

NORTH CAROLINA REGISTER

VOLUME 29 • ISSUE 24 • Pages 2762 - 2862

June 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.

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

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215 North Dawson Street

Raleigh, North Carolina 27603

contact: Amy Bason

(919) 715-2893

amy.bason@ncacc.org

NC League of Municipalities

215 North Dawson Street

Raleigh, North Carolina 27603

contact: Sarah Collins

(919) 715-4000

scollins@nclm.org

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Joint Legislative Administrative Procedure Oversight Committee

545 Legislative Office Building

300 North Salisbury Street

Raleigh, North Carolina 27611

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NORTH CAROLINA REGISTER
Publication Schedule for January 2015 – December 2015

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

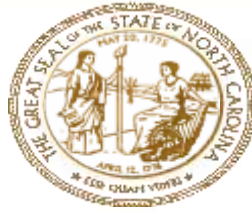
NOTICE OF TEXT

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.



State of North Carolina

PAT McCrory

GOVERNOR

APRIL 9, 2015

EXECUTIVE ORDER NO. 73

NORTH CAROLINA FOOD MANUFACTURING TASK FORCE

WHEREAS, agriculture is vital to the economy of the State of North Carolina; and

WHEREAS, agriculture industry contributes \$78 billion to the economy of the State of North Carolina and employs 16% of the state's work force; and

WHEREAS, 8.4 million acres of North Carolina land is utilized in agriculture; and

WHEREAS, there is a need for the in-state processing and manufacturing of the agricultural products of North Carolina; and

WHEREAS, the College of Agriculture and Life Sciences at North Carolina State University and the North Carolina Department of Agriculture and Consumer Services have jointly studied the economic feasibility of food processing and manufacturing in North Carolina; and

WHEREAS, the economic feasibility study estimated that advancement of a new Food Processing and Manufacturing Initiative, could add nearly 38,000 jobs and \$10.3 billion to North Carolina's economic output within five years;

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

Section 1. Established

The North Carolina Food Manufacturing Task Force (hereinafter "Task Force") is hereby established.

Section 2. Membership

The Task Force shall consist of not more than thirty-five (35) members. The Dean of the College of Agriculture and Life Sciences at North Carolina State University shall serve as the chair. The Lieutenant Governor, the Commissioner of Agriculture, and the Secretary of Commerce shall serve as voting members. The remaining advisory members of the Task Force shall be appointed by the Governor. All members shall serve at the pleasure of the Governor.

The Task Force shall be composed of individuals who are collectively experienced in agriculture, poultry production, beef production, pork production, dairy production, crop production, agribusiness, food processing, food packaging, transportation, education, government, and economic development.

Section 3. Duties

The Task Force will focus on:

1. Developing a strategic business plan to leverage existing activities in food processing and manufacturing.
2. Establishing a statewide food processing and manufacturing organization, directory and data base.
3. Creating a plan to develop a proactive industrial recruitment campaign for new business development.
4. Planning to foster the growth of food manufacturing entrepreneurial endeavors, enhance development of innovative food products and processes, and provide sector-specific regulatory training and outreach.

The Task Force shall report to the Governor on its activities regularly.

Section 4. Meetings

The Task Force shall meet upon the calling of the Governor or the Chair.

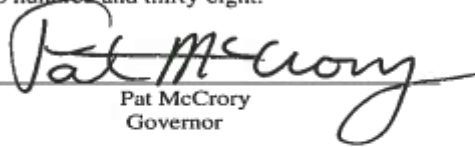
Section 5. Administration

The Department of Commerce and the Department of Agriculture shall cooperatively provide administrative and staff support services required by the Task Force. Members shall serve without compensation, but may receive necessary travel and subsistence expenses from the Department of Agriculture in accordance with state law and the policies and regulations of the Office of State Budget Management.

Section 6. Effect and Duration

This Executive Order is effective immediately and shall remain in effect until June 30, 2016, or until earlier rescinded.

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


Pat McCrory
Governor

ATTEST:


Elaine F. Marshall
Secretary of State





State of North Carolina

PAT McCrORY

GOVERNOR

May 11, 2015

EXECUTIVE ORDER NO. 74

AMENDING THE GOVERNOR'S SUBSTANCE ABUSE AND UNDERAGE DRINKING PREVENTION AND TREATMENT TASK FORCE

By the power vested in me as Governor by the Constitution and laws of the State of North Carolina, IT IS ORDERED:

Executive Order No. 52, *Establishment of North Carolina Governor's Substance Abuse and Underage Drinking Prevention and Treatment Task Force*, signed May 13, 2014, is hereby amended as follows:

Section 4. Purpose.

(b) The Task Force shall prepare and submit to the Governor and the General Assembly by May 1, 2016 a comprehensive plan for effectively addressing (1) the underage sale and use of alcohol and drugs, (2) risky behaviors and substance abuse among collegians, (3) and the provision of treatment and recovery services for individuals struggling with substance abuse. The Task Force shall review and consider the reports outlined in Section (a) above in the development of the report to submit to the Governor and General Assembly no later than May 1, 2016.

Section 7. Effect and Duration.

This Executive Order is effective immediately and shall remain in effect until December 31, 2016, pursuant to N.C. Gen. Stat. § 147-16.2, or until earlier rescinded.

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

Pat McCrory
Governor

ATTEST:

Elaine F. Marshall
Secretary of State



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 04 – DEPARTMENT OF COMMERCE



Approved by OSBM



No fiscal note required by G.S. 150B-21.4

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Rural Electrification Authority intends to amend the rule cited as 04 NCAC 08 .0304.

**CHAPTER 08 - RURAL ELECTRIFICATION
AUTHORITY**

**SECTION .0300 - TELEPHONE MEMBERSHIP
CORPORATIONS**

Link to agency website pursuant to G.S. 150B-19.1(c):
www.nc-rea.net

Proposed Effective Date: October 1, 2015

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice): Send request in writing to Frances Liles, NCRA Administrator at 4321 Mail Service Center, Raleigh, NC 27699-4321 or fliles@nc-rea.net*

Reason for Proposed Action: *The forms and other information that is required when Telephone Membership Corporations (TMCs) submit loan requests to the NCREA office are now posted on the NCREA website and we are making a revision to Rule .0304 that refers the TMCs to our website.*

Comments may be submitted to: Frances Liles, 4321 Mail Service Center, Raleigh, NC 27699-4321, phone (919) 733-7513, fax (919) 733-0012, email fliles@nc-rea.net

Comment period ends: August 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)

**04 NCAC 08 .0304 LOAN APPLICATIONS AND
CATEGORIES**

The list of documents required for a loan application by the North Carolina Rural Electrification Authority are as listed below:

- (1) ~~Petition to State Authority~~ _____ 1
- (2) ~~Excerpts from last board meeting including board resolution~~ _____ 1
- (3) ~~Characteristic letter from Rural Electrification Administration~~ _____ 1
- (4) ~~Certified copy of sworn statement of president and secretary stating all information presented to be accurate~~ _____ 1
- (5) ~~Certificate of secretary (stating excerpts and resolution to be true)~~ _____ 1
- (6) ~~Narrative regarding the history of corporation, use to which loan funds will be used, and benefits derived~~ _____ 1
- (7) ~~Form 479, Financial and Statistical Report for Telephone Borrowers~~ _____ 1
- (8) ~~REA Form 490, Application for Telephone Loans from REA and/or Rural Telephone Bank~~ _____ 1
- (9) ~~REA Form 494, Supplemental Loan Proposal Summary~~ _____ 1
- (10) ~~REA Form 495, Construction Cost Estimate~~ _____ 1
- (11) ~~REA Form 569, Area Coverage Survey Report~~ _____ 1

- (a) All TMCs shall petition the Authority to apply for any funds in the form of grants or loans issued from any agency of the United State Government for use in the State. The TMC shall send all loan documents to the Administrator three weeks prior to the Board meeting in accordance with Rule .0107 of this Chapter.
- (b) A checklist for Rural Utility Service (RUS) loans and Rural Economic Development Loans and Grants (REDLG) may be found on the Authority's website.

Authority G.S. 117-32.

**TITLE 09 – OFFICES OF THE GOVERNOR AND
LIEUTENANT GOVERNOR**

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC 911 Board intends to adopt the rules cited as 09 NCAC 06C .0101 - .0108, .0201 - .0204, .0206 - .0213, .0301 - .0307; .0401 - .0406.

Link to agency website pursuant to G.S. 150B-19.1(c):
<https://www.nc911.nc.gov/>

Proposed Effective Date: November 1, 2015

Public Hearing:

Date: August 28, 2015

Time: 10:00 a.m.

Location: NC 911 Board Office, 3154 A Bush Street, Banner Elk Room, Raleigh, NC 27609

Reason for Proposed Action:

09 NCAC 06C .0101: States 911 Board's authority to prescribe forms for use by Public Safety Answering Points (PSAPs) and service providers.

09 NCAC 06C .0102: Provides definitions of terms used in these rules.

09 NCAC 06C .0103: Describes the scope, purpose and application of standards established in Section 2 of these rules

09 NCAC 06C .0104: Describes consequences for failure of a PSAP or CMRS (Commercial Mobile Radio Services) to comply with these rules or with G.S. Chapter 62A.

09 NCAC 06C .0105: Requires PSAPs to maintain detailed audit and financial records of 911 Funds received and use of such funds in accordance with the Local Government Budget and Fiscal Control Act G.S. 159-7 et seq. Records shall be maintained in accordance with funding formula adopted by the Board pursuant to G.S. 62A-46(a)(3)(c). CMRS service providers shall maintain detailed books and records related to service charges remitted, and records necessary to support requested reimbursements in for 5 years.

09 NCAC 06C .0106: Explains conditions under which the 911 Board may issue a waiver of the rules.

09 NCAC 06C .0107: Describes procedures for a PSAP or service provider to follow when requesting a hearing before the 911 Board.

09 NCAC .0108: Explains conditions under which the 911 Board may issue a declaratory ruling.

09 NCAC 06C.0201: Outlines eligibility criteria a PSAP must meet in order to receive a disbursement from the 911 Fund

09 NCAC 06C .0202: Lists PSAP expense types eligible for disbursement from the 911 Fund

09 NCAC 06C .0203: Lists criteria under which a PSAP is not eligible to receive a disbursement from the 911 Fund, or may have funds terminated or suspended.

09 NCAC 06C .0204: Outlines reporting requirements for PSAPs that receive 911 Fund disbursements.

09 NCAC 06C .0207: Outlines requirements for management and operation of a PSAP, including telecommunicator qualifications and training, minimum staffing, timekeeping, recording 911 calls, and quality assurance.

09 NCAC 06C .0208: Describes minimum standards for power sources located within PSAPs.

09 NCAC 06C .0209: Describes minimum standards for telephones located within PSAPs.

09 NCAC 06C .0210: Describes minimum standards for 911 call dispatching systems.

09 NCAC 06C .0211: Outlines requirements for computer aided dispatching (CAD) systems and requires PSAPs to use a CAD system.

09 NCAC 06C .0212: Outlines requirements for regular testing of all electronic systems within a PSAP.

09 NCAC 06C .0213: Specifies what types of records PSAPs are required to maintain.

09 NCAC 06C .0301: Outlines requirements for CMRS service providers to register with the 911 Board within 30 days of beginning operations within the State.

09 NCAC 06C .0302: Outlines requirements for a CMRS service provider to submit a cost recovery plan to the 911 Board for possible reimbursement from the 911 Fund.

09 NCAC 06C .0303: Describes the 911 Board's authority to create a Cost Recovery Plan Committee to review submissions for reimbursement from CMRS service providers.

09 NCAC 06C .0304: Outlines conditions under which a CMRS service provider may receive reimbursements from the 911 Fund.

09 NCAC 06C .0305: Outlines requirements for CMRS service providers to submit periodic reports of their activities to the 911 Board.

09 NCAC 06C .0306: Describes procedure for service providers to remit service charges (per G.S. 62A-43) to the 911 Board.

09 NCAC 06C .0307: Describes the relationship between a voice communications service provider of prepaid wireless with the 911 Board.

09 NCAC 06C .0401: Describes the procedure between a voice communications service provider of prepaid wireless with the 911 Board.

09 NCAC 06C .0402: Lists eligibility requirements for PSAPs to receive grants for construction.

09 NCAC 06C .0403: Outlines the terms for grant agreements.

09 NCAC 06C .0404: Outlines requirements for grant approval.

09 NCAC 06C .0405: Lists requirements for management and use of grant funds

09 NCAC 06C .0406: Outlines requirements for submissions of grantee reports to the 911 Board.

Comments may be submitted to: Teresa M. Bank, NC Office of Information Technology Services, P.O. Box 17209, Raleigh, NC 27619-7209, phone (919) 754-6285, email Teresa.bank@nc.gov

Comment period ends: August 28, 2015

Procedure for Subjecting a Proposed Rule to Legislative

Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1).

The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Fiscal impact (check all that apply).

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

**CHAPTER 06 – OFFICE OF INFORMATION
TECHNOLOGY SERVICES**

SUBCHAPTER 06C - 911 BOARD

**SECTION .0100 – FORMS, DEFINITIONS,
ADMINISTRATION**

09 NCAC 06C .0101 FORMS

The 911 Board shall prescribe forms by or for use by Public Safety Answering Points (PSAPs), Service Providers, and any other parties as may be needed to ensure uniformity in the operation of these Rules and policies adopted by the Board.

Authority G.S. 62A-42.

09 NCAC 06C .0102 DEFINITIONS

- (a) "Addressing" means the assigning of a numerical address and street name (the street name may be numerical) to all locations within a local government's geographical service area for the purpose of providing Enhanced 911 service.
- (b) "Appropriate Public Safety Answering Point (PSAP)" means a Primary PSAP or a Board approved Back-up PSAP.
- (c) "Back-up PSAP" means a facility equipped with automatic number identification, automatic location identification displays and all other features common to primary PSAPs. A Backup PSAP receives 911 calls only when they are transferred from the primary PSAP or on an alternate routing basis when calls cannot be completed to the primary PSAP. A Backup PSAP facility is normally unattended, is remote from the Public Safety Answering Point and used to house equipment necessary for the functioning of an emergency communications system.
- (d) "Circuit" means the conductor or radio channel and associated equipment that are used to perform a specific function in connection with an emergency 911 call system.
- (e) "CMRS" is a commercial mobile radio service.
- (f) "CMRS Non-recurring cost (NRC)" means one-time costs incurred by CMRS Service Providers for initial connection to selective routers and the wireless systems service provider (3rd party vendor non-recurring) cost.
- (g) "Communications System" means a combination of links or networks that serve a general function such as a system made up

- of command, tactical, logistical, and administrative networks supporting the operations of an individual PSAP.
- (h) "Comprehensive Emergency Management Plan (CEMP)" means a disaster recovery plan that conforms to guidelines established by the Public Safety Answering Point and is designed to address natural, technological, and man-made disasters.
- (i) "Computer-Aided Dispatch (CAD)" means a combination of hardware and software that provides data entry, makes resource recommendations, and notifies and tracks those resources before, during, and after emergency 911 calls, preserving records of those emergency 911 calls and status changes for later analysis.
- (j) "Computer Aided Dispatch (CAD) Terminal" means an electronic device that combines a keyboard and a display screen to allow exchange of information between a telecommunicator and one or more computers in the system/network.
- (k) "Control Console" means a wall-mounted or desktop panel or cabinet containing controls to operate communications equipment.
- (l) "Coordinated Universal Time" means a coordinated time scale, maintained by the Bureau International des Poids et Mesures (BIPM), which forms the basis of a coordinated dissemination of standard frequencies and time signals.
- (m) "Dispatch Circuit" means a circuit over which a signal is transmitted from the Public Safety Answering Point to an Emergency Response Facility (ERF) or Emergency Response Unit (ERU) to notify the emergency response unit to respond to an emergency.
- (n) "Emergency 911 call Processing/Dispatching" means a process by which an emergency 911 call answered at the Public Safety Answering Point is transmitted to Emergency Response Facilities (ERFs) or to Emergency Response Units (ERUs) in the field.
- (o) "Emergency Response Facility (ERF)" means a structure or a portion of a structure that houses PSAP equipment and personnel for receiving and dispatching 911 calls.
- (p) "Emergency Response Unit (ERU)" means a first responder to include but not limited to a police vehicle, a fire truck, and an ambulance. Personnel who respond to fire, medical, law enforcement, and other emergency situations for the preservation of life and safety.
- (q) "Geographic Information Systems (GIS)" means computer programs linking features commonly seen on maps (such as roads, town boundaries, water bodies) with related information not usually presented on maps, such as type of road surface, population, type of agriculture, type of vegetation, or water quality information.
- (r) "GIS Base Map" means a map comprising streets and centerlines used in a Geographic Information System.
- (s) "Local Exchange Carrier" or "LEC" has the same meaning as provided in G.S. 62.
- (t) "Logging Voice Recorder" means a device that records voice conversations and automatically logs the time and date of such conversations; normally, a multichannel device that keeps a semi-permanent record of operations.
- (u) "Notification" means the time at which an emergency 911 call is received and acknowledged at a PSAP.
- (v) "Operations Room" means the room in the PSAP where emergency 911 calls are received and processed and

communications with emergency response personnel are conducted.

(w) "Phase I Wireless Enhanced 911 Service" means the CMRS Service Provider delivers to the appropriate PSAP the telephone number of the handset originating the 911 call (callback number), and the location of the cell site/sector receiving the 911 call.

(x) "Phase II Wireless Enhanced 911 Service" means the CMRS Service Provider delivers the telephone number of the handset originating the 911 call (callback number) to the appropriate PSAP in addition to the latitude and longitude coordinates representing the handset location.

(y) "Place of Primary Use" has the same meaning as provided in the Mobile Telecommunications Act, 4 U.S.C. 124(8), if applicable; and otherwise sourcing shall be determined pursuant to G.S. 105-163 or G.S. 105-164.4C.

(z) "Public Safety Agency" means an organization that provides law enforcement, emergency medical, fire, rescue, communications, or related support services.

(aa) "Public Safety Answering Point (PSAP)" means the public safety agency that receives incoming 911 calls.

(bb) "PSAP Nonrecurring Costs" means non-repetitive charges incurred by a Primary PSAP to pay for equipment or services which do not occur on a fixed schedule. Examples include computer equipment that has become functionally outdated, software upgrades, or repair costs that are not covered by any maintenance agreement.

(cc) "PSAP Recurring Costs" means repetitive charges incurred by a primary PSAP, including, but not limited to, database management, lease of access lines, lease of equipment, network access fees, and applicable maintenance costs.

(dd) "Security Vestibule" means a compartment provided with two or more doors where the intended purpose is to prevent continuous and unobstructed passage by allowing the release of only one door at a time.

(ee) "Standard Operating Procedures (SOPs)" means written organizational directives that establish or prescribe specific operational or administrative methods that are to be followed routinely for the performance of designated operations or actions.

(ff) "Selective Routing" or "Tandem Routing" means routing a 911 call to the appropriate PSAP based upon the caller's location.

(gg) "Stored Emergency Power Supply System (SEPSS)" means a system consisting of a UPS, or a motor generator, powered by a stored electrical energy source, together with a transfer switch designed to monitor preferred and alternate load power source and provide desired switching of the load, and all necessary control equipment to make the system functional.

(hh) "Sworn Invoice" means an invoice prepared by a CMRS Service Provider's vendor that describes the goods or services and identifies the costs that the CMRS Service Provider submits for cost recovery pursuant to an approved cost recovery plan, and that is accompanied by an affidavit that substantially complies with a form provided by the Board.

(ii) "911 Line/Trunk" means a telephone line/trunk which is dedicated to providing a caller with access to the appropriate PSAP by dialing the digits 911.

(jj) "Service Provider" means an entity that provides voice communications service, including resellers of such service.

(kk) "TDD/TTY" means a device that is used in conjunction with a telephone to communicate with persons who are deaf, who are

hard of hearing, or who have speech impairments, by typing and reading text.

(ll) "Telecommunicator" means any person engaged in or employed as a full time or part time 911 communications center call-taker (emergency communications specialist, emergency dispatcher, etc).

(mm) "Uninterruptible Power Supply (UPS)" means a system designed to provide power, without delay or transients, during any period when the primary power source is incapable of performing.

(nn) "Voice Communication Channel" means a single path for communication by spoken word that is distinct from other parallel paths.

Authority G.S. 62A-42; 47 C.F.R. 20.18.

09 NCAC 06C .0103 ADMINISTRATION

(a) Scope.

- (1) Standards established in Section .0200 of this Subchapter shall cover the installation, performance, operation, and maintenance of PSAPs and the associated emergency communication systems.
- (2) Standards established in Section .0200 of this Subchapter shall not be used as a design specification manual or an instruction manual.

(b) Purpose. The purpose of the Standards established in Section .0200 of this Subchapter shall be as follows:

- (1) To specify operations, facilities, and communications systems that receive emergency 911 calls from the public.
- (2) To provide requirements for the retransmission of such emergency 911 calls to the appropriate emergency response agencies.
- (3) To provide requirements for dispatching of appropriate emergency response personnel.
- (4) To establish the required levels of performance and quality of installations of emergency services communications systems.

(c) Application. The Standards established in Section .0200 of this Subchapter shall apply to emergency 911 systems that include, but are not limited to, dispatching systems, telephone systems, and public reporting systems that provide the following functions:

- (1) Communication between the public and emergency response agencies.
- (2) Communication within the emergency response agency under emergency and non-emergency conditions.
- (3) Communication among emergency response agencies.

(d) Equivalency. Nothing in the Standards established in Section .0200 of this Subchapter is intended to prevent the use of systems, methods, or devices of equivalent or superior quality, strength, fire resistance, effectiveness, durability, and safety over those prescribed by these standards.

Technical documentation shall be submitted to the local government to demonstrate equivalency.

The system, method, or device shall be approved for the intended purpose by the local government.

Authority G.S. 62A-40.

09 NCAC 06C .0104 FAILURE TO COMPLY WITH RULES

(a) If the Board determines that a Service Provider does not appear to have complied with G.S. Chap. 62A, these Rules or the requirements of FCC Report and Order 94-102 ("Report and Order"), a certified, return receipt letter shall be mailed to the company representative known to the Board. The letter shall request justification or an explanation from the Service Provider for the apparent non-compliance. The Service Provider shall have fifteen calendar days to respond to the letter.

(b) Board staff shall initially assess the Service Provider's response and report to the Board. The Board shall review the staff's report. If it appears to the Board that the Service Provider has failed to comply with applicable law, these rules or the FCC Order, the Board shall notify the Service Provider to that effect and to the consequences arising from such failure, and shall provide an opportunity for the Service Provider to appear before the Board.

(c) If after notice to the Service Provider, and appearance before the Board or Service Provider's failure to appear, the Board determines that the Service Provider has offered no reasonable solution, the Board may, at its discretion file a complaint with the FCC, the N.C. Utilities Commission or other regulatory body exercising jurisdiction over the Service Provider. A reasonable solution shall be defined as one that will comply with applicable law, these Rules or the FCC Order within thirty days or upon such other conditions as the Board may find reasonable.

(d) If the non-compliant Service Provider is a CMRS Service Provider, all reimbursement payments due shall be suspended until compliance with applicable law, these rules or the FCC Order has been completed.

(e) If after notice and hearing, the Board determines that the affected PSAP is at fault, rules and procedures regarding PSAP compliance shall be followed.

(f) If through the review process the Board determines that a PSAP or CMRS Service Provider is not adhering to an approved plan or is not using funds in the manner prescribed in these rules or G.S. 62A, the Board may, after notice and hearing, suspend distributions or reimbursements until satisfactory evidence of compliance is provided to the Board. A CMRS Service Provider is not eligible to receive or expend 911 Fund monies until such time as the Board determines that the Service Provider is in compliance with an approved plan and 911 Fund usage limitations.

Authority G.S. 62A-42; 62A-48.

09 NCAC 06C .0105 REVIEW 911 FUND EXPENDITURES

(a) PSAPs shall maintain detailed books and records related to 911 Funds received and use of such funds in accordance with the Local Government Budget and Fiscal Control Act and other applicable law and generally accepted accounting principles. PSAPs shall maintain these books and records for a minimum of five years. All books and records shall be available for review by the Board, its representatives, and/or audit by other governmental

entities with such authority upon reasonable notice and during normal business hours. PSAPs shall cooperate fully with any such review or audit. If any review or audit indicates overpayment to a PSAP, the Board shall adjust future or final payments otherwise due. If no payments are due and owed to a PSAP, or if the overpayment exceeds the amount otherwise due during that fiscal year, the PSAP shall immediately refund all amounts that may be due to the 911 Fund.

(b) PSAPs shall provide copies of any audit reports to the Board if such audit reports include receipts or expenditures for 911 systems.

(c) CMRS Service Providers shall maintain detailed books and records related to service charges remitted, and records necessary to support requested reimbursements in accordance with applicable law and generally accepted accounting principles. CMRS Service Providers shall maintain these books and records for a minimum of five years. All books and records shall be available for review or audit by the Board, its representatives, and other governmental entities with such authority upon reasonable notice and during normal business hours. CMRS Service Providers shall cooperate fully with any such review or audit. If any audit or review indicates overpayment to a CMRS Service Provider, or subcontractor, the Board shall adjust future or final payments otherwise due. If no payments are due and owed to a CMRS Service Provider, or if the overpayment exceeds the amount otherwise due during that fiscal year, the CMRS Service Provider shall immediately refund all amounts that may be due to the 911 Fund.

Authority G.S. 62A-46(d)-42; 62A-48; 62A-50.

09 NCAC 06C .0106 WAIVER OF RULES

Upon consideration of a written request and after publishing notice of any waiver request, the Board may waive any rule in this Chapter. The factors which the Board shall use in determining whether to grant a waiver are:

- (1) Whether the requested waiver is consistent with G.S. 62A, Article 3;
- (2) Whether any applicable Rule should be modified;
- (3) Costs to the 911 Fund if the waiver is granted;
- (4) Costs to the party requesting a waiver if the waiver is not granted;
- (5) Whether granting the waiver is consistent with the statewide 911 plan;
- (6) The benefit to the public;
- (7) Whether granting the waiver is consistent with the requirements and intent of the FCC Order;
- (8) Prior, concurrent, or similar waiver requests; and
- (9) Whether the waiver is supported or opposed by PSAPs or Service Providers.

Authority G.S. 62A-42; 150B-19(6).

09 NCAC 06C .0107 HEARINGS

(a) A PSAP or Service Provider aggrieved in connection with any action by the Board may request a hearing before the Board.

(b) Requests for hearings shall be made in writing to the Executive Director and Chair of the Board and shall be filed within 30 calendar days after the aggrieved party knows or should have known of the facts giving rise to the request. A request for hearing is considered filed when physically received by the Executive Director or Chair. Requests filed after the 30 calendar day period shall not be considered. To expedite handling of requests, the envelope should be labeled "911 Funds Request for Hearing." The written request shall include as a minimum the following:

- (1) The name and address of the party;
- (2) The action of the Board;
- (3) A statement of reasons for the hearing; and
- (4) Supporting exhibits, evidence, or documents necessary to substantiate the party's complaint.

Requests for hearing shall be sent to:

Executive Director, 911 Board or the Board Chair
c/o NC Office of Information Technology Services
P.O. Box 17209
Raleigh, NC 27619-7209

(c) Any additional information requested by the Board shall be submitted within the time periods established in order to expedite consideration of the request. Failure of the requesting party to comply expeditiously with a request for information by the Board may result in resolution of the request without consideration of that information.

(d) A decision on a request shall be made by the Board as expeditiously as possible after receiving all relevant requested information.

Authority G.S. 62A-42.

09 NCAC 06C .0108 DECLARATORY RULINGS

(a) Any request for a determination regarding the application of a relevant rule, statute or rule established by the 911 Board to a specific factual situation must be directed to the Board Chair or Executive Director at the address in Rule .0102 of this Section. The request for a ruling will follow this Rule and Rules .0109 through .0112 of this Section. A declaratory ruling proceeding may include written submissions, an oral hearing, or other procedure determined by the Board as may be appropriate in the circumstances of the particular request.

(b) Declaratory rulings pursuant to G.S. 150B-4 shall be issued by the Board only on the validity or applicability of a relevant statute, rule or order of the Board to stipulated facts. A declaratory ruling shall not be issued on a matter requiring an evidentiary proceeding.

(c) As used in this Rule and Rules .0109 through .0112, "standard" shall refer to and include such standards, policies and procedures adopted by the Board pursuant to authority found in G.S. 62A, Article 3.

(d) A person aggrieved must possess such an interest in the question to be ruled on that the petitioner's need to have such a ruling in order to comply with statutory requirements, these Rules, or standards shall be apparent from the petition and shall be explained therein.

Authority G.S. 62A-42; 150B-4.

SECTION .0200 – PUBLIC SAFETY ANSWERING POINTS (PSAPS)

09 NCAC 06C .0201 PSAP ELIGIBILITY

Before receiving distributions from the 911 Fund, a primary PSAP must meet the following criteria and certify to the same:

- (1) The PSAP is separately identified in its governing agency's budget and in any audit conducted under the Local Government Budget and Fiscal Control Act.
- (2) The PSAP meets the definition of primary PSAP under G.S. 62A-40(16). Callers must be able to reach the PSAP by placing a call using only the digits 911. The PSAP must operate an enhanced 911 system.
- (3) The PSAP equipment vendor or a Service Provider operating in the PSAP's jurisdiction must also certify that the PSAP is capable of receiving and dispatching Phase I wireless enhanced 911 service. If neither an equipment vendor nor a Service Provider is available, a city or county may use certification from a technology specialist satisfactory to the Board to meet this requirement.
- (4) Provide copies of all documentation evidencing agreements with other PSAPs governing the manner in which 911 Funds are used in overlapping geographic service areas, as identified by zip code or other identifier such as telephone exchange or township.

Authority G.S. 62A-46.

09 NCAC 06C .0202 PSAP ELIGIBLE EXPENSES

(a) Expenses that are solely incurred to enable a PSAP to receive and utilize the voice and data elements necessary for wireline 911 and wireless Phase I or Phase II compliance may be fully paid from a PSAP's 911 Fund distributions. Eligible lease, purchase, and maintenance expenses for emergency telephone equipment include 911 telephone equipment/system costs. Eligible costs for necessary computer hardware include Computer Aided Dispatch (CAD) workstation computers, servers, and ancillary equipment; GIS workstation computers, servers, and ancillary equipment; and voice logging recorder computers. Eligible costs for necessary computer software include software used in conjunction with the computer hardware to provide callers with access to the PSAP by dialing 911. Database provisioning includes creation of the automatic location identification (ALI) database and the GIS base map database. GIS base map eligible expenses include mapped street centerlines, together with costs for creation and maintenance of the base map. Nonrecurring costs of establishing a wireless Enhanced 911 system include emergency generator or uninterruptible power supplies, and telecommunicator furniture necessary for 911 system operation. Rates associated with local telephone companies' charges related to the operation of the 911 system include monthly charges for delivery of 911 calls, automatic number identification (ANI)/ALI, and monthly charges for telephone interpreter services.

(b) The 911 Board may create and periodically revise a list of eligible expenditures.

(c) Ineligible costs include:

- (1) Basic termination charges incurred due to the disconnection of telephone equipment to be replaced with 911 equipment;
- (2) Capital outlay expenditures, such as buildings, remodeling, communication towers and equipment not directly related to providing the user of a voice communications service connection access to a PSAP by dialing the digits 911;
- (3) Mobile or base station radios, pagers, or other devices used for response to, rather than receipt of, 911 calls, including mobile data terminals (MDT) and automatic vehicle location (AVL) systems used in response vehicles;
- (4) Seven-digit transfer-to-lines;
- (5) Private line circuit costs;
- (6) Directory listings; and
- (7) Maintenance costs for radio equipment and/or other miscellaneous equipment that is not necessary to provide the user of a voice communications service connection access to a PSAP by dialing the digits 911.

