

# ***NORTH CAROLINA REGISTER***

**VOLUME 29 • ISSUE 22 • Pages 2530 - 2595**

**May 15, 2015**

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

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**NORTH CAROLINA REGISTER**  
Publication Schedule for January 2015 – December 2015

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

## **EXPLANATION OF THE PUBLICATION SCHEDULE**

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

### **GENERAL**

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

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

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

### **FILING DEADLINES**

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

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

### **NOTICE OF TEXT**

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

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

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

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

## NOTICE OF RULE MAKING PROCEEDINGS AND PUBLIC HEARING

NORTH CAROLINA BUILDING CODE COUNCIL

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

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

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

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

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

**Comment Procedures:** *Written comments may be sent to Barry Gupton, Secretary, NC Building Code Council, NC Department of Insurance, 322 Chapanoke Road, Suite 200, Raleigh, NC 27603. Comments on both the proposed rule and any fiscal impact will be accepted. Comment period expires on July 14, 2015.*

**Statement of Subject Matter:**

**1. Request by Lon McSwain, representing the NC BCC, to amend the 2012 NC Building Code, Volume I, Table 508.4. The proposed amendment is as follows:**

**TABLE 508.4****REQUIRED SEPARATION OF OCCUPANCIES**

OCCUPANCY	A <sup>d</sup>	B	E	F-1	F-2	H-1	H-2	H-3	H-4	H-5	I-1	I-2	I-3	I-4	M	R	S-1	S-2 <sup>b</sup>	U
B	S	1	2 <sup>c</sup>	1	2	1	NP	2	1	1	1	2	1	1	1	1	<u>2</u> <sub>1</sub>	1	1
	NS	2	2 <sup>c</sup>	2	3	2	NP	3	2	2	2 <sup>a</sup>	2	NP	2	2	2	<u>3</u> <sub>2</sub>	2	2
M	S	1	1	1	2	1	NP	2	1	1	1	2	1	1	2 <sup>c</sup>	1	<u>2</u> <sub>1</sub>	1	1
	NS	2	2	2	3	2	NP	3	2	2	2 <sup>a</sup>	2	NP	2	2	2 <sup>c</sup>	<u>3</u> <sub>2</sub>	2	2
S-1	S	1	<u>2</u> <sub>1</sub>	1	2	1	NP	2	1	1	1	2	1	1	<u>2</u> <sub>1</sub>	1	3 <sup>c</sup>	1	1
	NS	2	<u>3</u> <sub>2</sub>	2	3	2	NP	3	2	2	2	2	NP	2	2	<u>3</u> <sub>2</sub>	2	3 <sup>c</sup>	2

**Motion/Second/Approved** – The request was granted. The proposed effective date of this rule is December 1, 2015 (earliest through RRC), unless the BCC assigns a delayed effective date (January 1, 2017).

**Reason Given** – The purpose of this amendment is to reduce the required fire resistance separation by 1-hour from moderate hazard storage to business and mercantile, for consistency with other similar use groups.

**Fiscal Statement** – This rule is anticipated to provide equivalent compliance with a small decrease in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

**2. Request by Lon McSwain, representing the NC BCC, to amend the 2012 NC Building Code, Volume I, Section 1007.7. The proposed amendment is as follows:**

**1007.7 Exterior area for assisted rescue.** The exterior area for assisted rescue must be open to the outside air and meet the requirements of Section 1007.6.1. Separation walls shall comply with the requirements of Section 705 for *exterior walls*. Where walls or openings are between the area for assisted rescue and the interior of the building, the building *exterior walls* within 10 feet (3048 mm) horizontally of a nonrated wall or unprotected opening shall have a *fire resistance rating* of not less than 1 hour. Openings within such *exterior walls* shall be protected by opening protectives having a *fire protection rating* of not less than 3/4 hour. This construction shall extend vertically from the ground to a point 10 feet (3048 mm) above the floor level of the area for assisted rescue or to the roof line, whichever is lower.

**Exception:** Areas for assisted rescue that are located 10 feet (3048 mm) or more from the exterior face of a building are not required to be separated from the building by fire-resistance rated walls or protected openings.

**Motion/Second/Approved** – The request was granted. The proposed effective date of this rule is December 1, 2015 (earliest through RRC), unless the BCC assigns a delayed effective date (January 1, 2017).

Reason Given – This purpose of this proposal is to clarify when a rated wall is not required between an exterior area for assisted rescue and a building.

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

**3. Request by Lon McSwain, representing the NC BCC, to amend the 2012 NC Building Code, Sections 712.4 and 1018.1 and Table 1018.1, and the 2012 NC Fire Code Section 1018.1 and Table 1018.1. The proposed amendment is as follows:**

**1018.1 Construction.** *Corridors* shall be fire-resistance rated in accordance with Table 1018.1. The *corridor* walls required to be fire-resistance rated shall comply with Section 709 for *fire partitions*.

**Exceptions:**

- ~~1. A fire-resistance rating is not required for corridors in a Group E occupancy where each room that is used for instruction has at least one door opening directly to the exterior and rooms for assembly purposes have at least one-half of the required means of egress doors opening directly to the exterior. Exterior doors specified in this exception are required to be at ground level.~~
- ~~2. A fire-resistance rating is not required for corridors contained within a Group R dwelling or sleeping unit.~~
- ~~3. A fire-resistance rating is not required for corridors in open parking garages.~~
- ~~4. A fire-resistance rating is not required for corridors in an occupancy in Group B which is a space requiring only a single means of egress complying with Section 1015.1.~~

**TABLE 1018.1**

**CORRIDOR FIRE-RESISTANCE RATING**

*(Table and footnotes a through e remain unchanged)*

~~f. Exit access corridors are not required to be rated on any single tenant floor or in any single tenant space, when 1-hour fire-resistance-rated tenant demising walls are provided between all tenants spaces and 1-hour fire-resistance-rated floor/ceiling assemblies are provided in multistory buildings and fire partitions are provided between other tenant spaces on the same floor. The structure supporting such floor/ceiling assemblies and fire partitions is not required to be rated in Types IIB, IIIB and VB construction.~~

~~g. A fire-resistance rating is not required for corridors in a Group E occupancy where each room that is used for instruction has at least one door opening directly to the exterior and rooms for assembly purposes have at least one-half of the required means of egress doors opening directly to the exterior. Exterior doors specified in this exception are required to be at ground level.~~

~~h. A fire-resistance rating is not required for corridors contained within a Group R dwelling or sleeping unit.~~

~~i. A fire-resistance rating is not required for corridors in open parking garages.~~

~~j. A fire-resistance rating is not required for corridors in an occupancy in Group B which is a space requiring only a single means of egress complying with Section 1015.1.~~

*(Insert footnote references as required in the table. Footnote f for Group B, g for Group E, h for Group R, i for Group S, j for Group B)*

**712.4 Continuity.** Assemblies shall be continuous without openings, penetrations or joints except as permitted by this section and Section 708.2, 713.4, 714 and 1022.1. Skylights and other penetrations through a fire-resistant-rated roof deck or slab are permitted to be unprotected, provided that the structural integrity of the fire-resistant-rated roof assembly is maintained. Unprotected skylights shall not be permitted in roof assemblies required to be fire-resistance rated in accordance with Section 705.8.6. The supporting construction shall be protected to afford the required *fire-resistance rating* of the *horizontal assembly* supported.

**Exceptions:**

~~1. In buildings of Type IIB, IIIB, or VB construction, the construction supporting the *horizontal assembly* is not required to be fire-resistance-rated at the following:~~

~~1-1.1. Horizontal assemblies at the separations of incidental uses as specified by Table 508.2.5, provided the required *fire-resistance rating* does not exceed 1 hour.~~

~~2-2.2. Horizontal assemblies at the separation of *dwelling units* and *sleeping units* as required by Section 420.3.~~

~~3-3.3. Horizontal assemblies as *smoke barriers* constructed in accordance with Section 710.~~

2. Horizontal assemblies constructed solely for the purpose of satisfying the requirements of footnote f of Table 1018.1.

**Motion/Second/Approved** – The request was granted. The proposed effective date of this rule is December 1, 2015 (earliest through RRC), unless the BCC assigns a delayed effective date (January 1, 2017).

Reason Given – This proposal relocates the 1018.1 exceptions to the table footnotes and clarifies how to construct the required Group B tenant separation.

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

**4. Request by Lon McSwain, representing the NC BCC, to amend the 2012 NC Building Code, Section 1109.14. The proposed amendment is as follows:**

**1109.14.1 Facilities serving a single building.** In Group R-2 and R-3 occupancies where recreational facilities are provided serving a single building containing *Type A units* or *Type B units*, 25 percent, but not less than one, of each type of recreational facility shall be *accessible*. Every recreational facility of each type on a site shall be considered to determine the total number of each type that is required to be *accessible*.

**Exception:** Pools for single or multiple Group R-2 and Group R-3 occupancy buildings intended for the residents only.

**1109.14.2 Facilities serving multiple buildings.** In Group R-2 and R-3 occupancies on a single *site* where multiple buildings containing *Type A units* or *Type B units* are served by recreational facilities, 25 percent, but not less than one, of each type of recreational facility serving each building shall be *accessible*. The total number of each type of recreational facility that is required to be *accessible* shall be determined by considering every recreational facility of each type serving each building on the site.

**Exception:** Pools for single or multiple Group R-2 and Group R-3 occupancy buildings intended for the residents only.

**1109.14.3 Other occupancies.** All recreational and sports facilities not falling within the purview of Section 1109.14.1 or 1109.14.2 shall be *accessible*.

**Exception:** Pools for single or multiple Group R-2 and Group R-3 occupancy buildings intended for the residents only.

**Motion/Second/Approved** – The request was granted. The proposed effective date of this rule is December 1, 2015 (earliest through RRC), unless the BCC assigns a delayed effective date (January 1, 2017).

Reason Given – This proposal is to satisfy the requirements of SL2014-120, Section 13(a) to require that swimming pools be accessible only to the extent required by the Americans with Disabilities Act.

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

**5. Request by Wayne Hamilton, NC Fire Service Code Revision Committee, to amend the 2012 NC Fire Code, Sections 308.1.6.3 & 202. The proposed amendment is as follows:**

**Add the following section to Chapter 3 of the NC Fire Code:**

**308.1.6.3 Sky lanterns.** A person shall not release or cause to be released an untethered *sky lantern*.

**Add the following to section 202 General Definitions of the NC Fire Code:**

**SKY LANTERN.** An unmanned device with a fuel source that incorporates an open flame in order to make the device airborne.

**Motion/Second/Approved** – The request was granted. The proposed effective date of this rule is December 1, 2015 (earliest through RRC), unless the BCC assigns a delayed effective date (January 1, 2017).

Reason Given – This proposal is limit the use of sky lanterns with open flames. This provision has been approved by the International Code Council for the 2015 IFC.

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

**6. Request by William Coviello, TLI Group Ltd., to amend the 2012 NC Fire Code, Sections 904.2.2.**

**Motion/Second/Denied** – No further action will be taken on this item.

Reason Given – This proposal is proprietary and conflicts with the NC Fire Code and NFPA Standards.

Fiscal Statement – A fiscal note has not been prepared.

<b>SEPARATION</b>	<b>MATERIAL</b>
From the residence and attics	Not less than 1/2-inch gypsum board or equivalent applied to the garage side
From all habitable rooms above the garage <sup>a</sup>	Not less than 5/8-inch X-gypsum board or equivalent
Structure(s) supporting floor/ceiling assemblies used for separation	Not less than 1/2-inch gypsum board or equivalent
Garages located less than 3 feet from a dwelling unit on the same lot	Not less than 1/2-inch gypsum board or equivalent applied to the interior side of exterior walls that are within this area

**7. Request by William Coviello, TLI Group Ltd., to amend the 2012 NC Fire Code, Sections 906.2.4 Exceptions.**

**Motion/Second/Denied** – No further action will be taken on this item.

Reason Given – This proposal is proprietary and conflicts with the NC Fire Code and NFPA Standards.

Fiscal Statement – A fiscal note has not been prepared.

**8. Request by William Coviello, TLI Group Ltd., to amend the 2012 NC Fire Code, Sections 906.3.4.**

**Motion/Second/Denied** – No further action will be taken on this item.

Reason Given – This proposal is proprietary and conflicts with the NC Fire Code and NFPA Standards.

Fiscal Statement – A fiscal note has not been prepared.

**9. Request by David Smith, representing the Residential Ad-Hoc Committee, to amend the 2012 NC Residential Code, Section R102.7. The proposed amendment is as follows:**

**R102.7 Existing structures.** For requirements of existing structures, refer to the North Carolina Administration and Enforcement Requirements Code and the North Carolina Existing Building Code.

**Motion/Second/Approved** – The request was granted. The proposed effective date of this rule is December 1, 2015 (earliest through RRC), unless the BCC assigns a delayed effective date (January 1, 2017).

Reason Given – The purpose of this amendment is to address relocated houses and associated accessory structures by cross-reference.

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

**10. Request by David Smith, representing the Residential Ad-Hoc Committee, to amend the 2012 NC Residential Code, Table R302.6. The proposed amendment is as follows:**

**TABLE R302.6**

**DWELLING/GARAGE SEPARATION**

For SI: 1 inch – 25.4 mm, 1 foot – 304.8mm

Footnote: a. For dwelling units constructed prior to the 2012 code edition, 1/2" or greater existing gypsum on the bottom side of the garage ceiling shall be acceptable. Joints shall be taped.

**Motion/Second/Approved** – The request was granted. The proposed effective date of this rule is December 1, 2015 (earliest through RRC), unless the BCC assigns a delayed effective date (January 1, 2017).

Reason Given – The purpose of this amendment is to clarify that the existing gypsum board separation is acceptable when converting unfinished space above the garage to habitable space.

Fiscal Statement – This rule is anticipated to provide equivalent compliance with a small decrease in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.



**11. Request by David Smith, representing the Residential Ad-Hoc Committee, to amend the 2012 NC Residential Code, Section R308.4. The proposed amendment is as follows:**

**R308.4 Hazardous Locations.** The following shall be considered specific hazardous locations for the purposes of glazing:

7. Glazing adjacent to stairways, landings and ramps within 36 inches (914 mm) horizontally of a walking surface when the exposed surface of the glazing is less than 60 inches (1524 mm) above the plane of the adjacent walking surface.

**Exceptions:**

1. When a rail is installed on the accessible side(s) of the glazing 34 to 38 inches (864 to 965 mm) above the walking surface. The rail shall be capable of withstanding a horizontal load of 50 pounds per linear foot (730 N/m) without contacting the glass and be a minimum of 1½ inches (38 mm) in cross sectional height.

2. Where a change in elevation is 8¼ inches or less at an exterior door.

**Motion/Second/Approved** – The request was granted. The proposed effective date of this rule is December 1, 2015 (earliest through RRC), unless the BCC assigns a delayed effective date (January 1, 2017).

Reason Given – The purpose of this amendment is to exempt glazing adjacent to a single step down from an exterior door, from hazardous location requirements.

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

**12. Request by David Smith, representing the Residential Ad-Hoc Committee, to amend the 2012 NC Residential Code, Section R311.4. The proposed amendment is as follows:**

**R311.4 Vertical egress.** ~~Egress from habitable levels including habitable attics and basements not provided with an egress door in accordance with Section R311.2 shall be by a ramp in accordance with Section R311.8 or a stairway in accordance with Section R311.7.~~  
Deleted.

**Motion/Second/Approved** – The request was granted. The proposed effective date of this rule is December 1, 2015 (earliest through RRC), unless the BCC assigns a delayed effective date (January 1, 2017).

Reason Given – This purpose of this amendment is to eliminate the requirement for vertical egress inside a dwelling, especially on change of use.

