located at <http://www.bmbt.org>.

(c) The application for licensure shall be submitted in the name of the owner or owners of the establishment. If the owner is a corporation, the application shall be submitted in the name of the corporation and shall be signed by a corporate representative.

(d) An owner may operate an establishment under a name other than the name of the owner, provided the owner complies with Rule .0402 of this Chapter. Any advertisement by the establishment shall include the business name, and shall comply with Rule .0404 of this Chapter.

Authority G.S. 90-626(9).

21 NCAC 30 .1003 REQUIREMENTS FOR LICENSURE

Upon application to the Board and the payment of the required fees required in Rule .1013 of this Chapter, an applicant shall be licensed as a massage and bodywork therapy establishment if the applicant meets all of the following qualifications:

- (1) employs, hires, or plans to employ or hire a massage and bodywork therapist who holds a current license from the Board;
- (2) has space and facilities for providing massage and bodywork therapy services;
- (3) has restroom facilities;
- (4) has property damage and bodily injury liability insurance coverage for the proposed establishment. If the establishment is operated under a business name, the proof of insurance shall include both the name of the owner and the business name;
- (5) has completed a self evaluation inspection report showing compliance with this Rule;
- (6) has submitted fingerprint cards in accordance with G.S. 90-629.1 at the time the license application is filed and consented to a criminal history record check by the North Carolina Department of Justice; and
- (7) has satisfied G.S. 90-629(3).

Authority G.S. 90-626(2); 90-626(3).

21 NCAC 30 .1004 MESSAGE ESTABLISHMENT OPERATIONS

(a) Each owner shall meet the following facility requirements:

- (1) comply with all local building code requirements, state fire safety codes, and state health inspection codes;
- (2) provide for the use of clients a restroom with at least one toilet and one sink with running water.

The facilities shall be equipped with toilet tissue, soap dispenser with soap or other hand cleaning materials, sanitary towels or other hand-drying device such as a wall-mounted electric blow dryer, and waste receptacle. Restroom and shower facilities and fixtures shall be maintained in good repair, lighted and ventilated, and in compliance with State and local building codes;

- (3) maintain toilet facilities in a common area of the establishment. Establishments located in buildings housing multiple businesses under one roof, such as shopping malls, terminals, or hotels may substitute centralized toilet facilities; and
- (4) if equipped with a whirlpool bath, sauna, steam cabinet, or steam room, maintain clean shower facilities on the premises.

(b) A licensed massage and bodywork therapist shall:

- (1) be on the premises of the establishment if a client is in a treatment room for the purpose of receiving massage or bodywork therapy; and
- (2) administer all massage or bodywork therapy treatment sessions.

(c) Each owner shall meet the following safety and sanitary requirements:

- (1) provide for safe and unobstructed human passage in the public areas of the premises;
- (2) provide for removal of garbage and refuse;
- (3) provide for safe storage or removal of flammable materials;
- (4) exterminate all vermin, insects, termites, and rodents on the premises;
- (5) maintain all equipment used to perform massage services on the premises in a safe and sanitary condition, including the application of cleansers and bactericidal agents to the massage table. Clean sheets, towels, or other coverings shall be used for each client and to cover the massage table for each client; and
- (6) maintain a supply of clean drapes, towels, gowns, or sheets, for the purpose of draping each client while the client is being massaged, and launder before reuse all linens furnished for the personal use of the client.

Authority G.S. 90-626(9).

21 NCAC 30 .1005 CLIENT RECORDS RETENTION AND OWNERSHIP

(a) Records shall be maintained for every client, regardless of the procedure or modality used during the massage and bodywork therapy session. Client records shall be maintained by the licensee or practice owner as follows:

- (1) in a secure manner that protects the confidentiality of the client and protects the records from damage or destruction; and

- (2) for at least four years after the termination of the client-therapist relationship and shall be disposed of by shredding or burning.

(b) Records stored electronically shall be maintained with a weekly back-up system.

(c) Client records are the property of the:

- (1) licensee when working as a sole proprietor or independent contractor; or
 (2) practice owner, if the licensee is an employee.

(d) Release of Records.

- (1) client records shall be released within 30 days when requested and authorized by the client in writing or when compelled by law or regulation.
 (2) record owners may charge actual cost for duplicating client records.

Authority G.S. 90-626(9).

21 NCAC 30 .1006 INSPECTION UPON APPLICATION FOR LICENSE

Upon receipt of an application for a massage and bodywork therapy establishment license, employees of the Board shall inspect the site to confirm that the criteria enunciated in Rule .1003 of this Chapter are satisfied.

Authority G.S. 90-626(5); 90-626(9).

21 NCAC 30 .1007 PERIODIC INSPECTIONS

The Board may inspect all massage and bodywork therapy establishments licensed in this State to ensure compliance with the Rules in this Chapter and Article 36 of G.S. Chapter 90.

Authority G.S. 90-626(5); 90-626(9).

21 NCAC 30 .1008 TRANSFER OF MASSAGE AND BODYWORK THERAPY ESTABLISHMENT LICENSE

(a) When there is no change of ownership or location, the owner may change the business name of the establishment. The owner shall apply for a change of business name by submitting to the Board a written change of name request accompanied by the fee provided in G.S. 90-628(b)(5). When a massage and bodywork therapy establishment business name is changed, without a change in ownership or location, a new establishment inspection shall not be required.

(b) When there is no change of ownership, the owner of a massage and bodywork therapy establishment may transfer the license from one location to another. The owner shall apply for a change of location by submitting to the Board a written change of location accompanied by the fee provided in G.S. 90-628(b)(5). A massage and bodywork therapy establishment license may not be transferred from one location to another until compliance with Rules .1003 and .1004 of this Chapter.

Authority G.S. 90-626(9).

21 NCAC 30 .1009 SEXUAL ACTIVITY PROHIBITED

(a) Sexual activity by any person or persons in any massage and bodywork therapy establishment shall be prohibited.

(b) No owner shall engage in or permit any person or persons to engage in sexual activity in the owner's massage and bodywork therapy establishment or use such establishment to make arrangements to engage in sexual activity in any other place.

Authority G.S. 90-623(d)(4); 90-626(9); 90-633(a)(12).

21 NCAC 30 .1010 DISCIPLINARY SANCTIONS; REPORTING REQUIREMENTS

The Board may utilize disciplinary sanctions for establishments set forth in Rule .0905(b) of this Chapter, if the licensed massage and bodywork therapy establishment violates the following:

- (1) any statute or rule required for licensure or approval of that establishment by any other licensing or approval authority; or
 (2) any applicable rule of this Chapter.

Authority G.S. 90-626(14); 90-626(15); 90-633(a)(6).

21 NCAC 30 .1011 REFUSAL TO ISSUE, SUSPENSION OR REVOCATION OF LICENSE

The Board may deny, suspend, revoke, discipline, or refuse to approve a massage and bodywork therapy establishment license for any of the following reasons:

- (1) the employment of fraud, deceit, or misrepresentation in obtaining or attempting to obtain approval of a massage and bodywork therapy establishment;
 (2) engaging in any act or practice in violation of any of the provisions of this Article or of any of the rules adopted by the Board; or aiding, abetting, or assisting any other person in the violation of the provisions of this Article or rules adopted by the Board;
 (3) failure to require that its employees be licensed to practice massage and bodywork therapy in this state;
 (4) operating a massage and bodywork therapy establishment without approval from this Board;
 (5) engaging in conduct that could result in harm or injury to the public;
 (6) the employment of fraud, deceit, or misrepresentation when communicating with the general public, health care professionals, or other business professionals;
 (7) falsely holding out a massage and bodywork therapy establishment as approved by this Board;
 (8) failure to allow Board members, employees, attorneys, or Board authorized inspectors to conduct inspections of the massage and bodywork therapy establishment or refusing to make available to the Board, following written notice to the massage and bodywork therapy

- establishment the requested information pertaining to the requirements for approval set forth in this Article;
- (9) failure to notify the Board in writing within 30 days of any notification it receives from its accrediting agency or the North Carolina Department of Health and Human Services of a show cause action, probation action, or denial of accreditation; and
- (10) the applicant for or holder of massage and bodywork therapy establishment license has pleaded guilty, entered a plea of nolo contendere, or has been found guilty of a crime involving moral turpitude by a judge or jury in any state or federal court.

Authority G.S. 90-633(a).

21 NCAC 30 .1012 UNLICENSED PRACTICE

A massage and bodywork therapy establishment shall not employ or contract with any person in this State to provide massage and bodywork therapy unless such person has obtained a current license to practice massage and bodywork therapy in this State.

Authority G.S. 90-626(3); 90-626(9).

21 NCAC 30 .1013 FEES

(a) Fees shall be as follows:

- | | | |
|-----|--|-----------------|
| (1) | <u>Application for Examination of Requirements for License</u> | <u>\$ 20.00</u> |
| (2) | <u>License fee</u> | <u>150.00</u> |
| (3) | <u>License renewal</u> | <u>100.00</u> |

(4) Late renewal penalty 75.00

(5) Duplicate license 25.00

(b) Fees shall be nonrefundable and shall be paid in the form of a cashier's check, certified check, or money order made payable to the North Carolina Board of Massage and Bodywork Therapy.

(c) If the applicant is currently licensed to practice massage and bodywork therapy in North Carolina and is practicing massage and bodywork therapy as a sole practitioner, the establishment license fee and license renewal fee shall be waived.

Authority G.S. 90-626(8); 90-626(9); 90-628(b).

21 NCAC 30 .1014 TERM OF LICENSE

(a) Initial applications for licensure submitted between October 1 and December 31 shall be granted for two full years, plus the additional period of up to three months. Initial applications submitted between January 1 and September 30 shall pay the full fee, but the initial license period shall be two years, minus the period following January 1.

(b) Pursuant to G.S. 90-632, a license shall be renewed for a term of two years, beginning on January 1 following the initial expiration date.

Authority G.S. 90-626(9); 90-632(a).

21 NCAC 30 .1015 BACKGROUND INVESTIGATION REQUIRED FOR APPLICANT

At the request of the Board, the applicant shall provide all documentation related to the applicant's compliance with G.S. 90-629(3).

Authority G.S. 90-629.1.

Note from the Codifier: The rules published in this Section of the NC Register are temporary rules reviewed and approved by the Rules Review Commission (RRC) and have been delivered to the Codifier of Rules for entry into the North Carolina Administrative Code. A temporary rule expires on the 270th day from publication in the Register unless the agency submits the permanent rule to the Rules Review Commission by the 270th day.

This section of the Register may also include, from time to time, a listing of temporary rules that have expired. See G.S. 150B-21.1 and 26 NCAC 02C .0500 for adoption and filing requirements.

**TITLE 15A – DEPARTMENT OF ENVIRONMENT AND
NATURAL RESOURCES**

Rule-making Agency: Wildlife Resources Commission

Rule Citation: 15A NCAC 10B .0106, .0118, .0219; 10H .0301, .0302, .0304; 10I .0102, .0104

Effective Date: February 27, 2015

Date Approved by the Rules Review Commission: February 19, 2015

Reason for Action:

15A NCAC 10B .0106, .0219 – A recent court order. The changes are in response to a settlement agreement for 2:13-cv-00060-BO, in which the Wildlife Resources Commission agreed to make a specific certain specified changes to regulate coyote hunting within five specific counties.

15A NCAC 10I .0102, .0104 - A recent court order. The changes are in response to a settlement agreement for 2:13-cv-00060-BO, in which the Wildlife Resources Commission agreed to make a specific change to add the red wolf to the list of threatened species.

15A NCAC 10B .0118 – The effective date of a recent act of the General Assembly, S.L. 2014-100. The changes to this Rule will allow captive cervid licensees to sell antlers, antler velvet and hides from captive populations of cervids.

Senate Bill 744 ratified in the 2014 session of the General Assembly contains six sections that direct the Commission to change how captive cervids are managed. Section 14.26(e) reads as follows, "(a) The Wildlife Resources Commission shall regulate the transportation, including importation and exportation, and possession of cervids, including game carcasses and parts of game carcasses extracted by hunters. The Commission shall allow the sale of antlers, antler velvet, or hides from captive populations of cervids. The Commission shall adopt rules to implement this section, including requirements for captivity licenses, captivity permits, and transportation permits..."

15A NCAC 10H .0301, .0302, .0304 – The effective date of a recent act of the General Assembly, S.L. 2014-100. The proposed changes to these Rules alter state program requirements for captive cervid licensees to align with the standards set in the USDA APHIS Herd Certification Program.

Senate Bill 744 ratified in the 2014 session of the General Assembly contains six sections that direct the Commission to change how captive cervids are managed. Section 14.26(d) reads as follows, "Except as further limited by subsection (a) of this section, or as modified by subsection (c) of this section, and notwithstanding any other provision of law or regulations

adopted by the Commission to the contrary, the Commission shall follow the USDA standards in carrying out its authority to regulate cervids."

**CHAPTER 10 – WILDLIFE RESOURCES AND WATER
SAFETY**

SUBCHAPTER 10B – HUNTING AND TRAPPING

SECTION .0100 – GENERAL REGULATIONS

**15A NCAC 10B .0106 WILDLIFE TAKEN FOR
DEPREDACTIONS**

(a) Depredation permits allow the ~~taking~~take of undesirable or excess wildlife resources as described in Subparagraphs (1) and (2) of this Paragraph. ~~The taking of depredating coyotes in the counties of Dare, Hyde, Washington, Tyrrell, and Beaufort, with or without a permit, is allowed only as described in Paragraph (e) of this Rule.~~ Only employees of the Wildlife Resources Commission and Wildlife Damage Control Agents may issue depredation permits. Each permit ~~shall~~must be written on a form supplied by the Commission. No permit is needed for the owner or lessee of a property to take wildlife while committing depredations on the ~~property~~property, however the manner of taking, disposition of dead ~~wildlife~~wildlife and reporting requirements as described in this Rule still ~~apply~~apply. No permit shall be issued to take any endangered or threatened species of wildlife listed under 15A NCAC 10I, except alligators, by reason of depredations to property. Only the Executive Director may issue depredation permits for Special Concern species listed in 15A NCAC ~~10I .0105~~ 10I .0105 ~~10I .0103~~ and for alligators. An individual may take an endangered or threatened species in immediate defense of his own life or of the lives of others without a permit. Any endangered or threatened species that may constitute a demonstrable but non-immediate threat to human safety shall be reported to a federal or state wildlife enforcement officer, who, upon verification of the report, may take or remove the specimen as provided by 15A NCAC 10I .0102. Depredation permits for other species shall be issued under the following conditions:

- (1) for taking wildlife that is or has been damaging or destroying property provided there is evidence of property damage. No permit may be issued for the taking of any migratory birds and other ~~federally-protected~~federally-protected animals unless a corresponding valid U.S. Fish and Wildlife Service depredation permit, if required, has been issued. The permit shall name the species allowed to be taken and may contain limitations as to age, ~~sex~~sex or any other condition within the species so named.

The permit ~~shall~~must be issued to a landholder or an authorized representative of a unit of local government for depredations on public ~~property; and the property.~~ The permit shall be used only by individuals named on the permit.

- (2) for taking of wildlife resources in circumstances of overabundance or when the wildlife resources present a danger to human safety. Cities as defined in G.S. 160A-1(2) seeking such a depredation permit must apply to the Executive Director using a form supplied by the Commission requesting the following information:
- (A) the name and location of the city;
 - (B) the acreage of the affected property;
 - (C) a map of the affected property;
 - (D) the signature of an authorized city representative;
 - (E) the nature of the overabundance or the threat to public safety; and
 - (F) a description of previous actions taken by the city to ameliorate the problem.

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

reviewing and updating information on wildlife ~~laws, laws~~ and safe, humane wildlife handling techniques within the previous 12 months.

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

(d) Manner of Taking:

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

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

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

(e) Disposition of Wildlife Taken:

(1) Generally. Except as provided by the succeeding Subparagraphs of this Paragraph, any wildlife killed without a permit while

- committing depredations shall be buried or otherwise disposed of in a safe and sanitary manner on the property. Wildlife killed under a depredation permit may be transported to an alternate disposal site if desired. Anyone in possession of carcasses of animals being transported under a depredation permit ~~shall must~~ have the depredation permit in his or her possession. Except as provided by ~~the succeeding~~ Subparagraphs of (d)(2) through (5) of this Rule, all wildlife killed under a depredation permit ~~shall must~~ be buried or otherwise disposed of as stated on the permit.
- (2) Deer and feral swine. The edible portions of feral swine and deer may be retained by the landholder for consumption but ~~shall must~~ not be transported from the property where the depredations took place without a valid depredation permit. The landholder may give a second party the edible portions of the feral swine and deer taken under the depredation permit. The receiver of the edible portions ~~shall must~~ hold a copy of the depredation permit. The nonedible portions of any deer carcass, including head, hide, feet, and antlers, shall be disposed of as specified in Subparagraph (1) of this Paragraph or turned over to a wildlife enforcement officer for disposition.
- (3) Fox. Any fox killed under a depredation permit may be disposed of as described in Subparagraph (1) of this Paragraph or, upon compliance with the fur tagging requirements of 15A NCAC 10B .0400, the carcass or pelt thereof may be sold to a licensed fur dealer.
- (4) Furbearing Animals. The carcass or pelt of any furbearing animal killed during the open season for taking such furbearing animal for control of depredations to property, whether with or without a permit, may be sold to a licensed fur dealer provided that the person offering such carcass or pelt for sale has a valid hunting or trapping ~~license; license~~, provided further that, bobcats and otters may only be sold upon compliance with any required fur tagging requirement set forth in 15A NCAC 10B .0400.
- (5) Animals Taken Alive. Wild animals in the order Carnivora, armadillos, groundhogs, nutria, and beaver shall be humanely euthanized either at the site of capture or at a facility designed to humanely handle the euthanasia or released on the property where captured. Feral swine ~~shall must~~ be euthanized while still in the trap in accordance with G.S. 113-291.12. For all other animals taken alive, the animal ~~shall must~~ be euthanized or ~~else~~ released on property with permission of the landowner. When the relocation site is public property, written permission must be obtained from an appropriate local, ~~state, state~~ or federal official before any animal may be released. Animals transported or held for euthanasia must be euthanized within 12 hours of capture. Anyone in possession of live animals being transported for relocation or euthanasia under a depredation permit ~~shall must~~ have the depredation permit in his or her possession.
- (f) Reporting Requirements. Any landholder who kills an alligator, a coyote in the counties of Beaufort, Dare, Hyde, Tyrrell, or Washington, deer, Canada goose, ~~bear, bear~~ or wild turkey under a valid depredation permit shall report such kill on the form provided with the permit and mail the form upon the expiration date to the Wildlife Resources Commission. Any landowner who kills a coyote in the counties of Beaufort, Dare, Hyde, Tyrrell and Washington shall report such kill as directed on the form provided with the depredation permit. The killing and method of disposition of every ~~alligator alligator and bear, or coyote in the counties of Beaufort, Dare, Hyde, Tyrrell or Washington and bear~~ taken without a permit shall be reported to the Wildlife Resources Commission within 24 hours following the time of such killing.
- ~~(g) In the counties of Dare, Hyde, Washington, Tyrrell, and Beaufort depredating coyotes may be taken subject to the following restrictions:~~
- ~~(1) Taking coyotes without a permit. Depredating coyotes may be harassed by non-lethal means. Coyotes may be shot in defense of a person's safety or the safety of others, or if livestock or pets are threatened.~~
 - ~~(2) Taking coyotes with a permit. Only employees of the Commission shall issue depredation permits for the taking of coyotes in these counties. Commission employees shall only authorize trapping or other non-lethal manners of take in the permit.~~
 - ~~(3) Reporting and disposition. All coyotes taken under a depredation permit shall be reported to the Wildlife Resources Commission within 24 hours and disposed of as stated on the permit. All coyotes killed in accordance with Subparagraph (g)(1) of this Rule shall be reported to the Wildlife Resources Commission within 24 hours.~~
- History Note: Authority G.S. 113-134; 113-273; 113-274; 113-291.4; 113-291.6; 113-300.1; 113-300.2; 113-307; 113-331; 113-333; 113-334(a); 113-337; Eff. February 1, 1976; Amended Eff. August 1, 2013; January 1, 2012; August 1 2010; July 1, 2010; May 1, 2008; August 1, 2002; July 1, 1997; July 1, 1995; January 1, 1995; January 1, 1992; August 1, 1990; Temporary Amendment Eff. August 1, 2014 and shall remain in effect until amendments expire as specified in G.S. 150B-21.1(d) or the United States District Court for the Eastern District of North Carolina's court order number 2:13-CV-60-BOs signed on May 13, 2014 is rescinded, whichever date is earlier. The court order is available at www.ncwildlife.org; Temporary Amendment Eff. February 27, 2015.*

15A NCAC 10B .0118 SALE OF WILDLIFE

(a) The carcasses or pelts of bobcats, opossums, and raccoon that have been lawfully taken by any hunting method, upon compliance with applicable fur tagging requirements set forth in 15A NCAC 10B .0400, may be sold to licensed fur dealers. The sale of carcasses or pelts of bobcats, opossums, and raccoon killed accidentally or taken by hunting for control of depredations is permitted under the conditions set forth in 15A NCAC 10B .0106(e)(4) and 15A NCAC 10B .0127.