Authority G.S. 62A-46.

09 NCAC 06C .0203 TERMINATION AND SUSPENSION OF 911 FUND DISTRIBUTIONS

(a) A primary PSAP operated by or for a local government that is not identified or included in its governing agency's budget or in any audit conducted pursuant to the Local Government Budget and Fiscal Control Act shall not be eligible for distributions from the 911 Fund.

(b) 911 Fund distributions that lapse due to termination of a primary PSAP shall be re-allocated by the Board.

(c) 911 Fund distributions that are suspended shall be maintained by the Board until such time as the PSAP entitled to such distributions complies with the requirements of applicable statutes, these rules, and the Board's standards, policies and procedures.

(d) Primary PSAPs that cease independent operation due to consolidation with other such PSAPs, or that are consolidated with newly formed PSAPs, shall give notice to the Board. Distributions for such PSAPs shall be allocated to the consolidated PSAP upon the Board's approval of such distributions.

Authority G.S. 62A-46; 62A-48.

09 NCAC 06C .0204 PSAP REPORTING

(a) Any PSAP receiving or requesting 911 Fund distributions must submit a copy of its governing agency's approved budget to the Board detailing the revenues and expenditures associated with the operation of its 911 system by December 1 of each year or as requested by the Board.

(b) If a PSAP fails to report its revenues and expenditures by January 30th of each year or as requested by the Board, the Board

will give notice to the PSAP's governing agency by certified mail. The notice shall also inform the governing agency that failure to provide the requested information within fifteen days will be cause for suspension of monthly PSAP fund distributions until the information is received. The notice will further inform the governing agency that continuing failure to provide the information will result in a report to the North Carolina Local Government Commission of the PSAP's failure.

(c) If after 60 days from January 30th of each year or the date requested by the Board under Paragraph (a) of this rule the financial information is still not received, the Board will inform the North Carolina Local Government Commission in writing of the PSAP's failure to respond to the requested information. A copy of the notice to the North Carolina Local Government Commission will also be sent to the PSAP manager and the governing agency.

(d) Each PSAP shall submit an annual report to the Board on or before December 1 of each calendar year, or as requested by the Board, detailing all revenues and expenditures associated with 911 systems during the immediately preceding fiscal year. The report shall be on a form provided by the Board and shall include information including installation schedules, installation expenses, anticipated 911 system changes, other system related costs and other information deemed necessary by the Board or by the PSAP.

(e) Each county or municipality shall submit a list of PSAPs operating within its jurisdiction each year; or, if none are known, a statement to that effect.

Authority; G.S. 62A-4; 62A-46.

09 NCAC 06C .0206 BACK-UP PSAPS

(a) An alternate method for receiving and processing 911 calls is necessary when a Primary PSAP becomes inoperable due to a catastrophic failure.

(b) The Board will disburse 911 Funds for back-up PSAPs to the extent eligible expenses are incurred for such PSAPs, and provided:

- (1) A written determination for the need of a back-up PSAP is provided to the 911 Board;
- (2) A plan supporting the written determination is submitted to the 911 Board, including detailed start-up costs and projected recurring expenses, and the Board approves the plan submitted;
- (3) The plan includes any local agreements which may exist, or which are anticipated, which provide for the back-up PSAP;
- (4) Regular annual reports regarding the back-up PSAP are made to the 911 Board; and
- (5) Any back-up PSAP plan revisions have been provided to the 911 Board staff.

Note: Alternate methods for receiving and processing 911 calls may include interlocal agreements among one or more PSAPs for sharing physical resources, entail use of portable equipment which could be temporarily implemented wherever appropriate network connectivity is accessible, construction and maintenance of a back-up PSAP facility that would only be utilized when the Primary PSAP is inoperable, or other alternative solution.

Authority G.S. 62A-42.

09 NCAC 06C .0207 PSAP OPERATIONS AND MANAGEMENT

(a) Personnel.

- (1) All systems shall be under the control of a responsible employee or employees of the PSAP served by the systems.
- (2) The PSAP Emergency services dispatching entities shall have trained and qualified technical assistance available for trouble analysis and repair by in-house personnel or by authorized outside contract maintenance services.
- (3) Where maintenance is provided by an organization or person other than an employee of the PSAP complete written records of all installation, maintenance, test, and extension of the system shall be forwarded to the responsible employee of the PSAP.
- (4) Maintenance performed by an organization or person other than an employee of the PSAP shall be by written contract that contains a guarantee of performance.
- (5) The PSAP shall have a written local management approved access control plan.
- (6) Maintenance personnel other than an employee of the PSAP shall be approved by the PSAP pursuant to the approved access control plan as offering no threat to the security of the facility or the employees and equipment within it.
- (7) All equipment shall be accessible to the PSAP for the purpose of maintenance.
- (8) At least one supervisor or lead with Telecommunicator certification shall be available to respond immediately at all times 24 hours per day, 7 days per week, 52 weeks per year.

(b) Telecommunicator Qualifications and Training.

- (1) Telecommunicators and Supervisors shall be certified in the knowledge, skills, and abilities related to their job function.
- (2) Telecommunicators and Supervisors shall have knowledge of the function of all communications equipment and systems in the PSAP.
- (3) Telecommunicators and Supervisors shall know the rules and regulations that relate to equipment use, including those of the Federal Communications Commission that pertain to emergency service radio use.
- (4) Telecommunicators and Supervisors shall be capable of operating and testing the communications equipment they are assigned to operate.
- (5) Telecommunicators and Supervisors shall receive training to maintain the skill level appropriate to their positions.

- (6) Telecommunicators and Supervisors shall be trained in TDD/TTY procedures, with training provided at a minimum of once per year as part of the Annual Training.

(c) Staffing.

- (1) There shall be sufficient Telecommunicators available to effect the prompt receipt and processing of emergency 911 calls needed to meet the requirements as specified herein.
- (2) After January 1, 2013 a minimum of two Telecommunicators must be available at all times 24 hours per day, 7 days per week, 52 weeks per year to immediately receive and process emergency 911 calls.
- (3) Where communications systems, computer systems, staff, or facilities are used for both emergency and non-emergency functions, the non-emergency use shall not degrade or delay emergency use of those resources.
 - (A) A PSAP shall handle emergency 911 calls for service and dispatching in preference to nonemergency activities.
 - (B) The PSAP and emergency response agencies shall develop written standard operating procedures that identify when a dedicated Telecommunicator is required to be assigned to an emergency incident.
- (4) Telecommunicators shall not be assigned any duties prohibiting them from immediately receiving and processing emergency 911 calls for service in accordance with the time frame specified in the Operating Procedures.

(d) Operating Procedures.

- (1) Ninety percent of emergency 911 calls received on emergency lines shall be answered within 10 seconds, and 95 percent of emergency 911 calls received on emergency lines shall be answered within 20 seconds. Compliance with this Subparagraph shall be evaluated monthly using data from the previous month.
- (2) The PSAP is required to provide pre-arrival medical protocols as set forth by the North Carolina Office of Emergency Services, Health and Human Services in the initial call reception or by the responsible EMS provider on behalf of the primary answering point.
- (3) For law enforcement purposes, the PSAP shall determine time frames allowed for completion of dispatch.
- (4) When emergency 911 calls need to be transferred to another PSAP, the Telecommunicator will transfer the call without delay. The Telecommunicator will advise the caller: "Please do not hang up; I am connecting you with (name of the agency)." The Telecommunicator should stay on the line until the connection is complete and verified.

- (5) The PSAP shall transfer calls for services as follows:
- (A) The call for service shall be transferred directly to the Telecommunicator.
 - (B) The transferring agency shall remain on the line until it is certain that the transfer is effected.
 - (C) The transfer procedure shall be used on emergency 911 calls.
- (6) All calls for service, including requests for additional resources, shall be transmitted to the identified Emergency Response Units over the required dispatch systems.
- (7) An indication of the status of all Emergency Response Units shall be available to Telecommunicators at all times.
- (8) Records of the dispatch of Emergency Response Units to call for services shall be maintained and shall identify the following:
- (A) Unit designation for each Emergency Response Unit (ERU) dispatched.
 - (B) Time of dispatch acknowledgment by each ERU responding.
 - (C) Enroute time of each ERU.
 - (D) Time of arrival of each ERU at the scene.
 - (E) Time of patient contact, if applicable.
 - (F) Time each ERU is returned to service.
- (9) All emergency response agencies shall use common terminology and integrated incident communications.
- (10) When the device monitoring the system for integrity indicates that trouble has occurred, the Telecommunicator shall act as follows:
- (A) Take appropriate steps to repair the fault.
 - (B) Isolate the fault and notify the official responsible for maintenance if repair is not possible.
- (11) Standard operating procedures shall include but not be limited to the following:
- (A) All standardized procedures that the Telecommunicator is expected to perform without direct supervision.
 - (B) Implementation plan that meets the requirements of a formal plan to maintain and operate the backup PSAP.
 - (C) Procedures related to the CEMP.
 - (D) Emergency response personnel emergencies.
 - (E) Activation of an emergency distress function.
 - (F) Assignment of incident radio communications plan.
 - (G) Time limit for acknowledgment by units that have been dispatched.
- (12) Every PSAP shall have a comprehensive regional emergency communications plan as part of the CEMP.
- (A) The emergency communications plan shall provide for real-time communications between organizations responding to the same emergency incident.
 - (B) This emergency communications plan shall be exercised at least once a year.
 - (C) In the event that an ERU has not acknowledged its dispatch/response within the time limits established by the PSAP, the Telecommunicator shall perform one or more of the following:
 - (i) Attempt to contact the ERU(s) by radio.
 - (ii) Re-dispatch the ERU (s) using the primary dispatch system.
 - (iii) Dispatch the ERU(s) using the secondary dispatch system.
 - (iv) Initiate two-way communication with the ERU's supervisor.
- (13) The PSAP shall develop and implement standard operating procedures for responding to and processing TDD /TTY calls.
- (14) Calls received as an open-line or "silent call" shall be queried as a TDD/TTY call if no acknowledgment is received by voice.
- (e) Time.
- (1) The clock for the main recordkeeping device in the PSAP shall be synchronized to Coordinated Universal Time.
 - (2) All timekeeping devices in the PSAP shall be maintained within ± 5 seconds of the main recordkeeping device clock.
- (f) Recording.
- (1) PSAPs shall have a logging voice recorder with one channel for each of the following:
 - (A) Each transmitted or received emergency radio channel or talk group.
 - (B) Each voice dispatch call for service circuit.
 - (C) Each Telecommunicator telephone that receives emergency 911 calls for service.
 - (2) Each Telecommunicator position shall have the ability to instantly recall telephone and radio recordings from that position.
 - (3) Emergency 911 calls that are transmitted over the required dispatch circuit(s) shall be automatically recorded, including the dates and times of transmission.
- (g) Quality Assurance/Improvement.

- (1) PSAPs shall establish a quality assurance/improvement program to ensure the consistency and effectiveness of emergency 911 call processing.
- (2) Statistical analysis of emergency 911 call and dispatch performance measurements shall be completed monthly and compiled over a one year period.

emergency 911 calls at that center.

- (ii) The plan shall be included in the Comprehensive Emergency Management Plan (CEMP).

- (5) The PSAP shall be capable of continuous operation long enough to enable the transfer of operations to the Backup PSAP in the event of an emergency in the PSAP or in the building that houses the PSAP.
- (6) Systems that are essential to the operation of the PSAP shall be designed to accommodate peak workloads.
- (7) PSAPs shall be designed to accommodate the staffing level necessary to operate the center as required by the Rules set herein.
- (8) The design of the PSAP shall be based on the number of personnel needed to handle peak workloads as required by the Rules set herein.
- (9) Each PSAP shall have a written Comprehensive Emergency Management Plan (CEMP).
- (10) Emergency Fire Plan. There shall be a local management approved, written, dated, and annually tested emergency fire plan that is part of the CEMP.
- (11) Damage Control Plan. There shall be a local management approved, written, dated, and annually tested damage control plan that is part of the CEMP.
- (12) Backup Plan. There shall be a local management approved, written, dated, and annually tested backup PSAP plan that is part of the CEMP and approved by the NC 911 Board.
- (13) Penetrations into the PSAP shall be limited to those necessary for the operation of the center.

Authority G.S. 62A-42(a)(4).

09 NCAC 06C .0208 PUBLIC SAFETY ANSWERING POINT (PSAP) FACILITIES

(a) General.

- (1) Any Primary PSAP, Backup PSAP, and Secondary PSAP that receives 911 Funds from the NC 911 Board shall comply with all NC 911 Board Rules.
- (2) All equipment, software, and services used in the daily operation of the PSAP shall be kept in working order at all times.
- (3) The PSAP shall be provided with an alternate means of communication that is compatible with the alternate means of communication provided at the Emergency Response Facilities (ERFs).
 - (A) The alternate means of communication shall be readily available to the telecommunicator in the event of failure of the primary communications system.
 - (B) Telecommunicators shall be trained and capable of using the alternate means of communication in the event of failure of the primary communications system.
- (4) Each PSAP shall maintain a Backup PSAP or have an arrangement for backup provided by another PSAP. Agencies may also pool resources and create regional backup centers.
 - (A) The Backup PSAP shall be capable, when staffed, of performing the emergency functions performed at the primary PSAP.
 - (B) The Backup PSAP shall be separated geographically from the primary PSAP at a distance that ensures the survivability of the alternate center.
 - (C) Each PSAP shall develop a formal written plan to maintain and operate the Backup PSAP or if backup is provided by another PSAP a formal written plan that defines the duties and responsibilities of the alternate PSAP.
 - (i) The plan shall include the ability to reroute incoming emergency 911 call traffic to the backup center and to process and dispatch

(b) Power.

- (1) At least two independent and reliable power sources shall be provided, one primary and one secondary; each of which shall be of adequate capacity for operation of the PSAP.
- (2) Power sources shall be monitored for integrity, with annunciation provided in the operations room.
- (3) Primary Power Source. One of the following shall supply primary power:
 - (A) A feed from a commercial utility distribution system;
 - (B) An engine-driven generator installation or equivalent designed for continuous operation, where a person specifically trained in its operation is on duty at all times; or
 - (C) An engine-driven generator installation or equivalent arranged for cogeneration with commercial light and power, where a person specifically

- trained in its operation is on duty or available at all times.
- (4) Secondary Power Source.
- (A) The secondary power source shall consist of one or more standby engine-driven generators.
- (B) Upon failure of primary power, transfer to the standby source shall be automatic.
- (5) A Stored Emergency Power Supply System (SEPSS) shall be provided for telecommunications equipment, two-way radio systems, computer systems, and other electronic equipment determined to be essential to the operation of the PSAP.
- (A) The SEPSS shall be of a class that is able to maintain essential operations long enough to implement the formal Comprehensive Emergency Management Plan.
- (B) The instrumentation required to monitor power shall be remotely annunciated in the operations room.
- (6) Power circuits shall include their associated motors, generators, rectifiers, transformers, fuses, and controlling devices.
- (7) The power circuit disconnecting means shall be installed so that it is accessible only to authorized personnel.
- (8) Surge Arresters otherwise known as Transient Voltage Surge Suppression (TVSS) shall be provided for protection of telecommunications equipment, two-way radio systems, computers, and other electronic equipment determined to be essential to the operation of the PSAP.
- (9) Isolated Grounding System. Telecommunications equipment, two-way radio systems, computers, and other electronic equipment determined to be essential to the operation of the PSAP shall be connected to an isolated grounding system.
- (10) Engine-driven generators shall be sized to supply power for the operation of all functions of the PSAP.
- (A) When installed indoors, engine-driven generators shall be located in a ventilated and secured area that is separated from the PSAP by fire barriers having a fire resistance rating of at least two hours.
- (B) When installed outdoors, engine-driven generators shall be located in a secure enclosure.
- (C) The area that houses an engine-driven generator shall not be used for storage other than spare parts or equipment related to the generator system.
- (D) Fuel to operate the engine-driven generator for a minimum of 24 hours at full load shall be available on site.
- (E) Equipment essential to the operation of the generator shall be supplied with standby power from the generator.
- (F) Generators shall not use the public water supply for engine cooling.
- (11) Uninterruptible Power Supply (UPS) and Battery Systems. A UPS and battery system shall be installed in accordance with local, State, and the Federal safety regulations and be sufficient to prevent power surges from damaging equipment in the PSAP as well as provide power for all essential 911 Emergency Center operations until the backup power source can be fully activated.
- (A) Each UPS shall be provided with a bypass switch that maintains the power connection during switch over and that is capable of isolating all UPS components while allowing power to flow from the source to the load.
- (B) The following UPS conditions shall be annunciated in the operations room:
- (i) Source power failure, overvoltage, and under-voltage;
- (ii) High and low battery voltage; and
- (iii) UPS in bypass mode.
- (C) The UPS and Battery Systems shall be capable of providing power for the PSAP when the Primary Power Source is not functioning but the duration of the outage is not sufficient to activate the Secondary Power Source.

Authority G.S. 62A-46.

09 NCAC 06C .0209 TELEPHONES

- (a) Telephone Receiving Equipment. The provisions of this Rule shall apply to facilities and equipment that receive emergency 911 calls transmitted by means of any voice communications service.
- (b) Equipment and Operations.
- (1) Telephone lines and telephone devices shall be provided as follows:
- (A) A minimum of two 911 emergency telephone lines and 911 emergency telephone devices shall be assigned exclusively for receipt of emergency 911 calls. These lines shall appear on at least two telephone devices within the PSAP.
- (B) Additional 911 emergency telephone lines and 911 emergency telephone devices shall be provided as required for the volume of calls handled.

(C) Additional telephone lines shall be provided for the normal business (non-emergency) use as needed.

(D) At least one outgoing-only line and telephone device shall be provided.

(2) 911 emergency lines and 911 emergency telephone devices will be answered prior to non-emergency telephone lines and non-emergency telephone devices.

(3) When all 911 emergency telephone lines and 911 emergency telephone devices are in use, emergency 911 calls shall hunt to other predetermined telephone lines and telephone devices that are approved by the PSAP.

(4) Calls to the business number shall not hunt to the designated emergency lines.

(5) When a PSAP receives an emergency 911 call for a location or an agency that is not in its jurisdiction, the PSAP shall transfer the call directly to the responsible PSAP. When possible the call data will be transferred with the emergency 911 call. If the call transfer method is not possible, call information shall be relayed by the telecommunicator. The telecommunicator shall remain on the line until it is certain that the transfer has been made and the originating telecommunicator verifies the transfer has been successfully completed by hearing both parties speaking to each other.

(6) All 911 emergency 911 calls shall be recorded.

(c) Circuits/Trunks.

(1) At least two 911 call delivery paths with diverse routes arranged so that no single incident interrupts both routes shall be provided to each PSAP.

(2) Where multiple PSAPs that serve a jurisdiction are not located in a common facility, at least two circuits with diverse routes, arranged so that no singular incident interrupts both routes, shall be provided between PSAPs.

(3) The PSAP shall have sufficient 911 emergency trunk capacity to receive 99.9 percent of all calls during the busiest hour of the average week of the busiest month of the year.

(d) 911 Emergency Number Alternative Routing.

(1) PSAPs shall maintain a written plan as part of the Comprehensive Emergency Management Plan (CEMP) for rerouting incoming calls on 911 emergency lines when the center is unable to accept such calls.

(2) The PSAP shall practice this plan at least once annually.

(3) Where overflow calls to 911 emergency telephone lines and emergency telephone devices are routed to alternative telephone lines and alternative telephone devices within the PSAP, the alternative telephone lines and alternative telephone devices shall be monitored for integrity and recorded as required

by these Rules, and by the Board's standards, policies and procedures.

Authority G.S. 62A-42.

09 NCAC 06C .0210 DISPATCHING SYSTEMS

(a) Fundamental Requirements of Emergency 911 call Dispatching Systems.

(1) An emergency 911 call dispatching system shall be designed, installed, operated, and maintained to provide for the receipt and retransmission of calls.

(2) Telecommunicators who receive emergency 911 calls shall have redundant means within the PSAP premises to dispatch calls.

(3) The failure of any component of one dispatching means shall not affect the operation of the alternative dispatching means and vice versa.

(b) Primary dispatch paths and devices upon which transmission and receipt of emergency 911 calls depend shall be monitored constantly for integrity to provide prompt warning of trouble that impacts operation.

(1) Trouble signals shall actuate an audible device and a visual signal located at a constantly attended location.

(2) The audible alert trouble signals from the fault and failure monitoring mechanism shall be distinct from the audible alert emergency alarm signals.

(3) The audible trouble signal shall be permitted to be common to several monitored circuits and devices.

(4) A switch for silencing the audible trouble signal shall be permitted if the visual signal continues to operate until the silencing switch is restored to the designated normal position.

(5) Where dispatch systems use computer diagnostic software, monitoring of the primary dispatch circuit components shall be routed to a dedicated terminal(s) that meets the following requirements:

(A) It shall be located within the communications center; and

(B) It shall not be used for routine dispatch activities.

(c) The radio communications system shall be monitored in the following ways:

(1) Monitoring for integrity shall detect faults and failures in the radio communications system; and

(2) Detected faults and failures in the radio communications system shall cause audible or visual indications to be provided within the PSAP.

Authority G.S. 62A-42.

**09 NCAC 06C .0211 COMPUTER AIDED
DISPATCHING (CAD) SYSTEMS**

(a) General.

- (1) PSAPs shall use Computer-aided dispatching (CAD) systems. These systems shall conform to the Rules in this Section.
- (2) The CAD system shall contain all hardware and software components necessary for interface with the 911 system.

(b) Secondary Method. A secondary method shall be provided and shall be available for use in the event of a failure of the CAD system.

(c) Security.

- (1) CAD systems shall utilize different levels of security to restrict unauthorized access to sensitive and critical information, programs, and operating system functions.
- (2) The PSAP shall have the ability to control user and supervisor access to the various security levels.
- (3) Physical access to the CAD system hardware shall be limited to authorized personnel as determined by the PSAP.
- (4) Operation of the CAD system software shall be limited to authorized personnel by log-on/password control, workstation limitations, or other means as required by the PSAP.
- (5) The PSAP shall provide network isolation necessary to preserve bandwidth for the efficient operation of the CAD system and processing of emergency 911 calls.
 - (A) The CAD system shall provide measures to prevent denial-of-service attacks and any other undesired access to the CAD portion of the network.
 - (B) The CAD system shall employ antivirus software where necessary to protect the system from infection.

(d) Emergency 911 call Data Exchange.

- (1) The CAD system should have the capability to allow emergency 911 call data exchange between the CAD system and other CAD systems.
- (2) The CAD system should have the capability to allow data exchange between the CAD system and other systems.

(e) CAD Capabilities.

- (1) The installation of a CAD system in emergency service dispatching shall not negate the requirements for a secondary dispatch circuit.
- (2) The PSAP shall provide software that is for or part of the CAD system that will provide data entry; resource recommendations, notification, and tracking; store records relating to all emergency 911 calls and all other calls for service and status changes; and track those resources before, during, and after emergency calls, preserving records of those emergency 911 calls and status changes for later analysis.

(A) The PSAP shall put in place safeguards to preserve the operation, sustainability, and maintainability of all elements of the CAD system in the event of the demise or default of the CAD supplier.

(B) The system applications shall function under the overall control of a standard operating system that includes support functions and features as required by the PSAP.

(f) Computer Aided Dispatch (CAD) Performance.

(1) The CAD system shall recommend units for assignment to calls.

(A) The CAD system shall ensure that the optimum response units are selected.

(B) The CAD system shall allow the telecommunicator to override the CAD recommendation for unit assignment.

(C) The CAD system shall have the ability to prioritize all system processes so that emergency operations take precedence.

(2) The CAD system shall detect errors, faults or failures.

(A) The CAD system shall automatically perform all required reconfiguration as a result of errors, faults or failures.

(B) The CAD system shall queue a notification message to the supervisor and any designated telecommunicator positions.

(3) Under all conditions, the CAD system response time shall not exceed two seconds, measured from the time a telecommunicator completes a keyboard entry to the time of full display of the system response at any position where a response is required.

(4) The CAD system shall be available and fully functional 99.95 percent of the time, excluding planned maintenance.

(5) The CAD system shall include automatic power-fail recovery capability.

(g) Backup. The CAD system shall include a data backup system, utilizing either removable media or independent disk storage arrays dedicated to the backup task.

(h) Redundancy.

(1) The failure of any single component shall not disable the entire system.

(A) The CAD system shall provide automatic switchover in case of failure of the required system component(s).

(B) Manual intervention by telecommunicators or others shall not be required.

(C) Notwithstanding automatic switchover, the CAD system shall

provide the capability to manually initiate switchover.

(D) CAD Systems that utilize server and workstation configuration shall accomplish automatic switchover by having a duplicate server available with access to all the data necessary and required to restart at the point where the primary server stopped.

(E) CAD Systems that utilize distributed processing, with workstations in the operations room also providing the call processing functions, shall be considered to meet the requirements of automatic switchover, as long as all such workstations are continually sharing data and all data necessary to pick up at the point where the failed workstation stopped are available to all other designated dispatch workstations.

(2) Monitoring for Integrity.

(A) The system shall continuously monitor the CAD interfaces for equipment failures, device exceptions, and time-outs.

(B) The system shall, upon detection of faults or failures, send an appropriate message consisting of visual and audible indications.

(3) The system shall provide a log of system messages and transactions.

(4) A spare display screen, pointing device, and keyboard shall be available in the PSAP for immediate change-out.

Authority G.S. 62A-42.

09 NCAC 06C .0212 TESTING

(a) General.

(1) Tests and inspections of all systems shall be made at the regular intervals.

(2) All equipment shall be restored to operating condition after each test or emergency 911 call for which the equipment functioned.

(3) Where tests indicate that trouble has occurred anywhere on the system, one of the following shall be required:

(A) The telecommunicator shall take appropriate steps within their scope of training to repair the fault.

(B) If repair is not possible, action shall be taken to isolate the fault and to notify the person(s) responsible for repair/maintenance.

(4) Procedures that are required by other parties and that exceed the requirements of these rules shall be permitted.

(5) The requirements of this Section shall apply to both new and existing systems.

(b) Acceptance Testing.

(1) New equipment shall be provided with operation manuals that cover all operations and testing procedures.

(2) All functions of new equipment shall be tested in accordance with the manufacturers' specifications and accepted PSAP practices before being placed in service.

(c) Power. Emergency and standby power systems shall be tested in accordance with the manufacturer's specifications and accepted business practices.

Authority G.S. 62A-42.

09 NCAC 06C .0213 RECORDS

(a) General. Complete records to ensure operational capability of all system functions shall be maintained for a minimum of five years.

(b) Acceptance Test Records and As-Built Drawings. After completion of acceptance tests, the following shall be provided:

(1) A set of reproducible, as-built installation drawings;

(2) Operation and maintenance manuals;

(3) Written sequence of operation; and

(4) Results of all operational tests and values at the time of installation.

(c) Electronic Records.

(1) For software-based systems, access to site-specific software shall be provided to the PSAP.

(2) The PSAP shall be responsible for maintaining the records for the life of the system.

(3) Paper or electronic media shall be permitted.

(d) Training Records. Training records shall be maintained for each employee as required by the PSAP.

(e) Operational Records.

(1) Call and dispatch performance statistics shall be compiled and maintained.

(2) Statistical analysis for call and dispatch performance measurement shall be done monthly and compiled over a one year period. A management information system (MIS) program shall track incoming emergency 911 calls and dispatched emergency 911 calls and provide real-time information and strategic management reports.

(3) Records of the following, including the corresponding dates and times, shall be kept:

(A) Test, emergency 911 call, and dispatch signals;

(B) Circuit interruptions and observations or reports of equipment failures; and

(C) Abnormal or defective circuit conditions indicated by test or inspection.

(f) Maintenance Records.

(1) Records of maintenance, both routine and emergency, shall be kept for all emergency 911

- call receiving equipment and emergency 911 call dispatching equipment.
- (2) All maintenance records shall include the date, time, nature of maintenance, and repairer's name and affiliation.

Authority G.S. 62A-42.

SECTION .0300 – COMMERCIAL MOBILE RADIO SERVICE (CMRS) PROVIDERS

09 NCAC 06C .0301 REGISTRATION OF CMRS SERVICE PROVIDERS

- (a) CMRS Service Providers, or any reseller of any commercial mobile radio service, which receive authority to serve any area within the State of North Carolina, shall register within 30 calendar days of receiving authority to operate, or of beginning operations, in North Carolina.
- (b) Such registration shall be filed with the Commission's Executive Secretary and shall include the following information:
- (1) Legal name of CMRS Service Provider;
 - (2) All business names used by the CMRS Service Provider in North Carolina;
 - (3) Name, title, mailing address, telephone number, fax number, and email address (if available) of the person to be contacted regarding 911 matters;
 - (4) A listing of all areas in which the CMRS Service Provider is authorized to serve any portion of North Carolina; and
 - (5) The FCC filer ID and FCC Registration Number of the CMRS Service Provider.
- (c) Changes to any of the above-listed information shall be filed with the Board's Executive Director within 30 calendar days of the effective date of such change(s). This filing requirement includes providing notice to the Board's Executive Director of any and all mergers, divestitures, acquisitions, or other similar actions affecting North Carolina service areas.

Authority G.S. 62A-42; 62A-45.

09 NCAC 06C .0302 CMRS SERVICE PROVIDER REIMBURSEMENT PLANS

- (a) Any CMRS Service Provider desiring reimbursement of eligible expenses from the 911 Fund must prepare and submit a detailed cost recovery plan to the Board. Plans shall be reviewed by Board staff and any committee established by the Board for such purpose. Confidential information shall not be publicly disclosed. To provide the Board adequate information to make an informed decision, CMRS Service Providers seeking reimbursement shall:
- (1) Upon receipt of a request for wireless E911 service from a primary PSAP, the CMRS Service Provider will develop an implementation plan (the Plan, as described in Paragraph (b) of this Rule for that PSAP, or the appropriate service area if the CMRS Service Provider serves more than one PSAP; and

- (2) The relevant portions of the Plan, excluding confidential information, will be presented to the requesting PSAP. Upon acceptance of the Plan by the PSAP, the CMRS Service Provider will present the Plan to the Board for approval.
- (b) The Cost Recovery Plan shall:
- (1) Describe the chosen technology or technologies used for delivery of calls to the PSAP (SS7 solutions, LEC solution, third party service bureau, etc.);
 - (2) Describe the architecture to implement the chosen technology(s) in areas or for PSAPs that have requested wireless or enhanced wireless 911 services, within the CMRS Service Provider's service areas, or statewide, as may be appropriate and relevant to the cost recovery plan. Indicate all counties and/or municipalities of the state in which the CMRS Service Provider provides wireless E911 service and where deployment is expected. Indicate areas of the state, if any, where deployment has already occurred;
 - (3) List the known cost elements for the deployment, including non-recurring and recurring charges. Provide statewide costs, if possible;
 - (4) Describe personnel costs (estimated number of hours and rates) and actual or proposed third party service rates, if any;
 - (5) If cost recovery is proposed on a monthly "per subscriber" rate, indicate the amount and describe the manner in which the rate was calculated;
 - (6) Include an accounting of the estimated total of service charges that the CMRS Service Provider expects to remit to the Board as of the anticipated date of the first sworn invoice. Include an estimate of the anticipated monthly service charge remittances for the subsequent 12 months and the anticipated sworn invoices for the same period.

