

# NORTH CAROLINA REGISTER

VOLUME 30 • ISSUE 23 • Pages 2433 - 2552

June 1, 2016

## I. PROPOSED RULES

### Commerce, Department of

Commissioner of Banks, Office of the..... 2433 – 2435

### Environmental Quality, Department of

Environmental Management Commission..... 2442 – 2448

Wildlife Resources Commission..... 2448 – 2449

### Health and Human Services, Department of

Health and Human Services/Director, DHSR..... 2435 – 2437

Public Health, Commission for..... 2437 – 2440

### Justice, Department of

Criminal Justice Education and Training Standards Commission..... 2440 – 2442

## II. APPROVED RULES..... 2450 – 2476

### Health and Human Services, Department of

Child Care Commission

Radiation Protection Commission

### Justice, Department of

Criminal Justice Education and Training Standards Commission

### Occupational Licensing Boards and Commissions

Dental Examiners, Board of

Electrical Contractors, Board of Examiners of

Medical Board

Midwifery Joint Committee

Pharmacy, Board of

Real Estate Commission

### Revenue, Department of

Department

## III. RULES REVIEW COMMISSION..... 2477 – 2488

## IV. CONTESTED CASE DECISIONS

Index to ALJ Decisions..... 2489 – 2499

### Text of ALJ Decisions

15 DHR 02731..... 2500 – 2512

15 DOJ 04662..... 2513 – 2515

15 EDC 04160..... 2516 – 2530

15 OSP 02606..... 2531 – 2546

15 OSP 06204..... 2547 – 2552

## Contact List for Rulemaking Questions or Concerns

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

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

Office of Administrative Hearings

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116 West Jones Street

(919) 807-4700

Raleigh, North Carolina 27603-8005

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osbmruleanalysis@osbm.nc.gov

(919)807-4740

NC Association of County Commissioners

215 North Dawson Street

(919) 715-2893

Raleigh, North Carolina 27603

contact: Amy Bason

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(919) 715-4000

215 North Dawson Street

Raleigh, North Carolina 27603

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scollins@nclm.org

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**NORTH CAROLINA REGISTER**  
 Publication Schedule for January 2016 – December 2016

FILING DEADLINES			NOTICE OF TEXT		PERMANENT RULE			TEMPORARY RULES
Volume & issue number	Issue date	Last day for filing	Earliest date for public hearing	End of required comment Period	Deadline to submit to RRC for review at next meeting	Earliest Eff. Date of Permanent Rule	Delayed Eff. Date of Permanent Rule 31st legislative day of the session beginning:	270 <sup>th</sup> day from publication in the Register
30:13	01/04/16	12/08/15	01/19/16	03/04/16	03/21/16	05/01/16	01/2017	09/30/16
30:14	01/15/16	12/21/15	01/30/16	03/15/16	03/21/16	05/01/16	01/2017	10/11/16
30:15	02/01/16	01/08/16	02/16/16	04/01/16	04/20/16	06/01/16	01/2017	10/28/16
30:16	02/15/16	01/25/16	03/01/16	04/15/16	04/20/16	06/01/16	01/2017	11/11/16
30:17	03/01/16	02/09/16	03/16/16	05/02/16	05/20/16	07/01/16	01/2017	11/26/16
30:18	03/15/16	02/23/16	03/30/16	05/16/16	05/20/16	07/01/16	01/2017	12/10/16
30:19	04/01/16	03/10/16	04/16/16	05/31/16	06/20/16	08/01/16	01/2017	12/27/16
30:20	04/15/16	03/24/16	04/30/16	06/14/16	06/20/16	08/01/16	01/2017	01/10/17
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30:22	05/16/16	04/25/16	05/31/16	07/15/16	07/20/16	09/01/16	01/2017	02/10/17
30:23	06/01/16	05/10/16	06/16/16	08/01/16	08/22/16	10/01/16	01/2017	02/26/17
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31:02	07/15/16	06/23/16	07/30/16	09/13/16	09/20/16	11/01/16	01/2017	04/11/17
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31:07	10/03/16	09/12/16	10/18/16	12/02/16	12/20/16	02/01/17	05/2018	06/30/17
31:08	10/17/16	09/26/16	11/01/16	12/16/16	12/20/16	02/01/17	05/2018	07/14/17
31:09	11/01/16	10/11/16	11/16/16	01/03/17	01/20/17	03/01/17	05/2018	07/29/17
31:10	11/15/16	10/24/16	11/30/16	01/17/17	01/20/17	03/01/17	05/2018	08/12/17
31:11	12/01/16	11/07/16	12/16/16	01/30/17	02/20/17	04/01/17	05/2018	08/28/17
31:12	12/15/16	11/22/16	12/30/16	02/13/17	02/20/17	04/01/17	05/2018	09/11/17

## 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

*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**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Office of the Commissioner of Banks intends to adopt the rule cited as 04 NCAC 03F .0203, amend the rules cited as 04 NCAC 03F .0201, .0301, .0402, .0504, .0506, and repeal the rule cited as 04 NCAC 03F .0507.*

**Link to agency website pursuant to G.S. 150B-19.1(c):**  
<http://www.nccob.org/Public/financialinstitutions/mt/mrules.aspx>

**Proposed Effective Date:** *October 1, 2016*

**Public Hearing:**

**Date:** *June 30, 2016*

**Time:** *9:00 a.m.*

**Location:** *Office of the Commissioner of Banks, 316 W. Edenton Street, Raleigh, NC 27603*

**Reason for Proposed Action:** *The Office of the Commissioner of Banks (the "OCOB") is responsible for drafting regulations related to the operation of virtual currency providers in North Carolina. The North Carolina Money Transmitters Act G.S. 53-208.1, et seq. (the "MTA") is broadly written to encompass entities engaged in the business of transferring virtual currencies in and out of rea currency, as well as entities engaged in the business of processing payments between virtual currency wallets. These rules in Subchapter F – Licensees Under the MTA need to be amended in order to clarify requirements for entities involved in virtual currency under the Act.*

**Comments may be submitted to:** *Lonnie Christopher, Rules Coordinator, 4309 Mail Service Center, Raleigh, NC 27699-4309, phone (919) 715-7438, fax (919) 733-6918, email lchristopher@nccob.gov*

**Comment period ends:** *August 1, 2016*

**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 03 – BANKING COMMISSION**

**SUBCHAPTER 03F – LICENSEES UNDER MONEY TRANSMITTERS ACT**

**SECTION .0200 - ADMINISTRATIVE**

**04 NCAC 03F .0201 DEFINITIONS**

In addition to the terms defined in G.S. 53-208.2, the following terms used in this Subchapter shall be defined as follows:

~~(a) As used in this Subchapter, unless the context clearly requires otherwise:~~

- ~~(1) "Agent" shall mean a person, partnership, corporation, or other entity authorized by a licensee to sell or issue checks of the licensee in this State as a service or for a fee or other consideration on the behalf of the licensee;~~
- (1) "Agent of Payee" shall mean a person appointed by a payee to collect and process payments as the legal agent of the payee, where:
  - (a) there exists a written agreement between the payee and agent directing the agent to collect and process payments on the payee's behalf;
  - (b) the payee, in writing, directs buyers of its goods or services to tender payment to the agent; and
  - (c) payment is treated as received by the payee on receipt by the agent.
- ~~(2) "Applicant" shall mean a person who applies for a license under the Money Transmitters Act;~~
- (2) "Engage in the business of money transmission," shall mean for compensation or gain, or in expectation of compensation or gain, either directly or indirectly, to make available monetary transmission services to North Carolina consumers for personal, family, or household purposes;

- (3) "Controlling person" shall mean any person as defined in G.S. 53-208.2(16) who owns or holds with the power to vote 10% or more of the equity securities of the applicant or licensee, or who has the power to direct the management and policy of the applicant or licensee; has the power, directly or indirectly, to direct the management or policy of a licensee or person subject to the Money Transmitter Act. This includes any person that is a director, general partner, executive officer, or managing member that shall be in control of a licensee or person subject to the Money Transmitters Act;
- (4) "Executive officer" shall have the same meaning as set forth in Regulation "O," promulgated by the Board of Governors of the Federal Reserve System and codified in the Code of Federal Regulations at Title 12, Chapter II, Subchapter A, Part 215.2; mean in addition to those identified in GS 53-208.2(7), the chief executive officer, chief operating officer, chief compliance officer, chief technology officer, or any other individual who exercises significant influence over, or participates in, major policy making decisions of the applicant or licensee without regard to title, salary, or compensation;
- (5) "Location" shall mean any place of business within this State operated by the licensee or the licensee's agent authorized delegate at which checks of the licensee are issued or sold; which the licensee or authorized delegate engage in the business of monetary transmission;
- (6) "Money Transmitters Act" shall mean the Money Transmitters Act codified at Chapter 53, Article 16A of the North Carolina General Statutes (G.S. 53-208.1, et seq.);
- (7) "State" shall mean the State of North Carolina;
- (8) ~~Terms defined in G.S. 53-208.2 shall have the same meaning in this Subchapter.~~
- (8) "Virtual currency" shall mean a digital representation of value that can be digitally traded and functions as a medium of exchange, a unit of account, or a store of value, but does not have legal tender status as recognized by the United States Government;
- (9) "Virtual currency transmitter" shall mean any person in the business of:
  - (a) receiving virtual currency for transmission to a third party; or
  - (b) maintaining control of virtual currency on behalf of others.

~~(b) An application for a license, amendment to the application, annual statement, notice, or any other document which is required by law or rule to be filed with the Commissioner shall be addressed as follows:~~

~~Mailing Address:  
Office of the Commissioner of Banks  
4309 Mail Service Center  
Raleigh, North Carolina 27699-4309.~~

Street Address:

~~Office of the Commissioner of Banks  
316 West Edenton Street  
Raleigh, North Carolina 27603~~

~~Authority G.S. 53-208.27.~~

**04 NCAC 03F .0203 PERMISSIBLE INVESTMENTS**  
Permissible investments shall include virtual currency owned by the licensee, but only to the extent of outstanding transmission obligations received by the licensee in identical denomination of virtual currency.

~~Authority G.S. 53-208.2; 53-208.6; 53-208.27.~~

**SECTION .0300 - LICENSING**

**04 NCAC 03F .0301 APPLICATION FOR A LICENSE**

(a) Any person who wishes to sell or issue checks engage in the business of monetary transmission in this State pursuant to the Money Transmitters Act must shall first obtain a license issued by the Commissioner. An application for a license can may be obtained from and shall be filed pursuant to Rule .0201(b) of this Subchapter at the address set forth in Paragraph (e) of this Rule or on the NCCOB website at <https://www.nccob.org/Public/docs/Financial%20Institutions/Money%20Transmitters/mtapp.pdf>.

(b) An application for a Money Transmitters' license shall include the information required by G.S. 53-208.5 through G.S. 53-208.10-53-208.09 of Chapter 53, Article 16A. The application must shall be submitted on a form provided by the Commissioner.

(c) In addition to the documents and information listed in Paragraph (b) of this Rule, the Commissioner may require additional information necessary to complete an investigation pursuant to G.S. 53-208.10.

(d) Incomplete application files shall be closed and deemed denied without prejudice when the applicant has not submitted information requested by the Commissioner within 30 days of such request.

(e) An application for a license, amendment to the application, annual statement, notice, or any other document that is required by law or rule to be filed with the Commissioner shall be addressed as follows:

Mailing Address:

~~Office of the Commissioner of Banks  
4309 Mail Service Center  
Raleigh, North Carolina 27699-4309~~

Street Address:

~~Office of the Commissioner of Banks  
316 West Edenton Street  
Raleigh, North Carolina 27603~~

~~Authority G.S. 53-208.3; 53-208.27.~~

**SECTION .0400 - OPERATIONS**

04 NCAC 03F .0402 SURRENDER OF LICENSE

A licensee shall notify the Commissioner in writing within 15 calendar days of its decision to cease operations in this State under the Money Transmitters Act, and shall surrender its license to the Commissioner no later than 30 days after it has ceased operations in this State.

Authority G.S. 53-208.13; 53-208.27.

SECTION .0500 – REPORTING AND NOTIFICATIONS

04 NCAC 03F .0504 ACTIVITY REPORTS

The reports required by GS 53-208.12 shall include: A licensee shall file each quarter of the calendar year, a quarterly report of agent activity no later than 60 days after the quarter has ended. The quarterly report shall contain the following information:

- (1) The licensee's total number of agents or subagents authorized delegates in this State; State; and
(2) The total number and dollar amount of the checks sold or issued by monetary transmission activity, designated by activity type, licensee, and by each agent or subagent of the licensee's authorized delegates in this State.

Authority G.S. 53-208.12; 53-208.19; 53-208.27.

04 NCAC 03F .0506 REVOCATION OR CANCELLATION OF SURETY BOND

(a) No later than 30 days after the renewal of its surety bond, a licensee shall file pursuant to Rule .0201(b) of this Subchapter:

- (1) a certificate of continuation of the surety bond required by G.S. 53-208.8; G.S. 53-208.8(a); or
(2) evidence of continued compliance with G.S. 53-208.8(b) which that shall consist of a safekeeping receipt received directly from the trustee of securities with a par value equal to the amount of the surety bond in required by G.S. 53-208.8.

(b) A licensee shall notify the Commissioner in writing of revocation or cancellation of its surety bond furnished pursuant to G.S. 53-208.8, 53-208.8 no later than 15 calendar days after revocation or cancellation.

Authority 53-208.8; 53-208(13); 53-208.27.

04 NCAC 03F .0507 CEASING OPERATIONS

A licensee shall immediately notify the Commissioner in writing of its decision to cease operations in this State under the Money Transmitters Act.

Authority G.S. 53-208.27.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Health and Human Services/Director, DHSR intends repeal the rules cited as 10A NCAC 14C .0103, .0201, .0401, .0403, .3201, and .3203.

Link to agency website pursuant to G.S. 150B-19.1(c): http://www2.ncdhhs.gov/dhsr/ruleactions.html

Proposed Effective Date: October 1, 2016

Public Hearing:

Date: July 28, 2016

Time: 10:00 a.m.

Location: Dortehea Dix Campus, Edgerton Building, Room 026, 809 Ruggles Drive, Raleigh, NC 27603

Reason for Proposed Action: The CON application forms authorized by G.S. 131E-182(b) request information from the applicants which is designed to address the review criteria found in G.S. 131E-183(a). It has been determined that the two of the rules proposed to be repealed, 10A NCAC 14C .3201 and .3203, are inconsistent with the State Medical Facilities Plan and are not needed in order for the agency to determine whether or not an application is conforming to the statutory review criteria. Furthermore, four of the rules proposed to the repealed are unnecessary or outdated, 10A NCAC 14C .0103, .0201, .0401, and .0403. The rules proposed to be repealed also place an unnecessary burden on applicants and increase the complexity of litigation which has a cost to the Department and the applicants.

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

Comment period ends: August 1, 2016

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)

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

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

**CHAPTER 14 – DIRECTOR, DIVISION OF HEALTH  
SERVICE REGULATION**

**SUBCHAPTER 14C – CERTIFICATE OF NEEDS  
REGULATION**

**SECTION .0100 - GENERAL**

**10A NCAC 14C .0103 STATE MEDICAL FACILITIES  
PLAN**

(a) ~~The North Carolina State Medical Facilities Plan contains the following information:~~

- ~~(1) — inventory of certain categories of inpatient and outpatient health care facilities, including number of beds and utilization of beds;~~
- ~~(2) — type of services provided by each category of health care facility;~~
- ~~(3) — projections of need for acute care hospitals (including rehabilitation services), long term care facilities (including nursing homes, home health agencies, and hospice inpatient facilities), mental health facilities and end stage renal dialysis services for various geographical areas of the state;~~
- ~~(4) — statement of policies related to acute care facilities, rehabilitation services, long term care, psychiatric facilities, chemical dependency facilities, and facilities for intermediate care for the mentally retarded, which are used with other criteria contained in this Subchapter and in G.S. 131E-183 and need projections to determine whether applications proposing additional beds and services of these types may be approved under the certificate of need program; and~~
- ~~(5) — the certificate of need review schedule and description of review categories.~~

~~(b) The annually published State Medical Facilities Plan approved by the Governor, and any duly adopted amendments or additions thereto, is hereby adopted by reference pursuant to G.S. 150B-14(e) as a rule for the calendar year during which it is in effect.~~

~~(c) This plan may be purchased from the Division of Health Service Regulation, 701 Barbour Drive, Raleigh, North Carolina. This plan is also available for inspection at the Division of Health Service Regulation.~~

*Authority G.S. 131E-176(25); 131E-177(1); 131E-183(1); 42 U.S.C. 300K-2.*

**SECTION .0200 – APPLICATION AND REVIEW  
PROCESS**

**10A NCAC 14C .0201 LETTER OF INTENT**

~~(a) Potential applicants may contact the agency as soon as possible after determining the scope or possible scope of the~~

~~project to determine on a preliminary basis whether a certificate of need is required, which review schedule or schedules might be applicable, and to address any other questions that may arise.~~

~~(b) An applicant shall file a letter of intent with the agency no later than the date the application is required to be submitted to the agency in 10A NCAC 14C .0203. A conference with the agency may be substituted for the letter of intent. The conference may be held at the agency or by telephone.~~

~~(c) The letter of intent or conference shall describe the:~~

- ~~(1) — project;~~
- ~~(2) — estimated total capital cost of the project; and~~
- ~~(3) — proposed filing date of the application.~~

~~(d) If more than six months have passed since the filing of the letter of intent or the conference and an application has not been filed with the agency, a new letter of intent must be filed or another conference must be held before an application or applications are filed.~~

*Authority G.S. 131E-177.*

**SECTION .0400 – CERTIFICATE OF NEED APPEAL  
PROCESS**

**10A NCAC 14C .0401 PETITION FOR A HEARING**

~~(a) The CON Section will not issue a certificate of need to an applicant so long as any affected person has filed a petition for a contested case challenging the agency decision to award a certificate to that applicant and has posted a bond pursuant to N.C.G.S. 131E-188.~~

~~(b) A contested case hearing is available to any affected person on an agency decision to withdraw or not to withdraw a certificate of need. The reasonableness of the approved timetable shall not be an issue at such a hearing. That issue may only be addressed in a contested case hearing on the agency's decision to issue a certificate following the review of an application.~~

*Authority G.S. 131E-177; 131E-188.*

**10A NCAC 14C .0403 CONTESTED CASE HEARINGS**

~~Contested case hearings shall be conducted in accordance with Article 3 of Chapter 150B of the General Statutes except for the timetables set forth in G.S. 131E-188.~~

*Authority G.S. 131E-177; 131E-188.*

**SECTION .3200 - CRITERIA AND STANDARDS FOR  
LITHOTRIPTOR EQUIPMENT**

**10A NCAC 14C .3201 DEFINITIONS**

The following definitions shall apply to all rules in this Section:

- ~~(1) — "Approved lithotripter" means a lithotripter which was not operational prior to the beginning of the review period but which had been issued a certificate of need or had been acquired prior to March 18, 1993 in accordance with 1993 N.C. Sess. Laws c. 7, s. 12.~~
- ~~(2) — "Complicated stone disease treatment capability" means the expertise necessary to manage all patients during the treatment of~~

kidney stone disease. This includes but is not limited to a urologist skilled and experienced in both percutaneous and retrograde endoscopic stone removal procedures, and experienced interventional radiologic support.

- (3) ~~"Existing lithotripter" means a lithotripter in operation prior to the beginning of the review period.~~
- (4) ~~"Host facility" means the site at which a mobile lithotripter is parked for the provision of SWL procedures.~~
- (5) ~~"Lithotripter" means equipment as defined in G.S. 131E-176(14d).~~
- (6) ~~"Lithotripter service area" means a geographical area defined by the applicant and which has boundaries that encompass at least 1,000,000 of the state's residents.~~
- (7) ~~"Mobile lithotripter" means a lithotripter and transporting equipment that is moved to provide services at two or more host facilities.~~
- (8) ~~"Shock wave lithotripsy (SWL) procedure" means a procedure for the removal of kidney stones which involves focusing shock waves on kidney stones so that they are pulverized into sand like particles which may then be passed through the urinary tract.~~

Authority G.S. 131E-177(1); 131E-183(b).

**10A NCAC 14C .3203 PERFORMANCE STANDARDS**

An applicant proposing to acquire a lithotripter, including a mobile lithotripter, shall demonstrate that the following standards are met:

- (1) ~~each existing lithotripter in the proposed lithotripter service area, except mobile lithotripters, performed 1,000 procedures in the last year;~~
- (2) ~~each proposed lithotripter shall be projected to perform 1,000 procedures per year in the third year of operation of the proposed lithotripter;~~
- (3) ~~each existing and approved lithotripter, except mobile lithotripters, in the proposed lithotripter service area shall be projected to perform at least 1000 procedures per year in the third year of operation of the proposed lithotripter;~~
- (4) ~~each existing mobile lithotripter providing services in the proposed lithotripter service area performed an average of 4.0 procedures per day per site in the proposed lithotripter service area;~~
- (5) ~~each existing and approved mobile lithotripter providing services in the proposed lithotripter service area shall perform an average of 4.0 procedures per day per site in the proposed lithotripter service area in the applicant's third year of operation.~~

Authority G.S. 131E-177(1); 131E-183(b).

\* \* \* \* \*

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for Public Health intends to amend the rule cited as 10A NCAC 41A .0101.*

**Link to agency website pursuant to G.S. 150B-19.1(c):** <http://cph.publichealth.nc.gov/>

**Proposed Effective Date:** *October 1, 2016*

**Public Hearing:**

**Date:** *July 18, 2016*

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

**Location:** *Cardinal Room, located at 5605 Six Forks Road, Raleigh, NC*

**Reason for Proposed Action:** *Makes permanent the temporary reporting of the Zika Virus and adds the reporting of Chronic Hepatitis C.*

*For Zika Virus, it is imperative that public health authorities be rapidly notified when this infection is suspected so that appropriate education can be provided and control measures can be implemented to mitigate the risk of local transmission.*

*Hepatitis C virus (HCV) is a bloodborne virus most commonly transmitted through injection drug use. Although HCV infection (i.e. hepatitis C) can be acute and self-limiting, approximately 75%-85% of infected individuals develop chronic disease. Chronic HCV infection is a serious disease that can result in long-term health problems (i.e., chronic liver disease, cirrhosis, and liver cancer) or death. Although highly effective treatments are now available, most individuals with chronic HCV infection are unaware of their infection and thus do not receive the recommended care and treatment. This amendment will provide NC public health authorities with the data needed to estimate the burden of chronic HCV infection in NC and more precisely direct public health activities and resources that address chronic HCV infection.*

**Comments may be submitted to:** *Chris Hoke, 1931 Mail Service Center, Raleigh, NC 27699-1931, phone (919) 707-5006, fax (919) 870-4829, email [chris.hoke@dhhs.nc.gov](mailto:chris.hoke@dhhs.nc.gov)*

**Comment period ends:** *August 1, 2016*

**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 41 – EPIDEMIOLOGY HEALTH**

**SUBCHAPTER 41A – COMMUNICABLE DISEASE CONTROL**

**SECTION .0100 – COMMUNICABLE DISEASE CONTROL**

**10A NCAC 41A .0101 REPORTABLE DISEASES AND CONDITIONS**

(a) The following named diseases and conditions are declared to be dangerous to the public health and are hereby made reportable within the time period specified after the disease or condition is reasonably suspected to exist:

- (1) acquired immune deficiency syndrome (AIDS) - 24 hours;
- (2) anthrax - immediately;
- (3) botulism - immediately;
- (4) brucellosis - 7 days;
- (5) campylobacter infection - 24 hours;
- (6) chancroid - 24 hours;
- (7) chikungunya virus infection - 24 hours;
- (8) chlamydial infection (laboratory confirmed) - 7 days;
- (9) cholera - 24 hours;
- (10) Creutzfeldt-Jakob disease – 7 days;
- (11) cryptosporidiosis – 24 hours;
- (12) cyclosporiasis – 24 hours;
- (13) dengue - 7 days;
- (14) diphtheria - 24 hours;
- (15) Escherichia coli, shiga toxin-producing - 24 hours;
- (16) ehrlichiosis – 7 days;
- (17) encephalitis, arboviral - 7 days;
- (18) foodborne disease, including Clostridium perfringens, staphylococcal, Bacillus cereus, and other and unknown causes - 24 hours;
- (19) gonorrhea - 24 hours;
- (20) granuloma inguinale - 24 hours;
- (21) Haemophilus influenzae, invasive disease - 24 hours;
- (22) Hantavirus infection – 7 days;
- (23) Hemolytic-uremic syndrome – 24 hours;
- (24) Hemorrhagic fever virus infection – immediately;
- (25) hepatitis A - 24 hours;
- (26) hepatitis B - 24 hours;

- (27) hepatitis B carriage - 7 days;
- (28) hepatitis C, acute – 7 days;
- (29) human immunodeficiency virus (HIV) infection confirmed - 24 hours;
- (30) influenza virus infection causing death – 24 hours;
- (31) legionellosis - 7 days;
- (32) leprosy – 7 days;
- (33) leptospirosis - 7 days;
- (34) listeriosis – 24 hours;
- (35) Lyme disease - 7 days;
- (36) lymphogranuloma venereum - 7 days;
- (37) malaria - 7 days;
- (38) measles (rubeola) - 24 hours;
- (39) meningitis, pneumococcal - 7 days;
- (40) meningococcal disease - 24 hours;
- (41) Middle East respiratory syndrome (MERS) - 24 hours;
- (42) monkeypox – 24 hours;
- (43) mumps - 7 days;
- (44) nongonococcal urethritis - 7 days;
- (45) novel influenza virus infection – immediately;
- (46) plague - immediately;
- (47) paralytic poliomyelitis - 24 hours;
- (48) pelvic inflammatory disease – 7 days;
- (49) psittacosis - 7 days;
- (50) Q fever - 7 days;
- (51) rabies, human - 24 hours;
- (52) Rocky Mountain spotted fever - 7 days;
- (53) rubella - 24 hours;
- (54) rubella congenital syndrome - 7 days;
- (55) salmonellosis - 24 hours;
- (56) severe acute respiratory syndrome (SARS) – 24 hours;
- (57) shigellosis - 24 hours;
- (58) smallpox - immediately;
- (59) Staphylococcus aureus with reduced susceptibility to vancomycin – 24 hours;
- (60) streptococcal infection, Group A, invasive disease - 7 days;
- (61) syphilis - 24 hours;
- (62) tetanus - 7 days;
- (63) toxic shock syndrome - 7 days;
- (64) trichinosis - 7 days;
- (65) tuberculosis - 24 hours;
- (66) tularemia – immediately;
- (67) typhoid - 24 hours;
- (68) typhoid carriage (Salmonella typhi) - 7 days;
- (69) typhus, epidemic (louse-borne) - 7 days;
- (70) vaccinia – 24 hours;
- (71) vibrio infection (other than cholera) – 24 hours;
- (72) whooping cough – 24 hours; ~~and~~
- (73) yellow fever - ~~7 days, 7 days; and~~
- (74) Zika virus – 24 hours.