(b) Except as otherwise provided in Paragraphs (a), (d), (e), and ~~(f) (a), (d), and (e)~~ of this Rule, the sale of game birds and game animals or parts thereof is prohibited, except that processed products other than those made from edible portions may be ~~sold, sold~~ provided that no label or advertisement identifies the product as a game bird, game animal, or part ~~thereof; thereof~~ and provided further that the game bird or game animal was lawfully ~~acquired~~ ~~acquired~~ and the product is not readily identifiable as a game ~~bird, bird~~ or game animal, or part thereof.

(c) The sale of edible portions or products of game birds and game animals is prohibited, except as may be otherwise provided by statute.

(d) The pelt or feathers of deer, elk, fox, pheasant, quail, rabbit, or squirrel (fox and gray) may be bought or sold for the purpose of making fishing flies provided that the source of these animals can be documented as being legally obtained from out of state sources or from lawfully operated commercial breeding facilities. The buying and selling of migratory game birds shall be in accordance with 50 C.F.R. 20.91. ~~50 C.F.R. 20.91 which is hereby incorporated by reference, including subsequent amendments and editions. 50 C.F.R. 20.91 is hereby incorporated by reference.~~ shall include any later amendments and editions of the incorporated material, and may be accessed free of cost at <http://www.gpo.gov/fdsys/pkg/CFR-2014-title50-vol9/pdf/CFR-2014-title50-vol9-sec20-91.pdf>.

(e) The Executive Director or his designee may issue Trophy Wildlife Sale permits as authorized in G.S. 113-274 for the sale of lawfully taken and possessed individual dead wildlife specimens or their parts that are mounted, stuffed, or otherwise permanently preserved that may be sold under G.S. 113-291.3. A copy of the permit ~~shall must~~ be retained with the specimen.

(f) Antlers, antler velvet, and hides from cervids held under a captivity license as authorized in 15A NCAC 10H .0301 may be sold.

History Note: Authority G.S. 113-134; 113-273; 113-274; 113-276.2; 113-291.3; 113-337; 50 C.F.R. 20.91;

Eff. November 9, 1980;

Amended Eff. May 1, 2014; August 1, 2002; April 1, 1991; February 1, 1990;

Temporary Amendment Eff. February 27, 2015.

SECTION .0200 – HUNTING

15A NCAC 10B .0219 COYOTE

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

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

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

(b) In the counties of Beaufort, Dare, Hyde, Tyrrell, and Washington, ~~Dare, Hyde, Washington, Tyrrell and Beaufort~~, the following apply: ~~coyote hunting is prohibited.~~

- (1) Coyote hunting on public lands is prohibited, except that coyotes may be taken on State-owned game lands by the holder of a permit for a specific special hunt opportunity for coyotes authorized by G.S. 113-264(d). Any special hunt for coyotes pursuant to G.S. 113-264(d) shall only allow hunting from the hours of one-half hour before sunrise until one-half hour after sunset. Contests or competition coyote hunts on public lands are prohibited. If, within a calendar year, two or more red wolves are shot by one or more hunters with a valid special hunt permit for coyotes on State game lands within the five counties identified in this Paragraph, all special hunts for coyotes on State game lands within those five counties shall be suspended for one calendar year.

- (2) There is no closed season for taking coyotes on private lands. Coyotes may be taken on private lands from hours of one-half hour before sunrise until one-half hour after sunset only.

- (3) Coyotes may be taken on private lands by permit only, and any take shall be reported within 24 hours to the Commission.

- (4) Coyote hunting permits are in addition to hunting licenses. Individuals exempted from license requirements under the provisions specified in G.S. 113-276 shall acquire the coyote hunting permits to hunt coyotes in the counties specified in this Paragraph. Coyote hunting permits are valid for one calendar year and are subject to annual renewal. These permits are non-transferable. Permit holders shall submit their harvest reports in order to be eligible for permit renewal.

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

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

History Note: Authority G.S. 113-134; 113-264; 113-291.1; 113-291.2;

Eff. July 1, 1993;

Temporary Amendment Eff. October 1, 2011;

Amended Eff. January 1, 2012;

Temporary Amendment Eff. August 1, 2012;

Amended Eff. July 26, 2013;

Temporary Amendment Eff. August 1, 2014 and shall remain in effect until amendments expire as specified in G.S. 150B-21.1(d) or the United States District Court for the Eastern District of

North Carolina's court order number 2:13-CV-60-BOs signed on May 13, 2014 is rescinded, whichever date is earlier. The court order is available at www.ncwildlife.org; Temporary Amendment Eff. February 27, 2015.

SUBCHAPTER 10H – REGULATED ACTIVITIES

SECTION .0300 – HOLDING WILDLIFE IN CAPTIVITY

15A NCAC 10H .0301 GENERAL REQUIREMENTS

(a) Captivity Permit or License Required

- (1) Requirement. The possession of any species of wild animal that is or once was native to this State or any species of wild bird, native or migratory, that naturally occurs or historically occurred in this State or any member of the family Cervidae is unlawful unless the institution or individual in possession obtains from the North Carolina Wildlife Resources Commission (Commission) a captivity permit or a captivity license as provided by this Rule.
- (2) Injured, ~~Crippled~~ or Orphaned Wildlife. When an individual has taken possession of an injured, crippled, or orphaned wild animal or wild bird, that individual shall contact the Commission within 24 hours of taking possession in order to apply for a captivity permit, provided, however, that under no circumstances shall an individual take possession of an injured, crippled, or orphaned wild turkey, black bear, deer, elk, or any other member of the family Cervidae except as described in Subparagraph (3) of this Paragraph.
- (3) Rehabilitation of white-tailed deer fawns. An individual may apply to the Commission to become a permitted white-tailed deer fawn rehabilitator for the State of North Carolina. Individuals deemed to be qualified according to this Section to rehabilitate injured or orphaned fawns may receive a captivity permit to possess fawns only for such a period of time as may be required for the rehabilitation and release of the fawns to the wild. These captivity permits apply only to wild white-tailed deer fawns and are available only to individuals recognized by the Commission as white-tailed deer fawn rehabilitators.

(b) Captivity Permit. A captivity permit shall be requested by mail, phone, facsimile, ~~or electronic transmission, transmission~~ or in person. A captivity permit authorizes possession of the animal or bird only for such period of time as may be required for the rehabilitation and release of the animal or bird to the wild; or to obtain a captivity license as provided by Paragraph (c) of this Rule, if such a license is authorized; or to make a proper disposition of the animal or bird if the application for such license is ~~denied; denied~~, or when an existing captivity license is not renewed or is terminated. Captivity permits shall not be issued for wild turkey or black bear.

(c) Captivity License.

- (1) The purpose of a captivity license is to provide humane treatment for wild animals or wild birds that are unfit for release, or for possession of cervids, or for scientific, educational, exhibition or other purposes. ~~eervids.~~ For purposes of this Rule, wild animals are considered "unfit" if they are incapacitated by injury or otherwise; if they are a non-native species that poses a risk to the habitat or to other species in that habitat; or if they have been rendered tame by proximity to humans to the extent that they cannot feed or care for themselves without human assistance. Persons interested in obtaining a captivity license shall complete an application for wildlife captivity provided on the Commission's web site or can be requested by calling (919) 707-0050. ~~contact the Commission for an application.~~
- (2) Denial of captivity license. Circumstances or purposes for which a captivity license shall not be issued include the following:
 - (A) ~~for~~ For the purpose of holding a wild animal or wild bird that was acquired ~~unlawfully; unlawfully;~~
 - (B) ~~for~~ For the purpose of holding the wild animal or wild bird as a pet. For purposes of this Rule, the term "pet" means an animal kept for amusement or companionship. The term shall not be construed to include cervids held in captivity for breeding for sale to another licensed ~~operator; operator.~~
 - (C) ~~for~~ For the purpose of holding wild animals or wild birds for hunting in North ~~Carolina; Carolina.~~
 - (D) ~~for~~ For the purpose of holding wild turkey or black ~~bear; or bear.~~
 - (E) ~~for~~ For the purpose of holding white-tailed deer (*Odocoileus virginianus*) or elk (*Cervus elaphus* or *Cervus canadensis*), ~~canadensis~~—except licenses issued before December 1, 2014 that may be renewed as specified in Subparagraph (6) of this Paragraph.
- (3) Required Facilities. No captivity license shall be issued until the applicant has constructed or acquired a facility for keeping the animal or bird in captivity that complies with the standards set forth in Rule .0302 of this Section and the adequacy of such facility has been verified on inspection by a representative of the Commission.
- (4) Term of License
 - (A) Dependent Wildlife. If the wild animal or wild bird has been permanently rendered incapable of subsisting in the wild, the license authorizing its retention in captivity shall be an

- annual license terminating on December 31 of the year for which issued.
- (B) **Rehabilitable Wildlife.** When the wild animal or wild bird is temporarily incapacitated, and may be rehabilitated for release to the wild, any captivity license that is issued shall be for a period less than one year as rehabilitation may require.
- (C) **Concurrent Federal Permit.** No State captivity license for an endangered or threatened species or a migratory bird, regardless of the term specified, shall operate to authorize retention thereof for a longer period than is allowed by any concurrent federal permit that may be required for retention of the bird or animal.
- (5) **Holders of Captivity License for cervids.**
- (A) **Records.** Each licensee shall maintain herd records as described in 9 C.F.R. 55.23(b)(4). 9 C.F.R. 55.23(b)(4) is hereby incorporated by reference, shall include any later amendments and editions of the incorporated material, and may be accessed free of cost at http://www.ecfr.gov/cgi-bin/text-idx?SID=940029f5dad7b72c54cd3985f1da490a&node=se9.1.55_123&rgn=div8.
- (A)(B) **Inspection of records.** The licensee shall make all records pertaining to tags, licenses, or permits issued by the Commission available for inspection by the Commission at any time during normal business hours, or at any time an outbreak of Chronic Wasting Disease (CWD) is suspected or confirmed within five miles of the facility or within the facility itself. For purposes of this Rule, normal business hours are Monday through Friday 8 a.m. to 5 p.m., excluding state holidays.
- (B)(C) **Inspection.** The licensee shall make all enclosures at each licensed facility and the herd records record book(s) documenting required monitoring of the outer fence of the enclosure(s) available for inspection by the Commission at any time during normal business hours, or at any time an outbreak of CWD is suspected or confirmed within five miles of the facility or within the facility itself.
- (C)(D) **Fence Monitoring Requirement.** The fence surrounding the enclosure shall be ~~[structurally sound]~~ built and maintained in a condition that would prevent ingress and egress of cervids. good repair. Any damage to the fence that creates an opportunity for cervid ingress or egress shall be repaired upon discovery. ~~inspected by the licensee or licensee's agent once a week during normal weather conditions to verify its stability and to detect the existence of any conditions or activities that threaten its stability. In the event of severe weather or any other condition that presents potential for damage to the fence, inspection shall occur every three hours until cessation of the threatening condition, except that no inspection is required under circumstances that threaten the safety of the person conducting the inspection.~~
- (D) ~~A record book shall be maintained to record the time and date of the inspection, the name of the person who performed the inspection, and the condition of the fence at time of inspection. The person who performs the inspection shall enter the date and time of detection and the location of any damage threatening the stability of the fence. If damage has caused the fence to be breachable, the licensee shall enter a description of measures taken to prevent ingress or egress by cervids. Each record book entry shall bear the signature or initials of the licensee attesting to the veracity of the entry. The record book shall be made available to inspection by a representative of the Commission upon request during normal business operating hours.~~
- (E) ~~Maintenance. Any opening or passage through the enclosure fence that results from damage shall, within one hour of detection, be sealed or otherwise secured to prevent a cervid from escape. Any damage to the enclosure fence that threatens its stability shall be repaired within one week of detection.~~
- (F)(E) **Escape.** When a licensee discovers the escape of any cervid from the facility, the licensee or designee shall report within 24 hours the escape ~~to the by calling 1-800-662-7137.~~ Commission. If possible, the escaped cervid shall be recaptured alive. If live recapture is not possible, the licensee shall request

a wildlife take permit under G.S. 113-274 by contacting the Wildlife Management Division of the Commission at (919) 707-0050 and take the escaped cervid pursuant to the terms of the permit. A recaptured live cervid shall be submitted to the Commission for Chronic Wasting Disease (CWD) testing using a test recognized by the Southeastern Cooperative Wildlife Disease Study, ~~Study~~ unless the executive director determines that the risk of CWD transmission as a result of this escape is negligible based ~~upon~~ upon the following:

- (i) amount of time the escaped cervid remained out of the facility;
- (ii) proximity of the escaped cervid to wild populations;
- (iii) known susceptibility of the escaped cervid species to CWD; and
- (iv) nature of the terrain in to which the cervid escaped.

~~(G)~~(F) Chronic Wasting Disease (CWD)

- (i) ~~Detection.~~—Each licensee shall notify the Commission immediately, but within 24 hours, hours if any cervid within the facility exhibits clinical symptoms of CWD, and may include symptoms as provided in 9 C.F.R. 81.1. ~~9 C.F.R. 81.1, or if a quarantine is placed on the facility by the State Veterinarian. All captive cervids that exhibit symptoms of CWD shall be tested for CWD.~~ 9 C.F.R. 81.1 is hereby incorporated by reference, shall include any later amendments and editions of the incorporated material, and may be accessed free of cost at <http://www.gpo.gov/fdsys/pkg/CFR-2012-title9-vol1/pdf/CFR-2012-title9-vol1-sec81-1.pdf>. Cervids that exhibit clinical symptoms of CWD shall not be transported. Regardless of age, cervids that exhibit clinical symptoms of CWD shall be made available for testing upon death.

- (ii) ~~Cervid—death.~~ Licensees shall inform the Commission at (919) 707-0050 during normal business hours and 1-800-662-7137 outside business hours of the death of any cervids 12 months of age or older within 12 hours of the death. The carcass of any captive cervid that was 12 ~~six months of age~~ or older at time of death shall be made available ~~for testing, transported~~ and submitted by the licensee or his designee to a North Carolina Department of Agriculture diagnostic lab for CWD evaluation within 48 hours of the cervid's death, or by the end of the next business day, whichever is later. Ear tags distributed by the Commission and subsequently affixed to the cervids as required by this Rule ~~Rule~~, may not be removed from the cervid's head prior to submitting the head for CWD evaluation.

- (iii) ~~The Commission shall require testing or forfeiture of cervids from a facility holding cervids in this State should the following circumstances or conditions occur:~~

- (I) ~~The facility has transferred a cervid that is received by a facility in which CWD is confirmed within five years of the cervid's transport date and that transferred cervid has tested positive for CWD or the test for CWD was inconclusive or the transferred cervid was no longer available for testing.~~

- (II) ~~The facility has received a cervid that originated from a facility in which CWD has been~~

~~confirmed within five years of the cervid's transport date and that received cervid has tested positive for CWD or the test for CWD was inconclusive or the received cervid was no longer available for testing.~~

(G) Herd Status. The Commission and the N.C. Department of Agriculture and Consumer Sciences shall designate herds as CWD-suspect, CWD-exposed, or CWD-positive as defined in 9 C.F.R. 55.1 when exposure to the disease is suspected. 9 C.F.R. 55.1 is hereby incorporated by reference, shall include any later amendments and editions of the incorporated material, and may be accessed free of cost at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=940029f5dad7b72c54cd3985f1da490a&n=pt9.1.55&r=PART&ty=HTML#se9.1.55> 11 No cervids shall move out from or into herds designated as CWD-suspect, CWD-exposed, or CWD-positive pending an epidemiological investigation. If the investigation determines a herd to be CWD-exposed or CWD-positive, movement shall resume only upon completion of a herd plan. The Commission shall follow herd planning guidelines set forth in the May 2014 edition or subsequent updates of the U.S. Department of Agriculture's Chronic Wasting Disease Program Standards Part B. Movement of cervids out from or into herds designated as CWD-suspect shall only resume after all suspected animals have been tested and no signs of CWD were detected in the submitted samples.

(H) Tagging Required. All cervids within a herd shall be tagged with two separate tags as provided by the Commission. Cervids born within a facility shall be tagged before 12 months of age. All cervids regardless of age shall be tagged before being transported. Effective upon receipt of tags from the Commission, each licensee shall implement the tagging requirement using only the tags

~~provided by the Commission as follows:~~

- ~~(i) All cervids born within a facility shall be tagged by March 1 following the birthing season each year.~~
- ~~(ii) All cervids transferred to a facility shall be tagged within five days of the cervid's arrival at the licensee's facility. However, no cervids shall be transported from one facility to another unless both sending and receiving herds are certified according to 15A NCAC 10H .0304, or the sending herd is a Certified herd and the receiving herd is a licensed facility. However, no cervids shall be transported from one facility to another unless both sending and receiving herds are certified according to 15A NCAC 10H .0304.~~

(I) Application for Tags.

- (i) Application for tags for calves and fawns. Application for tags for cervids born within a facility shall be made by the licensee by December 1 following the birthing season of each year. The licensee shall provide the following information, along with a statement and licensee's signature verifying that the information is accurate:
 - (I) applicant name, mailing address, and telephone number;
 - (II) facility name and site address;
 - (III) captivity license number;
 - (IV) species of each cervid; and
 - (V) birth year of each cervid.
- (ii) Application for tags for cervids that were not born at the facility site shall be made by written request to the Commission for the appropriate number of tags along with the licensee's application for transportation

of the cervid, along with a statement and licensee's signature verifying that the information is accurate. These tag applications shall not be processed unless accompanied by a completed application for transportation. However, no transportation permits shall be issued nor shall cervids be transported from one facility to another unless both sending and receiving herds are certified according to 15A NCAC 10H .0304, or the sending herd is a Certified Herd and the receiving herd is a licensed facility.

(J) Placement of Tags.

- (i) A single button ear tag provided by the Commission shall be permanently affixed by the licensee onto either the right or left ear of each cervid, provided that the ear chosen to bear the button tag shall not also bear a bangle tag, so that each ear of the cervid bears only one tag.
- (ii) A single bangle ear tag provided by the Commission shall be permanently affixed by the licensee onto the right or left ear of each cervid except Muntjac deer, provided that the ear bearing the bangle tag does not also bear the button tag, so that each ear of the cervid bears only one tag. Muntjac deer shall not be tagged with the bangle tag.
- (iii) Once a tag is affixed in the manner required by this Rule, it shall not be removed.

~~(K) Reporting Tags Requirement. For all cervids, except calves and fawns, the licensee shall submit a Cervidae Tagging Report within 30 days of receipt of the tags. Cervidae Tagging Reports for calves and fawns shall be submitted by March 1 following the birthing season each year. A Cervidae Tagging Report shall provide the following information and be accompanied by a statement and~~

~~licensee's signature verifying that the information is accurate:~~

- ~~(i) licensee name, mailing address, and telephone number;~~
- ~~(ii) facility name and site address, including the County in which the site is located;~~
- ~~(iii) captivity license number;~~
- ~~(iv) species and sex of each cervid;~~
- ~~(v) tag number(s) for each cervid; and~~
- ~~(vi) birth year of each cervid.~~

~~(L)(K)~~ Replacement of Tags. The Commission shall replace tags that are lost or unusable and shall extend the time within which a licensee shall tag cervids consistent with time required to issue a replacement.

- (i) Lost Tags. The loss of a tag shall be reported to the Commission by the licensee, and an licensee and application shall be made for a replacement upon discovery of the loss. Application for a replacement tag shall include the information required by Part (c)(5)(F) Part (e)(5)(4) of this Rule along with a statement and applicant's signature verifying that the information is accurate. The replacement tag shall be placed ~~Lost tags shall be replaced~~ on the animal by the licensee within 30 days of receipt of the replacement tag.
- (ii) Unusable Tags. Tags that cannot be properly affixed to the ear of a cervid or that cannot be read because of malformation or damage to the tags or obscurement of the tag numbers shall be returned to the Commission along with an application for a replacement tag with a statement and applicant's signature verifying that the information in the application is accurate.

(6) Renewal of captivity license for cervids. Existing captivity licenses for the possession of cervids at existing facilities shall be renewed as

long as the applicant for renewal continues to meet the requirements of this Section for the license. Only licensees with Certified Herds, as defined in 15A NCAC 10H .0304, may request in their renewal applications to expand pen size or the number of pens on the licensed facility to increase the holding capacity of that facility. A licensee whose license has lapsed shall not be eligible to renew his or her license, but may apply for a new ~~license~~ license as described in Paragraph (c) of this Rule.

