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Contact List for Rulemaking Questions or Concerns

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

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

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NORTH CAROLINA REGISTER
Publication Schedule for January 2015 – December 2015

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

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EXPLANATION OF THE PUBLICATION SCHEDULE

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

GENERAL

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

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

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

FILING DEADLINES

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

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

NOTICE OF TEXT

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

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

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

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

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Notice of ***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 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Notice *is hereby given in accordance with G.S. 150B-21.2 that the Environmental Management Commission intends to amend the rules cited as 15A NCAC 02D .0410, .0544; 02Q .0206, .0304, .0502, .0507.*

Link to agency website pursuant to G.S. 150B-19.1(c): *http://ncair.org/rules/hearing/*

Proposed Effective Date: *September 1, 2015*

Public Hearing:
Date: *June 9, 2015*
Time: *3:00 p.m.*
Location: *Training Room (#1210), DENR Green Square Office Building, 217 West Jones St., Raleigh, NC 27603*

Reason for Proposed Action: *On June 23, 2014, the United States Supreme Court issued a decision in Utility Air Regulatory Group (UARG) v. Environmental Protection Agency (EPA) that the EPA may not treat greenhouse gases as an air pollutant for the purposes of determining whether a source is a major source required to obtain a PSD or Title V permit. Rule 15A NCAC 02D .0544, Prevention of Significant Deterioration (PSD) Requirements for Greenhouse Gases (GHG), is proposed for amendment to remove the requirement that major stationary sources obtain a PSD permit on the sole basis of its GHG emissions. The rule is also proposed for amendment to update the global warming potentials for GHGs. Rule 15A NCAC 02Q .0502, Applicability, is proposed for amendment to remove the requirement that facilities obtain a Title V permit on the sole basis of its GHG emissions.*
The US EPA strengthened its National Ambient Air Quality Standards (NAAQS) for particulate matter, also known as PM2.5, on December 14, 2012. 15A NCAC 02D .0410 is proposed to be amended to reflect the revised standard.
In response to statutory revisions in North Carolina Session Law 2014-120, the Division of Air Quality (DAQ) is proposing changes to its source reduction and recycling reporting requirement Rules 15A NCAC 02Q .0206, Payment of Fees; .0304, Applications; and .0507, Application. In the existing rules, facilities holding permits are required to submit a written description of current and projected plans to reduce air contaminant emissions by source reduction and recycling. The revised statute reflects repeal of the three source reduction and recycling reporting requirement.

Comments may be submitted to: *Joelle Burleson, 1641 Mail Service Center, Raleigh, NC 27699-1641, phone (919) 707-8720, fax (919) 707-8720, or email daq.publiccomments@ncdenr.gov (please type June 9, 2015 Hearing Comments in the subject line)*

Comment period ends: *June 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** *15A NCAC 02D .0544; 02Q .0502*
☐ **Environmental permitting of DOT affected**
Analysis submitted to Board of Transportation
☐ **Local funds affected**
☐ **Substantial economic impact (≥$1,000,000)**
☒ **Approved by OSBM** *15A NCAC 02D .0544, 02Q .0502*
☒ **No fiscal note required by G.S. 150B-21.4** *15A NCAC 02D .0410; 02Q .0206, .0304, .0507*

CHAPTER 02 – ENVIRONMENTAL MANAGEMENT

SUBCHAPTER 02D – AIR POLLUTION CONTROL REQUIREMENTS

SECTION .0400 – AMBIENT AIR QUALITY STANDARDS

15A NCAC 02D .0410 PM2.5 PARTICULATE MATTER
(a) The national primary ambient air quality standards for ~~PM2.5 particulate matter are:~~

~~(1) 15.0 micrograms per cubic meter (ug/m3), annual arithmetic mean concentration; and~~
~~(2) 35 micrograms per cubic meter (ug/m3), 24-hour average concentration.~~

PM2.5 are 12.0 micrograms per cubic meter (µg/m^3) annual arithmetic mean concentration and 35 µg/m^3 24-hour average Concentration measured in the ambient air as PM2.5 (particles

with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers) by either:

(1) A reference method based on appendix L to 40 C.F.R. Part 50 and designated in accordance with 40 C.F.R. Part 53; or

(2) An equivalent method designated in accordance with 40 C.F.R. Part 53.

~~These standards are attained when the annual arithmetic mean concentration is less than or equal to 15.0 ug/m3 and when the 98th percentile 24 hour concentration is less than or equal to 35 ug/m3, as determined according to Appendix N of 40 CFR Part 50.~~

(b) The primary annual PM2.5 standard is met when the annual arithmetic mean concentration, as determined in accordance with appendix N of 40 C.F.R. Part 50, is less than or equal to 12.0 $\mu g/m^3$.

~~(b) For the purpose of determining attainment of the standards in Paragraph (a) of this Rule, particulate matter shall be measured in the ambient air as PM2.5 (particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers) by either:~~

~~(1) a reference method based on Appendix L of 40 CFR Part 50 and designed according to 40 CFR Part 53; or~~

~~(2) an equivalent method designed according to 40 CFR Part 53.~~

(c) The primary 24-hour PM2.5 standard is met when the 98th percentile 24-hour concentration, as determined in accordance with appendix N of 40 C.F.R. Part 50, is less than or equal to 35 $\mu g/m^3$.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(3).

SECTION .0500 – EMISSION CONTROL STANDARDS

15A NCAC 02D .0544 PREVENTION OF SIGNIFICANT DETERIORATION REQUIREMENTS FOR GREENHOUSE GASES

(a) The purpose of this Rule is to implement a program for the prevention of significant deterioration of air quality for greenhouse gases as required by 40 CFR 51.166. For purposes of greenhouse gases, the provisions of this Rule shall apply rather than the provisions of Rule .0530 of this Section. A major stationary source or major modification shall not be required to obtain a prevention of significant deterioration (PSD) permit on the sole basis of its greenhouse gases emissions. For all other regulated new source review (NSR) pollutants, the provisions of Rule .0530 of this Section apply.

(b) For the purposes of this Rule, the definitions contained in 40 CFR 51.166(b) and 40 CFR 51.301 shall apply except the definition of "baseline actual emissions." "Baseline actual emissions" means the rate of emissions, in tons per year, of a regulated NSR pollutant, as determined in accordance with Subparagraphs (1) through (3) of this Paragraph:

(1) For an existing emissions unit, baseline actual emissions means the average rate, in tons per year, at which the emissions unit ~~actually~~ emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the 5-year period ~~immediately~~ preceding the date that a complete permit application is received by the Division for a permit required under this Rule. The Director shall allow a different time period, not to exceed 10 years ~~immediately~~ preceding the date that a complete permit application is received by the Division, if the owner or operator demonstrates that it is more representative of normal source operation. For the purpose of determining baseline actual emissions, the following shall apply:

(A) The average rate shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions;

(B) The average rate shall be adjusted downward to exclude any non-compliant emissions that occurred while the source was operating above any emission limitation that was legally enforceable during the consecutive 24-month period;

(C) For an existing emission unit (other than an electric utility steam generating unit), the average rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source ~~must~~ shall currently comply. However, if the State has taken credit in an attainment demonstration or maintenance plan consistent with the requirements of 40 CFR 51.165(a)(3)(ii)(G) for an emission limitation that is part of a maximum achievable control technology standard that the Administrator proposed or promulgated under part 63 of the Code of Federal Regulations, the baseline actual emissions shall be adjusted to account for such emission reductions;

(D) For an electric utility steam generating unit, the average rate shall be adjusted downward to reflect any emissions reductions under G.S. 143-215.107D and for which cost recovery is sought pursuant to G.S. 62-133.6;

(E) For a regulated NSR pollutant, when a project involves multiple emissions units, only one consecutive 24-month period shall be used to determine the baseline actual emissions for all the emissions units being changed. A different consecutive 24-month period for each regulated NSR pollutant can be used for each regulated NSR pollutant; and

(F) The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount if required by Parts (B) and (C) of this Subparagraph;

(2) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit; and

(3) For a plantwide applicability limit (PAL) for a stationary source, the baseline actual emissions shall be calculated for existing emissions units in accordance with the procedures contained in Subparagraph (1) of this Paragraph and for a new emissions unit in accordance with the procedures contained in Subparagraph (2) of this Paragraph.

(c) In the definition of "net emissions increase," the reasonable period specified in 40 CFR 51.166(b)(3)(ii) shall be seven years.

(d) In the definition of "subject to regulation", a greenhouse gas's global warming potential is the global warming potential published at Table A-1 of Subpart A of 40 CFR Part 98 and shall include subsequent amendments and editions.

~~(d)~~(e) The limitation specified in 40 CFR 51.166(b)(15)(ii) shall not apply.

~~(e)~~(f) Major stationary sources and major modifications shall comply with the requirements contained in 40 CFR 51.166(i) and (a)(7) and by extension in 40 CFR 51.166(j) through (o) and (w). The transition provisions allowed by 40 CFR 52.21 (i)(11)(i) and (ii) and (m)(1)(vii) and (viii) are hereby adopted under this Rule. The minimum requirements described in the portions of 40 CFR 51.166 referenced in this Paragraph are hereby adopted as the requirements to be used under this Rule, except as otherwise provided in this Rule. Wherever the language of the portions of 40 CFR 51.166 referenced in this Paragraph speaks of the "plan," the requirements described therein shall apply to the source to which they pertain, except as otherwise provided in this Rule. Whenever the portions of 40 CFR 51.166 referenced in this Paragraph provide that the State plan may exempt or not apply certain requirements in certain circumstances, those exemptions and provisions of nonapplicability are also hereby adopted under this Rule. However, this provision shall not be interpreted so as to limit information that may be requested from the owner or operator by the Director as specified in 40 CFR 51.166(n)(2).

~~(f)~~(g) 40 CFR 51.166(w)(10)(iv)(a) is changed to read: "If the emissions level calculated in accordance with Paragraph (w)(6) of this Section is equal to or greater than 80 percent of the PAL [plant wide applicability limit] level, the Director shall renew the PAL at the same level." 40 CFR 51.166(w)(10)(iv)(b) is not incorporated by reference.

~~(g)~~(h) 15A NCAC 02Q .0102 and .0302 are not applicable to any source to which this Rule applies. The owner or operator of the sources to which this Rule applies shall apply for and receive a permit as required in 15A NCAC 02Q .0300 or .0500.

~~(h)~~(i) When a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation ~~which~~ that was established after August 7, 1980, on the capacity of the source or modification to emit a pollutant, such as a restriction on hours of operation, then the provisions of this Rule shall apply to the source or modification as though construction had not yet begun on the source or modification.

~~(i)~~(j) The provisions of 40 CFR 52.21(r)(2) regarding the period of validity of approval to construct are incorporated by reference except that the term "Administrator" is replaced with "Director".

~~(j)~~(k) Permits may be issued based on innovative control technology as set forth in 40 CFR 51.166(s)(1) if the requirements of 40 CFR 51.166(s)(2) have been met, subject to the condition of 40 CFR 51.166(s)(3), and with the allowance set forth in 40 CFR 51.166(s)(4).

~~(k)~~(l) A permit application subject to this Rule shall be processed in accordance with the procedures and requirements of 40 CFR 51.166(q). Within 30 days of receipt of the application, applicants shall be notified if the application is complete as to initial information submitted. Commencement of construction before full prevention of significant deterioration approval is obtained constitutes a violation of this Rule.

~~(l)~~(m) Approval of an application with regard to the requirements of this Rule shall not relieve the owner or operator of the responsibility to comply ~~fully~~ with applicable provisions of other rules of this Subchapter or Subchapter 02Q of this Title and any other requirements under local, state, or federal law.

~~(m)~~(n) If the owner or operator of a source is using projected actual emissions to avoid applicability of prevention of significant deterioration requirements, the owner or operator shall notify the Director of the modification before beginning actual construction. The notification shall include:

(1) a description of the project;

(2) identification of sources whose emissions could be affected by the project;

(3) the calculated projected actual emissions and an explanation of how the projected actual emissions were calculated, including identification of emissions excluded by 40 CFR 51.166(b)(40)(ii)(c);

(4) the calculated baseline actual emissions and an explanation of how the baseline actual emissions were calculated; and

(5) any netting ~~calculations~~ calculations, if applicable.

If upon reviewing the notification, the Director finds that the project will cause a prevention of significant deterioration evaluation, then the Director shall notify the owner or operator of his or her findings. The owner or operator shall not make the modification until the owner or operator has received a permit issued pursuant to this Rule. If a permit revision is not required pursuant to this Rule, the owner or operator shall maintain records of annual emissions in tons per year, on a calendar year basis related to the modifications for 10 years following resumption of regular operations after the change if the project involves increasing the emissions unit's design capacity or its potential to emit the regulated NSR pollutant; otherwise these records shall be maintained for five years following resumption of regular

operations after the change. The owner or operator shall submit a report to the Director within 60 days after the end of each year during which these records must be generated. The report shall contain the items listed in 40 CFR 51.166(r)(6)(v)(a) through (c). The owner or operator shall make the information documented and maintained under this Paragraph available to the Director or the general public pursuant to the requirements in 40 CFR 70.4(b)(3)(viii).

~~(n)~~(o) The references to the Code of Federal Regulations (CFR) in this Rule are incorporated by reference unless a specific reference states otherwise. The version of the CFR incorporated in this Rule is that as of July 20, 2011 as set forth here http://www.gpo.gov/fdsys/pkg/CFR-2011-title40-vol2/pdf/CFR-2011-title40-vol2-sec51-166.pdf, http://www.gpo.gov/fdsys/pkg/CFR-2011-title40-vol3/pdf/CFR-2011-title40-vol3-sec52-21.pdf, and with the amendment set forth on 76 FR 43507 at http://www.gpo.gov/fdsys/pkg/FR-2011-07-20/pdf/2011-17256.pdf and does not include any subsequent amendments or editions to the referenced material. This Rule is applicable in accordance with 40 CFR 51.166(b)(48) and (b)(49)(iv) and (v).

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(3); 143-215.107(a)(5); 143-215.107(a)(7); 143-215.108(b); 150B-21.6.

SUBCHAPTER 02Q – AIR QUALITY PERMITS PROCEDURES

SECTION .0200 – PERMIT FEES

15A NCAC 02Q .0206 PAYMENT OF FEES

(a) Payment of fees required under this Section may be by check or money order made payable to the N.C. Department of ~~Environment, Health~~ Environment and Natural Resources. Annual permit fee payments shall refer to the permit number.

(b) If, within 30 days after being billed, the permit holder fails to pay an annual fee required under this Section, the Director may initiate action to terminate the permit under Rule .0309 or .0519 of this Subchapter, as appropriate.

(c) A holder of multiple permits may arrange to consolidate the payment of annual fees into one annual payment.

~~(d) The permit holder shall submit a written description of current and projected plans to reduce the emissions of air contaminants by source reduction and recycling in accordance with G.S. 143-215.108(g) along with the annual permit fee payment. The description shall include a summary of activities related to source reduction and recycling and a quantification of air emissions reduced and material recycled during the previous year and a summary of plans for further source reduction and recycling.~~

~~(e)~~(d) The payment of the permit application fee required by this Section shall accompany the application and is non-refundable.

~~(f)~~(e) The Division shall annually prepare and make publicly available an accounting showing aggregate fee payments collected under this Section from facilities which have obtained or will obtain permits under Section .0500 of this Subchapter except synthetic minor facilities and showing a summary of reasonable direct and indirect expenditures required to develop and administer the Title V permit program.

Authority G.S. 143-215.3(a)(1),(1a),(1b),(1d); 150B-21.6.

SECTION .0300 – CONSTRUCTION AND OPERATION PERMITS

15A NCAC 02Q .0304 APPLICATIONS

(a) Obtaining and filing application. Permit, permit modification, or permit renewal applications may be obtained and shall be filed in writing according to Rule .0104 of this Subchapter.

(b) Information to accompany application. Along with filing a complete application form, the applicant shall also file the following:

(1) for a new facility or an expansion of existing facility, a consistency determination according to G.S. 143-215.108(f) that:
  (A) bears the date of receipt entered by the clerk of the local government, or
  (B) consists of a letter from the local government indicating that all zoning or subdivision

ordinances are met by the facility;

(2) for a new facility or an expansion of existing facility in an area without zoning, an affidavit and proof of publication of a legal notice as required under Rule .0113 of this Subchapter;

~~(3) for a new facility or modification of an existing facility, a written description of current and projected plans to reduce the emissions of air contaminants by source reduction and recycling according to G.S.143-215.108(g); the description shall include:~~
  ~~(A) for an existing facility, a summary of activities related to source reduction and recycling and a quantification of air emissions reduced and material recycled during the previous year and a summary of plans for further source reduction and recycling; or~~
  ~~(B) for a new facility, a summary of activities related to and plans for source reduction and recycling; and~~

~~(4)~~(3) for permit renewal, an emissions inventory that contains the information specified under 15A NCAC 02D .0202, Registration of Air Pollution Sources (the applicant may use emission inventory forms provided by the Division to satisfy this requirement); and

~~(5)~~(4) documentation showing the applicant complies with Parts (A) or (B) of this Subparagraph if the Director finds this information necessary to evaluate the source, its air pollution abatement equipment, or the facility:
  (A) The applicant is financially qualified to carry out the permitted activities, or
  (B) The applicant has substantially complied with the air quality and emissions standards applicable to any activity in which the applicant has previously been engaged, and has been

in substantial compliance with federal and state environmental laws and rules.

(c) When to file application. For sources subject to the requirements of 15A NCAC 02D .0530 (prevention of significant deterioration) or .0531 (new source review for sources in nonattainment areas), applicants shall file air permit applications at least 180 days before the projected construction date. For all other sources, applicants shall file air permit applications at least 90 days before the projected date of construction of a new source or modification of an existing source.

(d) Permit renewal, name, or ownership changes with no modifications. If no modification has been made to the originally permitted source, application for permit change may be made by letter to the Director at the address specified in Rule .0104 of this Subchapter. The permit renewal, name, or ownership change letter must state that there have been no changes in the permitted facility since the permit was last issued. However, the Director may require the applicant for ownership change to submit additional information, if the Director finds the following information necessary to evaluate the applicant for ownership change, showing that:

(1) The applicant is financially qualified to carry out the permitted activities, or

(2) The applicant has substantially complied with the air quality and emissions standards applicable to any activity in which the applicant has previously been engaged, and has been in substantial compliance with federal and state environmental laws and rules.

To make a name or ownership change, the applicant shall send the Director the number of copies of letters specified in Rule .0305(a)(3)or (4) of this Section signed by a person specified in Paragraph (j) of this Rule.

(e) Applications for date and reporting changes. Application for changes in construction or test dates or reporting procedures may be made by letter to the Director at the address specified in Rule .0104 of this Subchapter. To make changes in construction or test dates or reporting procedures, the applicant shall send the Director the number of copies of letters specified in Rule .0305(a)(5) of this Section signed by a person specified in Paragraph (j) of this Rule.

(f) When to file applications for permit renewal. Applicants shall file applications for renewals such that they are mailed to the Director at the address specified in Rule .0104 of this Subchapter and postmarked at least 90 days before expiration of the permit.

(g) Name, or ownership change. The permittee shall file requests for permit name or ownership changes as soon as the permittee is aware of the imminent name or ownership change.

(h) Number of copies of additional information. The applicant shall submit the same number of copies of additional information as required for the application package.

(i) Requesting additional information. Whenever the information provided on the permit application forms does not adequately describe the source and its air cleaning device, the Director may request that the applicant provide any other information that the Director considers necessary to evaluate the source and its air cleaning device. Before acting on any permit application, the Director may request any information from an applicant and conduct any inquiry or investigation that he considers necessary to determine compliance with applicable standards.

(j) Signature on application. Permit applications submitted pursuant to this Rule shall be signed as follows:

(1) for corporations, by a principal executive officer of at least the level of vice-president, or his duly authorized representative, if such representative is responsible for the overall operation of the facility from which the emissions described in the permit application form originates;

(2) for partnership or limited partnership, by a general partner;

(3) for a sole proprietorship, by the proprietor;

(4) for municipal, state, federal, or other public entity, by a principal executive officer, ranking elected official, or other duly authorized employee.

(k) Application fee. With the exceptions specified in Rule .0203(i) of this Subchapter, a non-refundable permit application processing fee shall accompany each application. The permit application processing fees are defined in Section .0200 of this Subchapter. A permit application is incomplete until the permit application processing fee is received.

(l) Correcting submittals of incorrect information. An applicant has a continuing obligation to submit relevant facts pertaining to his permit application and to correct incorrect information on his permit application.

(m) Retaining copy of permit application package. The applicant shall retain for the duration of the permit term one complete copy of the application package and any information submitted in support of the application package.

Authority G.S. 143-215.3(a)(1); 143-215.108.

SECTION .0500 – TITLE V PROCEDURES

15A NCAC 02Q .0502 APPLICABILITY

(a) Except as provided in Paragraph (b) or (c) of this Rule, the following facilities are required to obtain a permit under this Section:

(1) major facilities;

(2) facilities with a source subject to 15A NCAC 02D .0524 or 40 CFR Part 60, except new residential wood heaters;

(3) facilities with a source subject to 15A NCAC 02D .1110 or 40 CFR Part 61, except asbestos demolition and renovation activities;

(4) facilities with a source subject to 15A NCAC 02D .1111 or 40 CFR Part 63 or any other standard or other requirement under Section 112 of the federal Clean Air Act, except that a source is not required to obtain a permit solely because it is subject to rules or requirements under Section 112(r) of the federal Clean Air Act;

(5) facilities to which 15A NCAC 02D .0517(2), .0528, .0529, or .0534 applies;

(6) facilities with a source subject to Title IV or 40 CFR Part 72; or

(7) facilities in a source category designated by EPA as subject to the requirements of 40 CFR Part 70.

(b) This Section does not apply to minor facilities with sources subject to requirements of 15A NCAC 02D .0524, .1110, or .1111 or 40 CFR Part 60, 61, or 63 until EPA requires these facilities to have a permit under 40 CFR Part 70.

(c) A facility shall not be required to obtain a permit under this Section on the sole basis of its greenhouse gas emissions.

~~(c)~~(d) Once a facility is subject to this Section because of emissions of one pollutant, the owner or operator of that facility shall submit an application that includes all sources of all regulated air pollutants located at the facility except for insignificant activities because of category.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(10); 143-215.108.

15A NCAC 02Q .0507 APPLICATION

(a) Except for:

(1) minor permit modifications covered under Rule .0515 of this Section,

(2) significant modifications covered under Rule .0516(c) of this Section, or

(3) permit applications submitted under Rule .0506 of this Section,

the owner or operator of a source shall have one year from the date of beginning of operation of the source to file a complete application for a permit or permit revision. However, the owner or operator of the source shall not begin construction or operation until he has obtained a construction and operation permit pursuant to Rule .0501(c) or (d) and Rule .0504 of this Section.

(b) The application shall include all the information described in 40 CFR 70.3(d) and 70.5(c), including a list of insignificant activities because of size or production rate; but not including insignificant activities because of category. The application form shall be certified by a responsible official for truth, accuracy, and completeness. In the application submitted pursuant to this Rule, the applicant may attach copies of applications submitted pursuant to Section .0400 of this Subchapter or 15A NCAC 02D .0530 or .0531, provided the information in those applications contains information required in this Section and is current, valid, and complete.

(c) Application for a permit, permit revision, or permit renewal shall be made in accordance with Rule .0104 of this Subchapter on forms of the Division and shall include plans and specifications giving all necessary data and information as required by this Rule. Whenever the information provided on these forms does not describe the source or its air pollution abatement equipment to the extent necessary to evaluate the application, the Director may request that the applicant provide any other information that the Director considers necessary to evaluate the source and its air pollution abatement equipment.

(d) Along with filing a complete application form, the applicant shall also file the following:

(1) for a new facility or an expansion of existing facility, a consistency determination in accordance with G.S. 143-215.108(f) that:

(A) bears the date of receipt entered by the clerk of the local government, or

(B) consists of a letter from the local government indicating that all zoning or subdivision ordinances are met by the facility;

(2) for a new facility or an expansion of an existing facility in an area without zoning, an affidavit and proof of publication of a legal notice as required under Rule .0113 of this Subchapter; and

~~(3) for a new facility or modification of an existing facility, a written description of current and projected plans to reduce the emissions of air contaminants by source reduction and recycling in accordance with G.S. 143-215.108(g); the description shall include:~~

~~(A) for an existing facility, a summary of activities related to source reduction and recycling and a quantification of air emissions reduced and material recycled during the previous year and a summary of plans for further source reduction and recycling; or~~

~~(B) for a new facility, a summary of activities related to and plans for source reduction and recycling; and~~

~~(4)~~(3) if required by the Director, information showing that:

(A) The applicant is financially qualified to carry out the permitted activities, or

(B) The applicant has substantially complied with the air quality and emissions standards applicable to any activity in which the applicant has previously been engaged, and has been in substantial compliance with federal and state environmental laws and rules.

(e) The applicant shall submit copies of the application package as follows:

(1) for sources subject to the requirements of 15A NCAC 02D .0530, .0531, or .1200, six copies plus one additional copy for each affected state that the Director has to notify;

(2) for sources not subject to the requirements of 15A NCAC 02D .0530, .0531, or .1200, four copies plus one additional copy for each affected state that the Director has to notify.

The Director may at any time during the application process request additional copies of the complete application package from the applicant.

(f) Any applicant who fails to submit any relevant facts or who has submitted incorrect information in a permit application shall, upon becoming aware of such failure or incorrect submittal, submit, as soon as possible, such supplementary facts or corrected

information. In addition, an applicant shall provide additional information as necessary to address any requirements that become applicable to the source after the date he filed a complete application but prior to release of a draft permit.
(g) The applicant shall submit the same number of copies of additional information as required for the application package.
(h) The submittal of a complete permit application shall not affect the requirement that any facility have a preconstruction permit under 15A NCAC 02D .0530, .0531, or .0532 or under Section .0400 of this Subchapter.
(i) The Director shall give priority to permit applications containing early reduction demonstrations under Section 112(i)(5) of the federal Clean Air Act. The Director shall take final action on such permit applications as soon as practicable after receipt of the complete permit application.
(j) With the exceptions specified in Rule .0203(i) of this Subchapter, a non-refundable permit application processing fee shall accompany each application. The permit application processing fees are defined in Section .0200 of this Subchapter. Each permit or renewal application is incomplete until the permit application processing fee is received.
(k) The applicant shall retain for the duration of the permit term one complete copy of the application package and any information submitted in support of the application package.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(10); 143-215.108.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 46 – BOARD OF PHARMACY

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the Board of Pharmacy intends to amend the rule cited as 21 NCAC 46 .1801.*

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

Proposed Effective Date: *August 1, 2015*

Public Hearing:
Date: *June 16, 2015*
Time: *9:00 a.m.*
Location: *North Carolina Board of Pharmacy, 6015 Farrington Rd., Suite 201, Chapel Hill, NC 27517*

Reason for Proposed Action: *The Board proposes amending the rule regarding refusal of a prescription in order to judge the validity of prescriptions by reference to the standards set by the occupational licensing boards of the prescribers, rather than by attempting to enumerate those standards in the rule, in light of changing standards set by other boards for those prescribers.*

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

Comment period ends: *9:00 a.m., June 16, 2015*

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

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

SECTION .1800 – PRESCRIPTIONS

21 NCAC 46 .1801 RIGHT TO REFUSE A PRESCRIPTION

(a) A pharmacist or device and medical equipment dispenser ~~may~~ has a right to refuse to fill or refill a prescription order ~~order, if,~~ if doing so would be contrary to his or her ~~in his~~ professional judgment. ~~judgment, it would be harmful to the recipient, is not in the recipient's best interest or if there is a question as to its validity.~~
(b) A pharmacist or device and medical equipment dispenser shall not fill or refill a prescription order if, in the exercise of professional judgment, there is or reasonably should be a question regarding the order's accuracy, validity, authenticity, or safety for the patient. ~~the order was issued without a physical examination of the patient and in the absence of a prior prescriber-patient relationship, unless:~~

~~(1) the prescription order was issued for the patient by a psychiatrist;~~
~~(2) the prescription order was issued for the patient after discussion of the patient status with a treating psychologist, therapist, or physician;~~
~~(3) the prescription order was ordered by a physician for flu vaccinations for groups of patients or members of the public;~~
~~(4) the prescription order was for prophylactic purposes, such as the ordering of antibiotics by a pediatrician for members of a child's family when the child has a positive strep test;~~

~~(5) the prescription order was an emergency order for medication related to pregnancy prevention; or~~

~~(6) the prescription was an order for medications to be taken by groups traveling to foreign countries.~~

(c) A prescription order is valid only if it is a lawful order for a drug, device or medical equipment issued by a health care provider for a legitimate medical purpose, in the context of a valid patient-prescriber relationship, and in the course of legitimate professional practice as recognized by the occupational licensing board governing the health care provider.