(b) For purposes of reporting, "confirmed human immunodeficiency virus (HIV) infection" is defined as a positive virus culture, repeatedly reactive EIA antibody test confirmed by western blot or indirect immunofluorescent antibody test, positive nucleic acid detection (NAT) test, or other confirmed testing

method approved by the Director of the State Public Health Laboratory conducted on or after February 1, 1990. In selecting additional tests for approval, the Director of the State Public Health Laboratory shall consider whether such tests have been approved by the federal Food and Drug Administration, recommended by the federal Centers for Disease Control and Prevention, and endorsed by the Association of Public Health Laboratories.

(c) In addition to the laboratory reports for *Mycobacterium tuberculosis*, *Neisseria gonorrhoeae*, and syphilis specified in G.S. 130A-139, laboratories shall report:

- (1) Isolation or other specific identification of the following organisms or their products from human clinical specimens:
  - (A) Any hantavirus or hemorrhagic fever virus.
  - (B) Arthropod-borne virus (any type).
  - (C) *Bacillus anthracis*, the cause of anthrax.
  - (D) *Bordetella pertussis*, the cause of whooping cough (pertussis).
  - (E) *Borrelia burgdorferi*, the cause of Lyme disease (confirmed tests).
  - (F) *Brucella* spp., the causes of brucellosis.
  - (G) *Campylobacter* spp., the causes of campylobacteriosis.
  - (H) *Chlamydia trachomatis*, the cause of genital chlamydial infection, conjunctivitis (adult and newborn) and pneumonia of newborns.
  - (I) *Clostridium botulinum*, a cause of botulism.
  - (J) *Clostridium tetani*, the cause of tetanus.
  - (K) *Corynebacterium diphtheriae*, the cause of diphtheria.
  - (L) *Coxiella burnetii*, the cause of Q fever.
  - (M) *Cryptosporidium parvum*, the cause of human cryptosporidiosis.
  - (N) *Cyclospora cayetanensis*, the cause of cyclosporiasis.
  - (O) *Ehrlichia* spp., the causes of ehrlichiosis.
  - (P) Shiga toxin-producing *Escherichia coli*, a cause of hemorrhagic colitis, hemolytic uremic syndrome, and thrombotic thrombocytopenic purpura.
  - (Q) *Francisella tularensis*, the cause of tularemia.
  - (R) Hepatitis B virus or any component thereof, such as hepatitis B surface antigen.
  - (S) Human Immunodeficiency Virus, the cause of AIDS.
  - (T) *Legionella* spp., the causes of legionellosis.

- (U) *Leptospira* spp., the causes of leptospirosis.
- (V) *Listeria monocytogenes*, the cause of listeriosis.
- (W) Middle East respiratory syndrome virus.
- (X) Monkeypox.
- (Y) *Mycobacterium leprae*, the cause of leprosy.
- (Z) *Plasmodium falciparum*, *P. malariae*, *P. ovale*, and *P. vivax*, the causes of malaria in humans.
- (AA) Poliovirus (any), the cause of poliomyelitis.
- (BB) Rabies virus.
- (CC) *Rickettsia rickettsii*, the cause of Rocky Mountain spotted fever.
- (DD) Rubella virus.
- (EE) *Salmonella* spp., the causes of salmonellosis.
- (FF) *Shigella* spp., the causes of shigellosis.
- (GG) Smallpox virus, the cause of smallpox.
- (HH) *Staphylococcus aureus* with reduced susceptibility to vanomycin.
- (II) *Trichinella spiralis*, the cause of trichinosis.
- (JJ) Vaccinia virus.
- (KK) *Vibrio* spp., the causes of cholera and other vibrioses.
- (LL) Yellow fever virus.
- (MM) *Yersinia pestis*, the cause of plague.
- (2) Isolation or other specific identification of the following organisms from normally sterile human body sites:
  - (A) Group A *Streptococcus pyogenes* (group A streptococci).
  - (B) *Haemophilus influenzae*, serotype b.
  - (C) *Neisseria meningitidis*, the cause of meningococcal disease.
- (3) Positive serologic test results, as specified, for the following infections:
  - (A) Fourfold or greater changes or equivalent changes in serum antibody titers to:
    - (i) Any arthropod-borne viruses associated with meningitis or encephalitis in a human.
    - (ii) Any hantavirus or hemorrhagic fever virus.
    - (iii) *Chlamydia psittaci*, the cause of psittacosis.
    - (iv) *Coxiella burnetii*, the cause of Q fever.
    - (v) Dengue virus.
    - (vi) *Ehrlichia* spp., the causes of ehrlichiosis.
    - (vii) Measles (rubeola) virus.
    - (viii) Mumps virus.

- (ix) Rickettsia rickettsii, the cause of Rocky Mountain spotted fever.
- (x) Rubella virus.
- (xi) Yellow fever virus.
- (B) The presence of IgM serum antibodies to:
  - (i) Chlamydia psittaci.
  - (ii) Hepatitis A virus.
  - (iii) Hepatitis B virus core antigen.
  - (iv) Rubella virus.
  - (v) Rubeola (measles) virus.
  - (vi) Yellow fever virus.
- (4) Laboratory results from tests to determine the absolute and relative counts for the T-helper (CD4) subset of lymphocytes and all results from tests to determine HIV viral load.

(d) Laboratories utilizing electronic laboratory reporting (ELR) shall report all positive laboratory results from tests used to diagnosis hepatitis C infection, including:

- (1) Hepatitis C virus antibody tests (including the test specific signal to cut-off (s/c) ratio).
- (2) Hepatitis C nucleic acid tests.
- (3) Hepatitis C antigen(s) tests.
- (4) Hepatitis C genotypic tests.

Authority G.S. 130A-134; 130A-135; 130A-139; 130A-141.

**TITLE 12 – DEPARTMENT OF JUSTICE**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Criminal Justice Education and Training Standards Commission intends to amend the rule cited as 12 NCAC 09B .0203.*

**Link to agency website pursuant to G.S. 150B-19.1(c):**  
<http://www.ncdoj.gov/About-DOJ/Law-Enforcement-Training-and-Standards/Criminal-Justice-Education-and-Training-Standards/Forms-and-Publications.aspx>

**Proposed Effective Date:** October 1, 2016

**Public Hearing:**

**Date:** August 10, 2016

**Time:** 10:30 a.m.

**Location:** Wake Technical Community College-Public Safety Training Center, 321 Chapanoke Road, Raleigh, NC 27603

**Reason for Proposed Action:** *The revision to this rule is proposed in order to correct a publication error from a prior revision (February 1, 2016). Paragraph (i)(5) of the rule should read "Class A" Misdemeanors as opposed to Class B.*

**Comments may be submitted to:** Trevor Allen, PO Drawer 149, Raleigh, NC 27602, phone (919) 779-8205, fax (919) 779-8210, email tjallen@ncdoj.gov

**Comment period ends:** August 15, 2016

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

**Fiscal impact (check all that apply).**

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

**CHAPTER 09 – CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION**

**SUBCHAPTER 09B - STANDARDS FOR CRIMINAL JUSTICE EMPLOYMENT: EDUCATION: AND TRAINING**

**SECTION .0200 - MINIMUM STANDARDS FOR CRIMINAL JUSTICE SCHOOLS AND CRIMINAL JUSTICE TRAINING PROGRAMS OR COURSES OF INSTRUCTION**

**12 NCAC 09B .0203 ADMISSION OF TRAINEES**

- (a) The school shall not admit any individual as a trainee in a presentation of the Basic Law Enforcement Training Course who is not a citizen of the United States.
- (b) The school shall not admit any individual younger than 20 years of age as a trainee in any non-academic basic criminal justice training course. Individuals under 20 years of age may be granted authorization for early enrollment as trainees in a presentation of the Basic Law Enforcement Training Course with prior written approval from the Director of the Standards Division. The Director shall approve early enrollment if the individual will be 20 years of age prior to the date of the State Comprehensive Examination for the course.
- (c) The school shall give priority admission in certified criminal justice training courses to individuals holding full-time employment with criminal justice agencies.
- (d) The school shall not admit any individual as a trainee in a presentation of the "Criminal Justice Instructor Training Course" who does not meet the education and experience requirements for instructor certification under Rule .0302 of this Subchapter within

60 days of successful completion of the Instructor Training State Comprehensive Examination.

(e) The school shall not admit an individual, including partial or limited enrollees, as a trainee in a presentation of the Basic Law Enforcement Training Course unless the individual, within one year prior to admission to the Basic Law Enforcement Training Course, places into course DRE 098 or above at a North Carolina Community College as a result of taking the Reading and English component of the North Carolina Diagnostic Assessment and Placement test as approved by the State Board of Community Colleges on October 17, 2014, (<http://www.nccommunitycolleges.edu/state-board-community-colleges/meetings/october-17-2014>), or has taken the reading component of a nationally standardized test within one year prior to admission to Basic Law Enforcement Training and has scored at or above the tenth grade level or the equivalent. For the purposes of this Rule:

- (1) Partial or limited enrollee does not include enrollees who hold, or have held within 12 months prior to the date of enrollment, general certification pursuant to 12 NCAC 09C .0304.
- (2) A "nationally standardized test" means a test that:
  - (A) reports scores as national percentiles, stanines, or grade equivalents; and
  - (B) compares student test results to a national norm.

(f) The school shall not admit any individual as a trainee in a presentation of the Basic Law Enforcement Training Course unless the individual has provided to the School Director a medical examination report, completed by a physician licensed to practice medicine in North Carolina, a physician's assistant, or a nurse practitioner, to determine the individual's fitness to perform the essential job functions of a criminal justice officer. The Director of the Standards Division shall grant an exception to this standard for a period of time not to exceed the commencement of the physical fitness topical area when failure to receive the medical examination report is not due to neglect on the part of the trainee.

(g) The school shall not admit any individual as a trainee in a presentation of the Basic Law Enforcement Training Course unless the individual is a high school, college, or university graduate or has received a high school equivalency credential recognized by the issuing state. High school diplomas earned through correspondence enrollment are not recognized toward the educational requirements.

(h) The school shall not admit any individual trainee in a presentation of the Basic Law Enforcement Training Course unless the individual has provided the School Director a certified criminal record check for local and state records for the time period since the trainee has become an adult and from all locations where the trainee has resided since becoming an adult. An Administrative Office of the Courts criminal record check or a comparable out-of-state criminal record check shall satisfy this requirement.

(i) The school shall not admit any individual as a trainee in a presentation of the Basic Law Enforcement Training Course who has been convicted of the following:

- (1) a felony;

- (2) a crime for which the punishment could have been imprisonment for more than two years;
- (3) a crime or unlawful act defined as a Class B Misdemeanor within the five year period prior to the date of application for employment, unless the individual intends to seek certification through the North Carolina Sheriffs' Education and Training Standards Commission;
- (4) four or more crimes or unlawful acts defined as Class B Misdemeanors, regardless of the date of conviction;
- (5) four or more crimes or unlawful acts defined as Class ~~B~~ A Misdemeanors, except the trainee may be enrolled if the last conviction date occurred more than two years prior to the date of enrollment;
- (6) a combination of four or more Class A Misdemeanors or Class B Misdemeanors regardless of the date of conviction, unless the individual intends to seek certification through the North Carolina Criminal Justice Education and Training Standards Commission.

(j) Individuals charged with crimes specified in Paragraph (i) of this Rule may be admitted into the Basic Law Enforcement Training Course if such offenses were dismissed or the person was found not guilty, but completion of the Basic Law Enforcement Training Course does not ensure that certification as a law enforcement officer or justice officer through the North Carolina Criminal Justice Education and Training Standards Commission will be issued. Every individual who is admitted as a trainee in a presentation of the Basic Law Enforcement Training Course shall notify the School Director of all criminal offenses the trainee is arrested for or charged with, pleads no contest to, pleads guilty to, or is found guilty of, and of all Domestic Violence Orders (G.S. 50B) that are issued by a judicial official after a hearing that provides an opportunity for both parties to be present. This includes all criminal offenses except minor traffic offenses and includes any offense of Driving Under the Influence (DUI) or Driving While Impaired (DWI). A "minor traffic offense" is defined, for the purposes of this Paragraph, as an offense where the maximum punishment allowable by law is 60 days or fewer. Other offenses under G.S. 20 (Motor Vehicles) or similar laws of other jurisdictions that shall be reported to the School Director are G.S. 20-138.1 (driving while under the influence), G.S. 20-28 (driving while license permanently revoked or permanently suspended), G.S. 20-30(5) (fictitious name or address in application for license or learner's permit), G.S. 20-37.8 (fraudulent use of a fictitious name for a special identification card), G.S. 20-102.1 (false report of theft or conversion of a motor vehicle), G.S. 20-111(5) (fictitious name or address in application for registration), G.S. 20-130.1 (unlawful use of red or blue lights), G.S. 20-137.2 (operation of vehicles resembling law enforcement vehicles), G.S. 20-141.3 (unlawful racing on streets and highways), G.S. 20-141.5 (speeding to elude arrest), and G.S. 20-166 (duty to stop in event of accident). The notifications required under this Paragraph shall be in writing and specify the nature of the offense, the court in which the case was handled, the date of the arrest or criminal charge, the date of issuance of the

Domestic Violence Order (G.S. 50B), and the final disposition and the date thereof. The notifications required under this Paragraph shall be received by the School Director within 30 days of the date the case was disposed of in court. The requirements of this Paragraph are applicable at all times during which the trainee is enrolled in a Basic Law Enforcement Training Course. The requirements of this Paragraph are in addition to the notifications required under 12 NCAC 10B .0301 and 12 NCAC 09B .0101(8).

Authority G.S. 17C-6; 17C-10.

**TITLE 15A – DEPARTMENT OF ENVIRONMENTAL QUALITY**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Environmental Management Commission intends to adopt the rule cited as 15A NCAC 02D .0545 and amend the rule cited as 15A NCAC 02D .0535.*

**Link to agency website pursuant to G.S. 150B-19.1(c):** <http://deq.nc.gov/about/divisions/air-quality/air-quality-rules/rules-hearing-process>

**Proposed Effective Date:** November 1, 2016

**Public Hearing:**

**Date:** July 18, 2016

**Time:** 6:00 P.M.

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

**Date:** July 20, 2016

**Time:** 3:00 P.M.

**Location:** Mecklenburg County Land Use and Environmental Services Agency Building  
4<sup>th</sup> Floor Hal Marshall Conference Room (Room No. 407), 2145 Suttle Avenue, Charlotte, NC 28208

**Reason for Proposed Action:** *On May 22, 2015, the U.S. Environmental Protection Agency (EPA) issued a final action to ensure states have plans in place that are fully consistent with the clean Air Act (CAA) and recent court decisions concerning startup, shutdown and malfunction (SSM) emission limit exemptions. EPA's final action responds to the Sierra Club Petition; Clarifies the EPA's SSM Policy to assure consistency with the CAA and recent court decisions; and finalizes findings that the SSM provisions in the State Implementation Plans (SIPs) of 36 states including North Carolina, do not meet the requirements of the CAA and accordingly issues a "SIP call" for each of those states. There is a requirement to submit a SIP revision by November 22, 2016. Several states, including North Carolina, have entered into litigation over the validity of the EPA SIP call. Due to the uncertainty of the outcome of the litigation, North Carolina has chosen to move forward with rulemaking.*

*15A NCAC 02D .0535, Excess Emissions Reporting and Malfunctions, is proposed to be amended to include introductory*

*language that indicates that Rule 02D .0535 is the rule that will be in effect if the states' lawsuits are successful.*

*15A NCAC 02D .0545, Treatment of Malfunction Events and Work Practices for Startup and Shutdown Operations, is proposed for adoption and would be in effect in the event that states' lawsuits are unsuccessful as indicated in its introductory language. Rule 02D .0545 eliminates the exemptions in paragraphs (c) and (g). For startup and shutdown, Rule 02D .0545 allows a facility to demonstrate compliance with the applicable existing emission limits, generally available work practice standards, work practice standards in analogue federal rules that a specific source may not otherwise be subject to, or a source specific startup and shutdown work practice standard permit limit. For malfunctions a facility may demonstrate compliance with the applicable existing limits or with a source specific malfunction work practice standard permit limit.*

**Comments may be submitted to:** Joelle Burluson, 1641 Mail Service Center Raleigh, NC 27699-1641, phone 919-707-8720, fax 919-707-8720, email [daq.publiccomments@ncdenr.gov](mailto:daq.publiccomments@ncdenr.gov) (Please type SSM Hearing Comments in subject line)

**Comment period ends:** August 1, 2016

**Procedure for Subjecting a Proposed Rule to Legislative**

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

**Fiscal impact (check all that apply).**

- State funds affected 15A NCAC 02D .0545**
- Environmental permitting of DOT affected Analysis submitted to Board of Transportation**
- Local funds affected 15A NCAC 02D .0545**
- Substantial economic impact (≥\$1,000,000)**
- Approved by OSBM May 12, 2016**
- No fiscal note required by G.S. 150B-21.4**

**CHAPTER 02 - ENVIRONMENTAL MANAGEMENT**

**SUBCHAPTER 02D - AIR POLLUTION CONTROL REQUIREMENTS**

**SECTION .0500 - EMISSION CONTROL STANDARDS**

**15A NCAC 02D .0535 EXCESS EMISSIONS REPORTING AND MALFUNCTIONS**

(a) Applicability: This Rule shall not be in effect if Rule .0545 of this Subchapter is valid. This Rule shall not apply to sources to which Rule .0524, .1110, or .1111 of this Subchapter applies. In the event that United States Environmental Protection Agency's regulation, State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction, published in the Code of Federal Regulations (CFR) at 40 CFR 52 on June 12, 2015, is:

- (1) declared or adjudged to be invalid or unconstitutional or stayed by the United States Court of Appeals for the Fourth Circuit, by the District of Columbia Circuit, or by the United States Supreme Court; or
- (2) withdrawn, repealed, revoked, or otherwise rendered of no force and effect by the United States Environmental Protection Agency, Congress, or Presidential Executive Order;

such action shall render Rule .0545 of this Subchapter as invalid, void, stayed, or otherwise without force and effect upon the date such action becomes final and effective. At the time of such action, sources that were subject to Rule .0545 of this Subchapter shall be subject to this Rule.

(a)(b) For the purposes of this Rule—Rule, the following definitions apply:

- (1) "Excess Emissions" means an emission rate that exceeds any applicable emission limitation or standard allowed by any rule in Sections .0500, .0900, .1200, or .1400 of this Subchapter; or by a permit condition; or that exceeds an emission limit established in a permit issued under 15A NCAC 02Q .0700.
- (2) "Malfunction" means any unavoidable failure of air pollution control equipment, process equipment, or process to operate in a normal and usual manner that results in excess emissions. Excess emissions during periods of routine start-up and shut-down of process equipment ~~are~~ shall not be considered a malfunction. Failures caused entirely or in part by poor maintenance, careless ~~operations~~ operations, or any other upset condition within the control of the emission source are not considered a malfunction.
- (3) "Start-up" means the initial commencement of operation or subsequent commencement of operation of any source that has shut-down or ceased operation for a period sufficient to cause temperature, pressure, process, chemical, or a pollution control device imbalance that would result in excess emission.
- (4) "Shut-down" means the cessation of the operation of any source for any purpose.

(b) This Rule does not apply to sources to which Rules .0524, .1110, or .1111 of this Subchapter applies unless excess emissions

~~exceed an emission limit established in a permit issued under 15A NCAC 02Q .0700 that is more stringent than the emission limit set by Rules .0524, .1110 or .1111 of this Subchapter.~~

(c) Any excess emissions that do not occur during start-up or shut-down are considered a violation of the ~~appropriate applicable~~ rule unless the owner or operator of the source of excess emissions demonstrates to the Director, that the excess emissions are the result of a malfunction. To determine if the excess emissions are the result of a malfunction, the Director shall consider, along with any other pertinent information, the following:

- (1) ~~The~~ the air cleaning device, process equipment, or process has been maintained and operated, to the maximum extent practicable, consistent with good practice for minimizing emissions;
- (2) ~~Repairs~~ repairs have been made expeditiously when the emission limits have been exceeded;
- (3) ~~The~~ the amount and duration of the excess emissions, including any bypass, have been minimized to the maximum extent practicable;
- (4) ~~All~~ practical steps have been taken to minimize the impact of the excess emissions on ambient air quality;
- (5) ~~The~~ the excess emissions are not part of a recurring pattern indicative of inadequate design, operation, or maintenance;
- (6) ~~The~~ the requirements of Paragraph (f) of this Rule have been met; and
- (7) ~~If~~ if the source is required to have a malfunction abatement plan, it has followed that plan. ~~All malfunctions shall be repaired as expeditiously as practicable. However, the Director shall not excuse excess emissions caused by malfunctions from a source for more than 15 percent of the operating time during each calendar year. The Director may require the owner or operator of a facility to maintain records of the time that a source operates when it or its air pollution control equipment is malfunctioning or otherwise has excess emissions.~~

All malfunctions shall be repaired as expeditiously as practicable. The Director shall not excuse excess emissions caused by malfunctions from a source for more than 15 percent of the operating time during each calendar year. The Director may require the owner or operator of a facility to maintain records of the time that a source operates when it or its air pollution control equipment is malfunctioning or otherwise has excess emissions.