- (7) Provision for licensing the possession of cervids in an existing facility. A captivity license shall only be issued to an individual who is 18 years of age or older. If the licensee of an existing facility voluntarily surrenders his or her captivity license, becomes incapacitated or mentally incompetent, or dies, a person who has obtained lawful possession of the facility from the previous licensee or that licensee's estate, may request that the existing captivity license be transferred to him or her to operate the existing facility. Any license transferred under this provision shall be subject to the same terms and conditions imposed on the original licensee at the time of his or her surrender or death and shall be valid only for the purpose of holding the cervids of the existing facility within that existing facility. In addition, any actions pending from complaint, investigation, or other cause shall be continued notwithstanding the termination of the original license.

(d) Nontransferable. No ~~license, permit, license or permit~~ or tag issued pursuant to this Rule is transferable, either as to the holder or the site of a holding facility, except as provided in Subparagraph (c)(7) of this Rule.

(e) Sale, ~~Transfer, Transfer~~ or Release of Captive Wildlife.

- (1) It is unlawful for any person to transfer or receive any wild animal or wild bird that is being held under a captivity permit issued under Paragraph (b) of this Rule, except that any such animal or bird may be surrendered to an agent of the Commission. This Subparagraph does not apply to persons holding cervids under a captivity permit.
- (2) It is unlawful for any person holding a captivity license issued under Paragraph (c) of this Rule to sell or transfer the animal or bird held under such license, except that such animal or bird may be surrendered to an agent of the Commission, and any such licensee may sell or transfer the animal or bird (except members of the family Cervidae) to another person who has obtained a license to hold it in captivity. For animals in the family Cervidae, sale or transfer of animals is allowed only between Certified Herds, as defined in 15A NCAC 10H .0304, or from a Certified Herd to a licensed facility, except facilities licensed or permitted on or

after December 1, 2014 shall not take possession of white-tailed deer (*Odocoileus virginianus*) or elk (*Cervus elaphus* or *Cervus canadensis*). Upon such a sale or transfer, the seller or transferor shall obtain a receipt for the animal or bird showing the name, address, and license number of the buyer or transferee, a copy of which shall be provided to the Commission.

- (3) It is unlawful for any person to release into the wild for any purpose or allow to range free:
- (A) any species of deer, ~~elk, elk~~ or other ~~species members~~ of the family Cervidae; Cervidae, or
- (B) any wolf, coyote, or other non-indigenous member of the family ~~Canidae; Canidae, or~~
- (C) any member of the family Suidae.

(f) Transportation Permit.

- (1) Except as otherwise provided herein, no transportation permit is required to move any lawfully held wild animal or wild bird within the State.
- (2) No person shall transport black bear or Cervidae for any purpose without first obtaining a transportation permit from the Commission.
- (3) Except as provided in Subparagraph (f)(4) of this Rule, no transportation permits shall be issued for deer, elk, or other species in the family Cervidae except:
- (A) into and between Certified Herds as defined in 15A NCAC 10H .0304; or
- (B) from a Certified Herd to a licensed facility, except no transportation permits shall be issued for white-tailed deer (*Odocoileus virginianus*) or elk (*Cervus elaphus* or *Cervus canadensis*) if the receiving facility was licensed or permitted on or after December 1, 2014.

- (4) Cervid Transportation. A permit to transport deer, elk, or other species in the family Cervidae may be issued by the Commission to an applicant for the purpose of transporting the animal or animals for export out of state, to a slaughterhouse for slaughter, from a Certified Herd to another Certified Herd as defined in 15A NCAC 10H .0304, from a Certified Herd to a licensed facility, or to a veterinary medical facility for treatment provided that the animal for which the permit is issued is not under movement restrictions as described in Part (c)(5)(H) of this Rule, is issued does not exhibit clinical symptoms of Chronic Wasting Disease, except no transportation permits shall be issued for white-tailed deer (*Odocoileus virginianus*) or elk (*Cervus elaphus* or *Cervus canadensis*) if the receiving facility was licensed or permitted

on or after December 1, 2014. No person shall transport a cervid to slaughter or export out of state without bearing a copy of the transportation permit issued by the Commission authorizing that transportation. No person shall transport a cervid for veterinary treatment without having obtained approval from the Commission as provided by Part (f)(4)(D) of this Rule. Any person transporting a cervid shall present the transportation permit to any law enforcement officer or any representative of the Commission upon request, except that a person transporting a cervid by verbal authorization for veterinary treatment shall provide the name of the person who issued the approval to any law enforcement officer or any representative of the Commission upon request. Transportation permits shall be valid for 30 calendar days.

- (A) Slaughter. Application for a transportation permit for purpose of slaughter shall be submitted in writing to the Commission and shall include the following information along with a statement and applicant's signature verifying that the information is accurate:
- (i) applicant name, mailing address, and telephone number;
 - (ii) facility site address;
 - (iii) captivity license number;
 - (iv) name, address, county, ~~county~~ and phone number of the slaughter house to which the cervid will be transported;
 - (v) vehicle or trailer license plate number and state of issuance of the vehicle or trailer used to transport the cervid;
 - (vi) name and location of the North Carolina Department of Agriculture Diagnostic lab where the head of the cervid is to be submitted for CWD testing;
 - (vii) date of transportation;
 - (viii) species and sex of each cervid; and
 - (ix) tag number(s) for each cervid.
- (B) Exportation. Only licensees with Certified herds may export cervids as defined in 9 C.F.R. 55.1 out of state. 9 C.F.R. 55.1 is hereby incorporated by reference, shall include any later amendments and editions of the incorporated material, and may be

accessed free of cost at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=940029f5dad7b72c54cd3985f1da490a&n=pt9.1.55&r=PART&ty=HTML#se9.1.55.11>. ~~Nothing in this rule shall be construed to prohibit the lawful exportation of a member of the family Cervidae for sale out of state.~~ Application for a transportation permit for purpose of exportation out of state shall be submitted in writing to the Commission and shall include the following information along with a statement and applicant's signature verifying that the information is accurate:

- (i) applicant's name, mailing address, ~~address~~ and telephone number;
- (ii) facility site address;
- (iii) captivity license number;
- (iv) vehicle or trailer license plate number and state of issuance of the vehicle or trailer used to transport the cervid;
- (v) name, site address, county, state, ~~state~~ and phone number of the destination facility to which the cervid is exported;
- (vi) a copy of the importation permit from the state of the destination facility that names the destination facility to which the animal is to be exported;
- (vii) date of departure;
- (viii) species and sex of each cervid; and
- (ix) tag number(s) for each cervid.

In addition to the state transportation permit, each cervid as defined in 9 C.F.R. 55.1 exported shall have a federal certificate as described in 9 C.F.R. 81.4 which is hereby incorporated by reference, shall include any later amendments and editions of the incorporated material, and may be accessed free of cost at: <http://www.ecfr.gov/cgi-bin/text-idx?SID=72869bb3d0188a5a5f1e783845a988e5&node=se9.1.81.14&rgn=div8>.

- (C) Between herds. Application for a transportation permit for purpose of moving a cervid from one Certified Herd to another Certified Herd, as defined in 15A NCAC 10H .0304, or

from a Certified Herd to a licensed facility, shall be submitted in writing to the Commission and shall include the following information along with a statement and applicant's signature verifying that the information is accurate:

- (i) applicant's name, mailing address, ~~address~~ and telephone number;
- (ii) facility site address;
- (iii) captivity license number;
- (iv) vehicle or trailer license plate number and state of issuance of the vehicle or trailer used to transport the cervid;
- (v) name, site address, county, and phone number of the destination facility to which the cervid is moved;
- (vi) date of departure;
- (vii) species and sex of each cervid; and
- (viii) tag number(s) for each cervid.

(D) Veterinary treatment. No approval shall be issued for transportation of a cervid to a veterinary clinic out of the state of North Carolina, or for transportation from a facility out of the state of North Carolina to a veterinary clinic in North Carolina. An applicant from a North Carolina facility seeking to transport a cervid for veterinary treatment to a facility within North Carolina shall contact the Wildlife Telecommunications Center at (800) 662-7137 or the Wildlife Management Division of the Commission at (919) 707-0050 to obtain verbal authorization to transport the cervid to a specified veterinary clinic and to return the cervid to the facility. Verbal approval to transport a cervid to a veterinary clinic shall authorize transport only to the specified veterinary clinic and directly back to the facility, and shall not be construed to permit intervening destinations. To obtain verbal authorization to transport, the applicant shall provide staff of the Commission the applicant's name and phone number, applicant's facility name, site address and phone number, the cervid species, sex and tag numbers, and the name, address and phone number of the veterinary facility to which the cervid shall be transported. Within five calendar days

of transporting the cervid to the veterinary facility for treatment, the licensee shall provide the following information in writing to the Commission, along with a statement and applicant's signature verifying that the information is correct:

- (i) applicant's name, mailing address, ~~address~~ and telephone number;
- (ii) facility name and site address;
- (iii) captivity license number;
- (iv) vehicle or trailer license plate number and state of issuance of the vehicle or trailer used to transport the cervid;
- (v) date of transportation;
- (vi) species and sex of each cervid;
- (vii) tag number(s) for each cervid;
- (viii) name, address, ~~address~~ and phone number of the veterinarian and clinic that treated the cervid;
- (ix) symptoms for which cervid received treatment; and
- (x) diagnosis of the veterinarian who treated the cervid.

(g) Slaughter at cervid facility. Application for a permit for purpose of slaughter at the cervid facility shall be submitted in writing to the Commission and shall include the following information along with a statement and applicant's signature verifying that the information is accurate:

- (1) applicant name, mailing address, and telephone number;
- (2) facility site address;
- (3) captivity license number;
- (4) name ~~name~~, and location of the North Carolina Department of Agriculture Diagnostic lab where the head of the cervid is to be submitted for CWD testing;
- (5) date of slaughter;
- (6) species and sex of each cervid; and
- (7) tag number(s) for each cervid.

Permits or authorization may not be sold or traded by the licensee to any individual for the hunting or collection of captive cervids. Only the licensee may kill a cervid within the cervid enclosure.

(h) As used in this Rule, "Certified Herd" means a captive cervid herd certified in North Carolina according to the procedure set forth in 15A NCAC 10H .0304 available to North Carolina licensees only.

History Note: Authority G.S. 106-549.97(b); 113-134; 113-272.5; 113-272.6; 113-274;

Eff. February 1, 1976;

Amended Eff. April 1, 1991; September 1, 1990; June 1, 1990; July 1, 1988;

Temporary Amendment Eff. October 8, 2002; May 17, 2002 (this temporary rule replaced the permanent rule approved by RRC on June 21, 2001 to become effective in July 2002); July 1, 2001; Amended Eff. May 1, 2010; May 1, 2008; December 1, 2005; August 1, 2004; Temporary Amendment Eff. December 2, 2014; Temporary Amendment Eff. February 27, 2015.

15A NCAC 10H .0302 MINIMUM STANDARDS

(a) Exemptions. Publicly financed zoos, scientific and biological research facilities, and institutions of higher education that were granted an exemption by the Commission from the standards of this Rule prior to December 1, 2005 are exempt from the standards set forth in this Rule for all birds and animals except the black bear so long as the captivity license in effect on that date has not expired or been revoked.

(b) With the exception of those entities named in Paragraph (a) of this Rule who have received exemption from the Commission, all holders of captivity licenses shall comply with the following requirements:

- (1) Deer, ~~Elk, Elk~~ and other species of the family Cervidae

- (A) Enclosure. The enclosure shall be on a well-drained site containing natural or manmade shelter for shade. The minimum size of the enclosure for all cervids except Muntjac deer shall be not less than one-half acre for the first three animals and an additional one-fourth acre for each additional animal ~~held, held~~ provided that no more than 25 percent shall be covered with water. At no time shall the number of cervids in the enclosure exceed the number allowed by the captivity license, except that fawns and calves shall not count towards the total number of cervids in a facility from the time they are born until March 1 of the following year. The enclosure shall be surrounded by a fence of sufficient strength and design to prevent ingress or egress of cervids ~~contain the animal~~ under any circumstances, and at least eight feet high, high, and dog proof to a height of at least six feet. For enclosures exclusively holding Muntjac deer, the minimum pen size shall be 800 square feet for the first three animals and 200 square feet for each additional animal. No exposed barbed wire, nails, or other protrusions that may cause injury to the animal shall be permitted within the enclosure. Captive cervids shall not be contained within or allowed to enter a place of residence.

- (B) Sanitation and Care. Licensees shall provide an ample supply of clear water

and salt at all times. Food shall be placed in the enclosure as needed, but not less than three times weekly. An effective program for the control of insects, ectoparasites, disease, and odor shall be established and maintained. The animal(s) shall be protected against fright or harm from other animals.

- (2) Wild Boars

- (A) Enclosure. The enclosure shall be on a site containing trees or brush for shade. The minimum size of the enclosure shall be not less than one-half acre for the first three animals and an additional one-fourth acre for each additional animal held. The enclosure shall be surrounded by a fence at least five feet high and of sufficient strength to contain the animals. No exposed barbed wire or protruding nails shall be permitted within the enclosure. A roofed building large enough to provide shelter ~~for~~ both a standing or a lying position for each boar ~~shall must~~ be provided. This building shall be closed on three sides. A pool of water for wallowing or a sprinkler system shall be provided on days when heat could cause physiological stress to the animal(s).

- (B) Sanitation and Care. Licensees shall provide an ample supply of clear water at all times. Food shall be placed in the enclosure as needed, but in any case, not less than three times weekly. An effective program for the control of insects, ectoparasites, disease, and odor shall be established and maintained.

- (3) Wild Birds

- (A) Enclosure. The enclosure shall be large enough for the bird or birds to assume all natural postures. The enclosure shall be designed in such a way that the birds cannot injure themselves and are able to maintain a natural plumage. Protection from sun, weather, and predators shall also be provided.

- (B) Sanitation and Care. The cage shall be kept clean, dry, and free from molded or damp feed. Ample food and clean water shall be available at all times.

- (4) Alligators

- (A) Enclosure. The enclosure shall be surrounded by a fence of sufficient strength to contain the animals and that shall prevent contact between the

observer and alligator. The enclosure shall contain a pool of water large enough for the animal to completely submerge itself. If more than one animal is kept, the pool must be large enough for all animals to be able to submerge themselves at the same time. A land area with both horizontal dimensions at least as long as the animal shall also be provided. In case of more than one animal, the land area shall have both horizontal dimensions at least as long as the longest animals to occupy the land area at the same time without overlap.

- (B) Sanitation and Care. The water area shall be kept clean and food adequate to maintain good health provided. Protection shall be provided at all times from extremes in temperature. ~~temperature that could cause stress to the animal.~~

(5) Black Bear

- (A) Educational Institutions and Zoos Operated or Established by Governmental Agencies

- (i) Enclosure. A permanent, stationary metal cage shall be cage, at least eight feet wide by 12 feet long by six feet high and located in the shade or where shaded during the afternoon hours of summer. ~~summer, is required.~~ The cage shall have a concrete floor in which a drainable pool one and one-half feet deep and not less than four by five feet has been constructed. The bars of the cage shall be of iron or steel at least one-fourth inch in diameter, or heavy gauge steel chain link fencing may be used. The gate shall be equipped with a lock or safety catch, and guard rails shall be placed outside the cage so as to prevent contact between the observer and the caged animal. The cage shall must contain a den at least five feet long by five feet wide by four feet high and so constructed as to be easily cleaned. A scratching surface ~~"scratch log"~~ shall be placed inside the cage. The cage shall be equipped with a

removable food trough. Running water shall be provided for flushing the floor and changing the pool.

- (ii) Sanitation and Care. Food adequate to maintain good health shall be provided daily; and clean, clear drinking water shall be available at all times. The floor of the cage and the food trough shall be flushed with water and the water in the pool changed daily. The den shall be flushed and cleaned at least once each week in hot weather. An effective program for the control of insects, ectoparasites, disease, and odor shall be established and maintained. Brush, canvas, or other material shall be placed over the cage to provide additional shade when necessary for the health of the animal. The use of collars, ~~tethers, tethers~~ or stakes to restrain the bear is prohibited, except as a temporary safety device.

- (B) Conditions Simulating Natural Habitat. Black bears held in captivity by other than educational institutions or governmental zoos shall be held without caging under conditions simulating a natural habitat. All of the following conditions shall must exist to simulate a natural habitat in a holding facility:

- (i) The method of confinement is by chain link fence, wall, moat, or a combination of such, without the use of chains or tethers.
- (ii) The area of confinement is at least one acre in extent for one or two bears and an additional one-eighth acre for each additional bear.
- (iii) Bears are free, under normal conditions, to move throughout such area.
- (iv) At least one-half of the area of confinement is wooded with living trees, shrubs and other perennial vegetation capable of providing shelter from sun and wind.

- (v) The area of confinement contains a pool not less than one and one-half feet deep and not less than four by five feet in size.
 - (vi) ~~The area of confinement contains~~ Provision is made for a den for each bear to which the bear may retire for rest, shelter from the elements, or respite from public observation.
 - (vii) The area of confinement presents an overall appearance of a natural habitat and affords the bears protection from harassment or annoyance.
 - (viii) Provisions are made for food and water that are adequate to maintain good health and for maintenance of sanitation.
 - (ix) The applicant shall document that the applicant owns or has a lease of the real property upon which the holding facility is located, provided that if the applicant is a lessee, the lease shall be for a duration of at least five years from the point of stocking the facility.
- (6) **Cougar**
- (A) Educational or scientific research institutions and zoos supported by public funds.
 - (i) Enclosure. A permanent, stationary metal cage, at least nine feet wide by 18 feet long by nine feet high and located in the shade or where shaded during the afternoon hours of summer, is required. The cage shall have a concrete floor. The bars of the cage shall be of iron or steel at least one-fourth inch in diameter, or heavy gauge steel chain link fencing may be used. The gate shall be equipped with a lock or safety catch, and guard rails shall be placed outside the cage so as to prevent contact between the observer and the caged animal. The cage shall contain a den at least five feet long by five feet wide by four feet high and so constructed as to be easily cleaned. A scratching surface ~~"scratch log"~~ shall be placed inside the cage. The cage shall be equipped with a removable food trough. Running water shall be provided for flushing the floor and changing the pool.
 - (B) Sanitation and Care. Food adequate to maintain good health shall be provided daily; and clean, clear drinking water shall be available at all times. The floor of the cage and the food trough shall be flushed with water and the water in the pool changed as necessary to maintain good health of the animal. The den shall be flushed and cleaned at least once each week. An effective program for the control of insects, ectoparasites, disease, and odor shall be established and maintained. Brush, canvas, or other material shall be readily available to be placed over the cage to provide additional shade when necessary. The use of collars, ~~tethers, tethers~~ or stakes to restrain the cougar is prohibited, except as a temporary safety device.
- (B) Cougars held in captivity by other than educational or scientific institutions or publicly supported zoos shall be held without caging under conditions simulating a natural habitat. Applicants for a captivity license to hold cougar shall apply to the Commission on forms provided by the Commission, and shall provide plans that describe how the applicant's facility will comply with the requirement to simulate a natural habitat. All of the following conditions ~~shall~~ must exist to simulate a natural habitat in a holding facility.
- (i) The method of confinement is by chain link fence, without the use of chains or tethers, provided that:
 - (I) Nine gauge chain link fencing shall be at least 12 feet in height with a four

- foot fence overhang at a 45 degree angle on the inside of the pen to prevent escape from climbing and jumping.
- (II) Fence posts and at least six inches of the fence skirt shall be imbedded in a six inch wide by one foot deep concrete footer to prevent escape by digging.
- (ii) The area of confinement shall be at least one acre for two cougars with an additional one-eighth acre for each additional cougar. If, following a site evaluation, the Commission determines that terrain and topographical features offer sufficient escape, ~~cover, cover~~ and refuge, and meet all other specifications, and that the safety and health of the animal(s) will not be compromised, smaller areas shall be permitted.
- (iii) Cougars shall be free under normal conditions to move throughout the area of confinement.
- (iv) At least one-half of the area of confinement shall be wooded with living trees, ~~shrubs, shrubs~~ and other perennial vegetation capable of providing shelter from sun and wind; and a 20 foot wide strip along the inside of the fence shall be maintained free of trees, ~~shrubs, shrubs~~ and any other obstructions ~~that which~~ could provide a base from which escape through leaping could occur.
- (v) The area of confinement shall contain a pool not less than one and one-half feet deep and not less than four by five feet in size.
- (vi) Each cougar shall be provided a den to which the cougar may retire for rest, shelter from the elements, or respite from public observation. Each den shall be four feet wide by four feet high by four feet deep. Each den shall be enclosed entirely within at least an eight feet wide by ten feet deep by 12 feet high security cage. The security cage shall be completely within the confines of the facility, cement-floored, shall have nine gauge fencing on all sides and at the top, and shall have a four foot, 45 degree fence overhang around the outside top edge to prevent cougar access to the top of the security cage.
- (vii) The area of confinement shall protect the cougar from harassment or annoyance.
- (C) Provisions shall be made for maintenance of sanitation and for food and water adequate to maintain good health of the animal(s).
- (D) The applicant shall document that the applicant owns or has a lease of the real property upon which the holding facility is located, provided that if the applicant is a lessee, the lease shall be ~~is for~~ a duration of at least five years from the point of stocking the facility.
- (7) Other Wild Animal Enclosures.
- (A) General Enclosure Requirements.
- (i) The enclosure shall provide protection from free ranging animals and from sun or ~~weather, weather that could cause stress to the animals.~~
- (ii) A den area in which the animal can escape from view and large enough for the animal to turn around and lie down shall be provided for each animal within the enclosure.
- (iii) No tethers or chains shall be used to restrain the animal.
- (iv) Either a tree limb, exercise device, or shelf large enough to accommodate the animal shall be provided to allow for exercise and climbing.
- (v) Sanitation and Care. Fresh food shall be provided daily, and clean water shall be available at all times.
- (vi) A ~~An effective~~ program for the control of insects,

ectoparasites, disease, and odor shall be established and maintained.