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

**13. Request by David Smith, representing the Residential Ad-Hoc Committee, to amend the 2012 NC Residential Code, Section R408.2. The proposed amendment is as follows:**

**R408.2 Ground vapor retarder.** When required by Section R408.1.1 Exception, a minimum 6-mil (0.15 mm) polyethylene vapor retarder or equivalent shall be installed to nominally cover all exposed earth in the crawl space, with joints lapped not less than 12 inches (305 mm). Where there is no evidence that the groundwater table can rise to within 6 inches (152 mm) of the floor of the crawl space, it is acceptable to puncture the ground vapor retarder at low spots to prevent water puddles from forming on top of the vapor retarder due to condensation. ~~Install a drain to daylight or sump pump at each low spot. Crawl space drains shall be kept separate from roof gutter drain systems and foundation perimeter drains.~~

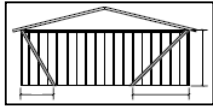
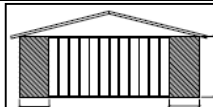

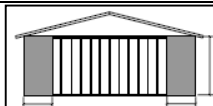
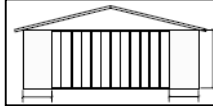
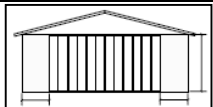
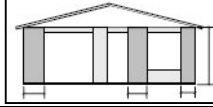
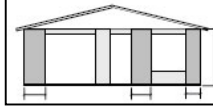
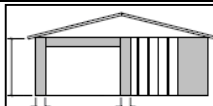
**Motion/Second/Approved** – The request was granted. The proposed effective date of this rule is December 1, 2015 (earliest through RRC), unless the BCC assigns a delayed effective date (January 1, 2017).

Reason Given – This purpose of this amendment is to eliminate the requirement for a drain at each low spot.

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

**14. Request by David Smith, representing the Residential Ad-Hoc Committee, to amend the 2012 NC Residential Code, Table R602.10.1. The proposed amendment is as follows:**

**Table R602.10.1**  
**BRACING METHODS<sup>1, 2</sup>**

Method	Minimum Brace Material Thickness or Size	Minimum Brace Panel Length or Brace Angle	Connection Criteria		Illustration of Bracing Method (illustrates method only, not location)
			Fasteners	Spacing	
LIB Let-in Bracing	1x4 wood brace (or approved metal brace installed per manufacturer instructions)	45° angle for maximum 16" oc stud spacing <sup>3</sup>	2-8d common nails or 3-8d (2-1/2" long x 0.113" dia.) nails	Per stud and top and bottom plates	
DWB Diagonal wood boards	3/4" (1" nominal)	48"	2-8d (2-1/2" long x 0.113" diameter) or 2 – 1-3/4" long staples	Per stud and top and bottom plates	
WSP Wood structural panel	3/8"	48" <sup>4</sup>	6d common nail or 8d (2-1/2" long x 0.113" diameter) nail <i>See Table R602.3(3)</i>	6" edges 12" field	
SFB Structural Fiberboard Sheathing	1/2"	48" <sup>4</sup>	1-1/2" long x 0.120" dia. Galvanized roofing nails	3" edges 6" field	
GB Gypsum Board Installed on both sides of wall	1/2"	96" for use with R602.10.2 48" for use with R602.10.3	Min. 5d cooler nails or #6 screws	7" edges 7" field	
PCP Portland cement plaster	3/4" (maximum 16" oc stud spacing)	48"	1-1/2" long, 11 gage, 7/16" diameter head nails or 7/8" long, 16 gage staples	6" o.c. on all framing members	
CS-WSP <sup>5</sup> Continuously sheathed WSP	3/8"	24" adjacent to window not more than 67% of wall height; 30" adjacent to door or window greater than 67% and less than 85% of wall height. 48" for taller openings.	Same as WSP	Same as WSP	
CS-SFB <sup>5</sup> Continuously sheathed SFB	1/2"		Same as SFB	Same as SFB	
PF Portal Frame <sup>6,7,8</sup>	7/16"	See Figure R602.10.1	See Figure R602.10.1	See Figure R602.10.1	

**Table Notes:**

1. Alternative bracing materials and methods shall comply with Section 105 of the North Carolina Administrative Code and Policies, and shall be permitted to be used as a substitute for any of the bracing materials listed in Table R602.10.1 provided at least equivalent performance is demonstrated. Where the tested bracing strength or stiffness differs from tabulated materials, the bracing amount required for the alternative material shall be permitted to be factored to achieve equivalence.

2. All edges of panel-type wall bracing shall be attached to framing or blocking, except GB bracing horizontal joints shall not be required to be blocked when joints are finished.
3. Two LIB braces installed at a 60° angle shall be permitted to be substituted for each 45° angle LIB brace.
4. For 8-foot or 9-foot wall height, brace panel minimum length shall be permitted to be reduced to 36-inch or 42-inch length, respectively, where not located adjacent to a door opening. A braced wall panel shall be permitted to be reduced to a 32-inch length when studs at each end of the braced wall panel are anchored to foundation or framing below using hold-down device with minimum 2,800 lbs. design tension capacity. For detached single story garages and attached garages supporting roof only, a minimum 24-inch brace panel length shall be permitted on one wall containing one or more garage door openings.

*The 24" braced wall panel length is intended to be located adjacent to the garage door opening.*

5. Bracing methods designated CS-WSP and CS-SFB shall have sheathing installed on all sheathable surfaces above, below, and between wall openings.
6. For purposes of bracing in accordance with Section R602.10.2, two portal frame brace panels with wood structural panel sheathing applied to the exterior face of each brace panel as shown in Figure R602.10.1 shall be considered equivalent to one braced wall panel.
7. Structural fiberboard (SFB) shall not be used in portal frame construction.
8. No more than three portal frames shall be used in a single building elevation.
9. CS-WSP and CS-SFD cannot be mixed on the same story.

**Motion/Second/Approved** – The request was granted. The proposed effective date of this rule is December 1, 2015 (earliest through RRC), unless the BCC assigns a delayed effective date (January 1, 2017).

Reason Given – This purpose of the addition of footnotes 7, 8 and 9 is to clarify the limitations on portal frame construction when used as a wall bracing method.

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

**15. Request by David Smith, representing the Residential Ad-Hoc Committee, to amend the 2012 NC Residential Code, Section R703.12. The proposed amendment is as follows:**

**R703.12. Adhered stone or masonry veneer installation.** Adhered stone or masonry veneer shall be installed in accordance with the manufacturer's instructions. Protection against the accumulation of water in the exterior wall assembly shall be provided in accordance with Section R703.6 of this code.

**Motion/Second/Approved** – The request was granted. The proposed effective date of this rule is December 1, 2015 (earliest through RRC), unless the BCC assigns a delayed effective date (January 1, 2017).

Reason Given – This purpose of this amendment is to clarify that the exterior plaster requirements also apply to adhered stone and masonry veneer.

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

**16. Request by Tim Norris, representing Norris Enterprises, Inc./NCAEC, to amend the 2011 NEC, Section 406.4(D)(4). The proposed amendment is as follows:**

**406.4(D)(4) Arc-Fault Circuit-Interrupter Protection.** ~~Where a receptacle outlet is supplied by a branch circuit that requires arc-fault interrupter protection as specified elsewhere in this Code, a replacement receptacle at this outlet shall be one of the following:~~

- ~~(1) A listed outlet branch circuit type arc fault circuit interrupter receptacle~~
- ~~(2) A receptacle protected by a listed outlet branch circuit type arc fault circuit interrupter type receptacle~~
- ~~(3) A receptacle protected by a listed combination type arc fault circuit interrupter type circuit breaker~~

~~This requirement becomes effective January 1, 2014.~~

Deleted.

**Motion/Second/Approved** – The request was granted. The proposed effective date of this rule is December 1, 2015 (earliest through RRC), unless the BCC assigns a delayed effective date (January 1, 2017).

Reason Given – This purpose of this amendment is to eliminate this requirement for receptacle replacement.

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

**17. Request by Tom Brown, Jeff Griffin, Mark Matheny and Reggie Hucks, representing the NC BIA, to amend the 2012 NC Residential Code, Section R324 & R324.1.**

**Motion/Second/Denied** – No further action will be taken on this item.

Reason Given – This proposal to regulate demolition is not necessary in residential construction.

Fiscal Statement – A fiscal note has not been prepared.

**18. Request by Tom Brown, Jeff Griffin, Mark Matheny and Reggie Hucks, representing the NC BIA, to amend the 2012 NC Building Code, Section 1008.1.10. The proposed amendment is as follows:**

**1008.1.10 Panic and fire exit hardware.** Doors serving a Group H occupancy and doors serving rooms or spaces with an *occupant load* of 50 or more in a Group A or E occupancy shall not be provided with a latch or lock unless it is panic hardware or *fire exit hardware*.

**Exception:** A main *exit* of a Group A occupancy in compliance with Section 1008.1.9.3, Item 2.

Electrical rooms with equipment rated ~~1,200~~ 800 amperes or more and over 6 feet (1829 mm) wide that contain overcurrent devices, switching devices or control devices with *exit* or *exit access* doors shall be equipped with panic hardware or *fire exit hardware*. The doors shall swing in the direction of egress travel.

**Motion/Second/Approved** – The request was granted. This hearing and effective date for this proposal will be coordinated with the 2014 NEC submittal.

Reason Given – This purpose of this amendment is to match the 2014 NEC, Article 110.26©(3) requirement.

Fiscal Statement – This rule is anticipated to provide equivalent compliance with a small increase in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

**19. Request by Tom Brown, Jeff Griffin, Mark Matheny and Reggie Hucks, representing the NC BIA, to amend the 2012 NC Building Code and the 2012 NC Residential Code, Chapter 2 Definitions.**

**Motion/Second/Denied** – No further action will be taken on this item.

Reason Given – This proposal needs additional work to be included in either Code. There is also a different definition in the Plumbing Code.

Fiscal Statement – A fiscal note has not been prepared.

**20. Request by Andrew Herring and Jeff Vernon, representing Mecklenburg County, to amend the 2012 NC Building Code, Section 706.2 & Table 706.4. The proposed amendment is as follows:**

**706.2 Structural stability.** *Fire walls* shall have sufficient structural stability under fire conditions to allow collapse of construction on either side without collapse of the wall for the duration of time indicated by the required *fire-resistance rating*.

**Exception:** For *fire walls* separating Group R-2 and S-2 buildings per footnotes c & d of Table 706.4, the structural wall of the S-2 building shall be permitted to serve as the fire wall between the buildings and shall be permitted to be laterally supported by floor construction of the same rating as the wall.

**706.3 Materials.** *Fire walls* shall be of any *approved* noncombustible materials.

**Exception:** Buildings of Type V construction.

**706.4 Fire-resistance rating.** *Fire walls* shall have a *fire-resistance rating* of not less than that required by Table 706.4.

**TABLE 706.4**  
**FIRE WALL FIRE-RESISTANCE RATINGS**

GROUP	FIRE-RESISTANCE RATING (hours)
A, B, E, H-4, I, R-1, R-2 <sup>c,d</sup> , U	3 <sup>a</sup>
F-1, H-3 <sup>b</sup> , H-5, M, S-1	3
H-1, H-2	4 <sup>b</sup>
F-2, S-2 <sup>c,d</sup> , R-3, R-4	2

a. In Type II or V construction, walls shall be permitted to have a 2-hour fire-resistance rating.

b. For Group H-1, H-2, or H-3 building, also see Sections 415.4 and 415.5.

c. Where fire walls separate R-2 buildings of Type V construction and S-2 buildings of Type IB construction, the structural rating of the Type IB S-2 structure shall be permitted to satisfy the requirements of Table 706.4.

d. Where fire walls separate R-2 buildings of Type III construction and S-2 buildings of Type IA construction, the structural rating of the Type IA S-2 structure shall be permitted to satisfy the requirements of Table 706.4 provided the floor construction of the S-2 structure complies with Table 721.2.1.1 and meets the equivalent thickness for a 3-hour slab when providing lateral stability to vertical construction.

**Motion/Second/Approved** – The request was granted. The proposed effective date of this rule is December 1, 2015 (earliest through RRC), unless the BCC assigns a delayed effective date (January 1, 2017).

Reason Given – This purpose of this amendment is to allow the noncombustible exterior wall construction of a Type IA or IB S-2 parking structure to serve as the fire wall separation from an adjacent R-2 building.

Fiscal Statement – This rule is anticipated to provide equivalent compliance with a small decrease in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

**21. Request by Paul Coats, representing the American Wood Council, to amend the 2012 NC Energy Conservation Code, Table 502.2(1). The proposed amendment is as follows:**

*Revise as follows:*

*(Note this is a companion change to a U-factor change, to Table 502.1.2)*

**TABLE 502.2(1)**  
**BUILDING ENVELOPE REQUIREMENTS – OPAQUE ASSEMBLIES**

Climate Zone	3		4		5	
	All Other	Group R	All Other	Group R	All Other	Group R
<b>Roofs</b>						
Insulation entirely above deck	R - 25 ci	R-25 ci	R - 30 ci	R-30 ci	R - 30 ci	R-30 ci
Metal buildings (with R-5 thermal blocks) <sup>a,b</sup>	R-10 + R-19 FC	R-10 + R-19 FC	R-19 + R-11 Ls	R-19 + R-11 Ls	R-19 + R-11 Ls	R-19 + R-11 Ls
Attic and other - wood framing	R-38	R-38	R-42	R-42	R-42	R-42
Attic and other - steel framing	R-38	R-38	R-49	R-49	R-49	R-49
<b>Walls, Above Grade</b>						
Mass	R-7.6 ci	R-9.5 ci	R-9.5 ci	R-11.4 ci	R-11.4 ci	R-15 ci
Metal building <sup>b</sup>	R-0+R-13 ci	R-0 + R-19 ci	R-0 + R-15.8 ci	R-0 + R-19 ci	R-0 + R-19 ci	R-0 + R-19 ci
Metal framed	R-13 + 7.5 ci	R- 13 + R-7.5 ci	<del>R-13 + R-10 ci</del> R-13 + R-7.5ci	<del>R-13 + R-10 ci</del> R-13 + R-7.5ci	<del>R-13 + R-10 ci</del> R-13 + R-7.5ci	<del>R-13 + R-10 ci</del> R-13 + R-10ci
Wood framed and other	R-13 + R-3.8 ci or R-20	<del>R-19, R-13+</del> <del>R-5, or R-15+</del> <del>R-3<sub>g</sub></del> R-13 + R-3.8 ci or R-20	<del>R-13 + R-7.5 ci</del> R-13 + R-3.8ci or R-20	<del>R-19, R-13+</del> <del>R-5, or R-15+</del> <del>R-3<sub>g</sub></del> R-13 + R-3.8 ci or R-20	<del>R-13 + R-10 ci</del> R-13 + R-3.8 ci or R-20	<del>R-19, R-13+</del> <del>R-5, or R-15+</del> <del>R-3<sub>g</sub></del> R-13 + R-7.5ci or R-20 + R- 3.8ci

**IN ADDITION**

<b>Walls, Below Grade</b>						
Below-grade wall <sup>c</sup>	R-7.5 ci	R-7.5 ci	R-7.5 ci	R-10 ci	R-7.5 ci	R-10 ci
<b>Floors</b>						
Mass	R-12.5 ci	R-12.5 ci	R-14.6 ci	R-16.7 ci	R-14.6 ci	R-16.7 ci
Joist / Framing	R-30 <sup>e</sup>	R-30 <sup>e</sup>	R-38	R-38	R-38	R-38
<b>Slab-on-Grade Floors<sup>d</sup></b>						
Unheated slabs	NR	R-10 for 24 in.	R-15 for 24 in.	R-15 for 24 in.	R-15 for 24 in.	R-20 for 24 in.
Heated slabs	R-15 for 24 in.	R-15 for 24 in.	R-20 for 24 in.	R-20 for 48 in.	R-20 for 48 in.	R-20 for 48 in.
<b>Opaque Doors</b>						
Swinging	U – 0.70	U – 0.50	U – 0.50	U – 0.50	U – 0.50	U – 0.50
Roll-up or sliding	U - 0.50	U - 0.50	U - 0.50	U - 0.50	U - 0.50	U - 0.50

**Motion/Second/Approved** – The request was granted. The proposed effective date of this rule is December 1, 2015 (earliest through RRC), unless the BCC assigns a delayed effective date (January 1, 2017).

Reason Given – This amendment is a companion change to a U-factor change. This will align the NC Code requirements for wood and steel frame walls with the 2015 IECC and the 2013 ASRAE 90.1.

Fiscal Statement – This rule is anticipated to provide equivalent compliance with a small decrease in cost. This rule is not expected to either have a substantial economic impact or increase local and state funds. A fiscal note has not been prepared.