(d) All electric utility boiler units shall have a malfunction abatement plan approved by the Director as satisfying the requirements of Subparagraphs ~~(4)(d)(1)~~ through ~~(3)(d)(3)~~ of this Paragraph. Rule. In addition, the Director may require any other source to have a malfunction abatement plan approved by the Director as satisfying the requirements of Subparagraphs ~~(4)(d)(1)~~ through ~~(3)(d)(3)~~ of this Paragraph. Rule. If the Director requires a malfunction abatement plan for a source other than an electric utility boiler, the owner or operator of that source shall submit a malfunction abatement plan within 60 days after receipt of the Director's request. The malfunction plans of electric utility boiler units and of other sources required to have them shall be

implemented ~~when a malfunction or other breakdown occurs, at all times.~~ The purpose of the malfunction abatement plan is to prevent, detect, and correct malfunctions or equipment failures that could result in excess emissions. A malfunction abatement plan shall contain:

- (1) a ~~complete~~ preventive maintenance program including:
  - (A) the identification of individuals or positions responsible for inspecting, ~~maintaining~~maintaining, and repairing air cleaning devices;
  - (B) a description of the items or conditions that will be inspected and maintained;
  - (C) the frequency of the inspection, maintenance services, and repairs; and
  - (D) an identification and quantities of the replacement parts that shall be maintained in inventory for quick replacement;
- (2) an identification of the source and air cleaning operating variables and outlet variables, such as opacity, grain loading, and pollutant concentration, that may be monitored to detect a malfunction or failure; the normal operating range of these variables and a description of the method of monitoring or surveillance procedures and of informing operating personnel of any malfunctions, including alarm systems, ~~lights~~lights, or other indicators; and
- (3) a description of the corrective procedures that the owner or operator will take in case of a malfunction or failure to achieve compliance with the applicable rule as expeditiously as ~~practicable~~practicable, but no longer than the next boiler or process outage that would provide for an orderly repair or correction of the malfunction or 15 days, whichever is shorter. If the owner or operator anticipates that the malfunction would continue for more than 15 days, a case-by-case repair schedule shall be established by the Director with the source. The owner or operator shall maintain logs to show that the operation and maintenance parts of the malfunction abatement plan are implemented. These logs are subject to inspection by the Director ~~or his designee~~ upon request during business hours.

(e) The owner or operator of any source required by the Director to have a malfunction abatement plan shall submit a malfunction abatement plan to the Director within ~~six months~~60 days after it has been required by the Director. The malfunction abatement plan and any amendment to it shall be reviewed by the ~~Director or his designee~~Director. If the plan carries out the objectives described by Paragraph (d) of this Rule, the Director shall approve it. If the plan does not carry out the objectives described by Paragraph (d) of this Rule, the Director shall disapprove the plan. The Director shall state ~~his~~the reasons for ~~his~~the disapproval. The person who submits the plan shall submit an amendment to the plan to satisfy the reasons for the Director's disapproval within 30

days of receipt of the Director's notification of disapproval. Any person having an approved malfunction abatement plan shall submit to the Director for ~~his~~the approval amendments reflecting changes in any element of the plan required by Paragraph (d) of this Rule or amendments when requested by the Director. The malfunction abatement plan and amendments to it shall be implemented within 90 days upon receipt of written notice of approval.

(f) The owner or operator of a source of excess emissions that last for more than four hours and that results from a malfunction, a breakdown of process or control ~~equipment~~equipment, or any other abnormal conditions, shall:

- (1) notify the Director ~~or his designee~~ of any such occurrence by 9:00 a.m. Eastern time of the Division's next business day of becoming aware of the occurrence and describe:
  - (A) name and location of the ~~facility~~facility;
  - (B) the nature and cause of the malfunction or ~~breakdown~~breakdown;
  - (C) the time when the malfunction or breakdown is first ~~observed~~observed;
  - (D) the expected ~~duration~~duration; and
  - (E) an estimated rate of emissions;
- (2) notify the Director ~~or his designee~~ immediately by 9:00 a.m. Eastern time of the Division's next business day when the corrective measures have been accomplished;
- (3) submit to the Director within 15 days after the ~~request~~notification in Subparagraph (f)(1) of this Rule, a written report that includes:
  - (A) name and location of the ~~facility~~facility;
  - (B) identification or description of the processes and control devices involved in the malfunction or ~~breakdown~~breakdown;
  - (C) the cause and nature of the ~~event~~event;
  - (D) time and duration of the violation or the expected duration of the excess emission if the malfunction or breakdown has not been ~~fixed~~fixed;
  - (E) estimated quantity of pollutant ~~emitted~~emitted;
  - (F) steps taken to control the emissions and to prevent recurrences and if the malfunction or breakdown has not been fixed, steps planned to be ~~taken~~taken; and
  - (G) any other pertinent information requested by the Director. ~~After the malfunction or breakdown has been corrected, the Director may require the owner or operator of the source to test the source in accordance with Section .2600 of this Subchapter to demonstrate compliance.~~

After the malfunction or breakdown has been corrected, the Director may require the owner or operator of the source to test the source in accordance with Section .2600 of this Subchapter to demonstrate compliance.

(g) Start-up and shut-down. Excess emissions during start-up and shut-down are considered a violation of the appropriate rule if the owner or operator cannot demonstrate that the excess emissions are unavoidable. To determine if excess emissions are unavoidable during ~~start-up~~start-up or ~~shut-down~~shut-down, the Director shall consider the items listed in ~~Paragraphs~~ Subparagraphs (c)(1), (c)(3), (c)(4), (c)(5), and (c)(7) of this Rule along with any other pertinent information. The Director may specify for a particular source the amount, time, and duration of emissions allowed during start-up or shut-down. The owner or operator shall, to the extent practicable, operate the source and any associated air pollution control equipment or monitoring equipment in a manner consistent with best practicable air pollution control practices to minimize emissions during start-up and shut-down.

*Authority G.S. 143-215.3(a)(1); 143-215.107(a)(4); 143-215.107(a)(5).*

**15A NCAC 02D .0545 TREATMENT OF MALFUNCTION EVENTS AND WORK PRACTICES FOR START-UP AND SHUT-DOWN OPERATIONS**

(a) Applicability. In the event that United States Environmental Protection Agency's regulation, State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction, published in the Code of Federal Regulations (CFR) at 40 CFR 52 on June 12, 2015, is:

- (1) declared or adjudged to be invalid or unconstitutional or stayed by the United States Court of Appeals for the Fourth Circuit, by the District of Columbia Circuit, or by the United States Supreme Court; or
- (2) withdrawn, repealed, revoked, or otherwise rendered of no force and effect by the United States Environmental Protection Agency, Congress, or Presidential Executive Order;

such action shall render this Rule as invalid, void, stayed, or otherwise without force and effect upon the date such action becomes final and effective. At the time of such action, sources that were subject to this Rule shall be subject to Rule .0535 of this Subchapter. This Rule shall not apply to sources to which Rule .0524, .1110, or .1111 of this Subchapter applies.

(b) For the purposes of this Rule, the following definitions apply:

- (1) "Excess Emissions" means an emission rate that exceeds any applicable emission limitation or standard allowed by any rule in Sections .0500, .0900, .1200, or .1400 of this Subchapter; by a permit condition; or that exceeds an emission limit established in a permit issued pursuant to 15A NCAC 02Q .0700.
- (2) "Malfunction" means any unavoidable failure of air pollution control equipment, process

equipment, or process to operate in a normal and usual manner. Failures caused entirely or in part by poor maintenance, careless operations or any other upset condition within the control of the emission source shall not be considered a malfunction.

- (3) "Start-up" means the initial commencement of operation or subsequent commencement of operation of any source that has shut-down or ceased operation for a period sufficient to cause temperature, pressure, process, chemical, or a pollution control device imbalance that would result in excess emissions.
- (4) "Shut-down" means the cessation of the operation of any source for any purpose.

(c) Malfunctions. All facilities subject to this Rule shall:

- (1) Comply with the otherwise applicable emissions limits; or
- (2) Comply with the source specific malfunction work practice standard permit condition described in Paragraph (d) of this Rule.

(d) Source Specific Malfunction Work Practice Standard Permit Condition.

- (1) A facility may request a source specific malfunction work practice standard to be included in the state and federal enforceable section of its air permit, after review by EPA and the public.
- (2) The source specific malfunction work practice standard shall minimize emissions during the malfunction event and require the malfunction duration to be minimized.
- (3) Subparagraphs (e)(1) and (e)(5) of this Rule shall be addressed in the source specific malfunction work practice standard. Any facility requesting a source specific malfunction work practice standard shall meet the requirements of Subparagraphs (f)(1) through (f)(3) of this Rule.
- (4) Requests shall be made through the application for a permit, permit modification, or permit renewal pursuant to the permit application requirements in 15A NCAC 02Q .0300 or .0500. The public notice requirements specified in 15A NCAC 02Q .0306 and .0307 shall be followed for all proposed work practice standards in non-Title V permits. Public notice requirements specified in 15A NCAC 02Q .0521 shall be followed for all proposed work practice standards in Title V permits.
- (5) At all times, the source shall be operated in a manner consistent with good practice for minimizing emissions and the owner or operator shall use their best efforts regarding planning, design, and operating procedures. The owner or operator's actions during malfunction periods shall be documented by properly signed, contemporaneous operating logs or other relevant evidence.

(6) Failure to implement or follow the Source Specific Malfunction Work Practice Standard Permit Condition shall be a violation of Paragraph (d) of this Rule.

(7) Facilities that follow a Source Specific Malfunction Work Practice Standard Permit Condition during a malfunction that has been addressed in the Source Specific Malfunction Work Practice Standard Permit Condition shall be deemed in compliance.

(e) The Director shall determine the appropriate enforcement response for excess emissions due to a malfunction. The Director shall consider, along with any other pertinent information, the following:

(1) The air cleaning device, process equipment, or process has been maintained and operated, to the maximum extent practicable, consistent with good practice for minimizing emissions;

(2) Repairs have been made expeditiously when the emission limits have been exceeded;

(3) The amount and duration of the excess emissions, including any bypass, have been minimized to the maximum extent practicable;

(4) All practical steps have been taken to minimize the impact of the excess emissions on ambient air quality;

(5) The excess emissions are not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

(6) The requirements of Paragraph (h) of this Rule have been met; and

(7) If the source is required to have a malfunction abatement plan, the source has followed that plan. All malfunctions shall be repaired as expeditiously as practicable. The facility shall maintain records of the time that a source operates when it or its air pollution control equipment is malfunctioning or otherwise has excess emissions.

(f) All electric utility boiler units shall have a malfunction abatement plan approved by the Director as satisfying the requirements of Subparagraphs (f)(1) through (f)(3) of this Rule. In addition, the Director may require any other source to have a malfunction abatement plan approved by the Director as satisfying the requirements of Subparagraphs (f)(1) through (f)(3) of this Rule. If the Director requires a malfunction abatement plan for a source other than an electric utility boiler, the owner or operator of that source shall submit a malfunction abatement plan within 60 days after receipt of the Director's request. The malfunction abatement plans of electric utility boiler units and of other sources required to have malfunction abatement plans shall be implemented at all times. The purpose of the malfunction abatement plan is to prevent, detect, and correct malfunctions that may result in excess emissions. A malfunction abatement plan shall contain:

(1) a preventive maintenance program including:  
 (A) the identification of individuals or positions responsible for inspecting,

maintaining, and repairing air cleaning devices;

(B) a description of the items or conditions that will be inspected and maintained;

(C) the frequency of the inspection, maintenance services, and repairs; and

(D) an identification and quantities of the replacement parts that shall be maintained in inventory for quick replacement;

(2) an identification of the source and air cleaning operating variables and outlet variables that may be monitored to detect a malfunction; the normal operating range of these variables and a description of the method of monitoring and of informing operating personnel of any malfunctions; and

(3) a description of the corrective procedures that the owner or operator will take in case of a malfunction or failure to achieve compliance with the applicable rule as expeditiously as practicable. The owner or operator shall maintain logs to show that the operation and maintenance parts of the malfunction abatement plan are implemented.

(g) The owner or operator of any source required by the Director to have a malfunction abatement plan shall submit a malfunction abatement plan to the Director within 60 days after it has been required by the Director. The malfunction abatement plan and any amendment to it shall be reviewed by the Director. If the plan carries out the objectives described by Paragraph (f) of this Rule, the Director shall approve it. If the plan does not carry out the objectives described by Paragraph (f) of this Rule, the Director shall disapprove the plan. The owner or operator shall submit an amendment to the plan to satisfy the plan requirements within 30 days of receipt of the Director's notification. Any person having an approved malfunction abatement plan shall submit to the Director for approval amendments reflecting changes in any element of the malfunction abatement plan required by Paragraph (f) of this Rule or amendments when requested by the Director. The malfunction abatement plan and amendments to it shall be implemented within 90 days upon receipt of written notice of approval.

(h) The owner or operator of a source of excess emissions that last for more than four hours and that results from a malfunction shall:

(1) notify the Director of any such occurrence by 9:00 a.m. Eastern time of the Division's next business day of becoming aware of the occurrence and describe:

(A) name and location of the facility;

(B) the nature and cause of the malfunction;

(C) the time when the malfunction is first observed;

(D) the expected duration; and

(E) an estimated rate of emissions;

- (2) notify the Director by 9:00 a.m. Eastern time of the Division's next business day when the corrective measures have been accomplished;
- (3) submit to the Director, within 15 days after the notification in Subparagraph (h)(1) of this Rule, a written report that includes:
  - (A) name and location of the facility;
  - (B) identification or description of the processes and control devices involved in the malfunction;
  - (C) the cause and nature of the event;
  - (D) time and duration of the violation or the expected duration of the excess emission if the malfunction has not been fixed;
  - (E) estimated quantity of pollutant emitted;
  - (F) steps taken to control the emissions and to prevent recurrences and if the malfunction has not been fixed, steps planned to be taken; and
  - (G) any other pertinent information requested by the Director.

After the malfunction has been corrected, the Director may require the owner or operator of the source to test the source in accordance with Section .2600 of this Subchapter to demonstrate compliance.

(i) Start-up and Shut-down: During periods of start-up and shut-down, sources at facilities subject to this Rule shall comply with any one of the following:

- (1) the applicable SIP emission limit in the 15A NCAC 02D rules, or a permit limit established in a permit issued pursuant to 15A NCAC 2Q .0700;
- (2) the applicable work practice standards in Subparagraphs (j)(1) through (j)(13) of this Rule;
- (3) work practice standards currently in effect for federal rules promulgated since 2009 that address compliance during start-up and shut-down operations for equipment that would be subject to the federal rule except for rule applicability exemptions; or
- (4) source specific start-up and shut-down work practice standard permit conditions described in Paragraph (k) of this Rule.

Excess emissions during start-up and shut-down shall be considered a violation of the applicable rule if the owner or operator cannot demonstrate that the work practice standards in Subparagraphs (i)(2), (i)(3), or (i)(4) of this Rule were followed. Facilities may comply with Subparagraphs (i)(1) or (i)(2) of this Rule during start-up and shut-down without a specific permit condition. Facilities that choose to comply with Subparagraph (i)(3) of this Rule during start-up and shut-down shall apply for and receive a permit condition that indicates the specific federal work practice standard that shall be followed. Failure to implement or follow the work practice standard shall be considered a violation of Subparagraph (i)(3) of this Rule. Facilities that choose to comply with Subparagraph (i)(4) of this

Rule during start-up and shut-down shall apply for and receive a permit condition described in Paragraph (k) of this Rule. Failure to implement or follow the work practice standard shall be considered a violation of Subparagraph (i)(4) of this Rule.

(j) Generally Available Work Practices for Start-Up and Shut-Down Operations. The owner or operator shall, to the extent practicable, operate the source and any associated air pollution control equipment or monitoring equipment in a manner consistent with best practicable air pollution control practices to minimize emissions during start-up and shut-down. The following generally available work practice standards shall be followed:

- (1) Periods of start-up and shut-down shall be documented in a permanent form suitable for inspection and submission to the Division. Documentation of start-ups and shut-downs shall include specific identification of each period of start-up or shut-down where a work practice standard is used and information required to demonstrate compliance with the applicable work practices. Start-up and shut-down operations shall occur as expeditiously as possible while minimizing emissions.
- (2) Boilers and other combustion sources. All combustion sources shall commence operations while firing on the cleanest permitted fuel, to the extent practicable. The source shall minimize the start-up and shut-down periods to the extent practicable.
  - (A) For sources for which the manufacturer has established recommended procedures for start-ups and shut-downs, the source shall follow the manufacturer's recommended procedures.
  - (B) For sources for which there is no manufacturer-recommended procedures for start-ups and shut-downs, the source shall follow recommended procedures for a unit of similar design for which manufacturer's recommended procedures are available.
- (3) Baghouses shall be operated upon start-up of emission unit, or when baghouse temperature exceeds the dew point, whichever occurs later, or as specified by manufacturer.
- (4) Cyclones shall be operated at all times, including start-up and shut-down of the emission unit.
- (5) Electrostatic precipitators (ESP) shall be operated upon start-up of emission unit, or when effluent temperature exceeds the dew point, whichever occurs later, or as specified by manufacturer.
- (6) Selective catalytic reduction (SCR) units shall be operated if catalyst bed temperature is greater than 400°F, or as specified by manufacturer.

- (7) Non-selective catalytic reduction (NSCR) units shall be operated when the effluent temperature is between 700°F and 1500°F, or as specified by manufacturer.
- (8) Scrubbers shall be operated at all times from initialization of start-up to completion of shut-down.
- (9) Carbon adsorption shall be operated at all times from initialization of start-up to completion of shut-down.
- (10) Biofilters shall be operated at all times from initialization of start-up to completion of shut-down.
- (11) Sorbent injection shall be operated at all times the gas stream temperature is greater than 300°F, or as specified by manufacturer.
- (12) Regenerative Thermal Oxidizers (RTO), thermal, and catalytic oxidizers shall be operated at all times from initialization of start-up to completion of shut-down.
- (13) Safety and fire protection protocols shall be followed during start-up and shut-down of all sources.

(k) Source Specific Start-Up and Shut-Down Work Practice Standard Permit Condition. A facility may request a source specific start-up and shut-down work practice standard be included in the state and federal enforceable section of their air permit, after review by EPA and the public. Such requests shall be made through the application for a permit, permit modification, or permit renewal pursuant to the permit application requirements in 15A NCAC 02Q .0300 or .0500. The public notice requirements specified in 15A NCAC 02Q .0306 and .0307 shall be followed for all proposed work practice standards in non-Title V permits. Public notice requirements specified in 15A NCAC 02Q .0521 shall be followed for all proposed work practice standards in Title V permits. Requests for work practice standards for periods of start-up and shut-down shall include the following considerations:

- (1) the work practice standard is specific to a source and the associated control strategy;
- (2) demonstration that the use of the control strategy for the source is technically infeasible during start-up or shut-down periods;
- (3) the work practice standard requires that the frequency and duration of operation in start-up or shut-down mode are minimized to the greatest extent practicable;
- (4) at all times, the source shall be operated in a manner consistent with good practice for minimizing emissions and the source uses best efforts regarding planning, design, and operating procedures; and
- (5) the owner or operator's actions during start-up and shut-down periods shall be documented by properly signed, contemporaneous operating logs or other relevant evidence.

Any source without a start-up and shut-down work practice standard permit condition shall be required to comply with any applicable emission limit. Facilities that follow a source specific

start-up and shut-down work practice standard permit condition during start-up and shut-down shall be deemed in compliance.

Authority G.S. 143-215.3(a)(1);143-215.107(a)(4); 143-215.107(a)(5).

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*Notice is hereby given in accordance with G.S. 150B-21.2 that the Wildlife Resources Commission intends to amend the rule cited as 15A NCAC 10F .0346.*

**Link to agency website pursuant to G.S. 150B-19.1(c):** [www.ncwildlife.org](http://www.ncwildlife.org)

**Proposed Effective Date:** October 1, 2016

**Public Hearing:**

**Date:** June 21, 2016

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

**Location:** NCWRC, 5<sup>th</sup> Floor Commission Room, 1751 Varsity Drive, Raleigh, NC 27606

**Reason for Proposed Action:** *The Chowan County Board of Commissioners made formal application to the Wildlife Resources Commission along with a certified Resolution requesting a no wake zone in the waters of an unnamed canal off the Chowan River, in Arrowhead Beach subdivision, for the purpose of mitigating hazards to boater safety. The canal is narrow with frequent vessel traffic. The WRC on April 21, 2016 approved the fiscal note review by OSBM and approved submission of Notice of Text for promulgating rulemaking.*

**Comments may be submitted to:** Betsy Haywood, 1701 Mail Service Center, Raleigh, NC 27699-1701, email [betsy.haywood@ncwildlife.org](mailto:betsy.haywood@ncwildlife.org)

**Comment period ends:** August 1, 2016

**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 10 – WILDLIFE RESOURCES AND WATER SAFETY**

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

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

**15A NCAC 10F .0346 ARROWHEAD BEACH SUBDIVISION**

(a) Regulated Areas. This Rule applies to the following waters or portions of waters in Chowan County:

- (1) Chowan River: that portion adjoining the shoreline of the Arrowhead Beach Subdivision Park and having dimensions of approximately 350 by 600 feet containing a marked swimming area and the area within 200 feet of the pier, the whole being designated as the recreational Area;
- (2) Indian Creek: that portion adjoining the Arrowhead Beach ~~Subdivision.~~ Subdivision; and
- (3) Chowan River: the waters of an unnamed canal in Arrowhead Beach Subdivision, shore to

shore at its intersection with the Chowan River at 36.22508 N, 76.70787 W.

(b) Swimming Area. No person operating or responsible for the operation of a vessel shall permit it to enter the swimming area described in Subparagraph (1) of Paragraph (a) of this Rule.

(c) Obstruction of Swimmers or Boats. No person shall place or maintain within the Recreational Area described in Subparagraph (1) of Paragraph (a) of this Rule any poles, cables, lines, nets, trotlines, fish traps or other obstructions or hazards to swimmers or boats, excepting those necessary to the proper marking of the area pursuant to this Rule.

(d) Speed Limit. No person shall operate a vessel at greater than no-wake speed in the area described in ~~Subparagraph~~ Subparagraphs (2) and (3) of Paragraph (a) of this Rule.

(e) Placement and Maintenance of Markers. The board of Commissioners of Chowan County is designated a suitable agency for the placement and maintenance of the markers implementing this Rule, subject to the approval of the United States Coast Guard and the United States Army Corps of Engineers. On condition that the said board of commissioners exercise its supervisory responsibility, it may delegate the actual placement and maintenance of markers to some responsible person or organization. With regard to marking the regulated areas described in Paragraph (a) of this Rule, the supplementary standards contained in Paragraph (g) of Rule .0301 of this Section shall apply.