- (B) Single Animal Enclosures for certain animals. The single-animal enclosure for the animals listed in this Subparagraph shall be a cage with the following minimum dimensions and horizontal areas:

Dimensions in Feet				
Animal	Length	Width	Height	Per Animal
Bobcat, Otter	10	5	5	50
Raccoon, Fox, Woodchuck	8	4	4	32
Opossum, Skunk, Rabbit	6	3	3	18
Squirrel	4	2	2	8

- (C) Single Enclosure Requirements for animals not mentioned elsewhere in this Rule. For animals not listed above or mentioned elsewhere in this Rule, single animal enclosures shall be a cage with one horizontal dimension being at least four times the nose to rump ~~nose-rump~~ length of the animal and the other horizontal dimension being at least twice the nose to rump ~~nose-rump~~ length of the animal. The vertical dimensions shall be at least twice the nose to rump ~~nose-rump~~ length of the animal. Under no circumstances shall a cage be less than four feet by two feet by two feet.
- (D) Multiple Animal Enclosures. The minimum area of horizontal space shall be determined by multiplying the required square footage for a single animal by a factor of 1.5 for one additional animal and the result by the same factor, successively, for each additional animal. The vertical dimension for multiple animal enclosures shall remain the same as for single animal enclosures.
- (E) Young animals. The young of any animal may be kept with the parent in a single-animal enclosure only until weaning. After weaning, if the animals are kept together, the requirements for multiple-animal enclosures apply.

15A NCAC 10H .0304 CAPTIVE CERVID HERD CERTIFICATION PROGRAM

~~(a) The Wildlife Resources Commission has established this Captive Cervid Herd Certification Program in order to prevent the introduction of Chronic Wasting Disease (CWD) into North Carolina and reduce the potential for spread of CWD while allowing transportation of cervids from herds in which CWD has not been detected for at least five years, in accordance with the requirements in this Section. Only licensees with Certified Herds as defined in Paragraph (e) of this Rule may request to expand their pen size to accommodate additional cervids, cervids and export cervids outside of North Carolina, and transport cervids within North Carolina for purposes other than those specified in 15A NCAC 10H .0301(f)(4). Licensees with Certified Herds may also import cervids from a herd in which CWD has not been detected for at least five years and has been managed using standards equivalent to, or more stringent than, the criteria specified in 15A NCAC 10H .0301 and 15A NCAC 10H .0302. The individual U.S. or Mexican state or territory, Canadian province or other country of origin must have CWD monitoring requirements that are at least as stringent as those described in this Section. The originating individual U.S. or Mexican state's or territory's, Canadian province's or other country's CWD monitoring program must be jointly reviewed by Wildlife Resources Commission and Department of Agriculture and Consumer Services personnel before approval of any importation of cervids into North Carolina. There shall be no importation from individual U.S. or Mexican states or territories, Canadian provinces or other countries in which CWD has been detected, either in a wild or captive herd.~~

~~(b) Enrollment qualifications. Only captive cervid herds held under a valid captivity license are eligible for enrollment in the Captive Cervid Herd Certification Program. Licensees shall comply with all captivity license requirements outlined in this Section and the rules and laws regulating possession, transportation and importation of cervids in order to remain in the Captive Cervid Herd Certification Program.~~

~~(c) Enrollment application. Each individual holding a current and valid Captivity License for cervids may apply to be enrolled in the Captive Cervid Herd Certification Program. All applications shall be in writing on a form supplied by the Commission. The Commission shall deny an application if:~~

*History Note: Authority G.S. 19A-11; 106-549.97(b); 113-134; 113-272.5, 113-272.6;
Eff. February 1, 1976;
Amended Eff. December 1, 1990; June 1, 1990; July 1, 1988;
November 9, 1980;
Temporary Amendment Eff. October 8, 2002;
Amended Eff. May 1, 2010; December 1, 2005; August 1, 2004;
Temporary Amendment Eff. February 27, 2015.*

- ~~(1) the licensee has not complied with all the requirements under the captivity license statutes and all rules pertaining to the holding of cervids in captivity and the transportation or importation of cervids resulting in a failed inspection report for the licensee's most recent inspection; or a pending citation;~~
- ~~(2) the licensee has provided false information; or~~
- ~~(3) CWD has been confirmed in a cervid at the licensee's facility.~~

~~(d)(b)~~ Enrollment dates. The enrollment date is:

- ~~(1) the first date upon official inspection, documented by Wildlife Resources Commission and Department of Agriculture and Consumer Services personnel, on which the licensee has complied with all captivity rules and statutes that pertain to cervids, including tagging, provided that the licensee has continued to comply with these regulations; or~~
- ~~(2) the date on which a waiver was issued by the Wildlife Resources Commission Executive Director under the conditions set forth in 15A NCAC 10A .1101(a) that brought the licensee into compliance assuming that there were no other compliance actions pending, provided that the licensee has continued to comply with the captive cervid regulations.~~

This date may be retroactive but may extend back no earlier than the date Wildlife Resources Commission and Department of Agriculture and Consumer Services personnel documented that the licensee came into compliance with all captivity rules and statutes related to holding cervids in captivity, including tagging of all cervids.

(c) Herd status shall be as defined in 9 C.F.R. 55.24(a). Loss or suspension of herd status shall be as defined in 9 C.F.R. 55.24 (b). 9 C.F.R. 55.24 (a)&(b) is hereby incorporated by reference, shall include any later amendments and editions of the incorporated material, and may be accessed free of cost at <http://www.ecfr.gov/cgi-bin/text-idx?SID=18c86a6244f627571204af3e86bf01fc&node=se9.1.55.124&rgn=div8>.

~~(e) Certified herd. When a herd is enrolled in the Captive Cervid Herd Certification Program, it shall be placed in First Year status. If the herd continues to meet the requirements of the Captive Cervid Herd Certification Program, each year on the anniversary of the enrollment date the herd status shall be upgraded by one year. One year from the date a herd is placed in Fifth Year status, the herd status shall be changed to Certified, and the herd shall remain in Certified status as long as it is enrolled in the Captive Cervid Herd Certification Program, provided its status is not lost or suspended without reinstatement as described in Paragraph (f).~~

~~(f) Herd status~~

- ~~(1) A Certified Herd or any herd enrolled in the program shall have its status suspended or reduced if:~~
 - ~~(A) the licensee fails to comply with any of the ongoing requirements for captive cervid licenses as identified in 15A NCAC 10H .0301;~~

~~(B) the licensee violates any other North Carolina law or rule related to captive cervids;~~

~~(C) an animal in the herd exhibits clinical signs of CWD;~~

~~(D) an animal in the herd can be traced back to a herd with an animal exhibiting clinical signs of CWD; or~~

~~(E) the herd is quarantined by the State Veterinarian.~~

~~(2) A Certified Herd or any herd enrolled in the program shall lose its status if:~~

~~(A) an animal in the herd can be traced back to a herd in which CWD has been detected;~~

~~(B) CWD is detected in an animal in the herd; or~~

~~(C) the licensee loses his or her license.~~

~~The Wildlife Resources Commission shall review cases of suspended status upon request. A Certified Herd with suspended status may regain its status if the licensee corrects within 30 days the deficiency under which the status was suspended or, in the case of suspected CWD, the disease was not detected in the suspect animal.~~

~~(g)(d) Inspection. If an inspection of the captive cervids is needed as a part of certification, including reinstating a suspended status, the licensee shall be is responsible for assembling, handling, handling and restraining the captive cervids and all costs incurred to present the animals for inspection.~~

History Note: Authority G.S. 106-549.97(b); 113-134; 113-272.5; 113-272.6; 113-274; 113-292;

Eff. May 1, 2010;

Temporary Amendment Eff. February 27, 2015.

SUBCHAPTER 10I – ENDANGERED AND THREATENED SPECIES

SECTION .0100 - ENDANGERED AND THREATENED SPECIES

15A NCAC 10I .0102 PROTECTION OF ENDANGERED/THREATENED/SPECIAL CONCERN

(a) No Open Season. There is no open season for taking any of the species listed as endangered in Rule .0103, or threatened in Rule .0104 of this Section, except for the American alligator (*Alligator mississippiensis*) as set forth in the rules of this Chapter. Unless otherwise provided in North Carolina General Statutes or the rules of this Chapter, there is no open season for taking any of the species listed as special concern in Rule .0105 of this Section. Except as provided in Paragraphs (b), (c) and (e) of this Rule, it is unlawful to take or possess any animal listed in Rules .0103, .0104, or .0105 of this Section of such species at any time.

(b) Permits. The executive director may issue permits to take or possess an endangered, threatened, or special concern species:

- (1) ~~to~~ ~~To~~ an individual or institution with experience and training in handling, and caring for the wildlife and in conducting a scientific study, for the purpose of scientific investigation

relevant to perpetuation or restoration of said species or as a part of a scientifically valid study or restoration effort;

- (2) ~~to~~ ~~Fe~~ a public or private educator or exhibitor who demonstrates that he or she has lawfully obtained the specimen or specimens in his or her possession, possesses the requisite equipment and expertise to care for such specimen or ~~specimens~~, ~~specimens~~ and abides by the caging requirements for the species set forth in 15A NCAC 10H .0302;
- (3) ~~to~~ ~~Fe~~ a person who lawfully possessed any such species for more than 90 days immediately prior to the date that such species was listed and who abides by the caging requirements for the species set forth in 15A NCAC 10H .0302, provided however, that no permit shall be issued more than 90 ~~ninety~~ days after the effective date of the initial listing for that species; or
- (4) ~~to~~ ~~Fe~~ a person with demonstrable depredation from a Special Concern Species, or the American alligator (*Alligator mississippiensis*).

(c) Taking Without a Permit:

- (1) An individual may take an endangered, threatened, or special concern species in defense of his own life or the lives of others.
- (2) A state or federal conservation officer or employee who is designated by his agency to do so may, when acting in the course of his official duties, take, possess, and transport endangered, threatened, or special concern species if the action is necessary to:
 - (A) aid a sick, injured, ~~diseased~~, ~~diseased~~ or orphaned specimen;
 - (B) dispose of a dead specimen;
 - (C) salvage a dead specimen that may be useful for scientific study; or
 - (D) remove specimens that constitute a demonstrable but nonimmediate threat to human safety, provided the taking is done in a humane and noninjurious manner. The taking may involve injuring or killing endangered, threatened, or special concern species only if it is not ~~reasonably~~ possible to eliminate the threat by live-capturing and releasing the specimen unharmed, in a habitat that is suitable for the survival of that species.

(d) Reporting. Any taking or possession of an endangered, threatened, or special concern species under Paragraphs (b) and (c) of this Rule is subject to applicable reporting requirements of federal law and ~~regulations~~, ~~regulations~~ and the reporting requirements of the permit issued by the Executive Director or of 15A NCAC 10B .0106(e).

(e) Exceptions.

- (1) Notwithstanding any other provisions of this Rule, processed meat and other parts of

American ~~alligators~~ ~~alligators~~, that have been lawfully taken in a state in which there is an open season for harvesting ~~alligators~~ ~~alligators~~, may be possessed, ~~bought~~, ~~bought~~ and sold when such products are marketed in packages or containers that are labeled to indicate the state in which they were taken and the identity, address, and lawful authority of the processor or distributor.

- (2) Raptors listed as special concern species in Rule .0105 of this Section may be taken from the wild for falconry purposes and for falconry propagation, provided that a valid North Carolina endangered species permit has been obtained as required in Paragraph (b) of this Rule.
- (3) Captive-bred raptors listed as special concern species may be bought, sold, ~~bartered~~, ~~bartered~~ or traded as provided in 50 C.F.R. 21.30 when marked as required under those regulations. 50 C.F.R. 21.30 is hereby incorporated by reference, shall include any later amendments and editions of the incorporated material, and may be accessed free of cost at http://www.ecfr.gov/cgi-bin/text-idx?SID=1bc046c08a9f0f17cb904604d98ab748&node=se50.9.21_130&rgn=div8.
- (4) ~~Red Wolves (*Canis rufus*) listed as threatened in Rule .0104 in this Section may be taken or harassed pursuant to the conditions provided in 50 C.F.R. 17.84(c). 50 C.F.R. 17.84(c) is hereby incorporated by reference, shall include any later amendments and editions of the incorporated material, and may be accessed free of cost at <http://www.ecfr.gov/cgi-bin/text-idx?rgn=div8&node=50:2.0.1.1.1.8.1.5>.~~
- (4)(5) Importation, possession, sales, ~~transportation~~, ~~transportation~~ and exportation of species listed as special concern species in Rule .0105 of this Section ~~shall be~~ ~~is~~ allowed under permit by retail and wholesale establishments whose primary function is providing scientific supplies for ~~research~~, ~~research~~ provided that:
 - (A) the specimens were lawfully obtained from captive or wild populations outside of North Carolina;
 - (B) they are possessed in indoor facilities;
 - (C) all transportation of specimens provides safeguards adequate to prevent accidental escape; and
 - (D) importation, ~~possession~~, ~~possession~~ and sale or transfer is permitted only as listed in Parts (e)(4)(A) and (B) of this Rule.

(f) A written application to the Commission ~~shall be~~ ~~is~~ required for a permit to authorize importation, and possession for the purpose of retail or wholesale sale. The application shall identify the source of the ~~specimens~~ ~~specimens~~, and provide documentation of lawful acquisition. Applications for permits

shall include plans for holding, transportation, advertisement, and sale in such detail as to allow a determination of the safeguards provided against accidental escape and sales to unauthorized individuals.

(g) Purchase, importation, and possession of special concern species within North Carolina is allowed under permit to state and federal governmental agencies, corporate research entities, and research institutions, institutions provided that:

- (1) sales are permitted to out of state consumers;
- (2) the specimens will be possessed in indoor facilities and safeguards adequate to prevent accidental escape are provided during all ~~transportation~~ ~~transportation~~ of the specimens;
- (3) the agency's or institution's Animal Use and Care Committee has approved the research protocol for this species; and
- (4) no specimens may be stocked or released in the public or private waters or lands of North Carolina and specimens may not be transferred to any private individual.

History Note: Authority G.S. 113-134; 113-291.2; 113-291.3; 113-292; 113-333; Eff. June 11, 1977; Amended Eff. January 1, 2013; January 1, 2012; May 1, 2009; April 1, 2003; April 1, 2001; April 1, 1997; February 1, 1994; September 1, 1989; March 1, 1981; March 17, 1978; Temporary Amendment Eff. February 27, 2015.

15A NCAC 10I .0104 THREATENED SPECIES LISTED

(a) The following species of resident wildlife are designated as federally-listed threatened species:

- (1) Amphibians: None Listed At This Time.
- (2) Birds: Piping plover (*Charadrius melodus melodus*).
- (3) Crustacea: None Listed At This Time.
- (4) Fish:
 - (A) Spotfin chub (*Cyprinella monacha*); and
 - (B) Waccamaw silverside (*Menidia extensa*).
- (5) Mammals: None Listed At This Time.
- (6) Mollusks: Noonday globe (*Patera clarki nantahala*).
- (7) Reptiles:
 - (A) Bog turtle (*Glyptemys muhlenbergii*);
 - (B) American alligator (*Alligator mississippiensis*);
 - (C) Green seaturtle (*Chelonia mydas*); and
 - (D) Loggerhead seaturtle (*Caretta caretta*).

(b) The following species of resident wildlife are designated as state-listed threatened species:

- (1) Amphibians:
 - (A) Carolina gopher frog (*Rana capito capito*);
 - (B) Eastern tiger salamander (*Ambystoma tigrinum tigrinum*);

- (C) Junaluska salamander (*Eurycea junaluska*); and
- (D) Wehrle's salamander (*Plethodon wehrlei*).

(2) Birds:

- (A) Bald eagle (*Haliaeetus leucocephalus*); ~~leucocephalus~~
- (B) Gull-billed tern (*Sterna nilotica aranea*); and
- (C) Northern saw-whet owl (*Aegolius acadicus*).

(3) Crustacea: None Listed At This Time.

(4) Fish:

- (A) American brook lamprey (*Lampetra appendix*);
- (B) Banded sculpin (*Cottus carolinae*);
- (C) Bigeye jumprock (*Scartomyzon ariommus*);
- (D) Blackbanded darter (*Percina nigrofasciata*);
- (E) Carolina madtom (*Noturus furiosus*);
- (F) Carolina pygmy sunfish (*Elassoma boehlkei*);
- (G) Carolina redbhorse (*Moxostoma* sp.) (Pee Dee River and its tributaries and Cape Fear River and its tributaries);
- (H) Least brook lamprey (*Lampetra aepyptera*);
- (I) Logperch (*Percina caprodes*);
- (J) Rosyface chub (*Hybopsis rubrifrons*);
- (K) Sharphead darter (*Etheostoma acuticeps*);
- (L) Sicklefins redbhorse (*Moxostoma* sp.) (Hiwassee River and its tributaries and Little Tennessee River and its tributaries);
- (M) Turquoise darter (*Etheostoma inscriptum*); and
- (N) Waccamaw darter (*Etheostoma perlongum*).

(5) Mammals:

- (A) Eastern woodrat (*Neotoma floridana floridana*);
- (B) Rafinesque's big-eared bat (*Corynorhinus rafinesquii rafinesquii*); and
- (C) Red wolf (*Canis rufus*).

(6) Mollusks:

- (A) Alewife floater (*Anodonta implicata*);
- (B) Big-tooth covert (*Fumonelix jonesiana*);
- (C) Cape Fear threetooth (*Triodopsis soelneri*);
- (D) Carolina fatmucket (*Lampsilis radiata conspicua*);
- (E) Clingman covert (*Fumonelix wheatleyi clingmanicus*);
- (F) Eastern lampmussel (*Lampsilis radiata radiata*);

TEMPORARY RULES

- (G) Eastern pondmussel (*Ligumia nasuta*);
(H) Engraved covert (*Fumonelix orestes*);
(I) Mountain creekshell (*Villosa vanuxemensis*);
(J) Roan supercoil (*Paravitrea varidens*);
(K) Roanoke slabshell (*Elliptio roanokensis*);
(L) Sculpted supercoil (*Paravitrea ternaria*);
(M) Seep mudalia (*Leptoxis dilatata*);
(N) Smoky Mountain covert (*Inflectarius ferrissi*);
(O) Squawfoot (*Strophitus undulatus*);
(P) Tidewater mucket (*Leptodea ochracea*);
(Q) Triangle floater (*Alasmidonta undulata*);

- (R) Waccamaw ambersnail (*Catinella waccamawensis*);
(S) Waccamaw fatmucket (*Lampsilis fullerkati*);
(T) Waccamaw spike (*Elliptio waccamawensis*).

(7) Reptiles: None Listed At This Time.

History Note: Authority *G.S. 113-134; 113-291.2; 113-292; 113-333;*
Eff. March 17, 1978;
Amended Eff. June 1, 2008; April 1, 2001; November 1, 1991;
April 1, 1991; June 1, 1990; September 1, 1989;
Temporary Amendment Eff. February 27, 2015.

This Section contains information for the meeting of the Rules Review Commission on February 19, 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
Jeff Hyde (1st Vice Chair)
Margaret Currin
Jay Hemphill
Faylene Whitaker

Appointed by House
Garth Dunklin (Chair)
Stephanie Simpson (2nd Vice Chair)
Anna Baird Choi
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

March 19, 2015 April 16, 2015
May 21, 2015 June 18, 2015

**RULES REVIEW COMMISSION MEETING
MINUTES
February 19, 2015**

The Rules Review Commission met on Thursday, February 19, 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, Jeff Hyde, and Stephanie Simpson.