Authority G.S. 90-85.6; 90-85.32.

This Section contains information for the meeting of the Rules Review Commission on March 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

April 16, 2015	May 21, 2015
June 18, 2015	July 16, 2015

RULES REVIEW COMMISSION MEETING
MINUTES
March 19, 2015

The Rules Review Commission met on Thursday, March 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, Stephanie Simpson, and Faylene Whitaker.

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 10:04 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 February 19, 2015 meeting. There were none and the minutes were approved as distributed.

FOLLOW UP MATTERS
Board of Physical Therapy Examiners
No action was required by the Commission. The review of 21 NCAC 48C .0104 will be at the May meeting.

LOG OF FILINGS (PERMANENT RULES)
Pesticide Board
02 NCAC 09L .0707 was unanimously approved.

Office of the Commissioner of Banks
All rules were unanimously approved.

Medical Care Commission
All rules were unanimously approved.

Frances Messer from the North Carolina Assisted Living Association addressed the Commission.

Commission for Public Health
All rules were unanimously approved.

Department of Transportation/Division of Motor Vehicles
19A NCAC 03B .0201 was unanimously approved.

Acupuncture Licensing Board
The Rules Review Commission extended the period of review on the rules in accordance with G.S. 150B-21.10 and G.S. 150B-21.13. The Commission extended the period of review to allow the Acupuncture Licensing Board additional time to revise the rules in response to technical change requests.

Board of Dental Examiners
All rules were unanimously approved.

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

Irrigation Contractors Licensing Board
All rules were unanimously approved, with the exception of Rule 21 NCAC 23 .0105. The Commission objected to the rule, finding the agency does not have statutory authority to promulgate the rule and that the text within the rule was ambiguous. The Board failed to cite to any authority for the agency to create a code of ethics. In addition, the rule text failed to define terms used within the rule, such as “defamation” and “harassment.” In addition, the Board did not say when the discipline will occur. Therefore, the rule is unclear and ambiguous.

Prior to the review of the rules from the Irrigation Contractors Licensing Board, Commissioner Whitaker recused herself and did not participate in any discussion or vote concerning these rules because the rules affect her business.

Tina Simpson, attorney to the Board, addressed the Commission.

Board of Physical Therapy Examiners
21 NCAC 48G .0109 was unanimously approved.

Board of Refrigeration Examiners
21 NCAC 60 .0102 was unanimously approved.

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

State Human Resources Commission
All rules were approved with the following exceptions:

25 NCAC 01D .2701 and 25 NCAC 01J .0618 were withdrawn at the request of the agency. Therefore, there was no action for the Commission to take on these rules.

The Commission objected to 25 NCAC 01C .0311, as the rule is not reasonably necessary to implement or interpret an enactment of the General Assembly, as required by G.S. 150B-21.9(a)(3). A majority of the rule is repetitive of G.S. 126-25.

The Commission objected to 25 NCAC 01E .1603, as the rule is not within the authority delegated to the agency by the General Assembly, as required by G.S. 150B-21.9(a)(1). The rule caps a literacy program at 45 hours per year.

The Commission objected to 25 NCAC 01H .1103, as the rule is not reasonably necessary to implement or interpret an enactment of the General Assembly, as required by G.S. 150B-21.9(a)(3). A majority of the rule is repetitive of G.S. 126-34.02.

The Commission objected to 25 NCAC 01J .1304, as the rule is not within the authority delegated to the agency by the General Assembly, as required by G.S. 150B-21.9(a)(1). The rule subjects orders to the approval of the Office of State Human Resources.

Prior to the review of the rules from the State Human Resources Commission, Commissioner Doran recused herself and did not participate in any discussion or vote concerning these rules because she is a state employee in a supervisory position over state employees.
Attorney Michael Byrne addressed the Commission.

Valerie Bateman from the agency addressed the Commission.

Nancy Lipscomb from the agency addressed the Commission.

The Honorable Don Overby from the OAH addressed the Commission.

Building Code Council
The Commission objected to all rules for failure to comply with G.S. 150B. The Council published these Rules in the NC Register, Volume 29, Issue 4, stating that the amendments and adoptions would not become effective until January 1, 2016. The Council then proposed to have the rule changes become effective April 1, 2015. The Commission found that the change to the effective date made to the rules following publication created a substantial change pursuant to G.S. 150B-21.2(g).

Barry Gupton from the agency addressed the Commission.

LOG OF RULES (TEMPORARY RULES)
Wildlife Resources Commission
15A NCAC 10F .0333 was withdrawn at the request of the agency. Therefore, there was no action for the Commission to take.

EXISTING RULES REVIEW
Rural Electrification Authority
04 NCAC 08 – The Commission unanimously approved the report as submitted by the agency.

Department of Health and Human Services
10A NCAC 05 – The Commission unanimously approved the report as submitted by the agency.

Child Care Commission
10A NCAC 09 – The Commission unanimously approved the report as submitted by the agency.

Board of Optometry Examiners
21 NCAC 42 – The Commission unanimously approved the report as submitted by the agency.

COMMISSION BUSINESS
Staff gave the Commission a brief legislative update.

The Commission discussed changing the June meeting dates to June 16th and June 17th.

At 11:55 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.

The Commission came out of closed session and reconvened at 12:56 p.m.

The meeting adjourned at 12:57 p.m.

The next regularly scheduled meeting of the Commission is scheduled for Thursday, April 16th 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,

_____

Alexander Burgos, Paralegal

Minutes approved by the Rules Review Commission:

_____

Garth Dunklin, Chair

March 2015

Rules Review Commission
Meeting
Please **Print** Legibly

Name	Agency
Frances Messer, Ex Director	North Carolina Assisted Living Assn
Evelyn Hawthorne	NCAHA
Tina Krasner	NCOCOB
BARRY GUPTON	NCDOI/NCBCC
Glenda Artis	NC DAAS (DHHS)
Jim Burnette, J	NCDA&CS
Carolin Bakewell	NC Dental Bd
Nadine Pfeiffer	NC DHHS - DHSR
Jan Brackley	NC DHSR
Chrissy Waggett	NCDA&CS
[illegible]	OSHR
Valerie Bateman	OSHR
Megan Lamphere	DHHS - DHSR
[illegible]	[illegible]
[illegible]	DOT
[illegible]	DOT
Betsy Veltri	AHA
James A. Wellons	NCDOJ for DHHS-DCDEE
Kelly Thomas	DMV
Xiongyi Li	Duke
Dacia Thompson	Duke

March 2015

Rules Review Commission
Meeting
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Name	Agency
Shari Howard	OSHR
Sebastian Ailes	DUKE
Amanda Ray	Optometry Board
Yolanda Stith	NCALTCF

March 2015

Rules Review Commission
Meeting
Please **Print** Legibly

Name	Agency
Lonnie Christopher	Commissioner of Banks
Kathy Arney	NC Board of Pt Examiners
Gehn Mattson	NC PPN
Helen Landa	NCDOT
Bob MARTIN	NC DPH
Paula Kwiatkinski	OSHR
Mitchell Smith	Ally
Frances Liles	NCREA
Bethany Burgon	DOJ
Adrian Dellinger	DOJ
Tina Simpson	DOJ
Rich Allen	DEQ

LIST OF APPROVED PERMANENT RULES
March 19, 2015 Meeting

PESTICIDE BOARD

Eastern and Hairy-Tailed Moles	02 NCAC 09L .0707

BANKS, OFFICE OF THE COMMISSIONER OF

Definitions	04 NCAC 03D .0105
Reports of Condition of State Trust Entities	04 NCAC 03D .0201
Administration of Trust Business	04 NCAC 03D .0302
Books and Records	04 NCAC 03D .0303
Collective Investment	04 NCAC 03D .0304

MEDICAL CARE COMMISSION

Medication Labels	10A NCAC 13F .1003
Pharmaceutical Services	10A NCAC 13F .1010
Medication Labels	10A NCAC 13G .1003
Pharmaceutical Services	10A NCAC 13G .1010
Group Homes; Developmentally Disabled Adults	10A NCAC 13H .0101
Group Homes for Developmentally Disabled Adults	10A NCAC 13H .0102
Private For Profit Group Homes	10A NCAC 13H .0103
Definitions	10A NCAC 13H .0104
Regulation	10A NCAC 13H .0201
The Co-Administrator	10A NCAC 13H .0202
Relief Person-in-Charge	10A NCAC 13H .0203
The Home Manager in Private Non-Profit Homes	10A NCAC 13H .0301
Change of Manager	10A NCAC 13H .0302
Personnel Requirements	10A NCAC 13H .0401
Qualifications of Other Staff and Family Members Living In	10A NCAC 13H .0402
Qualifications of Relief Person-In-Charge	10A NCAC 13H .0403
Responsibilities of Relief Person-In-Charge	10A NCAC 13H .0404
Qualifications of Other Staff Not Living In	10A NCAC 13H .0405
Health Requirements	10A NCAC 13H .0406
General Personnel Requirements	10A NCAC 13H .0407
Staff Competency and Training	10A NCAC 13H .0408
Training Program Content and Approval	10A NCAC 13H .0409
Qualifications of Medication Staff	10A NCAC 13H .0410
Medication Administration Competency Evaluation	10A NCAC 13H .0411
Location	10A NCAC 13H .0501
Construction	10A NCAC 13H .0502
Living Areas	10A NCAC 13H .0601
Dining Area	10A NCAC 13H .0602
Kitchen	10A NCAC 13H .0603
Bedrooms	10A NCAC 13H .0604
Closets	10A NCAC 13H .0605
Bathrooms	10A NCAC 13H .0606

Storage Areas	10A NCAC 13H .0607
Floors	10A NCAC 13H .0608
Laundry	10A NCAC 13H .0609
Outside Entrances	10A NCAC 13H .0610
Fire Safety Requirements	10A NCAC 13H .0611
Other Requirements	10A NCAC 13H .0612
Housekeeping and Furnishings	10A NCAC 13H .0613
Personal Care	10A NCAC 13H .0701
Health Care	10A NCAC 13H .0702
Food Service	10A NCAC 13H .0703
Other Regulations	10A NCAC 13H .0704
Individual Goals	10A NCAC 13H .0801
Individual Records	10A NCAC 13H .0802
Policies and Procedures	10A NCAC 13H .0803
Resident's Living Status	10A NCAC 13H .0804
Activities Outside the Home	10A NCAC 13H .0805
Accident Prevention	10A NCAC 13H .0806
Plan for Medical Services	10A NCAC 13H .0807
Personal Skills Development	10A NCAC 13H .0808
Admissions	10A NCAC 13H .0901
Medical Requirements	10A NCAC 13H .0902
Personal Information	10A NCAC 13H .0903
Written Agreements	10A NCAC 13H .0904
Plans at Time of Admission	10A NCAC 13H .0905
Procedures for Transfer	10A NCAC 13H .0906
Procedures for Discharge	10A NCAC 13H .0907
Physicians	10A NCAC 13H .1001
Physical Examinations	10A NCAC 13H .1002
Medications	10A NCAC 13H .1003
Handling Funds of Residents	10A NCAC 13H .1101
Refund Policies	10A NCAC 13H .1102
Records	10A NCAC 13H .1201
Reports	10A NCAC 13H .1202
Capacity	10A NCAC 13H .1301
Increase in Capacity	10A NCAC 13H .1302
Application for License	10A NCAC 13H .1401
New Construction: Additions and Renovations	10A NCAC 13H .1402
Current License	10A NCAC 13H .1501
Renewal of License	10A NCAC 13H .1502
Termination of License	10A NCAC 13H .1503
Denial or Revocation of License	10A NCAC 13H .1504
Procedures for Appeal	10A NCAC 13H .1505
Suspension of Admissions	10A NCAC 13H .1506
Administrative Penalty Determination Process	10A NCAC 13H .1601
Resident Assessment	10A NCAC 13H .1602
Resident Care Plan	10A NCAC 13H .1603
Licensed Health Professional Support	10A NCAC 13H .1604

Cooperation with Case Managers	10A NCAC 13H .1605
Health Care Personnel Registry	10A NCAC 13H .1606
Respite Care	10A NCAC 13H .1607
Definitions	10A NCAC 13H .1701
Persons Not Eligible for New Adult Care Home Licenses	10A NCAC 13H .1702
Conditions for License Renewal	10A NCAC 13H .1703
Definitions	10A NCAC 13H .1901
Scope	10A NCAC 13H .1902
Reporting Requirements	10A NCAC 13H .1903

PUBLIC HEALTH, COMMISSION FOR

Definitions	10A NCAC 43K .0101
Screening Requriements	10A NCAC 43K .0102
Reporting Requirements	10A NCAC 43K .0103
Accreditation Requirements	10A NCAC 48B .0103
Benchmark 34	10A NCAC 48B .1301
Benchmark 37	10A NCAC 48B .1304
Benchmark 38	10A NCAC 48B .1305
Benchmark 39	10A NCAC 48B .1306
Benchmark 40	10A NCAC 48B .1307
Benchmark 41	10A NCAC 48B .1308

TRANSPORTATION, DEPARTMENT OF/DIVISION OF MOTOR VEHICLES

Driver's License Examination	19A NCAC 03B .0201

DENTAL EXAMINERS, BOARD OF

Functions Which May Be Delegated	21 NCAC 16G .0101
Approved Education and Training Programs	21 NCAC 16H .0104
Permitted Functions of Dental Assistant II	21 NCAC 16H .0203
Applications	21 NCAC 16I .0101
Continuing Education Required	21 NCAC 16I .0102
Penalty/Non-Compliance/Continuing Education Requirement	21 NCAC 16I .0105
License Void Upon Failure to Renew	21 NCAC 16I .0107
Form of Certificate	21 NCAC 16I .0108
Definitions	21 NCAC 16I .0110
Exemptions Granted	21 NCAC 16I .0111
Premises	21 NCAC 16J .0101
Instructors to be Approved	21 NCAC 16K .0103
Reports to Board	21 NCAC 16K .0106
Request for Hearing	21 NCAC 16N .0502
Notice of Hearing	21 NCAC 16N .0504
Who Shall Hear Contested Cases	21 NCAC 16N .0505
Petition for Intervention	21 NCAC 16N .0506
Disqualification of Board Members	21 NCAC 16N .0508
Subpoena	21 NCAC 16N .0603

IRRIGATION CONTRACTORS LICENSING BOARD

Conduct of Hearing	21	NCAC 23	.0206
Decision of Board	21	NCAC 23	.0207
Trenching and Piping	21	NCAC 23	.0505

PHYSICAL THERAPY EXAMINERS, BOARD OF

Continuing Competence Activities	21	NCAC 48G	.0109

REFRIGERATION EXAMINERS, BOARD OF

Office of the Board	21	NCAC 60	.0102

STATE HUMAN RESOURCES COMMISSION

Time Frame for Raising Allegation of Discrimination	25	NCAC 01B	.0350
Exercise of Commission Discretion	25	NCAC 01B	.0413
Permanent and Time-Limited Appointment	25	NCAC 01C	.0402
Reduction in Force	25	NCAC 01C	.1004
Unavailability When Leave is Exhausted	25	NCAC 01C	.1007
Initial Employment	25	NCAC 01D	.0201
Total State Service Defined	25	NCAC 01E	.0204
Approved Holidays	25	NCAC 01E	.0901
Purpose	25	NCAC 01E	.1601
Definitions	25	NCAC 01E	.1602
Community Service Leave Administration	25	NCAC 01E	.1605
Additional Time for Community Service Activities	25	NCAC 01E	.1606
Special Applicant Considerations Related to Priority	25	NCAC 01H	.0633
Selection of Applicants	25	NCAC 01H	.0634
Employment: E-Verify	25	NCAC 01H	.0636
Employment of Relatives	25	NCAC 01H	.0641
Reduction in Force Application and Appeal	25	NCAC 01H	.0901
Requirements for Reduction in Force Priority Consideration	25	NCAC 01H	.0902
Agency and Employee Responsibilities	25	NCAC 01H	.0904
Office of State Human Resources Responsibilities	25	NCAC 01H	.0905
Appeals	25	NCAC 01J	.0603
Written Warning	25	NCAC 01J	.0610
Investigatory Leave	25	NCAC 01J	.0615
Credentials	25	NCAC 01J	.0616
Discrimination and Retaliation	25	NCAC 01J	.0617
Unlawful Workplace Harassment and Retaliation	25	NCAC 01J	.1101
General Provisions	25	NCAC 01J	.1201
Agency Responsibilities	25	NCAC 01J	.1202
Agency Grievance Reports	25	NCAC 01J	.1203
Discrimination and Retaliation/Special Provisions	25	NCAC 01J	.1204
Unlawful Workplace Harassment	25	NCAC 01J	.1205
Time Limits	25	NCAC 01J	.1206
Final Agency Action	25	NCAC 01J	.1207

Leave In Connection with Grievances	25	NCAC 01J .1208
Minimum Procedural Requirements	25	NCAC 01J .1301
General Agency Grievance Procedure Requirements	25	NCAC 01J .1302
Agency and University Grievance Reports and Data Entry	25	NCAC 01J .1303
Office of State Human Resources Review and Approval of Fi...	25	NCAC 01J .1305
Back Pay	25	NCAC 01J .1306
Front Pay	25	NCAC 01J .1307
Leave	25	NCAC 01J .1308
Health Insurance	25	NCAC 01J .1309
Interest	25	NCAC 01J .1310
Reinstatement	25	NCAC 01J .1311
Causes for Reinstatement	25	NCAC 01J .1312
Suspension Without Pay	25	NCAC 01J .1313
Discrimination, Harassment, or Retaliation	25	NCAC 01J .1314
Voluntary Programs or Benefits	25	NCAC 01J .1315
Remedies for Procedural Violations	25	NCAC 01J .1316
Remedies: Salary Adjustments	25	NCAC 01J .1317
Certain Remedies not Available	25	NCAC 01J .1318
Situations in Which Attorney's Fees May be Awarded	25	NCAC 01J .1319
Attorney's Fees may be Awarded as a Result of a Settlement	25	NCAC 01J .1320
Minimum Procedural Requirements	25	NCAC 01J .1401
Flexibility	25	NCAC 01J .1402
Informal Meeting with Supervisor	25	NCAC 01J .1403
Mediation Procedure	25	NCAC 01J .1404
Conclusion of Mediation	25	NCAC 01J .1405
Limitations on a Mediation Agreement	25	NCAC 01J .1406
Post Mediation	25	NCAC 01J .1407
Employee Responsibilities for Mediation	25	NCAC 01J .1408
Agency Responsibilities for Mediation	25	NCAC 01J .1409
Office of State Personnel Responsibilities	25	NCAC 01J .1410
Agency Procedural Requirements for Employee Mediation and...	25	NCAC 01J .1411
Office of State Personnel Responsibilities for Employee M...	25	NCAC 01J .1412

RRC DETERMINATION
PERIODIC RULE REVIEW
March 19, 2015
Necessary with Substantive Public Interest

Child Care Commission	10A NCAC 09 .0505	10A NCAC 09 .0606
10A NCAC 09 .0102	10A NCAC 09 .0508	10A NCAC 09 .0701
10A NCAC 09 .0201	10A NCAC 09 .0509	10A NCAC 09 .0702
10A NCAC 09 .0204	10A NCAC 09 .0510	10A NCAC 09 .0703
10A NCAC 09 .0205	10A NCAC 09 .0511	10A NCAC 09 .0704
10A NCAC 09 .0301	10A NCAC 09 .0512	10A NCAC 09 .0705
10A NCAC 09 .0302	10A NCAC 09 .0601	10A NCAC 09 .0707
10A NCAC 09 .0304	10A NCAC 09 .0602	10A NCAC 09 .0708
10A NCAC 09 .0401	10A NCAC 09 .0603	10A NCAC 09 .0709
10A NCAC 09 .0403	10A NCAC 09 .0604	10A NCAC 09 .0710
10A NCAC 09 .0501	10A NCAC 09 .0605	10A NCAC 09 .0711

10A NCAC 09 .0712
10A NCAC 09 .0713
10A NCAC 09 .0714
10A NCAC 09 .0801
10A NCAC 09 .0802
10A NCAC 09 .0803
10A NCAC 09 .0804
10A NCAC 09 .0806
10A NCAC 09 .0901
10A NCAC 09 .0902
10A NCAC 09 .0903
10A NCAC 09 .1001
10A NCAC 09 .1002
10A NCAC 09 .1003
10A NCAC 09 .1004
10A NCAC 09 .1301
10A NCAC 09 .1302
10A NCAC 09 .1303
10A NCAC 09 .1304
10A NCAC 09 .1401
10A NCAC 09 .1402
10A NCAC 09 .1403
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10A NCAC 09 .1904
10A NCAC 09 .2101
10A NCAC 09 .2201
10A NCAC 09 .2202
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10A NCAC 09 .3001
10A NCAC 09 .3002
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10A NCAC 09 .3010
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10A NCAC 09 .3012
10A NCAC 09 .3013
10A NCAC 09 .3014
10A NCAC 09 .3015
10A NCAC 09 .3016

RRC DETERMINATION
PERIODIC RULE REVIEW
March 19, 2015
Necessary <u>without</u> Substantive Public Interest

NC Rural Electrification Authority
04 NCAC 08 .0101
04 NCAC 08 .0102
04 NCAC 08 .0107
04 NCAC 08 .0109
04 NCAC 08 .0201
04 NCAC 08 .0202
04 NCAC 08 .0206
04 NCAC 08 .0301
04 NCAC 08 .0302
04 NCAC 08 .0304
04 NCAC 08 .0306
04 NCAC 08 .0401
04 NCAC 08 .0404

Health and Human Services, Department of
10A NCAC 05A .0101
10A NCAC 05A .0201
10A NCAC 05A .0202
10A NCAC 05B .0101
10A NCAC 05B .0102
10A NCAC 05B .0103
10A NCAC 05B .0201
10A NCAC 05B .0202
10A NCAC 05C .0202
10A NCAC 05C .0203
10A NCAC 05C .0204
10A NCAC 05C .0205
10A NCAC 05C .0206
10A NCAC 05C .0207
10A NCAC 05C .0208
10A NCAC 05C .0209
10A NCAC 05C .0210
10A NCAC 05C .0212

10A NCAC 05C .0213
10A NCAC 05C .0214
10A NCAC 05C .0215
10A NCAC 05C .0216
10A NCAC 05C .0301
10A NCAC 05C .0302
10A NCAC 05C .0303
10A NCAC 05C .0304
10A NCAC 05C .0305
10A NCAC 05C .0306
10A NCAC 05C .0403
10A NCAC 05C .0404
10A NCAC 05D .0101
10A NCAC 05D .0102
10A NCAC 05D .0103
10A NCAC 05D .0104
10A NCAC 05D .0201
10A NCAC 05D .0202
10A NCAC 05D .0301
10A NCAC 05D .0303
10A NCAC 05D .0401
10A NCAC 05D .0402
10A NCAC 05D .0501
10A NCAC 05D .0502
10A NCAC 05D .0601
10A NCAC 05D .0602
10A NCAC 05E .0101
10A NCAC 05E .0102
10A NCAC 05E .0103
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10A NCAC 05E .0110
10A NCAC 05E .0111
10A NCAC 05E .0112
10A NCAC 05E .0113
10A NCAC 05E .0114
10A NCAC 05E .0115
10A NCAC 05E .0116
10A NCAC 05E .0117
10A NCAC 05E .0118
10A NCAC 05E .0119
10A NCAC 05E .0120
10A NCAC 05E .0121
10A NCAC 05E .0122
10A NCAC 05E .0201
10A NCAC 05F .0101
10A NCAC 05F .0102
10A NCAC 05F .0201
10A NCAC 05F .0202
10A NCAC 05F .0301
10A NCAC 05F .0302
10A NCAC 05F .0303
10A NCAC 05F .0401
10A NCAC 05F .0402
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10A NCAC 05F .0701
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10A NCAC 05F .0705
10A NCAC 05F .0706
10A NCAC 05F .0801
10A NCAC 05F .0802
10A NCAC 05F .0803
10A NCAC 05G .0101
10A NCAC 05G .0201
10A NCAC 05G .0202
10A NCAC 05G .0203
10A NCAC 05G .0301
10A NCAC 05G .0302
10A NCAC 05I .0101
10A NCAC 05I .0201
10A NCAC 05I .0202
10A NCAC 05I .0203
10A NCAC 05I .0204
10A NCAC 05I .0205
10A NCAC 05J .0101
10A NCAC 05J .0201
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10A NCAC 05J .0207
10A NCAC 05J .0208
10A NCAC 05J .0209
10A NCAC 05J .0210
10A NCAC 05J .0211
10A NCAC 05J .0212
10A NCAC 05L .0101
10A NCAC 05L .0102
10A NCAC 05L .0103
10A NCAC 05M .0101
10A NCAC 05M .0102

Child Care Commission
10A NCAC 09 .2001
10A NCAC 09 .2002
10A NCAC 09 .2003
10A NCAC 09 .2004
10A NCAC 09 .2005
10A NCAC 09 .2006
10A NCAC 09 .2007

Optometry, Board of Examiners in
21 NCAC 42A .0101
21 NCAC 42A .0102
21 NCAC 42A .0105
21 NCAC 42B .0101
21 NCAC 42B .0103
21 NCAC 42B .0107
21 NCAC 42B .0108
21 NCAC 42B .0110
21 NCAC 42B .0112
21 NCAC 42B .0113
21 NCAC 42B .0201
21 NCAC 42B .0202
21 NCAC 42B .0203
21 NCAC 42B .0204
21 NCAC 42B .0302
21 NCAC 42B .0303
21 NCAC 42B .0304
21 NCAC 42B .0305
21 NCAC 42C .0102
21 NCAC 42C .0104
21 NCAC 42C .0105
21 NCAC 42D .0101
21 NCAC 42D .0102
21 NCAC 42E .0101
21 NCAC 42E .0102
21 NCAC 42E .0103
21 NCAC 42E .0104
21 NCAC 42E .0201
21 NCAC 42E .0203
21 NCAC 42E .0301
21 NCAC 42E .0302
21 NCAC 42J .0101
21 NCAC 42K .0101
21 NCAC 42K .0102
21 NCAC 42K .0201
21 NCAC 42K .0202
21 NCAC 42K .0203
21 NCAC 42K .0204
21 NCAC 42K .0205
21 NCAC 42K .0301
21 NCAC 42K .0401
21 NCAC 42K .0402
21 NCAC 42K .0501
21 NCAC 42K .0502
21 NCAC 42K .0503
21 NCAC 42K .0504
21 NCAC 42K .0601
21 NCAC 42K .0602
21 NCAC 42K .0603
21 NCAC 42K .0701
21 NCAC 42K .0702
21 NCAC 42K .0703
21 NCAC 42K .0704
21 NCAC 42L .0101
21 NCAC 42L .0102
21 NCAC 42L .0103
21 NCAC 42L .0104
21 NCAC 42L .0105
21 NCAC 42L .0106
21 NCAC 42L .0107

21 NCAC 42L .0108	21 NCAC 42L .0113	21 NCAC 42M .0102
21 NCAC 42L .0109	21 NCAC 42L .0114	21 NCAC 42M .0103
21 NCAC 42L .0110	21 NCAC 42L .0115	21 NCAC 42M .0104
21 NCAC 42L .0111	21 NCAC 42L .0116	21 NCAC 42M .0105
21 NCAC 42L .0112	21 NCAC 42M .0101	21 NCAC 42M .0106

RRC DETERMINATION
PERIODIC RULE REVIEW
March 19, 2015
Unnecessary

Health and Human Services, Department of	**Child Care Commission**	10A NCAC 09 .2604
10A NCAC 05C .0101	10A NCAC 09 .0206	10A NCAC 09 .2605
10A NCAC 05C .0102	10A NCAC 09 .0305	10A NCAC 09 .2606
10A NCAC 05C .0201	10A NCAC 09 .2210	10A NCAC 09 .2607
10A NCAC 05C .0211	10A NCAC 09 .2211	10A NCAC 09 .2608
10A NCAC 05C .0401	10A NCAC 09 .2212	10A NCAC 09 .2609
10A NCAC 05C .0402	10A NCAC 09 .2601	10A NCAC 09 .2610
10A NCAC 05D .0302	10A NCAC 09 .2602	
	10A NCAC 09 .2603	

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

OFFICE OF ADMINISTRATIVE HEARINGS

Chief Administrative Law Judge
JULIAN MANN, III

Senior Administrative Law Judge
FRED G. MORRISON JR.