*Authority G.S. 75A-3: 75A-15.*



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**APPROVED RULES**

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<u>Taxable Income of Nonresidents and Part-Year</u>	17	NCAC 06B .3904*	n/a G.S. 150B-1(d)(4)
<u>NonResident Members of Professional Athletic Teams</u>	17	NCAC 06B .3905*	n/a G.S. 150B-1(d)(4)
<u>Purchase of Real Property Located in North Carolina</u>	17	NCAC 06B .3906*	n/a G.S. 150B-1(d)(4)
<u>Nonresident Shareholders</u>	17	NCAC 06B .4003*	n/a G.S. 150B-1(d)(4)
<u>Basis In Stock</u>	17	NCAC 06B .4005*	n/a G.S. 150B-1(d)(4)
<u>General</u>	17	NCAC 06B .4101*	n/a G.S. 150B-1(d)(4)
<u>Exempt Interest Dividends</u>	17	NCAC 06B .4102*	n/a G.S. 150B-1(d)(4)
<u>Ordinary Dividends</u>	17	NCAC 06B .4103*	n/a G.S. 150B-1(d)(4)
<u>Common Carriers</u>	17	NCAC 06C .0110*	n/a G.S. 150B-1(d)(4)
<u>Supplemental Wage Payments</u>	17	NCAC 06C .0117*	n/a G.S. 150B-1(d)(4)
<u>Employee's Withholding Allowance Certificate</u>	17	NCAC 06C .0123*	n/a G.S. 150B-1(d)(4)
<u>Additional Withholding Allowances</u>	17	NCAC 06C .0124*	n/a G.S. 150B-1(d)(4)
<u>Submission of Certain Withholding Allowance Certificates</u>	17	NCAC 06C .0126*	n/a G.S. 150B-1(d)(4)
<u>Annual Reports</u>	17	NCAC 06C .0203*	n/a G.S. 150B-1(d)(4)
<u>Amounts Withheld are Held in Trust for Secretary of</u>	17	NCAC 06C .0204*	n/a G.S. 150B-1(d)(4)
<u>Requirements for Filing</u>	17	NCAC 06D .0102*	n/a G.S. 150B-1(d)(4)

**DENTAL EXAMINERS, BOARD OF**

<u>Record Content</u>	21	NCAC 16T .0101*	30:08 NCR
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**ELECTRICAL CONTRACTORS, BOARD OF EXAMINERS OF**

<u>Fees</u>	21	NCAC 18B .0209*	30:13 NCR
<u>Waiting Period Between Examinations</u>	21	NCAC 18B .0211*	30:13 NCR
<u>Renewal After Expiration of Annual License</u>	21	NCAC 18B .0406*	30:13 NCR

**MEDICAL BOARD**

<u>Clinical Pharmacist Practitioner</u>	21	NCAC 32T .0101*	30:12 NCR
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**MIDWIFERY JOINT COMMITTEE**

<u>Reporting Criteria</u>	21	NCAC 33 .0110*	30:13 NCR
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**PHARMACY, BOARD OF**

<u>Clinical Pharmacist Practitioner</u>	21	NCAC 46 .3101*	30:12 NCR
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**REAL ESTATE COMMISSION**

<u>Broker Name and Address</u>	21	NCAC 58A .0103*	30:12 NCR
<u>Retention of Records</u>	21	NCAC 58A .0108	30:12 NCR
<u>Reporting Criminal Convictions and Disciplinary Actions</u>	21	NCAC 58A .0113*	30:12 NCR
<u>Postponement of Postlicensing Education</u>	21	NCAC 58A .2104	30:12 NCR
<u>Proof of Eligibility</u>	21	NCAC 58A .2105	30:12 NCR
<u>Registration Fee</u>	21	NCAC 58B .0102*	30:12 NCR
<u>Renewal of Time Share Project Registration</u>	21	NCAC 58B .0103*	30:12 NCR

**TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**10A NCAC 09 .1718 REQUIREMENTS FOR DAILY OPERATIONS**

(a) Children shall be adequately supervised at all times. "Adequate supervision" shall mean that:

- (1) For pre-school age children, the operator shall be positioned in the indoor and outdoor environment to maximize his or her ability to hear and see the children at all times and render immediate assistance;
- (2) For school-age children, the operator shall be positioned in the indoor and outdoor environment to maximize his or her ability to hear or see the children at all times and render immediate assistance;
- (3) The operator shall interact with the children while moving about the indoor or outdoor area; and
- (4) For children of all ages:
  - (i) the operator shall know where each child is located and be aware of children's activities at all times;
  - (ii) the operator shall provide supervision according to the individual age, needs, and capabilities of each child; and
  - (iii) all of the conditions in this Paragraph shall apply except when emergencies necessitate that adequate supervision is impossible for brief periods of time. Written documentation of emergencies stating the date, time, and reason shall be maintained and available for review by Division representatives upon request.

(b) The operator shall provide the following on a daily basis for all children in care:

- (1) Developmentally appropriate equipment and materials for a variety of outdoor activities that allow for vigorous play, large and small muscle development, and social, emotional, and intellectual development. For purposes of this Rule "vigorous" means done with force and energy. Each child shall have the opportunity for outdoor play each day that weather conditions permit. The operator shall provide space and time for vigorous indoor activities when children cannot play outdoors;
- (2) An individual sleeping space such as a bed, crib, play pen, cot, mat, or sleeping bag with individual linens for each pre-school aged child in care for four hours or more, or for all children if overnight care is provided, to rest. Individual sleep requirements for infants aged 12 months or younger shall be provided for as specified in 10A NCAC 09 .1724(a)(2). Linens shall be

changed weekly or whenever they become soiled or wet;

- (3) For children who are sleeping or napping, the operator is not required to visually supervise them, but shall be able to hear and respond without delay to them. Children shall not sleep or nap in a room with a closed door between the children and the operator. The operator shall be on the same level of the home where children are sleeping or napping;
  - (4) A safe sleep environment by ensuring that when a child is sleeping or napping, bedding or other objects shall not be placed in a manner that covers the child's face;
  - (5) A separate area that can be supervised pursuant to Paragraph (a) of this Rule for children who become ill to the extent that they can no longer participate in routine group activities. Parents shall be notified immediately if their child becomes too sick to remain in care;
  - (6) The opportunity each day for each child under the age of 12 months to play while awake while positioned on his or her stomach;
  - (7) Developmentally appropriate activities as planned on a written schedule. Materials or equipment shall be available indoors and outdoors to support the activities listed on the written schedule. The written schedule shall:
    - (A) Show blocks of time assigned to types of activities and include periods of time for both active play and quiet play or rest;
    - (B) Be displayed in a place where parents are able to view it;
    - (C) Reflect daily opportunities for both free choice and guided activities;
    - (D) Include a minimum of one hour of outdoor play throughout the day, if weather conditions permit; and
    - (E) Include a daily gross motor activity that may occur indoors or outdoors.
- (c) When screen time, including videos, video games, and computer usage, is provided, it shall be:
- (1) Offered only as a free choice activity;
  - (2) Used to meet a developmental goal; and
  - (3) Limited to no more than two and a half hours per week for each child two years of age and older. Usage time periods may be extended for specific special events, projects, occasions such as a current event, homework, on-site computer classes, holiday, and birthday celebration. Screen time is prohibited for children under the age of two years. The operator shall offer alternate activities for children under the age of two years.
- (d) Nothing contained in this Rule shall be construed to preclude a "qualified person with a disability," as defined by G.S. 168A-3(9), or a "qualified individual," as defined by the Americans

With Disabilities Act at 42 U.S.C. 12111(8), from working in a licensed child care facility.

*History Note: Authority G.S. 110-85; 110-88; 110-91(2); 110-91(12); Eff. July 1, 1998; Amended Eff. May 1, 2016; December 1, 2012; July 1, 2010; March 1, 2006; May 1, 2004.*

**10A NCAC 15 .1403 DEFINITIONS**

As used in this Section, the following definitions shall apply:

- (1) "Agency" means the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Radiation Protection Section.
- (2) "Consumer" means any individual who is provided access to a tanning facility that is required to be registered pursuant to provisions of this Section.
- (3) "Formal Operator Training" is a course of study approved by this agency as meeting the requirements in Paragraph (i) of Rule .1418 in this Section.
- (4) "Individual" means any human being.
- (5) "Inspection" means an official examination or observation to determine compliance with the rules in this Section, and orders, requirements, and conditions of the agency.
- (6) "Minor" means any individual less than 18 years of age.
- (7) "Medical Lamps" means any lamp that is designed or labeled for medical use only.
- (8) "Operator" means any individual designated by the registrant to operate or to assist and instruct the consumer in the operation and use of the tanning facility or tanning equipment. Under this definition, the term "operator," includes any individual who conducts one or more of the following activities:
  - (a) determining consumer's skin type;
  - (b) determining the suitability of prospective consumers for tanning equipment use;
  - (c) informing the consumer of dangers of ultraviolet radiation exposure including photoallergic reactions and photosensitizing agents;
  - (d) assuring that the consumer reads and signs all forms as required by the rules in this Section;
  - (e) maintaining required consumer exposure records;
  - (f) recognizing and reporting consumer injuries or alleged injuries to the registrant;
  - (g) determining the consumer's exposure schedule;

- (h) setting timers which control the duration of exposure; and
- (i) instructing the consumer in the proper use of protective eyewear.
- (9) "Person," as defined in G.S. 104E-5(11), means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, agency, political subdivision of this State, any other State or political subdivision or agency thereof, and any legal successor, representative, agent, or agency of these entities.
- (10) "Registrant" means any person who is registered with the agency as required by provisions of this Section.
- (11) "Registration" means registration with the agency in accordance with provisions of this Section.
- (12) "Tanning components" means any constituent tanning equipment part, to include ballasts, starters, lamps, reflectors, acrylic shields, timers, and airflow cooling systems.
- (13) "Tanning equipment" means ultraviolet or other lamps and equipment containing such lamps intended to induce skin tanning through the irradiation of any part of the living human body with ultraviolet radiation, e.g., beds, booths, facials, and wands.
- (14) "Tanning equipment services" means the installation, sales and servicing of tanning equipment and associated tanning components; calibration of equipment used in surveys to measure radiation and timer accuracy; tanning health physics consulting, e.g. radiation output measurements, design of safety programs, and training seminars for tanning operators and service personnel.
- (15) "Tanning facility" means any location, place, area, structure or business that provides consumers access to tanning equipment. For the purpose of this definition, tanning equipment registered to different persons at the same location and tanning equipment registered to the same person, but at separate locations, shall constitute separate tanning facilities.
- (16) "Ultraviolet radiation" means electromagnetic radiation with wavelengths in air between 200 nanometers and 400 nanometers.

*History Note: Authority G.S. 104E-7(a)(7); Eff. June 1, 1989; Amended Eff. August 1, 2002; May 1, 1993; May 1, 1992; Transferred and Recodified from 15A NCAC 11 .1403 Eff. February 1, 2015; Amended Eff. May 1, 2016.*

**10A NCAC 15 .1414      WARNING SIGNS REQUIRED**

(a) The registrant shall post the warning sign described in Paragraph (b) of this Rule within one meter of each tanning station and in such a manner that the sign is clearly visible to consumers; not obstructed by any barrier, equipment, or other object; and may be easily viewed by the consumer before the tanning equipment is energized.

(b) The warning sign in Paragraph (a) of this Rule shall use upper and lower case letters that are at least seven millimeters and three and one-half millimeters in height, respectively, and shall state:

**DANGER - ULTRAVIOLET RADIATION**

UV – emitting tanning devices have been classified as "carcinogenic to humans. "

**ATTENTION: THIS DEVICE SHALL NOT BE USED BY PERSONS UNDER 18 YEARS OF AGE.**

- Follow instruction.

- Avoid overexposure. As with natural sunlight, overexposure can cause eye and skin injury and allergic reactions. **REPEATED EXPOSURE MAY CAUSE PREMATURE AGING OF THE SKIN AND SKIN CANCER.**

- Wear protective eyewear.

**FAILURE TO USE PROTECTIVE EYEWEAR MAY RESULT IN SEVERE BURNS OR LONG-TERM INJURY TO THE EYES.**

Contraindications: This sunlamp product must not be used if skin lesions or open wounds are present.

Warning: This sunlamp product should not be used on individuals who have had skin cancer or have a family history of skin cancer.

Warning: Persons repeatedly exposed to ultraviolet sunlamp products should be regularly evaluated for skin cancer.

- Medications or cosmetics may increase your sensitivity to the ultraviolet radiation. Consult a physician before using sunlamp or tanning equipment if you are using medication or have a history of skin problems or believe yourself to be especially sensitive to sunlight. Consult your certified tanning operator for a list of cosmetics and products known to create sensitivity to light.

- If you do not tan in the sun, you are unlikely to tan from the use of this product.

- Consumers should report to the agency any injury for which medical attention is sought or obtained resulting from the use of registered tanning equipment. This report should be made within five working days after the occurrence.

(c) Warning signs shall include the current address and telephone number of the agency: Department of Health and Human Services, Division of Health Service Regulation, Radiation Protection Section, 1645 Mail Service Center, Raleigh, NC 27699-1600, (919) 814-2250.

*History Note: Authority G.S. 104E-7(a)(7); 104E-9.1;*

*Eff. June 1, 1989;*

*Amended Eff. August 1, 2002; June 1, 1993;*

*Transferred and Recodified from 15A NCAC 11 .1403 Eff. February 1, 2015;*

*Amended Eff. May 1, 2016.*

**10A NCAC 15 .1415      EQUIPMENT AND CONSTRUCTION REQUIREMENTS**

(a) The registrant shall use only tanning equipment manufactured in accordance with the specifications set forth in 21 Code of Federal Regulations (CFR) Part 1040, Section 1040.20, and with 21 CFR Part 878.4635, which is herein incorporated by reference, including subsequent amendments and editions and may be accessed at <http://www.ecfr.gov/cgi-bin/ECFR?page=browse>. The standard of compliance shall be the standards in effect at the time of manufacture as shown on the equipment identification label required by 21 CFR Part 1010, Section 1010.3. The registrant shall place an additional label on the bed that states "North Carolina state law prohibits the use of this device by persons under 18 years of age."

(b) Each assembly of tanning equipment shall be designed for use by only one consumer at a time.

(c) Each assembly of tanning equipment shall be equipped with a timer that complies with the requirements of 21 CFR Part 1040, Section 1040.20(c)(2). The maximum timer interval shall not exceed the manufacturer's maximum recommended exposure time. No timer interval shall have an error exceeding plus or minus 10 percent of the maximum timer interval for the product.

(d) Tanning equipment shall include physical barriers to protect consumers from injury induced by touching or breaking the lamps.

(e) All tanning equipment labeling required in Paragraph (a) of this Rule shall be easily read by the consumer while in the proximity of the tanning bed.

(f) The timer intervals shall be numerically indicated on the face of the timer.

(g) The timer shall not automatically reset and cause radiation emission to resume for a period greater than the unused portion of

the timer cycle when emission from the tanning device has been interrupted.

(h) Each assembly of tanning equipment shall be provided with a control on the equipment to enable the consumer to manually terminate radiation emission from the equipment at any time without disconnecting the electrical plug or removing any ultraviolet lamp.

(i) The timer for the tanning devices shall be remotely located outside the room where the tanning equipment is located. The remote timer shall be set by a certified tanning operator.

(j) The registrant shall ensure that timer tests are performed annually on each assembly of tanning equipment and documented in writing for agency review during inspections to ensure the timer is accurate to within 10 percent as specified in Paragraph (c) of this Rule and the consumer is able to terminate the radiation manually in accordance with Paragraph (h) of this Rule.

(k) Medical lamps shall not be used for commercial cosmetic tanning purposes.

*History Note: Authority G.S. 104E-7(a)(7); 104E-9.1; Eff. June 1, 1989; Amended Eff. August 1, 2002; June 1, 1993; Transferred and Recodified from 15A NCAC 11 .1415 Eff. February 1, 2015; Amended Eff. May 1, 2016.*

**10A NCAC 15 .1418 RECORDS: REPORTS AND OPERATING REQUIREMENTS**

(a) Prior to initial exposure, the registrant shall provide each consumer the opportunity to read a copy of the warning specified in Rule .1414(b) of this Section and have the consumer sign a statement that the information has been read and understood. For illiterate or visually impaired persons unable to read, the warning statement shall be read aloud by the operator to that individual, in the presence of a witness, and the witness and the operator shall sign the statement.

(b) The registrant shall maintain a record of each consumer's total number of tanning visits, including dates and durations of tanning exposures.

(c) The registrant shall submit a written report of injury for which medical attention was sought or obtained from the use of registered tanning equipment to the Radiation Protection Section within five business days after occurrence. The report shall include:

- (1) the name of the affected individual;
- (2) the name and location of the tanning facility involved;
- (3) the nature of the actual or alleged injury; and
- (4) any other information relevant to the actual or alleged injury, including the date and duration of exposure and any documentation of medical attention sought or obtained.

(d) The registrant shall not allow individuals under the age of 18 to use tanning equipment.

(e) The registrant shall verify by checking legal identification that includes a driver's license, a passport, or military identification, each consumer is 18 years of age or older.

(f) The registrant shall not allow minors to remain in the tanning room while the tanning equipment is in operation.

(g) The registrant shall replace defective or burned out lamps, bulbs, or filters with a type intended for use in the affected tanning equipment as specified by the manufacturer's product label and having the same spectral distribution (certified equivalent lamp).

(h) The registrant shall replace ultraviolet lamps and bulbs that are not otherwise defective or damaged at such frequency or after such duration of use as is recommended by the manufacturer of such lamps and bulbs.

(i) The registrant shall certify that all tanning equipment operators are trained in at least the following:

- (1) the requirements of this Section;
- (2) procedures for correct operation of the tanning facility and tanning equipment;
- (3) recognition of injury or overexposure to ultraviolet radiation;
- (4) the tanning equipment manufacturer's procedures for operation and maintenance of the tanning equipment;
- (5) the determination of skin type of customers and determination of duration of exposure to registered tanning equipment; and
- (6) emergency procedures to be followed in case of injury.

(j) The registrant shall allow operation of tanning equipment only by and in the physical presence of persons who have completed formal training courses that meet the requirements of Subparagraphs (i)(1) to (6) of this Rule.

(k) The registrant shall maintain a record of operator training required in Paragraphs (i) and (j) of this Rule for inspection by authorized representatives of the agency.

(l) No registrant shall possess, use, operate, or transfer tanning equipment or their ultraviolet radiation sources in such a manner as to cause any individual under 18 years of age to be exposed to radiation emissions from such equipment.

(m) Each registrant shall make available to all employees current copies of the following documents:

- (1) the facility's certificate of registration with the Radiation Protection Section; and
- (2) conditions or documents incorporated into the registration by reference and amendments thereto.

*History Note: Authority G.S. 104E-7(a)(7); 104E-9; 104E-9.1; 104E-12; Eff. June 1, 1989; Amended Eff. August 1, 2002; May 1, 1993; May 1, 1992; Transferred and Recodified from 15A NCAC 11 .1418 Eff. February 1, 2015; Amended Eff. May 1, 2016.*

**10A NCAC 15 .1419 COMMUNICATIONS WITH THE AGENCY: AGENCY ADDRESS**

Applications for registration, reports, notifications, and other communications required by this Section shall be mailed to the Radiation Protection Section, 1645 Mail Service Center, Raleigh, North Carolina 27699-1600 or delivered to the agency at its office located at 5505 Creedmoor Road, Suite 100, Raleigh, North Carolina 27612.

*History Note: Authority G.S. 104E-7(a)(7); Eff. June 1, 1989; Amended Eff. August 1, 2002; May 1, 1992; Transferred and Recodified from 15A NCAC 11 .1419 Eff. February 1, 2015; Amended Eff. May 1, 2016.*

**10A NCAC 15 .1423 FEES AND PAYMENT**

- (a) Annual fees established in this Rule shall be due on the first day of July of each year.
- (b) Notwithstanding Paragraph (a) of this Rule, when a new registration is issued by the agency after the first day of July of any year, the initial fee is due on the date of issuance of the registration.
- (c) The initial fee in Paragraph (b) of this Rule shall be computed as follows:
  - (1) When any new registration is issued before the first day of January of any year, the initial fee is the full amount specified in this Rule; and
  - (2) When any new registration is issued on or after the first day of January of any year, the initial fee is one-half of the amount specified in this Rule.
- (d) Each registrant may pay all fees by cash, check, or money order as follows:
  - (1) Checks or money orders shall be made payable to "Radiation Protection Section," and mailed to 1645 Mail Service Center, Raleigh, NC 27699-1600 or delivered to the agency office at 5505 Creedmoor Road, Suite 100, Raleigh, NC 27612; and
  - (2) Cash payments shall be made only by appointment by calling the agency at 919/814-2250 and delivered to the agency office at 5505 Creedmoor Road, Suite 100, Raleigh, NC 27612.
- (e) Within five days after the due dates established in Paragraphs (a) and (b) of this Rule, the agency shall mail to each registrant who has not already submitted payment a notice that indicates the due date, the amount of fees due, and the delinquent date.
- (f) Payment of fees established in this Rule shall be delinquent if not received by the agency within 60 days after the due date specified in Paragraphs (a) and (b) of this Rule.
- (g) If a registrant remits a fee in the form of a check or other instrument that is uncollectible from the paying institution, the agency shall notify the registrant by certified mail and allow the registrant 15 days to correct the matter, including payment of any fee charged to the agency by a banking institution.
- (h) If payment of fees is uncollectible from the paying institution or not submitted to the agency by the delinquent date, the agency shall institute legal action to collect.
- (i) Annual fees for persons registered pursuant to provisions of this Section are as listed in the following table:

Type of registered facility	Letters appearing in registration number	Facility plus first piece of tanning equipment	Each additional piece of

			tanning equipment
Tanning Facility	B	\$200.00	\$30.00

*History Note: Authority G.S. 104E-9(a)(8); 104E-19(a); Eff. July 1, 1994; Amended Eff. July 1, 2011; August 1, 2007; August 1, 2002; Transferred and Recodified from 15A NCAC 11 .1423 Eff. February 1, 2015; Amended Eff. May 1, 2016.*

**TITLE 12 – DEPARTMENT OF JUSTICE**

**12 NCAC 09F .0106 SANCTIONS**

- (a) The Commission shall suspend an approved course when the Commission finds that the course has failed to meet or maintain the required standards for approval, pursuant to Rule .0103 of this Section.
- (b) The Commission, through the Standards Division, shall randomly conduct unannounced audits of a Concealed Carry Handgun course taught by a certified Concealed Carry Handgun instructor for compliance with the requirements of this Subchapter.
- (c) The Commission shall deny, suspend, or revoke the certification of instructor status when the Commission finds that the instructor:
  - (1) failed to meet or maintain the required course and instruction standards approved by the Commission as set forth in 12 NCAC 09F .0102;
  - (2) failed to submit modification of courses or change in instructor status;
  - (3) submitted any non-sufficient funds check;
  - (4) falsified any record of completion with a passing score of an approved course;
  - (5) distributed any certificate provided by the Commission without the named permittee undertaking the approved course from that instructor;
  - (6) taught any Concealed Carry Handgun course or approved certification while the instructor's certification was suspended by the Commission; or
  - (7) is ineligible to receive and possess a firearm under federal or North Carolina state law.
- (d) Instructors who have lost certified status pursuant to Subparagraphs (1), (2), or (3) of Paragraph (c) of this Rule may reapply for certification upon documentation of compliance after one year has elapsed from the date of suspension of the instructor's certification by the Commission. Instructors who have lost certified status pursuant to Subparagraphs (4), (5), (6), or (7) of Paragraph (c) of this Rule shall have their certification suspended or permanently revoked by the Commission.

*History Note: Authority G.S. 14-415.12; 14-415.13;*

Temporary Adoption Eff. November 1, 1995;  
Eff. May 1, 1996;  
Amended Eff. May 1, 2016; February 1, 2007; September 1, 2005;  
May 1, 2004.

TITLE 17 – DEPARTMENT OF REVENUE

17 NCAC 01C .0322 FORMS AND REQUIRED ACCOUNT IDENTIFICATION INFORMATION

(a) All North Carolina tax and Department of Revenue forms referenced in Title 17 of the North Carolina Administrative Code are available at www.dorncc.com or by calling 1-877-252-3052. Federal income tax forms are available at www.irs.gov.  
(b) All returns, reports, schedules, and correspondence filed with the Department shall contain the taxpayer's North Carolina identification number, federal employer identification number, or social security number, or combination thereof as required, to verify the identity of the taxpayer.

History Note: Authority G.S. 105-251; 105-252; 105-262;  
Eff. February 1, 1976;  
Amended Eff. May 1, 2016; January 1, 1994.

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17 NCAC 06B .0104 COMPLETING A RETURN

(a) A taxpayer shall use the North Carolina income tax form for the year that his or her taxable year begins.  
(b) A person who files an income tax return for an unmarried individual who died during the taxable year shall enter the date of the individual's death and the individual's name on the return.  
(c) On a return, a taxpayer shall furnish his or her social security number and the name and social security number of his or her spouse and shall indicate whether the return is filed jointly or separately.  
(d) The same filing status claimed on the federal income tax return shall be claimed on the North Carolina income tax return. However, if the taxpayer filed the federal return as married filing jointly and either the taxpayer or the taxpayer's spouse is a nonresident and had no North Carolina taxable income, the taxpayer may file the North Carolina tax return as either married filing jointly or married filing separately as explained in 17 NCAC 06B .3904.  
(e) Each applicable line of the tax return shall be completed and the entering of words or phrases, such as "unconstitutional" or "object - self incrimination" shall not meet the requirement of completing each applicable line on the return.  
(f) The tax shall be computed by multiplying North Carolina taxable income by the tax rate in G.S. 105-153.7. In the case of a delinquent return, the penalty and interest prescribed by statute shall be added.  
(g) If an individual has moved into or out of North Carolina during the tax year or is a nonresident with income from sources within North Carolina, the Computation of North Carolina Taxable Income for Part-Year Residents and Nonresidents section on Form D-400 Schedule S North Carolina Supplemental Schedule shall be completed. Credit for tax paid to another state shall not be allowed to an individual moving into or out of this

State unless the individual has income derived from and taxed by another state or country while a resident of this State.  
(h) If a tax credit is claimed for tax paid to another state or country, there shall be attached to the return a true copy of the return filed with the other state or country and a canceled check, receipt, or other proof of payment of tax to the other state or country.  
(i) Every return shall be signed by the taxpayer or his or her authorized agent, and joint returns shall be signed by both spouses.  
(j) Where tax has been withheld, the state copy of the Wage and Tax Statement shall be attached to the return.  
(k) Any additional information that the taxpayer believes will assist in the processing and auditing of a return shall be indicated on the return or a worksheet or schedule attached to the return.  
(l) Anyone who is paid to prepare a return shall sign the return in the space provided.