Staff members present were Commission Counsels Abigail Hammond, Amber Cronk May, and Amanda Reeder, and Julie Brincefield, Alex Burgos, and Dana Vojtko.

The meeting was called to order at 10:03 a.m. with Chairman Dunklin presiding.

Chairman Dunklin 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 Dunklin asked for any discussion, comments, or corrections concerning the minutes of the January 15, 2015 meeting. There were none and the minutes were approved as distributed.

FOLLOW UP MATTERS

Department of Commerce – Credit Union Division

All rules were unanimously approved.

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 a state employee with the Department of Commerce.

DHHS – Division of Mental Health

All rules were withdrawn at the request of the agency. No action was required by the Commission.

Board of Landscape Architects

All rules were unanimously approved.

Board of Physical Therapy Examiners

21 NCAC 48C .0104 - There has been no response by the agency, therefore no action was required by the Commission.

LOG OF FILINGS (PERMANENT RULES)

Industrial Commission

All rules were unanimously approved.

Prior to the review of the rules from the Industrial 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.

Child Care Commission

10A NCAC 09 .0102 was unanimously approved.

Criminal Justice Education and Training Standards Commission

12 NCAC 09B .0203 was unanimously approved.

Department of Labor

All rules were unanimously approved.

Building Code Council

All rules were unanimously approved.

LOG OF RULES (TEMPORARY RULES)

Wildlife Resources Commission

All rules were unanimously approved.

EXISTING RULES REVIEW

Office of State Budget and Management

09 NCAC 03 – The Commission unanimously approved the report as submitted by the agency, with the following exception for Rule 09 NCAC 03A .0103, which received public comment that was deemed to have merit as defined by G.S. 150B-21.3A(c)(2). The RRC designated this rule as “necessary with substantive public interest.”

Lindsey Wakely with the Governor's office addressed the Commission.

Office of Information Technology Services

09 NCAC 06 – The Commission unanimously approved the report as submitted by the agency.

Social Services Commission

10A NCAC 97 – The Commission unanimously approved the report as submitted by the agency with the following exceptions for rules 10A NCAC 97B .0401, .0402, .0403; 97C .0104, .0106, .0108, .0109 and .0111. The RRC designated these rules as “necessary with substantive public interest.”

Environmental Management Commission

15A NCAC 02S - The Commission unanimously approved the report as submitted by the agency.

Board of Barber Examiners

The Board requested a waiver of Rule 26 NCAC 05 .0203.

The waiver request was unanimously approved.

The Commission unanimously approved the report as submitted by the agency.

Prior to the review of the report from the Board of Barber Examiners, Commissioner Choi recused herself and did not participate in any discussion or vote concerning this report because the law firm she is employed at provides legal representation to the board.

Bain Jones with the agency addressed the Commission.

Agriculture Finance Authority

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

Coastal Resources Commission

The Board requested a waiver of Rules 26 NCAC 05 .0203 and .0211 for the report for 15A NCAC 07B.

The waiver request was unanimously approved.

The Commission rescheduled the date of review for the report.

The Commission will review the Board's report at its June 18, 2015 meeting.

COMMISSION BUSINESS

Staff proposed a recommendation to schedule rules for readoption after completion of the periodic review and expiration of existing rules. The following readoption deadline dates were adopted by the Commission:

- August 31, 2015
04 NCAC 24E Division of Employment Security
- November 30, 2015
21 NCAC 23 Irrigation Contractors' Licensing Board
21 NCAC 37 Board of Examiners for Nursing Home Administrators
- December 31, 2015
21 NCAC 02 Board of Architecture
- January 31, 2016
11 NCAC 18, 11 NCAC 20, 11 NCAC 21 Department of Insurance
21 NCAC 08 Board of Certified Public Accountant Examiners
- March 31, 2016
21 NCAC 14 Board of Cosmetic Art Examiners
- April 30, 2016
21 NCAC 52 Board of Podiatry Examiners
25 NCAC 01C State Human Resources Commission

Staff gave the Commission a brief legislative update.

At 11:21 a.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(a)(3) to discuss the lawsuit filed by the State Board of Education against the Rules Review Commission and G.S. 143-318.11(a)(6).

The Commission came out of closed session at 1:52 p.m.

The meeting adjourned at 1:53 p.m.

The next regularly scheduled meeting of the Commission is scheduled for Thursday, March 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:

Garth Dunklin, Chair

FEBRUARY 2015

Rules Review Commission
Meeting
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Name	Agency
THOMAS M CHAMBERS	NC Dept of Labor
BARRY GURTON	NCDOJ - NCBEC
Cliff Dantre	NC DOL
Meredith Henderson	NC Industrial Commission
Mike Cannon	NCMSA
Andrew Harris	NCIC
Conor Brockett	NCMS
Richard Braddock	DOJ - ITS
Charlton Allen	NC Industrial Comm.
Ryan Niland	NC OAH - Intern
Brian Jones	NCBBE
Mike Ellis	NCPR
Alexi Garber	DOJ
Debra Allen	DCDEE
Lindsay Wakely	NC OSBM / Gov ofc.
Pat Surpe	NC DENR - DWM - DSCA
Gary Salamido	NC Chamber
Stephanie Opley	Ag Finance Auth
Kyra Hudgins	Ag Finance Auth.
Ryan Boyce	NCFC
Jeff M. Smith	Bid. OLLA
Henry Patterson	Patterson Harkley LLP

Rules Review Commission
Meeting
Please **Print** Legibly

[illegible]

LIST OF APPROVED PERMANENT RULES
February 19, 2015 Meeting

COMMERCE, DEPARTMENT OF - CREDIT UNION DIVISION

<u>Fields of Membership</u>	04	NCAC 06C .0203
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This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 431-3000. Also, the Contested Case Decisions are available on the Internet at <http://www.ncoah.com/hearings>.

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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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Filed

STATE OF NORTH CAROLINA

IN THE OFFICE OF

COUNTY OF GUILFORD

2014 SEP 23 AM 9:57 ADMINISTRATIVE HEARINGS

14 DHR 01051

RHAMIA MACHAE ROBINSON,

Office of
Administrative Hearings

Petitioner,

v.

N.C. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, DIVISION OF
HEALTH SERVICE REGULATION,

FINAL DECISION

Respondent.

THIS CONTESTED CASE came for hearing before The Honorable Julian Mann, III, Chief Administrative Law Judge presiding, on August 25, 2014, in the Martin Courtroom of the High Point Courthouse, 505 East Green Drive, Guilford County, High Point, North Carolina. The record was held open so that the parties could submit proposed findings of fact and conclusions of law. Respondent, through counsel, submitted its proposed order on November 7, 2014 and Petitioner failed to submit her proposed order pursuant to a final e-mail request on November 19, 2014.

APPEARANCES

For Petitioner: Rhamia Machae Robinson
2420 Bellmeade Street, Apt. 1E
High Point, NC 27262

For Respondent: W. Thomas Royer
Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629

ISSUE

Whether Respondent substantially prejudiced Petitioner's rights, acted erroneously, or acted arbitrarily or capriciously when Respondent substantiated the allegation that Petitioner abused and neglected a resident (C.P.) of Meadowood Group Home in Greensboro, North Carolina, by not allowing C.P. to use the restroom and not following C.P.'s behavior plan, provoking him by telling C.P. to "hold his piss like a grown ass man," resulting in pain and mental anguish, and entered said finding on the Health Care Personnel Registry.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 131E-256
N.C. Gen. Stat. § 150B-1, *et seq.*
42 CFR § 488.301
10A N.C.A.C. 13O.0101(1)

EXHIBITS

Respondent's Exhibits 1 – 27 were admitted into the record.

WITNESSES

Shane Ferguson (Executive Director, ResCare Community Alternatives of North Carolina)
Steven Gilbert (Behaviorist, ResCare Community Alternatives of North Carolina, Northwest
Region)
Jennifer Baxter, RN (Investigator, Health Care Personnel Registry)
Rhamia Robinson (Petitioner)

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

FINDINGS OF FACT

1. At all times relevant to this matter, Rhamia Machae Robinson ("Petitioner") was employed as a health care personnel—namely, a Support Specialist—at Meadowood Group Home in Greensboro, North Carolina.
2. Meadowood Group Home is a residential facility, as defined by N.C.G.S. § 122C-3(14)e, and is therefore subject to N.C.G.S. § 131E-256.
3. Petitioner's duties as a Support Specialist included, among other things, assisting residents with activities of daily living (ADLs), interact frequently and positively with residents to promote an enhanced quality of life for residents, and promote behavioral support for residents using agency procedures and plans.

4. Petitioner received training in abuse, neglect, and behavior management, among other areas. (T. p 33)

5. C. P., a resident of Meadowood, is a 33 year old with Mental Retardation, Bipolar Disorder, and episodic mania.

6. C.P. has a Behavioral Support Plan, the most current version was implemented on February 1, 2013 and was in place on September 12, 2013. (Exh. 13)

7. The Behavioral Support Plan for C.P. identifies targeted behaviors that the Behavioral Support Plan seeks to address, including physical aggression, cooperation difficulties, elopement, and tantrums. Along with identifying targeted behaviors the Behavioral Support Plan provides strategies and guidelines for preventing or intervening in these targeted behaviors.

8. The Behavioral Support Plan for C.P. directs staff to not provide negative attention to C.P., not to badger him, to avoid power struggles, and cautions staff to always be respectful and kind. Steven Gilbert, Behavioralist for ResCare and author of C. P.'s Behavioral Support Plan explained during testimony that negative attention and rude behavior is seen by C. P. as being confrontational and tends to exacerbate his negative behaviors and make him more confused. (Exh. 13; T. pp 27-30)

9. All staff of Meadowood Group Home, including Petitioner, was made aware of residents' behavior plans, given copies of the behavior plans in the program books and clinical book for their reference, and expected to know the behavior plan of the resident they are working with. (T. pp 32, 52)

10. On September 12, 2013 Petitioner and employees Theo Givens and Tomonika Harvey took C.P. and five other residents on an outing to Burlington Coat Factory. Mr. Givens and Ms. Harvey left the van to shop while Petitioner remained on the van to be in charge of six residents. C.P. was one of the residents. Next, these same employees were instructed by William Lofton to stop at Walmart to pick up supplies for the group home on the way back from the outing. Mr. Givens and Ms. Harvey once again left the van to shop while Petitioner remained on the van to be in charge of six residents. Again, C.P. was one of the residents. (T. p 86)

11. After completing the trip to Burlington Coat Factory C.P. asked to go to the bathroom while the group was en route to Walmart. (Exh. 17-21)

12. At Meadowood at intervals of one to three times per month, C.P. would engage in physical altercations and assaults on Petitioner. This activity and frequency were known to the Meadowood management. During these times, C.P. engaged in heated arguments with Petitioner, stuck Petitioner in the face, and tackled Petitioner to the floor. Because of these

incidents, Petitioner was relieved of her care for C.P. and was instructed not to interact with C.P. On the day in question, according to statements attributed to Mr. Givens and Ms. Harvey, Petitioner told C.P. to "hold his piss like a grown ass man." Petitioner denies making this statement to C.P. Mr. Givens and Ms. Harvey were not present to testify. (Exh. 5;17-21 and T. pp 97-98; 102-105)

13. According to statements attributed to Theo Givens, Mr. Givens offered to take C.P. to the restroom inside the Walmart to which Petitioner responded that C.P. was "not going anywhere." Mr. Givens did not testify. Petitioner declares in Exhibit #9 the following: One staff was to go inside, but both staff went inside, leaving her with six clients alone in the van. Ms. Robinson stated once the staff were off the van, C.P. stated he had to use the restroom." (Exh. 9,17-19)(T. p 100)

14. C.P. became agitated and pushed Petitioner to the floor. Petitioner attempted to prevent C.P. from leaving the van by holding onto the door handle but C.P. pushed past Petitioner and exited the van. This physical altercation between Petitioner and C.P. continued outside the van. C.P. pushed Petitioner against the van then shoved Petitioner to the pavement. C.P. was yelling obscenities at Petitioner. Bystanders called the Greensboro police for emergency police intervention. C.P. entered Walmart. (T. pp 87-88).

15. Prior to Greensboro Police arriving, C.P. went into Walmart in search of the bathroom where an off duty employee of Meadowood encountered C.P. and noticed his ear was bleeding and that he had scratches on his face. (Exh. 22)

16. According to out of court statements attributed to Theo Givens, Mr. Givens encountered C.P. inside of Walmart, where he also noted the blood on C.P.'s ear and the scratches on his face. Mr. Givens asked C.P. what happened to him to which C.P. responded that Petitioner beat him up and that he was "not getting back on the van." Neither Mr. Givens nor C.P. testified. (Exh. 17)

17. Petitioner reported the incident to William Lofton and filled out an incident report on September 12, 2013. Nycole Mumford, Operations Manager for ResCare Community Alternatives of North Carolina, informed Petitioner that she had been placed on Administrative Leave pending the outcome of an internal investigation into the allegation of abuse and neglect due to Petitioner violating company policy. (Exh. 6)

18. On September 18, 2013, Mumford notified North Carolina Health Care Personnel Registry ("HCPR") of the allegation of abuse against Petitioner by submitting a 24-Hour Initial Report.

19. Shane Ferguson terminated Petitioner's employment at Meadowood Group Home as a result of the internal investigation.

20. Petitioner testified that she was not to be left alone with C.P. as a result of prior incidents between her and C.P.; however, statements attributed to Theo Givens indicated that Petitioner would not let C.P. off of the van when other staff members offered to take him with them into Walmart. Mr. Givens exited the van leaving Petitioner with C.P. and a total of six residents.

21. Petitioner, when filling out the incident report following the altercation at Walmart, noted that a body check had been completed but did not mark that there was an injury. (Exh. 9) Written statements provided by Theo Givens, Tomonika Harvey, and Whitney Nicholson, all present at Walmart when the incident took place, noted scratches to C.P.'s face and a cut on C.P.'s ear.

22. The HCPR investigates allegations against unlicensed health care personnel working in health care facilities in North Carolina. The allegations investigated by HCPR include, but are not limited to, abuse and neglect. With the exception of a finding of a single instance of neglect, substantiated findings against health care personnel are permanently listed on the HCPR. N.C.G.S. § 131E-256.

23. Upon receipt of the allegation against Petitioner, Jennifer Baxter, RN ("Baxter"), Investigator for HCPR, determined that the matter required further investigation.

24. At all times relevant to this incident, Baxter was employed as an Investigator for the HCPR. She is charged with investigating allegations of abuse and neglect, among others, against unlicensed health care personnel in Guilford County, North Carolina, and was assigned to conduct the investigation into the allegation against Petitioner.

25. As a part of her investigation, Petitioner visited ResCare Community Alternatives of North Carolina's facility and reviewed C.P.'s medical records, Petitioner's personnel file, and ResCare's documentation regarding this incident. Baxter also interviewed Theo Givens, Tomonika Harvey, Steven Gilbert, and C.P. Petitioner was not interviewed during the investigation but later gave a statement to Baxter regarding what happened on September 12, 2013.

26. Based on her investigation, Baxter determined that Petitioner neglected and abused C.P. on September 12, 2013, by not following C.P.'s behavior plan by cursing at C.P. and by not allowing C.P. to use the restroom and, accordingly, substantiated the allegations against Petitioner.

27. By certified letter dated December 31, 2013, Baxter notified Petitioner that the allegation that Petitioner had abused and neglected C.P. had been substantiated and said finding would be listed on the Health Care Personnel Registry. Petitioner was further notified of her right to appeal.

28. Steven Gilbert conducted an internal investigation regarding the allegation of abuse by interviewing Whitney Nicholson, Theo Givens, Tomonika Harvey, Petitioner, Abijah Shealy, William Lofton, LaChell Gentle, and C.P. But at the hearing Mr. Gilbert testified on behalf of Respondent's as Respondent's witness both in the case in chief and on rebuttal. Mr. Gilbert's testimony and opinion in rebuttal, in part, appears verbatim below.

TESTIMONY OF STEVEN GILBERT (Returns to witness stand)

A. The entire circumstances of a six-to-one ratio is absurd. That's something that none of the staff should have allowed. All three staff that were on board that van knew that. So for that circumstance to create itself, in itself is a violation of what we would do. That would be the first thing that would be wrong. There is no way that you're going to leave me on a van with six clients, and there is two other staff, in other words.

Q. Okay. Fair enough. Now, in this instance, was there any report Made that there were six consumers to only one employee?

A. Not clearly to me, no. I was not aware of that. That would have been – I couldn't understand why somebody would even go in to Walmart without a client. Our protocol is that if you go into a store to make a purchase, the client goes with you. We don't leave people on the van to go make purchases. That's what they do. That's (inaudible).

In other words, if one of our staff were to take a client into – or not take a client into Walmart, that would be a writeup. Why was that client not going into Walmart, not doing their shopping, no doing the things that they need to do for their home. We don't go into – staff don't go into stores and make purchases without clients.

Just like at Burlington Coat Factory, what in the world was somebody doing at Burlington Coat Factory without staff accompanying or clients with them? That's ridiculous. We don't do that.

Q. Okay. Was it unrealistic to expect Ms. Robinson to take all staff members – or – excuse me – all clients inside?

A. That would be a situation that is difficult for me to address. I probably would have if somebody had to use the bathroom myself. I can't stay what's correct about that because the entire scenario is a no-win scenario. ~~We would not be in that circumstance with that – in that circumstance.~~ (Tr. pp. 108-110)

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

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to Chapters 131E and 150B of the North Carolina General Statutes.
2. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder.
3. Pursuant to N.C.G.S. § 131E-256, the North Carolina Department of Health and Human Services ("Department") is required to establish and maintain a health care personnel registry that contains the names of all unlicensed health care personnel working in health care facilities in North Carolina who are subject to a finding by the Department that they, among other things, abused or neglected a resident in a health care facility, or have been accused of such an act if the Department has screened the allegation and determined that an investigation is warranted.
4. Meadowood Group Home is a residential facility, as defined by N.C.G.S. § 122C-3(14)e, and is therefore subject to N.C.G.S. § 131E-256.
5. As a health care personnel working in a residential facility, Petitioner is subject to the provisions of N.C.G.S. § 131E-256.
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. 130 .0101(1); 42 CFR § 488.301.
7. "Neglect" is the failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness.
8. The preponderance of the admissible evidence in the record shows that on September 12, 2013, Petitioner did not neglect C.P. by telling him to "hold his piss like a grown ass man," in direct violation of C.P.'s Behavioral Support Plan, which explicitly discusses avoiding confrontational situations such as this due to C.P.'s illness and the target behaviors that these confrontations trigger. Petitioner's testimony as the only witness to testify as to the events in question is found to be credible.
9. The preponderance of the admissible evidence in the record shows that on September 12, 2013, Petitioner did no verbally and physically abused C.P. by telling him to "~~hold his piss like a grown ass man,~~" and by actively preventing C.P. from going to the bathroom by telling other care staff that C.P. could not go with them so that he could be taken to the bathroom. Petitioner's testimony as the only witness to testify as to the events in question is found to be credible.

10. Respondent's action to substantiate the allegation of neglect against C.P. is not supported by a preponderance of the evidence.

11. Respondent's action to substantiate the allegation of abuse against C.P. is not supported by a preponderance of the evidence.

12. Petitioner carried her burden of proof by the preponderance of the evidence through Petitioner's credible in court testimony that conflicted with the out of court statements made by those who did not testify that Respondent substantially prejudiced Petitioner's rights, acted erroneously, or acted arbitrarily or capriciously when Respondent substantiated the allegation that Petitioner abused a resident (C.P.) of Meadowood Group Home in Greensboro, North Carolina. Meadowood management permitted Petitioner to be repeatedly assaulted by C.P. which was a situation well know and within the knowledge of Meadowood management. In spite of this knowledge, Meadowood management allowed Petitioner to remain in close proximity to C.P. on numerous occasions in a small van which could at any time erupt in violence causing Petitioner to defend herself from an assault and which finally did erupt in a violent assault to such an extent that bystanders had to summon the police. Furthermore, Meadowood management either condoned or was not aware of (and should have been aware of by imputed knowledge) that on at least two occasions Meadowood employees were allowed to leave the van without a client educational purpose to engage in a personal shopping experience. When doing so, the departing employees abandoned their responsibility to Meadowood's clients who were left on the van in order to engage in a personal pursuit and left residents to the charge of a single employee who then became responsible for the safety of six residents. The ratio was to be 1:2 (employee to clients). Petitioner when left as custodian for six residents on a small van. Petitioner made the best decision she could make when a sudden emergency arose under the facts and circumstances found herein. Petitioner cannot be found to have either abused or neglected C.P. in an attempt to defend herself from an assault or making verbal statements to C.P. during the altercation.