- (c) If any CMRS Service Provider believes that it can justify an exception to these CMRS Service Provider 911 Recovery Procedures or to any decision of the 911 Board pursuant to these procedures, it may submit its request and documentation supporting its request to the Board at least 15 days prior to the Board's next scheduled meeting. The Board will consider the exception request at its next scheduled meeting and shall convey its decision in writing to the requesting CMRS Service Provider. Note: A list of one-time and recurring costs include: Trunk costs comprising Trunking and Connection fee to 911 Selective Router (per DSO); engineering and network costs comprising facilities; T-1s selective router ports; routing charges; operations; engineering; switch upgrades; research and development; network design; test plan development; and database costs comprising P-ANI administration; database management and reporting/software.

Authority G.S. 62A-45.

09 NCAC 06C .0303 COST RECOVERY PLAN REVIEW

(a) The Board may establish a committee to review CMRS Service Providers' cost recovery plans.

(b) Any committee will include the Board's Executive Director, chairperson (or his or her designee), the Board's auditor or financial advisor, and one or more Board members who are familiar with the technical aspects of Enhanced 911 Systems. Board members representing CMRS Service Providers cannot be members of this committee.

(1) The initial plan presented to the Cost Recovery committee is intended to allow for the recovery of a CMRS Service Provider's cost on a one-time basis and/or recurring (monthly) basis. The Board may create and periodically revise a list of permitted expenditures consistent with G.S. 62A-45.

(2) The committee will review the proposed cost recovery plan to determine whether the cost and expense items are commercially reasonable.

(3) The committee will refer the proposed cost recovery plan to the Board with a recommendation that it either be approved or rejected. If the recommendation is for rejection, the committee will provide the reason, in writing, to both the Board and the CMRS Service Provider. The subcommittee shall indicate whether the Plan complies with the limitations of G.S. 62A-45(a).

(c) After review by the committee, the CMRS Service Provider will present the plan to the Board at its next regular meeting. Information deemed confidential or proprietary by a CMRS Service Provider as described in G.S. 62A-52 shall not be presented in a public meeting. The Board will not approve reimbursement of any amount in excess of the actual cost of the CMRS Service Provider in providing Enhanced 911. The Board will vote on the plan and provide the CMRS Service Provider, in writing and within five working days, either approval or denial. If rejected, the Board will provide documented reasons. The CMRS Service Provider may revise and resubmit its plan at subsequent meetings.

(d) Once a cost recovery plan is approved, the CMRS Service Provider may file claims for reimbursement. One-time costs, if any, will be reimbursed upon submission of sworn invoices. The amount of reimbursement that the CMRS Service Provider is entitled to receive on a recurring costs basis may be calculated as follows, or by other method approved by the Board upon request of a CMRS Service Provider:

(1) By multiplying the number of CMRS subscribers receiving wireless Enhanced 911 service as reported by the CMRS Service Provider prior to its request for reimbursement, by the amount authorized per subscriber for cost recovery by the Board. CMRS Service Providers will be required to report their subscriber counts no less than once per quarter. The dollar amount paid to the CMRS Service Provider will vary based on total number of

subscribers reported by the CMRS Service Provider; or

(2) By submission of the actual or estimated recurring costs incurred by the CMRS Service Provider and approved by the board. If the estimated costs are submitted, these costs must be corrected by comparison with actual costs not less than annually; or

(3) By a combination of the methods above.

(e) The Board may require periodic review and approval of a CMRS Service Provider's plan, but no more often than once per calendar year. After the initial one-year approval period has expired, presentation of a plan for re-approval may be in writing or in person if the Cost Recovery Subcommittee or Board requires.

(f) Once a plan is approved, changes to the plan must be submitted in writing and approved by the Board. A CMRS Service Provider may request an adjustment of the reimbursement rate at any time upon written notice to the Board. Proper justification will be required.

Authority G.S. 62A-45.

09 NCAC 06C .0304 CMRS SERVICE PROVIDER REIMBURSEMENT

(a) Sworn invoices must be attested to by an authorized agent of the CMRS Service Provider. Only costs which comport with an approved Plan are eligible for cost recovery. Costs may be the actual incurred costs of the CMRS Service Provider, an estimate of the incurred costs, or the approved rate per subscriber multiplied by the actual subscriber count. If estimated costs are used, CMRS Service Provider must annually true up its costs to ensure that over-recovery does not occur. CMRS Service Providers must maintain records to demonstrate that costs were actually incurred as invoiced. Internal costs (engineering time, facilities, proportionate share of software, etc.) must be supported by reasonable documentation. All costs are subject to audit by the Board.

(b) A CMRS Service Provider may be reimbursed for actual one-time costs incurred for their selected E911 solution prior to the Board's approval of a CMRS Service Provider's Cost Recovery Plan upon authorization of the Board's Chair and Executive Director. As a condition of such reimbursement, the CMRS Service Provider must sign an agreement stating that if a mistake in reimbursement is made, the CMRS Service Provider will refund any amounts determined by the board to be mistakenly distributed.

(c) CMRS Service Providers shall not be reimbursed in excess of actual and approved costs.

Authority G.S. 62A-45.

09 NCAC 06C .0305 CMRS SERVICE PROVIDER REPORTING

(a) CMRS Service Providers shall submit quarterly reports to the Board that identify or graphically depict areas of the state in which wireless or enhanced wireless 911 services have been implemented and indicating the schedule, if known, for

implementing such services in the CMRS Service Providers' remaining service areas.

(b) Each CMRS Service Provider shall file an annual report with the Board, by February 15th of each year that provides total customer count as of December 31 of the preceding year. This annual report, as well as the required monthly reports, shall be subject to verification by the Board.

Authority G.S. 62A-45; 62A-51.

09 NCAC 06C .0306 REMITTANCE OF SERVICE CHARGES

(a) Service Providers shall remit service charges to the 911 Board:

911 Board
Information Technology Services
P.O. Box 17209
Raleigh, NC 27619-7209

(b) Service Providers may remit funds by check payable to the Board, or by electronic funds transfer upon satisfaction of transaction processing requirements.

(c) Voice communications service providers that assess the service charge to resellers of their services shall remit such service charges to the Board.

(d) The Office of Information Technology Services (ITS) Fiscal Services will act as the receiving agent for the Service Providers' monthly reimbursements and as the administrator of the 911 Fund.

(e) Funds will be deposited in accordance with the State Cash Management Plan.

Authority G.S. 62A-43; 147-86.11.

09 NCAC 06C .0307 PREPAID WIRELESS SERVICE

(a) A Reseller of wireless services is not responsible for collecting and remitting the service charge if such Reseller's voice communication service supplier remits the appropriate service charges for the wireless services resold by such Reseller.

(b) A Reseller of wireless services shall give notice to the Board if the service charges will be remitted to the Board by such Reseller's voice communication service supplier(s). Notice shall include the identity of the voice communication service supplier(s), the contract(s) or other document(s) together with information as may be necessary or proper to calculate the appropriate service charge, and such other information as may be required by the Board.

(c) A Reseller of wireless services that does not remit service charges is not eligible for reimbursement under G.S. 62A-45.

(d) Contract or other information submitted to the Board may be proprietary under G.S. 62A-52. Any confidential information shall be marked accordingly prior to delivery to the Board.

Authority G.S. 62A-43.

SECTION .0400 – GRANT FUND

09 NCAC 06C .0401 PSAP GRANTS

(a) After establishing a Grant Account, the Board shall publish a notice of grant availability to primary PSAPs and governing entities operating primary PSAPs.

(b) Any primary PSAP or the governing entity operating a primary PSAP may apply for a grant.

(c) Each applicant applying for grant funds shall complete and submit an application, in the form prescribed by the Board, which is incorporated herein by reference and which may be obtained from the Board office at the following address:

Executive Director
c/o NC Office of Information Technology Services
P.O. Box 17209
Raleigh, NC 27619-7209

(d) The Board will accept grant applications as stated in the Board's published notice of grant availability. Grant applications submitted that do not conform to the Board's published requirements may be considered at the discretion of the Board, provided that Grant funds are not exhausted by conforming grant applications and non-conforming grant applications satisfy G.S. 62A-47.

(e) Applications for grants for each item over twenty-five thousand dollars (\$25,000) must be accompanied by at least three written competitive quotes. The Board will compare the three quotes to any existing state contract in order to determine appropriate funding.

Authority G.S. 62A-47.

09 NCAC 06C .0402 PSAP GRANTS FOR CONSTRUCTION

(a) General.

(1) As a condition for receipt of a grant from the North Carolina 911 Board for any type of new construction or for a renovation of an existing structure and/or facility incorporated into the construction agreement(s) shall be the following requirements.

(2) The requirements in this Section, PSAP Grants for Construction, shall apply only to new construction and construction renovations funded by the North Carolina 911 Board. Existing PSAP facilities are encouraged to meet these rules, but are not required to meet these Rules.

(b) HVAC.

(1) HVAC systems shall be designed to maintain temperature and relative humidity within limits specified by the manufacturer of the equipment critical to the operation of the PSAP.

(2) HVAC systems shall be independent systems that serve only the PSAP.

(3) HVAC system intakes for fresh air shall be arranged to minimize smoke intake from a fire inside or outside the building and to resist intentional introduction of irritating, noxious, toxic, or poisonous substances into the HVAC system.

(4) HVAC emergency controls shall be provided in the operations room to permit closing of outside air intakes.

(5) Backup HVAC systems shall be provided for the operations room and other spaces housing electronic equipment essential to the operation of the PSAP.

(6) HVAC systems shall be designed so that the PSAP is capable of uninterrupted operation with the largest single HVAC unit or component out of service.

(c) Fire Protection.

(1) The PSAP and spaces adjoining the PSAP shall be provided with an automatic fire detection, alarm, and notification system.

(2) The alarm system shall be monitored in the operations room.

(3) Operation of notification appliances shall not interfere with communications operations.

(4) Electronic computer and data processing equipment shall be protected in accordance with the manufacturer's recommended specifications, and common business practices.

(d) Security.

(1) The PSAP and other buildings that house essential operating equipment shall be protected against damage from vandalism, terrorism, and civil disturbances.

(2) Entry to the PSAP shall be restricted to authorized persons.

(3) Entryways to the PSAP that lead directly from the exterior shall be protected by a security vestibule.

(4) Door openings shall be protected by listed, self-closing fire doors that have a fire resistance rating of not less than 1 hour.

(5) Where a PSAP has windows, the following requirements shall apply:

(A) Windows shall be a minimum of 4 ft (1.2 m) above floor level.

(B) Windows shall be rated for bullet resistance to Level 4 as defined in UL 752, Standard for Safety Bullet-Resistant Equipment.

(C) Windows that are not bullet resistant shall be permitted provided that they face an area that cannot be accessed or viewed by the general public.

(D) Windows that are required to be bullet resistant shall be configured so that they cannot be opened.

(E) Walls with bullet-resistant windows shall be required to provide the same level of protection as the window.

(6) Means shall be provided to prevent unauthorized vehicles from approaching the building housing the PSAP to a distance of no less than 82 ft (25 m).

(7) As an alternative to prevent unauthorized vehicles, unauthorized vehicles shall be permitted to approach closer than 82 ft (25 m)

if the building has been designed to be blast resistant.

(e) Lighting.

(1) Artificial lighting shall be provided to enable personnel to perform their assigned duties.

(2) Emergency Lighting. The PSAP shall be equipped with emergency lighting that shall illuminate automatically immediately upon failure of normal lighting power.

(3) Illumination levels shall be sufficient to allow all essential operations.

(f) Circuit Construction and Arrangement.

(1) As built drawings shall be provided.

(2) Circuits shall not pass over, pass under, pass through, or be attached to buildings or property that is not owned by, or under the control of, the PSAP or the entity that is responsible for maintaining the system.

(3) Emergency 911 call instruments installed in buildings not under control of the PSAP shall be on separate dedicated circuits.

(4) The combination of public emergency services communication and signaling (C&S) circuits in the same cable with other circuits shall comply with the following:

(A) Other municipally controlled C&S circuits shall be permitted.

(B) Circuits of private signaling organizations shall be permitted only by permission of the PSAP.

(g) Underground Cables.

(1) Underground communication and signal cables shall be brought above ground only at points where the PSAP has determined there is no potential for mechanical damage or damage from fires in adjacent buildings.

(2) All cables that are installed in manholes, vaults, and other enclosures intended for personnel entry shall be racked and marked for identification.

(3) Cable splices, taps, and terminal connections shall be located only where accessible for maintenance and inspection and where no potential for damage to the cable due to falling structures or building operations exists.

(4) Cable splices, taps, and terminal connections shall be made to provide and maintain levels of conductivity, insulation, and protection that are at least equivalent to those afforded by the cables that are joined.

(h) Aerial Cables and Wires. Protection shall be provided where cables and wires pass through trees, under bridges, and over railroads, and at other locations where damage or deterioration is possible.

(i) Wiring Inside Buildings.

(1) At the PSAP shall extend to the operations room in conduits, ducts, shafts, raceways, or overhead racks and troughs of a construction

type that protects against fire and mechanical damage.

- (2) Cables or wiring exposed to fire hazards shall be protected from the hazard.
- (3) At the PSAP, cable terminals and cross connecting facilities shall be located either in or adjacent to the operations room.
- (4) All wired dispatch circuit devices and instruments whose failure can adversely affect the operation of the system shall be mounted in accordance with the following:
 - (A) On noncombustible bases, pedestals, switchboards, panels, or cabinets; and
 - (B) With mounting designed and constructed so that all components are readily accessible.

(j) Circuit Protection.

- (1) All surge arresters shall be connected to earth ground.
- (2) All protective devices shall be accessible for maintenance and inspection.
- (3) Wired surge arresters shall be designed and listed for the specific application.
- (4) Each conductor that enters a PSAP from a partial or entirely aerial line shall be protected by a surge arrester.

(k) Grounding.

- (1) Sensitive electronic equipment determined by the PSAP to be essential to the operation of telecommunications and dispatching systems shall be grounded.
- (2) Listed isolated ground receptacles shall be provided for all cord-and-plug-connected essential and sensitive electronic equipment.
- (3) Unused wire or cable pairs shall be grounded.
- (4) Ground connection for surge suppressors shall be made to the isolated grounding system.

(l) Access.

All equipment shall be accessible for the purpose of maintenance.

Authority G.S. 62A-47; 62A-42.

09 NCAC 06C .0403 GRANT AGREEMENTS

- (a) Grant agreements shall comply with requirements of G.S. 143C and administrative rules.
- (b) Unless otherwise determined by the Board, grant agreements will have a term not to exceed one year, and will begin on 1 July of the year awarded.

Authority G.S. 62A-42; 62A-47; 143C-6-22; 143C-6-23.

09 NCAC 06C .0404 GRANT APPLICATION APPROVAL

- (a) The Board will approve grants for leased equipment only if the applicant can demonstrate that a lease agreement would be financially beneficial to the grant program.
- (b) Priorities for awarding of grants will be determined by the Board.

Authority G.S. 62A-47.

09 NCAC 06C .0405 GRANT FUNDS

- (a) Grant funds shall be deposited in a bank account maintained by the applicant, and each grant shall be assigned a unique accounting code designation for deposits, disbursements, and expenditures. All Grant funds in the account shall be accounted for separately from other grantee funds. Grant funds may be used only between the beginning and ending dates of the grant, unless an extension is requested and authorized by the Board.
- (b) Grant funds are not transferable to any other entity. If equipment purchased using grant funds is sold or transferred within three years of the end of the grant period, the grantee must return the grant funds to the Board on a pro-rata basis.

Authority G.S. 62A-47.

09 NCAC 06C .0406 GRANTEE REPORTS

Grantees must submit reports to the Board summarizing expenditures of the grant funds and the activities supported by the grant funds. Unless otherwise stated in a Grant Agreement, the reports are due 15 days after the end of the reporting periods, which end September 30, December 31, March 31, and June 30. A final report must be submitted to the Board no more than 45 days after completion of the grant, detailing the activities, expenditures of the funds, and the ways in which the needs identified in the grant application were met. The final report must be accompanied by supporting documentation for all expenditures of the grant funds.

Authority G.S. 62A-47; 143C-6-22; 143C-6-23.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Child Care Commission intends to amend the rules cited as 10A NCAC 09 .2902 and .2903.

Link to agency website pursuant to G.S. 150B-19.1(c):
<http://ncchildcare.dhhs.state.nc.us/general/whatsnew.asp>

Proposed Effective Date: *November 1, 2015*

Public Hearing:

Date: *August 10, 2015*

Time: *1:00 p.m.*

Location: *Nature Research Center, William G. Ross Environmental Conference Center, 4th floor, 121 W Jones St, Raleigh, NC*

Reason for Proposed Action: *The NC Child Care Commission proposes to amend rule 10A NCAC 09 .2902 as the result of a rule-making petition received from the NC Association of Directors of Development Day Centers (NCADD). The petitioner requests that a requirement be added to Rule .2902 to state the hours of operation for Developmental Day Centers (DDC) as a*

minimum of eight (8) hours per day, five (5) days per week, and twelve (12) months per year. Rule 10A NCAC 09.2903 is referenced in the petition but no changes were requested by the petitioner. However, since this rule also refers to the length of time a DDC must operate, the Commission has included recommended changes to it to correspond with the changes requested by the petitioner in Rule .2902.

Note: Rule .2902 was submitted pursuant to a rule-making petition and the NC Child Care Commission wishes to solicit comments regarding the potential impact of the proposed rule language. The commission has not taken a position as to whether the rule should be adopted.

Comments may be submitted to: Dedra Alston, 2201 Mail Service Center, Raleigh, NC 27699-2201, phone (919) 527-6502, fax (919) 715-0970, email Dedra.Alston@dhhs.nc.gov

Comment period ends: August 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**

~~(d)~~(f) The center shall comply with the staff-child ratio and maximum group size as follows:

AGE	RATIO STAFF/CHILDREN	MAXIMUM GROUP SIZE
0-12 Months	1/4	8
1 to 2 Years	1/5	10
2 Years and Older	1/6	18

~~(e)~~(g) A minimum of two staff members shall be on site at all times while children are in attendance at the facility.

~~(f)~~(h) A child care center may appeal the removal of certification status in accordance with G.S. 110-94; however, an appeal does not preclude a Local Education Agency from removing contracted

☐ **No fiscal note required by G.S. 150B-21.4**

CHAPTER 09 – CHILD CARE RULES

SECTION .2900 - DEVELOPMENTAL DAY SERVICES

10A NCAC 09 .2902 LICENSE

(a) Developmental Day services shall be available for preschool children for a minimum of 8 hours per day, 5 days per week, and 12 months per year except in the following circumstances:

- (1) In counties where no community-based Developmental Day Center operates, a Developmental Day program operated by the Local Education Agency may provide services for the 10 month school year (as defined by the State Board of Education).
- (2) If a Community-Based Developmental Day center opens in a county where Developmental Day services are only provided by a Developmental Day program operated by the Local Education Agency, the Developmental Day program operated by the Local Education Agency may continue to provide services for the 10 month school year until the end of the following school year. At the end of the following school year, all Developmental Day services in the county shall be available as described in Paragraph (a) of this Rule.

(b) For purposes of this Rule, a "Community-Based Developmental Day Center" means a Developmental Day Center not operated by the Local Education Agency.

~~(a)~~(c) Developmental Day Centers shall maintain a four or five star rated license with an average score of 5.0 on the appropriate environment rating scale in each classroom evaluated.

~~(b)~~(d) A child care center with a temporary license may receive certification status if all rules in this Section are met, except for Paragraph ~~(a)~~(c) of this Rule, and an application for a two to five star rated licensed has been submitted. At the end of the temporary license period the child care center must receive a four or five star rated license as specified in Paragraph ~~(a)~~(c) of this Rule. Failure to receive a four or five star rated license shall result in the removal of certification status as a Developmental Day Center.

~~(e)~~(e) The license shall indicate certification as a Developmental Day Center.

children from the program before a final decision on the appeal is reached.

Authority G.S. 110-85; 110-88(14).

10A NCAC 09 .2903 STAFF QUALIFICATIONS

(a) Each center serving children ages birth to three years shall have a minimum of one staff who holds an Infant Toddler Family Specialist certification issued from the North Carolina Division of Public Health; Birth-through-Kindergarten (B-K) Standard Professional I licensure; or provisional licensure in B-K issued from the Department of Public Instruction. This staff shall provide program oversight and supervision for any caregivers in classrooms with children ages birth to three years.

(b) In accordance with G.S. 115C-84.2(a)(1), during the 185 day school year (as defined by the State Board of Education), each child aged three years old and older on or before the initial school entry date specified in G.S. 115C-364 (school entry date) shall be served in a classroom with at least one lead teacher who holds a B-K Standard Professional I licensure or provisional licensure in B-K, or Preschool Add-on licensure issued from the Department of Public Instruction.

(c) Children who turn three years old after the school entry date who are identified as a child with a disability as evidenced by an Individualized Education Program (IEP), shall be served in a classroom with a B-K licensed teacher.

(d) ~~During the time when school is not in session, For centers operating for 12 months as specified by Rule .2902(a) of this Section, during the two additional months of operation~~ each group of preschool children shall have at least one lead teacher with a minimum of an A.A.S. degree in early childhood education or child development, or an A.A.S. degree in any major with 12 semester hours in early childhood education or child development.

(e) For centers operating for 10 months as specified by Rule .2902(a), during ~~During~~ the 10 month school year, (as defined by the State Board of Education), each group of school-age children shall have at least one teacher who holds State certification as a Special Education Teacher. ~~During the time when school is not in session, For centers operating for 12 months as specified by Rule .2902(a) of this Section, during the two additional months of operation~~ each group of school-age children shall have at least one teacher who has completed at least two semester hours of school-age care related coursework and has completed or is enrolled in at least two additional semester hours of school-age related coursework.

(f) Center administrators shall have a Level III North Carolina Early Childhood Administration Credential and two years of verifiable work experience with children with developmental delays or disabilities.

Authority G.S. 110-85; 110-88(14).

TITLE 14B – DEPARTMENT OF PUBLIC SAFETY

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Public Safety intends to amend the rules cited as 14B NCAC 13 .0102, .0201, .0202 and repeal the rule cited as 14B NCAC 13 .0203.

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

Proposed Effective Date: *October 1, 2015*

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice): If a public hearing is demanded, interested persons can contact William Polk at 4201 Mail Service Center, Raleigh, NC 27699-4201 or email will.polk@ncdps.gov.*

Reason for Proposed Action: *The amendment to the rules is to reflect changes made to the text of the State Capitol Police enabling legislation when it was moved from the Department of Crime Control and Public Safety to the Department of Public Safety. There is a need to repeal the rule for State Parking lots, because that section dates back to when the State Capitol Police were under the jurisdiction of the Department of Administration.*

Comments may be submitted to: *William Polk, 4201 Mail Service Center, Raleigh, NC 27699-4201, email will.polk@ncdps.gov*

Comment period ends: *August 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

CHAPTER 13 – STATE CAPITOL POLICE

SECTION .0100 – GENERAL PROVISIONS

14B NCAC 13 .0102 AUTHORITY

Police officers of State Capitol Police are appointed as special police officers and have the same power of arrest as the police officers of the City of Raleigh. Such authority may be exercised within the same territorial jurisdiction as exercised by the police officers of the City of Raleigh, and in addition thereto the authority of a deputy sheriff may be exercised on property owned,

leased, or maintained by the State located in the County of Wake, in the City of Raleigh and on state property located in Wake County. These Police Officers receive the minimum training as required by Criminal Justice Training and Standards Council Commission and are certified as law enforcement officers.

Authority G.S. 143B-602; 143B-91.

SECTION .0200 - FUNCTIONS

14B NCAC 13 .0201 ARRESTS

Any time an arrest is made, the following procedures will be followed:

- (1) The arresting officer must identify himself, or be clearly identified as a law enforcement officer;
- (2) Inform the individual that he is under arrest;
- (3) Inform the arrestee of the ~~cause; charge or charges;~~
- (4) ~~Read the individual his rights;~~
- (5)(4) Transport the arrestee to a judicial official the county magistrate's office located in the Wake County Courthouse for booking; booking unless the arrestee is released subsequent to a summons or citation to appear in court; Complete the commitment papers, warrant and establish a trial date;
- (6)(5) ~~Return to office and complete report~~ Complete report(s) of arrest.

Authority G.S. 143B-602; 143B-911.

14B NCAC 13 .0202 TRAFFIC COLLISIONS

All traffic ~~accidents collisions~~ occurring on state property must be reported to State Capitol Police. All ~~accidents collisions~~ will be investigated. Those ~~accidents collisions~~ estimated to have damage over ~~four hundred one thousand dollars (\$400.00) (\$1000.00)~~ will be reported to Division of Motor Vehicles by the investigating agency. The reports of those ~~accidents collisions~~ with damage less than ~~four hundred one thousand dollars (\$400.00) (\$1000.00)~~ and ~~not involving death or personal injury~~ will be filed with State Capitol Police. ~~Copies of accident reports will be furnished to individuals involved and their insurance companies upon request.~~

Authority G.S. 143B-602; 143B-911.

14B NCAC 13 .0203 STATE PARKING LOTS

~~The rules and regulations adopted by the Council of State governing state parking lots will be enforced by this department. The issuing of warning tickets, citations and the towing of illegally parked vehicles are means used to enforce those rules and regulations. All state parking lots are patrolled by mobile units.~~

Authority G.S. 143-340(21),(22); 01 NCAC 04A.

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Environmental Management Commission intends to amend the rules cited as 15A NCAC 02D .1902 and .1903.

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

Proposed Effective Date: *These Rules shall become effective as provided in G.S. 150B-21.3(b1) as though 10 or more written objections had been received as provided by G.S. 150B-21.3(b2). Section 24(d) of S.L. 2014-120.*

Public Hearing:

Date: July 21, 2015

Time: 3:00 p.m.

Location: Ground Floor Hearing Room (Rm. G19), Archdale Building, 512 N. Salisbury Street, Raleigh, NC 27604

Reason for Proposed Action: *Amendments to Rule 15A NCAC 02D .1903, Open Burning without an Air Quality Permit, and 02D .1902, Definitions, are proposed to incorporate requirements of Session Law 2014-120, Section 24, which allows residential open burning of logs and stumps in addition to the already permissible residential open burning of leaves, tree branches, or yard trimmings under the conditions specified in the rule and specifies that burning of logs and stumps shall not be considered to create a nuisance.*

The amendments to Rule 02D .1902, Definitions, remove the definition of the term "Nuisance" from the list of definitions that apply to the rules in Section .1900, Open Burning, for consistency with the amendments to implement S.L 2014-120.

Comments may be submitted to: Ms. Joelle Burleson, Division of Air Quality, 1641 Mail Service Center, Raleigh, NC 27699-1641, phone (919) 707-8720, fax (919) 707-8720, email daq.publiccomments@ncdenr.gov

Comment period ends: August 14, 2015

Fiscal impact (check all that apply).

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

CHAPTER 02 – ENVIRONMENTAL MANAGEMENT

SUBCHAPTER 02D – AIR POLLUTION CONTROL REQUIREMENTS

SECTION .1900 – OPEN BURNING

15A NCAC 02D .1902 DEFINITIONS

For the purpose of this Section, the following definitions apply:

- (1) "Air Curtain Burner" means a stationary or portable combustion device that directs a plane of high velocity forced draft air through a manifold head into a pit or container with vertical walls in such a manner as to maintain a curtain of air over the surface of the pit and a recirculating motion of air under the curtain.
- (2) "Air Quality Action Day Code 'Orange' or above" means an air quality index greater than 100 as defined in 40 CFR Part 58, Appendix G.
- (3) "Air quality forecast area" means for:
 - (a) Asheville air quality forecast area: Buncombe, Haywood, Henderson, Jackson, Madison, Swain, Transylvania, and Yancey Counties;
 - (b) Charlotte air quality forecast area: Cabarrus, Gaston, Iredell South of Interstate 40, Lincoln, Mecklenburg, Rowan, and Union Counties;
 - (c) Hickory air quality forecast area: Alexander, Burke, Caldwell, and Catawba Counties;
 - (d) Fayetteville air quality forecast area: Cumberland and Harnett Counties;
 - (e) Rocky Mount air quality forecast area: Edgecombe and Nash Counties;
 - (f) Triad air quality forecast area: Alamance, Caswell, Davidson, Davie, Forsyth, Guilford, Randolph, Rockingham, and Stokes Counties; and
 - (g) Triangle air quality forecast area: Chatham, Durham, Franklin, Granville, Johnston, Person, Orange, Vance, and Wake Counties.
- (4) "Dangerous materials" means explosives or containers used in the holding or transporting of explosives.
- (5) "Initiated" means to start or ignite a fire or reignite or rekindle a fire.
- (6) "HHCU" means the Health Hazards Control Unit of the Division of Public Health.
- (7) "Land clearing" means the uprooting or clearing of vegetation in connection with construction for buildings; right-of-way maintenance; agricultural, residential, commercial, institutional, or industrial development; mining activities; or the initial clearing of vegetation to enhance property value; but does not include routine maintenance or property clean-up activities.
- (8) "Log" means any limb or trunk whose diameter exceeds six inches.
- (9) "Nonattainment area" means an area designated in 40 CFR 81.334 as nonattainment.
- (10) ~~"Nuisance" means causing physical irritation exacerbating a documented medical condition,~~

~~visibility impairment, or evidence of soot or ash on property or structure other than the property on which the burning is done.~~

- ~~(11)~~(10) "Occupied structure" means a building in which people may live or work, or one intended for housing farm or other domestic animals.
- ~~(12)~~(11) "Off-site" means any area not on the premises of the land-clearing activities.
- ~~(13)~~(12) "Open burning" means the burning of any matter in such a manner that the products of combustion resulting from the burning are emitted directly into the atmosphere without passing through a stack, chimney, or a permitted air pollution control device.
- ~~(14)~~(13) "Operator" as used in .1904(b)(6) and .1904(b)(2)(D) of this Section, means the person in operational control over the open burning.
- ~~(15)~~(14) "Permanent site" means for an air curtain burner, a place where an air curtain burner is operated for more than nine months.
- ~~(16)~~(15) "Person" as used in 02D .1901(c), means:
 - (a) the person in operational control over the open burning; or
 - (b) the landowner or person in possession or control of the land when he has directly or indirectly allowed the open burning or has benefited from it.
- ~~(17)~~(16) "Pile" means a quantity of combustible material assembled together in a mass.
- ~~(18)~~(17) "Public pick-up" means the removal of refuse, yard trimmings, limbs, or other plant material from a residence by a governmental agency, private company contracted by a governmental agency, or municipal service.
- ~~(19)~~(18) "Public road" means any road that is part of the State highway system; or any road, street, or right-of-way dedicated or maintained for public use.
- ~~(20)~~(19) "RACM" means regulated asbestos containing material as defined in 40 CFR 61.142.
- ~~(21)~~(20) "Refuse" means any garbage, rubbish, or trade waste.
- ~~(22)~~(21) "Regional Office Supervisor" means the supervisor of personnel of the Division of Air Quality in a regional office of the Department of Environment and Natural Resources.
- ~~(23)~~(22) "Salvageable items" means any product or material that was first discarded or damaged and then all, or part, was saved for future use, and include insulated wire, electric motors, and electric transformers.
- ~~(24)~~(23) "Smoke management plan" means the plan developed following the North Carolina Forest Service's smoke management program and approved by the North Carolina Forest Service. The purpose of the smoke management plan is to manage smoke from prescribed burns of

public and private forests to minimize the impact of smoke on air quality and visibility.

~~(25)~~(24) "Synthetic material" means man-made material, including tires, asphalt materials such as shingles or asphaltic roofing materials, construction materials, packaging for construction materials, wire, electrical insulation, and treated or coated wood.

Authority G.S. 143-212; 143-213; 143-215.3(a)(1).