History Note: Authority G.S. 105-153.7; 105-153.8; 105-153.9; 105-154; 105-155; 105-163.5(e); 105-163.7; 105-163.10; 105-251; 105-252; 105-262;  
Eff. February 1, 1976;  
Amended Eff. September 1, 2008; February 1, 2005; August 1, 2002; July 1, 1999; August 1, 1998; November 1, 1994; June 1, 1993; October 1, 1991; June 1, 1990;  
Readopted Eff. May 1, 2016.

17 NCAC 06B .0106 FEDERAL FORMS

A taxpayer whose federal return reflects an address outside of North Carolina shall attach a copy of the federal return to the taxpayer's North Carolina return.

History Note: Authority G.S. 105-153.8; 105-155; 105-251; 105-252; 105-262;  
Eff. February 1, 1976;  
Amended Eff. August 1, 1998; June 1, 1993; February 1, 1991; June 1, 1990; May 1, 1984;  
Readopted Eff. May 1, 2016.

17 NCAC 06B .0107 EXTENSIONS

(a) Application. -- If an income tax return cannot be filed by the due date, a taxpayer may apply for an automatic six-month extension of time to file the return. To receive the extension, an individual shall file Form D-410, Application for Extension for Filing Individual Income Tax Return, by the original due date of the return. A partnership, estate, or trust shall file Form D-410P, Application for Extension for Filing Partnership, Estate, or Trust Tax Return, by the original due date of the return.  
(b) Late Payment Penalty. -- A 10 percent late payment penalty shall apply to the remaining balance due if less than 90 percent of the total amount of tax due is paid by the due date. If the 90 percent requirement is met, any remaining balance due shall be paid with the income tax return before the expiration of the extension period to avoid the late payment penalty. If a taxpayer does not file the application for extension by the original due date of the return, the taxpayer is subject to both the five percent per month late filing penalty (25 percent maximum) and the 10 percent late payment penalty on the remaining balance due.

(c) Individuals Outside U.S. -- An individual who is "Out of Country" on the date the return is due shall be granted an automatic four-month extension for filing the North Carolina income tax return by marking the Out of Country indicator on the Form D-400 when the State return is filed. "Out of Country" means the individual is a United States citizen or resident who is living outside the United States and Puerto Rico and either the taxpayer's main place of work is outside the United States and Puerto Rico or the taxpayer is in the military service outside the United States and Puerto Rico. The time for payment of the tax shall also be extended; however, interest shall be due on any unpaid tax from the original due date of the return until the tax is paid. If an individual is unable to file the return within the automatic four-month extension period, an additional two-month extension may be obtained by following the provisions in Paragraph (a) of this Rule; however, the Form D-410 shall be filed by the automatic extension date of August 15.

(d) Return. -- A return may be filed at any time within the extension period but it shall be filed before the end of the extension period to avoid the late filing penalty.

*History Note: Authority G.S. 105-155; 105-157; 105-160.6; 105-160.7; 105-236(a)(3); 105-236(a)(4); 105-262; 105-263; Eff. February 1, 1976; Amended Eff. September 1, 2008; May 1, 2006; August 1, 2002; August 1, 1998; November 1, 1994; May 1, 1994; June 1, 1993; October 1, 1992; Readopted Eff. May 1, 2016.*

**17 NCAC 06B .0109 FILING REQUIREMENTS - GENERAL STATEMENT**

The minimum gross income filing requirements under North Carolina law are different from the filing requirements under the Internal Revenue Code because North Carolina law does not allow the same standard deduction amount as the Internal Revenue Code or a personal exemption for the individual, the individual's spouse, the individual's children, or any other qualifying dependents on the State return.

*History Note: Authority G.S. 105-153.5; 105-262; Eff. June 1, 1990; Readopted Eff. May 1, 2016.*

**17 NCAC 06B .0112 JOINT FEDERAL BUT SEPARATE STATE RETURN**

(a) Separate Return or Schedule. -- A spouse who files a joint federal return but files a separate North Carolina return pursuant to G.S. 105-153.8(c) shall complete a separate federal return and attach it to the North Carolina tax return to show how the spouse's adjusted gross income would be determined on a separate federal return. In lieu of completing a separate federal return, the spouse may submit a schedule showing the computation of the spouse's separate adjusted gross income. A spouse who submits a schedule shall attach a copy of the spouse's joint federal return if the federal return reflects an address outside North Carolina.

(b) Allowable Deductions. -- In completing a separate federal return or preparing a schedule computing a spouse's separate adjusted gross income, deductions are allowable only for items paid during the tax year. Deductions for separate obligations are

allowable only to the spouse who paid the obligation and was responsible for paying the obligation. Deductions for joint obligations paid by one spouse from that spouse's separate account are allowable only to that spouse. Deductions for joint obligations paid from a joint account are allowable to each spouse in proportion to the spouses' adjusted gross incomes for that tax year.

*History Note: Authority G.S. 105-134.1; 105-153.5(a)(2); 105-153.8(e); 105-262; Eff. June 1, 1990; Amended Eff. August 1, 2002; August 1, 1998; February 1, 1991; Readopted Eff. May 1, 2016.*

**17 NCAC 06B .0113 TAXPAYERS DOMICILED IN COMMUNITY PROPERTY STATES**

(a) If a married couple is domiciled in a state or country recognized for federal income tax purposes as a community property state or country and the spouses file separate North Carolina returns with each spouse reporting one-half of the salary and wages received while domiciled in the community property state or country, each spouse shall claim one-half of the credit for the income tax withheld with respect to community wages.

(b) A schedule or statement shall be attached to the North Carolina return showing the name and social security number of each spouse, that they were domiciled in a community property state or country, and that 50 percent of each spouse's income tax withheld is allocated to the other spouse's income tax return.

*History Note: Authority G.S. 105-163.10; 105-262; Eff. June 1, 1990; Amended Eff. June 1, 1993; Readopted Eff. May 1, 2016.*

**17 NCAC 06B .0114 COMPUTATION OF TAXABLE INCOME - GENERAL**

The starting point in determining North Carolina taxable income is federal adjusted gross income, subject to the additions, deductions, and North Carolina standard deduction or North Carolina itemized deductions as provided by G.S. 105-153.5 and 105-153.6. These adjustments do not apply to all individuals. Each individual shall determine if any of the adjustments apply to the individual's return.

*History Note: Authority G.S. 105-153.3; 105-153.4; 105-153.5; 105-153.6; 105-262; Eff. June 1, 1990; Amended Eff. June 1, 1993; October 1, 1991; Readopted Eff. May 1, 2016.*

**17 NCAC 06B .0115 ADDITIONS TO ADJUSTED GROSS INCOME**

The additions under G.S. 105-153.5(c)(1) include the portion of an exempt interest dividend from a regulated investment company that represents interest on direct obligations of states and their political subdivisions other than North Carolina and interest from obligations of the District of Columbia.

*History Note: Authority G.S. 105-153.5(c)(1); 105-262;*

*Eff. June 1, 1990;*  
*Amended Eff. May 1, 1994; June 1, 1993; October 1, 1992;*  
*October 1, 1991;*  
*Readopted Eff. May 1, 2016.*

**17 NCAC 06B .0116 DEDUCTIONS FROM ADJUSTED GROSS INCOME**

(a) Deductible Interest. -- The deduction for interest on obligations of the United States or its possessions provided in G.S. 105-153.5(b)(1) applies to direct obligations of the United States to the extent the interest has been included in federal adjusted gross income. For the interest to be deductible, the obligation shall be in writing, bear interest, be a binding promise by the United States to pay specific amounts at specific dates, and be specifically authorized by Congress. United States Treasury bonds, notes, bills, certificates, and saving bonds are primary examples of direct obligations.

(b) Nondeductible Interest. -- Interest earned on obligations that are backed or guaranteed by, but not direct obligations of, the United States Government shall not qualify for deduction from an individual's federal adjusted gross income. Interest earned on obligations where the United States is an insurer or guarantor, but the obligation is not a direct obligation, shall not be deductible from federal adjusted gross income. Examples include Federal Home Loan Mortgage Corporation ("Freddie Mac"), Federal National Mortgage Association ("Fannie Mae"), and the Government National Mortgage Association ("Ginnie Mae"). Distributions representing gain from the sale or other disposition of United States obligations or interest paid in connection with repurchase agreements issued by banks and savings and loan associations shall not be deductible from federal adjusted gross income. The deduction from federal adjusted gross income shall not apply to any portion of a distribution from an Individual Retirement Account (IRA).

(c) Indian Tribe. -- The income earned or received by an enrolled member of the Eastern Band of Cherokee Indians or another federally recognized Indian tribe shall be deductible from federal adjusted gross income if it is included in federal gross income and it is derived from activities on the Cherokee reservation or another federally recognized Indian reservation while the member resided on the reservation.

*History Note: Authority G.S. 105-153.5; 105-262;*  
*Eastern Band of Cherokee Indians v. Lynch 632 F.2d 373 (4th Cir. 1980);*  
*Eff. June 1, 1990;*  
*Amended Eff. April 1, 2001; November 1, 1994; June 1, 1993;*  
*October 1, 1992; October 1, 1991;*  
*Readopted Eff. May 1, 2016.*

**17 NCAC 06B .0119 REPORTING INCOME FROM CONVEYANCE OF REAL PROPERTY HELD IN TENANCY BY THE ENTIRETY**

When spouses file separate individual income tax returns, the spouses shall determine the portion of the income or loss from real property that shall be reported by each spouse. When real property conveyed jointly in the name of a married couple is located in another state and the share of ownership of each is not fixed in the deed or other instrument creating the co-tenancy, each

spouse is considered as having received one-half of the income or loss from the real property, unless they can demonstrate that the laws of that particular state with respect to the right to the income from the property allocate the income or loss in a different manner.

*History Note: Authority G.S. 39-13.6; 105-262;*  
*Eff. May 1, 2016.*

**17 NCAC 06B .3203 PENALTIES FOR FAILURE TO FILE AND PAY**

(a) General. -- Under the provisions of G.S. 105-236, both the "failure to file return" and "failure to pay tax when due" penalties, if due, can be applied for the same period. If a return is filed late without payment of the tax shown due, both the failure to file and failure to pay penalties shall be assessed at the same time.

(b) Extension. -- If the return is filed under an extension, the failure to file penalty applies from the extended filing date rather than from the original due date. The failure to pay penalty applies from the original due date of the return and shall be assessed if the taxpayer does not meet the 90 percent requirement established in 17 NCAC 06B .0107. If the 90 percent requirement is met, any remaining tax due shall be paid with the income tax return on or before the expiration of the extension period to avoid the failure to pay penalty. Interest is due on any tax not paid by the original due date from the original due date to the date paid.

(c) Amended Return. -- The failure to pay penalty shall not apply to amounts paid with an amended return if the amount shown due on the return is paid when the return is filed.

(d) Assessment. -- The failure to pay penalty applies to a proposed assessment of additional tax due that is not paid within 45 days of the assessment, unless a request for review is timely filed with the Department in accordance with G.S. 105-241.11. If a taxpayer timely requests a Departmental review of a proposed assessment, the failure to pay penalty applies to tax due that is not paid within 45 days of the date the assessment becomes collectible pursuant to G.S. 105-241.22(3), G.S. 105-241.22(4), G.S. 105-241.22(5), or G.S. 105-241.22(6).

*History Note: Authority G.S. 105-155; 105-157; 105-160.6;*  
*105-160.7; 105-236; 105-241.22(3); 105-241.22(4); 105-*  
*241.22(5); 105-241.22(6); 105-262; 105-263;*  
*Eff. April 1, 1978;*  
*Amended Eff. September 1, 2008; July 1, 1999; June 1, 1993;*  
*February 1, 1991; June 1, 1990;*  
*Readopted Eff. May 1, 2016.*

**17 NCAC 06B .3204 NEGLIGENCE PENALTIES**

When the accuracy-related penalty has been assessed for federal income tax purposes under Section 6662 of the Internal Revenue Code, the 10 percent negligence penalty shall be assessed for state income tax purposes unless the large individual income tax deficiency or other large tax deficiency penalty applies pursuant to G.S. 105-236.5(a)(5)b. or c., respectively.

*History Note: Authority G.S. 105-236(a)(5); 105-262;*  
*Eff. April 1, 1978;*  
*Amended Eff. April 1, 1999; June 1, 1993;*  
*Readopted Eff. May 1, 2016.*

**17 NCAC 06B .3407 SERVICE MEMBERS CIVIL RELIEF ACT**

*History Note:* Authority G.S. 105-262; 50 U.S.C. 501; P.L. 108-189;  
 Eff. February 1, 1976;  
 Amended Eff. February 1, 2005;  
 Repealed Eff. May 1, 2016.

**17 NCAC 06B .3501 GENERAL**

The starting point for preparing the North Carolina partnership income tax return shall be the total income or loss from lines 1 through 11 of Schedule K, Federal Form 1065. The adjustments required for individuals under G.S. 105-153.5 and 105-153.6 shall apply to partnerships.

*History Note:* Authority G.S. 105-154(b); 105-154(c); 105-262;  
 Eff. February 1, 1976;  
 Amended Eff. June 1, 1990; December 1, 1986;  
 Readopted Eff. May 1, 2016.

**17 NCAC 06B .3503 PARTNERSHIP RETURNS**

(a) When Required -- A North Carolina partnership return, Form D-403, shall be filed by every partnership doing business in North Carolina if a federal partnership return was required to be filed. The partnership return shall be filed on or before April 15 if on a calendar year basis, or on or before the 15th day of the fourth month following the end of the fiscal year if on a fiscal year basis. Income from an intangible source, including gain realized from the sale of intangible property received in the course of "doing business in this State" so as to have a taxable situs here (including income in the distributive share of partnership income, whether distributed or not) shall be included in the numerator of the fraction used in determining the portion of adjusted gross income that is taxable to North Carolina by a nonresident. The return shall include the names and addresses of the persons entitled to share in the net income of the partnership and shall be signed by one of the partners and the individual preparing the return.

(b) Schedule NC K-1 -- A partnership shall provide a completed Schedule NC K-1, or other document containing all of the information that would be reported on Schedule NC K-1, to each person who was a partner in the partnership at any time during the year reflecting that partner's share of the partnership's income, adjustments, tax credits, and tax paid by the manager of the partnership. The Schedule NC K-1 shall be provided to each partner on or before the day on which the partnership return is required to be filed. When reporting the distributive share of tax credits, a list of the amount and type of tax credits shall be provided to each partner.

(c) Investment Partnerships -- A partnership whose only activity is as an investment partnership shall not be considered to be doing business in North Carolina. An investment partnership shall be a partnership that is not a "dealer in securities," as defined in section 475(c)(1) of the Internal Revenue Code, and that derives income exclusively from buying, holding, and selling securities for its own account. If any of the partnership's income is from other activities, either within or outside this State, either received

directly or flowing through from other pass-through entities, the partnership shall not be an investment partnership for North Carolina tax purposes. Other activities include providing services or products to customers and holding real property for appreciation and income. An investment partnership shall not be required to file an income tax return in North Carolina or pay income tax to North Carolina on behalf of its nonresident partners.

*History Note:* Authority G.S. 105-154(c); 105-154(d); 105-262;  
 Eff. February 1, 1976;  
 Amended Eff. February 1, 2005; August 1, 2003; July 1, 2000;  
 August 1, 1998; May 1, 1994; June 1, 1993; July 1, 1991; June 1, 1990;  
 Readopted Eff. May 1, 2016.

**17 NCAC 06B .3513 NONRESIDENT PARTNERS**

(a) Although a partnership may treat guaranteed payments to a partner for services or for use of capital as if they were paid to a partner who is not a partner, that treatment is only for purposes of determining the partnership's gross income and deductible business expenses. For other tax purposes, guaranteed payments are treated as a partner's distributive share of ordinary income.

(b) Deductions from adjusted gross income do not include a partner's salary, interest on a partner's capital account, partner relocation and mortgage interest differential payments, or payments to a retired partner regardless of whether they were determined without regard to current profits. The payments listed in this Paragraph shall be treated as part of the partnership income.

(c) A nonresident individual partner is not required to file a North Carolina individual income tax return when the only income from North Carolina sources is the nonresident's share of income from a partnership doing business in North Carolina, and the manager of the partnership has reported the income of the nonresident partners and paid the tax due. A nonresident individual partner may file an individual income tax return and claim credit for the tax paid by the manager of the partnership if the partner submits with the individual income tax return the Schedule NC K-1 or other document from the partnership verifying that the partnership paid tax on behalf of the partner.

*History Note:* Authority G.S. 105-153.4 (d); 105-153.5(b); 105-154; 105-262;  
 Eff. February 1, 1976;  
 Amended Eff. May 1, 1994; June 1, 1993; February 3, 1992;  
 October 1, 1991;  
 Readopted Eff. May 1, 2016.

**17 NCAC 06B .3529 INTEREST INCOME PASSED THROUGH TO PARTNERS**

(a) Although the interest income passed through to a partner in a partnership retains its same character as when received by the partnership, the expenses incurred in earning interest income shall be either deductible by the partnership and net interest income after expenses shall be reflected in the partner's pro rata share of the income of the partnership, or not deductible by the partnership and interest income before expenses shall be reflected in the partner's pro rata share of the income of the partnership.

(b) Net interest income shall be reported if the activities are considered trade or business activities under federal law and interest income before expenses shall be reported if the activities are considered investment activities under federal law. If the activities are considered investment activities, the expenses incurred in earning that income shall be reported by the partnership to its partners as a separately stated item and shall be deducted by the partner to the extent allowable on the partner's income tax return.

(c) For interest income subject to federal income tax and considered trade or business activities, the partner's federal gross income shall include the net interest income after expenses incurred in earning the income. If that interest income is deductible from federal adjusted gross income pursuant to G.S. 105-153.5(b), the individual partner shall deduct the net income on the North Carolina return. For interest income subject to federal income tax and considered investment activities, the partner's federal gross income includes the interest income before expenses incurred in earning the income. If that interest income is deductible from federal adjusted gross income pursuant to G.S. 105-153.5(b), the individual partner shall deduct the income before expenses on the North Carolina return. No addition shall be made for the expenses incurred in earning that income to the extent those expenses are deductible by the individual partner in arriving at federal adjusted gross income.

(d) Interest income not subject to federal income tax is not included in the partner's federal adjusted gross income. For interest income not subject to federal tax but required to be added to federal adjusted gross income pursuant to G.S. 105-153.5(c), the individual partner shall add the total interest income on the North Carolina return. No deduction shall be made for expenses incurred in earning that income if the expenses are not deductible in arriving at federal adjusted gross income.

*History Note:* Authority G.S. 105-153.5(b); 105-153.5(c); 105-154; 105-262;  
*Eff. February 3, 1992;*  
*Readopted Eff. May 1, 2016.*

**17 NCAC 06B .3718 PAYMENT OF TAX**

*History Note:* Authority G.S. 105-160.2; 105-160.7; 105-262;  
*Eff. February 1, 1976;*  
*Amended Eff. October 1, 1991; June 1, 1990;*  
*Repealed Eff. May 1, 2016.*

**17 NCAC 06B .3723 ALLOCATION OF ADJUSTMENTS**

(a) The additions and deductions to federal taxable income of an estate or trust shall be apportioned between the estate or trust and the beneficiaries based on the distributions of income made during the taxable year. If the trust instrument or will that created the estate or trust does not provide for the distribution of certain classes of income to different beneficiaries, the apportionment of additions and deductions to the beneficiaries shall be determined on the basis that each beneficiary's share of the estate's or trust's "total income," the sum of lines 1 through 8 on the beneficiary's Schedule K-1, Federal Form 1041, relates to "adjusted total income" from line 17 of Federal Form 1041. If the trust

instrument or will specifically provides for the distribution of certain classes of income to different beneficiaries, any addition or deduction directly attributable to a particular class of income shall be apportioned to the beneficiaries to which that class of income is distributed. After apportioning the additions and deductions to the beneficiaries, the balance is apportioned to the fiduciary.

(b) In allocating the adjustments, for State purposes the amount of "total income" on Federal Schedule K-1 shall be adjusted for distributions to the beneficiary that are not reflected in "total income." The "adjusted total income" on Federal Form 1041 shall be adjusted:

- (1) to exclude classes of income that are not part of the distribution to the beneficiary;
- (2) to include classes of income that are a part of the distribution to the beneficiary, but shall not be included in adjusted total income; and
- (3) by any deduction treated differently for State and federal tax purposes that adjusts federal taxable income pursuant to G.S. 105-153.5 and G.S. 105-153.6.

*History Note:* Authority G.S. 105-153.4; 105-153.5; 105-153.6; 105-160.2; 105-160.5; 105-262;  
*Eff. June 1, 1990;*  
*Amended Eff. June 1, 1993;*  
*Readopted Eff. May 1, 2016.*

**17 NCAC 06B .3804 DEPOSIT OF PAYMENT**

When a payment is received by the Department of Revenue for less than the correct tax, penalty, and interest due and the payment includes the statement, "paid in full" or other similar statements, the payment will be deposited as required by G.S. 147-77.

*History Note:* Authority G.S. 39-13.6; 105-154; 105-262;  
*Eff. June 1, 1990;*  
*Amended Eff. June 1, 1993; October 1, 1991; February 1, 1991;*  
*Readopted Eff. May 1, 2016.*

**17 NCAC 06B .3904 TAXABLE INCOME OF NONRESIDENTS AND PART-YEAR RESIDENTS**

(a) Nonresidents and part-year residents shall prorate their adjusted gross income, adjusted as required under G.S. 105-153.5 and G.S. 105-153.6, to determine the portion that is subject to North Carolina tax.

(b) An individual who files a joint federal income tax return with his or her spouse and is not required to file a joint North Carolina income tax return because the spouse is a nonresident and had no North Carolina taxable income, may file the State return as either married filing jointly or married filing separately. However, once the individual files a joint North Carolina income tax return, the individual shall not amend the return to file as married filing separately for that tax year after the due date of the return. An individual who files a joint federal income tax return and chooses to file a separate State return shall calculate the individual's adjusted gross income on a federal income tax form as a married person filing a separate federal income tax return and attach it to the individual's North Carolina return to show how the separate adjusted gross income was determined. The individual filing the

separate federal income tax return shall report only the individual's income and deductions. In lieu of making the calculation on a federal form, an individual may submit a schedule showing the computation of the individual's separate adjusted gross income. An individual who submits a schedule shall attach a copy of pages one and two of the individual's joint federal return if the federal return reflects an address outside North Carolina.

(c) An individual who has income from sources within another state or country while a resident of North Carolina and is subject to tax on the income by the other state or country may be eligible to claim a tax credit for tax paid to another state or country under G.S. 105-153.9.

(d) A nonresident is not entitled to the tax credit for tax paid to another state or country.

*History Note: Authority G.S. 105-153.4; 105-153.8; 105-153.9; 105-262; Eff. June 1, 1990; Amended Eff. September 1, 2008; July 1, 1999; August 1, 1998; June 1, 1993; Readopted Eff. May 1, 2016.*

**17 NCAC 06B .3905 NONRESIDENT MEMBERS OF PROFESSIONAL ATHLETIC TEAMS**

(a) Determination of North Carolina source income.

- (1) To determine the portion of his or her total compensation for services rendered as a member of a professional athletic team during the taxable year that shall be considered North Carolina source income and shall be included in the numerator of the fraction determined under G.S. 105-153.4(b), the nonresident member of a professional athletic team shall multiply his or her total compensation for services rendered as a member of a professional athletic team during the taxable year by a fraction, the numerator of which is the number of duty days spent in North Carolina rendering services for the team in any manner during the taxable year. The denominator shall be the total number of duty days spent both within and outside North Carolina during the taxable year.
- (2) Travel days that do not involve any of the activities set forth in Subparagraph (b)(3) of this Rule, or other similar team activity, are not considered duty days spent in North Carolina and compensation for those days shall not be included in the numerator of the fraction determined under G.S. 105-153.4(b). However, the travel days shall be considered duty days spent within and outside North Carolina and compensation for those days is included in the denominator of the fraction determined under G.S. 105-153.4(b).
- (3) Where the method of apportioning and allocating the compensation provided in this Rule produces substantially incorrect results, the Secretary of Revenue may require the member of a professional athletic team to

apportion and allocate the compensation under another method prescribed by the Secretary as long as the prescribed method better reflects the compensation received for services rendered in North Carolina. A nonresident member of a professional athletic team may request an alternative method to apportion and allocate the compensation, demonstrating that the method provided under this Rule produces substantially incorrect results. If the Secretary approves the alternative method, a copy of the Secretary's written approval shall be included with the North Carolina income tax return filed by the nonresident member.