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

FINAL DECISION

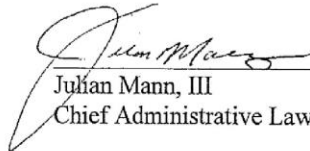
Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that Respondent's decision to place a finding of abuse against Petitioner on the Health Care Personnel Registry should be **REVERSED**.

NOTICE

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

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

This the 23rd day of December, 2014.


Julian Mann, III
Chief Administrative Law Judge

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
12/19/2014 3:31 PM

STATE OF NORTH CAROLINA
COUNTY OF MOORE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14DHR05763

Mary Jones Petitioner v. Department of Health and Human Services, Division of Health Service Regulation Respondent	FINAL DECISION
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THIS MATTER came on for hearing before Hon. J. Randolph Ward, Administrative Law Judge, on September 25, 2014 in Asheboro, North Carolina. Following receipt of the parties' proposed findings and conclusions, the following Final Decision was prepared.

APPEARANCES

For Petitioner: Ellis B. Drew III
Jenkins Law Group
155 Sunnynoll Court, Suite 200
Winston-Salem, NC 27106

For Respondent: Candace A. Hoffman
Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602

ISSUE

Whether Respondent erred in finding that the facts substantiated the allegations and justified the "Entry of Finding" on the Health Care Personnel Registry that, "On or about March 3, 2014, Mary E. Jones, a Nurse's Aide, neglected a resident, D.H., by failing to properly utilize the Hoyer lift, dropping the resident, picking the resident up without having a nurse assess for injuries and lying about the incident to avoid blame resulting in a delay of treatment."

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. §§ 150B-23, 131E-255(c), 131E-256, 10A N.C.A.C. 130 .0101(10), and 42 CFR § 488.301

EXHIBITS

Respondent's exhibits ("R. Exs.") 1-6, 7A & B, 8A & B, 10A & B, and 11-13 were admitted into the record.

WITNESSES

For Petitioner: Mary E. Jones, CNA (Petitioner)

For Respondent: Ramona Derrickson, CNA
Jena Darsey, LPN
Tracy Bain, RN
Athena Foreman, RN

UPON DUE CONSIDERATION of the submissions and arguments of counsel, the documents and other exhibits admitted, and the sworn testimony of each of the witnesses, considering their opportunity to see, hear, know, and recall the relevant facts and occurrences about which they testified; any interests they may have; and whether their testimony is reasonable and consistent with other credible evidence; and, assessing the greater weight of the evidence from the record as a whole, in light of applicable law, now therefore, based upon the preponderance of the credible evidence, the undersigned Administrative Law Judge makes the following:

FINDINGS OF FACT

1. At all times relevant to this matter, Petitioner Mary E. Jones was employed as a Certified Nursing Assistant at Pine Lake, a nursing home in Carthage, North Carolina, and therefore, was subject to N.C. Gen. Stat. § 131E-256. (T. p. 10) She had been employed at Pine Lake since 1996.
2. Petitioner completed all required training related to her job responsibilities. She received instruction on how to report an accident or incident involving a resident, and how to assist other CNAs. She also received training with regard to Pine Lake's policies on investigating incidents of abuse and neglect of residents. (T. pp. 23-26; R. Ex. 3)
3. Petitioner acknowledged receiving Pine Lake's Elder Abuse Training, indicating her knowledge of and agreement to comply with their code of conduct, and further indicating her understanding that failure to provide services necessary to avoid physical harm or mental anguish is considered caretaker neglect. Additionally, Petitioner acknowledged that she understood that it was Pine Lake's policy to report any falls to a nurse supervisor before attempting to move the resident. Petitioner acknowledged that she should promptly report any incident or accident that occurred with a resident. (T. pp. 23-26, 28; R. Ex. 3)
4. Petitioner received in-service training on how to properly handle falls, restraints, lifts,

and reporting. (T. p. 23; R. Ex. 3)

5. On March 3, 2014, Petitioner was with D.H., a resident at Pine Lake, when D.H. fell to the floor from a Hoyer lift, sustaining a small gash on the left side of his head which required stitches and an internal brain bleed. (T. pp. 26-30; R. Ex. 5)
6. Resident D.H. was 64 years old at the time of the incident. He suffered from Clostridium difficile colitis, Hyponatremia, chronic respiratory failure, Hypertension, and chronic anemia. D.H. was bed-bound, in a vegetative state, and required total care. (T. p. 15, R. Exs. 5 & 8A) The use of a Hoyer lift was required to leave his bed. His plan of care included that his weight should be documented once a month, using the Hoyer lift. (T. p. 16)
7. On March 3, 2014, Petitioner asked Ramona Derrickson to assist her with weighing D.H. with the Hoyer lift. (T. p. 16; R. Exs. 6 & 11) Petitioner testified that while weighing D.H., he fell out of the Hoyer lift and hit his head on the floor. Petitioner and Ms. Derrickson picked up D.H. and put him back into his bed before proper evaluation of his injuries, contrary to their training. They also failed to immediately report the incident to a nurse or supervisor, as they had been trained to do, causing a delay in treatment of the resident's injuries. (T. pp. 26-30, 33; R. Exs. 6 & 11)
8. By happenstance, Jena Darsey, LPN, came to D.H.'s room to store some supplies at some point after Petitioner and Ms. Derrickson put D.H. back into the bed. Ms. Darsey noticed blood on the floor and on the bed. Ms. Darsey examined D.H. and found a wound on the back of his head. Ms. Darsey asked Petitioner and Ms. Derrickson what happened to D.H. Petitioner testified that she told Ms. Darsey that D.H. jerked his head back while Petitioner was weighing him and bumped his head on the side rail of the bed. Ms. Darsey then contacted the wound nurse and the Director of Nursing, Tracy Bain. (T. p. 64; R. Exs. 4, 8A, & 8B)
9. After stopping the bleeding, Ms. Darsey and Ms. Bain decided to send D.H. to the hospital ER for stitches. Ms. Darsey recorded in D.H.'s progress notes what she was told by Petitioner about the incident and what she observed firsthand about D.H.'s injuries. (T. p. 67; R. Exs. 4, 8A, & 8B)
10. Ms. Bain performed a "facility investigation" into the incident. She brought Petitioner and Ms. Derrickson to her office separately to ask them about the cause of the accident. Both initially told Ms. Bain that D.H. hit his head on the side rail of his bed. (T. pp. 71-78; R. Exs. 10A & 10B)
11. Later in the evening of March 3, 2014, Ms. Derrickson went to Ms. Bain and admitted that D.H. had fallen from the Hoyer lift and hit his head on the floor. Ms. Bain immediately called the hospital and informed the doctor the actual circumstances that led to D.H.'s injury. Ms. Bain told Ms. Darsey to send both Petitioner and Ms. Derrickson home and to take the Hoyer lift out of service. (T. pp. 75-76; R. Exs. 8A, 8B, 10A, & 10B) CT scans at the hospital revealed that D.H. suffered a brain hemorrhage in the left

frontal lobe as a result of the fall from the Hoyer lift. (T. p. 83; R. Ex. 5)

12. Ms. Bain interviewed Petitioner again on March 4, 2014. Initially, Petitioner continued to lie about the incident and told Ms. Bain that D.H. had bumped his head on the side rail of the bed. Ms. Bain informed Petitioner that Ms. Derrickson told the truth about the incident with D.H., and shortly thereafter, Petitioner admitted to Ms. Bain that D.H. had fallen and hit his head on the floor. (T. p. 76; R. Exs. 10A & 10B) On March 4, 2014, Ms. Bain filled out the 24-Hour Initial Report detailing the incident resulting in D.H.'s injury. (T. p. 71; R. Ex. 1)
13. As part of her investigation, Ms. Bain had the Hoyer lift inspected. The inspector found that the lift was functioning properly. (T. p. 73; R. Exs. 10A & 10B) On March 5, 2014, Ms. Bain completed and filed a 5-Working Day Report, classifying the incident as "resident neglect" resulting in a fall and injury, and that the employees "placed resident in bed [and] then lied to charge nurse and Director of Nursing about what happened." (T. p. 72; R. Ex. 2) Both Petitioner and Ms. Derrickson were terminated by Pine Lake. (T. p. 30; R. Exs. 10A & 13)
14. On or about March 3, 2014, Petitioner Mary E. Jones, a Certified Nursing Assistant, neglected a resident ("D.H.") by: failing to properly use the Hoyer lift, resulting in the resident's fall to the floor; picking the resident up and putting him back into bed before having a nurse assess his injuries; failing to promptly report the fall, thus resulting in a delay of proper evaluation; and lying about how the injury occurred, putting the resident at risk of being inappropriately treated for his injury. (T. pp. 13, 17-20, 26-30; R. Exs. 6 & 11)
15. The Health Care Personnel Registry Section's Investigation Branch ("HCPRIB") investigates allegations of abuse, neglect, and other allegations against health care personnel in health care facilities. If the allegation is substantiated, the employee will be placed on the Registry. The HCPRIB covers most licensed facilities in North Carolina that provide patient care, including personnel at Pine Lake. (T. p. 36)
16. At all times relevant to this incident, Athena Foreman was employed as an investigator for the HCPRIB. She is charged with investigating allegations against health care personnel in the north central region of North Carolina. Accordingly, Pine Lake was in her region, and she received and investigated the complaint that Petitioner had neglected Resident D.H. (T. pp. 35-36)
17. After the complaint against Petitioner was received, it was determined that further investigation was needed. As part of the investigation, Ms. Foreman interviewed Petitioner, Ms. Darsey, Ms. Derrickson, and Ms. Bain. She also reviewed the resident's records and took into account the internal investigation conducted by the facility. (T. pp. 35-37; R. Exs. 1-7B, 10A, & 10B)
18. On June 9, 2014, Ms. Foreman interviewed Petitioner at the Southern Pines Library. Ms. Foreman asked Petitioner to clarify why she did not report the incident with D.H. to a

nurse. Petitioner told Ms. Foreman that she got scared when she dropped D.H. and lied to the nurse about what happened. Petitioner also admitted to Ms. Foreman that she knew she violated Pine Lake's policy on incident/accident reporting. (R. Ex. 6)

19. On May 20, 2014, Ms. Foreman interviewed Ms. Bain at Pine Lake. Ms. Bain explained that Petitioner had been terminated in part because D.H. had been allowed to fall, but primarily because she had moved him after the fall, disregarding the danger of exacerbating his injuries. Ms. Bain also believed that because Petitioner lied about what had occurred, D.H. did not immediately receive the proper treatment. (T. pp. 77-78, 81; R. Ex. 10A) Ms. Foreman also interviewed Ms. Darsey, who told Ms. Foreman that Ms. Derrickson came to her upset on the afternoon of March 3, 2014, and admitted D.H. had fallen from the Hoyer lift. (R. Ex. 8A)
20. On May 29, 2014, Ms. Foreman interviewed Ms. Derrickson at Southern Pines Library. Ms. Derrickson informed Ms. Foreman that she initially lied about what happened to D.H., but she eventually told another CNA and Ms. Darsey the truth about D.H.'s fall from the Hoyer lift. (T. p. 57; R. Ex. 7A)
21. Ms. Foreman concluded that Petitioner neglected Resident D.H. and wrote an investigation report which documented her conclusions. (T. pp. 10-79; R. Exs. 4, 6, 7A-8B, & 10A-11)
22. Petitioner was properly notified by letter that HCPRIB's finding of neglect would be listed against her name in the Health Care Personnel Registry and of her right to appeal. (R. Ex. 12) Petitioner timely sought this hearing.
23. To the extent that portions of the following Conclusions of Law include findings of fact, such are incorporated by reference into these Findings of Fact.

Upon the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this controversy pursuant to Chapters 131E and 150B of the North Carolina General Statutes.
2. The Health Care Personnel Registry Section of the North Carolina Department of Health and Human Services, Division of Health Service Regulation, 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 neglected a resident in a health care facility.
3. Pine Lake of Carthage is a health care facility as defined in N.C. Gen. Stat. § 131E-255(c) and N.C. Gen. Stat. § 131E-256(b). As a Certified Nursing Assistant working in a

health care facility, Petitioner is subject to the provisions of N.C. Gen. Stat. § 131E-256.

4. For the purposes of the Health Care Registry, “neglect” is defined as a failure to provide goods or services necessary to avoid physical harm, mental anguish, or mental illness. 10A N.C.A.C. 130 .0101(10), 42 CFR § 488.301.
5. Petitioner had the burden of proving that Respondent substantially prejudiced her rights, failed to act as required by law or rule, exceeded its authority, or failed to use proper procedure when it substantiated the allegations that Petitioner neglected D.H. on March 3, 2014, and entered said findings against Petitioner on the North Carolina Health Care Personnel Registry. *Overcash v. N.C. Dept. of Env't & Natural Res.*, 179 N.C. App. 697, 699, 635 S.E.2d 442, 444-45 (2006); *Byrd v. N.C. Dept. of Health and Human Services*, 2013 WL 8116135, 13DHR12691 (NC OAH, 5 Nov. 2013). Petitioner failed to sustain the burden of proof.
6. On or about March 3, 2014, Petitioner neglected Resident D.H. by failing to properly use the Hoyer lift, resulting in the resident’s fall; moving the resident before obtaining a medical clearance that he could be moved without exacerbating his injuries; failing to promptly report the accident; and misrepresenting the nature of the accident in a way that could affect the resident’s treatment.
7. To the extent that portions of the foregoing Findings of Fact include conclusions of law, such are incorporated by reference into these Conclusions of Law.

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

FINAL DECISION

The undersigned hereby determines that Respondent’s decision to enter a finding that Petitioner neglected a nursing home resident on the Health Care Personnel Registry was justified and appropriate and should be **UPHELD**.

NOTICE

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

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge’s Final Decision.** In conformity with the Office of Administrative Hearings’ rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1,

Article 2, this **Final Decision** was served on the parties the date it was placed in the mail as indicated by the date on the **Certificate of Service** attached to this **Final Decision**. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 19th day of December, 2014.



J. Randolph Ward
Administrative Law Judge

Filed

STATE OF NORTH CAROLINA

COUNTY OF NEW HANOVER

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

14 DOJ 02724

Office of
Administrative Hearings

GENE ARTHUR PULLEY, III,

Petitioner,

vs.

NORTH CAROLINA CRIMINAL
JUSTICE EDUCATION AND
TRAINING STANDARDS
COMMISSION,

Respondent.

PROPOSAL FOR DECISION

Pursuant to N.C. Gen. Stat. § 150B-40(e), Respondent filed a request for designation of an Administrative Law Judge to preside at a hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes on April 14, 2014. Petitioner initiated this hearing to contest Respondent's March 12, 2014 decision to deny or suspend Petitioner's law enforcement certification.

On August 27, 2014, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Wilmington, North Carolina. On October 7, 2014, the undersigned issued an Order ruling that there was insufficient evidence presented at hearing to support Respondent's proposed denial or suspension of Petitioner's law enforcement suspension. Pursuant to the undersigned's request, Petitioner filed a proposed Final Decision with the Office of Administrative Hearings on October 21, 2014.

APPEARANCES

For Petitioner:

J. Michael McGuinness
The McGuinness Law Firm
P.O. Box 952
Elizabethtown, NC 28337

For Respondent:

William P. Hart, Jr.
Assistant Attorney General
N. C. Department of Justice
P. O. Box 629
Raleigh, NC 27699-6001

ISSUE

Was there sufficient evidence to justify Respondent's decision to deny or suspend Petitioner's law enforcement certification for impersonating a law enforcement officer in violation of N.C. Gen. Stat. § 14-277?

STATUTES/RULES AT ISSUE

N.C. Gen. Stat. § 14-277
12 NCAC 9A .0204(b)(3)(A)

FINDINGS OF FACT**Procedural Background**

1. On March 12, 2014, Respondent Commission's Probable Cause Committee found probable cause to deny or suspend Petitioner's application for continued certification as a law enforcement officer for committing the Class B misdemeanor offense of "Impersonation of a Law Enforcement Officer," in violation of N. C. Gen. Stat. § 14-277.

2. Specifically, Respondent's Probable Cause Committee alleged that on October 1, 2013, Petitioner impersonated a law enforcement officer during a traffic stop "by advising Officer Bojko you were a 'cop' and opened your wallet displaying a police identification." (Resp. Ex. 1)

Adjudicated Facts

3. In 2008-2009, Petitioner began his law enforcement career by working as a detention officer for the New Hanover Sheriff's Office. On May 27, 2008, Petitioner resigned from the Sheriff's Department, and completed basic law enforcement training (BLET).

4. On May 4, 2010, Respondent issued a Probationary Law Enforcement certification to Petitioner Gene Arthur Pulley, III. (Pet. Ex. 1) On April 29, 2011, Respondent issued a General Law Enforcement Certification to Petitioner. (Pet. Ex. 2)

5. By report dated April 22, 2010, Dr. Gregory Gridley advised Wallace Police Chief Bobby Maready of the result of his psychological evaluation to assess Petitioner's fitness for employment and duty as a Wallace police officer. Dr. Gridley concluded that Petitioner was fit for employment as a law enforcement officer, and indicated that he will "be an excellent addition to your force." (Pet Ex. 10)

6. From May 2010 until September 2013, Petitioner served as a Wallace police officer under the leadership of Chief Bobby Maready. (Pet. Ex. 7)

7. Petitioner decided to pursue employment with a larger law enforcement agency, and resigned from the Wallace Police Department effective September 9, 2013. When Petitioner resigned from the Wallace Police Department, the Police Department affirmed that as of September 9, 2013, it was not aware of any investigation in the last 18 months concerning any potential criminal action or potential misconduct by Petitioner. (Pet. Ex. 3)

8. On September 3, 2013, Petitioner passed his firearms qualification, (Pet. Ex. 5), and a required drug screen to be hired as a Shallotte Police Officer. On September 16, 2013, Respondent received the Shallotte Police Department's Report of Appointment/Application for Law Enforcement Certification for Petitioner to be certified as a law enforcement officer, and become a Shallotte Police Officer. (Pet. Ex. 6)

9. The Shallotte Police Chief issued a Shallotte Police Department uniform to Petitioner for duty. Petitioner also wore his uniform in a photograph taken with other Shallotte Police Officers. (Pet. Ex. 11) However, the Shallotte Police Chief had not yet issued Petitioner his police badge or equipment for the Shallotte Police Department.

10. On October 1, 2013, Petitioner was between service as a law enforcement officer with the Wallace Police Department and with the Shallotte Police Department. Petitioner had applied for employment with the Shallotte Police Department. The Shallotte Police Chief had accepted Petitioner's application for employment, and offered Petitioner a job to serve as a police officer. Such job offer was conditionally based on Petitioner's continued law enforcement certification. Petitioner had also accepted the Chief's conditional offer of employment.

11. For all practical purposes, Petitioner had been hired as a police officer by the Shallotte Police Department on October 1, 2013, but Petitioner could not begin actual law enforcement service until Respondent Training & Standards Commission gave its final approval. Petitioner and the Shallotte Police Department were simply awaiting final approval of the documents associated with his continuous certification from Respondent. On October 10, 2013, Shallotte Police Chief Rodney Gause wrote a letter indicating that the Shallotte Police Department was awaiting the letter of approval from the Training & Standards Commission, and as soon as that letter is received, that the hiring process [of Petitioner] would be complete. (Pet. Ex. 8)

12. There was no evidence presented at hearing that suggested there was any problem that would have precluded Petitioner's finalized hiring, certification and service with the Shallotte Police Department.

13. Before March 12, 2014, Respondent had never taken any adverse action against Petitioner's law enforcement certification.

14. On October 1, 2013, Petitioner was driving on Carolina Beach Road in Carolina Beach, North Carolina, and taking his infant son to a medical appointment.

Carolina Beach Police Officer Mike Bojko stopped Petitioner for allegedly speeding. Officer Bojko approached Petitioner's vehicle, and asked Petitioner for his driver's license and registration. Petitioner opened his wallet, and retrieved his driver's license. Officer Bojko saw Petitioner's Wallace Police identification card in Petitioner's wallet. Petitioner had kept the identification card with permission of Wallace Police Chief Bobby Maready.

15. Petitioner's wallet was a two-fold black leather wallet that opened like a book. A black velvet flap covered the right side of the wallet. When the flap was opened, the flap revealed an empty space where a police badge could be kept. Petitioner used this wallet every day to carry his identification, driver's license, and other items.

16. Petitioner told Officer Bojko that he worked in law enforcement. Officer Bojko asked Petitioner what department he worked for. Petitioner explained that September 9, 2013 was his last day with the Wallace Police Department after working for them for 3 1/2 years. He told Bojko that he was awaiting his paper work "from Raleigh" for his transfer to the Shallotte Police Department.

17. After seeing the identification card, Officer Bojko requested to see the card. Per Bojko's request, Petitioner provided the identification card to Officer Bojko. The identification card was a paper document, and not an actual metal official police badge.