15A NCAC 02D .1903 OPEN BURNING WITHOUT AN AIR QUALITY PERMIT

(a) All open burning is prohibited except open burning allowed under Paragraph (b) of this Rule or Rule .1904 of this Section. Except as allowed under Paragraphs (b)(3) through (b)(9) of this Rule, open burning shall not be initiated in an air quality forecast area that the Department, or the Forsyth County Environmental Affairs Department for the Triad air quality forecast area, has forecasted to be in an Air Quality Action Day Code "Orange" or above during the time period covered by that forecast.

(b) The following types of open burning are permissible without an air quality permit:

(1) open burning of leaves, logs, stumps, tree branches or yard trimmings, ~~excluding logs and stumps~~, if the following conditions are met:

(A) The material burned originates on the premises of private residences and is burned on those premises;

(B) There are no public pickup services available;

(C) Non-vegetative materials, such as household garbage, lumber, or any other synthetic materials are not burned;

(D) The burning is initiated no earlier than 8:00 a.m. and no additional combustible material is added to the fire between 6:00 p.m. on one day and 8:00 a.m. on the following day; and

~~(E) The burning does not create a nuisance; and~~

~~(F)~~(E) Material is not burned when the North Carolina Forest Service has banned burning for that area.

The burning of logs or stumps of any size shall not be considered to create a nuisance for purposes of the application of the open burning air quality permitting exception described in this Subparagraph.

(2) open burning for land clearing or right-of-way maintenance if the following conditions are met:

(A) The wind direction at the time that the burning is initiated and the wind direction as forecasted by the National Weather Service at the time that the burning is initiated are away from any area, including public roads within

250 feet of the burning as measured from the edge of the pavement or other roadway surface, which may be affected by smoke, ash, or other air pollutants from the burning;

(B) The location of the burning is at least 500 feet from any dwelling, group of dwellings, or commercial or institutional establishment, or other occupied structure not located on the property on which the burning is conducted. The regional office supervisor may grant exceptions to the setback requirements if:

(i) a signed, written statement waiving objections to the open burning associated with the land clearing operation is obtained and submitted to, and the exception granted by, the regional office supervisor before the burning begins from a resident or an owner of each dwelling, commercial or institutional establishment, or other occupied structure within 500 feet of the open burning site. In the case of a lease or rental agreement, the lessee or renter shall be the person from whom permission shall be gained prior to any burning; or

(ii) an air curtain burner that complies with Rule .1904 of this Section, is utilized at the open burning site.

Factors that the regional supervisor shall consider in deciding to grant the exception include: all the persons who need to sign the statement waiving the objection have signed it; the location of the burn; and the type, amount, and nature of the combustible substances. The regional supervisor shall not grant a waiver if a college, school, licensed day care, hospital, licensed rest home, or other similar institution is less than 500 feet from the proposed burn site when such institution is occupied.

(C) Only land-cleared plant growth is burned. Heavy oils, asphaltic materials such as shingles and other roofing materials, items containing natural or synthetic rubber, or any materials other than plant growth shall not be burned; however, kerosene,

- distillate oil, or diesel fuel may be used to start the fire;
- (D) Initial burning begins only between the hours of 8:00 a.m. and 6:00 p.m., and no combustible material is added to the fire between 6:00 p.m. on one day and 8:00 a.m. on the following day;
 - (E) No fires are initiated or vegetation added to existing fires when the North Carolina Forest Service has banned burning for that area; and
 - (F) Materials are not carried off-site or transported over public roads for open burning unless the materials are carried or transported to:
 - (i) Facilities permitted in accordance with 15A NCAC 02D .1904 (Air Curtain Burners) for the operation of an air curtain burner at a permanent site; or
 - (ii) A location, where the material is burned not more than four times per year, that meets all of the following criteria:
 - (I) At least 500 feet from any dwelling, group of dwellings, or commercial or institutional establishment, or other occupied structure not located on the property on which the burning is conducted.
 - (II) There are no more than two piles, each 20 feet in diameter, being burned at one time.
 - (III) The location is not a permitted solid waste management facility.
- (3) camp fires and fires used solely for outdoor cooking and other recreational purposes, or for ceremonial occasions, or for human warmth and comfort ~~and which do not create a nuisance~~ and do not use synthetic materials or refuse or salvageable materials for fuel;
- (4) fires purposely set to public or private forest land for forest management practices for which burning is acceptable to the North Carolina Forest Service and which follow the smoke management plan as outlined in the North Carolina Forest Service's smoke management program;
- (5) fires purposely set to agricultural lands for disease and pest control and fires set for other agricultural or apicultural practices for which burning is currently acceptable to the Department of Agriculture;
 - (6) fires purposely set for wildlife management practices for which burning is currently acceptable to the Wildlife Resource Commission;
 - (7) fires for the disposal of dangerous materials when it is the safest and most practical method of disposal;
 - (8) fires purposely set by manufacturers of fire-extinguishing materials or equipment, testing laboratories, or other persons, for the purpose of testing or developing these materials or equipment in accordance with a standard qualification program;
 - (9) fires purposely set for the instruction and training of fire-fighting personnel at permanent fire-fighting training facilities;
 - (10) fires purposely set for the instruction and training of fire-fighting personnel when conducted under the supervision of or with the cooperation of one or more of the following agencies:
 - (A) the North Carolina Forest Service;
 - (B) the North Carolina Insurance Department;
 - (C) North Carolina technical institutes; or
 - (D) North Carolina community colleges, including:
 - (i) the North Carolina Fire College; or
 - (ii) the North Carolina Rescue College;
 - (11) fires not described in Subparagraphs (9) or (10) of this Paragraph, purposely set for the instruction and training of fire-fighting personnel, provided that:
 - (A) The regional office supervisor of the appropriate regional office and the HHCB have been notified according to the procedures and deadlines contained in the appropriate regional notification form. This form may be obtained by writing the appropriate regional office at the address in Rule .1905 of this Section and requesting it, and
 - (B) The regional office supervisor has granted permission for the burning. Factors that the regional office supervisor shall consider in granting permission for the burning include type, amount, and nature of combustible substances. The regional

office supervisor shall not grant permission for the burning of salvageable items, such as insulated wire and electric motors or if the primary purpose of the fire is to dispose of synthetic materials or refuse. The regional office supervisor of the appropriate regional office shall not consider previously demolished structures as having training value. However, the regional office supervisor of the appropriate regional office may allow an exercise involving the burning of motor vehicles burned over a period of time by a training unit or by several related training units. Any deviations from the dates and times of exercises, including additions, postponements, and deletions, submitted in the schedule in the approved plan shall be communicated verbally to the regional office supervisor of the appropriate regional office at least one hour before the burn is scheduled; and

- (12) fires for the disposal of material generated as a result of a natural disaster, such as tornado, hurricane, or flood, if the regional office supervisor grants permission for the burning. The person desiring to do the burning shall document and provide written notification to the regional office supervisor of the appropriate regional office that there is no other practical method of disposal of the waste. Factors that the regional office supervisor shall consider in granting permission for the burning include type, amount, location of the burning, and nature of combustible substances. The regional office supervisor shall not grant permission for the burning if the primary purpose of the fire is to dispose of synthetic materials or refuse or recovery of salvageable materials. Fires authorized under this Subparagraph shall comply with the conditions of Subparagraph (b)(2) of this Rule.

(c) The authority to conduct open burning under this Section does not exempt or excuse any person from the consequences, damages or injuries that may result from this conduct. It does not excuse or exempt any person from complying with all applicable laws, ordinances, rules or orders of any other governmental entity having jurisdiction even though the open burning is conducted in compliance with this Section.

Authority G.S. 143-215.3(a)(1); 143-215.107(a)(5); S.L. 2011-394, s. 2.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Environmental Management Commission intends to amend the rule cited as 15A NCAC 02L .0106.

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

Proposed Effective Date: January 1, 2016

Public Hearing:

Date: July 20, 2015

Time: 6:30 p.m.

Location: Archdale Building Ground Floor Hearing Room, 512 N. Salisbury St., Raleigh, NC 27604

Reason for Proposed Action: Session Law 2014-122 (the Coal Ash Management Act of 2014) directed the Environmental Management Commission (EMC) to review its compliance boundary and corrective action rules in 15A NCAC 2L for clarity and consistency, and to report the results of its review to the Environmental Review Commission (ERC) by December 1, 2014. In its review, the EMC identified five clarity or consistency issues in Rule 15A NCAC 2L .0106 that require this rule to be revised: (1)The use of the terminology "non-permitted" in 15A NCAC 2L .0106 to refer to some activities that in fact have permits; (2)Disagreement between the EMC and a recent court ruling over the interpretation of "immediate action to eliminate the source or sources of contamination," and the relevance of 15A NCAC 2L .0106(f) to such action; (3)whether, in the context of the corrective action rule, a compliance boundary is applicable to facilities that are truly permitted, but are considered "non-permitted" under 15A NCAC 2L .0106(e); (4)the omission of permits issued under Chapter 130A of North Carolina General Statutes from the definition of "permitted" activities under rule 15A NCAC 2L .0106, even though such permits are given compliance boundaries under rule 15A NCAC 2L .0107; and (5)various technical corrections and updates to reflect the current organizational structure of the Department of Environment and Natural Resources (DENR).

Comments may be submitted to: Evan Kane, Groundwater Planning and Environmental Review Branch Chief, NC Division of Water Resources, 1611 Mail Service Center, Raleigh, NC 27699-1611, email CorrectiveActionRule@lists.ncmail.net

Comment period ends: August 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

CHAPTER 02 – ENVIRONMENTAL MANAGEMENT

**SUBCHAPTER 02L - GROUNDWATER
CLASSIFICATION AND STANDARDS**

SECTION .0100 – GENERAL CONSIDERATIONS

15A NCAC 02L .0106 CORRECTIVE ACTION

(a) Where groundwater quality has been degraded, the goal of any required corrective action shall be restoration to the level of the standards, or as closely thereto as is economically and technologically feasible. In all cases involving requests to the ~~Director~~ Secretary, as defined in 15A NCAC 02C .0102, for approval of corrective action plans, or termination of corrective action, the responsibility for providing all information required by this Rule lies with the person(s) making the request.

(b) Any person conducting or controlling an activity which results in the discharge of a waste or hazardous substance or oil to the groundwaters of the State, or in proximity thereto, shall take immediate action to terminate and control the discharge, mitigate any hazards resulting from exposure to the pollutants and notify the ~~Division~~ Department, as defined in 15A NCAC 02C .0102, of the discharge.

(c) Any person conducting or controlling an activity which has not been permitted by the ~~Division~~ Department and which results in an increase in the concentration of a substance in excess of the standard, other than agricultural operations, shall:

- (1) ~~immediately within 24 hours of discovery of the violation, notify the Division~~ Department of the activity that has resulted in the increase and the contaminant concentration levels;
- ~~(2) take immediate action to eliminate the source or sources of contamination;~~
- (2) respond in accordance with Paragraph (f) of this Rule;
- (3) submit a report to the ~~Director~~ Secretary assessing the cause, significance and extent of the violation; and
- (4) implement an approved corrective action plan for restoration of groundwater quality in accordance with a schedule established by the ~~Director, or his designee~~ Secretary. In establishing a schedule the ~~Director, or his designee~~ Secretary shall consider any reasonable schedule proposed by the person

submitting the plan. A report shall be made to the Health Director of the county or counties in which the contamination occurs in accordance with the requirements of Rule .0114(a) in this Section.

Any activity not permitted pursuant to G.S. 143-215.1 or G.S. 130A-294 shall for the purpose of this Rule be deemed not permitted by the Department and subject to the provisions of this Paragraph of this Rule.

(d) Any person conducting or controlling an activity which is conducted under the authority of a permit initially issued by the ~~Division~~ Department on or after December 30, 1983 pursuant to G.S. 143-215.1 or G.S. 130A-294 and which results in an increase in concentration of a substance in excess of the standards:

- (1) at or beyond a review boundary, shall demonstrate, through predictive calculations or modeling, that natural site conditions, facility design and operational controls will prevent a violation of standards at the compliance boundary; or submit a plan for alteration of existing site conditions, facility design or operational controls that will prevent a violation at the compliance boundary, and implement that plan upon its approval by the ~~Director, or his designee~~ Secretary.
- (2) at or beyond a compliance boundary, shall assess the cause, significance and extent of the violation of standards and submit the results of the investigation, and a plan and proposed schedule for corrective action to the ~~Director, or his designee~~ Secretary. The permittee shall implement the plan as approved by and in accordance with a schedule established by the ~~Director, or his designee~~ Secretary. In establishing a schedule the ~~Director, or his designee~~ Secretary shall consider any reasonable schedule proposed by the permittee.

~~(e) For the purposes of Paragraphs (c) and (d) of this Rule, an activity conducted under the authority of a permit issued by the Division, and subject to Paragraph (d) of this Rule, is one for which:~~

- ~~(1) a permit has been issued pursuant to G.S. 143-215.1;~~
- ~~(2) the permit was originally issued after December 30, 1983;~~
- ~~(3) the substance for which a standard has been exceeded outside the compliance boundary has been released to groundwater as a result of the permitted activity;~~
- ~~(4) all other activities shall for the purpose of this Rule be deemed not permitted by the Division and subject to the provisions of Paragraph (c) of this Rule.~~

(e) Any person conducting or controlling an activity which is conducted under the authority of a permit initially issued by the Department prior to December 30, 1983 pursuant to G.S. 143-215.1 or G.S. 130A-294, and which results in an increase in concentration of a substance in excess of the standards at or beyond the compliance boundary specified in the permit, shall:

- (1) within 24 hours of discovery of the violation, notify the Department of the activity that has resulted in the increase and the contaminant concentration levels;
- (2) respond in accordance with Paragraph (f) of this Rule;
- (3) submit a report to the Secretary assessing the cause, significance and extent of the violation; and
- (4) implement an approved corrective action plan for restoration of groundwater quality at or beyond the compliance boundary, in accordance with a schedule established by the Secretary. In establishing a schedule the Secretary shall consider any reasonable schedule proposed by the person submitting the plan. A report shall be made to the Health Director of the county or counties in which the contamination occurs in accordance with the requirements of Rule .0114(a) of this Section.

(f) ~~Corrective action~~ Initial response required following discovery of the unauthorized release of a contaminant to the surface or subsurface of the land, and prior to or concurrent with the assessment required in Paragraphs ~~(e) and (d)~~ (c), (d), or (e) of this Rule, shall include, but is not limited to:

- (1) Prevention of fire, explosion or the spread of noxious fumes;
- (2) Abatement, containment or control of the migration of contaminants;
- (3) Removal, ~~or treatment~~ treatment, or and control of any primary pollution source such as buried waste, waste stockpiles or surficial accumulations of free products;
- (4) Removal, ~~treatment or treatment~~ or control of secondary pollution sources which would be potential continuing sources of pollutants to the groundwaters such as contaminated soils and non-aqueous phase liquids. Contaminated soils which threaten the quality of groundwaters must be treated, contained or disposed of in accordance with applicable rules. The treatment or disposal of contaminated soils shall be conducted in a manner that will not result in a violation of standards or North Carolina Hazardous Waste Management rules.

(g) The site assessment conducted pursuant to the requirements of Paragraph (c) or (e) of this Rule, shall include:

- (1) The source and cause of contamination;
- (2) Any imminent hazards to public health and safety and actions taken to mitigate them in accordance with Paragraph (f) of this Rule;
- (3) All receptors and significant exposure pathways;
- (4) The horizontal and vertical extent of soil and groundwater contamination and all significant factors affecting contaminant transport; and
- (5) Geological and hydrogeological features influencing the movement, chemical, and physical character of the contaminants.

Reports of site assessments shall be submitted to the ~~Division Department~~ as soon as practicable or in accordance with a schedule established by the Director, or his designee, Secretary. In establishing a schedule the ~~Director, or his designee~~ Secretary shall consider any reasonable proposal by the person submitting the report.

(h) Corrective action plans for restoration of groundwater quality, submitted pursuant to Paragraphs ~~(e) and (d)~~ (c), (d), and (e) of this Rule shall include:

- (1) A description of the proposed corrective action and reasons for its selection.
- (2) Specific plans, including engineering details where applicable, for restoring groundwater quality.
- (3) A schedule for the implementation and operation of the proposed plan.
- (4) A monitoring plan for evaluating the effectiveness of the proposed corrective action and the movement of the contaminant plume.

(i) In the evaluation of corrective action plans, the ~~Director, or his designee~~ Secretary shall consider the extent of any violations, the extent of any threat to human health or safety, the extent of damage or potential adverse impact to the environment, technology available to accomplish restoration, the potential for degradation of the contaminants in the environment, the time and costs estimated to achieve groundwater quality restoration, and the public and economic benefits to be derived from groundwater quality restoration.

(j) A corrective action plan prepared pursuant to Paragraph ~~(e) or (d)~~ (c), (d), or (e) of this Rule must be implemented using the best available technology for restoration of groundwater quality to the level of the standards, except as provided in Paragraphs (k), (l), (m), (r) and (s) of this Rule.

(k) Any person required to implement an approved corrective action plan for a ~~non-permitted site pursuant to~~ site subject to Paragraph (c) or (e) of this Rule may request that the ~~Director~~ Secretary approve such a plan without requiring groundwater remediation to the standards. A request submitted to the ~~Director~~ Secretary under this Paragraph shall include a description of site specific conditions, including information on the availability of public water supplies for the affected area; the technical basis for the request; and any other information requested by the ~~Director~~ Secretary to thoroughly evaluate the request. In addition, the person making the request must demonstrate to the satisfaction of the ~~Director~~ Secretary:

- (1) that all sources of contamination and free product have been removed or controlled pursuant to Paragraph (f) of this Rule;
- (2) that the time and direction of contaminant travel can be predicted with reasonable certainty;
- (3) that contaminants have not and will not migrate onto adjacent properties, or that:
 - (A) such properties are served by an existing public water supply system dependent on surface waters or hydraulically isolated groundwater, or
 - (B) the owners of such properties have consented in writing to the request;

- (4) that the standards specified in Rule .0202 of this Subchapter will be met at a location no closer than one year time of travel upgradient of an existing or foreseeable receptor, based on travel time and the natural attenuation capacity of subsurface materials or on a physical barrier to groundwater migration that exists or will be installed by the person making the request;
 - (5) that, if the contaminant plume is expected to intercept surface waters, the groundwater discharge will not possess contaminant concentrations that would result in violations of standards for surface waters contained in 15A NCAC 02B .0200;
 - (6) that public notice of the request has been provided in accordance with Rule .0114(b) of this Section;
 - (7) that the proposed corrective action plan would be consistent with all other environmental laws.
- (l) Any person required to implement an approved corrective action plan for a ~~non-permitted site pursuant to site~~ subject to Paragraph (c) or (e) of this Rule may request that the ~~Director~~ Secretary approve such a plan based upon natural processes of degradation and attenuation of contaminants. A request submitted to the ~~Director~~ Secretary under this Paragraph shall include a description of site specific conditions, including written documentation of projected groundwater use in the contaminated area based on current state or local government planning efforts; the technical basis for the request; and any other information requested by the ~~Director~~ Secretary to thoroughly evaluate the request. In addition, the person making the request must demonstrate to the satisfaction of the ~~Director~~ Secretary:
- (1) that all sources of contamination and free product have been removed or controlled pursuant to Paragraph (f) of this Rule;
 - (2) that the contaminant has the capacity to degrade or attenuate under the site-specific conditions;
 - (3) that the time and direction of contaminant travel can be predicted with reasonable certainty;
 - (4) that contaminant migration will not result in any violation of applicable groundwater standards at any existing or foreseeable receptor;
 - (5) that contaminants have not and will not migrate onto adjacent properties, or that:
 - (A) such properties are served by an existing public water supply system dependent on surface waters or hydraulically isolated groundwater, or
 - (B) the owners of such properties have consented in writing to the request;
 - (6) that, if the contaminant plume is expected to intercept surface waters, the groundwater discharge will not possess contaminant concentrations that would result in violations of standards for surface waters contained in 15A NCAC 02B .0200;
 - (7) that the person making the request will put in place a groundwater monitoring program
- sufficient to track the degradation and attenuation of contaminants and contaminant by-products within and down gradient of the plume and to detect contaminants and contaminant by-products prior to their reaching any existing or foreseeable receptor at least one year's time of travel upgradient of the receptor and no greater than the distance the groundwater at the contaminated site is predicted to travel in five years;
- (8) that all necessary access agreements needed to monitor groundwater quality pursuant to Subparagraph (7) of this Paragraph have been or can be obtained;
 - (9) that public notice of the request has been provided in accordance with Rule .0114(b) of this Section; and
 - (10) that the proposed corrective action plan would be consistent with all other environmental laws.
- (m) The ~~Division~~ Department or any person required to implement an approved corrective action plan for a ~~non-permitted site pursuant to site~~ subject to Paragraph (c) or (e) of this Rule may request that the ~~Director~~ Secretary approve termination of corrective action.
- (1) A request submitted to the ~~Director~~ Secretary under this Paragraph shall include:
 - (A) a discussion of the duration of the corrective action, the total project's cost, projected annual cost for continuance and evaluation of the success of the corrective action;
 - (B) an evaluation of alternate treatment technologies which could result in further reduction of contaminant levels projected capital and annual operating costs for each technology;
 - (C) effects, including health and safety impacts, on groundwater users if contaminant levels remain at levels existing at the time corrective action is terminated; and
 - (D) any other information requested by the ~~Director~~ Secretary to thoroughly evaluate the request.
 - (2) In addition, the person making the request must demonstrate to the satisfaction of the ~~Director~~ Secretary:
 - (A) that continuation of corrective action would not result in a significant reduction in the concentration of contaminants (At a minimum this demonstration must show the duration and degree of success of existing remedial efforts to attain standards and include a showing that the asymptotic slope of the contaminants curve of decontamination is less than a ratio of 1:40 over a term of one year based on quarterly sampling);

(B) that contaminants have not and will not migrate onto adjacent properties, or that:

- (i) such properties are served by an existing public water supply system dependent on surface waters or hydraulically isolated groundwater, or
- (ii) the owners of such properties have consented in writing to the request;

(C) that, if the contaminant plumes expected to intercept surface waters, the groundwater discharge will not possess contaminant concentrations that would result in violations of standards for surface waters contained in 15A NCAC 02B .0200;

(D) that public notice of the request has been provided in accordance with Rule .0114(b) of this Section; and

(E) that the proposed termination would be consistent with all other environmental laws.

(3) The ~~Director~~ Secretary shall not authorize termination of corrective action for any area that, at the time the request is made, has been identified by a state or local groundwater use planning process for resource development.

(4) The ~~Director~~ Secretary may authorize the termination of corrective action, or amend the corrective action plan after considering all the information in the request. Upon termination of corrective action, the ~~Director~~ Secretary shall require implementation of a groundwater monitoring program sufficient to track the degradation and attenuation of contaminants at a location of at least one year's predicted time of travel upgradient of any existing or foreseeable receptor. The monitoring program shall remain in effect until there is sufficient evidence that the contaminant concentrations have been reduced to the level of the standards.

(n) Upon a determination by the ~~Director~~ Secretary that continued corrective action would result in no significant reduction in contaminant concentrations, and the contaminated groundwaters can be rendered potable by treatment using readily available and economically reasonable technologies, the ~~Director~~ Secretary may designate the remaining area of degraded groundwater RS. Where the remaining degraded groundwaters cannot be made potable by such treatment, the ~~Director~~ Secretary may consider a request for reclassification of the groundwater to a GC classification as outlined in Rule .0201 of this Subchapter.

(o) If at any time the ~~Director~~ Secretary determines that a new technology is available that would remediate the contaminated groundwater to the standards specified in Rule .0202 of this Subchapter, the ~~Director~~ Secretary may require the responsible party to evaluate the economic and technological feasibility of

implementing the new technology in an active groundwater corrective action plan in accordance with a schedule established by the ~~Director~~ Secretary. The ~~Director's~~ Secretary's determination to utilize new technology at any site or for any particular constituent shall include a consideration of the factors in Paragraph (h) of this Rule.

(p) Where standards are exceeded as a result of the application of pesticides or other agricultural chemicals, the ~~Director~~ Secretary shall request the Pesticide Board or the Department of Agriculture to assist the ~~Division of Environmental Management~~ Department in determining the cause of the violation. If the violation is determined to have resulted from the use of pesticides, the ~~Director~~ Secretary shall request the Pesticide Board to take appropriate regulatory action to control the use of the chemical or chemicals responsible for, or contributing to, such violations, or to discontinue their use.

(q) The approval pursuant to this Rule of any corrective action plan, or modification or termination thereof, which permits the migration of a contaminant onto adjacent property, shall not affect any private right of action by any party which may be effected by that contamination.

(r) If a discharge or release is not governed by 15A NCAC 02L .0115 and the increase in the concentration of a substance in excess of the standard resulted in whole or in part from a release from a commercial or noncommercial underground storage tank as defined in G.S. 143-215.94A, any person required to implement an approved corrective action plan pursuant to this Rule and seeking reimbursement for the Commercial or Noncommercial Leaking Petroleum Underground Storage Tank Cleanup Funds shall implement a corrective action plan meeting the requirements of Paragraph (k) or (l) of this Rule unless such a person demonstrates to the ~~Director~~ Secretary that:

- (1) contamination resulting from the discharge cannot qualify for approval of a plan based on the requirements of the Paragraphs; or
- (2) the cost of making such a demonstration would exceed the cost of implementing a corrective action plan submitted pursuant to Paragraph (c) of this Rule.

(s) If a discharge or release is not governed by 15A NCAC 02L .0115 and the increase in the concentration of a substance in excess of the standard resulted in whole or in part from a release from a commercial or noncommercial underground storage tank as defined in G.S. 143-215.94A, the ~~Director~~ Secretary may require any person implementing or operating a previously approved corrective action plan pursuant to this Rule to:

- (1) develop and implement a corrective action plan meeting the requirements of Paragraphs (k) and (l) of this Rule; or
- (2) seek discontinuance of corrective action pursuant to Paragraph (m) of this Rule.

Authority G.S. 143-215.2; 143-215.3(a)(1); 143-215.94A; 143-215.94T; 143-215.94V; 143B-282.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

**CHAPTER 14 – BOARD OF COSMETIC ART
EXAMINERS**

Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Cosmetic Art Examiners intends to amend the rules cited as 21 NCAC 14H .0404; 14T .0201, .0205, .0305, .0601-.0606, .0612, and .0701; and readopt the rules cited as 21 NCAC 14H .0504, .0505; 14T .0607-.0610, and .0705.

Pursuant to G.S. 150B-21.2(c)(1), the text of rules proposed for readoption 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>.

Link to agency website pursuant to G.S. 150B-19.1(c):
www.nccosmeticarts.com

Proposed Effective Date: *October 1, 2015*

Public Hearing:

Date: *June 30, 2015*

Time: *9:00 a.m.*

Location: *1207 Front Street, Suite 110, Raleigh, NC 27609*

Reason for Proposed Action: *These rule changes fulfill a statutory requirement for re-review and address curriculum changes and space requirement reductions.*

Comments may be submitted to: *Stefanie Kuzdrall, 1207 Front Street, Suite 110 Raleigh, NC 27609*

Comment period ends: *August 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 - 21 NCAC 14H .0404; 14T .0201, .0205, .0305, .0601-.0606, .0612, and .0701**

☒ **No fiscal note required by G.S. 150B-21.3A(d)(2) - 21 NCAC 14H .0504, .0505; 14T .0607-.0610, and .0705**

SUBCHAPTER 14H – SANITATION

**SECTION .0400 - SANITATION PROCEDURES AND
PRACTICES**

21 NCAC 14H .0404 FIRST AID

(a) Each cosmetic art shop and school must have antiseptics, gloves or finger guards, sterile bandages and other necessary supplies available to provide first aid.

(b) If the skin of the licensee or student is punctured, the licensee or student shall immediately do the following:

- (1) ~~Apply antiseptic and a sterilized bandage; a protective glove to remove materials from first aid kit;~~
- (2) ~~Disinfect any implement exposed to blood before proceeding; and~~ Cleans injured area with antiseptic (e.g. alcohol, hand sanitizer);
- (3) ~~Put on disposable, protective gloves or a finger guard. Apply a sterilized bandage;~~
- (4) ~~Disinfect any implement exposed to blood before proceeding;~~
- (5) ~~Disposes of all contaminated supplies in a zip lock bag then place in the trash;~~
- (6) Sanitize hands; and
- (7) Put on disposable, protective gloves or a finger guard.

(c) If the skin of the patron is punctured, the licensee or student shall immediately do the following:

- (1) ~~Make available to the patron antiseptic and a sterilized bandage; Apply protective gloves to remove materials from first aid kit;~~
- (2) ~~Disinfect any implement exposed to blood before proceeding; and~~ Make first aid supplies available to the patron or assist the patron with:
 - (A) Cleans injured area with antiseptic (e.g. alcohol, hand sanitizer);
 - (B) Apply a sterilized bandage;
- (3) ~~Put on disposable, protective gloves or a finger guard. Disinfect any implement exposed to blood before proceeding;~~
- (4) ~~Disposes of all contaminated supplies in a zip lock bag then place in the trash;~~
- (5) Sanitize hands; and
- (6) Put on disposable, protective gloves or a finger guard.

Authority G.S. 88B-2; 88B-4; 88B-14.

**SECTION .0500 – ENFORCEMENT, MAINTENANCE OF
LICENSURE**

**21 NCAC 14H .0504 – READOPTION WITHOUT
SUBSTANTIVE CHANGES**

**21 NCAC 14H .0505 – READOPTION WITHOUT
SUBSTANTIVE CHANGES**

SUBCHAPTER 14T – COSMETIC ART SCHOOLS

**SECTION .0200 - PHYSICAL REQUIREMENTS FOR
COSMETIC ART SCHOOLS**

21 NCAC 14T .0201 ALL COSMETIC ART SCHOOLS

(a) ~~Cosmetic Art Cosmetology~~ schools must have the following physical departments:

- (1) ~~Beginner Department Practice Department~~ – a minimum of 200 square feet with a table or tables and or stands to accommodate at least 10 students and have at least 40 inches between each mannequin. Cosmetic art schools must provide an additional 5 square feet in the ~~beginner-practice~~ department for each student over the maximum of 10. This area shall have at least one mirror of a minimum of two square feet. ~~This area shall be dedicated to the instruction of beginner students;~~
- (2) ~~Advanced Department Clinic Department~~ – the clinic floor for performance of all cosmetic art services. Within the clinic area each school shall have:
 - (A) 48 inches of space from the center to the center of each styling chair, esthetics table or manicuring table;
 - (B) 24 inches from the center of the chair forward;
 - (C) 48 inches from the backrest behind the chair to any other styling chair, esthetics table or manicuring table; and
 - (D) at least 30 inches of space from the back of each styling chair, esthetics table ~~or manicuring table~~ to the wall of the ~~shop-school~~.
- (3) Dispensary – a room or area to organize and maintain supplies, equipment for disinfection of all implements and a sink with hot and cold running water. All cosmetic art schools must have the required equipment to carry out disinfection procedures;
- (4) Theory classroom – classroom with a minimum of 300 square feet to accommodate a maximum of 25 students. Cosmetic art schools must provide an additional 8 square feet in the theory classroom for each student over the maximum of 25;
- (5) Office – administrative office for the secure/locked facilitation of student records and files. This office must be outfitted with a minimum of one desk and one chair;

- (6) Reception area – a reception area for clients to wait prior to receiving services;
- (7) Break room for student use;
- (8) Restrooms for student/public use;
- (9) Locker/dressing room – a locker or room for students to secure/lock personal belongings throughout the day; and
- (10) All stations must be numbered numerically.