ADMINISTRATIVE LAW JUDGES

Melissa Owens Lassiter
Don Overby
J. Randall May
A. B. Elkins II
Selina Brooks
Phil Berger, Jr.
J. Randolph Ward

AGENCY	CASE NUMBER	DATE	PUBLISHED DECISION REGISTER CITATION
ALCOHOLIC BEVERAGE CONTROL COMMISSION			
ABC Commission v. Noble 6 Enterprises LLC, T/A Peppermint Rabbit	13 ABC 20226	08/13/14	
ABC Commission v. Demetrius Earl Smith, T/A Smith's Convenient Store	14 ABC 01354	08/18/14	
ABC Commission v. 40 and Holding, LLC T/A London Bridge Pub	14 ABC 01953	12/16/14	
Melody Locklear McNair v. ABC Commission	14 ABC 02323	06/25/14	
Marcus L. Bellamy T/A Bellas Grill v. ABC Commission	14 ABC 03485	07/24/14	
Kelvin M. Williams, dba Da Wave v. ABC Commission	14 ABC 04723	09/12/14	
ABC Commission v. Prescott Elliot Urban Environments LLC T/A Marquis Market	14 ABC 04798	10/02/14	
ABC Commission v. Noa Noa LLC T/A Noa Noa	14 ABC 05891	11/20/14	
M & K Investments Inc. v. ABC Commission	14 ABC 06199	11/24/14	
DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY			
Travis Earl Atkinson v. NC Victims Compensation Commission	13 CPS 16304	09/02/14	
Carl John Perkinson v. Department of Public Safety	14 CPS 02245	06/24/14	
Karen Tate v. Victims Compensation Commission	14 CPS 02397	09/03/14	
Waheeda Ammeri v. Department of Public Safety	14 CPS 03254	07/21/14	
Mitchell Kent Wilson v. NC Crime Victims Compensation Commission	14 CPS 05569	11/06/14	
Jacorey Thomas v. NC DPS Victim Services	14 CPS 05922	10/20/14	
Rodger L. Ackerson v. Janice W. Carmichael, NC Crime Victims Compensation Commission	14 CPS 06627	10/14/14	
DEPARTMENT OF HEALTH AND HUMAN SERVICES			
M. Yaghi, DDS, P.A. v. DHHS	11 DHR 11579	09/15/14	
M. Yaghi, DDS, P.A. v. DHHS	11 DHR 11580	09/15/14	
Timothy John Murray v. DHHS, Division of Health Service Regulation	11 DHR 12594	12/19/14	29:16 NCR 1971
Senior Home Care Services, Inc. v. DHHS	12 DHR 09750	08/13/14	
Parker Home Care LLC v. DHHS, Division of Medical Assistance	12 DHR 10864	10/06/14	
Johnson Allied Health Services, Inc. v. DHHS	12 DHR 11536	09/02/14	
Helen Graves v. Alamance County Department of Social Services and NC Department of Health and Human Services, Division of Health Service Regulation	12 DHR 12411	09/02/14	
AHB Psychological Services v. DHHS and Alliance Behavioral Healthcare	13 DHR 00115	01/06/14	29:02 NCR 202
Albert Barron, Sr. v. Eastpointe Human Services Local Management Entity	13 DHR 00784	04/22/14	29:04 NCR 444
At Home Personal Care Services, Inc. v. DHHS, Division of Medical Assistance	13 DHR 01922	03/20/14	29:07 NCR 834
AHB Psychological Services v. DHHS and Alliance Behavioral Healthcare	13 DHR 08874	01/06/14	29:02 NCR 202

Sheryl A. Lyons v. DHHS	13 DHR 10228	05/12/14	29:05 NCR 559
Cleveland Otis Dunston v. North Carolina Nurse Aide Registry	13 DHR 10364	10/06/14	
Kenneth Terrell Ford v. DHHS, Division of Facility Services	13 DHR 10745	02/12/14	29:03 NCR 356
Pamela Byrd v. DHHS	13 DHR 12691	11/05/13	29:06 NCR 685
Mary Lynne Nance v. DHHS, Division of Health Service	13 DHR 13351	05/13/14	29:08 NCR 959
Tricare Counseling and Consulting, Inc. v. DHHS, Division of Medical Assistance	13 DHR 14221	12/31/13	29:04 NCR 460
Neogenesis, LLC v. DHHS, Division of Medical Assistance and its agent Eastpointe Human Services Local Management Entity	13 DHR 14222	06/09/14	29:09 NCR 1113
J. Mark Oliver DDS, PLLC v. DHHS, Division of Medical Assistance	13 DHR 14369	02/19/14	29:02 NCR 206
Jabez Home Infusion Company Services v. DHHS	13 DHR 15135	09/02/14	29:12 NCR 1531
Genesis Project 1 Inc. v. DHHS, Division of Medical Assistance and its agent, Mecklink Behavioral Healthcare	13 DHR 17094	12/16/13	29:01 NCR 70
Ervin Smith v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 17560	07/30/14	
Ashley Renee Davis v. Department of Human Services	13 DHR 17606	09/02/14	
Estate of Earlene W. Alston, Lewis E. Alston v. DHHS, DMA	13 DHR 17909	04/08/14	29:02 NCR 211
Total Renal Care of North Carolina, LLC v. DHHS, Division of Health Service Regulation, Certificate of Need Section and Bio-Medical Applications of North Carolina	13 DHR 18127	06/23/14	29:07 NCR 842
Total Renal Care of North Carolina, LLC v. DHHS, Division of Health Service Regulation, Certificate of Need Section and Bio-Medical Applications of North Carolina	13 DHR 18223	06/23/14	29:07 NCR 842
Lawanda Suggs v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 18454	08/15/14	
David LeGrand v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 18668	08/01/14	29:10 NCR 1229
Absolute Home Care Agency, Inc. v. DHHS, Division of Medical Assistance	13 DHR 18689	09/02/14	29:11 NCR 1445
Victor Horn v. DHHS, Division of Health Service Regulation	13 DHR 19156	03/25/15	29:20 NCR 2366
John A. Page v. DHHS	13 DHR 19546	09/24/14	
United Home Care, Inc. d/b/a Untied Home Health, Inc. d/b/a United Home Health v. DHHS, Division of Health Service Regulation, Certificate of Need Section, and Maxim Healthcare Services, Inc.	13 DHR 19690	06/05/14	29:09 NCR 1122
Heartfelt Alternatives Inc. v. Alliance Behavioral Healthcare, DHHS	13 DHR 19958	12/09/14	29:16 NCR 2010
Susan Arrowood, OLPC v. DHHS, Division of Medical Assistance and its agent Partners Behavioral Health Management	13 DHR 19981	01/08/14	29:03 NCR 366
Rosemary Nwankwo v. DHHS	13 DHR 20013	08/13/14	
Akinsola Ade Okunsokan v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 20066	09/26/14	
Marilyn Sherrill v. DHHS	13 DHR 20086	08/13/14	
Angelo Cornilus Graham v. Office of Administrative Hearings	13 DHR 20090	10/01/14	
HSB Enterprise Corporation, Hettion S. Booker v. DHHS, Division of Medical Assistance, Program Integrity Section	13 DHR 20235	09/02/14	
Leisa Lenora Dockery v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	13 DHR 20318	09/15/14	
Gregory P. Lathan, President and Registered Agent, The EI Group Inc. v. DHHS	13 DHR 20332	08/20/14	
Jacqueline Marie Jackson v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	14 DHR 00460	07/10/14	
Parker Home Care LLC v. DHHS	14 DHR 00752	10/06/14	
Rhamia Machae Robinson v. DHHS, Division of Health Service Regulation	14 DHR 01051	12/23/14	29:18 NCR 2177
Nadiah Porter v. Durham County Department of Social Services (DSS) (Formerly Durham's Alliance for Child Care Access, DACCA)	14 DHR 01309	06/30/14	
Wittner Wright and Lisa Wright v. DHHS	14 DHR 01510	07/21/14	
Darrick Pratt v. DHHS, Division of Health Service Regulation	14 DHR 01598	08/26/14	
Victoria McLaughlin v. DHHS, Division of Health Service Regulation	14 DHR 01741	10/01/14	
Elite Care Inc. Demetrice Wilson v. DHHS and East Carolina Behavioral Health	14 DHR 01926	09/02/14	
Dana Eric Weaver v. DHHS, Division of Health Service Regulation	14 DHR 01958	12/30/14	29:20 NCR 2408
Elizabeth Mitchell v. Durham DSS	14 DHR 01982	06/23/14	
Wayne Mitchell v. Durham DSS	14 DHR 02044	06/23/14	
Sylvia B. Thompson v. DHHS, Vital Records	14 DHR 02280	10/17/14	
Robert Stanley Hendricks v. Walter B. Jones	14 DHR 02367	10/21/14	
Prince Onwuka, Roda V. Onwuka v. Division of Child Development and Early Education	14 DHR 02636	07/24/14	
Cumberland County Hospital System, Inc. d/b/a Cape Fear Valley Health System and Hoke Healthcare, LLC v. DHHS, Division of Health Service Regulation, Certificate of Need Section and FirstHealth of the Carolinas, Inc. d/b/a FirstHealth Moore Regional Hospital	14 DHR 02853	08/21/14	29:12 NCR 1588
Andrea Cook v. DHHS, Division of Health Service Regulation	14 DHR 02947	07/29/14	

Dianne Lucas v. DHHS, Division of Health Service Regulation	14 DHR 03088	08/05/14	
Faisal Saed Ismail v. New Hanover County DSS	14 DHR 03089	08/01/14	
Evangela Wayne v. DHHS, Division of Health Service Regulation	14 DHR 03296	09/09/14	
Peter K. Kagwanja, owner Lighthouse Foodmart v. DHHS, Division of Public Health	14 DHR 03335	07/03/14	
Independent Living Group Home Shanita Lovelace v. DHHS	14 DHR 03482	09/05/14	
Jennifer Lyn McKinney v. DHHS, Division of Health Service Regulation	14 DHR 03521	08/07/14	
Juan Wilbornx v. DHHS	14 DHR 03585	08/18/14	
Harold Eku John Coker v. Office of Administrative Hearings	14 DHR 03644	08/01/14	
Nancy A. Wood v. DHHS, Division of Social Services, Child Welfare Services	14 DHR 03938	11/04/14	
TT & T Services, Inc. v. DHHS, Division of Medical Assistance and Eastpointe Human Services	14 DHR 04461	09/19/14	
TT & T Services Inc., Euniceteen Diggs v. Eastpoint MCO	14 DHR 04560	11/04/14	
Lori Brady, Administrator, Randolph Fellowship Home Inc., Alpha House v. DHHS, Division of Health Service Regulation	14 DHR 04606	10/08/14	
Wilbert Nichols III, Community Alternative Housing Inc. v. Eastpointe MCO, Tichina Hamer	14 DHR 04640	09/16/14	
Derrik J. Brown v. DHHS	14 DHR 05065	10/08/14	
Jacqueline McAdoo v. DHHS	14 DHR 05287	09/12/14	
Eva Lewis Washington, Successful Transitions LLC	14 DHR 05447	10/06/14	
Mary Jones v. DHHS, Division of Health Service Regulation	14 DHR 05763	12/19/14	29:18 NCR 2186
Nicole Emanuel v. DHHS, Division of Health Service Regulation	14 DHR 05881	11/14/14	
ASA Food Mart #1 d/b/a Mohammad Shafi Khen	14 DHR 05927	11/03/14	
Lashawn Tillery v. DHHS, Division of Health Service Regulation	14 DHR 06059	11/25/14	
Duke Raleigh Hospital, Designated Rep: Mary Planisek v. DHHS, Division of Medical Assistance, Program Integrity Program	14 DHR 06107	10/29/14	
Forever Young Group Care LLC v. DHHS, Division of Health Service Regulation	14 DHR 06130	11/04/14	
Randolph Dugar v. Brunswick County DSS	14 DHR 06133	11/12/14	
De'Ericka Crowder v. DHHS, Division of Health Service Regulation	14 DHR 06489	11/18/14	
Muna Elmi v. DHHS	14 DHR 06563	10/13/14	
Yolanda M Lewis v. Health Personnel Care Registry Investigations Branch	14 DHR 06774	12/30/14	
Olivia Napier Wilson v. DHHS, Division of Health Service Regulation	14 DHR 07025	11/24/14	
Kathleen T. Clark, Bradley W. Burris v. Cumberland County Department of Social Services & Individual Social Workers Deborah Harrington, Sherita Hamilton, Veronica Hudson, Glenda Simmons	14 DHR 07354	12/19/14	
Beulah Forbes v. DHHS	14 DHR 07968	12/17/14	

DEPARTMENT OF JUSTICE

Derrick Wayne Knox v. NC Criminal Justice Education and Training Standards Commission	11 DOJ 04831	11/19/14	29:16 NCR 1979
Derrick Wayne Knox v. NC Criminal Justice Education and Training Standards Commission	11 DOJ 09478	11/19/14	29:16 NCR 1979
Riki Paul Matsufugi Johnson v. NC Alarm Systems Licensing Board	12 DOJ 09070	09/18/14	
Brian Louis Scott v. NC Private Protective Services Board	12 DOJ 10093	09/23/14	
Stephen James Riley v. NC Sheriffs' Education and Training Standards Commission	13 DOJ 09572	10/30/13	29:04 NCR 465
William Dale Aaronson v. NC Sheriffs' Education and Training Standards Commission	13 DOJ 11693	01/07/14	29:03 NCR 373
Benjamin Lee Torain v. NC Private Protective Services Board	13 DOJ 14220	12/11/13	29:06 NCR 692
Jose Monserrate Acosta v. NC Private Protective Services	13 DOJ 15271	12/11/13	29:02 NCR 213
Kent Patrick Locklear v. NC Sheriffs' Education and Training Standards Commission	13 DOJ 15368	01/03/14	29:01 NCR 74
Michael Keith Fox v. NC Criminal Justice Education and Training Standards Commission	13 DOJ 15453	05/27/14	29:05 NCR 572
Michael Tyler Nixon v. NC Alarm Systems Licensing Board	13 DOJ 16246	11/25/13	29:01 NCR 79
Vincent Dale Donaldson v. NC Sheriffs' Education and Training Standards Commission	13 DOJ 16255	04/14/14	29:07 NCR 877
Jason Thomas Hunt v. NC Criminal Justice Education and Training Standards Commission	13 DOJ 16261	09/18/14	29:12 NCR 1546
Garrett Dwayne Gwin v. NC Criminal Justice Education and Training Standards Commission	13 DOJ 17240	06/10/14	
Donald Shane Dublin v. NC Criminal Justice Education and Training Standards Commission	13 DOJ 18990	09/12/14	29:11 NCR 1453
James Brian Gilmore v. NC Criminal Justice Education and Training Standards Commission	13 DOJ 19034	12/10/14	29:16 NCR 2026
Howard Ron Simons v. NC Sheriffs' Education and Training Standards Commission	13 DOJ 19148	06/20/14	
William Richard Herring v. NC Sheriffs' Education and Training Standards Commission	13 DOJ 19149	09/18/14	
Keith Lavon Mallory, Jr. v. NC Sheriff's Education and Training Standards Commission	13 DOJ 19152	08/20/14	
Janet Staricha v. University of NC at Chapel Hill	13 DOJ 19693	06/06/14	
David Nollie Eure v. Criminal Justice Education and Training Standards Commission	14 DOJ 00561	11/07/14	29:15 NCR 1896
Scott Eric Smithers v. NC Private Protective Services Board	14 DOJ 00728	07/31/14	
Lisa Paulette Childress v. NC Sheriffs' Education and Training Standards Commission	14 DOJ 00869	07/07/14	

Derek Andre Howell v. NC Sheriffs' Education and Training Standards Commission	14 DOJ 00871	08/22/14	
Angela Renee Joyner v. NC Sheriffs' Education and Training Standards Commission	14 DOJ 00873	06/23/14	
Dennis Kevin Creed v. NC Sheriffs' Education and Training Standards Commission	14 DOJ 00878	05/23/14	29:08 NCR 992
Jeremy Samuel Jordan v. NC Sheriffs' Education and Training Standards Commission	14 DOJ 01203	06/12/14	
Orlando Rosario v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 01519	09/15/14	
Robert James Roy v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 02039	10/13/14	
Kerry Graves v. NC Private Protective Services Board	14 DOJ 02248	09/22/14	29:11 NCR 1467
Timothy Wayne Spivey, Sr v. Criminal Justice Training Standards Commission	14 DOJ 02719	12/16/14	
Susan Potts Casper v. Criminal Justice Education and Training Standards Commission	14 DOJ 02720	12/09/14	
Antwain Renae Smith v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 02721	10/31/14	29:11 NCR 1474
Areleous Carlos Tilghman v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 02723	11/10/14	
Gene Arthur Pulley III v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 02724	12/04/14	29:18 NCR 2193
Willie Urell Johnson v. NC Sherrifs' Education and Training Standards Commission	14 DOJ 03028	11/21/14	29:20 NCR 2422
Joe Louis Mason v. Sheriffs' Education and Training Standards Commission	14 DOJ 03029	11/06/14	29:15 NCR 1901
Shawn Quincy Bromell v. NC Sherrifs' Education and Training Standards Commission	14 DOJ 03030	01/12/15	29:20 NCR 2427
Dierdre Aston Rhinehart v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 03523	09/16/14	
Kenneth Lamont McCoy v. NC Alarm Systems Licensing Board	14 DOJ 03904	07/17/14	
Brenda Louise Lassiter v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 04104	09/17/14	
Donald Edward Cottle II v. NC Alarm Systems Licensing Board	14 DOJ 04127	08/27/14	
Ossie James Adkins v. NC Alarm Systems Licensing Board	14 DOJ 04129	08/29/14	
David R. Beatson v. NC Private Protective Services Board	14 DOJ 04313	09/04/14	29:09 NCR 1183
Lawrence Jason Roberts v. NC Sheriffs' Education and Training Standards Commission	14 DOJ 05565	12/14/14	29:19 NCR 2293
Jermaine Chareem Norfleet v. Private Protective Services Board	14 DOJ 05702	10/24/14	
Michael Ryan Davis v. Alarm Systems Licensing Board	14 DOJ 05704	10/24/14	
James Cornelius Tatum, Jr. v. NC Sheriffs' Education and Training Standards Commission	14 DOJ 05715	10/07/14	
Andrew George Anderson v. NC Sheriffs' Education and Training Standards Commission	14 DOJ 05716	12/19/14	29:18 NCR 2200
Jeremy Clark v. NC Private Protection Services Board	14 DOJ 05882	11/07/14	
Malinda McCray McCullum v. Alarm Systems Licensing Board	14 DOJ 06134	11/21/14	29:15 NCR 1907
Allen Leslie Jackson v. Private Protective Services Board	14 DOJ 08154	12/30/14	29:18 NCR 2215
Gordon Fareed Shaw v. Private Protective Services Board	14 DOJ 08581	12/16/14	
Markus Schopfer Von Stolz v. Private Protective Services Board	14 DOJ 08698	12/17/14	
DEPARTMENT OF LABOR			
Jacquelyn Thomas v. NCDOL	14 DOL 05878	09/26/14	
DIVISION OF EMPLOYMENT SECURITY			
Heather Clawson v. University of Pembroke	14 DSC 07243	12/09/14	
DEPARTMENT OF STATE TREASURER			
Reza M. Salami v. NC A&T State University, Retirement Systems Division	13 DST 09273	06/26/14	
Ozie L. Hall v. Department of State Treasurer, Retirement Systems Division, Teachers' and State Employees Retirement System	14 DST 02877	07/07/14	
Lucy Hayes v. Department of State Treasurer, Retirement Systems Division	14 DST 03138	08/29/14	
DG Gassaway v. NC Teachers and State Employees Retirement Systems	14 DST 06260	10/06/14	
STATE BOARD OF EDUCATION			
Isaac F. Pitts, Jr. v. Department of Public Instruction	13 EDC 11604	07/23/14	29:10 NCR 1237
Tara Jane Dumas v. Department of Public Instruction	13 EDC 18876	05/02/14	29:08 NCR 966
Catherine Helgesen v. Department of Public Instruction, Licensure Section	13 EDC 20059	07/22/14	29:10 NCR 1244
Crystal Arnae Kelly v. Department of Public Instruction	14 EDC 03803	09/05/14	
Barbara Cheskin v. Department of Public Instruction	14 EDC 04962	10/06/14	
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES			
Castle Bay Property Owners Association Inc. A NC Non-Profit Corp v. NCDENR Division of Energy, Mineral & Land Resources and White Horse Farm, Richard & Ann Donaldson v. DENR, Division of Water Quality	14 EHR 01136	11/14/14	29:15 NCR 1911
Certain Teed Corporation v. Department of Environment and Natural Resources, Division of Water Resources	13 EHR 13548	06/30/14	

Castle Bay Property Owners Association Inc. A NC Non-Profit Corp v. NCDENR Division of Energy, Mineral & Land Resources and White Horse Farm, Richard & Ann Donaldson v. DENR, Division of Water Quality	14 EHR 01410	11/14/14	29:15 NCR 1911
Certain Teed Corporation v. Department of Environment and Natural Resources, Division of Water Resources	13 EHR 14024	6/30/14	
NC Coastal Federation, Cape Fear River Watch, Penderwatch and Conservancy, Sierra Club v. Department of Environment and Natural Resources, Division of Air Quality and Carolinas Cement Company LLC	13 EHR 17906	07/01/14	

HUMAN RELATIONS COMMISSION

Shannon S. Smith v. Housing Authority of the Town of Mt. Airy	14 HRC 03220	08/20/14	

DEPARTMENT OF INSURANCE

Sandy T. Moore v. Blue Cross/Blue Shield NC, State Health Plan	14 INS 00275	08/07/14	
Beryl Joan Waters v. NC State Health Plan	14 INS 01413	09/18/14	

BOARD OF LICENSED PROFESSIONAL COUNSELORS

Beth Ford v. NC LPC Board	14 LPC 03805	08/25/14	

MISCELLANEOUS

Timothy Odell Hicks v. Minimal Housing Standard Commission	14 CTY 05449	11/24/14	
William L. Harris v. NC Administrative Office of the Courts	14 MIS 00113	08/25/14	
Beth Ford v. Wake County Special Proceeding Court	14 MIS 01123	08/26/14	
Dammion C. Wright v. North Carolina Central University	14 MIS 05200	09/16/14	
Lorriane Blackwell Lewis v. Guilford County District Court, Guilford County Superior Court, Appellant Division Clerk of Court, Office of the Governor	14 MIS 09122	12/30/14	

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

Ricky Lynn Mason v. NC Correctional Institution for Women	10 OSP 07753	10/09/14	
Peter Duane Deaver v. NC Department State Bureau of Investigation and NC Department of Justice	11 OSP 05950	08/26/14	29:09 NCR 1091
Azlea Hubbard v. Department of Commerce, Division of Workforce Solutions	12 OSP 08613	05/19/14	
Mark Smagner v. Department of Revenue	13 OSP 05246	12/05/13	29:04 NCR 471
Antonio Asion v. Department of Public Safety, et. Al.	13 OSP 10036	05/09/14	29:05 NCR 593
Thomas Carl Bland v. NC Agricultural & Technical State University	13 OSP 11087	10/30/13	29:06 NCR 697
Antonio Asion v. Department of Public Safety, et. Al.	13 OSP 11386	05/09/14	29:05 NCR 593
Ricky Ward v. Department of Public Safety	13 OSP 11968	05/14/14	29:05 NCR 615
Chauncey John Ledford v. Department of Public Safety	13 OSP 12223	12/31/13	29:03 NCR 381
Mary Chapman Knight v. Department of Commerce, Division of Employment Security	13 OSP 12677	07/30/14	29:12 NCR 1562
Mary S. Hardin v. Department of Public Safety	13 OSP 13014	07/10/14	29:10 NCR 1255
Harold Leonard McKeithan v. Fayetteville State University	13 OSP 13380	12/03/13	29:05 NCR 637
Vicki Belinda Johnson v. DHHS	13 OSP 13603	08/08/14	
Lenton Credelle Brown v. Department of Public Safety, W. Ellis Boyle General Counsel	13 OSP 13729	05/16/14	
Cleveland Dunston v. DHHS	13 OSP 14365	06/23/14	29:06 NCR 705
Kenneth Shields v. Department of Public Safety	13 OSP 15762	02/26/14	29:01 NCR 84
Tammy Cagle v. Swain County Consolidated Human Services Board	13 OSP 15763	12/19/13	29:04 NCR 480
Rena Pearl Bridges v. Department of Commerce	13 OSP 15896	02/19/14	29:01 NCR 95
Barbara Hinton v. Surry County Health and Nutrition Center	13 OSP 16230	02/12/14	29:03 NCR 388
Elaine Rouse v. Winston-Salem State University	13 OSP 17182	08/26/14	
Elaine Rouse v. Winston-Salem State University	13 OSP 17182	08/29/14	
Meg DeMay v. Richmond County Department of Social Services	13 OSP 18084	07/02/14	29:06 NCR 719
Chris Edward Fidler v. Department of Revenue	13 OSP 18255	08/25/14	29:11 NCR 1459
Patrick E. Holmes v. Fayetteville State University	13 OSP 188480	07/15/14	29:12 NCR 1576
Renecia Morgan v. Washington County Department of Social Services	13 OSP 18590	04/21/14	29:08 NCR 983
Gregg Sipler v. University of NC at Greensboro	13 OSP 18692	04/21/14	29:07 NCR 885
Josephine Keke v. DHHS	13 OSP 19639	04/17/14	29:08 NCR 973
Carolyn Collins v. Department of Public Safety	13 OSP 19827	07/11/14	29:10 NCR 1273
Wanda Renfrow v. Department of Revenue	13 OSP 20268	01/06/15	29:20 NCR 2388
Joseph Vincoli v. Department of Public Safety	14 OSP 00389	04/10/14	29:02 NCR 218
Anna Hamburg v. DHHS	14 OSP 00867	11/20/14	29:19 NCR 2297