**NOTICE:**

**Appeals and Interpretations** of the North Carolina State Building Codes are published online at the following link.

[http://www.ncdoi.com/OSFM/Engineering\\_and\\_Codes/Default.aspx?field1=Code\\_Interpretations&user=Code\\_Enforcement\\_Resources](http://www.ncdoi.com/OSFM/Engineering_and_Codes/Default.aspx?field1=Code_Interpretations&user=Code_Enforcement_Resources)

**NOTICE:**

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

<http://www.ncoah.com/rules/>

**STATE BOARD OF ELECTIONS**  
**Additional Public Hearing**

***Notice:** The State Board of Elections wishes to add one additional public comment hearing to its original schedule published in the NC Register Volume 29, Issue 21, May 1, 2015.*

**Public Hearing:**

**Date:** *Monday, June 15, 2015*

**Time:** *5:00 p.m. – 7:00 p.m.*

**Location:** *Edgecombe County Administrative Building, Auditorium, 201 St. Andrew St., Tarboro NC*

**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 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

### CHAPTER 02 – BOARD OF ARCHITECTURE

*Notice is hereby given in accordance with G.S. 150B-21.3A(c)(2)g. that the Board of Architecture intends to readopt without substantive changes to the rule cited as 21 NCAC 02 .0703.*

**Link to agency website pursuant to G.S. 150B-19.1(c):**  
<http://ncbarch.org/>

**Proposed Effective Date:** October 1, 2015

**Public Hearing:**

**Date:** July 10, 2015

**Time:** 10:00 a.m.

**Location:** 127 W. Hargett St. #304, Raleigh, NC 27601

**Reason for Proposed Action:** Re-adoption of existing rule due to administrative error. This rule was erroneously marked as "necessary with substantive public interest" on the September 24, 2015 G.S. 150B-21.3A Report for 21 NCAC 02 spreadsheet as submitted. It should have been identified as "necessary without substantive public interest". The error was not discovered until RRC counsel notified the Board of Architecture that the rule was identified for re-adoption due to it being identified (erroneously) as "necessary with substantive public interest".

**Comments may be submitted to:** Cathe Evans, 127 W. Hargett St #304, Raleigh, NC 27601, phone (919) 733-9544

**Comment period ends:** July 14, 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
- ☒ No fiscal note required by G.S. 150B-21.3A(d)(2)

Pursuant to G.S. 150B-21.2(c)(1), the text of rules to be readopted without substantive changes are not required to be published. The text of the rules are available on the OAH website: <http://reports.oah.nc.us/ncac.asp>.



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

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

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

**Rule-making Agency:** NC Wildlife Resources Commission

**Rule Citation:** 15A NCAC 10F .0333

**Effective Date:** May 1, 2015

**Date Approved by the Rules Review Commission:** April 16, 2015

**Reason for Action:** The proposed changes to 15A NCAC 10F .0333 would allow the Commission to create No Wake Zones to address safety concerns and water hazards, per authority for temporary rule-making established under NCGA 150B-21.1(a)(7).

Law Enforcement assessed safety concerns and identified safety issues for the east and west Sadler Island portions of Lake Wylie. Immediate adoption is necessary to allow placement of markers in the interest of safety before the boating season starts.

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

**SUBCHAPTER 10F – MOTORBOATS AND WATER  
SAFETY**

**SECTION .0300 – LOCAL WATER SAFETY  
REGULATIONS**

**15A NCAC 10F .0333 MECKLENBURG AND GASTON  
COUNTIES**

(a) Regulated Areas. This Rule applies to the following waters of Lake Wylie in Mecklenburg and Gaston Counties:

- (1) McDowell Park – The waters of the coves adjoining McDowell Park and the Southwest Nature Preserve in Mecklenburg County, including the entrances to the coves on either side of Copperhead Island;
- (2) Gaston County Wildlife Club Cove – The waters of the cove at the Gaston County Wildlife Club on South Point Peninsula in Gaston County;
- (3) Buster Boyd Bridge- The areas 250 feet to the north and 150 feet to the south of the Buster Boyd Bridge;
- (4) Highway 27 Bridge – The area beginning 50 yards north of the NC 27 Bridge and extending 50 yards south of the southernmost of two

railroad trestles immediately downstream from the NC 27 Bridge;

- (5) Brown's Cove – The area beginning at the most narrow point of the entrance to Brown's Cove and extending 250 feet in both directions;
- (6) Paradise Point Cove – The waters of the Paradise Point Cove between Paradise Circle and Lakeshore Drive as delineated by appropriate markers;
- (7) Withers Cove - The area 50 feet on either side of Withers Bridge; ~~and~~
- (8) Sadler Island west - beginning at a line formed from a point on the western shore of Lake Wylie at 35.27481N, 81.0138W to a point on the eastern shore at 35.27423N, 81.01111W extending south on the Lake to a line formed from a point on the western shore of Lake Wylie at 35.2708N, 81.01525W to a point on the western side of Sadler Island at 35.27056N, 81.01393W;
- (9) Sadler Island east - beginning at a line formed from a point on the western shore of Lake Wylie at 35.27481N, 81.0138W to a point on the eastern shore at 35.27423N, 81.01111W extending south on the Lake to a line formed from a point on the eastern side of Sadler Island at 35.2663N, 81.0143W to a point on the eastern shore of Lake Wylie at 35.26501N, 81.01374W;
- (~~8~~)(10) other bridges – the areas that are within 50 feet of any bridge in North Carolina that crosses the waters of Lake Wylie that is not otherwise specifically mentioned in this Paragraph.

(b) Speed Limit Near Ramps. No person shall operate a vessel at greater than no-wake speed within 50 yards of any public boat-launching ramp, dock, pier, marina, boat storage structure or boat service area.

(c) Speed Limit Near All Other Bridges. No person shall operate a vessel at greater than no-wake speed within 50 feet of any bridge in North Carolina that crosses the waters of Lake Wylie that is not otherwise specifically mentioned in Paragraph (a) of this Rule.

(d) Speed Limit in Marked Swimming or Mooring Areas. No person shall operate a vessel at greater than no-wake speed within 50 yards of any marked mooring area or marked swimming area.

(e) Placement and Maintenance of Markers. The Lake Wylie Marine Commission is designated a suitable agency for placement and maintenance of markers implementing this Rule.

*History Note:* Authority G.S. 75A-3; 75A-15;  
Eff. July 1, 1980;

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**TEMPORARY RULES**

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*Amended Eff. July 1, 1994; June 1, 1985; June 1, 1984; March 1, 1983;*  
*Temporary Amendment Eff. January 1, 1998;*  
*Amended Eff. July 1, 1998;*

*Temporary Amendment Eff. February 4, 2000;*  
*Amended Eff. April 1, 2009; June 1, 2004; July 1, 2000;*  
*Temporary Amendment Eff. May 1, 2015.*

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## **RULES REVIEW COMMISSION**

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*This Section contains information for the meeting of the Rules Review Commission on April 16, 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 2<sup>nd</sup> business day before the meeting. Please refer to RRC rules codified in 26 NCAC 05.*

### **RULES REVIEW COMMISSION MEMBERS**

**Appointed by Senate**  
Jeff Hyde (1<sup>st</sup> Vice Chair)  
Margaret Currin  
Jay Hemphill  
Faylene Whitaker

**Appointed by House**  
Garth Dunklin (Chair)  
Stephanie Simpson (2<sup>nd</sup> 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**

May 21, 2015                      June 18, 2015  
July 16, 2015                     August 20, 2015

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### **RULES REVIEW COMMISSION MEETING MINUTES April 16, 2015**

The Rules Review Commission met on Thursday, April 16, 2015, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Margaret Currin, Jeanette Doran, Garth Dunklin, Jay Hemphill, Jeff Hyde, Stephanie Simpson, Ralph Walker, and Faylene Whitaker.

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

The meeting was called to order at 10:05 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 March 19, 2015 meeting. There were none and the minutes were approved as distributed.

#### **FOLLOW UP MATTERS**

##### **Acupuncture Licensing Board**

21 NCAC 01 .0108, .0109, .0110, .0111, .0601, .0602, .0603, .0604, .0605, .0606, .0607, .0608, and .0609 - No action was required by the Commission. The review of the rules will occur at the May meeting.

##### **Irrigation Contractors Licensing Board**

21 NCAC 23 .0105 - No action was required by the Commission. The review of this Rule will occur at the June meeting.

##### **Board of Physical Therapy Examiners**

21 NCAC 48C .0104 - No action was required by the Commission. The review of this Rule will occur at the May meeting.

##### **State Human Resources Commission**

25 NCAC 01B .0350, .0413; 01C .0311, .0402, .1004, .1007; 01D .0201, .0207; 01E .0204, .0901, .1601, .1602, .1603, .1605, .1606; 01H .0633, .0634, .0636, .0641, .0901, .0902, .0904, .0905, .1103; 01J .0603, .0610, .0615, .0616, .0617, .0618, .1101, .1201, .1202, .1203, .1204, .1205, .1206, .1207, .1208, .1301, .1302, .1303, .1304, .1305, .1306, .1307, .1308, .1309, .1310, .1311, .1312, .1313, .1314, .1315, .1316, .1317, .1318, .1319, .1320, .1401, .1402, .1403, .1404, .1405, .1406, .1407, .1408, .1409, .1410, .1411, and .1412 - The Commission approved these Rules with Commissioners Dunklin, Hemphill, Hyde, Simpson, Walker, and Whitaker voting in favor of the motion to approve the rules and Commissioner Currin voting against.

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.

#### **Building Code Council**

The Commission approved the following rules in the NC Residential Code: AM106 and AM111 Tables; N1 and N2 Tables; and N1 and N2 Tables – Wood and Flitch Plate Examples.

The Commission approved these Rules with Commissioner Doran voting against. The Commission found that the Council setting an earlier effective date for these Rules was not a substantial change and therefore, the agency complied with the APA.

No action was taken on the 2012 NC Residential Code, Sections R101.2, R202, and R324, Screen Enclosure, the 2012 Building Code, Chapter 36, and the 2012 Fire Code, 4504.1. The review of these Rules will occur at the June meeting.

Barry Gupton from the agency addressed the Commission.

#### **LOG OF FILINGS (PERMANENT RULES)**

##### **Child Care Commission**

The Commission extended the period of review on 10A NCAC 09 .0302, .0604, .0607, .0707, .1701, .1705, .1720, .1721, .2318 and .2829 in accordance with G.S. 150B-21.10 and G.S. 150B-21.13. The Commission extended the period of review to allow the Child Care Commission additional time to revise the rules in response to technical change requests.

##### **Environmental Management Commission**

All rules were unanimously approved.

##### **Marine Fisheries Commission**

All rules were unanimously approved.

The Commission received more than 10 letters of objection to Rule 15A NCAC 03M .0513. Pursuant to G.S. 150B-21.3, the rule is now subject to legislative review and a delayed effective date.

##### **Coastal Resources Commission**

15A NCAC 07K .0208 was unanimously approved.

##### **Wildlife Resources Commission**

All rules were unanimously approved.

The Commission received more than 10 letters of objection to 15A NCAC 10B .0106 and .0219 and 15A NCAC 10I .0102 and .0104. Pursuant to G.S. 150B-21.3, these Rules are now subject to legislative review and a delayed effective date.

##### **Well Contractors Certification Commission**

All rules were unanimously approved.

##### **Medical Board**

All rules were unanimously approved.

Prior to the review of the rules from the Medical Board, Commissioner Walker recused himself and did not participate in any discussion or vote concerning the rules because he is a member of the board.

**Real Estate Commission**

Chairman Dunklin stepped away and Vice Chairman Hyde presided over the discussion and vote on the Real Estate Commission rules.

All rules were unanimously approved.

Prior to the review of the rules from the Real Estate Commission, Commissioner Dunklin recused himself and did not participate in any discussion or vote concerning the rules because he practices before the Commission.

Prior to the review of the rules from the Real Estate Commission, Commissioner Currin recused herself and did not participate in any discussion or vote concerning the rules because she possesses an inactive real estate broker's license.

**LOG OF RULES (TEMPORARY RULES)**

**Wildlife Resources Commission**

15A NCAC 10F .0333 was unanimously approved.

**EXISTING RULES REVIEW**

**Medical Care Commission**

10A NCAC 13L - The Commission unanimously approved the report as submitted by the agency.

**Medical Care Commission**

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

**Medical Care Commission**

10A NCAC 13O - The Commission unanimously approved the report as submitted by the agency.

**Commission for Mental Health**

10A NCAC 26A - The Commission unanimously approved the report as submitted by the agency.

**Commission for Mental Health**

10A NCAC 26B – The Commission unanimously approved the report as submitted by the agency.

**Commission for Mental Health**

10A NCAC 26D – The Commission unanimously approved the report as submitted by the agency.

**Environmental Management Commission**

15A NCAC 02R – The Commission unanimously approved the report as submitted by the agency.

**Medical Board**

21 NCAC 32 – The Commission voted to not approve the staff recommendation to approve the report as submitted by the agency, with Commissioners Currin, Doran, Dunklin, Hemphill, Simpson, and Whitaker voting against and Commissioner Hyde voting in favor.

The Commission objected to the report after receiving public comments that the Board did not post all information required by Rule 26 NCAC 05 .0207 during the public comment period. The Commission determined that the Board will need to repost the report for another 60 day comment period. The Commission rescheduled the review of the report for February 2016.

Prior to the review of the report from the Medical Board, Commissioner Walker recused himself and did not participate in any discussion or vote concerning the report because he is a member of the board.

Jeanne M. McIntosh addressed the Commission.

Marcus Jimison, attorney for the Board, addressed the Commission.

**Board of Massage and Bodywork Therapy**

21 NCAC 30 - The Commission voted for readoption of these Rules pursuant to G.S. 150B-21.3A(d)(2) no later than October 31, 2015.

**COMMISSION BUSINESS**

Staff provided an analysis to the Commission on fiscal notes and review of rules.

Staff gave the Commission a brief legislative update.

At 11:49 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 12:17 p.m.

The meeting adjourned at 12:17 p.m.

The next regularly scheduled meeting of the Commission is Thursday, May 21<sup>st</sup> 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,

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Alexander Burgos, Paralegal

Minutes approved by the Rules Review Commission:

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Garth Dunklin, Chair

April 2015

Rules Review Commission  
Meeting  
Please Print Legibly

Name	Agency
CATHERINE BLUM	NCDMF
Terry Pratt	ALBEMARLE FISHERMEN'S ASSOCIATION
Wanda Long	NCEM
Jenny Schill	NC Fishermen's Association
Jeanne McIntosh	Charlotte, NC Resident Anti-corruption activist
Valene Bateman	OSHR
Shari Howard	OSHR
Mary L. Gault	OSHR
BARRY GUTTON	NCDOT/NCBCC
Nadia Lahr	SELC
Jennifer Everett	DENR
Jeanne Rutledge	NW WCC
Andrew Morgan	NC WCC
Melissa Vuotto	NCREC
Curtis Aldenderfer	NCREC
Mark C. H.	PA
Marvin T. Smith	NCEMIS
Joelle Burleson	NCDENR-DAQ

Rules Review Commission  
Meeting  
Please Print Legibly

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**LIST OF APPROVED PERMANENT RULES**  
**April 16, 2015 Meeting**

**ENVIRONMENTAL MANAGEMENT COMMISSION**

<u>Riparian Buffer Mitigation Fees to the NC Ecosystem Enhan...</u>	15A NCAC 02B	.0269
<u>Emission Rates Requiring a Permit</u>	15A NCAC 02Q	.0711