(b) Manicuring, esthetics and natural hair care schools must have the following physical departments:

- (1) Clinic Department – the clinic floor for performance of all cosmetic art services. Within the clinic area each school shall have:
 - (A) 48 inches of space from the center to the center of each styling chair, esthetics table or manicuring table;
 - (B) 24 inches from the center of the chair forward;
 - (C) 48 inches from the backrest behind the chair to any other styling chair, esthetics table or manicuring table; and
 - (D) at least 30 inches of space from the back of each styling chair, or esthetics table to the wall of the school.
 - (2) Dispensary – a room or area to organize and maintain supplies, equipment for disinfection of all implements and a sink with hot and cold running water. All cosmetic art schools must have the required equipment to carry out disinfection procedures;
 - (3) Theory classroom – a room or area with equipment for theory training appropriate to both practical and theory learning including desks and chairs;
 - (4) Office – administrative office for the secure/locked facilitation of student records and files. This office must be outfitted with a minimum of one desk and one chair;
 - (5) Reception area – a reception area for clients to wait prior to receiving services;
 - (6) Break room for student use;
 - (7) Restrooms for student/public use;
 - (8) Locker/dressing room – a locker or room for students to secure/lock personal belongings throughout the day; and
 - (9) All stations must be numbered numerically.
- (b)(c) Each cosmetic art school must display a sign in a conspicuous place in the reception area. The sign cannot be smaller than 12 inches by 18 inches, with lettering at least one and one half inches in size and must read as follows: "Cosmetic Art School Work Done Exclusively by Students."
- (e)(d) Each of the requirements listed within this Rule must be located within the same building with the exception of the theory classroom which may be located in an adjacent building or another building within 500 feet of the main cosmetic art building.
- (d)(e) All Cosmetic Art schools must post hours of operation per cosmetic art discipline and submit this information to the Board. Any changes to the hours of operation must be posted and

submitted to the Board. A school will be considered open by the Board when cosmetic art instruction, services or performances are provided.

~~(e)(f)~~ Cosmetic art schools may not offer student hours or performances unless they are in compliance with Paragraph (a) of this Rule.

~~(f)(g)~~ All cosmetic art schools must adhere to any federal, state and local government regulation or ordinance regarding fire safety codes, plumbing and electrical work.

~~(g)(h)~~ All cosmetic art schools must maintain a ventilation system in good working order with temperature control. During school operating hours the temperature must be maintained between 60 and 85 degrees Fahrenheit.

~~(h)(i)~~ All equipment in cosmetic art schools shall be in working order; kept in safe repair; and installed in such a manner as to facilitate proper usage.

~~(i)(j)~~ All cosmetic art school buildings shall be maintained.

~~(j)(k)~~ All cosmetic art schools must maintain a bulletin board in plain sight of the clinic floor. The bulletin board shall be used to display at all times the Board sanitation rules and the sanitation grade card issued to the school.

~~(k)(l)~~ All cosmetic art schools must post together the school letter of approval, the school license and all cosmetic art licenses issued to the teachers on staff.

~~(l)(m)~~ Each room in a cosmetic art school must be labeled according to its assigned purpose.

~~(m)(n)~~ Each theory classroom shall be equipped with desks or chairs suitable for classroom work and one chair suitable for demonstrating cosmetic art practices.

~~(n)(o)~~ When a school and a shop are under the same ownership, separate operation of the shop and school shall be maintained and if the school and shop are located in the same building, separate entrances and visitor reception areas shall be maintained and the school and shop shall have separate public information releases, advertisements, names and advertising signs.

(p) A cosmetic art school must maintain space and equipment appropriate to both practical and theory learning including desks and chairs, and station requirements so that each student in attendance has a location within which to complete assigned tasks.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0205 NATURAL HAIR CARE SCHOOLS

Natural Hair Care Styling Schools must have the following physical departments: ~~Advanced-Clinic~~ Department - a minimum clinic floor of 600 square feet which shall accommodate a maximum of 16 enrolled advanced students. Schools must provide an additional 7.5 square feet on the clinic floor for each enrolled advanced student over 16.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

SECTION .0300 - SCHOOL EQUIPMENT AND SUPPLIES

21 NCAC 14T .0305 EQUIPMENT FOR NATURAL HAIR CARE STYLING SCHOOLS

(a) The ~~beginner-practice~~ department in a natural hair care styling school must be equipped with the following:

~~(1) One shampoo bowl and chair. Each side approach shampoo bowl must be at least 40 inches apart, center of bowl to center of bowl; free standing shampoo bowls must be at least 31 inches apart, center of bowl to center of bowl;~~

~~(2)(1)~~ Styling equipment for the purpose of natural hair care;

~~(3)(2)~~ Visual aids;

~~(4)(3)~~ One mannequin practice table/stand to accommodate each student.

(b) The ~~advanced-clinic~~ department in a natural hair care styling school must be equipped with the following:

(1) Two shampoo bowls and chairs. Each side approach shampoo bowl must be 40 inches apart center of bowl to center of bowl; free standing shampoo bowls must be 31 inches apart center of bowl to center of bowl;

(2) Eight stations. A station shall include one mirror and one hydraulic chair;

(3) ~~Two~~ One hooded floor type dryers; and

(4) Styling equipment for the purpose of natural hair care.

(c) The ~~advanced-clinic~~ department in a natural hair care styling school must be equipped with the following if there are more than 16 enrolled advanced students:

~~(1)~~ One station for each additional two students; a station shall include one mirror and one hydraulic chair;

~~(2) One hooded dryer for each additional 10 students; and~~

~~(3) One shampoo bowl for each additional 10 students.~~

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

SECTION .0600 - CURRICULA

21 NCAC 14T .0601 COSMETIC ART CURRICULA

(a) Cosmetic art schools must develop and submit to the Board a curriculum of each discipline to be taught at the school. The curriculum, once approved by the Board's standards listed in Rules .0602-.0610 of this Section must be adhered to and lessons developed from the approved curriculum.

(b) Before a student may perform a live model service the student must pass the respective mannequin service evaluation plan and blood exposure and disinfection procedure evaluation plan. ~~move from the beginner department to the advanced, the minimum requirements shall be met.~~

(c) Performances shall be defined as the systematic completion of the steps for safe and effective cosmetic art services to a client.

(d) All cosmetic art students shall receive training on Material Safety Data Sheets prepared by the manufacturer on all products used by the school's students in performances.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0602 COSMETOLOGY CURRICULUM

(a) To meet the approval of the Board, a cosmetologist training course shall consist of 1500 hours of instruction in theory and practical application, divided as follows:

Theory	Hours	Performances
Beginners: Professional image, sanitation, bacteriology, disinfection, first aid, anatomy, electricity, chemistry, professional ethics, draping, shampooing, roller sets, pin curls, ridge curls with C shaping, fingerwaves, braids, artificial hair, up-styles, blowdrying brush control, blowdrying with curling iron, pressing or thermal, hair cutting, partings, perm wraps, relaxer sectioning, color application sectioning, scalp treatments, manicures, pedicures, and artificial nails.	300	
Advanced: Styles and techniques of cosmetology services including arranging, dressing, curling, waving; cutting techniques and implements including razors, clippers, thinning shears, and shears, cleansing, cutting, singeing, bleaching, or coloring hair; esthetics and manicuring; and business management and salon business.	1200	
Performance Requirements		Performances
Scalp and hair treatments		105
Fullhead fingerwave and style		105
Fullhead pincurl and style		105
Hair styling - sets, blowdrying, thermal press or flat iron, and artificial hair		170
Haircuts		85
Chemical reformation or permanent waving and relaxers		35
Temporary color		2
Color application - semi, demi, permanent color, and hair lightening		40
Multidimensional color - low or high lighting, cap, or bleach		25
Lash and brow color		2
Nail care - manicures and pedicures		15
Artificial nails sets		10
Facials with surface manipulations		10
Makeup application		2
Hair removal - removal - razor, cream, waxing, or tweezing		5

(b) ~~A minimum of 300 hours of theory shall be required prior to conducting live model performances on the public. Performances shall be defined as the systematic completion of the steps for safe and effective cosmetic art services to a client.~~

(c) Certification of performance completions shall be required on the graduation form and application for the Board examination.

(d) Sharing of performance completions shall not be allowed.

(e) Credit for a performance shall be given to only one student.

(f) A "nail set" means one hand including all four fingers and thumb.

Authority G.S. 88B-4; 88B-16.

21 NCAC 14T .0603 APPRENTICE COSMETOLOGY CURRICULUM

(a) To meet the approval of the Board, an apprentice cosmetologist training course shall consist of 1200 hours of instruction in theory and practical application, divided as follows:

Theory	Hours	Performances
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Beginners: —Professional image, sanitation, bacteriology, disinfection, first aid, anatomy, electricity, chemistry, professional ethics, draping, shampooing, roller sets, pin curls, ridge curls with C shaping, fingerwaves, braids, artificial hair, up-styles, blowdrying brush control, blowdrying with curling iron, pressing or thermal, hair cutting, partings, perm wraps, relaxer sectioning, color application sectioning, scalp treatments, manicures, pedicures, and artificial nails.	300	
Advanced: Styles and techniques of cosmetology services including arranging, dressing, curling, waving; cutting techniques and implements including razors, clippers, thinning shears, and shears, cleansing, cutting, singeing, bleaching, or coloring hair; esthetics and manicuring; and business management and salon business.	900	
Performance Requirements		Performances
Scalp and hair treatments		84
Fullhead fingerwave and style		63
Fullhead pincurl and style		63
Hair styling - sets, blowdrying, thermal press or flat iron, and artificial hair		136
Haircuts		68
Chemical reformation or permanent waving and relaxers		27
Temporary color		1
Color application - semi, demi, permanent color, and hair lightening		19
Multidimensional color - low or high lighting, cap, or bleach		8
Lash and brow color		1
Nail care - manicures and pedicures		12
Artificial nails sets		8
Facials with surface manipulations		7
Makeup application		1
Hair removal—removal – razor, cream, waxing, or tweezing		3

(b) ~~A minimum of 300 hours of theory shall be required prior to conducting live model performances on the public. Performances shall be defined as the systematic completion of the steps for safe and effective cosmetic art services to a client.~~

(c) Certification of performance completions shall be required on the graduation form and application for the Board examination.

(d) Sharing of performance completions shall not be allowed.

(e) Credit for a performance shall be given to only one student.

(f) A "nail set" means one hand including all four fingers and thumb.

Authority G.S. 88B-4; 88B-16.

21 NCAC 14T .0604 ESTHETICS CURRICULUM

(a) To meet the approval of the Board, an esthetician training course shall consist of at least 600 hours of instruction in theory and practical application, divided as follows:

Theory and Performance Requirements	Hours	Performances
Beginners: —anatomy or physiology, hygiene, disinfection, first aid, chemistry, draping, facial or body treatment (cleansing, manipulations, masks), hair removal, basic dermatology, machines, electricity, apparatus, aromatherapy, nutrition, and make-up or color theory,	40	
Advanced: Styles and techniques of esthetics services including facials, makeup application, performing skin care, hair removal, eyelash extensions, and applying brow and lash color; business management; and professional ethics	560	
Performance Requirements		Performances
Facials Manual (skin analysis, cleansing, surface manipulations, packs, and masks)		40

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Facials Electronic (the use of electrical modalitus, including dermal lights, and electrical apparatus for facials and skin care including galvanic and faradic)		30
Eyebrow arching		20
Hair removal (hard wax, soft wax, and depilatories)		30
Makeup application (skin analysis, complete and corrective makeup)		30
Eyelash extensions		10
Brow and lash color		10

(b) ~~A minimum of 40 hours of theory shall be required prior to conducting live model performances on the public. Performances shall be defined as the systematic completion of the steps for safe and effective cosmetic art services to a client.~~

(c) Certification of performance completions shall be required on the graduation form and Board's application for the examination.

(d) Sharing of performance completions shall not be allowed.
(e) Credit for a performance shall be given to only one student.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0605 MANICURING CURRICULUM

(a) To meet the approval of the Board, a manicurist training course shall consist of at least 300 hours of instruction in theory and practical application, divided as follows:

Theory and Performance Requirements	Hours	Performances
Beginners: Manicuring theory, disinfection, first aid, trimming, filing, shaping, decorating, arm and hand manipulation, sculptured and artificial nails; and pedicuring	25	
Advance: Styles and techniques for the care, treatment, and decoration of fingernails, toenails, cuticles, nail extensions and artificial nails; electric file; business management; and professional ethics	275	
Performance Requirements		Performances
Manicures including trimming, filing, shaping, decorating, and arm and hand manipulations		15
Applications or repair of sculptured or artificial nail sets		20
Pedicures		10

(b) ~~A minimum of 25 hours of theory shall be required prior to conducting live model performances on the public. Performances shall be defined as the systematic completion of the steps for safe and effective cosmetic art services to a client.~~

(c) Certification of performance completions shall be required on the graduation form and Board's application for the examination.

(d) Sharing of performance completions shall not be allowed.

(e) Credit for a performance shall be given to only one student.
(f) A "nail set" means one hand including all four fingers and thumb.

Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17.

21 NCAC 14T .0606 NATURAL HAIR CARE CURRICULUM

(a) To meet the approval of the Board, a natural hair care styling training course shall consist of 300 hours of instruction in theory and practical application, divided as follows:

Theory	Hours	Performances
Beginners: Sanitation, bacteriology, disinfection, first aid, shampooing, draping, anatomy, disorders of the hair and scalp, and client consultation.	25	
Advanced: Styles and techniques of natural hair styling including twisting, wrapping, extending, locking, blowdry and thermal iron; and business management; and professional ethics.	275	
Performance Requirements		Performances

Braids		10
Twists		10
Knots		5
Corn rows		5
Hairlocking		10
Artificial hair and decorations		10
Blow dry and thermal iron		10
Braid Removal		10

(b) ~~A minimum of 25 hours of theory shall be required prior to conducting live model performances on the public. Performances shall be defined as the systematic completion of the steps for safe and effective cosmetic art services to a client.~~

(c) Certification of performance completions shall be required on the graduation form and Board's application for the Board examination.

(d) Sharing of performance completions shall not be allowed unless the live model service consists of 20 or more lengths of hair.

(e) Credit for a performance shall be given to only one student.

(f) A performance shall consist of 10 or more lengths of hair.

Authority G.S. 88B-2; 88B-4; 88B-16.

21 NCAC 14T .0607 – READOPTION WITHOUT SUBSTANTIVE CHANGES

21 NCAC 14T .0608 – READOPTION WITHOUT SUBSTANTIVE CHANGES

21 NCAC 14T .0609 – READOPTION WITHOUT SUBSTANTIVE CHANGES

21 NCAC 14T .0610 – READOPTION WITHOUT SUBSTANTIVE CHANGES

21 NCAC 14T .0612 INSTRUCTION GUIDELINES

(a) The hours earned in the ~~advanced-clinic~~ department must be devoted to study and performance completions.

(b) Work in the ~~advanced-clinic~~ department may be done on the public. ~~Cosmetology and apprentice students with fewer than 300 hours, esthetician students with fewer than 75 hours, and manicurist and natural hair care students with fewer than 60 hours shall not work in this department and are not allowed to work on the public except shampoo and scalp manipulations.~~

(c) All work done by students on the public must be checked by the cosmetic art teacher as the work is being performed and after the service has been completed so that the teacher may point out errors to the student in order that the errors may be corrected.

(d) Cosmetic art students shall receive training on theory of any cosmetic art service prior to performing that service.

(e) Theory work shall include lectures on theory subjects as well as demonstrations, questions and answers on textbooks, written examinations, and in-class practice of procedures and methods.

(f) Cosmetic art teacher trainees must be enrolled in school to earn hours.

(g) Cosmetic art schools must supply each student with a copy of the North Carolina Cosmetic Art Act, Board rules, and the student handbook.

(h) All of the work outlined in the ~~beginners'~~ practice department and the ~~advanced-clinic~~ department shall be given to the students through practical demonstrations and lectures, questions and answers on textbooks, and written exam.

(i) A minimum of 10 percent of scheduled attendance time each week will be spent on theory instruction, questions and answers on textbooks, and the administration of a written exam to full time students.

(j) All papers shall be graded and returned to the students.

(k) Cosmetic art students shall receive training and practice only in the discipline in which they are enrolled.

(l) All live model performances on the public must be done in the ~~advanced-clinic~~ department. Mannequin performances and live model performances on other students may be performed in the ~~advanced-clinic~~ department or in an ~~advanced-clinic~~ department classroom or room within the school with the required space and equipment for practice.

(m) Textbooks shall not be used more than five years after original publication date.

(n) Schools must provide textbooks and supplementary educational materials and equipment to students.

Authority G.S. 88B-4; 88B-16.

SECTION .0700 - SCHOOL LICENSURE, OPERATIONS, CLOSING AND RELOCATING SCHOOLS

21 NCAC 14T .0701 SCHOOL OPERATIONS/LICENSURE MAINTENANCE

(a) No individual shall be given credit for any hours earned in a cosmetic art school before the date the school is granted a license, before the student is enrolled, or after graduation or withdrawal of the student without a new enrollment.

(b) All Cosmetic Art schools shall submit hours of operation per cosmetic art discipline to the Board. Any changes to the hours of operation shall be submitted to the Board. A school will be considered open by the Board when cosmetic art instruction, services, or performances are provided.

(c) Students may be required to clean and disinfect work areas, reception areas, implements, and the dispensary. Students shall not be required to perform regular maintenance.

(d) All cosmetic art schools shall adhere to all Board sanitation regulations located in 21 NCAC 14H Sanitation.

(e) Cosmetic art schools may permit students to leave the cosmetic art school during instructional time to visit on campus libraries and other educational resource rooms such as computer

labs for research and study under the supervision of a cosmetic art instructor.

(f) Cosmetic art schools shall use the following grading scale as a minimum for passing grades:

Grade A	100-90
Grade B	80-89
Grade C	70-79
Grade F (Fail)	0-69

(g) Cosmetic art schools shall not graduate any student who has not met the minimum school and Board requirements for graduation.

(h) Examinations shall be administered in all subjects of the cosmetic art curriculum.

(i) Students present at school shall be supervised by a cosmetic art teacher at all times. If a guest lecturer is leading a class, at least one cosmetic art teacher must be present in the lecture.

(j) All cosmetic art schools shall provide:

- (1) One teacher for every 25 students enrolled in the ~~beginner-practice~~ department;
- (2) One teacher for every 20 students during practical work on live models in the ~~advanced clinic~~ department; and
- (3) Cosmetic art teachers at a ratio of 1:25 teacher to teacher trainees; or
 - (A) one teacher and up to 25 ~~beginner-practice~~ cosmetic art students and 5 teacher trainees; or
 - (B) one teacher and up to 20 cosmetic art students in practice on the clinic floor and 5 teacher trainees.

(k) In theory classes, the teacher-student ratio may exceed the ratios established in this Rule.

(l) The teacher student ratios established in this Rule shall be adhered to when schools are in operation.

(m) A teacher may administer instruction to up to 10 students enrolled in ~~beginner-practice~~ and ~~advanced-clinic~~ departments at the same time. A teacher shall not administer instruction to more than 10 students enrolled in ~~beginner-practice~~ and ~~advanced-clinic~~ departments at the same time.

(n) At no time can any one teacher be simultaneously responsible for students in a theory class and students in practice on the clinic floor.

(o) In cases of change in teaching staff, the school shall notify the Board of the change in writing prior to beginning instruction. A change in teaching staff includes any substitution for the regularly scheduled teacher and any change, scheduled or otherwise, in the list of teachers last given to the Board.

- (1) All courses in a cosmetic art school shall be taught by a licensed cosmetology teacher, except as follows:
 - (A) manicuring courses may be taught by either a licensed cosmetology teacher or a licensed manicurist teacher;
 - (B) natural hair care courses may be taught by either a licensed cosmetology

teacher or a licensed natural hair care teacher;

(C) esthetics courses may be taught by either a licensed cosmetology teacher or a licensed esthetician teacher.

(2) A licensed cosmetologist not licensed as a cosmetology teacher may substitute for a cosmetology, esthetician, natural hair care or manicurist teacher; a licensed manicurist not licensed as a manicurist teacher may substitute for a manicurist teacher; a licensed natural hair care specialist not licensed as a natural hair care teacher may substitute for a natural hair care teacher; and a licensed esthetician not licensed as an esthetician teacher may substitute for an esthetician teacher.

(p) In no event may any cosmetic art licensee substitution last for more than 15 consecutive working days per year per teacher. If any teacher substitution is 16 consecutive days or longer, the school shall provide a new cosmetic art teacher.

(q) Enrolled students may earn a maximum of 10 hours per day per discipline of cosmetic art and a maximum of 48 hours per week per discipline. A student enrolled in more than one cosmetic art discipline may not earn hours or complete performances concurrently.

(r) A cosmetic art student must complete at least 1/3 of the minimum required hours in the cosmetic art school certifying his or her application for the state board examination.

(s) Upon written petition by the student and the school, the Board shall make an exception to the requirements set forth in Paragraph (r) of this Rule if the student shows that circumstances beyond the student's control prohibited him or her from completing a minimum of 1/3 hours at the school certifying his or her application.

(t) The Board shall certify student hours for any North Carolina cosmetic art school that is closed. The Board shall not certify student hours between any North Carolina open cosmetic art schools. The Board shall certify student hours earned at North Carolina cosmetic art schools to other state boards and schools open outside of the state of North Carolina as set forth in Rule .0502 of this Subchapter.

Authority G.S. 88B-2; 88B-4; 88B-16.

21 NCAC 14T .0705 – READOPTION WITHOUT SUBSTANTIVE CHANGES

CHAPTER 46 - BOARD OF PHARMACY

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Board of Pharmacy intends to amend the rule cited as 21 NCAC 46 .2612.

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

Proposed Effective Date: *November 1, 2015*

Public Hearing:

Date: September 15, 2015

Time: 9:00 a.m.

Location: North Carolina Board of Pharmacy, 6015 Farrington Road, Suite 201, Chapel Hill, NC 27517

Reason for Proposed Action: *The Board proposes amending the rule regarding delivery of devices and medical equipment to provide that those items may be delivered from allowed storage sites without first taking those items to permitted locations, if delivery is performed by a bona fide employee of a permitted location.*

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

Comment period ends: 9:00 a.m., September 15, 2015

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

Fiscal impact (check all that apply).

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

SECTION .2600 - DEVICES

21 NCAC 46 .2612 STORAGE OF DEVICES AND MEDICAL EQUIPMENT

(a) Devices and medical equipment shall be stored at the location holding the pharmacy or device and medical equipment permit or a location that is within 50 miles of the permitted location. Devices and medical equipment shall not be stored on residential property.

(b) A device and medical equipment storage site not holding a pharmacy or device and medical equipment permit shall not provide any devices, medical equipment, or services directly to patients. A bona fide employee of a permitted location who has

been trained as required by Rule .2603 of this Section may travel from the permitted site to a storage site, retrieve devices or medical equipment from the storage site, and deliver devices or medical equipment to patients.

(c) Device and medical equipment storage sites shall be subject to inspection by the Board.

Authority G.S. 90-85.6; 90-85.22; 90-85.32.

CHAPTER 52 - BOARD OF PODIATRY EXAMINERS

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Board of Podiatry Examiners intends to adopt the rule cited as 21 NCAC 52 .0215 and amend the rules cited as 21 NCAC 52 .0208 and .0611.

Link to agency website pursuant to G.S. 150B-19.1(c): <http://www.ncbpe.org/content/executive-board>

Proposed Effective Date: October 1, 2015

Public Hearing:

Date: Friday, August 7, 2015

Time: 10:00 a.m.

Location: 1500 Sunday Drive, Suite 102, Raleigh, NC 27607

Reason for Proposed Action:

21 NCAC 52 .0215 – *To clarify the process for reinstating a cancelled or suspended license to require re-application similar to a first-time licensee and passing of the Board's licensing exams again.*

21 NCAC 52 .0208 – *To allow for the acceptance of a fellowship as Continuing Medical Education (CME) and to require one hour of CME per year in controlled substances prescribing practices per new legislation.*

21 NCAC 52 .0611 – *To include the Board's application and recommendation forms in the Rules.*

Comments may be submitted to: Penney De Pas, Executive Secretary, NC Board of Podiatry Examiners, 1500 Sunday Drive, Suite 102, Raleigh, NC 27607-5151, email info@ncbpe.org

Comment period ends: August 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 ($\geq \$1,000,000$)
- ☐ Approved by OSBM
- ☒ No fiscal note required by G.S. 150B-21.4

SECTION .0200 - EXAMINATION AND LICENSING

21 NCAC 52 .0208 CONTINUING EDUCATION

(a) An additional requirement for issuance of the annual renewal certificate shall be certification to the board of proof of having complied with the continuing education provisions of the General Statutes. The Board shall notify all podiatrists that 25 hours are required ~~annually~~, annually, including one hour of controlled substances prescribing practices and controlled substance prescribing for chronic pain management.

(b) General CME policy - 25 hours per year as follows:

- (1) Completion of 25 hours of Continuing Medical Education (CME) is required per year (July 1- June 30) for renewal of licensure. CME credits shall not be carried over from the previous licensure year.
- (2) It shall be the responsibility of the individual podiatrist to ascertain in advance that the courses which he or she attends have received proper approval of the certifying organizations, and comply with the Standards, Requirements, and Guidelines for Approval of Sponsors of Continuing Education in Podiatric Medicine of the Council on Podiatric Medical Education (<http://www.cpme.org/education/content.cfm?ItemNumber=2440&navItemNumber=0=2249>), including updates. The website may be accessed at no charge. The Board shall respond in writing within 45 days of receipt by the Board of all needed documentation with approval or denial to individuals requesting approval of CME courses and credit hours. Decisions by the Board are the final agency decision and may be appealed as set out in G.S. 150B-23.
- (3) Certificates of completion of courses other than those sponsored by the NC Foot and Ankle Society (NCF&AS) must be submitted to the Board on a form provided by the Board with the podiatrist's annual license renewal documents. Completion certificates must be typed and contain the following information:
 - (A) Podiatrist's name;
 - (B) Course name, location, and date;
 - (C) Number of hours CME completed;

- (D) Signature of seminar chairperson; and
- (E) Name of certifying or sponsoring agency.

- (4) A licensed podiatrist participating in the second or third year of a medical residency or fellowship may submit a letter signed by the podiatric residency or fellowship director stating the podiatrist's name and dates of residency. This shall substitute for the 25-credit hour requirement and CME certificate required by this Rule.
- (5) A podiatrist may submit his or her CME certificate(s) to the Board in facsimile, electronic, or hard copy format at any time during the renewal year.
- (6) The Board shall retain CME documentation with the individual podiatrist's license renewal information.

(c) Category 1: Minimum requirement 20 hours per year, as follows:

- (1) CME credit shall be granted for attendance at educational seminars offered by the NCF&AS. The number of qualifying hours of continuing education shall be determined and approved by the Board in advance based on the standards in 90-202.11. NCF&AS shall provide the Board directly with a listing of individuals attending its CME events and credits earned.
- (2) CME credit shall be granted for attendance at educational seminars offered by other national, state and podiatric education providers, as certified by the Council on Podiatric Medical Education (CPME) of the American Podiatric Medical Association (APMA). The number of qualifying hours of continuing education shall be determined and approved by the Board.
- (3) Lecturers shall be granted one hour of credit for each hour of CPME- or APMA- approved lectures given, but such credit shall be limited to one hour for each discrete topic. A brief summary of the content of each lecture must be submitted to the Board for approval.
- (4) Category 1 is limited to educational seminars either offered by NCF&AS or by sponsors pre-approved by CPME:
<http://www.cpme.org> (CPME 700: "Approved Sponsors of Continuing Education in Podiatry"). (APMA- or CPME- approved online or journal courses are considered Category 2.)
- (5) Since CPME evaluates only CME conducted in the United States, North Carolina-licensed podiatrists practicing outside the United States or participating in a foreign fellowship or other short-term residency abroad, may apply to the Board to have their continuing medical education credits from their country of practice considered and evaluated by the Board on an individual basis.

(d) Category 2: A maximum of only 5 of the total 25 CME hours per year shall be allowed as follows:

- (1) CME credit shall be allowed for educational programs approved for Category 1 credit by the American Medical Association (AMA) and the American Osteopathic Association (AOA) or their affiliated organizations.
- (2) CME credit shall be allowed for courses approved by North Carolina Area Health Education Centers (AHEC).
- (3) Online or medical journal courses approved by CPME are permitted.
- (4) For courses not pre-approved by AHEC, AOA, or AMA, all requests for CME approval must contain a timeline and course description and be submitted to the Board for approval.

(e) Waiver for Certified Illness, Medical Condition, Natural Disaster, or Undue Hardship. The Board may waive the continuing education requirement for license renewal in the following cases that preclude a licensed podiatrist from completing his or her CME requirement within the 18-month timeframe from July 1 of the year of the last license or renewal issuance through December 31 of the following year:

- (1) An unexpected illness or medical condition certified by a letter from a licensed physician regarding the licensee or the licensee's parents, spouse, children and other persons dependent upon the podiatrist for daily living supports; or
- (2) An undue hardship (such as active military service or natural disaster).

In such cases, the Board shall issue a conditional license predicated on the licensee acquiring all of the required continuing education credits in a mutually-agreeable timeframe, but no later than 24 months after December 31 of the year following the latest year of license or renewal issuance. Such requests for CME waiver must be received by the Board before the end of the grace period deadline for license renewal. The Board may require additional information when necessary to confirm the need for exemption to support the licensee's claim. The Board shall notify the licensee of its decision in writing within 45 days of receipt by the Board of all needed documentation.

Authority G.S. 90-202.4(g); 90-202.11; HB165/S317.

21 NCAC 52 .0215 LICENSE RE-INSTATEMENT

(a) A podiatrist whose license renewal has been delinquent for six months following the July 1 deadline of the end of the podiatrist's last renewal period and cancelled shall re-apply for a new examination. Application shall be made in accordance with the statute and the following:

- (1) re-apply to the Board for licensure as if he or she is a first-time applicant, including the same

application, required documents, and application and examination fees, pursuant to Rule .0201 of this Section and Rules .0601 and .0613 of this Chapter;

- (2) appear before the Board at the same time and in the same place as other license examinees and take the same examination as a first-time applicant, including the practice and ethics examination pursuant to Rules .0202, .0205, and .0206 of this Chapter; and
- (3) receive a passing grade in all parts of the Board licensing examination and pay the license certificate fee pursuant to Rule .0613 of this Chapter before being issued a new license certificate and license number.

(b) A podiatrist whose license has been suspended, put on probation, or has invoked any other form of temporary censure due to disciplinary action in accordance with the statute shall follow the instructions related to reinstatement contained in the specific consent order or other legal document setting forth the provisions of the sanction.

Authority G.S. 90-202.6(a); 90-202.8; 90-202.9; 90-202.10.

SECTION .0600 - GENERAL PROVISIONS

21 NCAC 52 .0611 FORMS AND APPLICATIONS

(a) The Board shall issue the following items in accordance with applicable state statutes and this Chapter's administrative rules:

- (1) Certificate of Licensure;
- (2) Licensure Renewal Card;
- (3) Temporary License Certificate; and
- (4) Certificate of Corporate Registration.

(b) The Board shall provide and require use of the following application forms that may be obtained from the Board's web site, <http://www.ncbpe.org>:

- (1) Licensure Renewal Application;
- (2) Disclaimer Form;
- (3) Corporate Registration Application;
- (4) Corporate Registration Renewal;
- (5) Specialty Credentialing Application; ~~and~~
- (6) CME (Continuing Medical Education) Submission ~~Form~~ Form;
- (7) Recommendation Form; and
- (8) License Application (Regular, Temporary, Military, Reciprocity).

Authority G.S. 55B-10; 55B-11; 90-202.4(g); 90-202.6; 90-202.7; 90-202.9; 90-202.10; 90-202.11.