Karis Fitch v. NC Department of Public Safety	14 OSP 04286	12/12/14	29:19 NCR 2323
Rose Marie Johnson v. Durham County Department of Social Services	14 OSP 01317	07/21/14	
Pamela M. Walsh v. Deborah McSwain, (NC DPS), Department of Public Safety	14 OSP 01345	09/25/14	
Ralph Douglas Moody v. NC State Treasurer's Office, Deputy Treasurer Brenda Williams	14 OSP 01733	09/24/14	
Craig Williams v. Billy Deaver NCCU Superintendent, NC Central University of Building Trades	14 OSP 02111	06/06/14	
Shaneda L. Gilliam v. Department of Public Safety, Division of Adult Correction	14 OSP 02493	10/21/14	
Crystal McLean v. Alicia Lopez, NC SCO/DOA, NC State Construction Office/Department of Administration	14 OSP 02944	07/01/14	
Sion A. Moss III v. NC School for the Deaf	14 OSP 02993	09/17/14	
Teresa Wheeler v. County of Currituck-Currituck County Fire/EMS Department	14 OSP 03688	08/12/14	
Wesley Monroe Enzor, Jr v. Department of Public Safety	14 OSP 04842	12/29/14	
Martin J. Rios v. DHHS, Cherry Hospital	14 OSP 05062	11/03/14	
Vickey A. Ingram v. CLT Transit Management of CLT Inc.	14 OSP 05202	09/19/14	
Sallie Newton v. NC State University	14 OSP 06467	11/12/14	
Denise Malloy Hubbard v. North Carolina State University	14 OSP 06909	11/06/14	
Maretta L Brewington v. Sampson County Department of Social Services	14 OSP 07608	12/19/14	
Gina-Marie Kross, RN v. DHHS, Division of Health Service Regulation	14 OSP 08199	12/19/14	
DEPARTMENT OF REVENUE			
C-Co Mini Mart Inc. v. Department of Revenue	13 REV 10490	09/10/14	
Feeling Great Inc. v. Department of Revenue	13 REV 18080	07/23/14	29:07 NCR 891
Sleep Medical Center Inc. v. Department of Revenue	13 REV 18081	07/23/14	29:07 NCR 891
Curtis Leyshon v. Department of Revenue	13 REV 20016	08/29/14	
Lisa Webb Leyshon v. Department of Revenue	13 REV 20017	08/29/14	
Cyril Broderick, Jr. v. Department of Revenue	14 REV 01773	06/24/14	
Kacey Suo v. Department of Revenue	14 REV 02878	10/14/14	
P&P of Holden Beach Inc. or Rockfish Ventures 1 Inc.	14 REV 03901	08/05/14	
C-Co Mini Mart Inc. v. Department of Revenue	14 REV 10490	08/01/14	
OFFICE OF THE SECRETARY OF STATE			
Cheryl A. Tatum v. Department of Secretary of State	13 SOS 18521	06/09/14	29:09 NCR 1176
Tonya Denise Pettaway v. Department of the Secretary of State	14 SOS 02369	08/05/14	
Anthony Garrard v. Secretary of State's Office	14 SOS 03403	08/22/14	
UNC HOSPITALS			
Sarah W. Robbins v. UNC Hospitals	13 UNC 13904	10/03/14	
WILDLIFE RESOURCES COMMISSION			
People for the Ethical Treatment of Animals, Inc., Jacob Matthew Norris, and Julie Coveleski v. North Carolina Wildlife Resources Commission and Gordon Myers, as Executive Director, North Carolina Wildlife Resources Commission	14 WRC 01045	08/01/14	
People for the Ethical Treatment of Animals, Inc., Jacob Matthew Norris, and Julie Coveleski v. North Carolina Wildlife Resources Commission and Gordon Myers, as Executive Director, North Carolina Wildlife Resources Commission	14 WRC 01348	08/01/14	
People for the Ethical Treatment of Animals, Inc., v. Wildlife Resources Commission and Gordon Myers, As Executive Director	14 WRC 10041	12/29/14	

STATE OF NORTH CAROLINA	Filed	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF WAYNE	2015 JAN 26 PM 2:52	13 DHR 19156

Victor Horn, Petitioner,	Office of Administrative Hearings	
v.	)	**AMENDED FINAL DECISION**
Department of Health and Human Service Division of Health Service Regulation,	)	
Respondent.	)	

The above-captioned case was heard before the Honorable Donald W. Overby, Administrative Law Judge, on July 18, 2014 in Raleigh, North Carolina and on August 28, 2014 in Goldsboro, North Carolina. The Final Decision issued on January 14, 2015 is amended as follows:

APPEARANCES

FOR PETITIONER: Glenn A. Barfield
Haithcock, Barfield, Hulse & Kinsey, PLLC
PO Drawer 7
Goldsboro, North Carolina 27533-0007

FOR RESPONDENT: Derek L. Hunter
Assistant Attorney General
NC Department of Justice
PO Box 629
Raleigh, NC 27602-0629

EXHIBITS

Admitted for Petitioner:

Exhibit Number	Description
1	Annual Psychiatric Assessment of M.V., Revised February 6, 2013 Noting Reason for Commitment at Cherry Hospital
2	Progress Note, Treatment Team Review Notes, Other Documents Summarizing Treatment Plan for M.V. Dated October 31, 2013
3	Falls Risk Reassessment of M.V. Dated October 31, 2013

4	Progress Notes, Flow Sheets, and Nursing Assignments, for the Following Dates: June 15, 2013, June 16, 2013, June 19, 2013, June 23, 2013, September 29, 2013, October 30, 2013.
5	CPI Training Materials
6	Cherry Hospital Precautions and Standard Accountability
7	Precaution Flow Sheet and Nursing Assignment Sheet Dated October 14, 2013
8	Witness Statement Victor Horn
**9	Witness Statement Milton Edmundson
**10	Witness Statement Beverly Cook
**11	Witness Statement Geraldine Brown
12	Witness Statement Jeannie Jackson
**13	Witness Statement Marilyn Aughtry
**14	Witness Statement M.V.
**15	Initial Report of Abuse, Neglect, Exploitation
**16	Management Investigation Report
**17	Registry Reports
**18	Registry Interview Notes
**19	Interview of Patient Advocate Neal Weeks by Nancy Gregory
**20	Interview of Karen Tyson by Nancy Gregory
**21	Cherry Hospital Internal Investigation Report
22	Cherry Hospital Video Surveillance of Alleged Incidents of Abuse
**23	Transcript of Testimony Given at the Division of Employment Security Appeals Hearing
24	Cherry Hospital Clinical Care Plan: Abuse/Neglect/Exploitation and Other Rights Infringements
25	Cherry Hospital Clinical Care Plan: Rapid Response – Behavioral Emergencies

26	Cherry Hospital Code of Conduct APM – Section IV
27	Competency Assessment Tool for Victor Horn

(** To the extent that Petitioner's exhibits include hearsay statements of persons who did not testify in person at the hearing, such statements within Petitioner's exhibits are not admitted for the truth of such statements, but are instead admitted for non-hearsay purposes.)

Admitted for Respondent:

Exhibit Number	**Description**
1	HCPR 24-Hour Initial Report
2	HCPR 5-Working Day Report
**3	HCPR Investigation Letter
4	Cherry Hospital Code of Conduct
5	Cherry Hospital Clinical Care Plan (Precautions and Standard Accountability)
6	Cherry Hospital Clinical Care Plan (Falls Prevention and Management Program)
7	Cherry Hospital Clinical Care Plan (Abuse/Neglect/Exploitation/Rights Infringements)
8	Cherry Hospital Clinical Care Plan (Restrictive Interventions – Behavioral)
**11	Jeannie Jackson's Interview (HCPR)
**12	Karen Tyson's Interview (HCPR)
**13	Internal Investigation's Summary Report (Cherry Hospital)
**14	Neal Weeks' Interview (HCPR)
**16	Victor Horn's Interview (HCPR)
17	Victor Horn's Written Statement (Cherry Hospital)
**18	Resident's Information and Observation Form (HCPR)
**19	HCPR Investigation Conclusion Report (Abuse)
**20	HCPR Investigation Conclusion Report (Neglect)
**21	HCPR Substantiation Letter and Entry of Findings
22	Cherry Hospital Video Surveillance of Alleged Incidents of Abuse

(** To the extent that Respondent's exhibits include hearsay statements of persons who did not testify in person at the hearing, such statements within Respondent's exhibits are not admitted for the truth of such statements, but are instead admitted for non-hearsay purposes.)

WITNESSES

Called by Petitioner: Victor Horn
Alok Uppal, MD

Called by Respondent: Jeannie Jackson
Neil Weeks
Nancy Gregory

ISSUES

The sole issue for consideration is whether Respondent acted erroneously, arbitrarily, or capriciously when it found that on October 14, 2013 Petitioner neglected and/or abused M.V., a patient resident in Cherry Hospital, and consequently placed his name in the Health Care Registry pursuant to G.S. 131E-256(a)(1)(a).

ON THE BASIS of careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following Findings of Fact. In making these Findings, the Undersigned has weighed all the evidence and has assessed the credibility, including, but not limited to, the demeanor of the witness; any interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know, and remember the facts or occurrences about which the witness testified; whether the testimony of the witness was reasonable; and whether such testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACTS

1. The parties received notice of hearing more than 15 days prior to the hearing, and each stipulated on the record that notice was proper.

2. The Health Care Personnel Registry is established and maintained by Respondent NCDHHS pursuant to G.S. 131E-256.

3. Pursuant to G.S. 131E-256(b)(7), Cherry Hospital is a health care facility as that term is defined in G.S. 122C-3(14)(f).

4. On October 14, 2013, Petitioner Victor Horn was employed by Respondent as a Health Care Technician ("HCT") assigned to Unit Woodard 1 West at Cherry Hospital.

5. G.S. 131E-256(a)(2) requires Respondent to enter into the Healthcare Personnel Registry the name of any healthcare personnel working in healthcare facilities in North Carolina who have been accused of the neglect or abuse of a resident in a healthcare facility.

6. G.S. 131E-256(a) requires facilities such as Cherry Hospital to report all allegations of such abuse or neglect of residents to the Respondent.

7. On October 15, 2013, Nurse Clinical Manager Karen Tyson signed and transmitted to the Respondent a "24 Hour Initial Report" alleging that Mr. Horn pushed resident M.V. to the floor, scratching M.V.'s hand and knee. (Respondent's Exhibit 1)

8. On October 17, 2013, Ms. Tyson signed and transmitted to Respondent a "Five Working Day Report" with allegations against Mr. Horn of resident abuse and resident neglect, stating the location of the incident as "Woodard 1 West men's bathroom and hallway" and describing the incident as "Mr. Horn accused of pushing patient to the floor, causing minor injuries". (Respondent's Exhibit 2)

9. The Five Working Day Report indicated that Cherry Hospital had investigated and "substantiated" these allegations.

10. On October 23, 2013, Respondent gave Mr. Horn written notice that it had entered his name into the Healthcare personnel registry and indicated that it would conduct an investigation of the following allegations: "On or about October 14, 2013 you abused a resident at Cherry Hospital; on or about October 14, 2013 you neglected a resident at Cherry Hospital". (Respondent's Exhibit 3)

11. The notice included a statement of Mr. Horn's right to contest the listing of allegations by filing a Petition for a Contested Case Hearing with the Office of Administrative Hearings.

12. Mr. Horn properly and timely filed his Petition for Contested Case with the Office of Administrative Hearings on November 12, 2013.

13. Mr. Horn filed an Amended Petition for Contested Case Hearing on January 8, 2014.

14. The Petition and the Amended Petition were filed pursuant to G.S. 131E-256(d1), allowing healthcare personnel to contest the placement in the Healthcare Registry of information regarding accusations made, but not yet substantiated, against the healthcare personnel.

15. The Respondent began its investigation into the allegations against Mr. Horn on October 23, 2013. (Respondent's Exhibit 19, p.1; Respondent's Exhibit 20, p.1)

16. Healthcare Personnel Investigator Nancy Gregory conducted the investigation. On May 5, 2014 she signed two "Investigation Conclusion Reports" (the "ICRs"), one regarding the allegation that Mr. Horn abused M.V. (Respondent's Exhibit 19) and the other regarding the allegation that Mr. Horn neglected M.V. (Respondent's Exhibit 20).

17. Ms. Gregory's first ICR "substantiated" the allegation that Mr. Horn abused M.V. "by willfully using improper and unauthorized physical interventions, resulting in physical harm" (Respondent's Exhibit 19, pp.1, 22) (T.pp. 238-242). She concludes that

"There is credible evidence to substantiate the allegation that Victor Horn abused the resident, (M.V.) by willfully using improper and unauthorized physical interventions to manage (M.V.)'s aggressive behavior". (Respondent's Exhibit 19, p. 22)

18. Ms. Gregory relied upon the definition of "abuse" as: "the willful infliction of injury…with resulting physical harm, pain or mental anguish," which she articulated in her Investigation Conclusion Report. (Respondent's Exhibit 19, p. 22, T. pp. 240, 262-265) This definition is not the same definition used by Cherry Hospital as articulated in its Clinical Care Plan. (Respondent's Exhibit 7, p. 30)

19. Ms. Gregory's second ICR "substantiated" the allegation that Mr. Horn had neglected M.V. "by failing to utilize facility approved behavioral interventions, and failing to report that the resident had fallen, resulting in physical harm" (Respondent's Exhibit 20, pp. 1, 20). She concluded that "There is credible evidence to substantiate the allegation that Victor Horne neglected the resident, (M.V.) by failing to use facility approved behavioral interventions with (M.V.) during the incidents, failing to report the resident's behaviors, failing to report the resident's falls, and failing to ensure that (M.V.) received a physical assessment by the nurse resulting in risks that physical harm will occur.". (Respondent's Exhibit 20, p. 20)

20. Ms. Gregory relied upon the definition of "neglect" as: "the failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness," which she articulated in her Investigation Conclusion Report. (Respondent's Exhibit 20, p. 20) This definition is not the same definition used by Cherry Hospital as articulated in its Clinical Care Plan. (Respondent's Exhibit 7, p. 31)

21. G.S. 131E-256(a)(1) requires the Respondent to enter into the Healthcare Registry the names of all healthcare personnel working in healthcare facilities in North Carolina who have been subject to findings by the Respondent of neglect and/or abuse of a resident in a healthcare facility.

22. G.S. 131E-256(d1) provides that "healthcare personnel who have filed a petition contesting the placement of information in the Healthcare Personnel Registry under subdivision (a)(2) of this section are deemed to have challenged any findings made by the Department at the conclusion of its investigation."

23. Patients housed and maintained in Woodard 1 West at the relevant times were acutely mentally ill, psychotic and aggressive. (T.pp. 32, 164, 178)

24. On October 14, 2013, M.V. was a mental health patient housed and maintained on Woodard 1 West. (Petitioner's Exhibits 1-4, Respondent's Exhibits 19 and 20, T.pp. 23-24, 31-32, 44-45, 162-163)

25. M.V. was at that time involuntarily committed to Cherry as a "House Bill–95" detainee, having been charged with murdering a female on December 22, 2003 while

residing in a group home for which crime he had been declared and remained incompetent to stand trial. (Petitioner's Exhibit 1, T.pp. 31-33, 163, 223-224)

26. M.V.'s primary diagnosis was schizophrenia, paranoid type. (Petitioner's Exhibits 1-4, T. pp. 33, 163-164)

27. M.V. was delusional and hallucinatory, frequently believing that other patients and staff were the devil, whom he was compelled to try to kill. (Petitioner's Exhibits 1-4, T. pp. 33, 37, 163-164)

28. M.V. had frequently assaulted or attempted to assault other patients and staff, including prior attacks on Petitioner. (Petitioner's Exhibits 1-4, T. pp. 25-26, 33, 87-88, 163-164)

29. M.V. had a documented history of falling, which included occasions when he was trying to assault others. M.V. was on fall precautions and aspiration precautions. (Petitioner's Exhibits 1-4, T. pp. 25-26, 214)

30. Dr. Alok Uppal was M.V.'s treating psychiatrist. (T.p. 162).

31. Dr. Uppal testified that M.V. was generally delusional and experienced hallucinations, for which medications had little effect (T.p.164). M.V. would hallucinate that he saw the devil in others and, believing these persons to be possessed, he would attack them (T. pp. 164-165). M.V. frequently attacked peers or staff (T. pp. 163-167), and "[w]hen he get violent in response to his internal stimuli he, is pretty much very active. He is slightly obese, but he is very strong. And so obviously he charges because the—that is one reason about the falls." (T.p. 167)

32. The allegations against Mr. Horn arise from two separate incidents occurring between approximately 6:50 AM and 7:10 AM on October 14, 2013. (Respondent's Exhibits 19 and 20, Petitioner's Exhibit 22)

33. The first incident occurred in a bathroom beginning at approximately 6:51 AM.

34. As to that incident Respondent investigated an allegation that Mr. Horn "pushed [M.V.] to the floor … causing minor injuries. (Respondent's Exhibit 2)

35. At that time, Mr. Horn was not assigned any direct patient monitoring duties, but instead was assigned duties in the general maintenance of the unit, including collecting soiled linens and cleaning bathrooms. (T. pp. 30-31)

36. As to this first incident, Mr. Horn testified (T. pp. 45-54, 91-95, 109-122, 138-144) as follows:

He was in the bathroom cleaning up when M.V. entered, followed by Mr. Edmunson. M.V. immediately came at him aggressively, swinging at him with closed fists. Mr. Horn used or attempted to use techniques referred to by Mr. Horn and other witnesses as "CPI" or "NCI" techniques. (T. pp.47-52, 107-109, 113, 122, 146, 207-208) Mr. Horn was trained to employ those techniques when being assaulted by a patient, including attempting to maneuver away and attempting to catch M.V.'s fist with his hands. M.V. was between Mr. Horn and the exit, restricting his ability to get away from M.V.. Mr. Horn was backing away and trying to catch and block M.V.'s punches, while M.V. kept coming at him. Mr. Horn was not able to avoid some of the punches striking him on the hands and arms. Any efforts by Mr. Edmundson, if indeed there were any efforts at all, to re-direct M.V. were ineffective. At some point M.V. missed on one of his swings, and started to slip or lose his balance. Mr. Horn was then able to grab M.V.'s body and ease him to the floor. Mr. Horn asked M.V. if he was alright and if he wanted Mr. Horn to help him back up. M.V. told Mr. Horn to leave him alone. Mr. Horn collected his linen cart and exited the bathroom. He did not observe M.V. sustain any injury.

37. On October 14, 2013, Milton Edmundson, a Health Care Technician also employed by Cherry Hospital on Unit Woodard 1 West, was assigned "1:1 observation" of M.V. (T. pp. 46, 75-81, 214, 260)

38. This meant that Mr. Edmundson was assigned to continuously stay physically very close to M.V., to continuously supervise, monitor and document M.V.'s activities, to be responsible for M.V.'s safety, and to interact with M.V. in an attempt to direct M.V.'s behaviors away from aggression against others. (T. pp. 46, 65-66, 75, 78-81, 99-103, Respondent's Exhibit 5)

39. During the Respondent's investigation, Mr. Horn consistently denied that he willfully or intentionally caused M.V. to go to the floor in the bathroom, other than his attempt to ease M.V. to the floor once M.V. had slipped and was otherwise going to fall to the floor. (Petitioner's Exhibit 16, 17; Respondent's Exhibits 19, 20)

40. There is no evidence that Mr. Edmundson attempted to do anything.

41. Mr. Horn, Mr. Edmundson, Nurse Geraldine Brown, and M.V. were the only eyewitnesses to what occurred in the bathroom between M.V. and Mr. Horn. (Petitioner's Exhibit 22, T. pp. 45-56, 69-71, 83-96, 115-122) Mr. Edmundson, M.V., nor Ms. Brown testified for either party, thus Petitioner Mr. Horn was the only eyewitness to the events to testify under oath in this contested case hearing.

42. Some of the interaction between Mr. Horn, M.V., and Mr. Edmundson in the bathroom was captured by Respondent's video surveillance camera system. (Petitioner's Exhibit 22)

43. A video camera located in the hallway outside the bathroom had a direct view of the entrance to the bathroom and of a portion of the front of the bathroom. (Petitioner's Exhibit 22)

44. The Undersigned viewed the video recorded by that surveillance camera multiple times during the course of the hearing while it was being used to illustrate or explain the testimony of several persons testifying as witnesses. During the first day of the hearing, the Undersigned and the witnesses were able to view the video on the video system installed in the hearing room at OAH in Raleigh, North Carolina, and the Undersigned watched the video both on the monitor at the bench as well as on the large screen monitor located to the left of the witness box. When the hearing resumed in Goldsboro, the Undersigned was able to view the video on a large projection screen set up in the courtroom.

45. The undersigned finds that the video playback system installed in the courtroom at the Office of Administrative Hearings provides the best picture clarity and resolution as is reasonably available and notes that the first day of the hearing was set in Raleigh instead of Goldsboro at the request of Respondent for the purpose of utilizing the video playback system at OAH.

46. The video was viewed multiple times, in real time and in slow motion, backwards and forwards.

47. The video clearly shows Mr. Horn entering the bathroom pushing a laundry cart, passing through towards the rear of the bathroom, and out of view of the video camera. (Petitioner's Exhibit 22)

48. The video then clearly shows M.V. and Mr. Edmundson entering the bathroom and moving towards the back of the bathroom. For a few seconds, the video camera provides a direct view of the back of M.V. and a part of Mr. Edmundson, during which time M.V. appears to move backwards and forwards; thereafter he moves forward out of direct view of the camera. (Petitioner's Exhibit 22)

49. Thereafter the camera has no direct view of the incident or interaction between Mr. Horn and M.V. (Petitioner's Exhibit 22)

50. The camera has a direct view of several mirrors on the wall on the left side of the bathroom as one would enter, which appear to be hung on the wall above several sinks attached to the wall. (Petitioner's Exhibit 22)

51. In the mirrors, the video very briefly shows Mr. Horn and M.V., and appears to show M.V. going downward towards the floor. (Petitioner's Exhibit 22)

52. From the video alone, it is not possible to determine how or why M.V. went downward towards the floor. (Petitioner's Exhibit 22)

53. Mr. Horn's sworn testimony and the video provided the only direct evidence offered by either party regarding the incident in the bathroom. Respondent's witnesses relied on statements of persons who did not testify in this hearing and thus were not subject to examination and cross-examination. Those hearsay statements are given little to no weight.

54. Some of Respondent's witnesses also testified from their view of the video which this finder of fact viewed many times and found to be sufficiently clear to judge the events at issue. This finder of fact's view of the video is often inconsistent with the view of some of those witnesses, and therefore finds those accounts to not be credible.

55. The undersigned finds Petitioner's testimony regarding the incident in the bathroom to be credible and believable.

56. M.V. losing his balance and beginning to fall before Mr. Horn caught him was consistent with his history of falling while attempting to attack others as testified to by Dr. Uppal.

57. Mr. Horne did not push M.V. to the floor in the bathroom, or otherwise willfully, intentionally, or by other than accidental means cause or contribute to M.V. going to the floor. There is no credible evidence of how Mr. Horn failed to use the approved behavioral interventions or what he could have done differently. Mr. Horn did not fail to utilize facility approved behavioral interventions.

58. The second incident investigated by Respondent occurred approximately 10 minutes later in a hallway where M.V. again attacked Mr. Horn. (Petitioner's Exhibit 22, T. pp. 55-65, 71-74, 123-139, Respondent's Exhibit 19-20)

59. As to this second incident, Mr. Horn testified (T pp. 56-65, 73-74, 123-138) as follows:

> He went into the linen room as Betty Cook, another healthcare technician, was coming out of that room with her assigned patient. Mr. Horn put some things away and came out of the linen room. He was immediately confronted by M.V., who attacked him swinging his fists. Mr. Edmundson was somewhere behind M.V. and again did practically nothing and was ineffective in re-directing M.V. from his attempt to assault Mr. Horn. Mr. Horn put his arm up to block M.V.'s punches and again attempted to use the CPI techniques he had been taught, including trying to grab M.V.'s hand as M.V. was swinging and trying to move away from M.V. He tried to move backwards away from M.V., but M.V. grabbed ahold of him. He tried to get his hand released so he could get ahold of M.V.'s hand. As he moved backwards away from and to the side of M.V, M.V. went down to the floor. Mr. Horn did not observe M.V. sustain any injury. At that point, consistent with his CPI training, Mr. Horn walked away so as to put some distance between himself and M.V.

60. Petitioner testified that he did not willfully or intentionally cause or contribute to M.V. falling in the hallway. (T. pp. 56-65, 73-74, 123-138)

61. From the video, it appears that M.V. lost his balance as Petitioner is backing up in an attempt to get away from M.V. It does not appear from the video that Petitioner caused M.V. to fall. Mr. Edmundson and Ms. Cook are both standing immediately where the incident took place. There is no evidence that Mr. Edmundson or Ms. Cook attempted to do anything to intervene or help in any way.

62. During the Respondent's investigation, Mr. Horn consistently denied that he willfully or intentionally caused or contributed to M.V. falling in the hallway. (Petitioner's Exhibit 16, 17; Respondent's Exhibits 19, 20)

63. The only eyewitnesses to this incident were M.V., Mr. Horn, Mr. Edmundson, and Betty Cook. (Petitioner's Exhibit 22, T.pp. 56-65, 73-74, 123-126, 243-258, Respondent's Exhibit 19-20) Mr. Edmundson, M.V., nor Ms. Cook testified for either party at the hearing; thus Petitioner Mr. Horn was the only eyewitness to the events to testify under oath in this contested case hearing.

64. Respondent's witnesses relied on statements of persons who did not testify in this hearing and thus were not subject to examination and cross-examination. Those hearsay statements are given little to no weight.

65. Mr. Horn's sworn testimony and the video provided the only direct evidence offered by either party regarding the incident in the bathroom.

66. Some of Respondent's witnesses also testified from their view of the video which this finder of fact viewed many times and found to be sufficiently clear to judge the events at issue. This finder of fact's view of the video is often inconsistent with the view of some of those witnesses, and therefore finds those accounts to not be credible.

67. The incident in the hallway was captured by a different video camera from the one that captured the view of the bathroom incident. (Petitioner's Exhibit 22)

68. This camera was at or close to the opposite end of the hall, some distance away from the location where the incident occurred. (Petitioner's Exhibit 22) Consequently the video image is not crystal clear.