**MARINE FISHERIES COMMISSION**

<u>Definitions</u>	15A NCAC 03I	.0101
<u>User Conflict Resolution</u>	15A NCAC 03I	.0122
<u>Duke Energy Progress Brunswick Nuclear Plant Intake Canal</u>	15A NCAC 03J	.0207
<u>New River</u>	15A NCAC 03J	.0208
<u>Albemarle Sound/Chowan River River Herring Management Areas</u>	15A NCAC 03J	.0209
<u>Pots</u>	15A NCAC 03J	.0301
<u>Permits to Use Mechanical Methods for Shellfish on Shellf...</u>	15A NCAC 03K	.0111
<u>Permits to Use Mechanical Methods for Oysters and Clams o...</u>	15A NCAC 03K	.0206
<u>Permits to Use Mechanical Methods for Oysters and Clams o...</u>	15A NCAC 03K	.0303
<u>Bay Scallop Harvest Management</u>	15A NCAC 03K	.0501
<u>Taking Bay Scallops at Night and on Weekends</u>	15A NCAC 03K	.0502
<u>Marketing Scallops Taken from Shellfish Leases or Franchises</u>	15A NCAC 03K	.0507
<u>Scallop Season and Harvest Limit Exemptions</u>	15A NCAC 03K	.0508
<u>Shrimp Harvest Restrictions</u>	15A NCAC 03L	.0101
<u>Prohibited Nets, Mesh Lengths and Areas</u>	15A NCAC 03L	.0103
<u>Recreational Shrimp Limits</u>	15A NCAC 03L	.0105
<u>Mutilated Finfish</u>	15A NCAC 03M	.0101
<u>American Eel</u>	15A NCAC 03M	.0510
<u>River Herring</u>	15A NCAC 03M	.0513
<u>Procedures and Requirements to Obtain Licenses, Endorseme...</u>	15A NCAC 03O	.0101
<u>Display of Licenses and Registrations</u>	15A NCAC 03O	.0106
<u>Ocean Fishing Pier Reporting Requirements</u>	15A NCAC 03O	.0113
<u>Procedures and Requirements to Obtain Permits</u>	15A NCAC 03O	.0501
<u>Permit Conditions; Specific</u>	15A NCAC 03O	.0503
<u>Descriptive Boundaries for Coastal-Joint-Inland Waters</u>	15A NCAC 03Q	.0202
<u>Shrimp Trawl Prohibited Areas</u>	15A NCAC 03R	.0114
<u>Anadromous Fish Spawning Areas</u>	15A NCAC 03R	.0115
<u>River Herring Management Areas</u>	15A NCAC 03R	.0202

**COASTAL RESOURCES COMMISSION**

<u>Single Family Residences Exempted</u>	15A NCAC 07K	.0208
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**WILDLIFE RESOURCES COMMISSION**

<u>Migratory Game Birds</u>	15A NCAC 10B	.0105
<u>Wildlife Taken for Depredations</u>	15A NCAC 10B	.0106
<u>Dog Training and Field Trials</u>	15A NCAC 10B	.0114
<u>Bear</u>	15A NCAC 10B	.0202

<u>Deer (White Tailed)</u>	15A NCAC 10B	.0203
<u>Coyote</u>	15A NCAC 10B	.0219
<u>Feral Swine</u>	15A NCAC 10B	.0223
<u>Trappers and Hunters</u>	15A NCAC 10B	.0404
<u>Public Mountain Trout Waters</u>	15A NCAC 10C	.0205
<u>Trotlines and Set-Hooks</u>	15A NCAC 10C	.0206
<u>Crappie</u>	15A NCAC 10C	.0306
<u>Striped Bass</u>	15A NCAC 10C	.0314
<u>Trout</u>	15A NCAC 10C	.0316
<u>Manner of Taking Nongame Fishes: Purchase and Sale</u>	15A NCAC 10C	.0401
<u>Taking Nongame Fishes for Bait or Personal Consumption</u>	15A NCAC 10C	.0402
<u>Permitted Special Devices and Open Seasons</u>	15A NCAC 10C	.0407
<u>General Regulations Regarding Use</u>	15A NCAC 10D	.0102
<u>Hunting On Game Lands</u>	15A NCAC 10D	.0103
<u>Fishing on Game Lands</u>	15A NCAC 10D	.0104
<u>Currituck County</u>	15A NCAC 10F	.0340
<u>Protection of Endangered/Threatened/Special Concern</u>	15A NCAC 10I	.0102
<u>Threatened Species</u>	15A NCAC 10I	.0104

#### **WELL CONTRACTORS CERTIFICATION COMMISSION**

<u>Requirements</u>	15A NCAC 27	.0801
<u>Approval of Continuing Education Courses</u>	15A NCAC 27	.0810
<u>Determination of Credit</u>	15A NCAC 27	.0820
<u>Special Provisions for Continuing Education</u>	15A NCAC 27	.0840

#### **MEDICAL BOARD**

<u>Definitions</u>	21 NCAC 32S	.0201
<u>Qualifications and Requirements for License</u>	21 NCAC 32S	.0202
<u>Agency</u>	21 NCAC 32S	.0211
<u>Prescriptive Authority</u>	21 NCAC 32S	.0212
<u>Supervision of Physician Assistants</u>	21 NCAC 32S	.0213
<u>Supervising Physician</u>	21 NCAC 32S	.0214
<u>Responsibilities of Primary Supervising Physicians in Reg...</u>	21 NCAC 32S	.0215
<u>Continuing Medical Education</u>	21 NCAC 32S	.0216
<u>Violations</u>	21 NCAC 32S	.0217
<u>Scope of Rules</u>	21 NCAC 32S	.0224
<u>Reporting Criteria</u>	21 NCAC 32Y	.0101

#### **REAL ESTATE COMMISSION**

<u>Agency Agreements and Disclosure</u>	21 NCAC 58A	.0104
<u>Advertising</u>	21 NCAC 58A	.0105
<u>Handling of Trust Money</u>	21 NCAC 58A	.0116
<u>Mineral and Oil and Gas Rights Mandatory Disclosure State...</u>	21 NCAC 58A	.0119
<u>Examination Subject Matter, Format, and Passing Scores</u>	21 NCAC 58A	.0402
<u>Business Entities</u>	21 NCAC 58A	.0502
<u>Continuing Education Required of Nonresident Licensees</u>	21 NCAC 58A	.1711

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**RULES REVIEW COMMISSION**

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<u>Request for Examinations and Video Recordings</u>	21	NCAC 58C	.0605
<u>Application and Criteria for Original Approval</u>	21	NCAC 58E	.0203
<u>Active and Inactive Status: Renewal of Approval</u>	21	NCAC 58E	.0204
<u>Application for Original Approval</u>	21	NCAC 58E	.0303
<u>Request for a Video Recording</u>	21	NCAC 58E	.0308
<u>Change in Sponsor Ownership</u>	21	NCAC 58E	.0408
<u>Changes During Approval Period</u>	21	NCAC 58E	.0409
<u>Denial or Withdrawal of Approval</u>	21	NCAC 58E	.0412
<u>Advertising, Providing Course Information</u>	21	NCAC 58E	.0505

**STATE HUMAN RESOURCES COMMISSION**

<u>Employee Objection to Material in File</u>	25	NCAC 01C	.0311
<u>Covered Employees and Leave Credits</u>	25	NCAC 01E	.1603
<u>Denial of Veterans' Preference</u>	25	NCAC 01H	.1103
<u>Settlements/Consent Agreements in Grievances, Contested C...</u>	25	NCAC 01J	.1304

**BUILDING CODE COUNCIL**

<u>2012 NC Residential Code/Southern Pine Spans</u>	AM106, AM111 Tables
<u>2012 NC Residential Code/Wood and Fitch Plate Beams</u>	N-1, N-2 Tables
<u>2012 NC Residential Code/Wood and Fitch Plate Examples</u>	N-1, N-2 Tables

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**LIST OF APPROVED TEMPORARY RULES**  
**April 16, 2015 Meeting****WILDLIFE RESOURCES COMMISSION**

<u>Mecklenburg and Gaston Counties</u>	15A	NCAC 10F	.0333
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**RRC DETERMINATION**  
**PERIODIC RULE REVIEW**  
**April 16, 2015****Necessary with Substantive Public Interest**

<b>Mental Health, Commission for</b>	<b>Environmental Management</b>	15A NCAC 02R .0301
10A NCAC 26D .1104	<b>Commission</b>	15A NCAC 02R .0302
10A NCAC 26D .1105	15A NCAC 02R .0101	15A NCAC 02R .0401
10A NCAC 26D .1202	15A NCAC 02R .0102	15A NCAC 02R .0402
10A NCAC 26D .1203	15A NCAC 02R .0201	15A NCAC 02R .0403
10A NCAC 26D .1204	15A NCAC 02R .0202	
10A NCAC 26D .1206	15A NCAC 02R .0203	

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**RRC DETERMINATION**  
**PERIODIC RULE REVIEW**  
**April 16, 2015****Necessary without Substantive Public Interest**

<b>Medical Care Commission</b>	10A NCAC 13L .0202	10A NCAC 13L .0301
10A NCAC 13L .0101	10A NCAC 13L .0203	10A NCAC 13L .0302
10A NCAC 13L .0201	10A NCAC 13L .0204	10A NCAC 13L .0303

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10A NCAC 13M .0101  
10A NCAC 13M .0201  
10A NCAC 13O .0101  
10A NCAC 13O .0102  
10A NCAC 13O .0201  
10A NCAC 13O .0202

**Mental Health, Commission for**

10A NCAC 26A .0101  
10A NCAC 26A .0102  
10A NCAC 26A .0103  
10A NCAC 26A .0104  
10A NCAC 26A .0105  
10A NCAC 26A .0106  
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10A NCAC 26D .1603

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**RRC DETERMINATION  
PERIODIC RULE REVIEW  
April 16, 2015  
Unnecessary**

**Mental Health, Commission for**

10A NCAC 26A .0204  
10A NCAC 26D .0602

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**CONTESTED CASE DECISIONS**

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

**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

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<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>DATE</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<b><u>ALCOHOLIC BEVERAGE CONTROL COMMISSION</u></b>			
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	
<b><u>DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY</u></b>			
Travis Earl Atkinson v. NC Victims Compensation Commission	13 CPS 16304	09/02/14	
Shamika Mack v. NC Department of Public Safety Victim Services	14 CPS 00557	01/30/15	29:21 NCR 2518
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	
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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	
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**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	

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STATE OF NORTH CAROLINA

COUNTY OF GUILFORD

ESTELLA WHITE,

Petitioner,

v.

N. C. DEPARTMENT OF HEALTH  
AND HUMAN SERVICES, DIVISION  
OF HEALTH SERVICE  
REGULATION, HEALTH CARE  
PERSONNEL REGISTRY SECTION,

Respondent.

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
14 DHR 03645

OFFICE OF  
ADMIN HEARINGS

FINAL DECISION

THIS MATTER came to hearing before the undersigned, Selina M. Brooks,  
Administrative Law Judge, on October 29, 2014, in High Point, North Carolina.

APPEARANCES

For Petitioner:

Estella White  
805 Sharon Way (Apt. 31)  
High Point, NC 27602

For Respondent:

Candace A. Hoffman  
Assistant Attorney General  
North Carolina Department of Justice  
114 W. Edenton Street  
Raleigh, NC 27699-9001

ISSUE

Whether Respondent otherwise substantially prejudiced Petitioner's rights, exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule when it denied Petitioner's request to remove the findings of neglect against Petitioner from the Health Care Personnel Registry.

**APPLICABLE STATUTES AND RULES**

N.C. Gen. Stat. § 131E-256

N.C. Gen. Stat. § 150B-23

42 C.F.R. § 488.301

10 N.C.A.C. 130.0101

**EXHIBITS**

Respondent's exhibits 1 through 14 were admitted into the record.

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

**FINDINGS OF FACT**

1. A finding of resident neglect was listed with Petitioner's name on the Health Care Personnel Registry ("HCPR") and the Nurse Aide I Registry on June 4, 2012. (Resp't. Ex. 4)

2. By letter dated June 6, 2013, Petitioner requested that her name be removed from the HCPR. (Resp't. Ex. 3)

3. At all times relevant to this matter, Debra T. Hockaday was employed as an investigator for the HCPR. She investigated Petitioner's request to remove the finding of neglect. (T. pp. 19-23)

4. By letter dated June 10, 2014, the HCPR notified Petitioner of the statutory requirements which must be met in order to have a finding of neglect removed from the HCPR, and what documentation would be required. (T. p. 25; Resp't. Ex. 4)

5. Ms. Hockaday obtained and reviewed all of the necessary documentation received from Petitioner concerning her employment history. (T. pp. 25-26; Resp't. Exs. 5, 6)

6. In May 2005, while working at Providence Place Senior Health and Housing, Petitioner was disciplined for eating a resident's food and was accused of rough handling by a resident. (T. p. 35; Resp't. Ex. 10)

7. On November 8, 2007, Petitioner was terminated from employment at Westwood Health and Rehabilitation Center for poor quality of work performance because she failed to ensure that a resident's safety needs were met. (T. pp. 38-40; Resp't Ex. 12)

8. On May 5, 2008, while working at Graybrier Nursing and Rehabilitation Center, Petitioner received an employee reprimand for refusing a direct order from her supervisor to help with feeding the residents. She also had received a written warning on May 15, 2007 for failing to feed a resident in a timely manner. (Resp't Ex. 11) Ms. Hockaday testified that both situations are considered instances of neglect. (T. pp. 35-38)

9. On October 4, 2010 while working at Libertywood Nursing Center, the facility substantiated a finding of neglect against Petitioner for refusing to get out of a resident's wheel-chair and to help another resident. (T. p.28-32; Resp't. Ex. 9)

10. Ms. Hockaday testified that the HCPR has considered a pattern to be something that has occurred more than once. If the act which would be considered the failure to provide goods and services to avoid physical harm, mental anguish or mental illness has occurred more than once the definition has been met. (T. pp. 42-44)

11. Ms. Hockaday summarized the results of her investigation for the HCPR on April 11, 2014 on a document entitled Review Conclusion Regarding Removal of Neglect Finding from the Nurse Aide I Registry and Health Care Personnel Registry for Estella White. (T. p. 40; Resp't. Ex. 13)

12. By letter dated April 17, 2014, the HCPR notified Petitioner that she had not met the state requirements allowing for removal of the finding of neglect. (T. p. 41; Resp't. Ex. 14)

**BASED UPON** the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following:

#### **CONCLUSIONS OF LAW**

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

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

3. As a Health Care Personnel working in a residential care facility at the time the incident occurred, Petitioner was subject to the provisions of N.C. Gen. Stat. § 131E-256.

4. N.C. Gen. Stat. § 131E-256(a)(1)(a) requires the Health Care Personnel Registry ("HCPR") to maintain a registry containing the names of all health care personnel working in

health care facilities in North Carolina who have been subject to findings of neglect of a resident.

5. Neglect is defined in 42 CFR Part 488.301 as the failure to provide goods and services necessary to avoid physical harm, mental anguish or mental illness. It is the obligation of the HCPR to protect the health and safety of residents. The HCPR must ensure that unlicensed staff in health care facilities has the ability to provide goods and services necessary to avoid physical harm, mental anguish or mental illness.

6. The HCPR established a Policy And Procedure to permit health care personnel with a finding of neglect to petition to have his or her name removed from the registry. (Resp't. Ex. 2) The policy states that "[a]n individual with a finding of neglect listed in the NC Nurse Aide I Registry and/or Health Care Personnel Registry may petition the Department to remove the listed finding ... 5. An individual with a neglect finding who has received disciplinary action/warning for abusive behavior or neglect in his/her employment history other than the incident that resulted in the neglect finding will not be eligible for removal of the listed neglect finding." (Resp't. Ex. 2)

7. Pursuant to N.C. Gen. Stat. § 131E-256(i), after an entry of finding is entered on the Health Care Personnel Registry, only a finding of neglect can be removed by petitioning the Department, to wit:

In the case of a finding of neglect under subdivision (1) of subsection (a) of this section, the Department shall establish a procedure to permit health care personnel to petition the Department to have his or her name removed from the registry upon a determination that:

- (1) The employment and personal history of the nurse aid does not reflect a pattern of abusive behavior or neglect;
- (2) The neglect involved in the original finding was a singular occurrence; and
- (3) The petition for removal is submitted after the expiration of the one-year period which began on the date the petitioner's name was added to the registry under subdivision (1) of subsection (a) of this section.

8. Black's Law Dictionary defines a "pattern" as a series of acts that are recognizably consistent. Webster's Dictionary defines a "series" as a number of things or events of the same kind occurring in a row or following one after the other in succession. Webster's II Dictionary (2nd Edition 1999)

9. The HCPR established and used proper procedures for the removal of a finding of neglect and, therefore, the HCPR acted as required by law under the provisions of N.C. Gen. Stat. § 131E-256(i).

10. Pursuant to N.C. Gen. Stat. § 131E-256(d) and (d1), Health Care Personnel can

appeal findings of neglect listed in the HCPR pursuant to N.C. Gen. Stat. § 131E-256(a)(1) by filing a petition for a contested case hearing within 30 days of the mailing of the written notice of the HCPR's intent to place the findings in the registry.