CONTESTED CASE DECISIONS

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

J. Randolph Ward

A. B. Elkins II
Selina Brooks
Phil Berger, Jr.

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**NORTH CAROLINA
BEAUFORT COUNTY**

Filed

OFFICE OF ADMINISTRATIVE HEARINGS

2015 JUN 22 PM 3:43
13 EHR 17938

**PAMLICO-TAR RIVER FOUNDATION and
NORTH CAROLINA COASTAL
FEDERATION**

Petitioners

v

**NORTH CAROLINA DEPARTMENT OF
ENVIRONMENT AND NATURAL
RESOURCES, DIVISION OF WATER
RESOURCES**

Respondent

MARTIN MARIETTA MATERIALS, INC.

Respondent-Intervenor

**ORDER FOR
SUMMARY JUDGMENT**

This matter coming on to be heard and being heard on January 28, 2015, pursuant to motions for Summary Judgment filed by the Petitioners on November 24, 2014 and the Respondent-Intervenor on November 25, 2014. The Respondent filed a Response seeking Summary Judgment and also opposing Petitioners' Motion for Summary Judgment and supporting Summary Judgment for Respondent-Intervenor on December 23, 2014. Respondent, however, took no position on the issue of Petitioners' standing. Present for the hearing were attorneys Mr. Geoffrey R. Gisler, Mr. Jack F. DaFoe, and Ms. Blakely Hildebrand for the Petitioners, Assistant Attorney General Donald W. Laton for the Respondent, and Mr. George W. House and Mr. Alexander Elkan for the Respondent-Intervenor.

Although a final decision granting summary judgment "need not include findings of fact or conclusions of law," N.C. Gen. Stat. §150B-34(e), certain undisputed facts are relevant to disposition of this matter.

UNDISPUTED FACTS

1. On July 24, 2013, Respondent issued a National Pollution Discharge Elimination System (hereinafter NPDES) permit to the Respondent-Intervenor authorizing discharge of wastewater from its Vanceboro quarry in Beaufort County. The receiving waters for said discharge were unnamed tributaries to Blounts Creek. Blounts Creek is located in the Tar-Pamlico River Basin and feeds into Blounts Bay and the Pamlico River.

2. Petitioners timely filed a Petition for a Contested Case Hearing in the Office of Administrative Hearings on September 20, 2013, alleging that issuance of the permit substantially prejudiced their rights and that the Respondent exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and failed to act as required by law or rule.

3. The not-for-profit Pamlico-Tar River Foundation (hereinafter PTRF) is a membership organization which seeks to promote “the environmental quality of the Tar-Pamlico River and its watershed through public education, regulatory advocacy, and scientific research” Petition, p1. PTRF has more than 2,000 members, many of whom live, work, and engage in recreational activities in and around the area of Blounts Creek. (Petition, p1)

4. PTRF Executive Director R. Harrison Marks, III stated in an affidavit that the “organizational purposes of PTRF are to protect, preserve, and enhance the environmental quality of the Tar-Pamlico watershed.” Marks also indicated that PTRF seeks to protect quality of life issues “by protecting the area’s water and air quality, fisheries, wetlands, wildlife habitat, natural beauty, and recreational opportunities.” (Affidavit of R. Harrison Marks, III, p2)

5. With the exception of two member-affiants, PTRF alleges injury to their members’ enjoyment of the waters, aesthetic interests, and those activities generally associated with education and research. The two members alleging potential economic harm include a marina operator and a charter boat business owner. (Affidavit of Jimmy Daniels and Affidavit of Robert Boulden)

6. Similarly, Petitioner North Carolina Coastal Federation (hereinafter NCCF), a not-for-profit organization with more than 10,000 members, seeks to protect various waters in this state through “public education, regulatory advocacy, and restoration” of wetland areas. Many of NCCF’s members live, work, and engage in recreational activities in and around the area of Blounts Creek. (Petition, p2)

7. NCCF Executive Director Todd Miller indicated that members of his organization would “suffer from the adverse environmental consequences of Martin Marietta’s discharge, and the resulting degradation of fishing, boating, and wildlife viewing opportunities.” (Affidavit of Todd Miller, p3)

8. Mr. Miller also stated in his affidavit that issuance of the permit affected NCCF’s “organizational efforts to restore, protect, and foster enjoyment of the coastal environment; the personal interests of our members in using and enjoying Blounts Creek; and my ability to carry out my responsibilities as the Coastal Federation’s Executive Director.” (Affidavit of Todd Miller, p4)

9. NCCF member-affiants alleged injury to their enjoyment of the waters, aesthetic interests, and those activities generally associated with education and research.

10. Respondent-Intervenor, a corporation authorized to do business in this state, obtained an NPDES permit to discharge water associated with mining operations at two locations on unnamed tributaries of Blounts Creek.

11. Blounts Creek headwaters are classified as a Class C, Swamp, Nutrient Sensitive Waters.

12. At the confluence of Blounts Creek and Herring Run, miles downstream from the two discharge points, the waters are classified as Saltwater, Class SB, Nutrient Sensitive Waters.

13. Respondent-Intervenor applied for the discharge permit in October, 2011.

14. Respondent-Intervenor, pursuant to 15A N.C. Admin. Code 2H .0112(c), had “the burden of providing sufficient evidence to reasonably ensure that the proposed system will comply with all applicable water quality standards and requirements.”

15. Respondent-Intervenor conducted investigations into potential effects of the discharge, some at the request of the Respondent. Documents, studies, and investigations which were provided to Respondent for consideration regarding issuance of the permit include, but were not limited to:

- a. Groundwater Management Associates, Inc.’s (GMA) Hydrogeologic Characterization and Predictive Modeling Analysis dated April 2, 2008, to analyze the hydrogeologic setting of the location; documentation of assistance with permitting, construction, and monitoring of a construction well; and aquifer testing.
- b. Kimley-Horn’s Preliminary Watershed Analysis for Proposed NPDES Discharge dated May 17, 2010, comparing the anticipated discharge to existing watershed discharge in a predicted 2 year, 24 hour rainfall, and associated rainfall/runoff depth.
- c. Kimley-Horn’s Geomorphic and Hydraulic Analysis for the Proposed Built-Out Dewatering Discharge dated July 14, 2010, which evaluated the potential impact of discharge on the structural stability of downstream receiving waters.
- d. CZR’s Aquatic Habitat Assessment of the Upper Headwaters of Blounts Creek in the Vicinity of a Potential Quarry Site Near Vanceboro, Beaufort County, NC dated August, 2011, which included analysis of water quality (salinity, dissolved oxygen, and pH), fish species, and aquatic macroinvertebrates.

16. Respondent conducted sampling studies and investigations of the impacted area, and utilized information from Respondent-Intervenor’s investigations in its decision to issue the permit.

17. Respondent requested additional information about effects of the potential discharge, and the Respondent-Intervenor complied with those requests, providing information which included, but was not limited to:

- a. Kimley-Horn's Stability, Flood, and Water Quality Analysis which addressed stream stability, potential flooding, and other water quality issues. It was determined, among other things, that the discharge would have little effect on flood elevations and little change to channel geography.
- b. Kimley-Horn's Qualitative Cumulative Impact Analysis to determine the anticipated impact to the area, existing uses of the waters, and necessary regulatory steps needed to address growth due to the project. Since there is no potential growth or additional development, no adverse impact was predicted.
- c. GMAs Engineering Alternatives Analysis from September 14, 2012
- d. CZRs Technical Memorandum dated October 30, 2012 concerned possible impact on identified fish populations and found no adverse affects would be likely to occur in fish species, macroinvertebrates, or essential fish habitats in Blounts Creek from anticipated changes in pH, salinity, or flow velocity attributable to discharge.

18. Respondent relied on the information and studies provided by Respondent-Intervenor, studies conducted by the Respondent, and the Hearing Officer's Report, in making its decision to issue the permit herein. Respondent specifically considered "the nature of the discharge effluent, permit terms and conditions, including monitoring requirements, potential effects of the permitted discharge on receiving waters, water quality classifications of receiving waters, and applicable water quality standards." (Affidavit of Tom Reeder, p3)

19. Respondent also relied on the knowledge and expertise of employees and agency representatives in reaching its decision to issue the permit herein, including but not limited to the following:

a. Tom Reeder, Director of the North Carolina Department of Environment and Natural Resources (DENR) Division of Water Resources, who made the final decision on issuance of the NPDES permit. Mr. Reeder has served in that position since July, 2008, and was the Acting Director of the Division of Water Quality from June, 2013 through August, 2013. Reeder holds a Master of Science Degree in Engineering and Environmental Management. He has been employed with DENR since 1998, working in the Division of Air Quality from 1998-2001; as head of Classifications and Standards from 2001-2004; and Branch Chief of the Wetlands and Stormwater Branch from 2004-2008. Reeder was an officer in the U.S. Marine Corps for 20 years where his duties included, among other things, "implementation of all environmental programs in accordance with applicable environmental statutes and regulations, including Clean Water Act Requirements." (Affidavit of Tom Reeder, p2.)

b. Tom Belnick, Supervisor of the Complex NPDES Permitting Unit of the Wastewater Branch, Water Quality Permitting Section, North Carolina Department of Environment and Natural Resources Division of Water Resources. Mr. Belnick has held that position since 2010, and has served as a supervisor in the NPDES permitting unit. He has worked with DENR since 1997, and served as a Permit Writer in the NPDES Permitting Unit from that time through 2008. He holds a Master of Science degree in Environmental Science. (Affidavit of Tom Belnick)

c. Erick D. Fleek, Branch Chief of the Biological Assessment Branch with the North Carolina Department of Environment and Natural Resources, Division of Water Resources. Mr. Fleek has served in that capacity since 2010, and has also served DENR as a Lead Biologist with the Biological Assessment Branch for five years. Fleek holds Master of Science degrees in Marine Biology and Fisheries and Wildlife Sciences. He has experience and expertise in benthic macroinvertebrate ecology, biology, and taxonomy. (Affidavit of Erik D. Fleek)

19. A Notice of Public Hearing was published on February 6, 2013, requesting public comment on the draft permit for proposed discharge. Respondent conducted a public hearing on March 14, 2013. 144 individuals attended; 22 spoke at the hearing and 72 written comments were provided.

20. Neither PTRF nor NCCF were precluded from or prohibited from participating in public hearings or providing submissions during the permitting process. While PTRF members and representatives attended and spoke at the public hearing, NCCF did not participate.

21. A Hearing Officer Report was issued following the public hearing, which set forth a summary of comments and the recommendations of the Hearing Officer.

22. The Hearing Officer made the following relevant conclusions:

a. pH ranges for the discharge would be “consistent with state water quality standards for protection of aquatic life in freshwater Class C.” (Hearing Officer Report, p2)

b. While some benthic organisms might “be outcompeted by invertebrates more adapted” to elevated pH, it would, nonetheless be “a tolerable pH range for many freshwater fish species commonly found throughout coastal plain fish communities.” (Hearing Officer Report p3)

c. Predicted changes in salinity downstream were less than 1 part per thousand and downstream pH was reported to remain at or near then existing conditions. There would be “insignificant changes to downstream salinity and downstream pH,” (Hearing Officer Report, p3)

23. Modifications to the draft permit were made based in part on the input received at the public hearing.

24. Respondent concluded in the Revised Fact Sheet for Final Permit Development, dated July 9, 2013, that:

- a. discharge “will have no likely significant adverse effects on aquatic life”;
- b. based on their evaluation of all the data, “the level of water quality necessary to protect the existing uses will be maintained and protected”;

- c. and because of effluent limits and the re-open provision, “the Final permit will be protective of state surface water quality standards.”
- 25. Respondent determined that issuance of the permit would “reasonably ensure” compliance with water quality standards.
- 26. The NPDES Permit was issued to the Respondent-Intervenor on July 24, 2013.
- 27. Following treatment in clarification ponds, discharge of stormwater and quarry dewater totaling 12 MGD is allowable under the permit. The permit also authorized and required:
 - a. pH - Limits to the pH levels of the discharge between 5.5 and 8.5 standard units.
 - b. Discharge Turbidity - Monthly monitoring of turbidity, and limiting discharge so that the turbidity of the receiving waters would not exceed 50 NTU. If turbidity exceeds 50 NTU due to natural background conditions, discharge cannot cause any increase in turbidity in the receiving waters.
 - c. Instream Turbidity - Monitoring was not required unless the effluent turbidity exceeds 50 NTU. Should the effluent turbidity exceed 50 NTU, the frequency of instream turbidity monitoring increases to weekly during summer months.
 - d. The permit also required monitoring requirements for, among other things, salinity, settleable solids, and iron.
 - e. The permit also required Martin Marietta to secure an approved pumping operation and monitoring plan, which included a detailed site plan, groundwater monitoring strategies, hydrology maintenance plans, and a pumping regime to protect impacted streams and wetlands.
 - f. BMPs - Martin Marietta was also required to implement Best Management Practices (BMPs) associated with the permit to reduce pollutants in stormwater discharge from stormwater runoff. BMPs also included a preventative maintenance program to prevent surface water and groundwater pollution.
 - g. The permit prohibits Martin Marietta from chemically treating the discharge or using chemicals in their production process without pre-approval from the Division.
 - h. Benthic Sampling - Martin Marietta is required to sample, for evaluation of biological impact, the same locations as CZR Incorporated did in April, 2011 and referenced in the Aquatic Habitat Assessment of August, 2011. Results from the sampling is to be provided to the NPDES Unit six months prior to expiration of the permit.
 - i. The permit is effective September 1, 2013 through August 31, 2018, and the permit can be reopened and modified at any time “if there are any parameters detected at levels of concern.”

28. The remaining facts set forth in each section that follows are undisputed facts directly relevant to that particular section.

ISSUES

I. Petitioners are not “Persons Aggrieved”

North Carolina law provides that an aggrieved party may file a contested case hearing to challenge an agency decision. A “person aggrieved” is “any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision.” N.C. Gen. Stat. §150B-2(6). Further, “person aggrieved” means “adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights.” *In the matter of the Rulemaking Petition of Warren Wheeler*, 85 N.C. App. 150 (1987) (quoting *In re Halifax Paper Company, Inc.*, 259 N.C. 589 (1963)).

However, the term “‘person aggrieved’ has no technical meaning.” *Empire Power Co. v. North Carolina Dep’t of Env’t, Health and Nat. Resources*, 337 NC 569 (1994). The question of “whether a party is a ‘person aggrieved’ must be determined based on the circumstances of each individual case.” *N. Carolina Forestry Ass’n v. N. Carolina Dep’t of Env’t & Natural Res., Div. of Water Quality*, 357 N.C. 640 (2003).

“[T]he requirement that a person be aggrieved is quite similar to the concept of ‘standing.’” *Orange Cnty. v. N. Carolina Dep’t of Transp.*, 46 N.C. App. 350 (1980).

Petitioners, as the parties seeking to invoke jurisdiction, “have the burden of proving the elements of standing.” *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, (2002). Proving those elements is “an indispensable part of the plaintiff’s case”. *Id* at 113 (quoting *Lujan v Defenders of Wildlife*, 504 US 555 (1992)).

The North Carolina Administrative Procedures Act confers only “procedural rights and imposes procedural duties,” *Empire Power* 337 N.C. at 583. There is no organic statute which provides the Petitioners with standing.

In addition, “there is no North Carolina authority supporting the contention that injury to aesthetic or recreational interests alone, regardless of degree, confers standing on an environmental plaintiff.” *Neuse River Found., Inc.*, 155 N.C. App. at 116.

Petitioners allege that 40 C.F.R. §123.30 confers standing upon them; however, this rule mandates that the states adopt rules regarding standing, it “does not provide an independent basis for standing.” *Families Against Corporate Takeover v. Mitchell*, 268 Kan. 803 (2000).

The two individuals who provided affidavits alleging some injury other than interference with aesthetic or recreational enjoyment involve speculative harm to disparate business interests. While there may be commonality amongst the Petitioners, Petitioners’ members, and the affiants on many issues, there is no commonality between the affiants’ purported economic harm and Petitioners’ stated purposes.

PTRF provided two member-affiants who alleged potential economic injury from issuance of the permit. The stated purpose of both PTRF and NCCF, however, is to educate the public, provide regulatory advocacy, and protect wetlands. Neither petitioner has alleged that its mission is the protection of its members economic or business interests. Neither petitioner is a trade association, business advocacy group, or business-focused organization alleging a particular or actual injury. There is no nexus between the stated purpose of the Petitioners' organizations and the alleged potential economic harm to the two individuals.

Further, Petitioners cannot show substantial injury to their rights. Petitioners fully participated in and enjoyed all procedural rights associated with hearings and input related to issuance of the permit. NCCF, as set forth above, declined to participate in the public hearing in this matter, but was not prevented or precluded from doing so in any way.

There is no genuine issue of material fact and the Respondent-Intervenor is entitled to judgment as a matter of law. Respondent-Intervenor's Motion for Summary Judgment is granted. The Petitioners' Motion for Summary Judgment is denied.

Even if the Petitioners were determined to be persons aggrieved, for the reasons set forth herein, Respondent and Respondent-Intervenor are entitled to judgment as a matter of law as there is no genuine issue of material fact.

II. Respondent's Decision to Issue the Permit was Not in Violation of N.C. Gen. Stat. §150B-23(a)

Petitioners must establish facts which establish that the agency in question "deprived the petitioner of property or has otherwise substantially prejudiced the petitioner's rights and (1) exceeded its authority or jurisdiction; (2) acted erroneously; (3) failed to use proper procedure; (4) acted arbitrarily or capriciously; or (5) failed to act as required by law or rule." N.C. Gen. Stat. §150B-23(a).

A presumption exists that the agency acted in good faith, and the Petitioners have the burden to prove otherwise. *Richardson v. DPI Licensure Section*, 199 N.C. App. 219 (2009). Moreover, "a reviewing court does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law." *Lewis v. N. Carolina Dep't of Human Res.*, 92 N.C. App. 737 (1989).

Due regard must be given "to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." N.C. Gen. Stat. §150B-34(a). "[A]n agency's interpretation of its own regulations will be enforced unless clearly erroneous or inconsistent with the regulation's plain language. *Hilliard v. N. Carolina Dep't of Correction*, 173 N.C. App. 594 (2005).

A. Respondent Ensured Compliance with Biological Integrity Standard

Biological integrity is the “ability of an aquatic ecosystem to support and maintain a balanced and indigenous community of organisms having species composition, diversity, population densities and functional organization *similar* to that of reference conditions.” 15A N.C. Admin. Code 2B.0202 (11) (emphasis added). A violation of biological integrity standards occurs if the discharge, on a short-term or long-term basis, precludes the ability of the aquatic ecosystem to support and maintain a balanced and indigenous community of organisms having species composition, diversity, population densities and functional organization similar to that of reference conditions. 15A N.C. Admin. Code 2B.0211(d)

The size and scope of the aquatic ecosystem is not defined by rule or statute, and the agency determined that relevant ecosystem was the Blounts Creek system, consisting of Blounts Creek and its tributaries. An aquatic ecosystem can include a large geographical area, including an entire estuary. The agency’s determination that the relevant ecosystem is broader than a particular stream segment or particular location is entitled to deference, and there is no evidence that this decision was made in bad faith.

Similarly, reference conditions are not defined by rule or statute, and the agency determined that the relevant reference conditions were those found in the Blounts Creek system. Blounts Creek is a dynamic system that can be affected by many environmental factors. The agency’s determination that the relevant reference conditions are those found in the Blounts Creek system and similar systems falls within the knowledge and expertise of agency representatives who made this decision and is entitled to deference. In addition, there is no evidence that this decision was made in bad faith.

The Department determined that, while certain existing and indigenous fish species, organisms, and macroinvertebrates may migrate to different portions of Blounts Creek, or further downstream, discharge as set forth in the permit would not preclude this ecosystem’s ability to support and maintain a balanced and indigenous community of organisms having species composition, diversity, population densities, and functional organization similar to that of conditions within the overall Blounts Creek ecosystem.

The predicted potential impact of discharge on benthic macroinvertebrates and fish communities does not violate 15A N.C. Admin. Code 2B .0211.

Based upon the undisputed facts, Petitioners have produced no evidence to overcome the presumption that the agency acted appropriately in issuing the permit, and there is no evidence of bad faith on the part of the Respondent. Further, the agency’s decision was not clearly erroneous or inconsistent with applicable rules and regulations.

There is no genuine issue of material fact, and the Respondent and Respondent-Intervenor’s Motions for Summary Judgment are granted. The Petitioners’ Motion for Summary Judgment is denied.

B. Respondent Ensured Compliance with pH Water Quality Standards

The pH water quality standard requires that the pH level “be normal for the waters in the area, which generally shall range between 6.0 and 9.0 except that swamp waters may have a pH as low as 4.3 if it is the result of natural conditions.” 15A N.C. Admin. Code 2B.0211 (14).

The pH level of Blounts Creek near the two discharge locations was generally in a range between 4.0-5.5. Effluent pH limitations were included in the draft permit, and following the public hearing and based on public input, Respondent set the effluent pH limit range of 5.5-8.5. The predicted elevation in Blounts Creek pH levels with the allowable discharge was in a range of 6.3-6.9.

Both the discharge pH levels and predicted pH levels in Blounts Creek are within the allowable ranges set forth by rule. The predicted potential change does not violate state water quality standards.

Based upon the undisputed facts, Petitioners have produced no evidence to overcome the presumption that the agency acted appropriately in issuing the permit, and there is no evidence of bad faith on the part of the Respondent. Further, the agency’s decision was not clearly erroneous or inconsistent with applicable rules and regulations.

There is no genuine issue of material fact, and the Respondent and Respondent-Intervenor’s Motions for Summary Judgment are granted. The Petitioners’ Motion for Summary Judgment is denied.

C. Respondent Protected Existing Uses

North Carolina’s anti-degradation policy provides in relevant part that “existing uses ... and the water quality to protect such uses shall be protected by properly classifying surface waters and having standards sufficient to protect these uses.” 15A N.C. Admin. Code 2B .0201(b).

Existing uses are those “uses actually attained in the water body, in a significant and not incidental manner ... whether or not they are included in the water quality standards, which either have been actually available to the public or are uses deemed attainable” 15A N.C. Admin. Code 2B .0202 (30). Such uses are “deemed attainable if they can be achieved by the imposition of effluent limits and cost-effective and reasonable best management practices” 15A N.C. Admin. Code 2B .0202 (30).

Based upon the undisputed facts, Petitioners have produced no evidence to overcome the presumption that the agency acted appropriately in issuing the permit, and there is no evidence of bad faith on the part of the Respondent. Further, the agency’s decision was not clearly erroneous or inconsistent with applicable rules and regulations.

There is no genuine issue of material fact, and the Respondent and Respondent-Intervenor's Motions for Summary Judgment are granted. The Petitioners' Motion for Summary Judgment is denied.

D. Re-opener Provision

The permit issued to the Respondent-Intervenor allows the Respondent to re-open and modify the permit if water quality standards are threatened or other monitored data cause concern. Even if Petitioner provided evidence of specific and particularized potential violations of water quality standards, the re-opener provision assures reasonable compliance with those standards.

Based upon the undisputed facts, Petitioners have produced no evidence to overcome the presumption that the agency acted appropriately in issuing the permit, and there is no evidence of bad faith on the part of the Respondent. Further, the agency's decision was not clearly erroneous or inconsistent with applicable rules and regulations.

There is no genuine issue of material fact, and the Respondent and Respondent-Intervenor's Motions for Summary Judgment are granted.

CONCLUSION

There is no evidence that Petitioners' rights have been substantially prejudiced, or that Respondent 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.

For the reasons discussed herein, there is no genuine issue as to any material fact. Respondent's Motion for Summary Judgment is allowed; Respondent-Intervenor's Motion for Summary Judgment is allowed. Petitioners' Motion for Summary Judgment is denied, and Petitioners are not entitled to the relief requested in the petition.

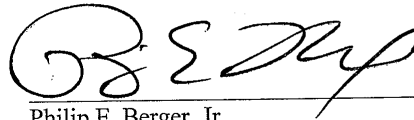
NOTICE

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

Under the provisions of N.C. Gen. Stat. § 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 party 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 20TH day of March, 2015.

A handwritten signature in black ink, appearing to read "P. E. Berger, Jr.", written over a horizontal line.

Philip E. Berger, Jr.
Administrative Law Judge

Filed

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 DOJ 08745

Office of
Administrative Hearings

ERICK MAURICE WALLACE,)
)
Petitioner,)
v.)
)
N.C. PRIVATE PROTECTIVE SERVICES)
BOARD,)
)
Respondent.)

**PROPOSED
FINAL DECISION**

On December 16, 2014, Administrative Law Judge Donald Overby called this case for hearing in Raleigh, North Carolina.

APPEARANCES

Petitioner appeared *pro se*.

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

ISSUE

Whether Petitioner should be denied an unarmed guard registration based on Petitioner's lack of good moral character and temperate habits as evidenced by a conviction of misdemeanor Possession of Stolen Goods/Property.

APPLICABLE STATUTES AND RULES

Official notice is taken of the following statutes and rules applicable to this case: N.C.G.S. §§ 74C-3(a)(6); 74C-8; 74C-9; 74C-11; 74C-12; 12 NCAC 7D .0700.

FINDINGS OF FACT

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

3. Respondent denied the unarmed guard registration due to Petitioner's criminal record which showed the following:

A conviction in Mecklenburg County, North Carolina on December 17, 2010 for misdemeanor Possession of Stolen Goods/Property.
4. Petitioner requested a hearing on Respondent's denial of the unarmed guard registration.
5. By Notice of Hearing dated November 10, 2014 and mailed via certified mail, Respondent advised Petitioner that a hearing on the denial of his unarmed guard registration would be held at the Office of Administrative Hearings, 1711 New Hope Church Road, Raleigh, North Carolina 27609 on December 16, 2014. Petitioner appeared at the hearing.
6. Petitioner testified that in 2010 he lived in Charlotte, NC and worked for Bud Security as an unarmed security guard. He was assigned to work at Channel 3 News Station (WTVD) in Charlotte; he worked the 3rd shift. An employee at Channel 3 news had a large amount of coins (nickels, dimes and quarters) on his desk in a large ash tray. Petitioner needed some gas for his car one night so he took some of the coins totaling eight (8) dollars.
7. He stated that the employee worked the day shift, arrived at work at approximately 8:00 a.m., and saw that money was missing from his ash tray. The employee immediately called the police. The police arrived and began an investigation into the theft. The police asked Petitioner if they could search his vehicle and he gave his permission. The police found the coins in his vehicle which were returned to the owner. The police issued him a criminal citation and a summons.
8. Petitioner retained an attorney to represent him. He went before a judge and entered a guilty plea. The court found him guilty and ordered him to pay court cost and complete 100 hours of community service. Petitioner was to receive a deferred prosecution but got into an altercation with his uncle and it was withdrawn. A letter from Petitioner's attorney, admitted into evidence as Petitioner's Exhibit 1, confirmed these facts.
9. Petitioner admitted he took the change. On cross-examination, he could not explain why he was charged with "possession of stolen goods" and not the theft itself.
10. Further, Petitioner offered into evidence a Petition and Order of Expunction signed by a District Court Judge on December 27, 2012 expunging this matter. (Petitioner's Exhibit 4.) The Court examined the original of this document and there is no apparent reason as to why this charge appears on a criminal history record check of Petitioner.
11. Petitioner has not been charged with any other criminal offense since being charged with this one in 2010.

12. Petitioner has worked at Landmark Security Incorporated where he worked at a grocery store and patrolled the area to deter crime. Landmark Security is aware of this criminal conviction and the facts surrounding it.
13. Petitioner's father, Samuel E. Wallace, Sr. testified on his behalf. He stated his son was raised in a Christian home; he is a "good guy" but made a mistake. He intended to put the money back before the owner knew it was missing.

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.
2. Under G.S. §74C-12(a)(25), Respondent Board may refuse to grant a registration if it is determined that the applicant has demonstrated intemperate habits or lacks good moral character.
3. Under G.S. §74C-8(d)(2), conviction of any crime involving larceny is *prima facie* evidence that the applicant does not have good moral character or temperate habits.
4. Respondent Board presented evidence that Petitioner had demonstrated intemperate habits and lacked good moral character through conviction in Mecklenburg County, North Carolina for a misdemeanor Possession of Stolen Good/Property.
5. Petitioner presented evidence that this charge should have been expunged from his record.
6. He further presented sufficient evidence to explain the factual basis for the charge and has rebutted the presumption even if the charge were validly on his criminal history.

Based on the foregoing, the undersigned makes the following:

FINAL DECISION


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

NOTICE AND ORDER

The NC Private Protective Services Board 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).

The undersigned hereby orders that agency serve a copy of its Final Decision in this case on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714.

This the 28th day of January, 2015.



Donald W. Overby
Administrative Law Judge

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
2/4/2015 10:17 AM

STATE OF NORTH CAROLINA
COUNTY OF WAKE

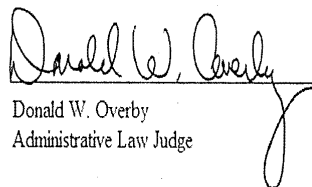
IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 DOJ 08745

Erick Maurice Wallace Petitioner v. N.C. Private Protective Services Board Respondent	ORDER AMENDING DECISION
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Pursuant to 26 NCAC 3.0129, for the purpose of correcting a clerical error, IT IS HEREBY ORDERED that the above-captioned Decision, issued from this Office on January 28, 2015 is amended as follows:

Proposed Final Decision is amended to read Proposal For Decision in the case caption.

This the 4th day of February, 2015.


Donald W. Overby
Administrative Law Judge

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
1/27/2015 10:24 AM

STATE OF NORTH CAROLINA

COUNTY OF PITT

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 EDC 04419

Donald R Heath Jr. v. Office of the State Superintendent, Department Of Public Instruction	Petitioner Respondent	FINAL DECISION
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THIS MATTER came on for hearing before the Honorable Donald W. Overby,
Administrative Law Judge, on October 23, 2014, presiding in Halifax, North Carolina.

APPEARANCES

For Petitioner: Mary-Ann Leon
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For Respondent: Tiffany Y. Lucas
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ISSUE

Whether Respondent failed to act as required by law or rule or acted in an arbitrary and capricious manner when Respondent suspended Petitioner's teaching license for one year.

APPLICABLE STATUTES AND RULES

N.C. Const., art. IX, §5
N.C. Gen. Stat. §115C-296
16 NCAC 06C.0312
16 NCAC 06C.0601
16 NCAC 06C.0602

EXHIBITS

For the Petitioner, Exhibits 1 – 7

For the Respondent, Exhibits 1 – 5; 7 – 15

WITNESSES

1. Donald R. Heath, Jr. (Petitioner)
2. Carol F. Manning (For the Petitioner)
3. Toni Ms. Campbell (For the Petitioner)
4. Janarde Mr. Cannon (For the Respondent)
5. Robert E. Hunt (For the Respondent)
6. Joseph G. ("Glen") Buck (For the Respondent)
7. Katie Ms. Cornetto (For the Respondent)
8. James Mr. Kirkpatrick (For the Respondent)

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

FINDINGS OF FACT

1. Petitioner is employed at E.B. Aycock Middle School, in the Pitt County School District, in Greenville, N.C. as a seventh grade social studies teacher. Petitioner was first licensed as a North Carolina teacher in 2008. He received career status in 2012. T p 10.
2. Petitioner has performed his duties as a teacher satisfactorily. Petitioner's principals for the

past four years have rated Petitioner's performance as either "proficient" or "accomplished" in all areas measured. Pet. Exs. #1, #2, #3; #4; T pp 25-26. On the end of grade examinations for the 2013-2014 school year, Petitioner's students had an 87% passing rate, which was higher than the average at Petitioner's school. T p 30. Petitioner's current principal, Janarde Cannon, wrote at the end of the 2014 school year that Petitioner has "worked well with the students this year." T p 25. Mr. Cannon characterized Petitioner as "a good guy," who was liked by the students and who did "a good job." T p 79. Mr. Cannon does not have any issues with Petitioner's performance. T p 95.