69. While it is difficult to precisely make out every detail that happened during the hallway incident by viewing the video, this finder of fact is sufficiently satisfied that the image was clear enough to make the findings of fact herein. (Petitioner's Exhibit 22)

70. As with the video in the bathroom incident, the Undersigned viewed the video on the video playback system installed in the hearing room at the Office of Administrative Hearings in Raleigh, viewing the video on the monitor on the bench as well as on the large screen monitor next to the witness box. When the hearing resumed in

Goldsboro, the Undersigned viewed the videos on the large projection screen set up in the courtroom, the same as viewing the incident in the bathroom.

71. Nothing seen in the video is inconsistent with Mr. Horn's testimony describing the incident in the hallway.

72. Respondent's witness Neil Weeks was at all relevant times the Director of Patient Advocacy at Cherry Hospital. The program he directs is an independent agency within the hospital tasked with investigating allegations of abuse, neglect and exploitation. (T.p. 195)

73. Mr. Weeks investigated the allegations that Mr. Horn pushed M.V. to the floor on the two occasions at issue, and concluded that Mr. Horn "abused" M.V. during the incident in the hallway. (T.pp. 196-199; Respondent's Exhibit 13)

74. Mr. Weeks relied upon the definition of "abuse" as: ". . . the infliction of physical or mental pain by other than accidental means or injury . . . or the depravation of services which are necessary to maintain the mental or physical health of the patient . . . ." (Respondent's Exhibit 7, p. 2, Respondent's Exhibit 13, p.2) This is the definition used by Cherry Hospital in its Clinical Care Plan, but differs from the one used by Ms. Gregory in her report.

75. Even though Mr. Weeks testified that while watching the video he could make out the details of who did what during the hallway incident, and concluded from the video that Mr. Horn "slung" M.V. to the floor, it appears to the Undersigned that Mr. Weeks was making assumptions not supported by the video. Contrary to Mr. Weeks testimony, the video is of sufficient clarity and it does not show Mr. Horn "slinging" M.V. to the floor. (T .pp. 205-211, 222, Petitioner's Exhibit 22)

76. Ms. Gregory acknowledged that no witness had described Mr. Horn "slinging" M.V. to the floor, that no witness had suggested to her that Mr. Horn had willfully or intentionally caused M.V. to go to the floor, and that from the video alone one could not conclude that Mr. Horn willfully or intentionally caused M.V. to go to the floor. (T. pp. 263-272)

77. Mr. Weeks testified that he concluded that Mr. Horn "abused" or "neglected" M.V. because his perception from watching the video was that Mr. Horn did not correctly attempt to break M.V.'s hold while trying to get away from M.V., although Mr. Horn did attempt to use CPI techniques including trying to move away from M.V., (T. pp. 207-209, 215-216)

78. Mr. Horn testified that he did try to break M.V's hold, and did try to use CPI techniques. (T. p. 58)

79. The undersigned finds Petitioner's testimony regarding the incident in the hallway to be credible, believable and consistent with what I viewed on the video.

80. Aside from being M.V.'s treating psychiatrist, Dr. Uppal regularly worked on this ward with its frequently aggressive patients, and was familiar with the CPI training. (T. pp. 171-172, 176-178)

81. Dr. Uppal also testified that the effectiveness of the CPI training in real world situations is open to question. Dr. Uppal stated that he has objected to a great deal of the CPI training as useless. He testified that under the circumstances Mr. Horn was facing, it would not be reasonable to expect "robotic" performance of specific CPI techniques, because of the normal human reactions to the stress of fending off an assault by someone as psychotic and aggressive as M.V.(T. pp. 171-178)

82. If Mr. Horn failed to perform any CPI technique exactly as prescribed, this was not for lack of trying and his efforts would have been reasonable under the circumstances. According to Dr. Uppal, in the heat of the moment everybody responds differently.

83. M.V.'s going to the floor during the hallway incident was consistent with his history of falling while assaulting others.

84. Mr. Horne did not sling M.V. to the floor in the hallway, or otherwise willfully, intentionally, or by other than accidental means cause or contribute to M.V. going to the floor in the hallway.

85. Mr. Horn's testimony as to the details of each of the two incidents in question differed in some respects from the details he gave in several interviews in Respondent's investigation. The suggestion that this makes his testimony inherently unreliable based on Dr. Uppal's testimony is without merit. Although there are some distinctions, the substance of his testimony is consistent, consistent with the video and is credible. Dr. Uppal did not examine or counsel Mr. Horn in any regard at or near the events at issue herein. Dr. Uppal was speaking in generalities and was not called upon to render a decision on the credibility of Mr. Horn.

86. To adopt the Respondent's suggestion of the inherent reliability of Mr. Horn's testimony because he had been engaged in a traumatic event and thus subject to creating "false memories" invades the province of the finder of fact to discern the truthfulness of testimony based upon the totality of the evidence. To adopt Respondent's suggestion as an absolute would be to negate the testimony of every person who either engages in or observes a traumatic even, without assessing the credibility of that witness' testimony, is not reasonable and without merit. It is for the finder of fact to weigh and determine the credibility of all evidence.

87. It is also noted that Mr. Horn's version changed on one occasion because Mr. Weeks told him that the video showed something different from what Mr. Horn was saying. Mr. Weeks refused to allow Mr. Horn to see the video. Mr. Weeks was being deceptive and untruthful with Mr. Horn, and Mr. Weeks' own testimony is not consistent

with what is clearly shown in the video. No one with Respondent allowed Mr. Horn to see the video, and it was not until Petitioner's attorney obtained a copy of the video that Mr. Horn finally had a chance to see the video himself. (T.p. 209-210; Respondent's Exhibit 20, pp. 12-13) If there was an attempt to create "false memories" it was by Mr. Weeks.

88. The Undersigned does not find any of the differences in statements Mr. Horn gave during the investigation, compared to the testimony he gave at trial, to be significant or material to the determination of the issues of whether Mr. Horn abused M.V., or whether Mr. Horn neglected M.V.

89. Without regard to whether references to the definition of "abuse" stated in the Cherry Hospital Clinical Care Plan and used by Mr. Weeks or the definition referenced by Ms. Gregory in Respondent's Exhibit 19, no "act, error or omission" of Mr. Horn constituted the abuse of M.V., a phrase common to both definitions.

90. The credible testimony given by Mr. Horn, and the previous statements given by Mr. Horn, tend to show that any "act, error, or omission" of Mr. Horn which may have caused or contributed to M.V. falling on either occasion was at most "accidental means" and therefore did not constitute abuse as defined by the patient advocate nor the definition set forth in Cherry Hospital's Clinical Care Plan. (Respondent's Exhibit 7, p.2)

91. Nothing in the video surveillance evidence shows or even suggests that any "act, error or omission" of Mr. Horn which may have caused or contributed to M.V. falling or going to the floor on either occasion constituted anything other than "accidental means".

92. There was no evidence presented at the hearing, nor even any other evidence referenced in Respondent's ICRs, suggesting that Mr. Horn willfully or intentionally inflicted any physical harm, pain, or mental anguish on M.V.

93. The Cherry Hospital Clinical Care Plan defines "neglect" as the failure to provide care or services necessary to maintain the mental and physical health of the individual served." (Respondent's Exhibit 7, p. 3)

94. One of the grounds on which Respondent substantiated the allegation that Mr. Horn neglected M.V. was that "Mr. Horn failed to utilize facility approved behavioral interventions with M.V. during the incidents". (Respondent's Exhibit 20, p.20)

95. Ms. Gregory did not describe or identify what "facility approved behavioral interventions" Mr. Horn failed to utilize. (T.pp. 235-242)

96. Ms. Gregory's ICRs include summaries of her interviews with persons other than Mr. Horn, which indicate that some of these persons had watched the same video surveillance evidence introduced at the hearing as Petitioner's Exhibit 22, and that from the review of the video these persons contended that there were actions Mr. Horn could have taken, or things he could have done differently, to avoid M.V.'s attacks, or to avoid

M.V. falling, and at least intimated that some of these alternate courses of action would have been consistent with Cherry Hospital's instructions in the use of CPI techniques.

97. Those persons are identified in Ms. Gregory's reports as staff numbers 1-6, respectively. Two of those persons identified as staff members 1-6 testified at the hearing, Nurse Jackson and Mr. Weeks.

98. Mr. Horn testified extensively about his training and the use of CPI techniques and the manner in which he attempted to use those on each occasion when M.V. attacked him. (T.pp. 47-53, 109-113, 58-63, 45-53, 91-95, Petitioner's Exhibit 5)

99. Mr. Horn's testimony was that he utilized or attempted to utilize these techniques during both of his encounters with M.V.

100. Nothing in the video of either incident shows or suggests that Mr. Horn did not use or attempt to use the techniques he described in his testimony. The quality of the video in the hallway incident is not crystal clear and makes it somewhat more difficult to determine if Mr. Horn was using proper techniques or not, but the appearance is that he is making good faith efforts. There is no testimony of what he could have done differently or better.

101. The only testimony given at the hearing tending to show or suggest that Mr. Horn failed to utilize facility approved behavioral intentions in his interactions with M.V. was given by Mr. Weeks. (T.pp. 207-208, 215-218)

102. With regard to the incident in the hallway, Mr. Weeks acknowledged that where the video showed Mr. Horn backing up or trying to get away from M.V., that action was consistent with CPI training. (T.p. 207-8)

103. Mr. Weeks testified that based on his review of the video he believed that patient M.V. had grabbed hold of Mr. Horn's sleeve and that in response Mr. Horn had not correctly exercised CPI techniques in attempting to break that hold. (T.pp. 207-208, 215-218)

104. As stated above, Dr. Uppal testified that the effectiveness of the CPI training in real world situations is suspect. Dr. Uppal has objected to a great deal of the CPI training as useless. Under the circumstances Mr. Horn was facing, Dr. Uppal said that it would not be reasonable to expect "robotic" performance of specific CPI techniques, because of the normal human reactions to the stress of fending off an assault by someone as psychotic and aggressive as M.V.(T. pp. 171-178)

105. It cannot be found that Mr. Horn failed to "utilize facility approved behavior interventions" during either incident. If any such failure occurred, it did not cause or contribute to any physical harm or mental anguish to M.V.

106. Respondent also substantiated the allegation that Mr. Horn neglected M.V. on the ground that Mr. Horn failed to report M.V.'s "behaviors", or that M.V. had fallen, and "fail[ed] to ensure that M.V. received a physical assessment by the nurse, resulting in risk that physical harm [would] occur." (Respondent's Exhibit 20, p. 20)

107. On October 14, 2014, M.V. was on "precautions" because of his history of aggression and falling while being assaultive. (Petitioner's Exhibit 7) M.V. was on 1:1 observations and his 1:1 care-taker was standing in the immediate area at the time of both incidents. M.V.s 1:1 caretaker, Mr. Edmundson, failed to take any action in either incident. Mr. Edmundson did not testify in this contested case hearing.

108. Respondent's Exhibit 5 is the Cherry Hospital Clinical Care Plan Protocol for Precautions and Standard Accountability.

109. The policy defines "assigned staff" as "a staff member who is assigned the responsibility for implementing and documenting the precautions." (Respondent's Exhibit 5, p. 1)

110. The same policy describes the duties of "an assigned staff member", when assigned to a patient on "1:1 Observation". (Respondent's Exhibit 5, p. 2)

111. Where Mr. Edmundson was the "assigned staff" with the duties of 1:1 observation of M.V., Mr. Edmundson was "the staff member who was assigned the responsibility for . . . documenting the [fall] precautions." (Respondent's Exhibit 5)

112. Respondent's Exhibit 6 is the Cherry Hospital Clinical Care Plan, Falls Prevention and Management Program.

113. The policy defines a "fall" as "a sudden, ***uncontrolled***, unintentional, non-purposeful, downward displacement of the body to the floor/ground or to another object (excluding such motion as a result of recreational activities or ***as a result of violent blows or other purposeful actions inflicted upon self or others***)."(Respondent's Exhibit 6, p. 1)

114. Dr. Uppal testified that even the definition of "fall" becomes suspect in the day to day operations of the hospital and when to document something as a fall, especially as it pertains to M.V. and his "falls" during aggressive incidents. He said that a "fall" may be dependent on the perception of the viewer.

115. Dr. Uppal testified that "The issue of falling is a very gray area. Particularly in our hospital we have been working with the policies because we want to reduce falls. But how the fall is documented, how the fall is addressed or defined is still work in progress." (T.p. 167)

116. According to Dr. Uppal it is difficult to precisely define what constitutes a "fall." Because of that difficulty there is discrepancy in how and how often falls are

documented in the hospital. What one person documents as a fall may not be perceived as a fall by another person who then may not document the incident. (T.p. 167)

117. According to Dr. Uppal the hospital policies encourage documenting everything, but he realizes that does not happen. (T.p. 169)

118. Mr. Horn testified during the bathroom incident that M.V. went to the floor while swinging at him, stating ". . . he missed on one of his swings, and with his weight and with his agility he actually started to slip. And what I was able to do was actually grab him and actually lower him down to the floor." According to Mr. Horn, the reason he is visible and over M.V. is because he was lowering M.V. to the floor. (T.p. 49, 92)

119. Mr. Horn consistently stated that he assisted lowering M.V. to the floor after M.V. had lost his balance and was falling to the floor. (T.p. 49, 92-93)

120. The admissible, credible and uncontroverted evidence is to the effect that M.V. *started* to fall in the bathroom, but Mr. Horn caught him and controlled his descent to the floor.

121. M.V.'s going to the floor in the bathroom was not a "fall" for which reporting was required, and if it was, Mr. Edmundson as the assigned 1:1 staff was the person having the responsibility for documenting and reporting the "fall".

122. The evidence shows that M.V. did in fact fall during the incident in the hallway.

123. Mr. Horn did not observe M.V. sustain any injury during either incident.

124. Upon assessment of M.V. by Nurse Jackson, she discerned an abrasion on his left knee and a scratch on his left hand, which did not require any medical attention; she merely "washed it with soap and water and put a Band-Aid on it." (T. pp. 23-24)

125. M.V. did not tell her how he got the abrasion or the scratch. (T. pp. 23-24) There is no evidence that Mr. Edmundson told Nurse Jackson how M.V. got the abrasion.

126. Respondent contends that even if Mr. Edmundson as the assigned 1:1 staff had the primary responsibility to report the incident and the fall, all staff who witness a fall have the obligation to report it and ensure a nurse assesses the patient, and failure of any staff to do so constitutes neglect of the patient.

127. While such a standard might be optimal, a test of reasonableness would indicate that under these conditions when the patient had a 1:1 care-taker standing there and another staff member was standing there, and then the Respondent is trying to punish Mr. Horn for NOT reporting, then such would be inane.

128. Mr. Horn testified that he did notify Nurse Jackson about the incident in the hallway (T. pp. 80-81); Nurse Jackson testified that he did not report the incident to her. (T. pp. 22-25).

129. Policy for documentation of a patient fall is addressed in the Falls Prevention and Management Program; the policy provides that "new or acute problems related to patient falls or fall precautions are documented on the falls risk reassessment form by the unit RN." (Respondent's Exhibit 6, p. 6)

130. The policy describes the interventions to be undertaken following a patient's fall. All of the required actions are described as being undertaken by the unit registered nurse, and do not address the question of when and under what circumstances health care technicians are required to report falls. (Respondent's Exhibit 6, p.5)

131. The policy does not include a provision requiring every health care worker who observes a patient fall to report or document the fall.

132. As stated above, Respondent's witness Dr. Uppal made clear his position on the definition of a "fall" as well as the documentation and reporting of such, which is contrary to the extraordinary rigidity the Respondent attempts to apply.

133. Respondent's Exhibit 19 includes summaries of Ms. Gregory's interviews with various members of Respondent's staff, identified only as staff #1 through #6.

134. Ms. Gregory indicates that some of these persons told her that "staff" were trained or taught that all staff witnessing a patient fall are supposed to report the fall to a nurse.

135. That testimony was not corroborated by any witness with knowledge. Uncorroborated statements to Ms. Gregory which are included in her report have little to no probative value. Such witnesses are not subject to examination and cross-examination to test their truthfulness and veracity.

136. None of the Cherry Hospital Clinical Care Plan Policies offered and admitted in evidence at the hearing include a requirement that every staff person who witnesses a patient fall must report or document the fall, unless the fall occurs under circumstances indicating the possibility of abuse, neglect, or exploitation. (Respondent's Exhibits 5-7)

137. Although Health Care Technician Betty Cook clearly observed the incident in the hallway, including M.V. falling, she did not report the incident or the fall. (Petitioner's Exhibit 22, T. pp. 254, 257, 268, 272)

138. Cherry Hospital did not send either a 24-hour or 5-working day report to the Registry indicating that Ms. Cook had neglected M.V. by failing to report the fall in

the hallway or failing to ensure that M.V. was assessed by a nurse. (T. pp. 246-248, 254-258).

139. Ms. Gregory testified that she was made aware during the course of her investigation that Ms. Cook was present when M.V. fell in the hallway and gave a statement during the investigation describing the fall, and Ms. Gregory acknowledged that she had seen on the video that Ms. Cook was present when M.V. fell.

140. Ms. Gregory acknowledged that if she had been concerned that Ms. Cook had neglected M.V. by not reporting the fall, she would have taken action to initiate an investigation of Ms. Cook for determination of whether she had in fact have neglected M.V., but that despite her knowledge that Ms. Cook had not reported the fall, she did nothing to initiate an investigation of Ms. Cook.

141. It was not necessary to avoid physical harm or mental anguish for Mr. Horn to report either incident, where in each case Mr. Edmundson as the assigned 1:1 staff was obligated to report and document any reportable fall. Mr. Horn had no reason to doubt that Mr. Edmundson would do so. Mr. Horn did not notice M.V. sustain any injury during either incident. If M.V. actually did sustain the abrasion or the scratch during either incident – which is not proven—these injuries were *de minimis* and it was not unreasonable for Mr. Horn to neither see nor suspect them under the facts and circumstances of this contested case.

142. Mr. Horn contends that he did report the hall incident to a nurse, but even if he did not report the incident to a nurse, he nonetheless did not neglect M.V. by failing to do so. Based on the facts and circumstances of this case, to attempt to hold Mr. Horn responsible for neglecting M.V. because he failed to report the "fall" has no merit.

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. Petitioner has the burden of proving that the Health Care Personnel Registry erred in substantiating against him the allegations of abuse and neglect and, accordingly, listing his name on the Health Care Personnel Registry.

5. Cherry Hospital is a health care facility, namely a state-operated facility, as defined in G.S. 122C-3(14)f.

6. As a health care personnel, Victor Horn—namely, a Healthcare Technician—working in a state-operated facility, Horn is subject to the provisions of G.S. § 131E-256.

7. "Abuse" is the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish. 10A N.C.A.C. 13O .0101(1); 42 CFR § 488.301.

8. The preponderance of the admissible evidence in the record shows that Petitioner met its burden of proving that Respondent acted erroneously in substantiating the allegation that Petitioner abused M.V. during the incidents on October 14, 2013.

9. "Neglect" is defined as the failure to provide goods and services necessary to avoid physical injury, mental anguish, or mental illness. 10A N.C.A.C. 13O .0101(10); 42 CFR § 488.301.

10. The preponderance of the admissible evidence in the record shows that Petitioner met its burden of proving that Respondent acted erroneously in substantiating the allegation that Petitioner neglected M.V. during the incidents on October 14, 2013.

11. Pursuant to N.C.G.S. 150B-33(b)(11), an Administrative Law Judge may order the assessment of reasonable attorneys' fees against the State agency where the judge finds the agency has substantially prejudiced the petitioner's rights and has acted arbitrarily or capriciously. Respondent has substantially prejudiced Petitioner's rights. As a result of the decision in this case, the allegations against Petitioner Mr. Horn will be removed from the Health Care Personnel Registry. Petitioner has not met the burden of proving that Respondent acted arbitrarily and capriciously. The admissible, credible evidence in the record does not support a finding that Respondent acted in bad faith, that it failed to give fair and careful consideration to the facts, or that it failed to act with reason or the exercise of judgment. Accordingly, Petitioner is not entitled to an award of attorneys' fees in this contested case.

On the basis of the above Findings of Fact and Conclusions of Law, the Undersigned issues the following:

FINAL DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Findings of Fact and Conclusions of Law cited above, and that the Findings of Fact properly and sufficiently support the Conclusions of Law. The Undersigned enters this Final Decision based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency. Based on those conclusions and the proved facts in this case, the Undersigned holds that Petitioner has carried his burden of proof and shown by a greater weight of the evidence that Respondent erred in substantiating the allegations that Petitioner abused and neglected M.V. Respondent has substantially prejudiced Petitioner's rights.

Respondent shall remove Petitioner's name from the Health Care Personnel Registry. Petitioner is entitled to the recovery of his filing fee. Petitioner is not entitled to an award of attorneys' fees in this contested case.

NOTICE

THIS IS A FINAL DECISION issued under the Authority of G.S. 150B-34. Under the provisions of Chapter 150B, Article 4, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County, or in the superior court of the county in which the party resides. The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's final decision. G.S. 150B-46 describes the contents of the petition and requires service of petition on all parties.

In conformity with the Office of Administrative Hearing's Rules and the Rules of Civil Procedure, G.S. 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the certificate of service attached to this Final Decision.

Under G.S. 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the petition for judicial review. Consequently, a copy of the petition for judicial review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 25th day of March, 2015, n*unc pro tunc January 14, 2015.*

Donald W. Overby
Administrative Law Judge

STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
WAKE COUNTY	**13 OSP 20268**

WANDA RENFROW,	)	
	)	
Petitioner,	)	
v.	)	**FINAL DECISION**
	)	
NORTH CAROLINA DEPARTMENT OF REVENUE	)	
	)	
Respondent.	)	

This contested case was commenced by the filing of a petition on December 20, 2013. It was assigned to Fred G. Morrison Jr., Senior Administrative Law Judge. On March 3, 2014, Respondent filed a Motion for Summary Judgment. On April 21, 2014, Judge Morrison held a hearing on the motion and instructed the parties that he was taking the matter under advisement until Respondent issued a Final Agency Decision. After issuance of the Final Agency Decision on October 16, 2014, Judge Morrison resumed the hearing for the Motion for Summary Judgment on October 31, 2014, and heard oral arguments on the motion. On December 30, 2014, the parties submitted a Stipulation of Facts at the direction of Judge Morrison.

Each party contends that it is entitled to summary judgment. After careful consideration of Respondent's motion, the oral arguments, the matters of record, and the submissions of the parties, the undersigned determines the following:

STIPULATION OF FACTS

1. Petitioner was a career State employee, as defined in N.C. Gen. Stat. § 126-1.1(a).

2. From December 4, 1988, until December 1, 2013, Petitioner was continuously employed by Respondent in Respondent's Motor Fuels Division (now Excise Tax Division). Petitioner did not work in the Respondent's division of individual income tax at any time during her career with Respondent.

3. Petitioner was promoted to the position of Returns Processing Supervisor, Grade 61, in Respondent's Excise Tax Division in 2000.

4. Throughout Petitioner's long career, Petitioner received performance review ratings of Good, Very Good, or Outstanding. For her most recent performance

review (2012-13), her immediate supervisor, Mrs. Christie Chewning, rated her Very Good and for her next most recent review (2011-12), Mrs. Chewning rated her Outstanding.

5. Mrs. Donna Alderman was an employee of the Division for over 30 years and was the supervisor of Christie Chewning. Her last position in the Division was as Assistant Director. She retired effective June 1, 2013. In her affidavit of March 12, 2014, Mrs. Alderman made the following statements:

> In my positions in the Motor Fuels Division, I was very familiar with the quality of Wanda Renfrow's work as well as her work ethic and her relationships with her co-workers. Wanda is an exemplary employee. Wanda is very knowledgeable about the work of the Division, she is very dependable, and the people in the unit she supervises love her. Wanda goes the extra mile to make sure that her work is done properly. Wanda is a go-to person I could rely on to get the job done.

6. Mr. Julian Fitzgerald was the Division Director for over 15 years and the supervisor of Donna Alderman. He retired effective August 1, 2013. In his affidavit of March 13, 2014, he made the following statements:

> Wanda Renfrow was an employee in the Motor Fuels Division for my entire tenure as Director. I am very familiar with the quality of Wanda Renfrow's work and her work habits. Wanda was a stellar employee. She had a spotless record. She was very good at her job and was always willing to make the extra effort. She was a valued employee and very highly regarded among her co-workers.

7. Petitioner's husband, Richard Renfrow, prepared their federal and state joint individual income tax returns for tax years 2008, 2009, and 2010, using a purchased software package and electronically filed them on time in calendar years 2009, 2010, and 2011 respectively. Petitioner and her husband have filed joint individual income tax returns since they were married over 33 years ago. Petitioner's affidavit states the following:

- Her husband has always been responsible for preparing the returns.
- She did not review the 2008, 2009, or 2010 joint returns before they were filed and did not sign them (as they were filed electronically).
- She thought the returns her husband prepared were correct.
- She trusts her husband and trusts him to prepare their income tax returns.
- She and her husband have never received a notice from the Internal Revenue service about having a return audited or owing more tax, including their 2008, 2009, and 2010 returns.
- Until the fall of 2011, she and her husband had never received a notice from Respondent about having a return audited or owing more tax.

8. Respondent has a long-standing employee tax compliance policy that is set out in a memorandum distributed each year to its employees. The memos dated February 11, 2009; February 8, 2010; and February 18, 2011 were restatements and reminders of the policy for tax years 2008, 2009, and 2010, respectively. All of these memos state that employees of the Department of Revenue "are expected to fully comply with" the tax laws and that "[f]ailure to comply with any of these policies will result in disciplinary action up to and including dismissal." The 2010 and 2011 memos add that failure to comply will result in "potential criminal prosecution." The memo dated February 11, 2009, instructs employees that they "must make timely payments of any tax imposed by these laws and file any required return in a timely manner, even if you are due a refund or there is no tax due with the return." The memo dated February 8, 2010, adds that employees must file any required return in an "accurate manner." The memo dated February 18, 2011, states that "employees are required to report their correct tax liability on all tax returns" and to "pay all their tax liabilities in a timely manner" and explains that paying tax under an installment agreement does not constitute full compliance.

9. The February 18, 2011 tax compliance memo has an attachment called "Frequently Asked Questions" ("FAQ"), which includes the following questions and answers:

> **I don't know a thing about taxes and my spouse always does our return. What if there are errors on our returns and I didn't have anything to do with them?** *When you file a joint return, you and your spouse are jointly liable for the information on that return. If you have any reason to believe that the information included in that return is not accurate, you should file a married filing separately return.*
>
> **I know that I made a number of contributions to various organizations this year and had an illness that resulted in higher than normal medical expenses. I just don't have receipts or cancelled checks to support all of them. Can't I just estimate these deductions for my return?** *No, you must be able to substantiate any and all information included in your return and the requirements for substantiation vary. . . . The bottom line is, however, you must be able to prove that you are entitled to the deduction.*

10. The February 8, 2010, and February 18, 2011, tax compliance memos state that each employee is to sign an acknowledgement signifying that the employee has read and understood the memo and, for 2011, also read and understood the FAQ. The signed acknowledgment is to be given to the employee's supervisor to be collected by Human Resources. The acknowledgements accompanying these two memos state that by signing the employee acknowledges that compliance with the policies in the memo is "a condition of employment." By signing the acknowledgement, Petitioner indicated, among other things, that she had read and understood the excerpt quoted above. Respondent produced an acknowledgement signed by Petitioner for the February 18, 2011, tax compliance memo to which the FAQ was attached, but was unable to provide a signed acknowledgement of the memo dated February 8, 2010.