18. Officer Bojko took the identification card, went back to his police vehicle, and called the Wallace Police Department regarding Petitioner's Wallace Police identification card. Subsequently, Officer Bojko returned to Petitioner's care and issued Petitioner a citation for speeding, and for impersonating a law enforcement officer.

19. In the citation/charge against Petitioner for impersonating an officer, the charge failed to specify what prong or aspect of N.C. Gen. Stat. § 14-277 that Petitioner allegedly violated. The New Hanover County District Attorney dismissed the criminal charge of "Impersonating a Law Enforcement Officer" against Petitioner.

20. On April 16, 2014, Wallace Police Chief Bobby Maready wrote a letter on Petitioner's behalf, confirming that Petitioner had served as an officer with the Wallace Police Department from May 4, 2010 until September 9, 2013. Chief Maready opined, "Officer Pulley was a fine officer known for his honesty and professional demeanor." Chief Maready "had no disciplinary actions or formal complaints filed against him." (Pet. Ex. 9)

21. At hearing, several witnesses attested to Petitioner's very good character and very good work performance. Each of these witnesses was credible and believable, and provided information regarding the integrity, truthfulness, character, and work performance of Petitioner. Each of the witnesses also provided credible testimony that Petitioner has been an honest, dedicated, and successful law enforcement officer who was truthful and professional.

22. The credible testimony of several witnesses at trial, as well the exhibits admitted into evidence showed that Petitioner has the support of both his former Chief at Wallace Police Department, and Shallotte Police Chief Gause, who was in the process of completing the hiring of Petitioner. In addition, retired New Hanover County Sheriff Sidney Causey opined that when Petitioner served under his command, Petitioner "performed in a conscientious and professional manner, he is an honest, hardworking person with a high degree of integrity." (Pet. Ex. 12) Petitioner's Exhibit 12 included a number of other additional character and work performance related letters and observations from various individuals. Each of those letters reflected very favorably upon the credibility and professionalism of Petitioner.

23. The preponderance of the evidence at hearing showed that Petitioner carried his Wallace Police identification card by "pure habit" and not for impersonating a law enforcement officer. During the October 1, 2013 traffic stop, Petitioner did not affirmatively display or use his Wallace Police identification card in connection with his communications with Officer Bojko. Petitioner's identification card was a paper identification card, not an official police badge, and was plainly visible to Officer Bojko from his position standing outside Petitioner's vehicle.

24. A preponderance of the evidence at hearing also showed that Petitioner did not misrepresent any material facts to Officer Bojko during the October 1, 2013 traffic stop. There was no evidence at hearing, which indicated or implied that Petitioner exhibited any criminal intent or other improper intent during the October 1, 2013 with Officer Bojko. In fact, Officer Bojko acknowledged at hearing that Petitioner did not state or represent to him that he was a "sworn police officer," or sworn law enforcement officer. Officer Bojko acknowledged that Petitioner did not say that he was an active duty police officer at that time, and that Petitioner stated that he was waiting on paperwork from Raleigh, i.e. a reference to Respondent Training & Standards Commission. Chief Gause's October 10, 2013 letter in Petitioner's Exhibit 8 corroborated Officer Bojko's testimony.

25. After receiving the October 1, 2013 citation, Petitioner appropriately self-reported the charge to Respondent Training & Standards Commission.

26. Petitioner was credible and believable, and was forthcoming in his testimony.

27. A preponderance of the substantial evidence supports Petitioner's position and testimony, and there is no factual basis for adverse action against Petitioner's certification.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case, and the parties received proper notice of the hearing

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

2. 12 NCAC 09A .0204 "SUSPENSION: REVOCATION: OR DENIAL OF CERTIFICATION" provides in part:

(b) The Commission may suspend, revoke, or deny the certification of a criminal justice officer when the Commission finds that the applicant for certification or the certified officer:

- (3) has committed or been convicted of:
 - (A) a criminal offense or unlawful act defined in 12 NCAC 09A .0103 as a Class B misdemeanor; or

3. N.C. Gen. Stat. § 14-277 makes it unlawful for any person to "falsely represent to another that he is a sworn law enforcement officer."

4. In *State v. Church*, 242 N.C. 230, 87 S.E.2d 256 (1955), a case interpreting N.C. Gen. Stat. § 14-277, our Supreme Court explained

To constitute the offense there must be an intentionally false impersonation of the officer designated in the statute, and the offense must be consummated in accordance with the terms and meaning of the statute. To constitute the offense requires something beyond the false pretense. There must be some overt act in furtherance of the false personation. 35 C.J.S. False Personation, s 3, pp. 629, 630. And it would not be sufficient if the person charged represented himself merely as an officer but not as the particular officer specified in the statute. *Walker v. State*, 89 Tex. CR.R.180, 229 S.W. 853.

Id. Therefore, N.C. Gen. Stat. § 14-277 requires "an intentional representation and some overt act in furtherance of the false personation to sustain conviction." *State v. Church*, 242 N.C. 230, 87 S.E.2d 256 (1955) (holding that "where defendant made no oral representation that he was a peace officer, but showed only a courtesy card which did not mislead anyone, and where defendant used no words or action which would indicate he intended to attempted to arrest, the statue prohibiting impersonating a peace officer had not been violated").

5. In this case, there was insufficient evidence that Petitioner falsely represented himself or impersonated a "sworn law enforcement officer" in violation of N.C. Gen. Stat. § 14-277 on October 1, 2013. Petitioner's Wallace Police identification card was plainly visible to Officer Bojko when Petitioner opened his wallet to retrieve his driver's license. Petitioner did not voluntarily bring out that identification card or display it

to Officer Bojko. Petitioner only retrieved his Wallace Police identification card after Officer Bojko specifically requested to see such identification card. Petitioner's conduct did not constitute displaying a badge or identification signifying that he was a sworn law enforcement officer. Petitioner exhibited no criminal or other improper intent during the October 1, 2013 traffic stop, and did not represent or state that he was a sworn law enforcement officer.

6. Based on the foregoing Findings of Fact and Conclusions of Law, there was insufficient proof that Petitioner committed the offense of "Impersonation of a Law Enforcement Officer" on October 1, 2013 in violation of N.C. Gen. Stat. § 14-277.

7. There was insufficient evidence that Petitioner violated any of Respondent's rules, and there is no legal basis for any adverse action to be taken against Petitioner's law enforcement certification.

8. A preponderance of the evidence showed that Petitioner is fit to continue to hold a law enforcement certification.

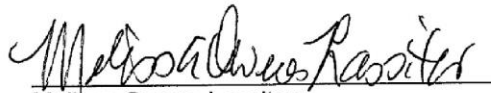
PROPOSAL FOR DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned proposes that Respondent Commission reverse its initial finding, find that Petitioner has not committed the alleged offense, and certify Petitioner as a law enforcement officer.

NOTICE

The North Carolina Criminal Justice Education and Training Standards Commission is the agency that will make the Final Decision in this contested case. As the final decision-maker, that agency is required to give each party an opportunity to file exceptions to this proposal for decision, to submit proposed findings of fact, and to present oral and written arguments to the agency pursuant to N.C. Gen. Stat. § 150B-40(e). It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714.

This 4th day of December, 2014.


Melissa Owens Lassiter
Administrative Law Judge

STATE OF NORTH CAROLINA

COUNTY OF NEW HANOVER

ANDREW GEORGE ANDERSON,

Petitioner,

v.

N.C. SHERIFFS' EDUCATION
AND TRAINING STANDARDS
COMMISSION,

Respondent.

Filed

IN THE OFFICE OF

ADMINISTRATIVE HEARINGS

14 DOJ 05716

Office of

Administrative Hearings

PROPOSAL FOR DECISION

On November 13, 2014, Administrative Law Judge Craig Croom heard this case in Bolivia, North Carolina. This case was heard after Respondent requested, pursuant to N.C.G.S. § 150B-40(e), the designation of an administrative law judge to preside at the hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

APPEARANCES

Petitioner: J. Michael McGuinness, Attorney at Law
Respondent: Matthew L. Boyatt, Assistant Attorney General

ISSUES

Has the Petitioner committed or been convicted of any combination of four (4) or more crimes or unlawful acts defined as either Class A or Class B misdemeanors pursuant to the Commissions' Rules, such that Petitioner's application for certification is subject to denial?

Did Petitioner commit the offense of Battery on or about September 20, 1990, in the State of Maryland?

Did Petitioner commit the offense of Resist Arrest on or about September 5, 1988, in the State of Maryland?

Did Petitioner commit the offense of Possession of Drug Paraphernalia on or about January 31, 1991, in the State of Maryland?

Did Petitioner commit the offense of Disorderly Conduct on or about October 6, 1987, in the State of Maryland?

FINDINGS OF FACT

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received notice of hearing, and that the Petitioner received by mail the proposed Denial of Justice Officer's Certification letter, mailed by Respondent Sheriffs' Commission on June 20, 2014.

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

Background

3. Petitioner is 46 years of age. Petitioner previously worked as a framing contractor in the construction industry. He was the owner and operator of Anderson Building Company. Petitioner built high end homes and also constructed home additions and engaged in home renovations. Petitioner desires to enter the field of law enforcement as a second career due to the decline in the construction industry in 2008 and the general lack of work in that industry.

4. Petitioner Anderson has been married since 2001 and has children who are 8 and 6 years of age, and two step children who are 21 and 25. (T. p. 57)

5. Petitioner completed Basic Law Enforcement Training Program at Brunswick Community College from July 8, 2011 until January 26, 2012. He successfully completed the program, had a perfect attendance record, attained the highest state exam score for his class and had a handgun qualification score of 99.7. See Petitioner's Exhibit 3, 4, 5, 6, 7.

6. Petitioner is an applicant for justice officer certification through the Pender County Sheriff's Office and was appointed for certification as a justice officer through that agency on September 26, 2013. Captain Billy Sanders and Sergeant Ryan Wilson of the Pender County Sheriff's Office appeared at the administrative hearing and testified on behalf of Petitioner.

7. Petitioner voluntarily disclosed his Maryland criminal history to Captain Sanders and to Respondent. Petitioner has been cooperative with the Pender County Sheriff's Office and Respondent regarding his criminal history. (T. p. 33)

8. Petitioner began as a reserve deputy. He trained with a Field Training Officer for three-four months on a voluntary basis with compensation, so he could eventually be employed full time as a Deputy Sheriff. (T. p. 23) Sergeant Wilson served as his Field Training Officer and as his current supervisor. (T. p. 36)

9. Petitioner is very professional in the performance of his duties. He has integrity, and he has no issues of misconduct or any type of significant problem while at the Pender County Sheriff's Office. (T. p. 22)

10. Pender County Sheriff Carson Smith, Jr wants Petitioner certified as a sworn justice officer and for him to remain with the Pender County Sheriff's Office. (T. p. 22)

12. Reverend Trish Archer, one of the pastors at Pine Valley United Methodist Church in Wilmington, also testified on behalf of Petitioner. She has known Petitioner since January 2002. (T. p. 47) Reverend Archer believes that Petitioner is an honest and trustworthy individual. (T. p. 51) Reverend Archer is aware that Petitioner has a past criminal history; however, she is not aware of the specifics regarding any one incident.

13. Petitioner is an active and respected member of Pine Valley United Methodist Church. He has served as a musician, trustee, Sunday School teacher, a youth counselor, and as vice president. He also served as the Church Coordinator for the Habitat for Humanity Program for two years. (T. p. 63)

14. The Respondent previously summarily denied Petitioner's application for certification pursuant to 12 NCAC 10B .0307 (a)(2) based solely on one (1) misdemeanor Battery conviction which occurred in the State of Maryland, and which carried with it the potential punishment of greater than two (2) years confinement under Maryland common law. Petitioner requested an administrative hearing and an Administrative Law Judge was assigned to preside over that contested matter. See *Andrew George Anderson v. NC Sheriffs' Education and Training Standards Commission*, 13 DOJ 03417.

15. During the pendency of Petitioner's 2013 administrative case, Petitioner obtained an order from the Maryland court setting aside his Battery conviction. Therefore, the Respondent Commission did not oppose Petitioner's Motion for Summary Judgment in 13 DOJ 03417, insofar as Petitioner no longer stood "convicted" of the Battery offense in Maryland. The Order granting Petitioner's Motion for Summary Judgment was limited to whether Petitioner stood "convicted" of Battery, and did not

adjudicate whether Petitioner committed this crime, or whether he was otherwise qualified to hold certification.

16. Following the granting of Petitioner's Motion for Summary Judgment in 13 DOJ 03417, the Respondent Commission was required to finish processing Petitioner's application for certification, which involved assigning an investigator to look into Petitioner's numerous other misdemeanor criminal charges arising out of the State of Maryland. Furthermore, the Commission was required to investigate whether Petitioner actually committed the Battery offense that was at issue in 13 DOJ 03417.

17. This Court must decide whether Petitioner stands convicted of 4 or more misdemeanor offenses. In addition, this Court must decide whether Petitioner committed the following offenses in the State of Maryland: 1) Battery; 2) Resisting Arrest; 3) Possession of Drug Paraphernalia; and 4) Disorderly Conduct.

Petitioner's Criminal Convictions

18. 12 NCAC 10B.0204(d)(5) provides the Sheriffs' Commission may deny the certification of a justice officer when the Commission finds that the applicant has committed or been convicted of:

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

19. Pursuant to the Commission's Rules, 12 NCAC 10B .0103, and the Class B Misdemeanor Manual adopted by the Respondent, a Class A misdemeanor is classified as those misdemeanor offenses for which the maximum period of confinement is less than 6 months. Included as Class A misdemeanors are offenses such as ordinance violations for which no period of confinement is possible.

20. Pursuant to the Commission's Rules, 12 NCAC 10B .0103, and the Class B Misdemeanor Manual adopted by the Respondent, Class B misdemeanors are those North Carolina criminal offenses set out in Respondent's Class B Misdemeanor Manual, in addition to out-of-state criminal offense which carry a potential punishment greater than 6 months, but less than 24 months confinement.

21. The record before this Court establishes Petitioner has been convicted of four (4) or more misdemeanors, such that his application for certification is subject to denial pursuant to 12 NCAC 10B.0204(d)(5).

22. On August 7, 1991, Petitioner was convicted of unlawful Possession of a Controlled Dangerous Substance in the State of Maryland, case number 91-175. See Respondent's Exhibit 9, p.3. Petitioner does not dispute this conviction which remains on Petitioner's criminal record. Petitioner indicates the substance was marijuana.

23. On July 24, 1989, Petitioner was also convicted of unlawful Possession of a Controlled Dangerous Substance in the State of Maryland, case number 00000318Q3. See Respondent's Exhibit 15. Petitioner does not dispute this conviction remains on Petitioner's criminal record. Petitioner indicates the substance was again marijuana, less than ¼ ounce.

24. A conviction for the unlawful possession of marijuana in the State of Maryland during the period in question carried with it a potential maximum sentence of one (1) year confinement. See Article 27, subparagraph (e) of section 287 of the Maryland Code. Respondent's Exhibit 22.

25. Pursuant to the Commission's Rules, 12 NCAC 10B .0103, and the Class B Misdemeanor Manual adopted by the Respondent, Petitioner's two (2) possession of marijuana convictions in the State of Maryland constitute separate Class B misdemeanor convictions.

26. On June 16, 1989, Petitioner was convicted of Entering Area Closed to Public, case number 00026462Z2. See Respondent's Exhibit 13. Petitioner does not dispute this conviction remains on Petitioner's criminal record. Petitioner indicates he was essentially trespassing. Petitioner and a friend were target shooting on private property when the owner of the property called the police. This resulted in criminal charges and ultimately a guilty plea on June 16, 1989.

27. The Entering Area Closed to Public conviction is classified as a Class A misdemeanor conviction because it appears Petitioner could not have been sentenced to a period of confinement greater than six (6) months for this criminal offense. Petitioner was ordered to pay a \$150.00 fine as a result of this conviction. See Respondent's Exhibit 13; Respondent's Exhibit 14.

28. Pursuant to the Commission's Rules, 12 NCAC 10B .0103, and the Class B Misdemeanor Manual adopted by the Respondent, Petitioner's Entering Area Closed to Public conviction in the State of Maryland constitutes a Class A misdemeanor conviction.

29. On September 21, 1988, Petitioner was convicted of Failing to Report a Boat Accident in the State of Maryland, case number 00026352Z4. See Respondent's Exhibit 11. Petitioner does not dispute this conviction remains on Petitioner's criminal record. Petitioner was operating his father's boat in the dark when he struck a pier that was recently installed in the area. Petitioner did not report the accident to the police. Petitioner's father submitted a claim to his insurance carrier to cover the damages. The

insurance carrier required a police report to process the claim. The police were notified approximately two (2) days following the collision, which resulted in Petitioner being charged criminally.

30. The Failing to Report a Boat Accident conviction is classified as a Class A misdemeanor conviction because it appears Petitioner could not have been sentenced to a period of confinement greater than six (6) months for this criminal offense. Petitioner was ordered to pay a \$50.00 fine as a result of this conviction. Respondent's Exhibit 11 and Exhibit 12.

31. Pursuant to the Commission's Rules, 12 NCAC 10B .0103, and the Class B Misdemeanor Manual adopted by the Respondent, Petitioner's Failing to Report a Boat Accident conviction in the State of Maryland constitutes a Class A misdemeanor conviction.

32. On March 11, 1992, Petitioner was convicted of violating his probation in case number 00606649Q1. See Respondent's Exhibit 17. Petitioner admits that he stands convicted of this misdemeanor probation violation; however, Petitioner does not recall the circumstances surrounding this violation. See Respondent's Exhibit 21 (response to Request for Admission number 5). At the hearing of this matter, Petitioner stated he may have failed a drug screen, which ultimately resulted in the adjudication of guilt for violating a condition of probation. It appears from the record in this case that Petitioner's probation violation bears the same case number as Petitioner's Battery conviction that was set aside in 2013. See Respondent's Exhibit 17 and Exhibit 6. Notwithstanding the foregoing, Petitioner did not present any evidence which would show that the misdemeanor probation violation conviction was set aside at the same time Petitioner's Battery conviction was set aside. The record establishes that the probation violation adjudication occurred two (2) years after Petitioner was charged with the Battery offense on September 20, 1990.

33. The Respondent Commission classified the probation violation conviction as a Class A misdemeanor conviction because it appears Petitioner could not have been sentenced to a period of confinement greater than six (6) months for this probation violation.

34. Pursuant to the Commission's Rules, 12 NCAC 10B .0103, and the Class B Misdemeanor Manual adopted by the Respondent, Petitioner's March 11, 1992 probation violation conviction in the State of Maryland constitutes a Class A misdemeanor conviction.

35. Petitioner has been convicted of a combination of 4 or more offenses classified as either Class A or Class B misdemeanors. In total, Petitioner has 5 misdemeanor convictions on his record: three (3) class A misdemeanor convictions and two (2) class B misdemeanor convictions. Petitioner's application for certification is, therefore, subject to denial pursuant to 12 NCAC 10B .0204(d)(5).

Commission of Maryland Battery Offense

36. As stated above, Petitioner was previously convicted of Battery in the State of Maryland. See Respondent's Exhibit 6. In 2013, Petitioner had this criminal conviction set aside and subsequently dismissed after Petitioner requested an administrative hearing in case number 13 DOJ 03417. This Court must decide whether Petitioner committed the Battery offense on or about September 20, 1990.

37. Petitioner was arrested for Battery in St. Mary's County Maryland on September 20, 1990. See Respondent's Exhibit 6. Petitioner recalls the events of that day, although Petitioner has attempted to minimize his unlawful conduct.

38. The victim in the battery case was Brad McElroy ("Mr. McElroy").

39. On or about September 20, 1990, Petitioner learned from his girlfriend that she had been having sex with Mr. McElroy. This upset Petitioner and Petitioner went to confront Mr. McElroy. Petitioner drove to the home of Mr. McElroy and confronted him at the front door. Petitioner admits taking a "fighting stance" when he approached Mr. McElroy. However, at this hearing, Petitioner denied that he struck Mr. McElroy first. This is at odds with Petitioner's prior statement to Diane Konopka at the Sheriff's Training and Standards Division where Petitioner admitted to punching Mr. McElroy in the face. Further, in Petitioner's written statement to the Respondent Commission, Petitioner stated he "confronted [McElroy] with the situation. A fight broke out and I left." See Respondent's Exhibit 7.

40. Petitioner admitted under oath that several witnesses were present who observed the altercation at Mr. McElroy's residence. These individuals were other residents of the apartment complex where Mr. McElroy resided. Petitioner was the only one charged with Battery on September 20, 1990. Mr. McElroy was not charged criminally.

41. A preponderance of the evidence presented at the administrative hearing establishes Petitioner committed a Battery against Mr. McElroy when Petitioner went to McElroy's home on September 20, 1990, confronted him, and subsequently punched him.