(b) Definitions. For purposes of this Rule:

- (1) The term "professional athletic team" includes any professional baseball, basketball, football, soccer, hockey, or other team.
- (2) The term "member of a professional athletic team" shall include those employees who are active players, players on the disabled list, and any other persons required to travel and who do travel with and perform services on behalf of a professional athletic team on a regular basis. This includes coaches, managers and trainers.
- (3) The term "duty days" shall mean all days during the taxable year from the beginning of the professional athletic team's official pre-season training period through the last game in which the team competes or is scheduled to compete. Duty days shall also include days on which a member of a professional athletic team renders a service for a team on a date that does not fall within the period from the beginning of the professional athletic team's official pre-season training period through the last game in which the team competes or is scheduled to compete. The services include participation in instructional leagues, the "Pro Bowl," or promotional caravans. This includes days during the member's off-season where the member conducts training activities at the facilities of the team. Duty days include game days, practice days, days spent at team meetings, promotional caravans and pre-season training camps, and days served with the team through all post-season games in which the team competes or is scheduled to compete. Duty days for any person who joins a team during the season shall begin on the day the person joins the team, and for any person who leaves a team shall end on the day the person leaves the team. Where a person switches teams during the taxable year, a separate duty day calculation shall be made for the period the person was with each team. Days for which a member of a professional athletic team is not compensated and is not rendering services for the team in any manner, including days when

the member of a professional athletic team has been suspended without pay and prohibited from performing any services for the team, shall not be treated as duty days. Days for which a player is on the disabled list shall be considered duty days and shall be included in the denominator of the fraction described in Subparagraph (a)(1) of the Rule, but shall not be considered duty days spent in North Carolina and shall not be included in the numerator of the fraction.

(4) The term "total compensation for services rendered as a member of a professional athletic team" means the total compensation received during the taxable year for services rendered:

- (A) from the beginning of the official pre-season training period through the last game in which the team competes or is scheduled to compete during that taxable year; and
- (B) for an event during the taxable year that occurs on a date that does not fall within the period from the beginning of the professional athletic team's official pre-season training period through the last game in which the team competes or is scheduled to compete, such as participation in instructional leagues, the "Pro Bowl," or promotional caravans.

The compensation shall include salaries, wages, bonuses, and any other type of compensation identified in Internal Revenue Code Section 61 and its regulations and paid during the taxable year to a member of a professional athletic team for services performed in that year. The compensation shall not include strike benefits, severance pay, termination pay, contract or option year buy-out payments, expansion or relocation payments, or any other payments not related to services rendered to the team.

(5) For purposes of Subparagraph (b)(4) of this Rule, "bonuses" included in "total compensation for services rendered as a member of a professional athletic team" subject to the allocation described in Paragraph (a) of this Rule are:

- (A) bonuses earned as a result of play, such as performance bonuses, during the season, including bonuses paid for championship, play-off, or "bowl" games played by a team, or for selection to all-

star league or other honorary positions; and

- (B) bonuses paid for signing a contract, unless all of the following conditions are met:
  - (I) the payment of the signing bonus is not conditional upon the signee playing any games for the team, or performing any subsequent services for the team, or even making the team;
  - (II) the signing bonus is payable separately from the salary and any other compensation; and
  - (III) the signing bonus is nonrefundable.

(c) Withholding requirements.

- (1) A professional athletic team shall withhold income tax from the North Carolina source income of a nonresident member of the team at the rate for individuals with no withholding allowances as provided in G.S. 105-163.5. Taxes shall be withheld from the income of a resident member of the team as provided in G.S. 105-163.2.
- (2) A professional athletic team that is not domiciled in this State shall be classified as a quarterly employer and shall file a return reporting the amount of taxes withheld and pay the amounts withheld as provided in G.S. 105-163.6. A professional athletic team that is domiciled in this State shall determine its filing and paying requirements based on its average monthly withholding as provided in G.S. 105-163.6.

(d) Income tax return filing requirements.

- (1) A nonresident member of a professional athletic team is not required to file a North Carolina individual income tax return when the only income from North Carolina sources is the compensation received for services rendered as a member of the team and the team has withheld taxes from the North Carolina source income as set forth in Paragraph (c) of this Rule. The individual may file an individual income tax return and claim credit for the tax withheld.
- (2) The professional athletic team, as well as the individual, shall be personally and individually liable for any additional tax due if the professional athletic team does not properly determine the North Carolina source income of a member of the professional athletic team or properly withhold tax from the income.

*History Note: Authority G.S. 105-153.4; 105-163.2; 105-163.3; 105-163.5; 105-163.6; 105-163.7; 105-163.8; 105-262; Eff. November 1, 1995; Amended Eff. August 1, 2002; Readopted Eff. May 1, 2016.*

**17 NCAC 06B .3906 PURCHASE OF REAL PROPERTY LOCATED IN NORTH CAROLINA FROM A NONRESIDENT**

(a) Every individual, fiduciary, partnership, corporation, or unit of government buying real property located in North Carolina from a nonresident individual, partnership, estate, or trust shall complete Form NC-1099NRS, Report of Sale of Real Property by Nonresidents, to report the following:

- (1) the seller's name, address, and social security number, or federal employer identification number;
- (2) the location of the property;
- (3) the date of closing; and
- (4) the gross sales price of the real property and its associated tangible personal property.

(b) Within 15 days of the closing date of the sale, the buyer shall file one copy of the report with the Department and also furnish a copy of the report to the seller.

*History Note: Authority G.S. 105-154(b); 105-262; Eff. May 1, 2016.*

**17 NCAC 06B .4003 NONRESIDENT SHAREHOLDERS**

(a) A nonresident shareholder of an S corporation shall take into account only his or her share of the S corporation's income attributable to North Carolina in the numerator of the fraction in determining that portion of adjusted gross income that is taxable to North Carolina. If an S corporation does business in North Carolina and one or more other states, the income attributable to North Carolina shall be determined under G.S. 105-130.4.

(b) A nonresident shareholder in an S corporation may claim credit on the shareholder's North Carolina individual income tax return for the tax paid on his or her behalf by the S corporation to North Carolina on his or her share of the S corporation income.

(c) A nonresident shareholder in an S corporation shall not be required to file a North Carolina individual income tax return when the only income from North Carolina sources is his or her share of S corporation income and the S corporation pays the tax on his or her behalf.

*History Note: Authority G.S. 105-130.4; 105-131.1; 105-131.5; 105-131.7; 105-153.4(d); 105-262; Eff. June 1, 1990; Amended Eff. June 1, 1993; October 1, 1991; Readopted Eff. May 1, 2016.*

**17 NCAC 06B .4005 BASIS IN STOCK**

(a) Due to different tax treatment of an S corporation's income for State and federal purposes for taxable years beginning before January 1, 1989, a shareholder's basis in the stock of an S corporation for State tax purposes may be different than for federal tax purposes; thereby causing adjustments in determining

North Carolina taxable income upon receipt by the shareholder of distributions from the S corporation and upon disposition of the S corporation stock.

(b) The initial basis of the stock in an S corporation to a nonresident of North Carolina is zero, and the nonresident shareholder shall not be taxed on distributions from the corporation and recognizes no income or loss upon disposition of the stock. A nonresident shareholder's basis in the S corporation stock shall be adjusted for his or her pro rata share of the income or loss of the corporation.

(c) A resident shareholder's initial basis in the stock of an S corporation shall be determined as of the later of the date the stock is acquired, the effective date of the S corporation election, or the date the shareholder became a resident of North Carolina. A resident shareholder's basis in the stock shall be increased by his or her pro rata share of the corporation's income, subject to the adjustments required under G.S. 105-153.5 and G.S. 105-153.6, except for income exempt from federal or State income taxes and deductions for depletion in excess of the basis of the property being depleted. The basis shall be decreased by:

- (1) distributions to the extent deemed a return of basis;
- (2) a pro rata share of the losses of the corporations as adjusted under G.S. 105-153.5 and G.S. 105-153.6;
- (3) nondeductible expenses of the corporation; and
- (4) the amount of the shareholder's deduction for depletion of oil and gas wells to the extent the deduction does not exceed the proportionate share of the adjusted basis of that property allocated to the shareholder.

The adjustments to the basis do not apply to tax periods beginning prior to January 1, 1989.

*History Note: Authority G.S. 105-131.3; 105-262; Eff. June 1, 1990; Readopted Eff. May 1, 2016.*

**17 NCAC 06B .4101 GENERAL**

(a) Exempt interest dividends paid by a regulated investment company ("mutual fund") to a shareholder and not included in the shareholder's federal adjusted gross income shall be added to adjusted gross income to the extent it represents interest on obligations of states, other than North Carolina, and their political subdivisions.

(b) The total distribution designated as exempt interest dividends by a regulated investment company ("mutual fund") shall be added to adjusted gross income in computing the shareholder's North Carolina taxable income, unless the regulated investment company provides a statement to the shareholder that designates the portion of the exempt interest dividends that represents interest from obligations of the State of North Carolina or its political subdivisions or the United States or its possessions.

*History Note: Authority G.S. 105-153.4; 105-153.5(c)(1); 105-262; Eff. June 1, 1990; Amended Eff. June 1, 1993; Readopted Eff. May 1, 2016.*

**17 NCAC 06B .4102 EXEMPT INTEREST DIVIDENDS**

*History Note:* Authority G.S. 105-153.5 (c); 105-262; Eff. June 1, 1990; Amended Eff. October 1, 1991; Repealed Eff. May 1, 2016.

**17 NCAC 06B .4103 ORDINARY DIVIDENDS**

(a) Interest received in the form of dividends from regulated investment companies shall be deductible from an individual's adjusted gross income to the extent the distributions represent interest on direct obligations of the United States Government. Interest earned on obligations that are merely backed or guaranteed by the United States Government shall not qualify for the deduction. Further, this deduction shall not apply to distributions that represent gain from the sale or other disposition of the securities nor to interest paid in connection with repurchase agreements issued by banks and savings and loan associations.

(b) The taxpayer may not deduct mutual fund dividends on the basis of a percentage of investments held by the fund (i.e., a fund has 75 percent of its investments in United States Treasury Notes). The regulated investment company shall furnish the shareholder a statement verifying the amount of interest paid to the shareholder that accrued from direct obligations of the United States Government. The statement to support the deduction shall specify the amount dividended to the shareholder that represents interest on direct obligations of the United States Government.

*History Note:* Authority G.S. 105-153.5(b)(1); 105-262; Eff. June 1, 1990; Amended Eff. June 1, 1993; December 1, 1990; Readopted Eff. May 1, 2016.

**17 NCAC 06C .0110 COMMON CARRIERS**

*History Note:* Authority G.S. 105-163.2; 105-262; 49 U.S.C. Sec. 26; Sec. 301A; Sec. 923; Sec. 1512; Eff. February 1, 1976; Amended Eff. July 1, 1999; November 1, 1994; December 1, 1990; November 1, 1988; Repealed Eff. May 1, 2016.

**17 NCAC 06C .0117 SUPPLEMENTAL WAGE PAYMENTS**

(a) If an employer pays supplemental wages separately (or combines them with regular wages in a single payment and specifies the amount of each), the income tax withholding method depends on whether the employer withholds income tax from the employee's regular wages and whether the wages and supplemental wages are paid in a single payment.

(b) If tax has been withheld on the regular wages and the supplemental amount is not paid in a single payment together with regular wages, the employer may treat the supplemental wages as wholly separate from the regular wages and apply the rate of five and three-fourths percent to the supplemental wage payment without consideration for allowances claimed on the employee's withholding allowance certificate. Otherwise, the supplemental

wages shall be added to the regular wages for the most recent payroll period. The income tax shall be figured as if the regular wages and supplemental wages constitute a single payment. The tax already withheld from the regular wages is subtracted from this amount.

(c) The remaining tax determined under Paragraph (b) of this Rule shall be withheld from the supplemental wages. If the employer did not withhold income tax from the employee's regular wages, the employer shall add the supplemental wages to the employee's regular wages paid for the current or last preceding payroll period and withhold tax as though the supplemental wages and regular wages were one payment.

(d) Tips shall be treated as supplemental wages. The employer shall withhold the income tax on tips from wages or collect the tax from funds the employee provides. If an employee receives regular wages and reports tips, the employer shall figure income tax as if the tips were supplemental wages. If the employer has not withheld income tax from the regular wages, the employer shall add the tips to the regular wages and withhold income tax on the total. If the employer withheld income tax from the regular wages, the employer shall withhold on the tips as explained in Paragraphs (b) and (c) of this Rule.

*History Note:* Authority G.S. 105-153.7; 105-163.1(13); 105-163.2; 105-262; Eff. February 1, 1976; Amended Eff. June 1, 1990; Readopted Eff. May 1, 2016.

**17 NCAC 06C .0123 EMPLOYEE'S WITHHOLDING ALLOWANCE CERTIFICATE**

(a) Requirement. -- Each new employee, before beginning employment, shall furnish his or her employer with a signed North Carolina Employee's Withholding Allowance Certificate, Form NC-4, Form NC-4 EZ, or Form NC-4 NRA. A federal exemption certificate shall not be acceptable. A certificate filed by a new employee shall be effective upon the first payment of wages after it is filed and remains in effect until the employee furnishes a new one. G.S. 105-153.3 defines the terms married individual, head of household, and surviving spouse (qualifying widow(er)) by reference to the Internal Revenue Code; however, the number of allowances to which an individual is entitled may differ under federal and state law. If an employee fails to furnish an allowance certificate, Form NC-4, Form NC-4 EZ, or Form NC-4 NRA, the employer shall withhold tax as if the employee is single with no allowances.

(b) Notice. -- The employer is not required to ascertain whether or not the total amount of allowances claimed is greater than the total number to which the employee is entitled. If, however, the employer has reason to believe that the number of allowances claimed by an employee is greater than the number to which the employee is entitled, the employer shall notify the Department of Revenue at the time for filing the quarterly report for the quarter during which the certificate is received, if the employer files quarterly withholding reports. If the employer files monthly withholding reports, the employer shall notify the Department of Revenue of certificates received during the quarter at the time for filing the monthly report for the third month of the quarter.

(c) Military spouse. -- A military spouse exempt from withholding under the Military Spouse Residency Relief Act shall furnish an employer a Form NC-4 EZ certifying the spouse meets the requirements of the Military Spouse Residency Relief Act and the state in which the spouse is domiciled, a copy of the spouse's spousal military identification card, and a copy of the servicemember's most recent leave and earnings statement. A new Form NC-4 EZ shall be submitted each calendar year, along with the supplemental information set forth in this Paragraph.

*History Note: Authority G.S. 105-163.2; 105-163.5; 105-262; 50 U.S.C. 571; Eff. June 1, 1990; Amended Eff. August 1, 2002; June 1, 1993; October 1, 1991; Readopted Eff. May 1, 2016.*

**17 NCAC 06C .0124 ADDITIONAL WITHHOLDING ALLOWANCES**

(a) Deductions. -- Additional withholding allowances may be claimed by taxpayers expecting to have allowable itemized deductions exceeding the standard deduction or allowable adjustments to income. For most taxpayers, one additional allowance may be claimed for each two thousand five hundred dollars (\$2,500) that the itemized deductions allowed under G.S. 105-153.5(a)(2) are expected to exceed the standard deduction allowed under G.S. 105-153.5(a)(1) and for each two thousand five hundred dollars (\$2,500) of net adjustments reducing income.

(b) Tax Credits. -- A taxpayer who will be entitled to a tax credit may claim one additional allowance for each one hundred forty-six dollars (\$146.00) of tax credit.

*History Note: Authority G.S. 105-163.2(b); 105-163.2A; 105-163.5; 105-262; Eff. June 1, 1990; Amended Eff. April 1, 2001; July 1, 1999; Readopted Eff. May 1, 2016.*

**17 NCAC 06C .0126 SUBMISSION OF CERTAIN WITHHOLDING ALLOWANCE CERTIFICATES**

(a) An employer is required to submit a copy of any withholding allowance certificate on which the employee claims more than 10 withholding allowances or claims exemption from withholding and the employee's wages would normally exceed two hundred dollars (\$200.00) per week.

(b) An employer filing quarterly withholding reports shall submit copies of the certificates received during the quarter when filing the quarterly report. An employer filing monthly withholding reports shall submit copies of the certificates received during the quarter when filing the monthly report for the third month of the calendar quarter. Copies may be submitted earlier and for shorter reporting periods.

(c) Copies of the certificates, along with a letter showing the employer's name, address, withholding identification number, and the number of certificates submitted, shall be mailed to: North Carolina Department of Revenue, Tax Compliance - Withholding Tax, P.O. Box 25000, Raleigh, North Carolina 27640.

(d) The employer shall withhold on the basis of the certificate until written notice is received from the Department that the certificate is defective. As part of that written notice, the

Department shall advise the employer to ignore the allowance certificate filed and to withhold using the number of allowances specified.

(e) The employer shall furnish the employee a copy of the written notice upon receipt.

(f) If the employee files a new certificate, the employer shall honor that certificate only if the employee does not claim exempt and claims a number smaller than the number allowed in the Department's written notice. If the new certificate claims a number larger than the employee has been allowed and the employee specifies, in writing, any circumstances as justification to support the claims, the employer shall, upon receipt, forward a copy of the certificate and the employee's written statement to the Department for review. The employer shall continue to withhold as specified in the Department's written notice until written notice is received from the Department advising the employer to withhold on the basis of the new certificate.

(g) To increase withholding, an employee or a recipient of a pension payment may claim less than his or her allowable allowances or may enter into an agreement with his or her withholding agent and request that an additional amount be withheld by entering the desired amount on Form NC-4, NC-4 EZ, NC-4 NRA, or NC-4P.

(h) An employee working for two or more employers or a recipient receiving pension payments from two or more pension payers shall claim his or her allowable allowances with only one withholding agent and claim zero allowances with the other withholding agents.

(i) If an employee claims total exemption from withholding, the employee's wages shall be exempt from withholding of North Carolina income tax for the remainder of the calendar year, and through February 15 of the succeeding year unless the employee withdraws the statement during the year. An employee claiming exemption from withholding shall complete a new certificate by February 15. If the employee does not complete a new certificate, the employer shall withhold on the basis of a single individual with no allowances.

*History Note: Authority G.S. 105.163.2; 105-163.2A; 105-163.5; 105-262; Eff. June 1, 1990; Amended Eff. April 1, 2001; June 1, 1993; Readopted Eff. May 1, 2016.*

**17 NCAC 06C .0203 ANNUAL REPORTS**

(a) At the end of each calendar year, employers shall furnish wage and tax statements, Form W-2, to employees and Form NC-1099PS or NC-1099 ITIN to contractors from whom tax was withheld. Federal Form 1099-MISC may be filed in lieu of Form NC-1099 PS or NC-1099 ITIN if it reflects the amount or North Carolina income tax withheld. Two copies shall be furnished to the employee or contractor and one copy shall be furnished to the Department. Pension payers shall report pension income and State tax withheld on federal Form 1099-R.

(b) Form NC-1099 PS, NC-1099 ITIN, NC-1099 NRS, and any federal report of Form 1099-MISC or 1099-R shall be filed with North Carolina; however, other reports of 1099 information (interest, rents, premiums, dividends) shall not be filed with North

Carolina unless the payments have not been reported to the Internal Revenue Service.

(c) Notwithstanding Paragraph (b) of this Rule, any person required to file Form NC-1099 NRS under the provisions of 17 NCAC 06B .3906 shall do so regardless of any requirement to report the sale to the Internal Revenue Service.

*History Note: Authority G.S. 105-154; 105-163.2; 105-163.2A; 105-163.3; 105-163.7; 105-262; Eff. February 1, 1976; Amended Eff. September 1, 2008; February 1, 2005; April 1, 2001; August 1, 1998; June 1, 1993; February 3, 1992; October 1, 1991; February 1, 1991; Readopted Eff. May 1, 2016.*

**17 NCAC 06C .0204 AMOUNTS WITHHELD ARE HELD IN TRUST FOR SECRETARY OF REVENUE**

(a) A withholding agent who fails to withhold or pay the amount required to be withheld is personally and individually liable for the tax, including any penalties and interest due. If a withholding agent has failed to withhold or to pay over income tax withheld or required to have been withheld, the unpaid principal amount of tax may be asserted against the responsible persons of the withholding agent when the taxes that have become collectible under G.S. 105-241.22 are not paid by the withholding agent. More than one person may be liable as a responsible person; however, the amount of the income tax withheld or required to have been withheld shall be collected only once, whether from the withholding agent or one or more responsible persons. The term "responsible person" is defined in G.S. 105-242.2(a)(2). Any responsible person who fails to pay the tax withheld or required to be withheld by the Secretary of Revenue shall be personally and individually liable for this failure, regardless of the person's reasons or knowledge of the failure. A finding of willfulness shall not be required.

(b) When the Department of Revenue determines that collection of the tax from an employer is in jeopardy, the employer may be required to report and pay the tax at any time after payment of the wages, compensation, or pension payments.

*History Note: Authority G.S. 105-163.8; 105-241.23; 105-242.2; 105-262; Eff. June 1, 1990; Amended Eff. September 1, 2008; April 1, 2001; June 1, 1993; February 1, 1991; Readopted Eff. May 1, 2016.*

**17 NCAC 06D .0102 REQUIREMENTS FOR FILING**

(a) A married couple may make joint payments of estimated income tax even if the couple is not living together; however, the married couple may not make joint estimated tax payments if the couple is separated under a decree of divorce or of separate maintenance. The married couple may not make joint estimated tax payments if either spouse is a nonresident alien or if either spouse has a different tax year. Whether a married couple makes joint estimated tax payments or separate payments shall not affect the couple's choice of filing a joint income tax return or separate return. If the married couple makes joint payments and then the

couple files separate returns, the spouses may determine how to divide the estimated tax payments between them.

(b) A taxpayer filing a short period return because of changing his or her income year shall make estimated income tax payments on the installment dates that fall within the short period and 15 days after the close of the short period that would have been due had the taxpayer not changed his or her income year. Interest on an underpayment of estimated income tax for a short period shall be computed for the period of underpayment based on the tax shown due on the short period return and computed in the same manner as it would have been computed had the taxpayer not changed his income year.

(c) An individual may elect to have his or her income tax refund applied only to estimated income tax for the following year. A return reflecting an election to apply a refund to estimated tax for the following year shall be filed by the last allowable date for making estimated tax payments for that year for the election to be valid.

(d) If an individual makes a valid election, that individual may not revoke the election after the return has been filed in order to have the amount refunded or applied in any other manner, such as an offset against any subsequently determined tax liability.

*History Note: Authority G.S. 105-163.15; 105-262; Eff. February 1, 1976; Amended Eff. May 1, 2006; June 1, 1993; October 1, 1991; June 1, 1990; February 1, 1988; Readopted Eff. May 1, 2016.*

**TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS**

**CHAPTER 16 – BOARD OF DENTAL EXAMINERS**

**21 NCAC 16T .0101 RECORD CONTENT**

A dentist shall maintain complete treatment records on all patients for a period of at least 10 years from the last treatment date. Treatment records may include such information as the dentist deems appropriate but shall include:

- (1) Patient's full name, address, and treatment dates;
- (2) Patient's nearest relative or responsible party;
- (3) Current health history;
- (4) Diagnosis of condition;
- (5) Specific treatment rendered and by whom;
- (6) Name and strength of any medications prescribed, dispensed, or administered along with the quantity and date provided;
- (7) Work orders issued during the past two years;
- (8) Treatment plans for patients of record, except that treatment plans are not required for patients seen only on an emergency basis;
- (9) Diagnostic radiographs, orthodontic study models, and other diagnostic aids, if taken;
- (10) Patients' financial records and copies of all insurance claim forms; and
- (11) Rationale for prescribing each narcotic.

History Note: Authority G.S. 90-28; 90-48; Eff. October 1, 1996; Amended Eff. May 1, 2016; July 1, 2015.