3. On February 6, 2014, Petitioner arrived on time to school, performed his morning hall duties. He then went into his homeroom, took attendance and collected students' report cards. An intern, Ms. Denton, was with him in homeroom. After the bell rang for the first class period, Petitioner was reminded by Ms. Denton that he had an Individualized Educational Plan ("IEP") meeting. Petitioner went to the meeting which lasted fifteen to twenty minutes and then Petitioner returned to his classroom. T pp 11-13.
4. Mr. Cannon is the principal at E.B. Aycock Middle School where Petitioner teaches. T p 69. T p 81. Mr. Cannon also attended the IEP meeting which was chaired by Carol Manning, an Exceptional Children's teacher at Aycock Middle School. T pp 71, 81, 83.
5. At the IEP meeting, Petitioner may have greeted Principal Cannon but did not otherwise engage in conversation with him before or during the IEP meeting. T pp 18-19; 77. Petitioner was seated immediately to Mr. Cannon's left. T p 83.
6. The participants at the IEP meeting sat at a rectangular conference table. Ms. Manning was on an opposite end of the table from Mr. Cannon because she was "chairing the meeting." T p 83. As chair, Ms. Manning did most of the talking and the other participants' attention was directed toward her.
7. Mr. Cannon believed that he smelled alcohol on Petitioner's breath. Mr. Cannon did not see Petitioner exhibiting any signs that he was impaired by alcohol and did not believe that Petitioner was impaired by alcohol or any narcotic substance. T pp 71; 103-105; 109; 113.
8. No other teachers, staff members, students or parents complained to Mr. Cannon or anyone else about smelling alcohol on Petitioner's breath. T pp 76; 107.
9. Ms. Manning recalled nothing "eventful" at the IEP Meeting and did not smell alcohol on Petitioner's breath. Ms. Manning had a long relationship with the parents whose child was the subject of the IEP meeting and was confident that the parents would have expressed to her any concerns with the Petitioner's conduct if there had been some. Neither parent reported smelling alcohol on Petitioner's breath. T pp 82-83; 85.
10. Toni Campbell is an eighth-grade science and social studies teacher at E.B. Aycock Middle School. Ms. Campbell had hall duty with Petitioner on the morning of February 6, 2014. Before beginning hall duty Ms. Campbell, Petitioner, and two other teachers would regularly meet in the hallway for a discussion before assuming their hall duty posts. Ms. Campbell did

not smell alcohol on Petitioner's breath that day. Ms. Campbell's classroom was next to Petitioner's classroom at that time and she interacted with him on a daily basis for the entire school year. She did not smell alcohol on Petitioner's breath at any time when she was standing close to him. T p 91.

11. Following the IEP meeting, Mr. Cannon called Petitioner to his office and questioned him. Petitioner denied that he had been drinking that morning. Mr. Cannon asked Petitioner to submit to a "breathalyzer" test. Petitioner told Mr. Cannon that he had eaten a sausage, had an electronic cigarette ("e-cigarette"), and was chewing gum. Petitioner denied that he had been drinking that morning. Petitioner initially denied to Mr. Cannon that he had been drinking the previous evening, then admitted it. T pp 13-14; 39; 41; 138; 152-153.
12. Corporal Robert E. Hunt, the school resource officer, was called into Mr. Cannon's office after the Petitioner left to retrieve his e-cigarette and chewing gum. Mr. Cannon told Cpl. Hunt that he smelled alcohol on Petitioner's breath. Cpl. Hunt claimed that he smelled alcohol in Mr. Cannon's office after Petitioner left. There is no evidence that Cpl. Hunt smelled alcohol on Petitioner while in Petitioner's presence. T p 106; 115; 117.
13. Mr. Cannon asked Cpl. Hunt to arrange for Petitioner to take a "breathalyzer" test. A Greenville police officer was summoned to administer the test. T pp 71-72.
14. This trier of fact has spent in excess of 25 years as a criminal defense lawyer and as a district court judge. Having participated in hundreds if not thousands of alcohol related cases, I am especially well informed on alcohol testing devices and the methods used in criminal courts for determining impairment. A trier of fact is not called upon to have a blank slate when listening to evidence but to use his or her experience and knowledge in fairly adjudicating the case based upon the evidence presented.
15. Generally, the courts rely on the Intoxilyzer 5000, which is the state of the art breath testing device currently being used in this state. It is fairly large and cumbersome and not such that can easily be transported for field use. Therefore, field officers generally will rely upon a "portable breath test" (PBT) device, the "Alco-sensor." The "Alco-sensor" is not as accurate or reliable as the Intoxilyzer.
16. Acknowledging the fallibility of machines, the state has set standards for use of the Intoxilyzer and the Alco-sensor. Those standards require that there be two sequential breath samples tested which have to be within .02% of each other to be valid and then the lower of the two readings will be used. Although not a common occurrence, it is not unheard of for the readings to be more than .02% apart, and it may happen more than once in testing for the same person, invalidating the tests. It is not unheard of for a particular machine to have to be taken off-line because of such malfunctions.
17. State standards also dictate that the Intoxilyzer's and Alco-sensors must have regular and valid maintenance and a log must be kept for each machine's maintenance.
18. There is no evidence of the maintenance of the Alco-sensor used to test Petitioner.

19. Although Cpl. Hunt is not currently certified on either the portable breath test or the more accurate Intoxilyzer 5000, he was familiar with both the Alco-sensor and the Intoxilyzer 5000 and at one point in his career served as an instructor on the Intoxilyzer 5000. Cpl. Hunt testified that two readings are required for both kinds of machines and field sobriety tests are required to corroborate either machine's result. Furthermore, there can be significant variance between two readings and only two consecutive readings within .02 establish a valid reading. T pp 127-128.
20. Cpl. Hunt testified that neither the odor of alcohol nor a .04 reading on a portable breath test indicate that someone is "under the influence" of alcohol. T p 123.
21. Petitioner submitted to a breath test on the Alco-sensor, the less accurate of the two machines. Petitioner was not asked to remove his chewing gum before blowing into the Alco-sensor machine and he was only asked to blow into the machine once. T p 17; 19; 52; 61; 129.
22. Gum is not likely to cause a false reading but it could because of other contaminants the gum may absorb. Petitioner's other rationalizations as to what may have caused an odor of alcohol are without merit.
23. Mr. Cannon is the only person who testified who contends he saw the reading on the Alco-sensor. He states that the officer showed it to him and that it read .04. Neither Petitioner nor Cpl. Hunt actually saw the reading but were told what it read. T pp 19-20; 119.
24. Petitioner was not asked to submit a second breath sample for analysis, so there is no way to test the validity of the reading. No other test was performed to analyze Petitioner's blood alcohol content on Feb. 6, 2014. T p 54.
25. Neither Cpl. Hunt nor the officer who administered the portable breath test required the Petitioner to perform any field sobriety tests to demonstrate any degree of impairment.
26. On February 6, 2014, Petitioner was not "under the influence" of an alcoholic beverage or controlled substance while on school premises, nor did he possess or consume an alcoholic beverage or a controlled substance while on school premises. T p 11; 38; 103-105; 109; 113; 123.
27. On February 5, 2014, Petitioner did go out with friends and did consume alcohol until about one or two in the morning. T p 20; 38. Petitioner has told varying stories of what happened the evening of February 5, 2014, but there is no question that he drank a substantial amount of alcohol that evening. Petitioner did not drive while under the influence of alcohol, did not commit any illegal or immoral acts on this evening. On February 5, 2014, he did not engage in any conduct that drew negative attention to his activities or that negatively impacted his ability to teach. T p 21. In North Carolina, it is not against the law to consume alcohol, even to excess.

28. Following the Alco-sensor test results of February 6, 2014 being reported to Pitt County Schools' personnel director, Glenn Buck, Petitioner was suspended with pay pending evaluation by a qualified counselor. T p 46. Petitioner's return to teaching was conditioned upon engaging in counseling and the counselor's report that Petitioner was complying with the requirement to get counseling. T p 134-135.
29. Pitt County was satisfied that it had addressed the problem with Petitioner and that he had successfully complied with their conditions to return to the classroom.
30. Once he returned to teaching, Petitioner was required to comply with certain conditions relative to continued counseling and random testing for alcohol and controlled substances. T p 144. There is no evidence of Petitioner's noncompliance with his employer's requirements. T pp 145-146; 151.
31. Petitioner has continued to teach since returning to work after the February 6, 2014 incident and there has been no conduct that has reflected negatively on Petitioner's performance as a teacher. T p 26
32. Petitioner has had difficulties with alcohol in the past. Petitioner was convicted for driving while impaired in 2003 and 2005, as well as in 1985, 1990, and 1997. T pp 22-23; 33-35. His driver's license has been and continues to be revoked. T p 36.
33. Following his conviction in 2005, Petitioner completed a six month alcohol treatment program through Potter's Wheel Ministries. T p 23; Pet. Ex. #5. There have been no arrests for driving while impaired or for any other alcohol-related incidents since 2005. T p 24.
34. After enrolling in the program through Potter's Wheel Ministries, Petitioner was accepted into a program of study at East Carolina University and graduated from that program of study in 2008.
35. As a result of his convictions prior to applying for a teaching license, Petitioner was given a probationary teaching license in 2008. Resp. Ex. #5; T p 156. Petitioner's license has since been converted to a Standard Professional License II, which authorizes Petitioner to teach on an ongoing basis, subject to renewal every five years. There are currently no restrictions on his teaching license. In particular, there are no stipulations that would have proscribed Petitioner's activities on February 5, 2014. T pp 10; 52; 59; Resp. Ex. #14. 16 NCAC 06C.0304(c)(2).
36. On two separate occasions, Petitioner has cited the breakup of a relationship as a primary cause for alcohol related incidents and/or depression. Petitioner was suffering from depression prior to February 6, 2014. Petitioner sought medical treatment for the effects of stress and depression in December 2013. T p 27-28; p 63. Pet. Ex. #7. Petitioner had a follow-up doctor's appointment set for Feb. 6th, even before the incidents of the 6th which led to the licensure action. Pet Ex #6
37. Pitt County Schools reported to the Department of Public Instruction's Licensure Section,

that Petitioner had been suspended with pay because his principal had smelled alcohol on his breath and had one reading on a portable breath test of .04. T pp 140-141; Resp. Ex. #7.

38. The authority to license teachers is delegated by the State Board of Education to the State Superintendent, who, in turn relies upon the Ethics Advisory Committee, a committee of "educator peers, teachers, administrators, HR directors, [and] folks who work in colleges and universities of North Carolina." T p 158. The committee makes recommendations to the State Superintendent who, in turn, makes the final decision about actions concerning teachers' licenses. T p 199.
39. Petitioner met with the State Superintendent's Ethics Advisory Committee on April 11, 2014. T p 49.
40. Ms. Katie Cornetto is the attorney for the State Board of Education. Her responsibility is to review all applications for a teaching license or renewal with respect to character and fitness. James Kirkpatrick is the director of bands at West Forsyth High School in Clemmons, North Carolina and has served as a member of the Superintendent's Ethics Advisory Committee for two and a half years. T pp 156-157; 188.
41. Ms. Cornetto's and Mr. Kirkpatrick's testimony indicated that the committee's recommendation to the State Superintendent was based on personal and subjective reactions to Petitioner's problems with alcohol prior to being licensed in 2008 and their subjective inferences concerning the implications of Petitioner's drinking on February 5, 2014.
42. Mr. Kirkpatrick testified that the biggest issue revealed in Petitioner's interview with the Ethics Advisory Committee was that "there was a drinking problem in his life," "that he had grappled with for a long time and had continued to work on" and that "there was some growth [since 2008] and there was a lapse in the growth." He also acknowledged that Petitioner had been a good teacher. T pp 156-157; 190; 196.
43. The committee's recommendation to suspend Petitioner's license was in order to "send a clear message to continue working on the recovery process and at the same time 'don't mess up again.'" T p 197.
44. Mr. Kirkpatrick acknowledged that the Committee's meeting with Petitioner was rather chaotic and that at times people were talking over Petitioner while he attempted to explain. Petitioner felt as though he was being interrogated.
45. Mr. Kirkpatrick stated that the alcohol was "discovered on a hunch and then followed up with the Breathalyzer that confirmed." Mr. Kirkpatrick acknowledged that if the breath test was not before the committee there would have been a completely different result. T p 194; 206; 207.
46. Ms. Cornetto testified that she felt "crestfallen" upon learning of the February 6, 2014 incident. Ms. Cornetto testified that the committee felt that Petitioner "was struggling with and not winning the battle with being an alcoholic." T pp 164-165; 174-175.

47. Ms. Cornetto acknowledged (as professional treatment providers contend) that with substance abusers there is an expectation of relapse, and that there should still be a measure of assistance when the person relapses.
48. Following Petitioner's meeting with the Ethics Advisory Committee, the Ethics Advisory Committee recommended to the State Superintendent that Petitioner's license be suspended for one year. Resp. Ex. #15.
49. Respondent's contention that the sole issue in this case is whether the Petitioner's conduct bears an adverse relationship to his ability to be an effective teacher is erroneous.
50. State Superintendent Dr. June Atkinson relied heavily on the Committee's recommendation, but ultimately it is her decision to make. Thus, Dr. Atkinson's letter dated May 15, 2014 is the official document which states the only basis for suspending his license. (Emphasis added)
51. Dr. Atkinson notified Petitioner that she intended to suspend his professional educator's license. The only reason cited by Dr. Atkinson is that Petitioner violated 16 NCAC 06(c).0602(b)(9)(b) which states that an educator "shall not be under the influence of, possess, use or consume an alcoholic beverage or a controlled substance on school premises or at a school-sponsored activity involving students." T p 170; Resp. Ex #15.
52. Neither the Superintendent's Ethics Advisory Committee nor the State Superintendent had evidence before it that Petitioner was "under the influence" of alcohol while on school premises. Neither the Committee nor this Tribunal had any evidence that Petitioner possessed, used or consumed an alcoholic beverage or a controlled substance on school premises or at a school event on February 6, 2014. T p 172.
53. There has been no evidence introduced in this contested case hearing that Petitioner was "under the influence" of alcohol. Even Mr. Cannon who had smelled the alcohol acknowledges that Petitioner was not under the influence of alcohol.
54. The committee based its determination that Petitioner was "under the influence" on the fact that he had been drinking the night before he came to school, that an employee smelled alcohol on his breath and the .04 reading on the portable breath testing device. T pp 171; 193.
55. Ms. Cornetto admitted that the committee relied on its subjective judgment to determine whether Petitioner was "under the influence" based on the evidence that it had. T p 174.
56. Ms. Cornetto admitted that neither the odor of alcohol nor the .04 reading on the PBT were evidence of being under the influence of alcohol. T p 171.
57. The committee did not examine evidence of whether the PBT results upon which they relied in making their recommendation to the superintendent were reliable or valid results. Neither the committee nor anyone acting on its behalf interviewed the principal or the school

resource officer, nor took any steps to determine whether the amount of alcohol alleged to be in Petitioner's body based on the PBT results constituted being "under the influence." T pp 172; 184.

58. A function of a professional educator is to serve as a role model for students. T p 181. Ms. Cornetto testified that Respondent felt Petitioner was not a role model because "he had alcohol on his breath at school." T p 192. However, there is no evidence that any student or staff member other than Mr. Cannon detected alcohol on Petitioner's breath or his person at any time on February 6, 2014. Whether Petitioner knew that he smelled of alcohol before he arrived at school that morning is of no consequence. T p 178-179.
59. Teacher's should be held to the highest ethical and moral standards, but, while the reasons cited by Ms. Cornetto are noble and reasonable expectations as well as essential for a professional educator, Petitioner was not on notice that the State Superintendent intended to suspend his teacher's license for failing to act as an appropriate role model for students, parents, or the community.
60. There is no evidence that Petitioner failed to adequately perform the duties of his job as a teacher. The evidence before the Ethics Advisory Committee indicated that Petitioner "was a very respected professional in the classroom." T pp 175;196.
61. Even assuming the Respondent's contention that the issue is whether or not his conduct bears an adverse relationship to his ability to be an effective teacher, the evidence before this Tribunal and the committee does not support that conclusion.

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 under Chapter 150B of the North Carolina General Statutes and 16 NCAC 6C.0312(c). All parties have been correctly designated and there is no question as to misjoinder or non-joinder. The parties received proper notice of the hearing in this matter.
2. To the extent the Findings of Fact contain conclusions of law or that the Conclusions of Law contain findings of fact, they should be so considered without regard to their given labels.
3. The North Carolina Constitution empowers the State Board of Education to "supervise and administer the free public school system" and to "make all needed rules and regulations in relation thereto, subject to the laws enacted by the General Assembly." N.C. Const. art. IX, §5.
4. The State Board of Education controls teacher licensure requirements pursuant to the authority delegated to it in N.C. Gen. Stat. §115C-296, which provides, in pertinent part, that it "shall adopt rules to establish the reasons and procedures for the suspension and revocation

of licenses.” N.C. Gen. Stat. §115C-296(d).

5. Petitioner has the burden to show by the preponderance of evidence that the State Board of Education’s decision exceeds its authority, is erroneous, based on improper procedure, unlawful or arbitrary and capricious. *Peace v. Employment Security Comm’n*, 349 N.C. 315, 507 S.E.2d 272 (1988).
6. The letter from Dr. Atkinson which states the reasons for which Petitioner is being sanctioned affirmatively states that Petitioner had a .04% blood alcohol content at the IEP meeting. Dr. Atkinson’s letter states that the only reason that she is suspending his license to teach is the rule in the North Carolina Administrative Code 16 NCAC 6C .0602(b)(9)(B). (Emphasis added) Dr. Atkinson could have adopted other grounds as now contended by Respondent, but did not do so.
7. Procedural due process “requires that an individual receive adequate notice and a meaningful opportunity to be heard” before being deprived of life, liberty or property. *In re Magee*, 87 N.C. App. 650, 654, 362 S.E.2d 564, 566-7 (1987). The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. *Morgan v. United States*, 304 U.S. 1 (1938). Dr. Atkinson’s letter appropriately notifies Petitioner of the grounds upon which she is suspending his license. To suspend or to otherwise sanction Petitioner for any other grounds would violate procedural due process.
8. The only grounds upon which Dr. Atkinson is suspending Petitioner’s license is 16 NCAC 6C.0602(b)(9)(B) which provides that an educator shall not “be under the influence of, use or consume an alcoholic beverage or a controlled substance on school premises or at a school-sponsored activity involving students.”
9. The Ethics Committee’s recommendation to Dr. Atkinson was heavily influenced by the erroneous assumption that a reading of .04 on the Alco-Sensor demonstrated that the Petitioner was “under the influence.”
10. If an agency is going to rely upon a piece of equipment as the primary if not total reason for suspending or revoking a person’s professional license, or otherwise administering punishment, then that piece of equipment should be reliable. The State of North Carolina has long standing and accepted procedures for use of breath testing equipment. In this contested case, the Alco-Sensor was not even remotely used in accordance with those standards, and there is no way to determine the validity of that reading. Therefore, the Alco-sensor reading is entitled to zero credibility and weight in this contested case.
11. There is no definition of “under the influence” provided anywhere in the State Board’s regulations or policies. T p 173.
12. Both criminal law statutes and Worker’s Compensation statutes in North Carolina have defined “under the influence” to mean that there is an “appreciable impairment” of the persons

faculties. There is no credible evidence in this contested case to demonstrate that Petitioner was “appreciably impaired” or that he was “under the influence” other than the highly subjective assumptions made by the committee, based on the unsubstantiated Alco-sensor reading. All of the evidence at this hearing indicated that Petitioner performed his job duties as he normally did without any adverse impact on his duties as a teacher.

13. Violation of 16 NCAC 06C.0602(b)(2) or other statute or rule is not considered in rendering this decision because Petitioner was not noticed of any violation other than 16 NCAC 06C.0602(b)(9)(B); however, it is noted that a teacher is expected to be a “positive role model for students, parents, and the community,” (16 NCAC 06C.0602(b)(2)). The State Board of Education may only revoke or suspend a teacher’s license for violation of this standard of professional conduct when the teacher’s alleged unethical conduct has “a reasonable and adverse relationship” to “the continuing ability of the person to perform any of his/her professional functions effectively.” 16 NCAC 6C .0312.
14. There has not been sufficient credible evidence to support a conclusion that Petitioner would have violated this provision even if it were at issue. There was no evidence that any student or parent, or anyone other than Petitioner’s principal, detected the odor of alcohol on Petitioner on February 4, 2014. The evidence at this hearing demonstrated that Petitioner has successfully performed his professional functions before and since February 6, 2014 and that the incident on February 6, 2014 has had no adverse impact on the performance of any professional functions, including his teaching and his students’ testing outcomes.
15. However, it is noted that the evidence before this Tribunal is clear that Petitioner admitted to have consumed substantial quantities of alcohol the night before, that he has had a problem with alcohol in the past and that his principal smelled alcohol on his breath. It would be fair to assume that this is Petitioner’s last “slip,” his last relapse, if he is to be able to keep his teaching license. Rationalizations and justifications will be meaningless, because everyone goes through struggles in life.
16. The decision of the State Board of Education must be reversed if the substantial rights of the Petitioner have been prejudiced because the agency’s findings, inferences, conclusions or decisions exceed its authority, are erroneous, based on improper procedure, unlawful, or arbitrary and capricious. N.C. Gen. Stat. §150B-23.
17. Petitioner has carried his burden of proof and demonstrated by a preponderance of evidence that Respondent erred in suspending his North Carolina teaching license. The State Board of Education’s decision to suspend Petitioner’s license for one year is erroneous and not in accordance with the law.
18. On February 6, 2014, Petitioner was not “under the influence” of an alcoholic beverage or controlled substance while on school premises, nor did he possess or consume an alcoholic beverage or a controlled substance while on school premises. T p 11; 38; 103-105; 109; 113; 123.
19. The State Board of Education’s decision to suspend Petitioner’s teaching license for one year

based on a violation of 16 NCAC 6C.0602(b)(9)(B) exceeds its delegated authority.

20. The State Board of Education, therefore, exceeded its statutory authority when it determined that Petitioner's license should be suspended for violation of 16 NCAC 6C .0602(b)(9)(B).
21. There is not sufficient evidence to support the contention that the State Board of Education's decision to suspend Petitioner's license for one year was arbitrary and capricious.

FINAL DECISION

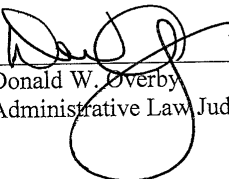
Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned finds that Petitioner has met his burden to prove that Respondent's decision to suspend Petitioner's license for one year, is not in accordance with the law, exceeds its authority, and is not supported by substantial evidence on the record and, therefore, is **REVERSED**.

NOTICE

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

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

This the 27th day of January, 2015.


Donald W. Overby
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF FORSYTH

FILED
IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 OSP 5387
OFFICE OF
ADMINISTRATIVE HEARINGS

EMILIE McNAIR,

Petitioner,

FINAL DECISION

v.

WINSTON-SALEM STATE UNIVERSITY,

Respondent.

This contested case was heard before the Honorable Selina M. Brooks, Administrative Law Judge, on 8 December 2014 and 9 December 2014 in Greensboro, North Carolina.

APPEARANCES

FOR RESPONDENT: Matthew Tulchin
Assistant Attorney General
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Raleigh, N.C. 27602

FOR PETITIONER: Hunter Hickman
Liza Baron
Legal Aid of North Carolina, Inc.
102 West Third St., Suite 460
Winston-Salem, NC 27101

EXHIBITS

Admitted for Respondent:

Exhibit	Description
1	April 2012 - June 2012 Work Plan and Appraisal Form
2	June 2012 - June 2013 Work Plan and Appraisal Form
3	September 22, 2012 Sexual Harassment and Sexual Violence Policy

4	Resolution Procedures for Sexual Harassment and Sexual Violence Complaints
5	November 2008 Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) And the Health Insurance Portability and Accountability Act of 1996 (HIPPA) to Student Health Records
6	U.S. Department of Education Dear Colleague Letters (Apr. 4, 2011)
7	January 2001 - Revised Sexual Harassment Guidance: Harassment of Students by School Employees, other Students, or Third Parties
8	Questions and Answers on Title IX and Sexual Violence
9	November 30, 2012 - Division of Student Affairs Title IX Training Materials
10	Title IX Training: Preventing Sexual Harassment On The Field, In The Classroom And In the Workplace
11	November 30, 2012 - Title IX Training: Preventing Sexual Harassment On The Field, In The Classroom And In the Workplace - Appendix A
12	Title IX Training - Pre and Post-Questionnaires
13	Dr. Laureano's Investigation Questions to Student Health Services staff
14	Summary of Dr. Laureano's investigation and meetings with Wellness Center-Student Health Services staff
15	December 18, 2013 - Notice of Placement on Investigatory Leave Status with Pay
16	February 10, 2014 - Notice to Attend a Pre-Disciplinary Conference
17	February 20, 2014 - Disciplinary Decision of Dismissal
19	Student Health Services Records
20	December 3, 2013 E-mail from Gloria Laureano to Trae Cotton, copying Natasha Jeter and Silvia Ramos
21	December 6, 2013 Amber Scott signed statement

Admitted for Petitioner:

Exhibit	Description
1	Notice of Placement on Investigatory Leave
2	WSSU Title IX Training Materials
3	Patient Records from Student Wellness Center
4	Petitioner's Handwritten Notes from Staff Meetings
5	Petitioner's Handwritten Notes from Staff Meetings
6	Dismissal Letter
7	Final Agency Decision
8	April 2012 - June 2012 Work Plan and Appraisal Form
9	June 2012 - June 2013 Work Plan and Appraisal Form
10	Petitioner's Final Pay Stubs
11	December 6, 2013 Amber Scott signed statement
12	Summary of Dr. Laureano's investigation and meetings with Wellness Center-Student Health Services staff
13	Grievance Committee Recommendation

WITNESSES**Called by Respondent:**

Ms. Silvia Ramos
Ms. Natasha Jeter
Dr. Gloria Laureano
Dr. Trae Cotton
Dr. Wynne Brown
Mr. Calvin Holloway

Called by Petitioner:

Ms. Emilie McNair
Ms. Amber Scott

ISSUE

Whether Respondent had just cause to dismiss Petitioner.

ON THE BASIS of careful consideration of the sworn testimony of witnesses presented

at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making these findings, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness; any interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case. In the absence of a transcript, the Undersigned reviewed her notes to refresh her recollection.

FINDINGS OF FACT

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case pursuant to Chapters 126 and 150B of the North Carolina General Statutes.
2. Petitioner Emilie McNair was a permanent State employee subject to Chapter 126 of the North Carolina General Statutes.
3. Respondent Winston-Salem State University ("WSSU" or "the University") is subject to Chapter 126 and was Petitioner's employer.
4. Petitioner began her employment with WSSU in 2012. Petitioner was hired as a Nurse Practitioner to work in the University's A.H. Ray Student Wellness Center (the "Wellness Center"). She initially reported to Nurse Practitioner Ether Joe; however, Nurse Joe retired shortly thereafter and then Petitioner reported to Dr. Anthony Philadelphia, a licensed mental health counselor who was the Interim Director of the Wellness Center.
5. At all times during the relevant time period, Dr. Philadelphia reported to Dr. Gloria Laureano, Associate Vice Chancellor of Student Affairs and Dean of Students. Dr. Laureano has spent her entire career in the higher education field. She joined the University in May 2012 from the University of Central Florida. In her current position, Dr. Laureano oversees Career Development Services, the Wellness Center, Student Conduct, and Interpersonal Violence Prevention. As Dean of Students, she adjudicates all Title IX hearings involving students. Dr. Laureano reported to Dr. Trae Cotton, Vice Chancellor of Student Affairs.
6. The Wellness Center is a campus-based health center that provides health and counseling services to students. As a University-run health clinic that treats only students, its records are governed by the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g rather than the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule. **Resp. Ex. 5.** The records maintained by the Wellness Center are either "education records" or "treatment records," as the terms are defined under FERPA. **Id.** The records may be disclosed to University officials without consent provided there are legitimate educational interests. **Id.**
7. Wellness Center records and student health information are maintained electronically using a software system called Medicat. **Resp. Ex. 19; Pet. Ex. 3.**

8. Prior to working at WSSU, Petitioner was Director of Student Health Services for Fayetteville State University. She has spent almost twenty years in the health care field. She has Bachelor's and Master's degrees in Nursing and received her Nurse Practitioner license in 2009. She is currently employed as a Nurse Practitioner for Friendly Urgent & Family Care.
9. As Nurse Practitioner, Petitioner was responsible for treating patients, conferring with the health care staff regarding treatment of patients, and supervising health services staff. **Resp. Exs. 1 & 2; Pet. Exs. 8 & 9.** As Nurse Practitioner and supervisor, Petitioner was responsible for explaining policies and procedures to the staff, reviewing and approving students' treatment plans, and reviewing students' records. **Id.; Resp. Ex. 19; Pet. Ex. 3.**
10. When WSSU students visit the Wellness Center, they are generally first seen by the nursing staff. The nurses will assess the situation and obtain the necessary background information for determining treatment. **Resp. Exs. 1, 2 & 19; Pet. Exs. 3, 8 & 9.** The nurses will enter the information obtained from students along with their observations into the Medcat system and will then electronically sign the notes. **Id.**
11. Signing a note indicates the employee has reviewed the information in the file. Although it is possible to add to a note once it has been signed, the prior information cannot be altered. Electronic signatures are time-stamped and date-stamped.
12. Wellness Center nurses often will confer with a health care provider (either a physician or a Nurse Practitioner) to determine the proper course of treatment, and will provide initial treatment as needed. The nurses send the patient records to the Nurse Practitioner for review and approval. After reviewing the files, the Nurse Practitioner will sign and "lock" the files. **Resp. Exs. 1, 2 & 19; Pet. Exs. 3, 8 & 9.** Locking the file prevents anyone from going in and adding anything to the nurse's note. Only a provider can unlock a note, and must document the reason for doing so.
13. Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 *et seq.*, is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities. **Resp. Exs. 6-8, 10; Pet. Ex. 2.** Sexual harassment, which includes sexual assault and other acts of sexual violence, is a form of sex discrimination prohibited by Title IX. All universities receiving any federal financial assistance must comply with Title IX. **Id.** WSSU receives federal financial assistance and must comply with Title IX.
14. Once the University has notice of sexual harassment, Title IX requires that WSSU take immediate action to investigate the allegation, eliminate any harassment, prevent its recurrence and address its effects. **Resp. Exs. 6-8.** The University should complete its investigation and take appropriate measures within 60 days of being given notice.
15. The University has notice for Title IX purposes if it knew, or in the exercise of reasonable care should have known, about allegations of sexual assault. **Resp. Exs. 6-8.** The University does not need to receive information of the alleged sexual assault directly from the student or victim in order to have notice. Rather, the University can receive notice of

sexual harassment indirectly from other sources, including University employees. **Id.**

16. A Title IX investigation constitutes a legitimate educational interest under FERPA. Moreover, in the event that there is any direct conflict between the privacy or confidentiality requirements of FERPA and the reporting requirements of Title IX, then Title IX controls. **Resp. Exs. 6-8.**
17. The University is required to promptly investigate all allegations of sexual assault and take appropriate steps to resolve the situation. **Resp. Exs. 6-8.** This duty exists regardless of whether the student, his or her parent, or a third party files a complaint. **Id.** The University's investigation must be completed within 60 days of the University being given notice. **Id.**
18. Multiple witnesses testified to the fact that the University is obligated to investigate even if the student requests confidentiality or does not wish to pursue the complaint. **Resp. Exs. 6-8.** An investigation conducted by law enforcement does not relieve the University of its obligations under Title IX.
19. The failure to investigate and respond to reports of sexual assault and harassment on campus is a serious issue in this country and has prompted the federal government in recent years to launch numerous investigations of universities over concerns about how they handled sexual assault cases on campus.
20. All WSSU employees receive training regarding Title IX. During training, employees learn about Title IX, the school's sexual harassment policy, and how to identify and report sexual harassment and violence. **Resp. Exs. 10-12; Pet. Ex. 2.**
21. Petitioner and other members of the Wellness Center staff, including Nurse Amber Scott, attended the University's Title IX training on November 30, 2012. **Resp. Ex. 9.** Training lasted more than two hours and was led by Ms. Silvia Ramos, the University Title IX Coordinator and Equal Employment Opportunity/Affirmative Action & Diversity Officer. Ms. Ramos was assisted by Ms. Natasha Jeter, Deputy Title IX Coordinator & Special Assistant to Vice Chancellor of Student Affairs; Ms. Patricia Eaddy, Director of Interpersonal Violence Prevention; and Mrs. Camille Kluttz-Leach, General Counsel of WSSU. **Resp. Ex. 10; Pet. Ex. 2.**
22. Training materials included a PowerPoint presentation, case studies, a list of frequently asked questions, and pre-training and post-training questionnaires. **Resp. Ex. 10; Pet. Ex. 2.** Attendees were instructed that WSSU policy and federal regulation required University employees to report all allegations of sexual harassment or sexual assault to the University Title IX Coordinator or Deputy Title IX Coordinator. **Id.** Attendees were told that the only employees exempt from this reporting requirement are licensed mental health counselors. Attendees were also informed that the best way to maintain confidentiality is to limit disclosure of sexual harassment to the appropriate University officials. **Id.**
23. Attendees of the Title IX training were provided opportunities to ask questions both during and at the end of the training session. Petitioner did not ask any questions during or after the training. On her post-training questionnaire, Petitioner indicated she understood that if

someone reported an allegation of sexual harassment to her she needed to report it to either Ms. Ramos or Ms. Jeter. **Resp. Ex. 12; Pet. Ex. 2.** At no point did Petitioner raise the potential issue of patient confidentiality under HIPAA and reporting sexual assaults as required by Title IX with Ms. Ramos, Ms. Jeter, or any other appropriate University administrator.