11. The preponderance of the evidence shows that the Petitioner has displayed a pattern of neglectful behavior which does not ensure the ability to provide goods and services necessary to avoid physical harm, mental anguish or mental illness. The request for removal does not meet the eligibility requirements of the HCPR's policy and procedures.

12. Respondent's decision to deny Petitioner's request to remove the findings of neglect that were listed against Petitioner on June 4, 2012 from the Health Care Personnel Registry is in compliance with N.C. Gen. Stat. § 131E-256(i) which prohibits the removal of a finding of neglect if the employment history of the nurse aide reflects a pattern of neglect.

**BASED UPON** the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

#### **DECISION**

Respondent's decision to deny Petitioner's request to remove the findings of neglect that were listed against Petitioner on June 4, 2012 from the Health Care Personnel Registry is **UPHELD**.

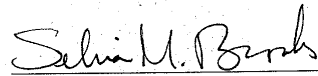
#### **NOTICE**

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

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

Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 8th day of January, 2015.



Selina M. Brooks  
Administrative Law Judge



Filed

STATE OF NORTH CAROLINA      IN THE OFFICE OF  
COUNTY OF DURHAM      ADMINISTRATIVE HEARINGS  
14DHR04338

Mount Zion Daycare And Kimberly Brandon Petitioner  v.  NC Department of Health and Human Services Respondent	<b>FINAL DECISION</b>
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THIS MATTER came on for hearing before Hon. J. Randolph Ward, Administrative Law Judge, on October 30, 2014 in Raleigh. Following preparation of a transcript, and submission of proposed findings and conclusions by both parties, this Final Decision was prepared.

**APPEARANCES**

For Petitioners:      Michelle M. Walker  
Law Office of James C. White, P.C.  
4819 Emperor Blvd., Suite 400  
Durham, NC 27703

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

**ISSUE**

Whether Respondent deprived Petitioners of property; otherwise substantially prejudiced Petitioners' rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; or failed to act as required by rule or law in finding fraudulent misrepresentation and upholding Durham County Department of Social Services' ("DSS's") imposition of a sanction against receipt of benefits for new enrollees for a period of 12 months.

**APPLICABLE STATUTES AND RULES**

N.C. Gen. Stat. § 110-94

N.C. Gen. Stat. § 110-107  
N.C. Gen. Stat. §150B-23  
10A NCAC 10. 0308  
10A NCAC 10 .0312(l)  
Subsidized Childcare Services Manual

**EXHIBITS**

Petitioners' Exhibits 1-15 were admitted into evidence.

Respondents' Exhibits 1-10 were admitted into evidence.

**WITNESSES**

For Petitioners:        Ms. Kimberly Brandon, Director, Mt. Zion Daycare

For Respondent:        Ms. Kim Miller, Acting Subsidy Services Section Chief

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

**FINDINGS OF FACT**

1.        For 14 years, and at all times relevant to this matter, Kimberly Brandon (hereinafter, "Ms. Brandon") has served as the Director of Mt. Zion Daycare ("Mt. Zion"), a child care facility in Durham, North Carolina. She also oversees preschool, afterschool and summer programs at Mt. Zion serving children ages zero through 12. These programs are parts of an education complex than includes a kindergarten through 12<sup>th</sup> grade school, a beauty school, and a Bible college. She supervises a staff of 32 teachers, serving approximately 180 students. Mt. Zion enrolls preschool children from 11 counties receiving subsidized child care benefits administered through their county's Department of Social Services ("DSS"), and Ms. Brandon is also responsible for the accounting and compliance documentation for these programs, and the food subsidies for the school and summer programs. More than half of the students at Mt. Zion are subsidized for some or all their fees, based on family income.

2.        An infant, "D.A.," was enrolled in the daycare at Mt. Zion in June 2013. D.A.'s mother, Shuzette Rhodes ("Ms. Rhodes"), sent a letter dated August 16, 2013 to Ms. Brandon indicating that D.A.'s last day at Mt. Zion would be August 23, 2013. On August 20<sup>th</sup>, Ms. Brandon sent a memo to Ms. Rhodes explaining, per DSS policies, that termination of care by Mt.

Zion required a two-week notice period, and that D.A.'s voucher could not be transferred to another daycare until a balance of \$368.00 owed to Mt. Zion had been paid.

3. Also on August 20, 2013, Ms. Brandon left a voicemail message for D.A.'s social services case worker relating the above facts. This was Ms. Brandon's final communication with the Durham Department of Social Services ("Durham DSS"), before it issued a "Redetermination" that D.A. would attend Mt. Zion, and actual payments to Petitioner for D.A. in the Fall of 2013.

4. On or about August 23, 2013, Ms. Brandon met with Ms. Rhodes, who told her that she had been very satisfied with Mt. Zion's summer program by attending by D.A. and siblings, would consider enrolling D.A. and her five children at Mt. Zion for the remainder of the year. Ms. Brandon gave Ms. Rhodes additional information regarding enrollment in Mt. Zion Academy for her elementary and middle school age children.

5. Approximately one week after meeting with Ms. Rhodes, Ms. Brandon received a "Child Care Action Notice" dated August 30, 2013 for each of Ms. Rhodes' six (6) children from Durham Department of Social Services. The "action" for each of Ms. Rhodes' five older children was "TERMINATION," with the notation that the, "PAYMENT TO CURRENT PROVIDER WILL END ON 8/23/2013 -- Referred to Another Provider." Ms. Brandon was not very surprised by this, because subsidies are not accepted for students attending the elementary and middle school grades, although some students are offered partial scholarships.

6. By contrast, in the "Child Care Action Notice" the infant for D.A., the "action" was "REDETERMINATION/CO-PAY/TRANSPORTATION/HOURS OF CARE/TERMINATION," followed by the "REDETERMINATION OF ELIGIBILITY FROM 8/26/2013 THROUGH 36/09/2014," and the "TERMINATION" space left blank. This document specifically shows as "PROVIDER: MT. ZION DAY CARE." The form includes authorization for care from 7 AM to 6 PM, Monday through Friday, and the parent's portion of the costs, presumably based on the specific charges of Zion Day Care and the parent(s) income.

7. Based on receipt of the "Child Care Action Notice" concerning D.A. from the Durham Department of Social Services, and the fact that Ms. Rhodes had not paid the \$368.00 owing for D.A.'s care as she knew was required by Social Services, Ms. Brandon reasonably formed the expectation that D.A. would remain at Mt. Zion Day Care from August 26, 2013 through June 9, 2014.

8. Ms. Brandon and Mount Zion Daycare did not receive a "Child Care Action Notice" concerning termination of D.A.'s attendance from the Durham Department of Social Services until November 2013.

9. Mount Zion Daycare, and Ms. Brandon on its behalf, was responsible for reporting the attendance of children for whom the Petitioner received subsidy payments, and that information was used in calculating the amount due to the Petitioner. Each month, the Departments of Social Services ("DSS") would send Ms. Brandon a pre-printed form listing each of the children, and by their names, each day of the month, with the weekends and holidays "X-ed" out. It was Ms. Brandon's task to go through this 12- or 13-page form and make an entry in

each of the empty blocks representing the school days in the month, for each child. The most common entries she made were “F” for “Full-Day care,” or “A” for “Excused Absence.” See, Plaintiff’s Exhibit 6.

10. Ms. Brandon creditably testified that she used the following method of filling out these 18,000+ blocks per year during the 14 years she had done this prior to hearing. She obtained Attendance Reports from the caregivers or teachers in each of the 19 classrooms on forms that used the same general format and code letters as the DSS’s forms. See, Plaintiff’s Exhibit 5. She would first locate the “A’s” and other relatively uncommon code letters, and record them and the DSS forms. Once that was done, she would go back through the forms and fill in all the other boxes with “F’s”.

11. Ms. Brandon instructed and relied on her teachers to tell her if a child designated for their classroom was not coming to school, presumably so that she would know about this more quickly, even if both the parents their social worker failed to notify both her office and DSS. To her recollection, no teacher during her tenure at Mt. Zion had ever failed to notify her before the incident with D.A. After that incident, she added to the school’s Attendance Report forms, in Spanish and English, written instructions and blanks that inquire whether, why and when a child has stopped attending the teacher’s class.

12. “Ms. Luzmina,” an elderly Spanish teacher, was also the “lead teacher” for D.A.’s “class,” and responsible for preparing the Attendance Reports for that group. When D.A. failed to attend at the beginning of the school year, she dropped him from her attendance roll. She did not notify Ms. Brandon that D.A. was not attending, or that she had deleted him from her Attendance Report. For health reasons, Ms. Lucina ceased teaching at Mt. Zion later in the school year.

13. Consistent with their submission to Mt. Zion of the “Child Care Action Notice” bearing the “redetermination of eligibility from 8/26/2013 through 36/09/2014” for D.A., with Mt. Zion as the designated “provider,” Durham Department of Social Services sent Ms. Brandon their preprinted forms for reporting attendance with D.A.’s name on in September, October and November of 2013.

14. When Ms. Brandon scanned the lists of students on the 19 teachers’ Attendance Reports in September and October, she did not find any “A’s” or other code indicating non-attendance on a line beside D.A.’s name, because the teacher who prepared the form had omitted his name. Consequently, Ms. Brandon did not transfer any absence notation to the DSS form by his preprinted name. Thus, when she completed noting all the absences, and went back through the form filling in the remaining blank day boxes with “F’s”, all of the blocks by D.A.’s name were marked as if he had attended.

15. There is no credible suggestion this record that Ms. Brandon’s actions in completing the September and October attendance forms for Durham Department of Social Services were anything other than an honest mistake, induced by an extraordinary series of erroneously created authoritative documents, as well as direct personal contact with the child’s mother, who had the prerogative to choose his daycare provider.

16. At some point between submission of the October and November DSS attendance forms, Ms. Brandon was contacted by Ms. Roane at the Durham Department of Social Services, and told that they had been paying two providers for D.A.'s care. Ms. Roane asked her when D.A. had stopped coming to Mt. Zion. Ms. Brandon's response during that conversation was she was not aware he had stopped attending, but would check and report back. When she did, the DSS supervisor instructed Ms. Brandon to show D.A. as enrolled through the first 10 days of November, and said that Durham DSS would recoup the overpayment for D.A. in the subsequent month's payment. Ms. Brandon cooperated by filling in all the days of November beside D.A.'s preprinted name with "A's" for "absent." The Durham DSS recouped the funds paid to Mt. Zion for D.A. in September, October and November attendance, a grand total of \$1,521.00, out of the December 2013 payment. (See, Plaintiff's Exhibit 9.)

17. The Petitioner's records have been audited on three occasions during Ms. Brandon's tenure. In 2003, they were found to be in compliance and "excellent order." In 2005, there were three findings (one of them erroneous) that one document was missing from the individual files for the 141 subsidized children attending. In 2010, Mt. Zion was again found in compliance, although Petitioner was asked to keep copies of the children's vouchers in one place, rather than in the children's individual files, to make access to them easier for the auditor, and Ms. Brandon has accommodated that request.

18. Ms. Brandon testified that she had never had an overpayment problem other than the episode involving D.A., until the week before the hearing, when she received "ironically, ... over \$52,000 from the Department of Social Services for children that I had already been paid for."

19. The monthly fee paid for D.A. would be about 1% of the amount Ms. Brandon's program was receiving from Durham DSS at the time of the hearing, after that amount had been suppressed somewhat by the sanctions imposed due to the allegations under review in this case.

20. On December 3, 2013, Ms. Dorsett, program integrity supervisor for the Durham County DSS, send a letter to Ms. Brandon stating that she was undertaking a "review" of "your Subsidized Child Care benefits" as a "result of possible benefits paid for a child that was attending another facility." Without first contacting Ms. Brandon, Ms. Dorsett set an appointment for the following week. The letter was mishandled at the Mt. Zion campus, and Ms. Brandon did not receive it until it was too late to attend that appointment. The appointment was reset, but canceled because Ms. Dorsett's was ill. Ms. Dorsett did not attempt to reset the appointment when she was well.

21. Ms. Dorsett did not meet with Ms. Brandon or anyone from Mt. Zion, prior to issuing a Notification of Sanctions against Petitioner on February 4, 2014. It appears that Durham DSS attempted to send this by certified mail (7007 0220 0004 2892 4234), but it was never delivered, presumably because it was improperly addressed. Ms. Dorsett subsequently contacted Ms. Brandon by telephone to notify her of the sanctions, and Ms. Brandon received copy of the Notification of Sanctions when she later met with Ms. Dorsett.

22. The sanctions Noticed prohibit Mt. Zion from enrolling students receiving subsidy benefits through Durham DSS for a period of 12 months, based on allegations of an "Intentional Program Violation." The stated reason for the sanctions was, "You received said benefits ["\$1,521"] from September 2013 to November 2013 and were not eligible because D.A. did not attend your facility during this period, yet you reported that he did." It appears that Ms. Dorsett did not discuss with Ms. Roane the discovery of the double payment problem, and the arrangement she made for recoupment with Ms. Brandon, nor review the documents issued by Durham DSS during the pertinent period. The "Findings of Fact" appended to the February 4<sup>th</sup> Notice do not mention Ms. Brandon's meeting with Ms. Rhodes when she was told D.A. would be attending Mt. Zion, or Durham DSS issuance of a "Redetermination," presumably based on the same information from Ms. Rhodes. The "Findings" incorrectly suggest that Ms. Brandon "terminated" D.A. before preparing the DSS attendance reports, and concludes by saying that the \$1,521.00, which was recouped in December 2013, "is due as of the date of this summary [February 4, 2014] will be deducted from the next monthly payment to Mt. Zion."

23. Mt. Zion timely appealed the imposition of sanctions, and received a "Local Hearing." The "Local Hearing Summary" prepared by Ms. Dorsett on March 19, 2014 reflects the same pattern of omissions, both in text and the list of documents reviewed as "evidence."

24. Mt. Zion again appealed, and on short, verbal notice, appeared before a "Local Appeal" panel. On this occasion, Petitioner was represented by counsel, and her Motion to Continue was denied. Apparently, the hearing focused on Ms. Brandon's preparation of the attendance documents. The prior decision was upheld.

25. The Petitioner timely appealed to the Respondent's "Subsidy Appeal Panel," which reviewed the records and decisions generated at the county level. Petitioner's counsel prepared and submitted a 13 page Statement of Appeal, with 32 pages of exhibits, in what appears to be the first comprehensive presentation of the Petitioner's case in the record. However, this was not given to the Subsidy Appeal Panel. (See, Plaintiff's Exhibit 10, and Transcript pages 85 and 94.) According to the "Notice of Subsidy Appeals Panel Action" -- being the document constituting agency action -- this panel concluded that "the attendance records ... were falsified since they did not match the classroom attendance records for the child." Chapter 23 of the Subsidized Child Care Services Manual offers illustrations of the distinction between a fraudulent misrepresentation, and an inadvertent error for which no sanction may be imposed. Among them is when "a provider submitted information, such as an attendance report, that has unintentional errors." See, Chapter 23, Section III(A)(2).

26. The Subsidy Appeal Panel also found that Mt. Zion violated the "Child Care Provider Agreement [paragraph] #11 regarding collection of fees." This section requires that "if a parent does not pay his/her parent fee that I must notify the local purchasing agency," i.e., Durham DSS. Ms. Brandon notified Durham DSS on August 20, 2013 of Ms. Rhodes outstanding fees. Petitioners did not violate paragraph 11 of the Child Care Provider Agreement.

27. The Durham Department of Social Services' mistaken issuance of the Child Care Action Notice reauthorizing D.A.'s attendance at Mt. Zion in the 2013-14 school year, and the payment of subsidies to Mt. Zion, while knowing that D.A. attending another school, and paying

that school accordingly, was a primary cause of Ms. Brandon's erroneous entries on Mt. Zion's attendance reports to Durham DSS.

28. The Petitioners have shown by the greater weight of the evidence that there was no intentional misrepresentation of fact caused the overpayment.

29. Petitioners filed their Petition in the Office of Hearings and Appeals on June 13, 2014, within 30 days of Respondent's mailing its final agency decision dated May 15, 2014 with notice of Petitioner's right to seek a contested case hearing. However, testimony at the hearing of this matter indicated that Durham DSS has enforced the sanctions since the spring of 2014.

30. To the extent that portions of the following Conclusions of Law include Findings of Fact, such are incorporated by reference into these Findings of Fact.

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

#### **CONCLUSIONS OF LAW**

1. To the extent that portions of the foregoing Findings of Fact include conclusions of law, such are incorporated by reference into these Conclusions of Law.