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CHAPTER 18 – BOARD OF EXAMINERS OF ELECTRICAL CONTRACTORS

21 NCAC 18B .0209 FEES

- (a) The application and examination fee for qualifying examinations shall be ninety dollars (\$90.00) for all classifications.
(b) The fee for review of a failed examination is twenty-five dollars (\$25.00). All reviews are supervised by the Board or staff.
(c) The examination fees for examinations in all classifications and the fees for examination reviews shall be in the form of cash, check, money order, Visa, or Mastercard made payable to the Board and shall accompany the respective applications when filed with the Board.
(d) Examination fees received with applications filed for qualifying examinations shall be retained by the Board unless:
(1) an application is not filed as prescribed in Rule .0210 of this Section, in which case the examination fee of sixty dollars (\$60.00) shall be returned and application shall be returned; or
(2) the applicant does not take the examination during the period for which application was made, files a written request for a refund setting out extenuating circumstance, and the Board finds extenuating circumstances.
(e) Examination review fees are non-refundable unless the applicant does not take the review, files a written request for a refund, setting out extenuating circumstance, and the Board finds extenuating circumstances.
(f) Any fee retained by the Board shall not be creditable toward any future examination fee or examination review.
(g) Extenuating circumstances for the purposes of Paragraphs (d)(2) and (e) of this Rule are the applicant's illness, bodily injury or death, or death of the applicant's spouse, child, parent, or sibling, or a breakdown of the applicant's transportation to the designated site of the examination or examination review.

History Note: Authority G.S. 87-42; 87-43.3; 87-43.4; 87-44; Eff. October 1, 1988; Amended Eff. May 1, 1998; July 1, 1989; Temporary Amendment Eff. June 30, 2000; Temporary Amendment Eff. August 31, 2001; Amended Eff. July 1, 2011; January 1, 2008; December 4, 2002; Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2, 2016; Amended Eff. July 1, 2016.

21 NCAC 18B .0211 WAITING PERIOD BETWEEN EXAMINATIONS

- (a) A person who fails a qualifying examination shall not be eligible to take another examination in the same classification until three months after the date of the failed examination.

- (b) A person shall be considered a new applicant each time he or she applies to take an examination, and he or she shall file an application setting forth the information specified in G.S. 87-42 and Rules .0201 and .0202 of this Subchapter and pay the required application and examination fee. Application forms may be found on the Board's website at www.ncbeec.org/need-a-form/.

History Note: Authority G.S. 87-42; 87-43.3; 87-43.4; 87-44; Eff. October 1, 1988; Amended Eff. July 1, 2011; January 1, 2006; Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2, 2016; Amended Eff. July 1, 2016.

21 NCAC 18B .0406 RENEWAL AFTER EXPIRATION OF ANNUAL LICENSE

- (a) Subject to Rule .0906 of this Subchapter, any licensee whose license has expired or been revoked solely because of failure to apply for renewal may apply and have the license renewed without further examination, and in compliance with the provisions contained in G.S. 87-44, if the applicant makes application within a period of 12 months immediately following the date the license expired.
(b) If the renewal application is filed more than 12 months immediately following the date the license expired, the applicant may have the license renewed if, during the 12 month period immediately preceding the date the application is filed with the Board, the applicant's listed qualified individual has obtained at least 500 hours of primary experience as defined in Rule .0202 of this Subchapter within the most recent 12 months, is current on the fee requirements set forth in Rule .0404 of this Section, pays the late fee set forth in Rule .0405 of this Section, and meets the continuing education requirements set forth in Rule .1101 of this Subchapter.
(c) An applicant failing to meet the requirements of Paragraphs (a) or (b) of this Rule may obtain a new license in accordance with Section .0200 of this Subchapter and Rule .0401 of this Section.
(d) The provisions of Section .0600 of this Subchapter apply to applicants whose last license expired on or before June 30, 1970.

History Note: Authority G.S. 87-44; 87-44.1; Eff. October 1, 1988; Amended Eff. March 1, 1999; February 1, 1990; Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. February 2, 2016; Amended Eff. July 1, 2016.

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CHAPTER 32 – MEDICAL BOARD

21 NCAC 32T .0101 CLINICAL PHARMACIST PRACTITIONER

- (a) Definitions as used in the Rule:
(1) "Medical Board" means the North Carolina Medical Board.
(2) "Pharmacy Board" means the North Carolina Board of Pharmacy.

- (3) "Clinical Pharmacist Practitioner" or "CPP" means a licensed pharmacist who is approved to provide drug therapy management, including controlled substances, under the direction or supervision of a Supervising Physician pursuant to a CPP Agreement Only a pharmacist approved by the Pharmacy Board and the Medical Board may legally identify himself as a CPP.
- (4) "Supervising Physician" means a licensed physician who, by signing the CPP Agreement, is held accountable for the on-going supervision and evaluation of the drug therapy management performed by the CPP as defined in written CPP Agreement. This term includes both Primary Supervising Physician and Back-up Supervising Physician.
- (5) "Primary Supervising Physician" means the Supervising Physician who shall provide on-going supervision, collaboration, consultation, and evaluation of the drug therapy management performed by the CPP as defined in the CPP Agreement.
- (6) "Back-up Supervising Physician" means a Supervising Physician who shall provide supervision, collaboration, consultation, and evaluation of the drug therapy management performed by the CPP as defined in the CPP Agreement when the Primary Supervising Physician is not available.
- (7) "Approval" means authorization by the Medical Board and the Pharmacy Board for a pharmacist to practice as a CPP in accordance with this Rule.
- (8) "Continuing Education or CE" is defined as courses or materials which have been approved for credit by the American Council on Pharmaceutical Education.
- (9) "Clinical Experience approved by the Boards" means work in a pharmacy practice setting which includes experience consistent with the following components as listed in Parts (b)(2)(A), (B), (C), (D), (E), (H), (I), (J), (N), (O), and (P) of this Rule. Clinical experience requirements must be met only through activities separate from the certificate programs referred to in Parts (b)(1)(B) of this Rule.
- (10) "CPP Agreement" means a written agreement between the CPP, Primary Supervising Physician and any Back-Up Supervising Physician by which the Supervising Physician(s) have provided written instructions to the CPP for patient-specific and disease-specific drug therapy, which may include ordering, changing, or substituting therapies or ordering tests.

(b) CPP application for approval.

- (1) The requirements for application for CPP approval include that the pharmacist:

- (A) has an unrestricted and current license to practice as a pharmacist in North Carolina;
- (B) meets one of the following qualifications:
  - (i) has earned Certification from the Board of Pharmaceutical Specialties, is a Certified Geriatric Pharmacist as certified by the Commission for Certification in Geriatric Pharmacy, or has completed an American Society of Health System Pharmacists (ASHP) accredited residency program with two years of Clinical Experience approved by the Boards; or
  - (ii) holds the academic degree of Doctor of Pharmacy, has three years of Clinical Experience approved by the Boards, and has completed a North Carolina Center for Pharmaceutical Care (NCCPC) or American Council on Pharmaceutical Education (ACPE) approved certificate program in the area of practice covered by the CPP Agreement; or
  - (iii) holds the academic degree of Bachelor of Science in Pharmacy, has five years of Clinical Experience approved by the Boards, and has completed two NCCPC or ACPE approved certificate programs with at least one program in the area of practice covered by the CPP Agreement;
- (C) submits the required application and fee to the Pharmacy Board;
- (D) submits any information deemed necessary by the Pharmacy Board in order to evaluate the application; and
- (E) has a signed CPP Agreement.

If for any reason a CPP discontinues working under an approved CPP Agreement, the clinical pharmacist practitioner shall notify the Pharmacy Board in writing within 10 days, and the CPP's approval shall automatically terminate or be placed on inactive status until such time as a new application is approved in accordance with this Subchapter.

- (2) All certificate programs referred to in Subpart (b)(1)(B)(i) of this Rule must contain a core curriculum, including the following components:

- (A) communicating with healthcare professionals and patients regarding drug therapy, wellness, and health promotion;
  - (B) designing, implementing, monitoring, evaluating, and modifying or recommending modifications in drug therapy to insure effective, safe, and economical patient care;
  - (C) identifying, assessing, and solving medication-related problems and providing a clinical judgment as to the continuing effectiveness of individualized therapeutic plans and intended therapeutic outcomes;
  - (D) conducting physical assessments, evaluating patient problems, and ordering and monitoring medications and laboratory tests;
  - (E) referring patients to other health professionals as appropriate;
  - (F) administering medications;
  - (G) monitoring patients and patient populations regarding the purposes, uses, effects, and pharmacoeconomics of their medication and related therapy;
  - (H) counseling patients regarding the purposes, uses, and effects of their medication and related therapy;
  - (I) integrating relevant diet, nutritional, and non-drug therapy with pharmaceutical care;
  - (J) recommending, counseling, and monitoring patient use of non-prescription drugs, herbal remedies, and alternative medicine practices;
  - (K) ordering of and educating patients regarding proper usage of devices and durable medical equipment;
  - (L) providing emergency first care;
  - (M) retrieving, evaluating, utilizing, and managing data and professional resources;
  - (N) using clinical data to optimize therapeutic drug regimens;
  - (O) collaborating with other health professionals;
  - (P) documenting interventions and evaluating pharmaceutical care outcomes;
  - (Q) integrating pharmacy practice within healthcare environments;
  - (R) integrating national standards for the quality of healthcare; and
  - (S) conducting outcomes and other research.
- (3) The completed application for approval to practice as a CPP shall be reviewed by the Pharmacy Board upon verification of a full and unrestricted license to practice as a pharmacist in North Carolina. The Pharmacy Board shall:
- (A) approve the application and, at the time of approval, issue a number which shall be printed on each prescription written by the CPP;
  - (B) deny the application; or
  - (C) approve the application with restrictions, in the even that restrictions are appropriate in order to protect the public health, safety, and welfare in light of information received and reviewed in the CPP application in Subparagraph (b)(1) of this Rule.
- (c) Annual Renewal.
- (1) Each CPP shall register annually on or before December 31 by:
    - (A) verifying that the CPP holds a current Pharmacist license;
    - (B) submitting the renewal fee as specified in Subparagraph (j)(2) of this Rule;
    - (C) completing the Pharmacy Board's renewal form; and
    - (D) reporting continuing education credits as required by subsection (d) of this Rule.
  - (2) If the CPP has not renewed the CPP's annual registration pursuant to Subparagraph (c)(1) of this Rule, within 60 days of December 31, the approval to practice as a CPP shall lapse.
- (d) Continuing Education.
- (1) Each CPP shall earn 35 hours of practice-relevant CE each year, approved by the Pharmacy Board.
  - (2) Documentation of these hours shall be kept at the CPP practice site and made available for inspection by agents of the Medical Board or Pharmacy Board.
- (e) A Supervising Physician who has a CPP Agreement with a CPP shall be readily available for consultation with the CPP and, at the meetings required by Subparagraph (f)(6) of this Rule, shall review each order written by the CPP.
- (f) The CPP Agreement shall:
- (1) be approved and signed by the Primary Supervising Physician, and Back-Up Supervising Physician, and the CPP, and a copy shall be maintained in each practice site for inspection by agents of either Board upon request;
  - (2) be specific in regards to the physician, the pharmacist, the patient, and the disease;
  - (3) specify the predetermined drug therapy, which shall include the diagnosis and product selection by the patient's physician and any modifications which may be permitted, dosage forms, dosage schedules and tests which may be ordered;

- (4) prohibit the substitution of a chemically dissimilar drug product by the CPP for the product prescribed by the physician without first obtaining written consent of the physician;
- (5) include a pre-determined plan for emergency services;
- (6) for the first six months of the CPP Agreement include a plan and schedule for monthly meetings to discuss the operation of the CPP Agreement and quality improvement measures between the Primary Supervising Physician and CPP, and thereafter include a plan and schedule for meetings between the Primary Supervising Physician and CPP at least once every six months to discuss the operation of the CPP Agreement and quality improvement measures. Documentation of the meetings between the CPP and the Primary Supervising Physician shall:
  - (A) identify clinical issues discussed and actions taken;
  - (B) be signed and dated by those who attended; and
  - (C) be retained by both the CPP and Primary Supervising Physician and be available for review by members or agents of either Board for five calendar years;
- (7) require that the patient be notified of the collaborative relationship under the CPP Agreement; and
- (8) be terminated when patient care is transferred to another physician and new orders will be written by the succeeding physician.

- (g) The Supervising Physician of the CPP shall:
  - (1) be fully licensed with the Medical Board and engaged in clinical practice;
  - (2) not be serving in a postgraduate medical training program;
  - (3) be approved in accordance with this Subchapter before the CPP supervision occurs; and
  - (4) supervise no more than three pharmacists.
- (h) The CPP shall wear a nametag spelling out the words "Clinical Pharmacist Practitioner".
- (i) The CPP may be censured or reprimanded or the CPP's approval may be restricted, suspended, revoked, annulled, denied, or terminated by the Medical Board or the Pharmacy Board. In addition or in the alternative, the pharmacist may be censured or reprimanded or the pharmacist's license may be restricted, suspended, revoked, annulled, denied, or terminated by the Pharmacy Board, in accordance with provisions of G.S. 150B. The Pharmacy Board or the Medical Board may take the actions set forth in this Paragraph with respect to the pharmacist, the CPP approval, or the pharmacist's license, if either Board finds one or more of the following:
  - (1) the CPP has held himself or herself out as, or permitted another to represent that the CPP is, a licensed physician;

- (2) the CPP has engaged or attempted to engage in the provision of drug therapy management other than at the direction of, or under the supervision of, a physician licensed and approved by the Medical Board to be that CPP's Supervising Physician;
- (3) the CPP has provided or attempted to provide medical management outside the approved CPP Agreement or for which the CPP is not qualified by education and training to provide;
- (4) The CPP commits any act prohibited by any provision of G.S. 90-85.38 as determined by the Pharmacy Board or G.S. 90-14(a)(1), (a)(3) through (a)(14) and (c) as determined by the Medical Board; or
- (5) the CPP has failed to comply with any of the provisions of this Rule.

Any modification of treatment for financial gain on the part of the Supervising Physician or CPP shall be grounds for denial of Board approval of the CPP Agreement.

(j) Fees:

- (1) An application fee of one hundred dollars (\$100.00) shall be paid at the time of initial application for approval and each subsequent application for approval to practice as a CPP.
- (2) The fee for annual renewal of approval, due at the time of annual renewal pursuant to Paragraph (c) of this Rule, is fifty dollars (\$50.00).
- (3) No portion of any fee in this Rule is refundable.

*History Note Authority G.S. 90-8.2(b); 90-18(c)3a; 90-18.4; Eff. April 1, 2001; Amended Eff. July 1, 2016; March 1, 2007; October 1, 2001.*

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**CHAPTER 33 – MIDWIFERY JOINT COMMITTEE**

**21 NCAC 33 .0110 REPORTING CRITERIA**

- (a) The Department of Health and Human Services ("Department") may report to the Committee information regarding the prescribing practices of those midwives ("prescribers") whose prescribing:
  - (1) falls within the top one percent of those prescribing 100 milligrams of morphine equivalents ("MME") per patient per day; or
  - (2) falls within the top one percent of those prescribing 100 MME's per patient per day in combination with any benzodiazepine and who are within the top one percent of all controlled substance prescribers by volume.
- (b) In addition, the Department may report to the Committee information regarding midwives who have had two or more patient deaths in the preceding 12 months due to opioid poisoning.
- (c) The Department may submit these reports to the Committee upon request and may include the information described in G.S. 90-113.73(b).

(d) The reports and communications between the Department and the Committee shall remain confidential pursuant to G.S. 90-113.74.

History Note: Authority G.S. 90-113.74; Eff. May 1, 2016.

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CHAPTER 46 – BOARD OF PHARMACY

21 NCAC 46 .3101 CLINICAL PHARMACIST PRACTITIONER

(a) Definitions. As used in this Rule:

- (1) "Medical Board" means the North Carolina Medical Board.
(2) "Pharmacy Board" means the North Carolina Board of Pharmacy.
(3) "Clinical Pharmacist Practitioner" or "CPP" means a licensed pharmacist who is approved to provide drug therapy management, including controlled substances, under the direction or supervision of a Supervising Physician pursuant to a CPP Agreement. Only a pharmacist approved by the Pharmacy Board and the Medical Board may legally identify himself as a CPP.
(4) "Supervising Physician" means a licensed physician who, by signing the CPP Agreement, is held accountable for the on-going supervision and evaluation of the drug therapy management performed by the CPP as defined in the CPP Agreement. This term includes both the Primary Supervising Physician and any Back-Up Supervising Physician.
(5) "Primary Supervising Physician" means the Supervising Physician who shall provide on-going supervision, collaboration, consultation, and evaluation of the drug therapy management performed by the CPP as defined in the CPP Agreement.
(6) "Back-Up Supervising Physician" means a Supervising Physician who shall provide supervision, collaboration, consultation, and evaluation of the drug therapy management performed by the CPP as defined in the CPP Agreement when the Primary Supervising Physician is not available.
(7) "Approval" means authorization by the Medical Board and the Pharmacy Board for a pharmacist to practice as a CPP in accordance with this Rule.
(8) "Continuing Education or CE" is defined as courses or materials which have been approved for credit by the American Council on Pharmaceutical Education.
(9) "Clinical Experience approved by the Boards" means work in a clinical pharmacy practice setting which includes experience consistent

with the components listed in Parts (b)(2)(A), (B), (C), (D), (E), (H), (I), (J), (N), (O), and (P) of this Rule. Clinical experience requirements must be met only through activities separate from the certificate programs referred to in Parts (b)(1)(B) of this Rule.

(10) "CPP Agreement" means a written agreement between the CPP, Primary Supervising Physician and any Back-Up Supervising Physician by which the Supervising Physician(s) have provided written instructions to the CPP for patient-specific and disease-specific drug therapy, which may include ordering, changing, or substituting therapies or ordering tests.

(b) CPP application for approval.

(1) The requirements for application for CPP approval include that the pharmacist:

(A) has an unrestricted and current license to practice as a pharmacist in North Carolina;

(B) meets one of the following qualifications:

(i) has earned Certification from the Board of Pharmaceutical Specialties, is a Certified Geriatric Pharmacist as certified by the Commission for Certification in Geriatric Pharmacy, or has completed an American Society of Health System Pharmacists (ASHP) accredited residency program with two years of Clinical Experience approved by the Boards; or

(ii) holds the academic degree of Doctor of Pharmacy, has three years of Clinical Experience approved by the Boards, and has completed a North Carolina Center for Pharmaceutical Care (NCCPC) or American Council on Pharmaceutical Education (ACPE) approved certificate program in the area of practice covered by the CPP Agreement; or

(iii) holds the academic degree of Bachelor of Science in Pharmacy, has five years of Clinical Experience approved by the Boards, and has completed two NCCPC or ACPE approved certificate programs with at least one program in the area of



(2) Documentation of these hours shall be kept at the CPP practice site and made available for inspection by agents of the Medical Board or Pharmacy Board.

(e) A Supervising Physician who has a CPP Agreement with a CPP shall be readily available for consultation with the CPP and, at the meetings required by Subparagraph (f)6 of this Rule, shall review each order written by the CPP.

(f) The CPP Agreement shall:

- (1) be approved and signed by the Primary Supervising Physician, any Back-Up Supervising Physician, and the CPP, and a copy shall be maintained in each practice site for inspection by agents of either Board upon request;
- (2) be specific in regard to the physician, the pharmacist, the patient, and the disease;
- (3) specify the predetermined drug therapy, which shall include the diagnosis and product selection by the patient's physician and any modifications which may be permitted, dosage forms, dosage schedules and tests which may be ordered;
- (4) prohibit the substitution of a chemically dissimilar drug product by the CPP for the product prescribed by the physician without first obtaining written consent of the physician;
- (5) include a pre-determined plan for emergency services;
- (6) for the first six months of the CPP Agreement include a plan and schedule for monthly meetings to discuss the operation of the CPP Agreement and quality improvement measures between the Primary Supervising Physician and CPP, and thereafter include a plan and schedule for meetings between the Primary Supervising Physician and CPP at least once every six months to discuss the operation of the CPP Agreement and quality improvement measures. Documentation of the meetings between the CPP and the Primary Supervising Physician shall:
  - (A) identify clinical issues discussed and actions taken;
  - (B) be signed and dated by those who attended; and
  - (C) be retained by both the CPP and Primary Supervising Physician and be available for review by members or agents of either Board for five calendar years;
- (7) require that the patient be notified of the collaborative relationship under the CPP Agreement; and
- (8) be terminated when patient care is transferred to another physician and new orders will be written by the succeeding physician.

(g) A Supervising Physician shall:

- (1) be fully licensed with the Medical Board and engaged in clinical practice;
- (2) not be serving in a postgraduate medical training program;
- (3) be approved in accordance with this Subchapter before the CPP supervision occurs; and
- (4) supervise no more than three pharmacists.

(h) The CPP shall wear a nametag spelling out the words "Clinical Pharmacist Practitioner".

(i) A CPP may be censured or reprimanded, and his or her approval may be restricted, suspended, revoked, annulled, denied, or terminated by the Medical Board or the Pharmacy Board. In addition or in the alternative, the pharmacist may be censured or reprimanded, and the pharmacist's license may be restricted, suspended, revoked, annulled, denied, or terminated by the Pharmacy Board, in accordance with provisions of G.S. 150B. The Pharmacy Board or the Medical Board may take the actions set forth in this Paragraph with respect to the pharmacist, the CPP approval, or the pharmacist's license, if either Board finds one or more of the following:

- (1) the CPP has held himself or herself out as, or permitted another to represent that the CPP is, a licensed physician;
- (2) the CPP has engaged, or attempted to engage, in the provision of drug therapy management other than at the direction of, or under the supervision of, a physician licensed and approved by the Medical Board to be that CPP's Supervising Physician;
- (3) the CPP has provided, or attempted to provide, medical management outside the approved CPP Agreement or for which the CPP is not qualified by education and training to provide;
- (4) the CPP commits any act prohibited by G.S. 90-85.38 as determined by the Pharmacy Board or G.S. 90-14(a)(1), (a)(3) through (a)(14) and (c) as determined by the Medical Board; or
- (5) the CPP has failed to comply with any of the provisions of this Rule.

Any modification of treatment for financial gain on the part of the Supervising Physician or CPP shall be grounds for denial of Board approval of the CPP Agreement.

(j) Fees:

- (1) An application fee of one hundred dollars (\$100.00) shall be paid at the time of initial application for approval and each subsequent application for approval to practice as a CPP.
- (2) The fee for annual renewal of approval, due at the time of annual renewal pursuant to Paragraph (c) of this Rule, is fifty dollars (\$50.00).
- (3) No portion of any fee in this Rule is refundable.

*History Note: Authority G.S. 90-8.2; 90-18; 90-18.4; 90-85.3; 90-85.18; 90-85.26A; Eff. April 1, 2001; Amended Eff. July 1, 2016; April 1, 2007; March 1, 2004; October 1, 2001.*

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**CHAPTER 58 – REAL ESTATE COMMISSION**

**21 NCAC 58A .0103      BROKER NAME AND ADDRESS**

(a) Upon initial licensure every broker shall notify the Commission of the broker's current personal name, firm name, trade name, residence address, firm address, telephone number, and email address. Every broker shall notify the Commission in writing of each change of personal name, firm name, trade name, residence address, firm address, telephone number, and email address within 10 days of said change. All addresses shall be sufficiently descriptive to enable the Commission to correspond with and locate the broker.

(b) In the event that any broker shall advertise or operate in any manner using a name different from the name under which the broker is licensed, the broker shall first file the appropriate certificate with the office of the county register of deeds in each county in which the broker intends to engage in brokerage activities in compliance with G.S. 66-68 and shall notify the Commission in writing of the use of such a firm name or assumed name. An individual broker shall not advertise or operate in any manner that would mislead a consumer as to the broker's actual identity or as to the identity of the firm with which he or she is affiliated.

(c) A broker shall not include the name of a provisional broker or an unlicensed person in the name of a sole proprietorship, partnership, or business entity other than a corporation or limited liability company. No broker shall use a business name that includes the name of any active, inactive, or cancelled broker without the permission of that broker or that broker's authorized representative.