24. On the morning of November 11, 2013, a female student visited the Wellness Center in order to get a pregnancy test. **Resp. Ex. 19; Pet. Ex. 3.** The student was seen by Nurse Amber Scott. **Id.** During her visit, the student told Nurse Scott that she had been raped on campus the month before, during Homecoming weekend. **Id.** Nurse Scott informed the student that she could still report the incident and told the student about the University's counseling services. **Id.** The student indicated to Nurse Scott that she did not want to report the incident. **Id.**
25. Nurse Scott provided the student with a pregnancy test, an HIV test, and a venereal disease screening. **Resp. Ex. 19; Pet. Ex. 3.** The student returned that afternoon to get the results of the tests. **Id.** Nurse Scott again suggested that the student seek counseling and provided her with educational materials and handouts regarding pregnancy and sexually transmitted infections prevention. **Id.** The student declined to report the incident or to speak with a counselor. **Id.** Nurse Scott told the student that she would follow up in a couple of days to see how she was doing. **Id.**
26. Nurse Scott sought Petitioner's guidance on what to do about the student's report of the sexual assault. Petitioner told Nurse Scott that if the student did not want to report the incident, there was nothing they could do.
27. Petitioner testified that she based her guidance on information she received from Campus Police during the summer of 2012, shortly after she started working at the University. Petitioner admitted, however, that she received this information from Campus Police prior to attending the University's Title IX training.
28. The guidance Petitioner provided to Nurse Scott was inaccurate, contrary to University policy, and contrary to Title IX regulations.
29. After she finished seeing the student, Nurse Scott sent to Petitioner her detailed notes which documented pregnancy screening and counseling, test results, and the patient's allegation that "she had unwanted sex ... on campus". **Resp. Ex. 19; Pet. Ex. 3.** Petitioner reviewed Nurse Scott's notes and agreed with the plan of care prescribed by her. **Id.**
30. Nurse Scott followed up with the student on November 13, 2013, and again on November 18, 2013. **Resp. Ex. 19; Pet. Ex. 3.** On both occasions, Nurse Scott sent notes from her sessions with the student to Petitioner for review. Both times, Petitioner reviewed, signed and locked Nurse Scott's notes in the student's record. **Id.**
31. Petitioner testified that there were times, particularly when the Wellness Center was busy, when it would take her several days to review all the files that were sent to her. The student record in this case shows that on two occasions Petitioner signed and locked the file the same day Nurse Scott sent it to her and on two other occasions Petitioner signed and locked

the file within two days of it being sent to her. **Resp. Ex. 19; Pet. Ex. 3.**

32. Dr. Wynne Brown, the current Director of the Wellness Center, testified that health care providers, including Nurse Practitioners, were expected to review the electronic records prior to signing and locking them.
33. Neither Nurse Scott nor Petitioner ever reported the alleged sexual assault. While Petitioner did not see the student, she was made aware of the alleged sexual assault by Nurse Scott on the day of the student's visit to the Wellness Center, and she subsequently reviewed, signed, and locked Nurse Scott's notes documenting the student's allegations as well as the plan of care on four different occasions. **Resp. Ex. 19; Pet. Ex. 3.**
34. On December 3, 2013, Dr. Laureano received a call from the parent of a female student who wished to withdraw from WSSU. **Resp. Ex. 20.** The student wanted to leave the University because she had been raped the weekend of Homecoming. **Id.** Dr. Laureano took down the student's information and immediately notified her boss, Dr. Cotton, of the Title IX case.
35. As Vice Chancellor of Student Affairs, Dr. Cotton oversees all aspects of student life on campus. This includes Student Activities (student government, student organizations, Greek life, etc.); the Student Centers; Housing and Residence Life; Career Services; the Wellness Center; Student Conduct; and University Recreation (intramural sports, club sports, athletic facilities, etc.). Dr. Cotton reports to WSSU's Chancellor, Dr. Donald Reaves.
36. Dr. Laureano also notified Ms. Ramos and Ms. Jeter. **Resp. Ex. 20.** As the University's Title IX Coordinator, Ms. Ramos handles all aspects of gender equity issues, sexual discrimination, and sexual harassment, including all Title IX reporting and investigations involving faculty and staff. She also oversees the Title IX investigations involving students, which are done by Ms. Jeter, the Deputy Title IX Coordinator. Ms. Ramos reports to Provost Brenda Allen. Ms. Jeter reports to both Dr. Cotton and Ms. Ramos.
37. Ms. Jeter immediately initiated a Title IX complaint in the University case management system and opened an investigation of the incident. She contacted the student and arranged for a meeting.
38. Ms. Jeter met with the student on December 6, 2013. The meeting was recorded and transcribed. Ms. Jeter explained her duties as a Deputy Title IX Coordinator to the student and provided a brief overview of Title IX and the University's obligations under Title IX. Ms. Jeter obtained the student's consent to conduct an investigation of the alleged sexual assault.
39. During her interview of the student, Ms. Jeter learned that the student had visited the Wellness Center the prior November and had reported the sexual assault incident to Nurse Scott. Ms. Jeter was surprised to learn this because neither Nurse Scott nor anyone else at the Wellness Center had reported the alleged sexual assault to her or Ms. Ramos as required by University policy and federal regulation.
40. Ms. Jeter informed Ms. Ramos, Dr. Laureano, and Dr. Cotton that members of the Wellness Center staff might have failed to report a Title IX incident. **Resp. Exs. 15-17; Pet. Exs. 1,**

6.

41. On December 6, 2013, Ms. Jeter sought to interview Nurse Scott as part of her Title IX investigation. Nurse Scott refused to answer any of Ms. Jeter's questions and refused to participate in the Title IX inquiry. **Resp. Ex. 21; Pet. Ex. 11.** Nurse Scott believed that providing any information to Ms. Jeter regarding the investigation would violate HIPAA. **Id.**
42. Ms. Jeter informed Ms. Ramos that Nurse Scott refused to cooperate with the investigation. Ms. Ramos then met with Nurse Scott and tried to convince her to cooperate. She reminded Nurse Scott of the requirements of Title IX and the University's policy regarding the reporting of sexual assaults. Ms. Ramos explained to Nurse Scott that FERPA, not HIPAA, controlled in this situation. Nurse Scott would not answer any questions or provide any information regarding the student.
43. As a result of Nurse Scott's refusal to cooperate with the Title IX investigation, Dr. Cotton directed Dr. Laureano to obtain the student's file from the Wellness Center.
44. Dr. Cotton reviewed the student's file which confirmed that the student had visited the Wellness Center in November and reported the alleged sexual assault to Nurse Scott. **Resp. Ex. 19; Pet. Ex. 3.** Dr. Cotton also discovered that Petitioner had signed and locked the student's file. **Id.**
45. Dr. Cotton asked Dr. Laureano to investigate and determine (i) if members of the Wellness Center staff had failed to comply with Title IX regulations; and (ii) if there had been a failure to comply, the reasons for the failure. **Resp. Exs. 13, 14; Pet. Ex. 12.**
46. As part of her investigation, Dr. Laureano prepared a list of questions to ask. **Resp. Ex. 13; Pet. Ex. 12.** She then met individually with members of the Wellness Center staff, including Petitioner. **Resp. Ex. 14; Pet. Ex. 12.**
47. Petitioner confirmed to Dr. Laureano that she had attended the University's Title IX training in the Fall of 2012. **Resp. Ex. 14; Pet. Ex. 12.** However, Petitioner told Dr. Laureano that she could not recall specifics of the training, and that when it came to reporting sexual assaults, she was guided by HIPAA. She told Dr. Laureano that she did not recall reviewing the student's records at the time of the student's visit to the Wellness Center, but believed the student indicated she was "okay," and that the sexual assault had occurred "months" before the student's visit to the Wellness Center. **Id.**
48. Dr. Laureano informed Dr. Cotton of the results of her investigation. **Resp. Ex. 14; Pet. Ex. 12.** She noted that while there was some confusion among the Wellness Center staff regarding their reporting obligations under Title IX, none of the staff had sought clarification from the appropriate administrative officials, or had otherwise taken any steps to raise the possibility of an issue of patient confidentiality requirements from HIPAA for health care practitioners as it may relate to the reporting of a sexual assault from a student. **Id.** Dr. Laureano concluded that there had been a failure to comply with Title IX regulations.

49. Dr. Laureano consulted with Dr. Cotton and Mr. Calvin Holloway, Employee Relations Manager, regarding possible next steps of the investigation. In part because of the University's upcoming Winter Break, it was decided that Petitioner would be placed on investigatory leave status with pay to allow management more time to investigate the allegations and consider if disciplinary action was appropriate.
50. On December 18, 2013, Nurse Scott was notified that she was being placed on investigatory leave status with pay for her failure to report the alleged sexual assault as required by University policy and Title IX. **Resp. Ex. 15; Pet. Ex. 1.**
51. The Notice of Placement on Investigatory Leave Status with Pay states, in pertinent part:

Purpose of Notification

This letter is formal notification that you were placed on Investigatory Leave Status with Pay ... The purpose of this investigatory status is to allow management time to investigate these reports and to consider if disciplinary action, up to and including dismissal, may be appropriate.

Resp. Ex. 15

52. After further investigation, Dr. Laureano consulted with Mr. Holloway and Dr. Cotton regarding Petitioner's conduct and they decided that disciplinary action was warranted.
53. On or about February 11, 2014, Petitioner was notified to attend a Pre-Disciplinary Conference scheduled for February 14, 2014. The Notice to Attend a Pre-Disciplinary Conference states, in pertinent part:

Purpose of Notification

This is formal notification that you are to attend a Pre-Disciplinary Conference ... [t]he purpose of the Conference is to determine if your alleged involvement in recent events specifically, violation of Title IX law, may warrant disciplinary action, up to and including dismissal.

Resp. Ex. 16.

54. The notice also informed Petitioner of the incidents resulting in the conference; specifically, that Petitioner was aware that a student had shared with Nurse Scott in November 2013 that she had been sexually assaulted and Petitioner had failed to report that information to the proper University authorities. **Id.** Due to the weather, the Pre-disciplinary Conference was rescheduled for February 17, 2014.
-
55. On February 17, 2014, Petitioner attended the Pre-Disciplinary Conference conducted by Dr. Laureano and Mr. Holloway. **Resp. Ex. 17; Pet. Ex. 6.** Petitioner was provided with information regarding the allegations against her and was provided an opportunity to respond. **Id.**

56. When asked by Mr. Holloway to provide her understanding of HIPAA, and whether there were any exceptions that might apply to the reporting of a sexual assault, Petitioner replied that the only exceptions were in suicidal or homicidal situations. **Resp. Ex. 17; Pet. Ex. 6.**
57. Petitioner testified that she did not fully respond to the allegations against her during her Pre-Disciplinary Conference because Dr. Laureano was behaving in a hostile manner.
58. Mr. Holloway testified that Dr. Laureano was both calm and professional throughout the meeting and that Petitioner was hostile.
59. Petitioner testified that she was not aware that the University was contemplating dismissing her or that dismissal was a possibility. **Resp. Exs. 15-16.**
60. Following the Pre-Disciplinary Conference, Dr. Laureano consulted with Dr. Cotton and Mr. Holloway and made the decision to dismiss Petitioner for her failure to comply with University policy and Title IX because Petitioner's refusal or failure to comply with University policy and Title IX posed a threat to student safety and was detrimental to the University.
61. On February 20, 2014, Dr. Laureano sent Petitioner a dismissal letter detailing the reasons for Petitioner's dismissal; specifically, unacceptable personal conduct for failing to report an alleged sexual assault as required by Title IX. **Resp. Ex. 17; Pet. Ex. 6.**
62. On February 26, 2014, Petitioner was dismissed from employment due to unacceptable personal conduct. **Resp. Ex. 17; Pet. Ex. 6.**
63. The Undersigned finds that Ms. Ramos, Ms. Jeter, Dr. Cotton, Dr. Laureano, Dr. Brown, and Mr. Holloway were credible witnesses and crucial parts of their testimony were supported by documentation.
64. The Undersigned finds that the testimony of Petitioner was less credible and crucial parts of her testimony were not supported by documentation.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal jurisdiction over the issue in this contested case pursuant to Chapter 126 and Chapter 150B of the North Carolina General Statutes.
2. The parties are properly before the Office of Administrative Hearings and there is no issue of improper procedure.
3. Respondent Winston-Salem State University is subject to Chapter 126 of the North Carolina General Statutes and is the former employer of Petitioner.
4. A "career state employee" is defined as a state employee who is in a permanent position appointment and continuously has been employed by the State of North Carolina in a non-exempt position for the immediate 24 preceding months. N.C. Gen. Stat. § 126-1.1.

5. At the time of her discharge, Petitioner was a career State employee subject to the provisions of the State Personnel Act, N.C. Gen. Stat. § 126-1, *et seq.*
 6. A career State employee may be dismissed only for just cause. N.C. Gen. Stat. §126-35(a). The State employer has the burden of showing by a preponderance of the evidence that there was just cause for dismissal. N.C. Gen. Stat. § 126-34.02(d); see also Teague v. N.C. Dep't of Transp., 177 N.C. App. 215, 628 S.E.2d 395, disc. rev. denied, 360 N.C. 581 (2006).
 7. On the issue of just cause, Respondent has met its burden of proof to show it had just cause to dismiss Petitioner.
 8. Pursuant to regulations promulgated by the Office of State Personnel, there are two bases for the dismissal of an employee for just cause: (1) unsatisfactory job performance; and (2) unacceptable personal conduct. 25 N.C.A.C. 01J .0604(b). However, "the categories are not mutually exclusive, as certain actions by employees may fall into both categories, depending upon the facts of each case." 25 N.C.A.C. 01J .0604(c). Furthermore, "[n]o disciplinary action shall be invalid solely because the disciplinary action is labeled incorrectly." Id.
 9. An employee must receive at least two prior disciplinary actions before being dismissed for a current incident of unsatisfactory job performance. 25 N.C.A.C.01J .0605(b). However, an employee may be dismissed without any prior warning or disciplinary action when the basis for dismissal is unacceptable personal conduct. 25 N.C.A.C. 01J 0608(a). One instance of unacceptable conduct constitutes just cause for dismissal. Hilliard v. North Carolina Dep't of Corr., 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005).
 10. Unacceptable personal conduct, as defined by the Office of State Personnel, includes "conduct for which no reasonable person should expect to receive prior warning," "job-related conduct which constitutes a violation of state or federal law," "the willful violation of known or written work rules," and "conduct unbecoming a state employee that is detrimental to state service." 25 N.C.A.C. 01J .0614(8).
 11. In the case of "conduct unbecoming a state employee that is detrimental to state service," the State employer is not required to make a showing of actual harm, "only a potential detrimental impact (whether conduct like the employee's could potentially adversely affect the mission or legitimate interests of the State employer)." Hilliard, 173 N.C. App. at 597, 620 S.E.2d at 17.
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12. In the case of "willful violation of known or written work rules," the State employer's "work rules may be written or 'known' and a willful violation occurs when the employee willfully takes action which violates the rule and does not require that the employee intend his conduct to violate the work rule." Hilliard, 173 N.C. App at 597, 620 S.E.2d at 17.

13. Determining whether a public employer had just cause to discipline its employee requires two separate inquiries: first, whether the employee engaged in the conduct the employer alleges, and second, whether the conduct constitutes just cause for the disciplinary action taken. N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 599 S.E.2d 888 (2004).
14. Title IX and Respondent's policy with regard to reporting allegations of sexual harassment or sexual violence require all University employees (except for licensed counselors or members of the clergy) to report all such allegations to the proper authorities. Petitioner was required to report all such allegations to Ms. Ramos or Ms. Jeter.
15. Petitioner provided inaccurate and misleading instructions to Nurse Scott when asked for guidance on what to do with information of an alleged sexual assault that was reported to her by a student visiting the Student Wellness Center.
16. Petitioner was aware that a student had provided information regarding an alleged sexual assault to Nurse Scott and willfully failed to report or refused to report the allegations to the proper authorities as required by federal law and University policy.
17. Petitioner's conduct in failing to report or refusing to report the allegation of sexual violence constituted unacceptable personal conduct which justified dismissal.
18. Moreover, Petitioner's failure or refusal to report the allegation of sexual violence constituted conduct "for which no reasonable person should expect to receive prior warning," interfered with the University's obligations with regard to Title IX, threatened the health and safety of the University's students, was detrimental to the University, and was unbecoming of a state employee.
19. Similarly, Petitioner's failure or refusal to report the allegation of sexual violence violated Title IX and the University's policy with regard to reporting allegations of sexual harassment or sexual violence.
20. Respondent followed the procedures required before dismissing Petitioner for unacceptable personal conduct.

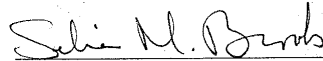
FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned determines that Respondent has met its burden of proving by a preponderance of the evidence that it had just cause to dismiss Petitioner based on her unacceptable personal conduct and Respondent's decision is therefore **UPHELD**.

NOTICE

This Final Decision is issued under the authority of N.C.G.S. § 150B-34. Pursuant to N.C.G.S. § 126-34.02, any party wishing to appeal the Final Decision of the Administrative Law Judge may commence such appeal by filing a Notice of Appeal with the North Carolina Court of Appeals as provided in N.C.G.S. § 7A-29(a). The appeal shall be taken within 30 days of receipt of the written notice of final decision. A notice of appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing.

This, the 7th day of January, 2015.



Honorable Selina M. Brooks
Administrative Law Judge

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
2/12/2015 11:27 AM

STATE OF NORTH CAROLINA
COUNTY OF PITT

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14 REV 05079

Arthur K and Wilhelmina J Dees)
Petitioners,)
v.)
N.C. Department of Revenue)
Respondent.)

FINAL DECISION

On July 11, 2014, Petitioners filed a contested case petition with the Office of Administrative Hearings appealing Respondent's Notice of Final Determination, dated June 24, 2014, which upheld a proposed individual tax assessment against Petitioners, and denied Petitioner's claim for a three thousand dollar (\$3000.00) tax credit for tax year 2012.

On November 14, 2014, Administrative Law Judge Melissa Owens Lassiter conducted an administrative hearing in this case in Raleigh, North Carolina. On December 19, 2014, Chief Administrative Law Judge Julian Mann, III extended the deadline for filing a Final Decision in this case until February 16, 2015. The undersigned hereby denies Respondent's Motion to Dismiss.

APPEARANCES

For Petitioners: Arthur and Wilhelmina Dees, 3011 Spruell Court, Waxhaw, North Carolina 28173

For Respondent: Andrew Furuseth, Assistant Attorney General, NC Department of Justice, PO Box 629, Raleigh, North Carolina 27602-0629

ISSUE

Whether Petitioners qualify for the \$3000.00 education expenses tax credit under N.C. Gen. Stat. § 105-151.33 on their individual income tax return for 2012?

APPLICABLE STATUTES

N.C. Gen. Stat. § 105-151.33 & 105-241.11 (2012)
N.C. Gen. Stat. § 115C-106.3(1) & (8)
Article 9, Chapter 115C of N.C. General Statutes
Department of Revenue Directive, PD-12-1 (2012)

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioners: 1 – 6

For Respondent: 1 – 6

FINDINGS OF FACT

1. The 2012 Individual Income Tax Instructions for Form D-400 (p. 19) advised taxpayers that:

Certain taxpayers are allowed a tax credit of up to \$3000.00 for tuition paid for an eligible dependent child. To determine eligibility for the credit, please refer to our website

<http://www.dornnc.com/practitioner/individual/directives/pd-12-1.pdf>.

(Resp. Exh. 1)

2. Petitioners filed a North Carolina individual income tax return for tax year 2012 in accordance with N.C. Gen. Stat. § 105-152 claiming a \$3000.00 education expenses credit. (Resp. Exh. 3) Petitioners requested the education expenses credit to offset their \$22,000/year expenses for sending their daughter to The Fletcher School, a private school for students with disabilities. Their daughter's psychiatrist and psychologist had both recommended Petitioners' daughter attend The Fletcher School due to the daughter's severe learning disabilities. (Pet. Exh. 1)

3. Respondent's Tax Auditor D.S. Jimenez requested Petitioners submit the following information to support their request for the education expenses tax credit for tax 2012: the dependent's name, social security number, school attended, tuition documentation, and copy of the daughter's Individualized Education Plan (IEP).

4. On January 2, 2014, Petitioner submitted the requested documents to Respondent, including tuition and general information about The Fletcher School, and a copy of their daughter's evaluation and therapy she had received for an auditory processing disorder. However, Petitioners acknowledged that their daughter:

Did not have an IEP, as the nature of the Fletcher School curriculum is that each enrolled child receives individualized instruction and accommodations according to the child's needs. An IEP is not necessary at The Fletcher School; however, she is eligible for an IEP, as she has documented learning disabilities.

(Pet. Exh. 5)

5. On January 15, 2014, Respondent issued a proposed individual income tax assessment against Petitioners for tax year 2012 denying the education expenses

credit, because Petitioners' daughter did not have an IEP as required by Respondent's Directive PD-12-1.

6. By letter dated February 11, 2014, Petitioners appealed Respondent's January 15, 2014 proposed assessment. In this letter, Petitioners objected to Ms. Jimenez's findings that N.C.G. S. § 105-151.33 and Respondent's Directive PD-12-1 required her daughter actually have a written IEP that was developed, and reviewed by a local educational agency.

a. Petitioners contended that the language in N.C.G.S. § 105-151.33 and Respondent's Directive PD-12-1 stated that their dependent required an IEP, not actually have a written IEP. Petitioners explained that they enrolled their daughter at The Fletcher School after "it was determined" that their daughter's specific learning disabilities could not be met in public school, and would better be met by a school where students with learning disabilities received an instruction program specific to their needs. (Pet. Exh. 6)

b. Petitioners noted, "Each child at The Fletcher School is provided an implied IEP, because courses and assistance are provided to each child according to his/her need."

c. They opined that had their daughter been enrolled at a public school during the time she was enrolled at The Fletcher School, she "would have required an IEP to get the same level of support she received from The Fletcher School." (Pet. Exh. 6)

7. Petitioner submitted other documents (Pet. Exhs. 2, 3, 4) to Respondent supporting the basis for their education expense tax credit. In Petitioner's Exhibit No. 2, Dr. Ethan Musgrave noted that he had worked with Petitioners' daughter since February 2012, and:

At that time, she [the daughter] had longstanding and well-established diagnoses of Attention-Deficit/Hyperactivity Disorder (ADHA), Fine Motor Coordination Disorder, and Learning Disorder, Not Otherwise Specified (LD NOS)(processing speed deficit). Despite psychopharmacological treatment of the ADHD and individualized accommodations in the academic setting, she was struggling significantly in public high school.

(Pet. Exh. 2) Dr. Musgrave noted that updated psychological testing in spring 2011 confirmed the daughter's continued presence of ADHD, and LD-NOS, and also indicated she met the criteria for a Reading Disorder. Based on the daughter's "significant psychiatric and learning disabilities," Dr. Musgrave opined that it was "medically necessary" for Petitioners' daughter to receive "highly specialized educational services that cannot be provide by public school." (Pet. Exh. 2)

8. Petitioners submitted Petitioner's Exhibit No. 3 to Respondent in April 2014. In this letter, Michele Carol-Mannering, PhD described the results of her comprehensive psychoeducational evaluation of Petitioners' daughter where she identified Petitioners' daughter as having a Reading Disorder (DSM-IV-TR-315.00). Based on her evaluation, Mannering also recommended that Petitioner's daughter receive a comprehensive auditory processing evaluation to ascertain if there are additional clinical deficits in that area.

9. Mannering opined that these diagnoses made Petitioners' daughter eligible for a Section 504 plan and an IEP, but since Petitioners placed their daughter in a private school for kids with ADHD and learning disabilities, there was no IEP created for the daughter. Mannering further opined that had the daughter returned to private school, "recommendations would have been specific to include the establishment of an IEP for the daughter to provide accommodations for ADAH" and to "create and monitor specific learning goals in reading, writing and math. (Pet. Exh. 3)

10. Petitioners also submitted to Respondent an auditory information processing assessment performed on their daughter at SPEECH WISE. (Pet. Exh. 4) The certified audiologist & speech-language pathologists who conducted such testing found deficits in the daughter's lexical extraction and integration areas, temporal processing, and organization and sequencing of verbal information. "These problem areas could impact her abilities to comprehend and slow her down in processing what she hears." (Pet. Exh. 4)

11. On April 22, 2014, Leonard Marcacci, Respondent's Administrative Officer, and Respondent's Assistant Director of Personal Taxes Section of the Income Tax Division in Tax Administration, Greg Radford, conducted a telephone conference with Petitioners about their appeal. Radford explained the procedural process, and discussed the merits of the case with Petitioners. Radford had also reviewed Petitioners' file. Radford determined that Petitioners' daughter had not received an IEP conducted by a local education agency (LEA).

12. On June 24, 2014, Respondent issued its Notice of Final Determination that Petitioners were not eligible for the education expenses tax credit, because Petitioners did not meet the criteria in N.C. Gen. Stat. § 105-151.33(a)(2).

13. Petitioners do not dispute that their daughter did not have an IEP developed by the local educational agency (LEA) at any time. Instead, they contend that criteria in N.C.G.S. § 105-151.33(a)(2), and Respondent's Directive PD-12-1, should be interpreted to mean that their eligible dependent child was determined by doctors, who submitted the letters to Respondent (Pet. Exhs. 2-5), to require an IEP.

14. The language of that statute and/or directive does not specify who, such as the LEA, is required to determine that their daughter needed an IEP. However, 20 USC § 1414 clearly requires that the local educational agency "shall conduct a full and individual initial evaluation in accordance with this paragraph and subsection (b) before

the initial provision of special education and related services to a child with a disability under this subchapter." 20 USC § 1414 (a).

CONCLUSIONS OF LAW

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

2. N.C. Gen. Stat. 105-151.33(a) states:

A taxpayer is allowed a credit against the tax imposed by this Part for each of the taxpayer's eligible dependent children who is a resident of this State and who for one or two semesters during the taxable year is enrolled in grades kindergarten through 12 in a nonpublic school or in a public school at which tuition is charged in accordance with G.S. 115C-366.1. As used in this section, the term "eligible dependent child" means a child who meets all of the following criteria:

- (1) Is a child with a disability as defined by G.S. 115C-106.3(1).
- (2) **Was determined to require an individualized education program as defined by G.S. 115C-106.3(8).**
- (3) Receives special education or related services on a daily basis.
- (4) Is a child for whom the taxpayer is entitled to deduct a personal exemption under section 151(c) of the Code for the taxable year?

For the initial eligibility for the tax credit, for at least the preceding two semesters, the eligible dependent child shall have been either (i) enrolled in a public school or (ii) receiving special education or related services through the public schools as a preschool child with a disability as defined by G.S. 115C-106.3(17). An eligible dependent child shall be reevaluated every three years by the local educational agency in order to verify that the child continues to be a child with a disability as defined by G.S. 115C-106.3(1). (Emphasis added)

3. N.C. Gen. Stat. § 115C-106.3(8) defines "Individualized education program" or "IEP" as "a written statement for each child with a disability that is developed, reviewed, implemented, and revised consistent with IDEA and State law."

4. 20 USC § 1414 specifically requires that state and federal law vest the authority to determine whether a child requires an IEP with state educational agencies and local

education agencies. These agencies "shall conduct a full and individual initial evaluation in accordance with this paragraph and subsection (b) before the initial provision of special education and related services to a child with a disability under this subchapter." 20 USC § 1414 (a)

5. Respondent published Directive -12-1(2012) to advise taxpayers they must first obtain an IEP determination by contacting the child's public school and requesting an evaluation of their child by the LEA to determine if their child requires an IEP.

6. Reading the requirement in 20 USC § 1414 with N.C.G.S. § 105-151.33(a), the taxpayers, Petitioners, must have a determination by the local LEA that their eligible dependent child required an IEP before Petitioners as taxpayers, can qualify for an education expense credit under N.C.G.S. § 105-151.33(a) for the tax year 2012.

7. In this case, Petitioners produced letters from doctors who believed that Petitioners' daughter, the eligible dependent, would have been eligible for an IEP. Based on their daughter's doctors' recommendation, Petitioners placed their daughter in a private school that specifically taught towards children with learning disabilities such as Petitioners' daughter's learning disabilities. There was no dispute, including by Petitioners, that Petitioners' daughter was never taken to, and determined by the child's public school or local LEA, to require an IEP. Therefore, Petitioners did not qualify for the education expense tax credit under N.C.G.S. § 105-151.33 for the tax year 2012.

8. The preponderance of the evidence at hearing proved that Respondent acted properly when it determined that Petitioners were not eligible for an education expenses credit for the tax year 2012, and upheld a proposed \$3178.64 assessment against Petitioners for the tax year 2012.

FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **AFFIRMS** Respondent's proposed tax assessment of \$3178.64 in its June 24, 2014 Notice of Final Determination to Petitioner.

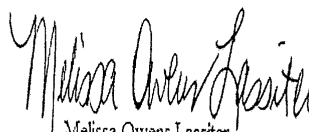
NOTICE

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties.

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

N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. N.C. Gen. Stat. § 150B-47 requires the Office of Administrative Hearings 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. To ensure the timely filing of the record, the appealing party must send a copy of the Petition for Judicial Review to the Office of Administrative Hearings when the appeal is initiated.

This the 12th day of February, 2015.


Melissa Owens Lassiter
Administrative Law Judge