2. The Office of Administrative Hearings has jurisdiction of the parties and the subject matter upon Petitioner's timely request for a contested case hearing. N.C. Gen. Stat. §§ 110-94 and 150B-23; 10A NCAC 10 .0312(l).

3. The Respondent shall impose sanctions for fraudulent misrepresentation if, and only if, a recipient of child care subsidies makes a false statement "with the intent to deceive," which results in receipt of child care subsidy funds to which the recipient is not lawfully entitled. N.C. Gen. Stat. §§ 110-107(a); 10A NCAC 10 .0308(a).

4. The Petitioners Mt. Zion Daycare and Kimberly Brandon did not make any statement with intent to deceive to obtain child care subsidy funds.

5. Respondent acted erroneously in finding that Petitioners made fraudulent misrepresentations, and depriving Petitioners of property by upholding the imposition of a sanctions barring Mt. Zion Daycare's receipt of subsidy benefits for new enrollees for a period of 12 months.

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

#### **DECISION**

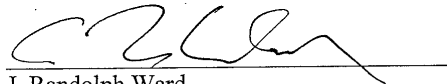
Consequently, the imposition of the sanction barring Petitioners' receipt of benefits for new enrollees for a period of 12 months must be **REVERSED**.

**NOTICE**

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

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

This the 16<sup>th</sup> day of February, 2015.

  
J. Randolph Ward  
Administrative Law Judge



FILED  
OFFICE OF ADMINISTRATIVE HEARINGS  
1/20/2015 9:18 AM

STATE OF NORTH CAROLINA  
COUNTY OF PENDER

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
14DOJ04106

RICHARD FRANK DAMBAKLY PETITIONER,  V.  N C CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION RESPONDENT.	<b>PROPOSAL FOR DECISION</b>
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THIS CASE CAME ON FOR HEARING on October 14, 2014 before Administrative Law Judge J. Randall May in Surf City, North Carolina. This case was heard after Respondent requested, pursuant to N.C.G.S. § 150B-40(e), designation of an Administrative Law Judge to preside at the hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

**APPEARANCES**

Petitioner:	Richard Dambakly, <i>pro se</i> 94 Century Road Hampstead, North Carolina 28443
Respondent:	Lauren Tally Earnhardt Attorney for Respondent Department of Justice Law Enforcement Liaison Section 9001 Mail Service Center Raleigh, North Carolina 27699-9001

**ISSUE(S)**

1. Is Respondent's proposed denial of Petitioner's law enforcement certification supported by a preponderance of the evidence?

**RULES AT ISSUE**

12 NCAC 09A .0204(b)(2)  
12 NCAC 09A .0204(b)(6)  
12 NCAC 09A .0205(c)(2)

12 NCAC 09B .0101(3)  
12 NCAC 09B .0111(1)(b)

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

In making the FINDING OF FACT, the undersigned has weighed all the evidence, or the lack thereof, 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 or the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

**FINDINGS OF FACT**

1. Both parties are properly before the Office of Administrative Hearings (“OAH”), and jurisdiction and venue are proper; both parties received notice of hearing; and Petitioner received, by certified mail, the Proposed Denial of Law Enforcement Officer Certification letter, mailed by Respondent, the North Carolina Criminal Justice Education and Training Standards Commission, on March 12, 2014. (Respondent’s Exhibit 13)

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

3. Petitioner has never held certification as a law enforcement officer in the State of North Carolina.

4. Richard Squires (“Squires”), the Commission’s investigator during the certification process of Petitioner, was on vacation and did not appear at the hearing; therefore, he was not subject to cross-examination concerning the manner or content of his investigation. Kevin Wallace (“Wallace”), another investigator for the Commission, provided most of the testimony for Respondent based on Squires’ notes and documents, even though he did not investigate the case. (Tape 1)

5. Petitioner submitted an incomplete a Personal History Statement (“Form F-3”) for the Surf City, North Carolina, Police Department on June 6, 2013. Petitioner signed this document in the presence of a notary and in so doing “certif[ied] that each and every statement made on th[e] form [wa]s true and complete.” By signing the document Petitioner further acknowledged his understanding that “any misstatement or omission of information will subject [him] to disqualification or dismissal. (Respondent’s Exhibit 11) Petitioner never submitted that application but gave it to Chief Michael Halstead, Sr., Surf City Police Department.

6. The Form F-3 submitted by Petitioner to Surf City Police Department on June 6, 2013 did not include answers to questions nine and twenty-one. Question nine asked, "Have you previously submitted an application for employment with this agency?" and offered Petitioner the option to check a box marked "Yes" or "No" with an accompanying blank for an "Approximate date." Question twenty-one asked, "Have you ever been sued with a civil judgment being rendered against you?" and offered Petitioner the option to check a box marked "Yes" or "No" with accompanying space denoted, "If yes, give details." Petitioner did not answer either question. (Respondent's Exhibit 11, pp. 133-34)

7. At the request of Chief Halstead, Petitioner amended his June 6, 2013 Surf City Form F-3 twice (Tape 2): June 13, 2013 (Respondent's Exhibit 11, p. 138) and June 22, 2013. (Respondent's Exhibit 11, p. 140)

8. Petitioner first amended his Surf City Form F-3 on June 13, 2013. Petitioner submitted a notarized, amended statement that read, to wit: "While completing the F3 form I somehow forgot to answer questions #9 and #21. This was not an intentional act. I just got ahead of myself." Petitioner set forth Question #21 as, "Have you ever been sued with a civil judgment being against (sic) you?" He answered this question by stating, "Yes, satisfied 09-26-2007 for construction material dispute. Judgment settled paid in full \$15,487. Case# SMC077751." (Respondent's Exhibit 11, p. 138)

9. Petitioner's June 13, 2013 Form F-3 amended statement was notarized and he acknowledged that his new answers, as well as those in his initial June 6, 2013 Form F-3, were answered "true to fact and to the best of [his] memory." (Respondent's Exhibit 11, p. 138)

10. Petitioner amended his Surf City Form F-3 again on June 22, 2013. On this occasion, Petitioner submitted a notarized statement to amend both his June 6, 2013 Form F-3 and his June 13, 2013 amended statement. The statement set forth "Question #21 Have you ever been sued with a civil judgment being (sic) against you?" Petitioner responded, "Yes, March 4, 2000 Civil NO. 000900841, I was an employee of the firm RD White & Co. and was named along with all RD White & co. employees, I did no (sic) pay any fines and there was no further action taken on (sic) me." Petitioner also amended his answer to question #21 to include the following, "Yes, Disciplinary Proceeding Sept 17, 1999 No. C3A980077, I was a branch manager of an office Paragon Capital, when they went under investigation, I was questioned, but no further action was taken against me I paid no fines and was not charged." Petitioner again certified that the foregoing answers, as well as "all others in the F3", were answered "true to fact and to the best of [his] memory." (Respondent's Exhibit 11, p. 140)

11. Chief Halstead testified that Petitioner informed him that he no longer wished to pursue certification with Surf City. The Chief placed Petitioner's Form F-3 in a "closed" file and put it in his desk drawer. Subsequently Squires arrived at Chief Halstead's office and demanded that the Chief turn over the Form F-3. The Chief stated that it had never been submitted to the Commission; however, under threat of a subpoena from Squires, and to comply with his duties to the Commission, the Chief turned over the entire file. Chief Halstead testified that this file contained additional personal information concerning some of the events of this appeal. (Tape 2, Side 1)

12. Chief Halstead further testified that he called Squires prior to the probable cause hearing to see if he needed to attend. The Chief stated that Squires told him that he did not see a problem and saw nothing in the "file" that he was able to corroborate. (Tape 2, Side1)

13. Petitioner completed an additional Form F-3 for the Topsail Beach, North Carolina, Police Department on July 12, 2013. Petitioner signed this document in the presence of a notary and in so doing "certif[ied] that each and every statement made on th[e] form [wa]s true and complete." By signing the document Petitioner further acknowledged his understanding that "any misstatement or omission of information will subject [him] to disqualification or dismissal. (Respondent's Exhibit 12)

14. The Form F-3 submitted by Petitioner to Topsail Beach Police Department on July 12, 2013 included question twenty-one, "Have you ever been sued with a civil judgment being rendered against you?" This question offered Petitioner the option to check a box marked "Yes" or "No" with accompanying space denoted, "If yes, give details." Petitioner marked the "Yes" box and answered as follows, "Satisfied 09-26-07 for construction material dispute, Judgement (sic) settled in full \$15,487. Case #SMC077751;" "-March 4, 2000 Civil No. 000900841 I was employed by R. D. White & Co. and was named along with all employees, I did not pay any fine and no further action was taken against me;" and "-Sept 17, 1999 Disciplinary Proceeding No. C3A980077, I was a branch manager of a (sic) office of Paragon Capitol, when they went under investigation, I was questioned, but no further against me" (sic). (Respondent's Exhibit 12, p. 143)

15. On August 5, 2013, Respondent received a Report of Appointment/Application for Certification, Form F-5A, requesting that certification be awarded to Petitioner as a part-time law enforcement officer with the Topsail Beach Police Department.

16. As part of the certification process Squires, as investigator for Respondent, reviewed Petitioner's Surf City Form F-3; Petitioner's Topsail Form F-3; and Petitioner's Topsail Beach Report of Appointment/Application for Certification (Form F-5A), along with other supporting documentation to ensure that Petitioner answered all questions fully, accurately, and truthfully.

17. During his investigation Squires obtained additional documentation to corroborate Petitioner's notarized answers regarding civil suits and judgments. Additional documentation included: a Hearing Panel Decision of the National Association of Securities Dealers, Department of Enforcement v. Richard F. Dambakly (Respondent's Exhibit 4); a FINRA (Financial Industry Regulatory Authority) record check of Petitioner (Respondent's Exhibit 5); a January 2007 story about the Petitioner reported in "The Sentinel, Newsletter of the Utah Division of Securities" (Respondent's Exhibit 6); as well as a verified complaint and entry of default against Petitioner from the Third Judicial District in and for Salt Lake City County, Utah, in the matter of The State of Utah v. R.D. White & Co., Inc., et al. (Respondent's Exhibits 7-9).

18. Squires discovered four material misrepresentations when comparing Petitioner's, Form F-3, specifically, disclosures about civil suits to the documentation discovered by Respondent. Squires submitted a memorandum to Respondent's Probable Cause Committee

regarding the consideration of denial of law enforcement officer certification to Petitioner. (Respondent's Exhibit 1)

19. Squires' memorandum included four allegations as the basis for which the Probable Cause Committee should consider the denial of law enforcement certification to Petitioner. These allegations included: (1) Commission of an offense for which the authorized punishment included imprisonment for more than two years (Bad Check—Third Degree Crime, filed 1991); (2) Commission of an offense for which the authorized punishment included imprisonment for more than two years (Theft by Deception—Third Degree Crime); (3) Material Misrepresentation; and (4) Lack of good moral character. (Respondent's Exhibit 1)

20. Based on the lack of evidence of the first two allegations above, the lack of testimony by Squires, and the passage of time, they will not be further considered by the undersigned.

21. Respondent's Probable Cause Committee convened to review the matter of Petitioner's law enforcement certification on February 19, 2014. Petitioner was present at this meeting. Upon reviewing Squires' memorandum and supporting documentation, the Committee found probable cause existed to deny Petitioner's law enforcement certification for not less than five years because probable cause existed to believe that Petitioner committed the offense of passing a bad check; that Petitioner committed the offense of theft by deception; that Petitioner knowingly made misrepresentations of information required for certification; and that Petitioner lacked the good moral character required of all law enforcement officers. (Respondent's Exhibit 13, p. 2-3)

22. At the October 14, 2014, hearing Wallace testified regarding material misrepresentations made by the Petitioner in his Form F-3 documentation submitted to the Surf City Police Department and the Topsail Beach Police Department. Wallace testified to four total material misrepresentations, two each submitted to the Surf City and Topsail Beach agencies.

23. Petitioner made his first material misrepresentation in response to question twenty-one on the Form F-3 through an amended statement to the Surf City Police Department. The question asked Petitioner whether he had "ever been sued with a civil judgment being rendered against [him]?" Petitioner marked "Yes," and stated, "Yes, March 4, 2000 Civil NO. 000900841, I was an employee of the firm RD white & Co. and was named along with all RD White & co. employees, I did no (sic) pay any fines and there was no further action taken on me." Wallace testified that Petitioner materially misrepresented the outcome of Civil No. 000900841. Wallace testified that documentation obtained by Respondent showed that the State of Utah, Division of Securities of the Department of Commerce, took action against Petitioner by naming him as a defendant in the suit The State of Utah v. R.D. White & Co., Inc., et al. (Respondent's Exhibit 7) Records from the Third Judicial District Court in and for Salt Lake County additionally reflect that a default judgment was entered against Petitioner in the above-captioned case, and that as a result he was "enjoined from (1) making cold calls within and/or to residents of the State of Utah; (2) soliciting or opening new accounts within or with residents of the State of Utah; or (3) exercising any discretionary authority relative to existing accounts within, and/or with residents of, the State of Utah." (Respondent's Exhibit 9, pp. 105-6)

Petitioner was additionally ordered to pay a fine of \$6,500.00 and restitution in the amount of \$48,494.27. (Respondent's Exhibit 9, p. 106) Petitioner did not disclose the judgment or the fines against him in his Form F-3 to the Surf City agency.

24. Petitioner made his second material misrepresentation in response to question twenty-one on the Form F-3 through an amended statement to the Surf City Police Department. The question asked Petitioner whether he had "ever been sued with a civil judgment being rendered against [him]?" Petitioner marked "Yes," and stated, "Yes, Disciplinary Proceeding Sept. 17, 1999 No. C3A980077, I was a branch manager of an office Paragon Capitol, when they went under investigation, I was questioned, But no further action was taken against me I paid no fines and was not charged." Wallace testified that Petitioner materially misrepresented the outcome of this disciplinary proceeding. Wallace further testified that Respondent had obtained a Hearing Panel Decision entered by the Department of Enforcement of the National Association of Securities Dealers, Inc. against Petitioner ordering that he "pay costs in the amount of \$2,479.25," and that he be "fined \$25,000, barred in his capacity as a principal, and suspended for one year from associating with any NASD member firm in any capacity." (Respondent's Exhibit 4) Petitioner did not disclose any of these sanctions in his Form F-3 to the Surf City agency.

25. Petitioner made his third material misrepresentation in response to question twenty-one on the Form F-3 submitted to the Topsail Beach Police Department. The question asked Petitioner whether he had "ever been sued with a civil judgment being rendered against [him]?" Petitioner marked "Yes," and stated, "Yes, March 4, 2000 Civil NO. 000900841, I was an employee of the firm RD white & Co. and was named along with all RD White & co. employees, I did no (sic) pay any fines and there was no further action taken on me." Wallace testified that Petitioner materially misrepresented the outcome of Civil No. 000900841. Wallace testified that documentation obtained by Respondent showed that the State of Utah, Division of Securities of the Department of Commerce, took action against Petitioner by naming him as a defendant in the suit The State of Utah v. R.D. White & Co., Inc., et al. (Respondent's Exhibit 7) Records from the Third Judicial District Court in and for Salt Lake County additionally reflect that a default judgment was entered against Petitioner in the above-captioned case, and that as a result he was "enjoined from (1) making cold calls within and/or to residents of the State of Utah; (2) soliciting or opening new accounts within or with residents of the State of Utah; or (3) exercising any discretionary authority relative to existing accounts within, and/or with residents of, the State of Utah." (Respondent's Exhibit 9, pp. 105-6) Petitioner was additionally ordered to pay a fine of \$6,500.00 and restitution in the amount of \$48,494.27. (Respondent's Exhibit 9, p. 106) Petitioner did not disclose the judgment or the fines against him in his Form F-3 to the Topsail Beach agency.