11. Respondent selected Petitioner's joint individual income tax returns for tax years 2008, 2009, and 2010 for audit.

12. In September of 2011, Petitioner received a letter from an auditor at Respondent informing Petitioner that the joint individual income tax returns of Petitioner and her husband for tax years 2008, 2009, and 2010 had been selected for audit by Respondent. The auditor provided a list of records for the Renfrows to bring and scheduled a meeting for September 28, 2011. She then worked with them, giving them time to substantiate the deductions. On February 22, 2012, the auditor issued an explanation of adjustment for the three years examined.

13. The auditor found that for the 2008 tax year, "[s]ome itemized deductions were claimed that you could not provide adequate records to support." Similarly, for the 2009 and 2010 tax years, the auditor found that Petitioner and her husband "could not provide adequate records to support all of the deductions claimed on your tax return." The primary unsubstantiated deductions for which the Renfrows had no documentation whatsoever were as follows:

2008	$22,385 cash contributions
	$ 11,063 medical deductions
2009	$23,376 cash contributions
	$16,098 medical deductions
2010	$21,250 cash contributions
	$14,535 medical deductions

14. The auditor disallowed the deductions that lacked supporting records, which almost doubled the taxable income for the Renfrows and accordingly increased the amount of tax due on their state joint returns for those years. The audit resulted in total tax due to the State in the amount of $7,107 for tax years 2008, 2009, and 2010.

15. On February 29, 2012, Respondent issued notices of assessment against Petitioner and her husband for the additional tax owed. Amended notices were issued on April 2, 2012. The Renfrows were then entitled to a period in which to appeal the amount of tax owed. They did not contest the tax. The notices of assessment did not include either a negligence penalty or a fraud penalty. According to the auditor, she had originally included the negligence penalty, but was instructed to drop it by Respondent.

16. According to Petitioner's affidavit, at some point after Petitioner met with Respondent's auditor, Petitioner met with her division Director, Mr. Julian Fitzgerald, to discuss the 2008, 2009, and 2010 returns.

17. After meeting with Mr. Fitzgerald, Petitioner received a call from Respondent's auditor informing Petitioner that she and her husband would receive documents in the mail setting up a payment plan to repay the amount of tax due. On March 23, 2012, Petitioner's husband signed the documents, which authorized Respondent to draft $315.00 from their joint checking account each month until the tax debt was paid. The monthly payment amount is more than ten percent (10%) of Petitioner's disposable income from her individual earnings.

18. The payment plan concluded in January of 2014 upon payment of all the tax and interest owed. Upon payment of the principal and interest, Respondent waived the failure to pay penalty.

19. Respondent administers its employee tax compliance policy through upper management. Upper management recommended termination of Petitioner. A representative of upper management communicated this decision to Director Julian Fitzgerald, who was expected to implement the decision. No one in the Excise Tax Division initiated or recommended disciplinary action against Petitioner. Mr. Fitzgerald had not implemented this decision as of his retirement effective August 1, 2013. In his affidavit of March 13, 2014, he stated that he did not agree with terminating Petitioner.

20. On November 5, 2013, Petitioner's then Acting Division Director, Mr. John Panza, met with Petitioner and gave her a Notice of Pre-Disciplinary Conference. The Notice recommended that Petitioner be dismissed on the basis of unacceptable personal conduct for "violation of the Department's Tax Compliance Policy." The Notice states that Petitioner's "Individual Income Tax Returns were examined for tax years 2008, 2009, and 2010" and that on each of those returns itemized deductions were claimed that Petitioner could not substantiate, resulting in a total state tax liability of $7,107 for those years. The Notice advised Petitioner that she was to attend a pre-disciplinary conference scheduled the next day.

21. According to Petitioner, in the more than 19 months that had elapsed since Petitioner's entry into the payment plan, no one at Respondent had said anything to Petitioner about the 2008, 2009, and 2010 returns.

22. In the time between Petitioner's entry into the payment plan and November 5, 2013, Respondent had "looked over" Petitioner's joint individual income tax returns filed for 2011 and 2012 but did not audit them or otherwise make a determination as to errors.

23. As of November 5, 2013, over 4½ years had elapsed since the filing of the 2008 return, over 3½ had elapsed since the filing of the 2009 return, and over 2½ had elapsed since the filing of the 2010 return. Over two years had elapsed since Petitioner

received the September 2011 letter informing her of the audit. During this time, Respondent experienced a change of administration and two of the three individuals in Petitioner's supervisory chain within the Excise Tax Division at the time of the audit had retired.

24. On November 6, 2013, Respondent received a fax requesting that Petitioner be excused from work for medical reasons until November 12, 2013. Petitioner has a heart condition. Respondent sent correspondence to Petitioner on November 7, 2013, by overnight Federal Express rescheduling the pre-disciplinary conference for November 12, 2013.

25. On November 7, 2013, Petitioner submitted to Respondent the North Carolina form, "Claiming Your Monthly Retirement Benefit," on which Petitioner answered December 1, 2013, as the effective retirement date for the section, "Please choose an effective retirement date."

26. On November 12, 2013, Petitioner attended the pre-disciplinary conference with Acting Director John Panza and Assistant Director Al Milak. Petitioner had secured representation by legal counsel before this date. Petitioner had had 7 days from the date she received the pre-disciplinary notice to consider what action she wanted to take and to seek counsel to advise her in this process.

27. At the conference, in addition to offering the evidence she wanted considered, Petitioner presented a letter and a note. The letter stated that "I do not want to be dismissed from my job. I intend to go through the internal review of the decision. . . . I love my job and what I do." The letter further stated, "Before any decision to dismiss me becomes final, I would like the opportunity to have my records reflect that I retired rather than I was dismissed." A note provided in addition to the letter and signed by Petitioner states "If the agency is not going to reinstate my employment with the Department. I'am [sic] turning in my letter of retirement from Returns Processing Supervisor effective December 1, 2013."

28. After hearing the report from the persons conducting the conference, upper management made the decision to follow its previous recommendation to terminate Petitioner. In consideration of Petitioner's letter and note presented at the disciplinary conference, Respondent sent Petitioner a letter dated November 13, 2013, informing Petitioner that "We are accepting your resignation of retirement effective December 1, 2013. We understand you will be taking approved leave until that day. Per your request we have stopped any further disciplinary action."

29. Respondent did not give Petitioner a letter of dismissal or any document stating that Respondent had decided to dismiss Petitioner beyond the letter of November 13, 2013, "accepting your resignation of retirement" and stopping any further disciplinary action per her request. Respondent did not give Petitioner a notice of her appeal rights at the pre-disciplinary conference or at any other time. Voluntary retirement is not subject to appeal rights.

30. Respondent recorded Petitioner's termination of employment on the State's Beacon System as retired effective December 1, 2013, the date Petitioner selected on the Claiming Your Retirement Benefit she submitted.

31. By letter hand-delivered to Respondent on November 14, 2014, Petitioner stated,

> I received your letter today stating that "We are accepting your resignation of retirement effective December 1, 2013" and I want to be sure there is no misunderstanding here. In my November 13, 2013 letter to you, I stated that I do not want to be dismissed from my job and that I intend to go through the internal review of the decision. I further stated that "Before any decision to dismiss me becomes final, I would like the opportunity to have my records reflect that I retired rather than I was dismissed."
> My retirement is conditional and the triggering condition is a decision by you [Respondent] that you have considered all other options and have made a determination to dismiss me." As I stated in my letter, I love my job and I want to continue to work at the Department. Based on your letter, I can only conclude that you decided to dismiss me. If this conclusion is not correct, please advise me in writing. I do not want to retire unless I absolutely have to in order to avoid dismissal.

Respondent did not provide a further response to Petitioner because Petitioner's conclusion that the final decision had been to dismiss her was correct.

32. Respondent did not suggest retirement or resignation to Petitioner. Petitioner initiated the subject of retirement.

33. Petitioner stated in her affidavit of March 11, 2014, that she "submitted retirement papers out of concern for the loss of income she would experience if [she] were dismissed" and that she felt that she was "forced to retire."

34. The organizational charts for Respondent at the time of the 2011 audit establish the following chain from Petitioner to the Secretary of Revenue:

> Petitioner – Returns Processing Supervisor
> Christie Chewning - Assistant Manager of Operations, Excise Tax Division
> Donna Alderman – Assistant Director of Excise Tax Division
> Julian Fitzgerald – Director of Excise Tax Division
> John Sadoff – Assistant Secretary for Exams
> Linda Millsaps – Chief Operating Officer
> David Hoyle – Secretary of Revenue.

The first four listed are in the Excise Tax Division and the last three listed are not in that Division.

35. The organizational charts for Respondent at the time the Notice of Pre-Disciplinary Conference was issued (November 5, 2013) establish the following chain from Petitioner to the Secretary of Revenue:

Petitioner – Returns Processing Supervisor
Christie Chewning - Assistant Manager of Operations, Excise Tax Division
John Panza – Acting Director of Excise Tax Division
Tom Dixon – Assistant Secretary for Tax Administration
Jeffrey Epstein – Chief Operating Officer
Lyons Gray – Secretary of Revenue.

The first three listed are in the Excise Tax Division and the last three listed are not in that Division.

36. Respondent identified the following individuals as having participated in the decision to impose disciplinary action on Petitioner as a result of Respondent's audit of Petitioner's tax returns for 2008, 2009, and 2010.

Jerry Coble – assistant secretary
Angela Crawford – former director of human resources
Joe Hengsen – former internal auditor
Linda Millsaps – former chief operating officer
John Sadoff – former assistant secretary of exams
Canaan Huie – former general counsel
Ton Dixon – assistant secretary
David Hoyle – former secretary of NC DOR
Tanya Sullivan, employee relations manager
Eric McKinney, director of human resources

Jerry Coble, Angela Crawford, Joe Hengsen, and Tanya Sullivan, Employee Relations Manager, served on a committee that reviewed the audit findings and applied the disciplinary criteria. Finally, Eric McKinney met with Tom Dixon, Julian Fitzgerald and Tanya Sullivan to discuss the disciplinary recommendations as applied to Petitioner based on the tax returns.

37. Of the individuals Respondent identified as participating in the decision to impose disciplinary action on Petitioner, only Jerry Coble, Tom Dixon, Tanya Sullivan, and Eric McKinney were employed by Respondent on November 5, 2013. None of these individuals were in the Excise Tax Division in 2011 or 2013.

38. The disciplinary criteria applied by the committee were unknown to both Petitioner's Assistant Director and Director of Excise Taxes. Petitioner's division director, Julian Fitzgerald stated in his affidavit that "I had no influence on the determination of what disciplinary action to impose based on the results of the audits done on employees in the Division. I have never seen any written criteria for determining what discipline Respondent considers appropriate for mistakes on tax returns."

39. The Assistant Director of the Division, Mrs. Donna Alderman, stated in her affidavit that "no one in [the Division] supervisory chain had any say in what disciplinary action, if any, was recommended for an employee of the Division as a result of audit findings. ... Likewise, no one in that supervisory chain received any guidelines or criteria establishing the basis for determining what disciplinary action, if any, should be imposed on an employee as the result of audit findings. ... I do not know who was making the decisions about what disciplinary action to impose. ... I have never seen any written criteria for determining what discipline Respondent considers appropriate for mistakes on tax returns and I do not know that any exist. I have never received an explanation of any such criteria."

40. The disciplinary criteria were determined by and known to management above the level of Division Director Julian Fitzgerald and Assistant Director Donna Alderman, and the disciplinary decisions were also made at higher supervisory positions than the positions held by Mr. Fitzgerald or Mrs. Alderman.

41. On June 25, 2013, a meeting was held between Julian Fitzgerald, Eric McKinney, Tom Dixon, and Tanya Sullivan. Respondent's purpose for the meeting was to determine why Mr. Fitzgerald had not completed the instructions given to him by Mr. Dixon to terminate Petitioner as well as complete the discipline on other employees in his division who had violated the tax compliance policy. At this time, Mr. Fitzgerald's division was the only one in the agency that had not completed the disciplinary actions from this particular round of internal audits. While Mr. Fitzgerald indicated he did not want to terminate any employees, Mr. McKinney, Mr. Dixon, and Ms. Sullivan state that he agreed he would do as instructed. Over the next few weeks, he was asked by Ms. Sullivan several times whether he had completed the task. He had still not done so. Ms. Sullivan states that he confirmed to her that he had told the individuals involved that their discipline for breach of the tax compliance policy was still at issue. Petitioner states that he made no such statement to her.

42. This matter arose prior to December 1, 2013, the date the new process for disciplinary actions at the Department was made effective by the Office of State Human Resources. Petitioner filed a contested action at the Office of Administrative Hearings ("OAH") on December 20, 2013, without requesting a grievance hearing as was allowed under the process in effect at the time of her disciplinary conference. This filing was within 30 days of her retirement date of December 1, 2013, but was more than 30 days after she received the letter of November 13, 2013, stating that her resignation of retirement had been accepted.

43. At a hearing on the Respondent's motion for summary judgment, Judge Morrison expressed his concern that under the new personnel statute effective August 21, 2013, OAH did not have jurisdiction until a "final agency decision" had been made as defined by the new statute. Without deciding the merits of Respondent's motion for summary judgment and without prejudice to it being brought before him at a later date, this matter, at his suggestion, was submitted to the Department's Internal Grievance Committee for a determination.

44. Petitioner submitted evidence at her pre-disciplinary conference and at her Internal Grievance Hearing.

45. A final agency decision ("FAD") was issued on October 16, 2014, by Secretary Lyons Gray. The FAD states,

> The purpose of this letter is to inform you of the final agency decision regarding your internal grievance hearing held June 3, 2014. The purpose of the hearing was to investigate, review and recommend a course of action that I would then accept, change, or modify based on the evidence provided.
>
> Based on the evidence I have reviewed, I agree with the recommendation of the Internal Grievance Committee that your unacceptable personal conduct would have constituted good cause for your termination. However, because you requested to be allowed to resign before any decision to dismiss you became final, my final agency decision is that your resignation has been accepted.
>
> I understand that you have already filed a petition for a contested case hearing at the Office of Administrative Hearings. Therefore, I am not including the usual appeal rights in this letter. However, if you wish to further contest this decision you or your counsel should contact our attorney, Peggy S. Vincent, within 30 days of the date of this letter.
>
> The Office of State Human Resources has reviewed and approved this Final Agency Decision.
>
> I wish you every success in your future.
>
> Regards,
>
> Lyons Gray, Secretary
>
> NC Department of Revenue

46. The FAD was reviewed and approved by the Office of State Human Resources. "The proposed final agency decision shall not be issued nor become final until reviewed and approved by the Office of State Personnel (now named the Office of State Human Resources)." N.C. Gen. Stat. § 126-34.01 (2013) (parenthetical added).

47. Respondent does not require its employees to inform anyone at Respondent if they file an amended return that is unassociated with an audit.

48. Respondent believes it had just cause under N.C. Gen. Stat. § 126-35 to dismiss Petitioner from employment.

BASED UPON the foregoing Stipulation of Facts, the undersigned makes the following:

CONCLUSIONS OF LAW

1. To the extent that any part of a stipulated fact constitutes a mixed issue of law and fact, it is deemed incorporated herein by reference as a conclusion of law.

2. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this contested case and this matter is properly before OAH for consideration.

3. There are no genuine issues of material fact and summary judgment is appropriate in this contested case. "A party is entitled to summary judgment 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.'" N.C. Gen. Stat. § 1A-1, Rule 56(c); *Steel Creek Development Corp. v. James*, 300 N.C. 631, 636-37, 268 S.E.2d 205, 209 (1980).

4. Respondent contends that Petitioner voluntarily retired and Petitioner contends that she was constructively discharged without just cause in violation of N.C. Gen. Stat. § 126-35. Petitioner seeks reinstatement, back pay, and attorney's fees.

5. Petitioner is a "career State employee" as defined in N.C. Gen. Stat. § 126-1.1(a)(2). As a career State employee, Petitioner could be dismissed for disciplinary reasons only for "just cause" and only in accordance with the requirements of N.C. Gen. Stat. § 126-35 and Section .0600 of Subchapter 1J of Title 25 of the North Carolina Administrative Code. N.C. Gen. Stat. § 126-35; 25 N.C.A.C. 01J .0604, 25 N.C.A.C. 01J .0608, and 25 N.C.A.C. 01J .0613.

6. Just cause for discipline or dismissal includes unacceptable personal conduct. 25 N.C.A.C. 01J .0604(b)(2). Unacceptable personal conduct includes conduct for which no reasonable person should expect to receive prior warning; job-related conduct which constitutes a violation of state or federal law; the willful violation of known or written work rules; and conduct unbecoming a state employee that is detrimental to state service. 25 N.C.A.C. 01J .0614(8)(a), (b), (d), and (e).

7. Petitioner's submission of retirement application documents does not create a presumption that Petitioner retired voluntarily. *Covington v. Dep't of Health and Human Serv.*, 750 F.2d 397, 943 (Fed. Cir. 1984)(citing *Gonzalez v. Dep't of Transp.*, 701 F.2d 36, 39 (5th Cir. 1983). Even if it did, Petitioner has rebutted this presumption.

8. An involuntary resignation amounts to constructive discharge. *Parker v. Bd. of Regents of Tulsa Junior College,* 981 F.2d 1159, 1162 (10th Cir. 1992) A resignation is involuntary when it is either forced by the employer's duress or coercion or

it is obtained by the employer's misrepresentation or deception. *Leardini v. Charlotte-Mecklenburg Bd. of Educ.*, 2011 U.S. Dist. LEXIS 42501 (W.D.N.C. 2011).

9. The question of whether coercion or misrepresentation, causing constructive discharge, occurred on the facts presented is a question of law. *Hargray v. City of Hallendale*, 57 F.3d 1560, 1567 (11th Circuit 1995).

10. It is concluded that Respondent lacked good cause, both procedurally and substantively, to terminate Petitioner and that, consequently, Petitioner did not voluntarily resign her position but was constructively discharged. These conclusions are based on the following reasons, each of which provides an independent basis for granting summary judgment to Petitioner:

a. Respondent failed to follow the procedure required for disciplinary action against Petitioner and this failure is a violation of due process that voids the disciplinary action as well as its effects.
b. Petitioner's retirement was involuntary because Respondent lacked good cause for its threatened dismissal of her and this lack of good cause renders the threatened dismissal coercive and her retirement involuntary.
c. Petitioner's retirement was involuntary because it was induced by her reasonable reliance on misleading and erroneous statements made by Respondent in both the Notice of Pre-Disciplinary Conference and the various employee tax compliance memos.
d. Respondent did not have just cause to dismiss Petitioner and Respondent's initiation of a disciplinary action to dismiss her in the absence of just cause and while her payment plan was in effect violates N.C. Gen. Stat. § 143-553.

Respondent Failed To Follow the Required Procedures

11. "It is well-settled that a career State employee enjoys a "property interest of continued employment created by state law and protected by the Due Process Clause of the United States Constitution." *Nix v. Dep't of Admin.*, 106 N.C. App 664, 666, 417 S.E.2d 823, 825 (1992) (internal citations and quotations omitted). As a consequence, Respondent cannot "rightfully take away this interest without first complying with appropriate procedural safeguards." *Id.*

12. "The imposition of disciplinary action shall comply with the procedural requirements of this Section [.0600 of Subchapter 1J)." 25 N.C.A.C. 01J .0604(d). The procedural requirements of Section .0600 for a dismissal include the following:

a. A supervisor's recommendation of dismissal. 25 N.C.A.C. 01J .0613(4)(a).
b. The requirement that the individual who conducts the pre-dismissal conference with the employee have the authority to recommend or decide what, if any, disciplinary action to impose. 25 N.C.A.C. 01J .0613(4)(a).

c. A pre-dismissal conference between the employee and the person recommending dismissal. 25 N.C.A.C. 01J .0608(b).

13. Respondent violated the procedural requirements of 25 N.C.A.C. 01J .0613(4)(a) by failing to obtain a recommendation of dismissal from Petitioner's supervisor. Petitioner's supervisor was Christie Chewning and she did not recommend dismissal. Likewise, none of the other individuals in the Excise Tax Division initiated or recommended disciplinary action against Petitioner. The individuals outside the Division who were above the Division Director in the chain from Petitioner to the Secretary did not supervise Petitioner and were not her supervisors as that term is applied in 25 N.C.A.C. .0613(4)(a). Even if they were, no one in that chain at the time of the audit was in the chain in 2013, and none of the four individuals Respondent identified in Fact # 36 as serving on a committee that applied the disciplinary criteria were in Petitioner's supervisory and management chain.

14. Respondent violated the procedural requirements of 25 N.C.A.C. 01J .0613(4)(a) when it allowed the pre-disciplinary conference to be conducted by individuals who had no authority to recommend or decide what, if any, disciplinary action was to be imposed on Petitioner. The individuals who conducted the conference had no input into the decision. They are not included in the list of individuals identified in fact # 36 as the ones who participated in the decision to impose disciplinary action. Respondent's disciplinary decisions were made "at higher supervisory positions" than director or assistant director of a division. The individuals who conducted the conference gave a report of the conference to upper management, which made the decision to terminate.

15. Respondent violated the procedural requirements of 25 N.C.A.C. 01J .0608(b) when it allowed the pre-disciplinary conference to be conducted by an individual who did not recommend dismissal. The individuals who conducted the conference were in the Excise Tax Division and no one in that division initiated or recommended dismissal.

16. "When a Government agency does not follow its rules, regulations, or procedures, due process is violated and its action cannot stand." *Ameira Corp. v. Veneman*, 347 F. Supp. 2d 225, 226 (M.D.N.C. 2004). If dismissal from employment is based on a defined procedure, that procedure must be scrupulously observed. *Service v. Dulles*, 354 U.S. 363, 388-89 (1957) (reversing dismissal of petitioner for failure to comply with regulation). Regulations with the force and effect of law serve to supplement the statutory framework, and when they prescribe a procedure to be followed by the agency, it must be followed. *United States ex. rel. Accardi v. Shaughnessy*, 354 U.S. 260, 265 (1954). The purpose behind the *Accardi* principle is "to prevent the arbitrariness which is inherently characteristic of any agency's violation of its own procedures." *United States v. Hefner*, 420 F. 2d 809, 812 (4th Cir. 1969).

17. Respondent's violation of the procedural requirements denied Petitioner a meaningful pre-disciplinary conference in violation of due process.

18. Had Respondent followed the mandated procedures, there is more than a substantial chance that the result would have been different because of the high regard in which she was held by her supervisors. Consequently, Respondent's actions violated Petitioner's due process rights and her induced retirement -- the result obtained by Respondent's failure to comply with the procedures – must be stricken. See *Liephart v. North Carolina School of the Arts*, 80 N.C. App. 339, 348-49, 342 S.E. 2d 914, 923 (1986).

19. Respondent also violated N.C.A.C. 01J .0608(c) by failing to provide notice of appeal rights. N.C. Gen. Stat. § 126-35(a) clearly states that "the employee shall, before the [disciplinary] action is taken, be furnished with a statement in writing setting forth … the employee's appeal rights." Furnishing this statement is "a condition precedent that the employer must fulfill before disciplinary action against an employee may be taken" and is constitutionally mandated by due process. *Luck v. Employment Sec. Comm'n,* 50 N.C. App. 192, 194, 272 S.E.2d 607, 608 (1980).

20. Respondent decided to dismiss Petitioner and did so without notifying her of her appeal rights, as required by due process and N.C. Gen. Stat. § 126-35(a).

Respondent Lacked Good Cause In Initiating Discipline

21. "[A] threatened termination must be for good cause in order to precipitate a binding, voluntary resignation. *Christie v. United States.,* 518 F.2d. 584, 588 (1975)(*citing Autera V. United States*, 389 F.2d 815 (1968)).

22. Generally, a choice between the unpleasant alternatives of resignation or termination does not establish that the resignation was involuntary. *Stone v. Univ. of Md. Med. Sys. Corp.,* 855 F.2d 167, 174 (4th Cir. 1988). This general principle does not apply when "the employer lacked good cause to believe that there were grounds for termination." *Id.* at 174. If an agency lacks reasonable grounds for threatening to take an adverse action, the threatened action by the agency is "purely coercive." *Shultz V. United States Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987). Here, Respondent did not have good cause to believe that its threatened termination could be sustained. Consequently, its threatened termination of Petitioner was "purely coercive" and Respondent constructively discharged Petitioner without just cause.

23. Respondent lacked good cause to believe the threatened termination of Petitioner could be sustained for each of the following reasons:

a. The threatened termination is contrary to the procedural requirements of 25 N.C.A.C. Subchapter 01J, Section .0600, as explained above.
b. The threatened termination is contrary to the plain language of 25 N.C.A.C. 01J .0608(a), which requires a current incident of unacceptable conduct.

c. The threatened termination is contrary to the plain language of 25 N.C.A.C. 01J .0604(b)(2) and 25 N.C.A.C. 01J .0614(8), which require personal acts and not attributed acts.
d. The threatened termination is contrary to the settled case law on what constitutes unacceptable personal conduct and "just cause."

24. Dismissal for unacceptable personal conduct must be for a current incident of unacceptable personal conduct. 25 N.C.A.C. 01J .0608(a). The rules do not define "current;" therefore its ordinary meaning applies. *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 666, 509 S.E.2d. 165, 172 (1998) (applying dictionary definition of word "deposit" used in rule). The term "current" when used as an adjective means "of the present time." World Book Dictionary A-K 509 (9th Ed. 1993).

25. The incident of alleged unacceptable personal conduct set out in the November 5, 2013, Notice of Pre-Disciplinary Conference was not a current incident. It consisted of the filing of returns in 2009, 2010, and 2011 (for tax years 2008, 2009, and 2010) that were audited by Respondent in the fall of 2011.

26. Since the audit, Petitioner had entered into a payment plan on March 23, 2012, and that plan had been in effect for over 18 months and was near completion, Petitioner had received two annual performance reviews in which she was rated Outstanding on one and Very Good on the other, and Petitioner and her husband had filed two more joint individual income tax returns – one filed in 2012 for tax year 2011and one filed in 2013 for tax year 2012 – and Respondent had "looked over" these returns and made no adjustments to them. Respondent has offered no explanation whatsoever for the lengthy delay.

27. Case law confirms the short time period contemplated for dismissals based on unacceptable personal conduct. *E.g., Kea v. Dep't of Health and Human Serv.*, 153 N.C. App. 595, 570 S.E. 2d 919 (2002) (less than one month between date sexual harassment claim filed against employee and employee's dismissal); *Davis v. N.C. Dep't of Crime Control & Pub. Safety*, 151 N.C. App. 513, 565 S.E.2d 716 (2002) (one month between traffic incident and dismissal). Even when a lengthy investigation was involved, the time between the incident and dismissal did not exceed 10 months. *Poarch v. N.C. Dep't of Crime Control & Pub. Safety*, 2012 N.C. App. LEXIS 1191, 741 S.E.2d 315 (2012) (10 months between complaint of officer's conduct and dismissal).

28. Assuming, arguendo, that Respondent could, at some prior point in time, have dismissed Petitioner for unacceptable personal conduct on the basis of the errors her husband made on their 2008, 2009, and 2010 returns, that time had passed. As of November 5, 2013, the errors on those returns were not a current incident. *Cf.* 25 N.C.A.C. 01J .0614(6) (disciplinary action deemed inactive if 18 months have passed since warning or action and employee does not have another active warning or disciplinary action that occurred within the last 18 months).