Commission of Maryland Resisting Arrest

42. Petitioner was charged with Resisting Arrest on September 5, 1988. Petitioner completed a deferred prosecution and that the criminal case was ultimately

dismissed in 1989. Petitioner recalls the events of September 5, 1988, although Petitioner was grossly intoxicated on the evening in question.

43. On the date in question, Petitioner attended a Grateful Dead concert with some friends in Landover Maryland. The police report indicates Petitioner was ejected from the concert. See Respondent's Exhibit 4. Petitioner denies that he was kicked out of the concert, although he concedes he was intoxicated.

44. Upon exiting the concert, Petitioner jumped into the back of a marked police car and demanded that the police drive him home. The patrol vehicle was running at the time Petitioner jumped into the backseat of the vehicle, but the officer was not inside the vehicle at that time. Petitioner recalls that the officer was in uniform and that the officer demanded that Petitioner get out of the vehicle. The Petitioner refused. As the officer reached into the vehicle to remove Petitioner, the Petitioner crawled to the opposite side of the vehicle.

45. The Petitioner then crawled from the backseat of the running patrol vehicle into the front seat of the vehicle in an attempt to drive the vehicle away. The Petitioner admitted under oath that by the time the officers were able to extricate Petitioner from the patrol vehicle, there were several police officers that had been dispatched to the scene. Petitioner does not dispute the officers were at the concert venue discharging their official duties.

46. Once out of the vehicle, the Petitioner continued to fight with the police after being advised he was under arrest. The Petitioner also attempted to run from the officers. Petitioner denies that he continued to struggle after he was removed from the vehicle. Petitioner's testimony is not credible given the record before this Court. Petitioner admits to being intoxicated at the time, and does not dispute that his behavior was so irrational that it caused him to attempt to steal a running patrol vehicle from a uniformed police officer. It is obvious that the officer had the legal authority to place Petitioner under arrest. By continuing to fight with the officers after being advised he was under arrest, Petitioner committed the offense of Resisting Arrest.

47. In Maryland, Resisting Arrest is a common law offense that requires a showing of resistance of a lawful arrest made by an officer of the law in the performance of his official duties. See Busch v. State of Maryland, 289 Md. 669, 675; 426 A.2d 954, 957 (1981). A preponderance of the evidence presented at the administrative hearing shows Petitioner committed the misdemeanor offense of Resisting Arrest in the State of Maryland on September 5, 1988.

Commission of Maryland Possession of Drug Paraphernalia Offense

48. Petitioner was arrested and charged with possession of marijuana, possession of marijuana with the intent to distribute, and possession of drug paraphernalia in 1991. As stated above, Petitioner entered a plea of guilty to the

possession of marijuana charge, and the remaining charges were dismissed. See Respondent's Exhibit 9.

49. Petitioner testified that he was arrested on the date in question because his marijuana dealer, Brad McElroy, was attempting to set Petitioner up. The police arrived at Petitioner's residence with a search warrant. Petitioner was residing in a two (2) bedroom apartment with another individual at the time. When the police searched the apartment, several marijuana plants were found in the room occupied by Petitioner's roommate. Petitioner claims to have been completely unaware that his roommate was growing marijuana within the apartment.

50. When the police searched Petitioner's room they discovered marijuana. Petitioner does not dispute this fact. The marijuana discovered in Petitioner's room formed the basis of Petitioner's criminal conviction for possession of a Controlled Dangerous Substance in case number 91-175.

51. Although Petitioner admits to having possessed marijuana at the time of the police search, he denies that he possessed drug paraphernalia. This is at odds with Petitioner's previous statements to the Respondent Commission. Petitioner was interviewed by Respondent's investigator on April 21, 2014, regarding this incident. During that interview, Petitioner admitted that marijuana was found in Petitioner's bedroom, along with a smoking device. See Respondent's Exhibit 10. This admission by Petitioner is consistent with his statement made in the presence of Diane Konopka at the Sheriff's Training and Standards Division.

52. A preponderance of the evidence presented at the administrative hearing establishes Petitioner committed the misdemeanor offense of Possession of Drug Paraphernalia in Maryland case number 91-175.

Commission of Maryland Disorderly Conduct

53. On or about October 6, 1987, Petitioner was arrested and charged with disorderly conduct in a public place. See Respondent's Exhibit 18 (MD case number 00001173W4) Petitioner was a student at Frostburg State University at the time. Petitioner admits that he was intoxicated at the time he was arrested. According to Petitioner's testimony at the administrative hearing, a group of students were being loud outside their dorm rooms. The campus police arrived to disperse the crowd. According to Petitioner, the police were in uniform and were discharging their official duties. Petitioner testified that he returned to his dorm room, as ordered by the police. Petitioner testified that a short time later, he again went outside of his dorm room and was arrested at that time. Petitioner stated he did not recall being disruptive when he went outside the second time.

54. Petitioner's testimony at the administrative hearing is at odds with Petitioner's previous admission made to the Respondent Commission regarding this

incident. On March 29, 2012, Petitioner completed a F-3- Personal History Statement in furtherance of his application for certification. Attached to that F-3, Petitioner provided a signed statement regarding his past criminal history. In that signed statement, Petitioner wrote: " I was at a college party where I drank way to (sic) much. After my friends took me back to my dorm room, I refused to stay in my room and the campus police were called. Campus police told me to go to my room and I refused." See Respondent's Exhibit 20, attachment entitled "Criminal History."

55. Petitioner's testimony at the administrative hearing regarding this incident is not credible given Petitioner's prior statements regarding his refusal to cooperate with campus police and his "refusal" to stay in his dorm room. Petitioner is attempting to minimize his previous conduct. During the time period in question, it was unlawful to be intoxicated and to create a public disturbance in a public place in the State of Maryland. See Article 27, section 123 of the Maryland Code; Respondent's Exhibit 24. A preponderance of the evidence presented at the administrative hearing establishes that Petitioner committed the offense of Disorderly Conduct in Maryland on or about October 6, 1987.

56. In addition to Petitioner's convictions, this Court finds that Petitioner committed the following criminal offenses in the State of Maryland, such that Petitioner's application for certification is subject to denial pursuant to the Commission's Rules: 1) Battery, MD case number 00606649Q1; 2) Resist Arrest, MD case number 00000988E1 3) Possession Drug Paraphernalia, MD case number 91-175 ; and 4) Disorderly Conduct, MD case number 00001173W4.

CONCLUSIONS OF LAW

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

2. Pursuant to 12 NCAC 10B .0204(d)(5), the Commission may revoke, suspend, or deny the certification of a justice officer when the Commission finds that the applicant for certification or certified officer has committed or been convicted of:

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

3. The preponderance of the evidence presented at the administrative hearing does establish that Petitioner has been convicted of a combination of 4 or more Class A or Class B misdemeanors.

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

5. Pursuant to 12 NCAC 10B .0205(3)(d), when the Commission denies the certification of a justice officer for a combination of 4 or more misdemeanor convictions, the period of sanction shall be for an indefinite period, but continuing so long as the stated deficiency, infraction, or impairment continues to exist, where the cause of sanction is commission or conviction of offenses as specified in 12 NCAC 10B .0204(d)(5).

6. The record establishes Petitioner stands convicted of two (2) separate counts of unlawful possession of marijuana in the State of Maryland, MD case numbers 91-175 and 00000318Q3. A conviction for the unlawful possession of marijuana in the State of Maryland during the period in question carried with it a potential maximum sentence of one (1) year confinement. See Article 27, section 287 subparagraph (e) of the Maryland Code.

7. Pursuant to the Commission's Rules, 12 NCAC 10B .0103, and the Class B Misdemeanor Manual adopted by the Respondent, Petitioner's two (2) possession of marijuana convictions in the State of Maryland constitute separate Class B misdemeanor convictions. The basis of this classification is that these out-of-state offenses carried with them maximum sentences in excess of 6 months confinement.

8. Pursuant to the Commission's Rules, 12 NCAC 10B .0103, and the Class B Misdemeanor Manual adopted by the Respondent, a Class A misdemeanor is classified as those misdemeanor offenses for which the maximum period of confinement is less than 6 months. Included as Class A misdemeanors are offenses such as ordinance violations for which no period of confinement is possible. The record establishes that Petitioner stands convicted of the following Class A misdemeanors: 1) Failing to Report a Boat Accident, MD case number 00026352Z4; 2) Entering Area Closed to Public, MD case number 00026462Z2; and 3) Probation violation, MD case number 00606649Q1. These convictions are classified as Class A misdemeanors pursuant to the Commission's Rules because punishment in excess of 6 months confinement is not authorized under Maryland law.

9. Petitioner stands convicted of two (2) Class B misdemeanors and three (3) Class A misdemeanors. Petitioner's application for certification is, therefore, subject to denial for an indefinite period pursuant to 12 NCAC 10B .0204(d)(5).

10. However, the record further establishes that Petitioner has committed several unlawful offenses, such that his application is subject to denial pursuant to 12 NCAC 10B .0204(d)(5) and 12 NCAC 10B .0204(a)(2).

11. Petitioner unlawfully committed the offense of Battery in the State of Maryland on or about September 20, 1990, when Petitioner punched the victim, Brad McElroy. Petitioner traveled to the victim's home in order to confront the victim about an affair. By striking Mr. McElroy with a punch, Petitioner committed the common law offense of Battery. See Ireland v. State of Maryland, 310 Md. 328; 529 A.2d 365 (1987).

12. Battery in the State of Maryland is a common law offense that carries with it a potential period of confinement greater than two (2) years. Ireland v. State of Maryland; See also Respondent's Exhibit 26 and Exhibit 27. This would pose a complete bar to Petitioner's certification pursuant to 12 NCAC 10B .0307 (a)(2) and 12 NCAC 10B .0204 (a)(2). In Ireland, the defendant was sentenced to a term of three (3) years for hitting and kicking his wife. The Maryland Court of Appeals held this punishment did not constitute cruel and unusual punishment, thereby affirming the sentence. Id. at 341. Even assuming *arguendo* that the common law does not apply, Maryland's current Code with respect to the offense of Battery specifically provides for a penalty of not more than 10 years confinement. (emphasis added) see Article 27, section 12A of the Maryland Code (1996).

13. 12 NCAC 10B .0204 (a)(2) of the Commission's Rules provides the Commission shall deny certification when the Commission finds that the applicant for certification has committed or been convicted of "a crime for which the authorized punishment could have been imprisonment for more than two years." Petitioner's commission of the offense of Battery in Maryland, whether considered a common law offense or statutory, constitutes the commission of a crime that carries with it an authorized punishment in excess of two (2) years. Petitioner is therefore not in compliance with 12 NCAC 10B .0204 (a)(2) and his application for certification is therefore subject to denial.

14. This Court further finds that Petitioner unlawfully committed the offense of Possession of Drug Paraphernalia in violation of Maryland law in 1991, MD case number 91-175. Petitioner's apartment was searched by police pursuant to a warrant, which produced marijuana in Petitioner's bedroom, accompanied by a smoking device. Prior to the administrative hearing, Petitioner admitted to the Respondent Commission that he had a smoking device in his drawer along with the marijuana on the date in question.

15. Pursuant to Maryland law at the time in question, a first conviction for the unlawful Possession of Drug Paraphernalia did not carry with it a potential maximum sentence of six (6) months or greater. See Article 27, section 287A of the Maryland Code; See also Respondent's Exhibit 23. Therefore, pursuant to the Commission's Rules, 12 NCAC 10B .0103, and the Class B Misdemeanor Manual adopted by the Respondent, Petitioner's Possession of Drug Paraphernalia in the State of Maryland in case number 91-175 constitutes the commission of a Class A misdemeanor offense.

16. This Court also finds that Petitioner committed the offense of Disorderly Conduct on or about October 6, 1987. Petitioner was intoxicated outside his dorm room which resulted in the police being called. Petitioner continued to argue with the police and refused to go back to his dorm room. This resulted in Petitioner's arrest. Disorderly conduct in Maryland is classified as a misdemeanor offense punishable by a maximum period of confinement of 90 days. See Article 27, Section 123 of the Maryland Code. The Code prohibits an individual acting in a disorderly manner to the disturbance of the peace. Under the Code, apartment houses constitute public places. The preponderance of the evidence presented at the administrative hearing establishes Petitioner committed this offense. Pursuant to the Commission's Rules, 12 NCAC 10B .0103, and the Class B Misdemeanor Manual adopted by the Respondent, Petitioner's Disorderly Conduct offense constitutes the commission of a Class A misdemeanor offense.

17. Finally, this Court concludes that Petitioner committed the Maryland common law offense of Resisting Arrest on September 5, 1988, when Petitioner attempted to drive away in a marked police vehicle and continued to fight and run from the police after Petitioner had been advised he was under arrest. As set out in greater detail in Findings of Fact numbers 33 through 38 above, Petitioner's actions on September 5, 1988 were extreme and outrageous. Petitioner struggled with police in the backseat of a patrol vehicle, after which Petitioner crawled through to the front seat of the patrol vehicle in an attempt to drive away. The patrol car was running at the time. Once police were able to remove Petitioner from the car and advise him that he was under arrest, Petitioner continued to fight and ran from the police.

18. Under Maryland law at the time in question, Resisting Arrest was a common law offense that required a showing of resistance of a lawful arrest made by an officer of the law in the performance of his official duties. See Busch v. State of Maryland, 289 Md. 669, 675; 426 A.2d 954, 957 (1981). A preponderance of the evidence presented at the administrative hearing shows Petitioner committed the misdemeanor offense of Resisting Arrest in the State of Maryland on September 5, 1988.

19. Under Maryland common law, Resisting Arrest was punishable by any period of confinement not deemed to be cruel and unusual. In the case of Preston v. Warden of Md., 225 Md. 628, 169 A.2d 407 (1961), the defendant received a 10 year active sentence for resisting arrest. The Maryland Court of Appeals held that the "sentence imposed was neither excessive nor illegal." *Id.* at 629.

It is also instructive to consider Maryland's current Code with respect to the offense of Resisting Arrest. Currently, this offense is codified in Title 9 of the Maryland Criminal Code, section 9-408. This section provides it shall be unlawful for any person to resist a lawful arrest. The offense is classified as a misdemeanor. The penalty

provides: "A person who violates this section is guilty of a misdemeanor and is subject to imprisonment not exceeding three years." MD Criminal Law Code Ann. 9-408 (2014).

20. 12 NCAC 10B .0204 (a)(2) of the Commission's Rules provides the Commission shall deny certification when the Commission finds that the applicant for certification has committed or been convicted of "a crime for which the authorized punishment could have been imprisonment for more than two years." Petitioner's commission of the offense of Resisting Arrest in Maryland, whether considered a common law offense or statutory, constitutes the commission of a crime that carries with it an authorized punishment in excess of two (2) years. Petitioner is therefore not in compliance with 12 NCAC 10B .0204 (a)(2) and his application for certification is therefore subject to denial.

21. As an applicant for certification through the Respondent Commission, the Petitioner has the burden of proof. The undersigned admires and applauds Petitioner's willingness to serve as a Deputy Sheriff. Furthermore, the undersigned recognizes that Petitioner has not committed any new offenses in over twenty years. However, the undersigned cannot ignore the multiple convictions and offenses committed. The Petitioner has failed to show by a preponderance of the evidence that the Respondent Commission improperly proposed to deny Petitioner's application for certification.

PROPOSAL FOR DECISION

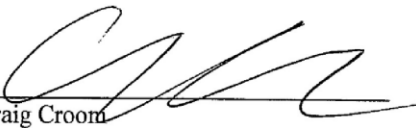
Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the undersigned recommends the Respondent deny Petitioner's application for certification. The basis of the denial is that, pursuant to 12 NCAC 10B .0204 (d)(5), Petitioner has committed or been convicted of a combination of four (4) or more Class A or Class B offenses. Petitioner's application for certification is further denied based on Petitioner having committed the offenses of Resisting Arrest and Battery in the State of Maryland, offenses that carry with them an authorized punishment in excess of two (2) years. Petitioner is therefore not in compliance with 12 NCAC 10B .0204 (a)(2).

NOTICE

The Agency making the Final Decision in this contested case are 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 Sheriffs' Education and Training Standards Commission.

This the 19th day of December, 2014.



Craig Croom
Administrative Law Judge

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
12/30/2014 12:52 PM

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14DOJ08154

COUNTY OF WAKE

Allen Leslie Jackson Petitioner	PROPOSAL FOR DECISION
v.	
N C Private Protective Services Board Respondent	

On November 18, 2014, Administrative Law Judge Randolph Ward called this case for hearing in Raleigh, North Carolina.

APPEARANCES

Petitioner appeared *pro se*.

Respondent was represented by attorney Jeffrey P. Gray, Bailey & Dixon, LLP, P.O. Box 1351, Raleigh, North Carolina 27602.

ISSUE

Whether Petitioner should be denied an unarmed guard registration based on Petitioner's lack of good moral character and temperate habits as evidenced by four (4) convictions of driving under the influence in the Commonwealth of Pennsylvania.

APPLICABLE STATUTES AND RULES

Official notice is taken of the following statutes and rules applicable to this case:
N.C.G.S. §§ 74C-8(d)(2); 74C-9; 74C-11(a); 74C-12(a)(1), (9) & (30); 12 NCAC 7D § .0700.

FINDINGS OF FACT

1. Respondent Board is established pursuant to N.C. Gen. Stat. §74C-1, *et seq.*, and is charged with the duty of licensing and registering individuals engaged in the armed and unarmed security guard and patrol business.
2. Petitioner applied to Respondent Board for an unarmed guard registration.
3. Respondent denied the unarmed guard registration due to Petitioner's criminal record

which showed the following:

A conviction in Allegheny County, Commonwealth of Pennsylvania, on October 27, 2010 for Driving While BAC .02 or Greater While License Suspended

A conviction in Allegheny County, Commonwealth of Pennsylvania, on October 27, 2010 for DUI: Highest RTE of ALC (BAC .16+); 2nd offense

A conviction in Allegheny County, Commonwealth of Pennsylvania, on October 27, 2010 for DUI: GEN IMP/INC of Driving Safely; 2nd offense

A conviction in Allegheny County, Commonwealth of Pennsylvania, on October 27, 2010 for DUI: GEN IMP/INC of Driving Safely; 1st offense

4. Petitioner requested a hearing on Respondent's denial of the unarmed guard registration.
5. By Notice of Hearing dated October 22, 2014, and mailed via certified mail, Respondent advised Petitioner that a hearing on the denial of his unarmed guard registration would be held at the Office of Administrative Hearings, 1711 New Hope Church Road, Raleigh, North Carolina 27609 on November 18, 2014. Petitioner appeared at the hearing.
6. Petitioner's Criminal History Record Check, which showed the above, was admitted into evidence as part of Respondent's Exhibit 1, Petitioner's application.
7. Petitioner testified that in 2010, he was living in Pittsburgh, PA. He stated that the incident at issue resulted from him feeling depressed over the loss of his grandmother. He had gone to a local bar to have a drink. He stated that he left the bar around 8:30 p.m. to drive home. He ran a stop sign and was pulled over by a police officer. The police officer transported him to the emergency room where blood was drawn. The court found him guilty of DUI.
8. Petitioner further testified that he actually only has two (2) DUI offenses, not three (3). On his Criminal History Record Check, one (1) offense is listed twice. The 1st offense (which was from 2003) was heard at the same time as the 2nd offense.
9. Petitioner played professional basketball for the Canada Ducks from 1994 to 2000 and had previously played college basketball for USC, but was "redshirted."
10. Petitioner's driver's license was suspended, but restored. He drove a truck for the City of Pittsburgh while living in Pennsylvania and had a Commercial Driver's License (CDL). He continues to have a CDI.
11. Petitioner has a 21-year old son.
12. Petitioner considers himself to be an outstanding person and feels that the DUI charges

do not reflect who he is.

13. Petitioner worked for On Guard Security at a mall in Charlotte, patrolling the area to deter crime.

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.
2. Under G.S. §74C-12(a)(25), Respondent Board may refuse to grant a registration if it is determined that the applicant has demonstrated intemperate habits or lacks good moral character.
3. Under G.S. §74C-8(d)(2), conviction of any crime involving an act of multiple offenses of Driving While Impaired, crimes involving alcoholic beverages, is *prima facie* evidence that the applicant does not have good moral character or temperate habits.
4. Respondent Board presented evidence that Petitioner had demonstrated intemperate habits and lacked good moral character through conviction in Allegheny County, Commonwealth of Pennsylvania for not less than two convictions of Driving While Impaired for offenses committed on separate occasions, years apart.

Based on the foregoing, the undersigned makes the following:

FINAL DECISION


Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby recommends that Petitioner be denied an unarmed guard registration.

NOTICE AND ORDER

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

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

This the 30th day of December, 2014.

A handwritten signature in black ink, appearing to read 'J. Randolph Ward', written over a horizontal line.

J. Randolph Ward
Administrative Law Judge