26. Petitioner made his fourth material misrepresentation in response to question twenty-one on the Form F-3 submitted to the Topsail Beach Police Department. The question asked Petitioner whether he had "ever been sued with a civil judgment being rendered against [him]?" Petitioner marked "Yes," and stated, "Yes, Disciplinary Proceeding Sept. 17, 1999 No. C3A980077, I was a branch manager of an office Paragon Capitol, when they went under investigation, I was questioned, But no further action was taken against me I paid no fines and was not charged." Wallace testified that Petitioner materially misrepresented the outcome of this

disciplinary proceeding. Wallace further testified that Respondent had obtained a Hearing Panel Decision entered by the Department of Enforcement of the National Association of Securities Dealers, Inc. against Petitioner ordering that he “pay costs in the amount of \$2,479.25,” and that he be “fined \$25,000, barred in his capacity as a principal, and suspended for one year from associating with any NASD member firm in any capacity.” (Respondent’s Exhibit 4) Petitioner did not disclose any of these sanctions in his Form F-3 to the Topsail Beach agency.

27. Respondent did not present victim statements or witness testimony regarding Petitioner’s alleged commission of the offenses of passing a bad check and theft by deception.

28. Petitioner testified at the hearing and stated that his failure to disclose the judgments and fines entered against him was not intentional. Petitioner explained that the National Association of Securities Dealers, Inc. (“NASD”) licensed him as a securities broker in approximately 1992. Petitioner admitted that he worked at the stock brokerage firm of R.D. White & Co. before leaving around 1998. Petitioner stated that both the NASD disciplinary proceeding and the Utah civil suit occurred after he left R.D. White & Co. and that according to his understanding he did not need to pay the fines against him unless he wanted to return to the securities industry.

29. Petitioner stated that the NASD disciplinary hearing derived from the misconduct of his supervisors who “threw [him] under the bus.” A review of the Hearing Panel Decision of the NASD Department of Enforcement, however, demonstrates that Petitioner’s own misconduct and violation of NASD rules resulted in his sanctions. (Respondent’s Exhibit 4, p. 45-47)

30. Petitioner similarly blamed his involvement in the Utah civil suit on his superiors and supervisors stating that the “brokerage firm was the problem.” The Default Judgment from the Third Judicial District Court in and for Salt Lake County, Utah, however, reflects that Petitioner was among several defendants individually sanctioned for personal improper conduct. (Respondent’s Exhibit 9, p. 106)

31. During the hearing, Petitioner admitted that the NASD supervises the actions of securities brokers much in the same way that Respondent supervises the actions of law enforcement officers. Petitioner admitted that he had twice been recognized as violating rules set forth by the NASD. The NASD differs from the Securities and Exchange Commission (“SEC”) in that it monitored over-the-counter securities, and the SEC is primarily concerned with public securities listed on the New York Stock Exchange. In 2007 they merged. When asked how he will follow the Respondent’s rules, Petitioner stated that he will, “read every detail of what [he] do[es] before [he] proceed[s],” and “understand every rule and regulation before [he] go[es] any further in anything [he] do[es].”

32. Petitioner testified regarding his character and explained that although the NASD disciplinary process and the Utah civil suit were “things that happened in [his] life” he has “grown from th[em.]” Petitioner detailed a career including military service; intensive civilian volunteer service at Ground Zero in the wake of September 11, 2001; and building his own business. Petitioner stated that he “can do [a law enforcement] job 100% and do it very well.”

33. Two character witnesses testified on behalf of Petitioner at the hearing: Chief of the Surf City Police Department, Michael Halstead Sr., and Chief of the Topsail Beach Police Department, Samuel Gervase. Chief Halstead testified that he has known Petitioner for eight years, both professionally and personally, and that Petitioner is a pillar of the local community. Chief Halstead indicated that he would himself hire Petitioner. Chief Gervase testified that he has known Petitioner for four years. Gervase stated that he still wishes to hire Petitioner. The testimony of these two chiefs, especially Chief Gervase, was very impressive and assuaged concerns that the undersigned had concerning the previous misstatements of facts. It is felt that Chief Gervase and his law enforcement career could be vulnerable if he made a mistake as to the character of his hires and, therefore, his judgment is given great weight.

#### **CONCLUSIONS OF LAW**

1. The parties are properly before the OAH and jurisdiction and venue are proper.
2. The OAH has personal and subject matter jurisdiction over this contested case. The parties received proper notice of the hearing in the matter. To the extent that the Findings of Facts contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.
3. 12 NCAC 09A .0204(b)(6) provides that the North Carolina Criminal Justice Education and Training Standards Commission may suspend, revoke, or deny the certification of a criminal justice officer when the Commission finds that the applicant for certification or the certified officer: (6) has knowingly made a material misrepresentation of any information required for certification or accreditation.
4. 12 NCAC 09A .0205(b)(4) provides that when the North Carolina Criminal Justice Education and Training Standards Commission suspends or denies the certification of a criminal justice officer for material misrepresentation, the period of sanction shall be not less than five years; however, the Commission may either reduce or suspend the period of sanction or substitute a period of probation in lieu of suspension of certification.
5. The findings of the Probable Cause Committee of the Respondent are supported by substantial evidence and are not arbitrary and capricious.
6. The party with the burden of proof in a contested case must establish the facts required by N.C.G.S. § 150B-23(a) by a preponderance of the evidence. N.C.G.S. § 150B-29(a). The administrative law judge shall decide the case based upon the preponderance of the evidence. N.C.G.S. § 150B-34(a).
7. Petitioner, as an applicant, has the burden of proof in the case at bar.
8. Petitioner showed by a preponderance of the evidence that Respondent's proposed denial of Petitioner's certification on the grounds of Petitioner's commission of the offenses of (1) passing a bad check and (2) theft by deception is unsupported by substantial evidence. Respondent failed to present sufficient witnesses or factual allegations to support those charges.



9. Petitioner showed by a preponderance of the evidence that Respondent's proposed denial of Petitioner's certification on the grounds of Petitioner lacking good moral character is not supported by substantial evidence. Petitioner demonstrated, through his own testimony and the testimony of two character witnesses, that his good character has been restored.

10. Petitioner has shown by a preponderance of the evidence that Respondent's proposed denial of Petitioner's certification on the grounds of material misrepresentation may be unsupported by substantial evidence. Respondent has shown that Petitioner made material misrepresentations on his June 22, 2013 amended statement for the Surf City Police Department Form F-3, and on his July 12, 2013 Topsail Beach Police Department Form F-3 when Petitioner knowingly failed to report civil judgments and fines entered against him. However, it is the opinion of the undersigned that the testimony of the two police chiefs, with over 48 years of law enforcement between them, should outweigh the Respondent's showing. It is believed that Petitioner's work and reputation in this small beach community has shown that he has rehabilitated himself and restored his reputation. This is based upon his service in the Navy; his work as a first responder in New York City during "9 -11", his work with youth in the Topsail/Surf City area; and his character references that designate him as a pillar of the community.

#### **PROPOSAL FOR DECISION**

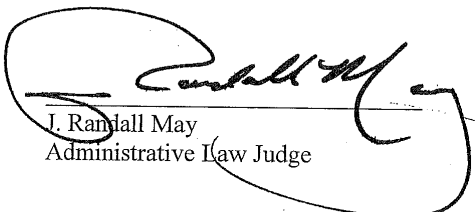
BASED ON the foregoing Findings of Fact and Conclusions of Law, it is proposed that Respondent suspend a five-year suspension for the Petitioner; and that he should be monitored under terms of probation as the Commission should determine for making material misrepresentations on his June 22, 2013 amended statement for the Surf City Police Department Personal History Statement (Form F-3) and on his July 12, 2013 Topsail Beach Police Department Personal History Statement (Form F-3).

#### **NOTICE AND ORDER**

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

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714, in accordance with N.C. Gen. Stat. § 150B-36(b).

This the 20th day of January, 2015.



J. Randall May  
Administrative Law Judge

STATE OF NORTH CAROLINA

COUNTY OF CABARRUS

JOSEPH O'DONNELL,

Petitioner,

v.

NORTH CAROLINA CRIMINAL  
JUSTICE EDUCATION AND  
TRAINING STANDARDS  
COMMISSION,

Respondent

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
14 DOJ 04108

PROPOSAL FOR DECISION

This case came on for hearing on October 7, 2014 before Administrative Law Judge Craig Croom in Charlotte, North Carolina. This case was heard after Respondent requested, pursuant to N.C.G.S. § 150B-40(e), designation of an Administrative Law Judge to preside at the hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

**APPEARANCES**

Petitioner: Mr. Joseph O'Donnell  
Pro Se  
418 Ross Street  
China Grove, North Carolina 28023

Respondent: Lauren Tally Earnhardt  
Attorney for Respondent  
Department of Justice  
Law Enforcement Liaison Section  
P.O. Box 629  
Raleigh, North Carolina 27602-0629

**ISSUES**

Does substantial evidence exist for Respondent to suspend Petitioner's law enforcement certification for five years for his commission of the Class B misdemeanor of Assault by Pointing a Gun?

**FINDINGS OF FACT**

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, both parties received notice of hearing, and that the Petitioner received by certified mail, the proposed Suspension of Law Enforcement Officer's Certification letter, mailed by Respondent, the North Carolina Criminal Justice Education and Training Standards Commission (hereinafter "The Commission"), on March 12, 2014.
2. Petitioner was certified as a full-time law enforcement officer with the Concord Police Department from June 12, 1989 until he resigned on January 23, 2012.
3. Petitioner now seeks certification as a part-time law enforcement officer with the Oakboro Police Department.
4. Richard Squires ("Squires"), an investigator for Respondent, reviewed Petitioner's request for certification with the Oakboro Police Department. Through his due diligence, Squires investigated why Petitioner left the Concord Police Department. Squires found that Petitioner resigned his position in 2012 after being investigated by the Concord Police Department for pointing his loaded service weapon at a fellow officer. No criminal charges were filed against Petitioner.
5. Squires contacted the Concord Police Department and requested documents pertaining to the investigation and separation of Petitioner. Squires also contacted Petitioner for a statement about the incident.
6. Based on his investigation, Squires prepared a memorandum summarizing his findings. That memorandum was presented to Respondent's Probable Cause Committee on February 19, 2014. Petitioner was present at the Committee meeting, able to speak with the Committee members, and able to present evidence.
7. The Probable Cause Committee found probable cause to believe that Petitioner committed the Class B Misdemeanor offense of Assault by Pointing a Gun in violation of N.C. Gen. Stat. § 14-34.
8. In December of 2012 Petitioner was employed with the Concord Police Department as a sergeant. Mr. Denan Sabanija ("Sabanija") was employed with the Concord Police Department as a law enforcement officer. Although Petitioner was assigned to a different district, he acted in a supervisory capacity with respects to Sabanija.
9. Sometime during the day of Friday, December 21, 2012, Petitioner left shift duty due to illness. Later, sometime after midnight on December 22, 2012, Petitioner arrived at the "Charlie" District Office of the Concord Police Department. Sergeant B.C. Kennerly, Officer Marty Ritchie, and Officer Sabanija were present at the district office when Petitioner arrived.
10. Upon Petitioner's arrival at the Charlie District Office, Sabanija raised his

voice to shout at Petitioner, "Sarge, don't be bringing [your sickness] in here." When Petitioner responded that he was not contagious, Sabanija retorted, "that's not what I heard. I heard it was deadly." Sabanija jokingly tapped his own service weapon and unsnapped the holster while speaking with Petitioner, but did not remove his weapon from his belt.

11. Petitioner approached Sabanija's desk, raised his voice and said something along the lines of, "go ahead and draw if you're going to. What are you going to do? Are you going to fucking shoot me, Sabanija?" While speaking, Petitioner drew his own service weapon, a loaded Glock .40 caliber, and pointed it at Sabanija.

12. Sabanija testified that Petitioner was "within arm's reach" when he drew his weapon, further estimating that the drawn gun was "twenty inches away" from Sabanija's body during the incident.

13. Petitioner placed both hands on his service weapon when he pointed it at Sabanija. His trigger finger remained off of the trigger and on the weapon's frame rail during the incident. In total, Petitioner pointed his weapon at Sabanija for approximately twenty seconds.

14. After pointing his weapon at Sabanija for twenty seconds, Petitioner holstered his weapon and went to the office break room. Petitioner returned to Sabanija a few minutes later, unholstered his service weapon again, and attempted to hand the weapon to Sabanija handle first. While extending his weapon to Sabanija, Petitioner stated, "You know I'm just kidding. Here you go; you point the gun at me." Sabanija declined Petitioner's offer and stated, "I don't want to do that. I do that if I want to hurt someone. I don't point guns."

15. Both Petitioner and Sabanija indicated that they had a positive working relationship prior to and after the December 22, 2012 incident. Neither Petitioner nor Sabanija characterized the incident as one of ill-will or malicious intent. Instead, both described the incident as a "joke carried too far" within the context of officer "camaraderie." Despite this characterization, Petitioner's assault of another officer by pointing a weapon is one of serious concern because it reflects a pattern of inappropriate conduct with respect to firearms.

16. Sabanija testified that he has seen officers tap or indicate their service weapons while joking with other officers, but that prior to the December 22, 2012 incident he had never seen an officer remove his or her weapon from its holster or point a weapon at a fellow officer in jest.

17. Petitioner admitted to pointing his service weapon on two other occasions at fellow law enforcement officers once in 1993 and 1998.

18. In 1993 Petitioner was employed by the Concord Police Department as a law enforcement officer. At some point during the year he was assigned to field train Officer Lawrence Lentz ("Lentz"). Petitioner admitted that on one occasion, he and Lentz were both in a patrol car when Lentz continued to pass gas. In response,

Petitioner admitted that he drew his weapon, at that time a 9mm, and pointed it at Lentz in jest. Petitioner described this incident as a "quick draw" in which he drew his loaded weapon with the safety on, took his finger off of the trigger, and pointed it at Lentz for a few seconds.

19. In 1998 Petitioner remained employed by the Concord Police Department as a law enforcement officer. At the time Petitioner was assigned to field train Officer Stephen Brian Kelly ("Kelly"). Petitioner testified that sometime during the summer of 1998 he was in a patrol car with Kelly conducting a surveillance operation. Sometime during the evening Kelly passed gas. Petitioner stated that Kelly, who knew of the 1993 incident with Lentz, asked Petitioner whether Petitioner was going to "do [him] like he did . . . the other officer." Petitioner admitted that he then drew his loaded weapon, with the safety on, and pointed it at Kelly for a few seconds in jest before holstering it. Petitioner also characterized this incident as a "quick draw."

20. At the time of each "quick draw" incident (1993, 1998, and 2012) Petitioner was in a senior position to the officers he pointed his weapon at. As a senior officer Petitioner was tasked with setting an example for and teaching younger officers. Petitioner acknowledged that drawing his service weapon and pointing it at a fellow officer did not set a good example.

21. Petitioner admitted that drawing a firearm on a fellow officer in jest is inappropriate and that his actions reflected "poor judgment," "a poor form of camaraderie," and a "bad example."

22. Petitioner has at least twenty-four years of experience with handling firearms. Petitioner acknowledged that the most basic rule of that training is not to point a weapon at another individual.

23. Petitioner presented four character witnesses: Concord Police Department Officer Kem England, Retired Belmont Police Chief David James, Concord Police Department Detective Deckster Barlowe, and retired Concord Police Department District Captain Tim Templeton.

24. Petitioner is an asset to the law enforcement community.

24. Petitioner serves as a mentor to character witnesses England and Barlowe and their association with Petitioner directly contributed to their own success as law enforcement officers.

25. Petitioner took responsibility for his actions and has learned what conduct to avoid in the future.

#### **CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. The parties received proper notice of the hearing in the matter. To the extent that the Findings of Fact contain Conclusions of Law, or

that the Conclusions of Law are findings of fact, they should be so considered without regard to the given labels.

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

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

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

(3) has committed or been convicted of:

(A) a criminal offense or unlawful act defined in 12 NCAC 09A.0103 as a Class B misdemeanor

4. 12 NCAC 09A.0103(23)(b) states that:

(23) ...Misdemeanor offenses are classified by the Commission as follows:

(b) "Class B Misdemeanor" means an act committed or omitted in violation of any common law, criminal statute, or criminal traffic code of this state that is classified as a Class B Misdemeanor as set forth in the Class B Misdemeanor Manual as published by the North Carolina Department of Justice. . .

5. The Class B Misdemeanor Manual published by the North Carolina Department of Justice includes as a Class B misdemeanor the offense of "Assault by Pointing a Gun" set forth in N.C. Gen. Stat. § 14-34.