29. Dismissal for "unacceptable personal conduct" by its terms requires personal conduct. The rules do not define "personal;" therefore, its ordinary meaning applies. *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 666, 509 S.E. 2d. 165, 172 (1998) (applying dictionary definition of word "deposit" used in rule). The term "personal" when used as an adjective means "belonging to a person; individual; private" and "done in person; directly by oneself, not through others or by letter." World Book Dictionary L-Z 1555 (9th Ed. 1993).

30. Determining whether the employee engaged in the conduct the employer alleges is the first of the three steps for determining whether just cause for discipline exists. *Warren v. N.C. Dep't of Crime Control and Public Safety*, 2012 N.C. App. LEXIS 770, 726 S.E.2d 920, 925 (2012). The Notice of Pre-Disciplinary Conference does not allege that Petitioner prepared the returns or knew or had reason to know the returns were incorrect. Instead it uses the passive voice, stating that "errors were made" on her returns. The just cause analysis fails at the first step because Respondent's threatened termination of Petitioner is based on acts done, not by her, but by her husband. Petitioner's acts were to rely on her husband to prepare their returns and to promptly enter into a payment plan when told that her husband had made mistakes on the returns. Petitioner's husband had prepared their returns for decades and they had never received a notice from either the IRS or Respondent that a return contained an error. Petitioner's reliance was reasonable under the circumstances.

31. Petitioner's joint financial liability under the tax laws for errors on the returns does not negate the requirement that dismissal for just cause be based on personal acts and not attributed acts. Dismissal based on personal conduct requires substantial misconduct of the individual who is dismissed. E.g., *Poarch v. N.C. Dep't of Crime Control and Public Safety,* 2012 N.C. App. LEXIS 1191, 741 S.E.2d 920, 315 (2012), rev. denied 2012 N.C. LEXIS 1030, 735 S.E.2d 174 (on-duty sexual misconduct of highway patrol officer); *Granger v. University of N.C.*, 197 N.C. App. 699; 678 S.E.2d 715 (2009)(addressing co-workers with racially charged language); *Brunson v. N.C. Dep't of Correction*, 152 N.C. App. 430, 567 S.E.2d 416 (2002)(case worker held in contempt of court while on-duty).

32. The errors Petitioner's husband made on their returns were not considered by Respondent to be negligent or fraudulent. If they had been determined to be either negligent or fraudulent, Respondent would have assessed a penalty for negligence or fraud, as appropriate, as required by N.C. Gen. Stat. § 105-236. Subpart (a)(5)a. of that statute states: "For negligent failure to comply with [the state tax laws], without intent to defraud, the Secretary shall assess a penalty equal to ten percent (10%) of the deficiency due to the negligence." Subdivision (a)(6) states: If there is a deficiency or delinquency in payment of any tax because of fraud with intent to evade the tax, the Secretary shall assess a penalty equal to fifty percent (50%) of the total deficiency. Respondent was required to assess negligence and fraud penalties if they applied. Respondent did not assess these penalties and had instructed the auditor to not assess the negligence penalty.

33. The second step of the *Warren* three-part test is to determine whether the employee's conduct falls within one of the categories of unacceptable conduct provided by the Administrative Code. *Warren* at 775, 726 S.E.2d 925. Here, none of the four grounds for unacceptable personal conduct referenced in the Notice of Pre-Disciplinary Conference applies. If Respondent had applied the settled case law to the facts, it could not reasonably have believed that it had good cause to dismiss Petitioner.

a. Respondent's acts negate the application of the category of "conduct for which no reasonable person could expect to receive a warning." Respondent believed it needed to warn employees about filing correct tax returns and did so in an annual memo.

b. The category of "job-related conduct which constitutes a violation of state or federal law" is inapplicable by its terms. Job-related conduct is conduct concerning the duties of the employee's job. Petitioner's preparation of her income tax return is not among her job duties. This category was added in response to two decisions by the North Carolina Court of Appeals holding that the employee's conduct fell into the category of job performance, and not personal conduct, and therefore required warnings before dismissal. *Leeks v. Cumberland County Mental Health, Developmental Disability, and Substance Abuse Facility*, 154 N.C. App. 71, 78, 571 S.E.2d 684, 689 (2002). The category is further limited to violations that threaten the "immediate disruption of work or safety of persons or property," *Steeves v. Scotland County Bd. of Health*, 152 N.C. App. 400, 409, 567 S.E.2d 818, 820-21 (2002), and the mistakes on Petitioner's tax returns did not pose these threats.

c. The category of "willful violation of known or written work rules" is also inapplicable by its terms. The errors on Petitioner's joint returns, even if committed by her, were not even negligent, much less willful. Respondent's employee tax compliance policy was not a work rule because it did not apply to Petitioner's performance of her job. *E.g., Hilliard v. N.C. Dep't of Correction, 173 N.C. App. 594, 597, 620 S.E. 2d 14, 17, (2005)* (acts for which discipline imposed occurred while at job).

d. The category of "conduct unbecoming a state employee that is detrimental to state service" is rendered inapplicable by the facts. The incorrect returns were filed in three successive years starting in 2009. The Notice of Pre-Disciplinary Conference was issued on November 5, 2013. During that time, Petitioner continued her exemplary career and service to the state, resulting in a beneficial rather than a detrimental impact.

34. The third step of the *Warren* test is to determine whether the conduct amounted to just cause for the disciplinary action taken. *Warren* at 775, 726 S.E.2d 925. A commensurate discipline approach applies in North Carolina; unacceptable personal conduct does not necessarily establish just cause for all types of discipline. *Id.*

Unacceptable personal conduct is misconduct of a serious nature. *N.C. Dep't of Env't & Natural Res. v. Carroll,* 358 N.C. 649, 599 S.E. 2d 888 (2004).

35. Just cause must be determined on the facts and circumstances of each case. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 901 (2004)(not every violation of law gives rise to "just cause" for employee discipline). Even if Petitioner had prepared the returns on which the errors were made, the facts and circumstances of this case would require balancing Petitioner's spotless and exemplary career against the conduct. Any reasonable weighing of this balance would determine that equity and fairness would not be served by dismissing Petitioner. *See, e.g., Kelly v. N.C. Dep't of Env't & Natural Res.*, 192 N.C. App. 129, 664 S.E.2d 625 (2008)(employees' misdemeanor off-duty violations of fin fish laws administered by Department not just cause for disciplinary 5-day suspension without pay for unacceptable personal conduct). Termination of Petitioner's employment would not have been "just".

36. Application of the *Warren* three-part test for determining whether just cause exists for discipline establishes that all three parts of the test fail here. Respondent therefore lacked good cause for initiating disciplinary action against Petitioner.

Respondent Misrepresented the Alternative To Retirement

37. A resignation is involuntary when it is induced by an employee's reasonable reliance on the employer's misrepresentation of a material fact concerning the resignation. A misrepresentation is material if it concerns the alternative to resignation. *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 174 (4th Cir. 1988). "A decision made . . . based on misinformation . . . cannot be binding as a matter of fundamental fairness and due process." *Covington v. Dep't of Health and Human Services*, 750 F.2d 937, 943 (Fed. Cir. 1984).

38. The November 5, 2013, Notice of Pre-Disciplinary Conference set out the alternative to retirement and that alternative was dismissal based on failure to comply with Respondent's employee tax compliance policy. The Notice hinges entirely on failure to comply with that policy and that policy misstates the settled law on both the consequences of failure to comply with the policy and on the grounds for dismissal based on just cause.

39. The tax compliance memos demand perfection of employees in filing returns, but failure to achieve perfection is not the standard for just cause for discipline. The memos all end with the categorical statement that failure to "fully comply" or to report "correct tax liability" will result in disciplinary action. By this policy, an employee will be subject to disciplinary action for any mistake on a return, regardless of the source or reason for the mistake and regardless of whether the mistake was made by a paid preparer or another individual on whom the employee reasonably relied to prepare the return.

40. Petitioner relied on Respondent's statements in the Notice about her impending dismissal when she began to prepare for that occurrence and completed the "Claiming Your Monthly Retirement Benefit" form. It is not surprising that a career employee with a stellar record would consider retirement as a way to avoid the humiliation of dismissal, the blemish on her record, the difficulty the dismissal would pose in seeking other employment, the loss of income, and the loss of health benefits. *Cf. Nix v. Dep't of Admin.*, 106 N.C. App 664, 668, 417 S.E.2d 823, 827 (1992) (noting that "to take disability retirement after you are told you will be terminated on a specific date is hardly a voluntary career change"). In the absence of Respondent's threatened dismissal, Petitioner would clearly not have begun to explore retirement. Her initiation of retirement was based on the misinformation contained in the Notice of Pre-Disciplinary Conference.

Respondent Violated Public Policy

41. The public policy of the state is expressed in the statutes enacted by the North Carolina General Assembly. *Cauble v. Trexler*, 227 N.C. 307, 311(1747).

42. N.C. Gen. Stat. § 143-553 expresses the public policy of the state with respect to the repayment of debts owed to the state by state employees. It prohibits the termination of a state employee who owes a debt to the state while the employee is making payments under a written agreement to repay the debt through periodic withholding of at least ten percent (10%) of the employee's net disposable earnings.

43. The installment payment plan Petitioner made with the State was in effect on November 5, 2013, and that plan met the requirements of N.C. Gen. Stat. § 143-553.

44. Respondent could terminate Petitioner while Petitioner was subject to the payment plan only if authorized by another statute. N.C. Gen. Stat. § 126-35 authorizes dismissal only for just cause, and the agency has the burden of establishing just cause. N.C. Gen. Stat. § 126-34.02(d). Respondent cannot meet this burden. Respondent initiated dismissal against Petitioner in violation of the public policy in N.C. Gen. Stat. § 143-553 and its actions are void as against public policy.

BASED UPON the foregoing Stipulation of Facts and Conclusions of Law, the undersigned makes the following:

FINAL DECISION

1. Respondent's Motion for Summary Judgment is DENIED.

2. Summary Judgment is GRANTED to Petitioner.

3. Petitioner shall be reinstated to her former position, Returns Processing Supervisor (Data Entry Supervisor II), in Respondent's Excise Tax Division.

4. Petitioner shall be awarded, from December 1, 2013, until her reinstatement, back pay and benefits to which she would have been entitled had she not been constructively discharged. The back pay shall be reduced by the amount of retirement benefits received by Petitioner for the period December 1, 2013, until her reinstatement.

5. Petitioner is awarded reasonable attorney's fees and costs under N.C. Gen. Stat. § 150B-23.2(a) and § 150B-33(b)(11), in the amount of $35,287.50, as submitted in Second Affidavit filed on January 14, 2015.

NOTICE

Pursuant to N. C. Gen. Stat. 126-34.02, any party wishing to appeal this Final Decision may commence such by appealing to the North Carolina Court of Appeals as provided in N. C. Gen. Stat. 7A-29(a). The party seeking review must file such appeal within thirty (30) days after receiving a written copy of the Final Decision.

This the 16th day of January, 2015.

Fred G. Morrison Jr.
Senior Administrative Law Judge

STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF PITT	**14 DHR 01958**
DANA ERIC WEAVER, Petitioner, v. N. C. DEPARTMENT of HEALTH and HUMAN SERVICES, DIVISION of HEALTH SERVICE REGULATION, Respondent.	**FINAL DECISION**

THIS MATTER came on to be heard before the undersigned Administrative Law Judge, Augustus B. Elkins II, on July 24, 2014 in Farmville, North Carolina. After presentation of testimony and exhibits, the record was left open for the parties' submission of materials, including but not limited to supporting briefs, further written arguments and proposals after receipt of the official transcript. Mailing time was allowed for submissions including the day of mailing as well as time allowed for receipt by the Administrative Law Judge.

The Petitioner submitted timely proposals and argument to the Clerk's Office of the Office of Administrative Hearings on October 7, 2014 which was received by the Undersigned on October 13, 2014. Respondent submitted timely proposals and argument electronically which was received by the Undersigned on October 13, 2014. For good cause shown and by order of the Chief Administrative Law Judge, the Undersigned was granted an extension until December 19, 2014 to file the decision in this case.

APPEARANCES

For Petitioner: Mary-Ann Leon
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ISSUE

Whether Respondent substantially prejudiced the rights of the Petitioner and exceeded its authority or jurisdiction, acted erroneously; failed to use proper procedure, acted arbitrarily or capriciously, or otherwise failed to act as required by law or rule when Respondent substantiated two allegations of negligence and entered two findings of neglect by Petitioner's name in the Health Care Personnel Registry.

APPLICABLE STATUTES AND RULES

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

EXHIBITS

For Petitioner Exhibits 1-3, 5-8 and 20

For Respondent Exhibits 2-4, 6-11, 13, 14, and 16-18

WITNESSES

For Petitioner
Dana Weaver (Petitioner)
Ruth V (Mother of MV)
Barbara Perkins (Mother of CC)
Pamela Anderson

ForRespondent
Delafea Dixon
Mary Grace Bright
Pamela Anderson

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

FINDINGS OF FACT

1. For the last eighteen years, Petitioner Dana Weaver has been employed by the Pitt County Group Homes (PCGH) in Grifton, North Carolina. Petitioner has been a lead teacher/parent at one of the PCGH's residential facilities for intellectually disabled male adults. Prior to becoming employed with the PCGH Petitioner worked as a caregiver at other health care facilities, including the Beaufort County Developmental Center and Neuse Enterprises. In all, Petitioner has spent the last twenty-five years of his life caring for adults with developmental disabilities.

2. Petitioner has been highly regarded as a care giver by his employer, as well as by residents and guardians of the residents in his care. During the twenty-five years that he has cared for developmentally disabled adults, Petitioner has never been reported for abuse or neglect of a client. During the time that he has been employed with PCGH, he has not had any performance issues. The director of the PCGH stated that Petitioner was "an exemplary employee" and that, in particular, he does an excellent job of caring for residents MV and CC. He is regarded as a "conscientious and caring employee" including when he undertakes the responsibility of transporting residents to activities outside the PCGH facilities. T p 14; 65-66; 69; 71; 168; 182. Resp. Ex. 16; Pet. Ex. 20. Resp. Ex. 9.

3. Mary Grace Bright is the executive director of the PCGH. Bright has a degree in occupational therapy from the Medical College of Georgia and has worked in the health care field since 1977. Bright is responsible for the general operations of the homes, including supervising and training staff and writing the facility's policies and procedures.

4. On September 16, 2013, Petitioner was assigned to transport three adult male residents, SC, MV, and CC, from the homes in Grifton and Ayden, respectively, to take them on a planned outing at a skating arena in Kinston, North Carolina. Petitioner left the home in Grifton with resident SC seated in one of the PCGH's vehicles. He drove in a facility van to the group home in Ayden in order to pick up Residents CC, a resident with Autism and Moderate Mental Retardation, and MV, a resident with Autism and Profound Mental Retardation.

5. Petitioner received training on Pitt County Group Homes policies of vehicle safety. Petitioner's training for transporting residents included the following: "make sure all occupants of vehicles are buckled up." Resp. Ex. 2. T p 43; 137. Petitioner normally checked the occupants' seatbelts by looking in the rearview mirror. Petitioner had observed other staff members also using the rearview mirror to check occupants' seatbelts. The policy did not specify when the seat belt check was to be done.

6. In addition to the above, PCGH has a policy titled "Vehicle Safety" which was in effect on September 16, 2013. It instructs employees to "check behind the van before you get in it, if you are going to back the van . . . . Take the time to do a visual inspection." The

policy in effect on September 16, 2013, did not specifically state that employees must walk behind the van to do a visual inspection. Resp. Ex. 3.

7. The vehicle being driven by Petitioner on September 16, 2013 day was a Ford E350 passenger van. Passengers climb into the van via side doors that open similar to French doors.

8. At approximately 5:40 p.m., Petitioner arrived at the Pitt County Group Home in Ayden with another Resident SC, from the Pitt County Group Home located in Grifton, North Carolina.

9. Petitioner parked the van perpendicular to the home's sidewalk that provided a direct path from the front door of the home to the driveway. Petitioner deliberately stopped the vehicle where the driveway intersected the sidewalk so that MV and CC would naturally follow the path down the sidewalk, in front of the vehicle, and to the side door of the van, where they would enter the van. Petitioner left SC in the van and proceeded toward the Ayden Pitt County Group Home.

10. When Petitioner reached the front door of the home MV and CC were at the door waiting for Petitioner and they exited the home while Petitioner went into the home to get medications as he was required to do. While MV and CC were at the home in Ayden, they were supervised by Delafea Dixon and Shaniqua Washington .

11. In the past, MV and CC had sometimes exited the home and gone to the vehicle ahead of Petitioner. On those occasions, they would get inside the van with their belongings. They had never stood behind the van waiting for Petitioner. Nothing in Petitioner's experience or training suggested that MV and CC would go to the back of the van instead of to the side door.

12. On September 16, 2013, there was no PCGH policy in place that prohibited staff from allowing residents to exit the home and board the van unsupervised. Prior to September 16, 2013, Petitioner's training had never included instructions to keep residents from exiting the home without a staff member, a procedure where two staff members would assist in getting residents seated in the vehicle, or an instruction to check seatbelts while staff members were on the outside of the van.

13. When Petitioner exited the home, the sun was beginning to set and was shining brightly and directly behind the van. Petitioner looked to the back of the van and did not see that any doors at the back of the van were opened. Petitioner believed that when he exited the home and looked behind the van that he could see everything that could have been seen behind the van.

14. Petitioner opened the driver's side door to get into the van, glancing into the back seat as he did. He believed that he saw MV and CC seated in the van. Petitioner climbed into the van and put the medication box between the two front seats. Petitioner realized that the sun interfered with vision through the rear view mirror so he looked to the side view

mirrors in the van. Because the sun was so bright, Petitioner did not look in the rearview mirror as he usually would have. Instead, he used the side view mirrors. He noted that the side doors were closed. He buckled his seat belt and closed the driver's side door.

15. Petitioner turned the engine on, placed his foot on the brake pedal and checked his side view mirrors a second time. Seeing no obstructions, he put the van in gear, took his foot off the brake pedal and placed it onto the gas pedal. The van speed at this point was too slow to have registered on the speedometer. As soon as the van began to move, Petitioner became cognizant of several things simultaneously: he realized he had not done a head count and seatbelt check, he noticed that the rear door of the van was ajar and heard a thump at the back of the van. Realizing that CC and MV were behind the van, Petitioner immediately turned off the engine and went behind the van where he saw CC sitting on the pavement and MV standing behind the van. Petitioner saw that CC had an abrasion on his leg and that MV had a nose bleed.

16. Petitioner went to get Delafea Dixon, the Lead Teacher/Parent for the Ayden Pitt County Group Home from inside the group home, where Petitioner told Mr. Dixon, "I had an accident. I actually hit the guys." The two immediately went to MV and CC where Dixon saw that CC "had a couple of scrapes on his knee," and that "MV's nose was bleeding." (T. pp 131-2) They brought MV and CC back into the house and Shaniqua Washington got material to clean up MV's nose and Band-Aids and Neosporin for CC. Dixon was also trying to calm Petitioner down noting he was "shaky and in shock" by telling him, "it will be okay" and "I understand accidents happen." (T. pp132-33)

17. While Dixon and Washington were helping MV and CC, Petitioner immediately called his nurse supervisor, as well as the executive director, Mary Grace Bright, and another qualified professional, Angie Humphrey. Within approximately 15 minutes from the accident, Ms. Bright was at the home. A PCGH nurse, Norman Thurn was assessing MV and CC to determine what type of medical treatment they needed.

18. CC did not require treatment at a medical facility for his scrapes. MV had a bloody nose and an abrasion on the back of his head. MV was taken to an urgent care facility where diagnostic tests were negative for any internal injuries. Neither CC nor MV had any permanent or serious injuries from the incident and both have maintained the same warm relationship with the Petitioner that they had with him prior to the incident.

19. MV's mother, Ruth V, observed MV the day following the accident and noted that although he had some superficial lacerations, a little bruising around his face and a scrape on his knee, she saw no indication of pain or unhappiness. Ms. V testified that she would know if something had frightened MV or in any way upset him and that on the day following the accident she observed MV to be normal and happy. Ms. V has observed no sign that MV was permanently affected by the accident.

20. CC's mother, Barbara Perkins, observed that CC's injury was a scratch on his knee. CC has never again mentioned the accident to his mother.

21. MV is happy and content when he is with Petitioner and displays an attachment to the Petitioner. Ms. V believes that MV would suffer not to have Petitioner in his life. Ms. Perkins believes that her son, CC, would suffer if Petitioner were no longer a caregiver at PCGH. Executive Director Mary Grace Bright stated that Petitioner does an excellent job of looking out for CC and MV and that not having Petitioner interact with them would create a void in their lives.

22. After the incident PCGH made significant changes to the procedure and training that staff use to transport residents. Those changes include: vehicles remain locked when not in use; residents are not permitted to exit the home without being accompanied by staff; when residents approach the van, the doors are locked and can only be unlocked by staff who are now responsible for seeing residents get into the van and for doing a headcount; staff are also required to walk around the perimeter of the vehicle before getting into the vehicle. The responsibility for the procedures lie with all staff, including driver and any and all staff members with the driver.

23. PCGH's new vehicle safety policy is a more detailed policy with multiple security steps because executive director Mary Grace Bright recognized that even when staff were doing their job to the very best of their ability, unforeseen accidents could happen.

24. The incident was reported to HCPR on September 19, 2014 by executive director Mary Grace Bright using HCPR's form identified as the "five day working report." Although Bright acknowledged that she had checked "Yes" in response to the question on the five day working report that asked whether the allegation had been substantiated, she believed that her response to the question was constrained by limitations in the form and she would have characterized the incident as an "accident" or a "momentary lapse in judgment" rather than an act of negligence. Resp. Ex. 8; T p 153; 168; 173.

25. Bright testified that, because she had no experience with an investigation by HCPR prior to providing the report on September 19, 2014, she did not understand the significance to the investigation of the five day working report or of checking "Yes" to the question regarding whether the allegation was substantiated. Bright believed that the additional information that she provided on the five day working form would assist the HCPR to understand that she did not view the incident as an incidence of negligence on the part of Petitioner.

26. Upon receipt of the allegation against Petitioner, Penny Owen-Keiper, Investigator for HCPR, was assigned to conduct the investigation into the allegation against Petitioner. As a part of the investigation, Owen-Keiper visited the Ayden Pitt County Group Home facility and reviewed CC's and MV's medical records, Petitioner's personnel file, health care facility investigation documentation of this incident. Owen-Keiper interviewed Petitioner, Delafea Dixon, Shanikqua Washington Bright, and CC. Based on the investigation, Owen-Keiper determined that Weaver neglected CC and MV on September 16, 2013. Owen-Keiper did not testify at this hearing as she is out on disability and is no longer working for Respondent at this point.

27. Pamela Anderson is a regional supervisor with the Health Care Personnel Registry section and testified as to the investigation of the September 16, 2013 incident conducted by HCPR investigator Penny Owen-Keiper. Anderson did not speak with any of the witnesses who participated in the investigation.

28. Ms. Anderson testified that the agency's normal procedure is to complete investigations within 60 to 65 days from the time that the incident is reported to the agency. The agency normally completes investigations during that time period in order to get the most competent evidence that it can. The agency also recognizes that fairness to the accused is a consideration in its normal process of completing an investigation closer to the time of the incident.

29. HCPR screened the five day working reports on September 24, 2013 and September 25, 2013 and determined that the investigation should be completed no later than December 23, 2013. Although the incident was reported to the Health Care Personnel Registry on September 19, 2014 by PCGH, no one from HCPR contacted the PCGH prior to February 3, 2014 and no one spoke with Petitioner or any other witnesses about the incident until February 10, 2014.

30. In addition to its own investigation, the agency typically relies on the information compiled by the facility at or near the time of the incident. In this case, the facility did not conduct any investigation beyond the incident report submitted by the Petitioner. The executive director of the PCGH did not believe that statements other than Petitioner's were necessary for an investigation of the incident. The additional staff that provided information to Owen-Keiper five months after the incident had not previously provided statements to their employer.

31. Although he had not provided a statement at or near the time of the incident, staff member Delafea Dixon was interviewed by Owens-Keiper on February 10, 2014. He stated to Owen-Keiper that the residents had exited with Petitioner. At the hearing, Dixon admitted that the residents could not have exited the facility with Petitioner and that what he had told Owen-Keiper was incorrect.

32. CC reads on the first grade level and has an IQ of 55 or 56 points. CC has some ability to apprehend and follow safety rules on his own. CC was interviewed by Owens-Keiper, who summarized CC's statements. Owen-Keiper did not ask CC whether he normally got himself in the van. Owen-Keiper did not ask CC whether he understood that he should not stand behind the van. CC was not capable of reading through the summary statement prepared by Owen-Keiper and would not have been able to understand the summary statement in its entirety even if it had been read to him by Owen-Keiper. There is no indication in Owen-Keiper's investigative report that she was able to verify that CC understood what he was signing.

33. HCPR supervisor Pamela Anderson did not have any independent knowledge as to whether Owen-Keiper had read the questions and answers on CC's signed statement or if

Owen-Keiper had read the questions and answers back to CC before having him sign the document.

34. Staff witnesses who had not been asked to provide statements at or near the time of the incident provided incorrect information to Owen-Keiper. Further; there is no indication that resident CC understood the record of his statement as it was prepared by Owen-Keiper; and, the information which Owen-Keiper summarized from CC contained internal inconsistencies as well as observations that were inconsistent with other verified observations.

35. Petitioner believed CC and MV were on the van before he climbed into the van. It is unclear from Owen-Keiper's report whether she had any evidence to contradict Petitioner's statement. Owen-Keiper reported both that CC stated Petitioner was aware that CC was not on the van and that CC stated that Petitioner was unaware that CC was not on the van.

36. Investigator Penny Owen-Keiper did not examine the PCGH facility in Petitioner's presence in order to determine where the van was parked or what could be seen from the facility's sidewalk. Owen-Keiper did not document whether she had investigated the effect of the sunlight on Petitioner's ability to see behind the van. Owen Keiper conducted her investigation in the morning and took pictures of the scene of the accident in the morning, rather than in the afternoon.

37. Petitioner was emotionally distraught following the incident and continued to be distraught from the time of the incident through the time that he was questioned by Owen-Keiper. During his interview with Owen-Keiper, and while he was in an emotional state, Owen-Keiper asked Petitioner whether he had "failed to provide for the safety of residents . . . because [he was] not aware that the two residents were not on the van before [he] began backing the van up" and Petitioner answered in the affirmative. Resp. Ex. 7.

38. Petitioner testified that prior to speaking with HCPR Investigator Penny Owen-Keiper he had not had an opportunity to study any materials related to the incident. Petitioner testified that some of the responses he gave to Owen-Keiper were "reconstructive," based on what he had learned after the incident and not necessarily what he had been able to observe prior to the incident.

39. Owen-Keiper did not investigate whether allowing residents to exit the facility without supervision was a cause of harm to the residents. Executive Director Mary Grace Bright admitted that it is foreseeable that residents, excited about an activity or outing, would exit the home and run out to the van unsupervised and that allowing residents to leave the home unsupervised could result in physical harm.

40. Owen-Keiper's investigation failed to consider whether there were contributing factors to the incident that were not within Petitioner's control.

41. Owen-Keiper's investigative report indicated that CC stated that both residents had fallen to the ground, although all of the other evidence in the investigation indicates that only CC had fallen to the ground. MV was standing behind the van when Petitioner went behind it.

42. Neither the facility nor Owen-Keiper investigated whether one resident had bumped into the other one during the incident. Owen-Keiper did not ask CC whether MV had bumped into him, causing him to fall to the ground. PCGH Executive Director Mary Grace Bright testified that their review could not verify one way or the other what had caused CC to fall to the ground.

43. Owen-Keiper's conclusion to her investigation was that "on or about September 16, 2013, Dana Eric Weaver, a health care personnel, neglected a resident, MV, by failing to ensure that the resident was on the van prior to backing the van up, resulting in physical harm" and that "on or about September 16, 2013, Dana Eric Weaver, a health care personnel, neglected a resident, CC, by failing to ensure that the resident was on the van prior to backing the van up, resulting in physical harm." Resp. Ex. 16.. Owen-Keiper concluded that the allegations of two separate instances of negligence should be substantiated based upon the admission of the Petitioner and "interviews with staff and a resident." Resp. Ex. 16.

44. It is the agency's procedure to treat each outcome to any resident as an instance of neglect, even though a single act on the part of a health care personnel could have caused multiple outcomes. It was Owen-Keiper's decision to substantiate two, rather than one, allegation of negligence against Petitioner. The procedure used by the agency to regard two outcomes based on a single act as two acts of negligence is not contained in N.C. Gen. Stat. §131E or in the accompanying administrative regulations.

45. Although Anderson took the position that "any break in the skin, even redness can be considered physical harm," there is no agency guideline in the record which serves as a basis for that position. Executive Director Bright has never been instructed that a skin abrasion was normally viewed as an example of physical harm resulting from negligent conduct..

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. All parties are properly before the Office of Administrative Hearings (OAH), and jurisdiction and venue are proper. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder. 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. A court need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, *aff'd*, 335 N.C. 234, 436 S.E.2d 588 (1993).

3. As a lead teacher / parent working for the Pitt County Group Homes, Petitioner is a healthcare personnel and is subject to the provisions of North Carolina General Statute §131E-256.

4. 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. Gen. Stat. §131E-256(i). Before hiring health care personnel into a health care facility or service, every employer is required to access the Health Care Personnel Registry. N.C. Gen. Stat. §131E-256(d2). A permanent listing on the HCPR is intended to have the effect of barring health care personnel against whom there are substantiated findings from being employed at a health care facility.

5. Neglect, as used in the context of Health Care Personnel regulations means "failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness." 10 NCAC 13O.0101. 42 C.F.R. 488.301.

6. The Undersigned reviews the Respondent's decision using the whole record test to determine whether the agency's investigation and decision is supported by substantial admissible evidence in view of the entire record, taking into account whatever in the record fairly supports or contradicts the decision. N.C. Gen. Stat. 150B-51(b). *N.C. Dep't of Nat. Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004); *Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E.2d 538 (1977); *Overton v. Goldsboro City Board of Education*, 304 N.C. 312, 283 S.E.2d 495 (1981); *N.C. Dep't of Health & Human Services v. Maxwell*, 156 N.C. App. 260, 576 S.E.2d 688 (2003).

7. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It is more than a scintilla of evidence or a permissible inference. *Comr. of Insurance v. Automobile Rate Office,* 287 N.C. 192, 214 S.E.2d 98 (1975).

8. While Respondent may assess the credibility of those individuals who provide information to it where there is a proper basis to determine credibility without a hearing, the agency is not free to disregard evidence for whimsical or arbitrary reasons. In conducting its investigation and in its decision, Respondent has a duty to give fair and careful consideration to all of the evidence it receives. *Comm'r of Ins. v. Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547 (1980).

9. An arbitrary decision is one which disregards facts. *Black's Law Dictionary* 119 (9th ed. 2011). An arbitrary decision lacks "adequate determining principle . . . . without consideration or adjustment with reference to principles, circumstances, or significance . . . ." *U.S. v. Carmack*, 329 U.S. 230, 243 n.14 (1946). Capriciousness is "contrary to evidence or established rules of law." *Blacks Law Dictionary* 239 (9th ed. 2011). A decision is arbitrary and capricious if it is "without any rational basis in the record such that a decision made thereon amounts to an abuse of discretion." *Abell v. Nash County Bd of Educ.*, 71 N.C. App. 48, 52-53, 321 S.E.2d 502, 506 (1979). *Accord. Joyner v. Perquimans County Bd of Educ.*, No. COA 13-446, 2013 N.C. App. LEXIS 1315, 752 S.E.2d 517, 522 (Dec. 17, 2013).

10. The Petitioner has met his burden to establish that Respondent's decision to substantiate two allegations of negligence based on the September 16, 2013 incident was arbitrary and capricious because the evidence introduced at the hearing showed that Respondent relied on incompetent or ambiguous evidence to substantiate its allegations of negligence.

a) Respondent failed to consider relevant evidence that Petitioner followed his employer's procedures as written and that Petitioner took reasonable care under the circumstances.

b) Respondent based its decision on incompetent evidence that was gathered after a long delay, where one witness admitted to giving incorrect information to the investigator, where another witness admitted that the information given to the investigator was based on "reconstructions" of facts that were learned after the incident, and where the investigator failed to verify that the statement it attributed to a resident was understood by the resident to be an accurate statement of his observations and/or recollections of the incident. Respondent has not established that the resident meets the test of competency pursuant to *State v. Higginbottom*, 312 N.C. 760 (1985) demonstrating sufficient understanding of the questions asked to assist the finder of fact in rendering a decision.

c) Respondent has failed to articulate any reasoned principle to substantiate its position that Petitioner's conduct amounted to a failure to deliver goods or services to the residents which caused physical harm, where unusual circumstances combined to distract Petitioner from his normal routine, where the residents had deviated from their normal routine of going to the side rather than the rear door of the vehicle, and where other staff who were assigned to supervise the residents in the Ayden facility allowed the residents to exit the facility unsupervised.

d) Respondent based its decision on what it characterized as Petitioner's admission. However, Petitioner's agreement to the investigator's statement that he had failed to provide goods and services to the residents because he was "not aware" that the residents were behind the van is ambiguous because Petitioner was emotionally distraught, was not advised that the words "failed to provide goods and services" had a specific meaning as a standard for judging Petitioner's conduct and it was not clear that Petitioner's response to the investigator's question was an

unambiguous acknowledgement of the legal standard used by the investigator.

11. The Petitioner has met his burden to establish that Respondent's decision was arbitrary and capricious where Respondent determined that resident CC had suffered physical harm as a result of Petitioner's failure to provide goods and services. The preponderance of the evidence showed that CC had a mild abrasion to his knee that did not require medical treatment and which may have been the result of being bumped by MV. The evidence introduced at the hearing was that it was the investigator's decision to characterize the impact on CC as physical harm. The investigator did not testify and Respondent's witness only stated that this decision seemed to be consistent with the agency's usual practice.

12. The right to a fair and impartial hearing, with the right to cross-examine witnesses for the Respondent, is afforded to petitioners to enable them to hear and refute the evidence against them. Without the testimony of Respondent's investigator Petitioner is prejudiced by the agency's reliance on conclusions contained in the investigator's report that could not be tested through cross-examination.

13. "[T]he touchstone of due process is protection of the individual against arbitrary action of government, ... whether the fault lies in a denial of fundamental procedural fairness, . . . or in the *exercise of power without any reasonable justification in the service of a legitimate government objective* . . . ." *Robins v. Town of Hillsborough*, 176 N.C. App. 1, 625 S.E.2d 813, 818 (2006), quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (Emphasis and '. . .' in original).

14. The government's attempt to protect public health cannot be unreasonable in degree, "compared with the probable public benefit." *Hartford Accident and Indemnity Co. v Ingram*, 290 N.C. 457, 466, 226 S.E.2d 498, 504 (1976). Whenever the state acts to deprive an individual of the right to engage in a lawful occupation, this deprivation is so great that the government must show "a substantially greater likelihood of benefit to the public" in order to survive the constitutional challenge. *In re Hospital*, 282 N.C. 542, 550, 193 S.E.2d 729, 735 (1973).

15. The Respondent's decision to substantiate two allegations of negligence, rather than a single allegation of negligence, against the Petitioner is not in accordance with established law because the Respondent has failed to articulate a reasonable relationship between its decision to substantiate two, rather than one, allegation of negligence and its need to protect the health of individuals for whose protection the provisions of N.C.Gen.Stat.§131E are designed. In particular, where the facility has established procedures to safeguard against the kind of momentary lapse on the part of an employee which occurred in this case and where the evidence shows that Petitioner's absence would hurt the residents, the Respondent has failed to show that its prohibitions against Petitioner's fundamental right to work in his chosen occupation is narrowly tailored to protect the government's legitimate interests.

16. The government's denial of a citizen's rights must be based on reasons that are articulated as well as significant. *King v. Beaufort County Board of Education*, 364 N.C. 368, 377-378, 704 S.E.2d 259, 265 (2010). Here Respondent has determined that Petitioner's singular act should be substantiated as two acts of negligence because there were two residents involved. The agency has not articulated a justification for taking this position, especially in light of the circumstances of this case. The agency's determination that there were two acts of negligence is not based on a standard articulated in the enabling legislation or its accompanying regulations, nor did the agency's witness identify a reason for this practice.

17. By exercising discretion to substantiate two, rather than one, allegation of negligence against the Petitioner, the agency will effectively prohibit Petitioner from ever again working as a health care provider, a field in which he has worked for over twenty-five years. In this case, because the facility recognized that the harm to residents could result from a momentary lapse on the part of an employee, even when an excellent employee is competently performing his or her job, it put into place measures to insulate residents from simple human inadvertence. Thus, it is incumbent upon the Respondent to identify a compelling interest in keeping Petitioner from working in his chosen occupation, or, at the very least, to articulate a significant reason given that there is no demonstrated risk to public health or safety from allowing Petitioner to return to work as a lead teacher / parent with the PCGH or any other health care provider.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following Final Decision.

FINAL DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. The Undersigned enters the following Final Decision based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge and expertise of the Agency with respect to facts and inferences within the specialized knowledge of the Agency.

Based on those conclusions and the facts in this case, the Undersigned holds that Petitioner did carry his burden of proof by a greater weight or preponderance of the evidence that Respondent was in error when it substantiated neglect against the Petitioner, regarding his care of residents CC and MV on September 16, 2013. As such two findings of neglect by Petitioner's name in the Health Care Personnel Registry should be removed.

NOTICE

THIS IS A FINAL DECISION issued under the authority of N.C. Gen. Stat. § 150B-34.

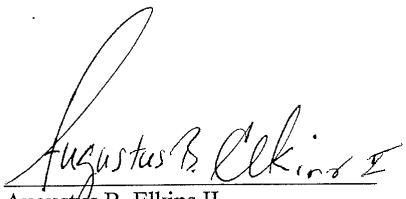
Under the provisions of North Carolina General Statutes Chapter 150B, Article 4, any party wishing to appeal the Final Decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county in which the party resides. The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties.

In conformity with the Office of Administrative Hearings' Rules, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.

Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This is the 4th day of December, 2014.



Augustus B. Elkins II
Administrative Law Judge

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OFFICE OF ADMIN HEARINGS

STATE OF NORTH CAROLINA	)	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF MECKLENBURG	)	14 DOJ 03028
WILLIE URELL JOHNSON,	)	
Petitioner,	)	
v.	)	
N.C. SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION,	)	**PROPOSED DECISION**
Respondent.	)	

On October 6, 2014, Administrative Law Judge Selina M. Brooks heard this case in Charlotte, 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: Mark S. Jetton, Esq
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Respondent: Matthew L. Boyatt, Assistant Attorney General
N.C. Department of Justice
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Raleigh, North Carolina 27699-9001

ISSUES

1. Has the Petitioner committed the offense of Assault on a Female after receiving certification from Respondent?

2. Does Petitioner currently possess the good moral character that is required of a sworn justice officer in North Carolina?

BASED UPON careful consideration of the sworn testimony of the witnesses present at the hearing, the documents, and exhibits received and admitted into evidence, and the entire record in the proceeding, the undersigned Administrative Law Judge ("ALJ") makes the following Finding of Fact. In making these Findings of Fact, the ALJ has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors by judging credibility, including, but not limited to the demeanor of the witnesses, any interests, bias or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. In the absence of a transcript, the Undersigned relied upon her notes and listened to audiotapes of the hearing to refresh her recollection.

FINDINGS OF FACT

1. Petitioner obtained employment as a detention officer with the Mecklenburg County Sheriff's Office in 1995. Petitioner then obtained his justice officer certification for deputy sheriff through the North Carolina Sheriffs' Education and Training Standards Commission (hereinafter "Commission") in 1998. Petitioner was certified through the Commission and was employed at the Mecklenburg County Sheriff's Office until his retirement on December 1, 2013. (Respondent's Exhibit 3) Petitioner's current certification through the Commission will expire on December 1, 2014 because Petitioner is not currently employed at a Sheriff's Office.

2. Petitioner retired early from the Mecklenburg County Sheriff's Office due to an arrest on September 16, 2013, for assaulting his girlfriend, Ms. Bridget Wardlow (hereinafter "Ms. Wardlow"). Petitioner admitted to arresting officers that he punched Ms. Wardlow in the face with a closed fist because she would not return his wallet.

3. The Petitioner testified at the administrative hearing that he punched Ms. Wardlow in the face on September 16, 2013 and that he was justified in punching Ms. Wardlow because she had his wallet.

4. Petitioner and Ms. Wardlow were involved in an intimate dating relationship at the time Petitioner punched Ms. Wardlow. The two had dated for approximately 5 years. Petitioner stated their relationship was "on and off." Petitioner admitted that he and Ms. Wardlow were still involved in a sexual relationship on September 16, 2013.

5. Petitioner took a day off from work on September 16, 2013 in order to take his daughter to the doctor. When Petitioner woke up on that day he noticed that Ms. Wardlow had called his cell phone several times. Petitioner returned the call and learned that Ms. Wardlow was outside Petitioner's residence and that she wanted to talk. Petitioner met Ms. Wardlow at the front door of his residence and the two decided they would discuss matters at an alternate location to avoid any embarrassment at Petitioner's place of residence.

6. Petitioner and Ms. Wardlow left Petitioner's residence in separate vehicles and met each other at the Hess gas station near Petitioner's residence. Petitioner and Ms. Wardlow

engaged in a heated argument while at the Hess gas station. Ms. Wardlow did not want Petitioner to leave because the two had not finished their discussion.

7. Petitioner and Ms. Wardlow decided to leave the Hess gas station because there were too many people at that location. They went to the CiCi's Pizza in the Wexford Plaza Shopping Center. Petitioner exited his vehicle and left his wallet on the front seat of his car. Petitioner then approached Ms. Wardlow's vehicle and the two continued to argue about their relationship. At some point during the discussion, Ms. Wardlow went to the driver's side of Petitioner's vehicle, which was locked. Petitioner wanted to leave but Ms. Wardlow insisted that the two were not done with their discussion.

8. Petitioner attempted to unlock his vehicle with the remote key in order to jump in the passenger seat of the vehicle. Ms. Wardlow reached into the vehicle and grabbed Petitioner's wallet so he could not leave.

9. Ms. Wardlow and Petitioner then got back into Petitioner's vehicle and continued to argue. Ms. Wardlow stated to Petitioner that if Petitioner did not tell Alicia about their relationship, she was going to find out about it at some point. Petitioner was angered by this and struck Ms. Wardlow in the face with a closed fist. Ms. Wardlow exited Petitioner's vehicle immediately and ran to her car. Ms. Wardlow called 911 and advised that she had been punched in the face by her boyfriend, who was a deputy with the Mecklenburg County Sheriff's Office.

10. Ms. Wardlow was visibly upset when Officer J.P. Dawson with the Charlotte Mecklenburg Police Department ("CMPD") arrived. Petitioner admitted to Officer Dawson that he punched Ms. Wardlow in the face. Petitioner also stated to the police that he was not going to give the police any trouble.

11. Officer S.P. Scanlon with CMPD also responded to Petitioner' domestic violence call. Officer Scanlon was responsible for taking down a statement that Ms. Wardlow dictated to the officer. She advised that Petitioner and Ms. Wardlow had been arguing about their relationship. Ms. Wardlow wanted Petitioner to tell the truth about another woman named Alicia that Petitioner had been seeing. Petitioner was agitated and upset during the conversation. Ms. Wardlow told Petitioner that he should just tell Alicia about their relationship because she was going to find out anyway. Petitioner became agitated further and punched Ms. Wardlow in the face with a closed fist.

12. Petitioner was charged with assault on a female in violation of North Carolina General Statutes § 14-33 (c)(2). Petitioner's criminal trial resulted in a not guilty verdict.

14. Petitioner called several witnesses who testified regarding Petitioner's ability to perform his duties as a sworn justice officer, that they believed Petitioner to be a good person and a good law enforcement officer. None of these witnesses were aware of the events leading up to the assault.

CONCLUSIONS OF LAW

1. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law. Similarly, to the extent that some of these Conclusions of Law are Findings of Fact, they should be so considered without regard to the given label.

2. 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 Revocation of Justice Officer's Certification letter, mailed by Respondent Sheriffs' Commission on March 18, 2014.

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

4. 12 NCAC 10B .0204(d)(1) provides that the Sheriffs' Commission may revoke the certification of a justice officer when the Commission finds that the officer has committed or been convicted of a crime defined as a Class B misdemeanor, which occurred after the officer's date of appointment through the Respondent Commission.

5. Assault on a Female in violation of N.C.G.S. § 14-33 (c)(2) is classified as a Class B misdemeanor pursuant to 12 NCAC 10B .0103 (10)(b) and the Class B Misdemeanor Manual adopted by Respondent.

6. A preponderance of the evidence presented at the administrative hearing establishes that Petitioner intentionally assaulted Ms. Wardlow on September 16, 2013.

7. Petitioner exhibited a lack of integrity through his actions and also exhibited a lack of respect for the laws of this state. Petitioner engaged in this unacceptable conduct while holding certification as a sworn justice officer.

8. Pursuant to 12 NCAC 10B .0301(a)(8), every justice officer employed or certified in North Carolina shall be of good moral character. 12 NCAC 10B .0204(b)(2) further provides the Sheriff's Commission shall revoke, deny, or suspend a justice officer's certification when the Commission finds that the justice officer no longer possesses the good moral character that is required of all sworn justice officers.

9. Good moral character has been defined as "honesty, fairness, and respect for the rights of others and for the laws of the state and nation." In Re Willis, 288 N.C. 1, 10 (1975).

10. Given the totality of the evidence presented at the administrative hearing, the Undersigned concludes Petitioner no longer possesses the good moral character that is required of a sworn justice officer in this state.

11. Petitioner engaged in an act of assault against his girlfriend at a time when Petitioner held a justice officer certification through the State of North Carolina. Based on the evidence presented at the administrative hearing, Respondent's proposed revocation of Petitioner's justice officer certification due to Petitioner's lack of good moral character and failure to maintain the minimum standards required of all sworn justice officers under 12 NCAC 10B .0301 is supported by a preponderance of the evidence.

PROPOSAL FOR DECISION

BASED UPON the foregoing Findings of Fact and Conclusions of Law and pursuant to 12 NCAC 10B .0205 (2), the undersigned recommends Respondent revoke the Petitioner's Justice Officer Certification for a period not less than five (5) years based on Petitioner's commission of the Class B misdemeanor offense of assault on a female in violation of North Carolina General Statute § 14-33 (C) (2). The Undersigned further recommends the Respondent revoke Petitioner's certification for an indefinite period due to Petitioner's failure to maintain the good moral character that is required of sworn justice officers under 12 NCAC 10B .0300.

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 21st day of November, 2014.

Selina M. Brooks
ADMINISTRATIVE LAW JUDGE

STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF WAKE	**14 DOJ 03030**
SHAWN QUINCY BROMELL, Petitioner, v. N.C. SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION, Respondent.	**PROPOSAL FOR DECISION**

THE ABOVE-ENTITLED MATTER was heard before the undersigned Augustus B. Elkins II, Administrative Law Judge, in Raleigh, North Carolina. This case was heard pursuant to N.C.G.S. § 150B-40, 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. The record was left open for the parties' submission of further materials, including but not limited to supporting briefs, memorandums of law and proposals.

The Petitioner submitted proposals and argument to the Clerk's Office of the Office of Administrative Hearings on November 21, 2014 which was received by the Undersigned on November 24, 2014. The Undersigned held the record open for seven additional business days for further submissions. Receiving nothing further from either party, the record was closed on December 4, 2014.

APPEARANCES

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ISSUE

Did Petitioner conspire to conceal shift and time worked at a secondary employment at Food Lion and enter fraudulent information into the Durham Police Department's secondary employment tracking system thereby failing to meet minimum standards for certification as a justice officer?

EXHIBITS

Petitioner's Exhibits 1-3 were introduced and admitted.

Respondent's Exhibits 1-17 were introduced and admitted.

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

FINDINGS OF FACT

1. Shawn Quincy Bromell was a Durham Police Officer for approximately thirteen years and was asked to resign or be fired and in fact did resign in December 2010.

2. Officer Bromell is currently a Detention Officer with the Durham County Sheriff's Department at the Durham County Jail and has been for approximately one and a half years from the date of request for hearing.

3. Officer Bromell, along with Durham Police Officer Everette Jeffries, was accused by the Durham Police Department with entering fraudulent information into the Durham Police Department's CYA System. The CYA System is what is used for police officers to log in their time for off duty work so that the Durham Police Department can keep track of their off duty work. Both officers entered into the system that Officer Bromell substituted for Officer Jeffries at Food Lion on August 25, 2010.

4. Officer Jeffries testified at this hearing. He described the CYA system and the normal practice followed by all officers of the Durham Police Department. Officer Jeffries' testimony was informative and credible.

5. Officer Bromell was also accused of taking timesheets from Food Lion without permission on September 11, 2010.

6. As a result of the Durham Police Department Internal Affairs' investigation, Officer Jeffries was not fired or asked to resign but rather was punished by the Durham Police Department with 40 hours without pay and 18 months without being able to perform secondary employment.

7. As a result of the Durham Police Department Internal Affairs' investigation, Officer Bromell was asked to resign or be fired and he chose to resign.

8. Deputy Chief S.M. Mihaich of the Durham Police Department on December 9, 2010 in a written document stated the following: "The evidence in this case is clear. Officer Bromell took financial records from Food Lion without authority or permission which amounts to larceny. Police Officers are held to a higher standard, as they should be, and theft cannot be tolerated under any circumstances. I therefore concur with the recommendation of termination in this case."

9. When Officer Bromell initially talked to Internal Affairs at the Durham Police Department in October 2010 he was not sure whether or not he had permission to take time sheets where the officers keep their time for their off duty employment at Food Lion.

10. Officer Bromell was not allowed by the Durham Police Department to talk to anybody about this during the investigation and as a result was not able to talk to Diana Soper, who was a supervisor at Food Lion at the time.

11. Officer Bromell was able to talk to Ms. Soper sometime after the investigation and she reminded him that he did in fact ask for permission and she did give him permission to take the time sheets home with him.

12. Officer Bromell thought he had a problem with his pay check and wanted to take the time sheets home so he could go over them with his records to determine if his check was in fact correct. It turns out it was correct and he subsequently cashed the check.

13. Diana Soper testified at this hearing. She was a supervisor at Food Lion in August and September of 2010 and was the person responsible for the time sheets.

14. Ms. Soper remembers September 11, 2010, the day Officer Bromell took the time sheets, because Bromell had asked her to call him at 7:00 am that morning so that he would not miss his shift. She did call him and he did come in that morning, asked for the time sheets and took them with her permission.

15. Ms. Soper had already transferred the information from the time sheets that were taken by Officer Bromell onto the permanent Food Lion records, which was her responsibility. She did it on that Sunday morning prior to Officer Bromell taking the time sheets with him.

16. Although Diana Soper was the "go to" person for the time sheets at Food Lion and ultimately responsible for them, nobody from the Durham Police Department contacted her about the time sheets that she authorized Officer Bromell to take with him and no one else ever questioned her about that fact.

17. Sergeant Vaughn, who testified at this hearing, worked for Durham Police Department Internal Affairs in 2010, and conducted the investigation of Officers Bromell and Jeffries. Sergeant Vaughn stated that he was somewhat familiar with the CYA System in 2010 but admitted that it was a confusing system and that there have been significant changes made to it since 2010 to make it more accurate and more predictable with more rules.

18. Officer Jeffries was investigated by Internal Affairs for making the false entry into the CYA System but was not investigated concerning the larceny of the timesheets at Food Lion.

19. Officer Bromell made the same error that Officer Jeffries made when he relied on Officer Jeffries' information concerning the substitution for Officer Jeffries at Food Lion on August 25, 2010.

20. Officer Bromell did in fact substitute shifts with Officer Jeffries in August, 2010 but not on August 25, 2010.

21.. Officer Bromell was following the accepted practice of the Durham Police Department at the time when he substituted his off duty work with Officer Jeffries.

22. Officer Jeffries was also following the acceptable practices of the Durham Police Department at the time that Officer Bromell substituted his off duty work with him.

23. Three character witnesses testified for Officer Bromell. They were Sergeant Jeffrey Hodder, his direct supervisor, Lieutenant Sharon Sowell, a person in his chain of command, and Captain Cynthia Kornegay, also a person in Petitioner's chain of command. All three witnesses stated that Officer Bromell was a hard worker, honest, a man of integrity and an asset as a Durham County Detention Officer at the Durham County Jail.

24. Captain Kornegay had no doubts regarding Officer Bromell's truthfulness and good character. Lieutenant Sowell stated Petitioner has never been disciplined and is outstanding in his job.

25. Sergeant Hodder stated that Officer Bromell was one of the best that he had, and he in fact wished he had a "whole force like him." Sergeant Hodder testified that Officer Bromell was always up front with all people and never allowed stress to show or affect him. Further Officer Bromell never questioned his duty assignments, and was straight with his report writing which was unblemished

BASED UPON the foregoing Findings of Fact, the Undersigned makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. The evidence in this case overwhelmingly supports the conclusion that Officer Bromell did not steal time sheets at Food Lion and therefore did not commit the crime of larceny. At all times relevant in this matter he had permission to possess the time sheets from Ms. Diana Soper who was always the individual who input time and the person responsible for those time sheets

2. The evidence in this case overwhelmingly supports the conclusion that Officer Bromell did not conspire to conceal actual shifts and time worked at the secondary employment with Food Lion when he was allowed to remove the time sheets from the store log. Officer Bromell did not fraudulently and with knowing intent enter information into the Durham Police Department's secondary employment tracking system (CYA), but did make the same incorrect entry as Officer Jeffries.

3. The evidence in this case overwhelmingly supports the conclusion that Officer Bromell is an individual of excellent moral character.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following Proposal for Decision.

PROPOSAL FOR DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above.

Based on those conclusions and the totality of all evidence, including testimony and exhibits provided at the above-captioned case, the Undersigned holds that the Petitioner is a person of good moral character and should not be found to fail to meet the employment standards required by the Commission's rules. The Undersigned proposes that the Petitioner's request for certification as a Justice Officer be allowed.

NOTICE

The agency making the Final Decision in this contested case is required to give each party an opportunity to file exceptions to this Proposal for Decision, to submit proposed findings

of fact, and to present oral and written arguments to the agency. N.C.G.S. § 150B-40(e). The agency that will make the final decision in this contested case is the North Carolina Sheriffs' Education and Training Standards Commission.

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to his attorney of record. N.C.G.S. § 150B-42(a). It is requested that the agency furnish a copy to the Office of Administrative Hearings.

IT IS SO ORDERED.

This is the 12th day of January, 2015.

Augustus B. Elkins II
Administrative Law Judge