6. N.C. Gen. Stat. § 14-34, "Assaulting by Pointing Gun," states that:

If any person shall point any gun or pistol at any person, **either in fun or otherwise**, whether such gun or pistol be loaded or not loaded, he shall be guilty of a Class A1 misdemeanor. (emphasis added)

7. The North Carolina Criminal Justice Education and Training Standards Commission has some discretion granted under Chapter 17C of the North Carolina General Statutes and Title 12 of the North Carolina Administrative Code, Chapter 9A, to determine the period of suspension for the commission of specific offenses.

8. 12 NCAC 09A.0205(b)(1) states that:

(b) When the Commission suspends or denies the certification of a criminal justice officer, the period of sanction shall be not less than five years; however, the Commission may either reduce or suspend the period of sanction under Paragraph (b) of this Rule or substitute a period of probation in lieu of suspension of certification following an administrative hearing, where the cause of action is:

(1) commission or conviction of a criminal offense other than those listed in Paragraph (a) of this Rule.

9. 12 NCAC 09A.0205(a)(1-3) include the following offenses:

- (1) commission or conviction of a felony offense; or
- (2) commission or conviction of a criminal offense for which authorized punishment included imprisonment for more than two years; or
- (3) the second suspension of an officer's certification for any of the causes requiring a five-year period of suspension.

10. The commission of the criminal offense Assault by Pointing a Gun is not recognized under 12 NCAC 09A.0205(a)(1-3). Because the offense is not listed, the Commission may, but is not required to, reduce or suspend the default five year period of sanction or substitute a period of probation in lieu of the default five-year suspension of certification.

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

12. Respondent has the burden of proof in the case at bar.

13. Petitioner admitted, and Respondent has shown by a preponderance of the evidence, that Petitioner committed the Class B misdemeanor offense of Assault by Pointing a Gun on December 22, 2012, when Petitioner drew his service weapon and pointed it at fellow Concord Police Department Officer Denan Sabanija.

14. The findings of the Probable Cause Committee of the Respondent are supported by substantial evidence.

15. Petitioner is an asset to the law enforcement community and mentors younger officer. Furthermore, he does not deny that his conduct was wrong, and he takes full responsibility for his actions. He has shown remorse as well. Therefore,

Respondent has not shown by a preponderance of the evidence that Respondent's proposed five-year suspension of Petitioner's law enforcement certification based on his commission of the offense of Assault by Pointing a Gun, a Class B misdemeanor, is supported by substantial evidence. Probation is more appropriate under these circumstances.

**PROPOSAL FOR DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned recommends two years of probation for Petitioner's certification as a law enforcement officer in lieu of the default five-year suspension of certification.

**NOTICE**

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

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

This the 15<sup>th</sup> day of December, 2014.



Craig Croom  
Administrative Law Judge



FILED  
OFFICE OF ADMINISTRATIVE HEARINGS  
1/20/2015 9:22 AM

STATE OF NORTH CAROLINA  
COUNTY OF CUMBERLAND

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
14DOJ05066

CHARLES CORNELIUS GUNNING PETITIONER,  V.  N C CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION RESPONDENT.	<b>PROPOSAL FOR DECISION</b>
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THIS CASE CAME ON FOR HEARING on December 11, 2014 before Administrative Law Judge J. Randall May, in Lillington, North Carolina. This case was heard after Respondent requested, pursuant to N.C.G.S. § 150B-40(e), designation of an Administrative Law Judge to preside at the hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes.

**APPEARANCES**

Petitioner: Charles Cornelius Gunnings, *pro se*  
1135 Helmsley Drive  
Fayetteville, North Carolina 28314

Respondent: William P. Hart, Jr.  
Attorney for Respondent  
Department of Justice  
Law Enforcement Liaison Section  
P.O. Box 629  
Raleigh, North Carolina 27602-0629

**ISSUES**

1. Whether Petitioner knowingly made one or more material misrepresentations of any information required for certification?
2. What sanction, if any, should be imposed against Petitioner's justice officer certification?

**PROPOSED FINDINGS OF FACT**

1. Petitioner applied for certification as a law enforcement officer with the Laurinburg Police Department on September 13, 2013. He has not been previously certified.

2. Prior to the year 2000, Petitioner had been charged with the following offenses in the State of North Carolina, with the respective final dispositions indicated in parentheses: (1) DWI – Provisional License (Scotland Co. No. 92 CR 930) (guilty); (2) DWI (Scotland Co. No. 92 CR 931) (guilty); (3) DWI Level 2 (Pasquotank Co. No. 94 CR 1521) (guilty); (4) (M) Larceny (Pasquotank Co. No. 96 CR 816) (vol. dismissal); (5) DWI (Pasquotank Co. No. 97 CR 933) (guilty of lesser offense of Reckless Driving to Endanger); (6) (M) Simple Assault (Pasquotank Co. No. 95 CR 5264) (vol. dismissal); (7) Assault on a Female (Mecklenburg Co. No. 95 CR 53388) (vol. dismissal); (8) Assault on a Female (Mecklenburg Co. No. 95 CR 53389) (prayer for judgment); and (9) Resisting a Public Officer (Pasquotank Co. No. 99 CR 494) (vol. dismissal).

3. In his application for appointment and certification as a justice officer with the Laurinburg Police Department in or about 2013, Petitioner was required to fill out, sign, and submit a Form F-5A Report of Appointment/Application for Certification—Law Enforcement Officer. This document contains, *inter alia*, a section with the heading of “ALL APPLICANTS AND TRANSFERS READ AND COMPLETE THIS CRIMINAL RECORD SECTION.” Petitioner failed to list the following offenses: (1) DWI – Provisional License (Scotland Co. No. 92 CR 930) (guilty); (2) Assault on a Female (Mecklenburg Co. No. 95 CR 53388) (vol. dismissal); and (3) Assault on a Female (Mecklenburg Co. No. 95 CR 53389) (prayer for judgment).

4. Petitioner’s signature on the Laurinburg P.D. Form F-5A, dated September 13, 2013, indicated, among other things, his understanding and agreement that “any omission, falsification, or misrepresentation of any factor or portion of such information can be the sole basis for termination of my employment and/or denial, suspension or revocation of my certification at any time, now or later. Petitioner also attested by his signature “that the information provided above and all other information submitted by me, both oral and written throughout the employment and certification process, is thorough, complete, and accurate to the best of my knowledge.” As of the date of his Laurinburg P.D. Form F-5A, Petitioner had never previously been certified as a Law Enforcement Officer.

5. Also in support of his application for appointment and certification as a justice officer with the Laurinburg Police Department in or about 2013, Petitioner was required to fill out, sign, and submit a Form F-3 Personal History Statement. On the second page of the Form F-3 is a section headed “CRIMINAL OFFENSE RECORD AND DISCIPLINARY ACTIONS.” The questions in this section are preceded by introductory language which reads in pertinent part as follows:

NOTE: Include all offenses other than minor traffic offenses. . . .

Answer all of the following questions completely and accurately. Any falsifications or misstatements of fact may be sufficient to disqualify you. If any doubt exists in your mind as to whether or not you were arrested or charged with a criminal offense at some point in your life or whether an offense remains on your record, you should answer "Yes." You should answer "No" **only** if you have never been arrested or charged, or your record was expunged by a judge's court order.

6. Question number 47 under the criminal offense section of the Form F-3 reads: "Have you ever been arrested by a law enforcement officer or otherwise charged with a criminal offense?" In his response to this question, Petitioner checked the box indicating his answer to be "Yes." However, Petitioner failed to list (1) DWI – Provisional License (Scotland Co. No. 92 CR 930) (guilty); (2) Assault on a Female (Mecklenburg Co. No. 95 CR 53388) (vol. dismissal); (3) Assault on a Female (Mecklenburg Co. No. 95 CR 53389) (prayer for judgment); and (4) (M) Simple Assault (Pasquotank Co. No. 95 CR 5264) (vol. dismissal). This Form F-3 was signed by Petitioner and notarized on April 24, 2013. Petitioner's signature indicated his certification "that each and every statement made on this form is true and complete and I understand that any misstatement or omission of information will subject me to disqualification or dismissal."

7. Petitioner provided a notarized written statement regarding his omission of the following offense: (1) DWI – Provisional License (Scotland Co. No. 92 CR 930) (guilty). According to his written statement and his testimony at the hearing, Petitioner was unaware that the Provisional DWI offense was separate from the DWI offense for which he was charged on the same date pursuant to the same traffic stop. By a preponderance of the evidence, it is found that Petitioner's omission of the DWI – Provisional License charge was not knowingly made.

8. Petitioner also provided a notarized written statement regarding his omission of the following offenses: (1) Assault on a Female (Mecklenburg Co. No. 95 CR 53388) (vol. dismissal); and (2) Assault on a Female (Mecklenburg Co. No. 95 CR 53389) (prayer for judgment). Petitioner has stated both that he did not recall the charges and that he was told they would not appear on his record. However, according to Petitioner's own statement, he was taken to the police station at the time he was charged and he subsequently appeared in court for the matters. The preponderance of the evidence supports a finding that Petitioner did know of these charges as of when he omitted them from his Form F-3 and Form F-5 without apparently raising the subject with his hiring agency. Moreover, these charges were significant in nature and material to Petitioner's application for justice officer certification.

9. With regard to the omission on Petitioner's Form F-3 of the (M) Simple Assault offense, it was included on Petitioner's Form F-5A and therefore, by a preponderance of the evidence, was not a knowing misrepresentation.

10. Question number 11 on the Form F-8 reads: "How many tickets have you received in your driving career?" In response to this question, the officer who interviewed Petitioner wrote "3." However, Petitioner has approximately eight (8) tickets for the following offenses: (1) DWI, Civil Revocation Driver License (Scotland Co. No. 92 CR 931); (2) DWI Provisional License (Scotland Co. No. 92 CR 930); (3) Speeding, Driving While License

Revoked (Pasquotank Co. No. 97 CR 979); (4) DWI, reduced to Reckless Driving to Endanger, Civil Revocation (Pasquotank Co. No. 97 CR 933); (5) Fail to Wear Seatbelt-Driver, No Operator License (Pasquotank Co. No. 94 CR 1564); (6) DWI-Level 2, Fictitious Info to Officer, Civil Revocation (Pasquotank Co. No. 94 CR 1521); (7) Expired Registration Card/Tag, Expired/No Inspection (Cumberland Co. No. 09 CR 725531); and (8) Location of TV in Vehicle (Cumberland Co. No. 02 CR 21700).

11. Question number 12 on the Form F-8 reads: "Starting with the most recent ticket, give the year, location, violation, and disposition. This should include any tickets that were dismissed or given a prayer for judgment?" In his response to this question, the interviewing officer listed two offenses, but failed to disclose the following: (1) DWI Provisional License (Scotland Co. No. 92 CR 930); (2) Speeding, Driving While License Revoked (Pasquotank Co. No. 97 CR 979); (3) DWI, reduced to Reckless Driving to Endanger, Civil Revocation (Pasquotank Co. No. 97 CR 933); (4) Fail to Wear Seatbelt-Driver, No Operator License (Pasquotank Co. No. 94 CR 1564); (5) DWI-Level 2, Fictitious Info to Officer, Civil Revocation (Pasquotank Co. No. 94 CR 1521); and (6) Location of TV in Vehicle (Cumberland Co. No. 02 CR 21700).

12. Question 32 on the Form F-8 reads: "Describe any criminal involvement you may have in the past?" In response to this question, the interviewing officer wrote: "None beside the DWI." Also Question 35 on the Form F-8 reads: "Have you ever been arrested, detained, or charged with a crime, even if the charges against you have been dismissed?" In response to this question, the interviewing officer wrote: "Yes, DWI." As stated above, Petitioner has been charged with the following additional criminal offenses which were omitted: (1) (M) Larceny (Pasquotank Co. No. 96 CR 816) (vol. dismissal); (2) (M) Simple Assault (Pasquotank Co. No. 95 CR 5264) (vol. dismissal); (3) Assault on a Female (Mecklenburg Co. No. 95 CR 53388) (vol. dismissal); (4) Assault on a Female (Mecklenburg Co. No. 95 CR 53389) (prayer for judgment); and (5) Resisting a Public Officer (Pasquotank Co. No. 99 CR 494) (vol. dismissal).

13. Question 40 on the Form F-8 reads: "Have you ever been convicted of a crime?" The recorded response to this question was: "Yes, DWI." Nothing was listed with respect to the Assault on a Female prayer for judgment (Mecklenburg Co. No. 95 CR 53389).

14. Petitioner's Form F-8 was filled out by the Investigator, D. Williams, and not by Petitioner himself as his F-3 and F-5A forms were. With respect to the traffic citations not listed on the Form F-8, these were all included in the Form F-3 and/or the Form F-5A, and therefore the omission of these matters from the Form F-8 does not constitute a material misrepresentation. With respect to the Pasquotank County simple assault charge, this was also not a material misrepresentation for the reason that it was addressed in Petitioner's Form F-5A. However, with respect to the two 1995 assault on a female charges from Mecklenburg County, Petitioner's failure to apprise the interviewing officer for his Form F-8 was a knowing material misrepresentation by a preponderance of the evidence.

15. At the hearing in this matter, Petitioner did not deny any of the foregoing omissions from his prior application and certification documents.

16. The forms associated with Petitioner's application for employment and certification through Laurinburg P.D. were unequivocal in requesting criminal background information from Petitioner. He did not make any inquiry to Laurinburg P.D. regarding the assault on a female charges in order to address any concerns about whether these were required to be disclosed. Nor did petitioner provide a plausible reason for omitting them. In fact, there could have been no doubt for any person of ordinary intelligence that the F-5A and F-3 both sought the very information which Petitioner omitted. Therefore, Petitioner's omission of his criminal charges in association with his application for appointment and certification as a law enforcement officer with Laurinburg P.D. constitute knowing and material misrepresentations in violation of the Commission's rules.

17. Due consideration has been given to the fact the omitted charges were filed against Petitioner approximately 18 years prior to his application for certification, and that Petitioner had not previously applied for certification as a law enforcement officer. Petitioner is active in his community as a football coach and mentor to youth. He has steady employment as an assistant manager at a retail store in the Laurinburg area. Petitioner's criminal charges, including the charges for DWI, all pre-date the year 2000, and most of his charges were included on his application forms.

#### **CONCLUSIONS OF LAW**

1. The parties are properly before the Office of Administrative Hearings, and jurisdiction and venue are proper.

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

3. Pursuant to 12 NCAC 09A .0204(b)(6), the Commission may suspend or revoke the certification of a justice officer when the Commission finds the certified officer "has knowingly made a material misrepresentation of any information required for certification." The sanction for such a violation, if imposed, "shall be for a period of not less than five years" unless reduced or suspended following an administrative hearing. 12 NCAC 09A .0205(b). Alternatively, a period of probation may be imposed, instead. *Id.*

4. The threshold for the element of "knowingly" must be lower than the threshold for the violation of 12 NCAC 09A .0204(b)(7), which prohibits an applicant or certified officer from obtaining or attempting to obtain certification from the Commission "knowingly and willfully, by any means of false pretense, deception, defraudation, misrepresentation or cheating whatsoever." The intention to deceive is not necessary to be proven for violations of 12 NCAC 09A .0204(b)(6), which is charged here.

5. Given the nature of the law enforcement provision and the fact that criminal charges and convictions are highly pertinent to the investigation of possible violations of other

rules of the Commission and the assessment of an applicant's character and qualifications to obtain certification, Petitioner's misrepresentations were material.

6. By a preponderance of the evidence, Petitioner violated 12 NCAC 09A .0204(b)(6) when he knowingly omitted criminal background information during his application for appointment and employment with Laurinburg P.D. Therefore, his justice officer certification is subject to denial for a period of not less than five years.

#### **PROPOSAL FOR DECISION**

Based on the foregoing Proposed Findings of Fact and Proposed Conclusions of Law, the undersigned recommends Petitioner's application for Law Enforcement Certification be denied. The Commission may consider reducing this sanction or instead imposing a period of probation based on the evidence presented at the administrative hearing and the foregoing findings in mitigation.

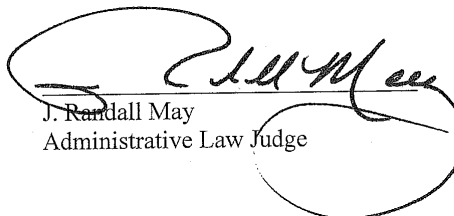
#### **NOTICE AND ORDER**

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

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

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

This the 20th day of January, 2015.

  
J. Randall May  
Administrative Law Judge