*History Note: Authority G.S. 55B-5; 66-68; 93A-3(c); 93A-6(a)(1); Eff. February 1, 1976; Readopted Eff. September 30, 1977; Amended Eff. July 1, 2016; April 1, 2013; August 1, 1998; February 1, 1989; May 1, 1984.*

**21 NCAC 58A .0108      RETENTION OF RECORDS**

(a) Brokers shall retain records of all sales, rental, and other transactions conducted in such capacity, whether the transaction is pending, completed, or terminated prior to its successful conclusion. The broker shall retain records for three years after all funds held by the broker in connection with the transaction have been disbursed to the proper party or parties or the successful or unsuccessful conclusion of the transaction, whichever occurs later. However, if the broker's agency agreement is terminated prior to the conclusion of the transaction, the broker shall retain such records for three years after the termination of the agency agreement or the disbursement of all funds held by or paid to the broker in connection with the transaction, whichever occurs later.

(b) Records shall include copies of the following:

- (1) contracts of sale;
- (2) written leases;
- (3) agency contracts;
- (4) options;
- (5) offers to purchase;

- (6) trust or escrow records;
- (7) earnest money receipts;
- (8) disclosure documents;
- (9) closing statements;
- (10) brokerage cooperation agreements;
- (11) declarations of affiliation;
- (12) broker price opinions and comparative market analyses prepared pursuant to G.S. 93A, Article 6, including any notes and supporting documentation;
- (13) sketches, calculations, photos, and other documentation used or relied upon to determine square footage;
- (14) advertising used to market a property; and
- (15) any other records pertaining to real estate transactions.

(c) All records shall be made available for inspection and reproduction by the Commission or its authorized representatives without prior notice.

*History Note: Authority G.S. 93A-3(c); Eff. February 1, 1976; Readopted Eff. September 30, 1977; Amended Eff. July 1, 2004; September 1, 2002; August 1, 1998; February 1, 1989; February 1, 1998; Temporary Amendment Eff. October 1, 2012; Amended Eff. July 1, 2016; April 1, 2013.*

**21 NCAC 58A .0113      REPORTING CRIMINAL CONVICTIONS AND DISCIPLINARY ACTIONS**

Any broker who is convicted of any felony or misdemeanor, or who is disciplined by or enters into a conciliation agreement or consent order with any governmental agency in connection with any occupational license, or whose notarial commission is restricted, suspended, or revoked, shall file with the Commission a Criminal Conviction Disciplinary Action Reporting Form of such conviction or action within 60 days of the final judgment, order, or disposition in the case. The Criminal Conviction Disciplinary Action Reporting Form is available on the Commission's website at [www.ncrec.gov](http://www.ncrec.gov) or upon request to the Commission. In the Form, the broker shall set forth the broker's:

- (1) full legal name;
- (2) physical and mailing address;
- (3) real estate license number;
- (4) telephone number;
- (5) email address;
- (6) social security number;
- (7) date of birth; and
- (8) description of the criminal conviction and disciplinary action, including the jurisdiction and file number.

*History Note: Authority G.S. 93A-3(c); 93A-6(a); 93A-6(a)(10); 93A-6(b)(2); Eff. August 1, 1996; Amended Eff. July 1, 2016; July 1, 2009; January 1, 2008; April 1, 2006; July 1, 2003; July 1, 2000.*

**21 NCAC 58A .2104 POSTPONEMENT OF POSTLICENSING EDUCATION**

A broker described by Rule .2101 of this Section who is a provisional broker shall not be required to complete any postlicensing education during the period to be disregarded under 26 U.S.C. 7508 until the 180th day following the ending of such period. The broker's license shall not be placed on inactive status or cancelled for his or her failure to complete the required postlicensing education prior to the deadline established in this Rule.

*History Note: Authority G.S. 93A-3(c); 93B-15(b); Eff. July 1, 2010; Amended Eff. July 1, 2016.*

**21 NCAC 58A .2105 PROOF OF ELIGIBILITY**

It shall be the responsibility of every broker eligible for the postponement of fees and education requirements established by this Section to demonstrate his or her eligibility and the beginning and ending of the time to be disregarded as described in 26 U.S.C. 7508.

*History Note: Authority G.S. 93A-3(c); 93B-15(b); Eff. July 1, 2010; Amended Eff. July 1, 2016.*

**21 NCAC 58B .0102 REGISTRATION FEE**

(a) For the initial registration or subsequent registration of a time share project by a developer proposing to sell or develop 16 or more time shares, the fee shall be one thousand dollars (\$1,000). For an initial or subsequent registration of a time share project in which the developer proposes to sell 15 or fewer time shares, the fee shall be seven hundred dollars (\$700.00). For any time share registration by a homeowner association for the purpose of reselling time shares in its own project which it has acquired in satisfaction of unpaid assessments by prior owners, the fee shall be four hundred fifty dollars (\$450.00).

(b) Payment of application fees for time share registration shall be made to the Commission by certified check, money order, debit card, or credit card. Applications for registration not accompanied by the appropriate fee shall not be considered by the Commission.

(c) In the event a properly completed application filed with the Commission is denied for any reason, or if an incomplete application is denied by the Commission or abandoned by the developer prior to a final decision by the Commission, the amount of two hundred fifty dollars (\$250.00) shall be retained by the Commission from the application fee and the balance refunded to the applicant developer.

*History Note: Authority G.S. 93A-51; 93A-52; Eff. March 1, 1984; Amended Eff. July 1, 2016; April 1, 2013; July 1, 2000.*

**21 NCAC 58B .0103 RENEWAL OF TIME SHARE PROJECT REGISTRATION**

(a) A developer seeking a renewal of a time share project registration shall submit a complete renewal application form

during the month of June. A renewal application form is available on the Commission's website at [www.ncrec.gov](http://www.ncrec.gov). In the renewal application form, the developer shall set forth:

- (1) the time share's project name, registration number, and mailing address;
- (2) the developer's name, telephone number, and email address;
- (3) the full legal name of brokers that are associated with the time share project and their real estate license numbers;
- (4) the name of all exchange programs associated with the time share project along with a current copy of the Exchange Disclosure Report pursuant to G.S. 93A-48;
- (5) the name, address, email address, telephone number, real estate broker license number if applicable, and the assignment date for each of the following:
  - (A) the managing entity;
  - (B) the marketing entity;
  - (C) the registrar, pursuant to G.S. 93A-58(a);
  - (D) the independent escrow agent, pursuant to G.S. 93A-42(a); and
  - (E) the project broker, pursuant to 93A-58(c);
- (6) a certification that the information contained in the registration filed with the Commission is accurate and current on the date of the renewal application; and
- (7) notarized signature(s) by either:
  - (A) two executive officers of the corporation developer;
  - (B) two managers of the limited liability company developer;
  - (C) the sole proprietor of the sole proprietor developer;
  - (D) the general partner of the partnership developer; or
  - (E) the developer's attorney.

(b) The developer shall submit a nonrefundable fee of eight hundred dollars (\$800.00) payable to the North Carolina Real Estate Commission by certified check, money order, debit card, or credit card.

(c) A complete renewal application shall be accompanied by the prescribed fee and shall be received at the Commission's office prior to the expiration of the certificate of registration as described in G.S. 93A-52(d).

(d) Making a false certification on a time share project registration renewal application shall be grounds for disciplinary action by the Commission.

*History Note: Authority G.S. 93A-51; 93A-52(d); Eff. March 1, 1984; Temporary Amendment Eff. May 23, 1985; Amended Eff. July 1, 2016; April 1, 2013; February 1, 1989; September 1, 1985.*

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**RULES REVIEW COMMISSION**

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*This Section contains information for the meeting of the Rules Review Commission June 16, 2016 at 1711 New Hope Church Road, RRC Commission Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-431-3000. Anyone wishing to address the Commission should notify the RRC staff and the agency no later than 5:00 p.m. of the 2<sup>nd</sup> business day before the meeting. Please refer to RRC rules codified in 26 NCAC 05.*

**RULES REVIEW COMMISSION MEMBERS**

**Appointed by Senate**

Jeff Hyde (1<sup>st</sup> Vice Chair)  
Robert A. Bryan, Jr.  
Margaret Currin  
Jay Hemphill  
Jeffrey A. Poley

**Appointed by House**

Garth Dunklin (Chair)  
Stephanie Simpson (2<sup>nd</sup> Vice Chair)  
Anna Baird Choi  
Jeanette Doran  
Danny Earl Britt, Jr.

**COMMISSION COUNSEL**

Abigail Hammond	(919)431-3076
Amber Cronk May	(919)431-3074
Amanda Reeder	(919)431-3079
Jason Thomas	(919)431-3081

**RULES REVIEW COMMISSION MEETING DATES**

June 16, 2016	July 21, 2016
August 18, 2016	September 15, 2016

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**AGENDA**

**RULES REVIEW COMMISSION**

**THURSDAY, JUNE 16, 2016 10:00 A.M.**

**1711 New Hope Church Rd., Raleigh, NC 27609**

- I. Ethics reminder by the chair as set out in G.S. 138A-15(e)
- II. Approval of the minutes from the last meeting
- III. Follow-up matters
  - A. Public Safety – Division of Emergency Management – 14B NCAC 03 .0104 (Reeder)
  - B. Public Safety – State Capitol Police – 14B NCAC 13 .0102, .0201, .0202, .0203 (Reeder)
  - C. Property Tax Commission – 17 NCAC 11 .0216, .0217 (Hammond)
- IV. Review of Log of Filings (Permanent Rules) for rules filed April 21, 2016 through May 20, 2016
  - Office of State Budget and Management (Thomas)
  - Medical Care Commission (Hammond)
  - Commission for Public Health (Thomas)
  - Criminal Justice Education and Training Standards Commission (Hammond)
  - Environmental Management Commission 02B (Hammond)
  - Coastal Resources Commission (Thomas)
  - Wildlife Resources Commission (Thomas)
  - Environmental Management Commission 13A (Hammond)
  - Board of Barber Examiners (Reeder)
  - Interpreter and Transliterator Licensing Board (Thomas)
  - Respiratory Care Board (Thomas)
- V. Review of Log of Filings (Temporary Rules) for any rule filed within 15 business days prior to the RRC Meeting
- VI. Existing Rules Review
  - Review of Reports
    1. 14B NCAC 15B – Alcoholic Beverage Control Commission (Hammond)

- 2. 17 NCAC 01 - Department of Revenue (Thomas)
- 3. 17 NCAC 10 - Department of Revenue (Thomas)
- 4. 17 NCAC 11 – Property Tax Commission (Thomas)
- 5. 17 NCAC 12 - Department of Revenue (Thomas)
- 6. 25 NCAC 01H - State Human Resources Commission (Hammond)
- 7. 25 NCAC 01I - State Human Resources Commission (Hammond)
- 8. 25 NCAC 01J - State Human Resources Commission (Hammond)
- Readoption
  - 9. 11 NCAC 18 - Department of Insurance (Reeder)

VII. Commission Business

- D. Review of Amendments to 26 NCAC 05 .0211
  - Next meeting: Thursday, July 21, 2016

**Commission Review**  
*Log of Permanent Rule Filings*  
*April 21, 2016 through May 20, 2016*

**STATE BUDGET AND MANAGEMENT, OFFICE OF**

The rules in Subchapter 03A concern the organization and function of the Office of State Budget and Management.

<u>Budget Manual</u>	09	NCAC	03A	.0103
Readopt with Changes/*				

The rules in Chapter 3 are from the Office of State Budget and Management.

The rules in Subchapter 3M provide for the uniform administration of State grants including rules about organization and structure (.0100); responsibilities of grantees and subgrantees (.0200); responsibilities of the Office of the State Controller (.0300); responsibilities of agencies (.0400); responsibilities of the office of State Auditor (.0500); responsibilities of the Office of State Budget and Management (.0600); contracting monitoring and oversight (.0700); and sanctions (.0800).

<u>Purpose</u>	09	NCAC	03M	.0101
Readopt with Changes/*				
<u>Definitions</u>	09	NCAC	03M	.0102
Readopt with Changes/*				
<u>Allowable Uses of State Funds</u>	09	NCAC	03M	.0201
Readopt with Changes/*				
<u>Recipient/Subrecipient Responsibilities</u>	09	NCAC	03M	.0202
Readopt with Changes/*				
<u>Subgrantee Responsibilities</u>	09	NCAC	03M	.0203
Readopt with Changes/*				
<u>Minimum Reporting Requirements for Recipients and Subreci...</u>	09	NCAC	03M	.0205
Readopt with Changes/*				
<u>Agency Responsibilities</u>	09	NCAC	03M	.0401
Readopt with Changes/*				
<u>Office of the State Auditor Responsibilities</u>	09	NCAC	03M	.0501
Readopt with Changes/*				
<u>Office of State Budget and Management Responsibilities</u>	09	NCAC	03M	.0601
Readopt with Changes/*				
<u>Grant Documentation</u>	09	NCAC	03M	.0701
Readopt with Changes/*				

<u>Subordination of Other Contracts Agreements</u> Readopt without Changes/*	09	NCAC	03M	.0702
<u>Required Contract Provisions</u> Readopt with Changes/*	09	NCAC	03M	.0703
<u>Grant Monitoring and Evaluation</u> Readopt with Changes/*	09	NCAC	03M	.0704
<u>Noncompliance with Rules</u> Readopt with Changes/*	09	NCAC	03M	.0801
<u>Recovery of State Funds</u> Readopt with Changes/*	09	NCAC	03M	.0802

**MEDICAL CARE COMMISSION**

The rules in Chapter 13 are from the NC Medical Care Commission.

The rules in Subchapter 13D are rules for the licensing of nursing homes including general information (.2000); licensure (.2100); general standards of administration (.2200); patient and resident care and services (.2300); medical records (.2400); physician's services (.2500); pharmaceutical services (.2600); dietary services (.2700); activities, recreation and social services (.2800); special requirements (.2900); specially designated units (.3000); design and construction (.3100); functional requirements (.3200); fire and safety requirements (.3300); and mechanical, electrical, and plumbing requirements (.3400).

<u>Definitions</u> Readopt with Changes/*	10A	NCAC	13D	.2001
<u>Reporting and Investigating Abuse, Neglect or Misappropri...</u> Readopt without Changes/*	10A	NCAC	13D	.2210
<u>Nurse Staffing Requirements</u> Readopt without Changes/*	10A	NCAC	13D	.2303
<u>Preservation of Medical Records</u> Readopt with Changes/*	10A	NCAC	13D	.2402
<u>Use of Nurse Practitioners and Physician Assistants</u> Readopt with Changes/*	10A	NCAC	13D	.2503
<u>Required Spaces</u> Readopt with Changes/*	10A	NCAC	13D	.3201

**PUBLIC HEALTH, COMMISSION FOR**

The rules in Chapter 45 are general procedures for public health programs.

The rules in Subchapter 45A are rules about payment programs including general provisions (.0100); eligibility determinations (.0200); eligibility procedures (.0300); reimbursement (.0400); and quality control (.0500).

<u>General</u> Amend/*	10A	NCAC	45A	.0101
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**CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION**

The rules in Chapter 9 are from the Criminal Justice Education and Training Standards Commission. This Commission has primary responsibility for setting statewide education, training, employment, and retention standards for criminal justice personnel (not including sheriffs).

The rules in Subchapter 9B cover minimum standards for: employment (.0100); schools and training programs (.0200); criminal justice instructors (.0300); completion of training (.0400); school directors (.0500); and certification of post-secondary criminal justice education programs (.0600).

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**RULES REVIEW COMMISSION**

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<u>Basic Law Enforcement Training</u> Amend/*	12	NCAC	09B	.0205
<u>Basic Training - Juvenile Court Counselors and Chief Cour...</u> Amend/*	12	NCAC	09B	.0235
<u>Basic Training - Juvenile Justice Officers</u> Amend/*	12	NCAC	09B	.0236
<u>Terms and Conditions of Specialized Instructor Certification</u> Amend/*	12	NCAC	09B	.0305
<u>Military Transferees</u> Adopt/*	12	NCAC	09B	.0701

The rules in Subchapter 9E relate to the law enforcement officers' in-service training program.

<u>Instructors: Annual In-Service Training</u> Amend/*	12	NCAC	09E	.0104
<u>Minimum Training Specifications: Annual In-Service Training</u> Amend/*	12	NCAC	09E	.0105

### **ENVIRONMENTAL MANAGEMENT COMMISSION**

The rules in Subchapter 2B pertain to surface water standards and monitoring including procedures for assignment of water quality standards (.0100); the standards used to classify the waters of the state (.0200); stream classifications (.0300); effluent limitations (.0400); monitoring and reporting requirements (.0500); and water quality management plans (.0600).

<u>Water Quality Management Plans</u> Amend/*	15A	NCAC	02B	.0227
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### **COASTAL RESOURCES COMMISSION**

The rules in Subchapter 7H are the state guidelines for areas of environmental concern (AECs) including introduction and general comments (.0100); the estuarine system (.0200); ocean hazard areas (.0300); public water supplies (.0400); natural and cultural resource areas (.0500); development standards (.0600); general permits for construction or maintenance of bulkheads and the placement of riprap for shoreline protection in estuarine and public trust waters (.1100); piers, docks and boat houses in estuarine and public trust waters (.1200); general permit to construct boat ramps along estuarine and public trust shorelines and into estuarine and public trust waters (.1300); groins in estuarine and public trust waters (.1400); excavation within or connecting to existing canals, channels, basins, or ditches in estuarine waters, public trust waters, and estuarine shoreline AECs (.1500); aerial and subaqueous utility lines with attendant structures in coastal wetlands, estuarine waters, public trust waters and estuarine shorelines (.1600); emergency work requiring a CAMA or a dredge and fill permit (.1700); beach bulldozing landward of the mean high-water mark in the ocean hazard AEC (.1800); temporary structures within the estuarine and ocean hazard AECs (.1900); authorizing minor modifications and repair to existing pier/mooring facilities in estuarine and public trust waters and ocean hazard areas (.2000); construction of sheetpile sill for shoreline protection in estuarine and public trust waters (.2100); construction of freestanding moorings in established waters and public trust areas (.2200); replacement of existing bridges and culverts in estuarine waters, estuarine shorelines, public trust areas and coastal wetlands (.2300); placement of riprap for wetland protection in estuarine and public trust waters (.2400); replacement of structures; the reconstruction of primary or frontal dune systems; and the maintenance excavation of existing canals, basins, channels, or ditches, damaged, destroyed, or filled in by hurricanes or tropical storms (.2500); construction of wetland, stream and buffer mitigation sites by the North Carolina Ecosystem Enhancement Program or the North Carolina Wetlands Restoration Program (.2600); and the construction of riprap sills for wetland enhancement in estuarine and public trust waters (.2700).

<u>AECs Within Ocean Hazard Areas</u> Amend/*	15A	NCAC	07H	.0304
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**WILDLIFE RESOURCES COMMISSION**

The rules in Subchapter 10F cover motorboats and water safety including boat registration (.0100); safety equipment and accident reports (.0200); and local water safety regulations covering speed limits, no-wake restrictions, restrictions on swimming and other activities, and placement of markers for designated counties or municipalities (.0300).

Craven County 15A NCAC 10F .0347  
Amend/\*

**ENVIRONMENTAL MANAGEMENT COMMISSION**

The rules in Chapter 13 cover hazardous and solid waste management, inactive hazardous substances, and waste disposal sites.

The rules in Subchapter 13A cover hazardous waste management and specifically HWTSD (hazardous waste treatment, storage, or disposal) facilities.

General 15A NCAC 13A .0101  
Amend/\*

Definitions 15A NCAC 13A .0102  
Amend/\*

Petitions - Part 260 15A NCAC 13A .0103  
Amend/\*

Identification and Listing of Hazardous Wastes - Part 261 15A NCAC 13A .0106  
Amend/\*

STDS Applicable to Generators of Hazardous Waste-Part 262 15A NCAC 13A .0107  
Amend/\*

STDS Applicable for Transporters of Hazardous Waste 15A NCAC 13A .0108  
Amend/\*

**BARBER EXAMINERS, BOARD OF**

The rules in Subchapter 06A are departmental rules including organizational rules (.0100); and rules about the executive secretary (.0300).

Physical and Mailing Address 21 NCAC 06A .0102  
Readopt without Changes/\*

The rules in Subchapter 06B concern rulemaking procedures including petitions for rulemaking (.0100); notice (.0200); hearings (.0300); temporary rules (.0400); and declaratory rulings (.0500).

Petition for Adoption of New Rule 21 NCAC 06B .0101  
Readopt without Changes/\*

Petition for Amendment or Repeal of Rule 21 NCAC 06B .0103  
Readopt without Changes/\*

Granting or Denying Petitions 21 NCAC 06B .0105  
Readopt without Changes/\*

Mailing List 21 NCAC 06B .0202  
Readopt without Changes/\*

Information Requests 21 NCAC 06B .0204  
Readopt without Changes/\*

<u>Locations of Hearings</u>	21	NCAC	06B	.0301
Readopt without Changes/*				
<u>Oral Presentations</u>	21	NCAC	06B	.0302
Readopt without Changes/*				
<u>Written Statement</u>	21	NCAC	06B	.0305
Readopt without Changes/*				
<u>Acknowledgement</u>	21	NCAC	06B	.0306
Readopt without Changes/*				
<u>Control of Hearings</u>	21	NCAC	06B	.0307
Readopt without Changes/*				
<u>Request for Statement on Final Decision</u>	21	NCAC	06B	.0308
Readopt without Changes/*				
<u>Records</u>	21	NCAC	06B	.0309
Readopt without Changes/*				
<u>Request for Declaratory Ruling</u>	21	NCAC	06B	.0501
Readopt with Changes/*				
<u>Contents of Request</u>	21	NCAC	06B	.0502
Readopt with Changes/*				
<u>Refusal to Issue Declaratory Ruling</u>	21	NCAC	06B	.0503
Readopt with Changes/*				
<u>Procedure</u>	21	NCAC	06B	.0505
Readopt with Changes/*				

The rules in Subchapter 06C concern contested cases including general rules (.0100); request for a hearing (.0200); notice (.0500); who shall hear contested cases (.0600); place of hearing (.0700); intervention (.0800); and hearing officers (.0900).

<u>Administrative Hearings</u>	21	NCAC	06C	.0101
Readopt without Changes/*				
<u>Request</u>	21	NCAC	06C	.0201
Readopt without Changes/*				
<u>Informal Resolution Encouraged</u>	21	NCAC	06C	.0202
Readopt without Changes/*				
<u>Request After Informal Efforts</u>	21	NCAC	06C	.0203
Readopt without Changes/*				
<u>Contents of Request</u>	21	NCAC	06C	.0204
Readopt without Changes/*				
<u>Acknowledgement</u>	21	NCAC	06C	.0205
Readopt without Changes/*				
<u>Reasonable Notice</u>	21	NCAC	06C	.0501
Readopt without Changes/*				
<u>Notice and Hearing</u>	21	NCAC	06C	.0502
Readopt without Changes/*				
<u>Additional Information on Notices and Hearings</u>	21	NCAC	06C	.0503
Readopt without Changes/*				
<u>Written Answers to Notice</u>	21	NCAC	06C	.0504
Readopt without Changes/*				
<u>Who Hears Contested Cases</u>	21	NCAC	06C	.0601
Readopt without Changes/*				
<u>Location</u>	21	NCAC	06C	.0701
Readopt without Changes/*				

<u>Requirements for Intervention</u> Readopt without Changes/*	21	NCAC	06C	.0801
<u>Allowance</u> Readopt without Changes/*	21	NCAC	06C	.0807
<u>Denial</u> Readopt without Changes/*	21	NCAC	06C	.0808
<u>Bias of Board Member</u> Readopt without Changes/*	21	NCAC	06C	.0903
<u>Bias Claimed by Party</u> Readopt without Changes/*	21	NCAC	06C	.0904
<u>Affidavit of Disqualification</u> Readopt without Changes/*	21	NCAC	06C	.0905
<u>Filing Affidavit</u> Readopt without Changes/*	21	NCAC	06C	.0906
<u>Disqualification</u> Readopt without Changes/*	21	NCAC	06C	.0907
<u>Disqualification of Majority of Board</u> Readopt without Changes/*	21	NCAC	06C	.0909

The rules in Subchapter 06D concern conduct of the contested case.

<u>Contested Case Hearings</u> Readopt without Changes/*	21	NCAC	06D	.0101
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The rules in Subchapter 06F concern barber schools.

<u>Physical Structure</u> Readopt with Changes/*	21	NCAC	06F	.0101
<u>Manager</u> Readopt with Changes/*	21	NCAC	06F	.0102
<u>Filing</u> Readopt without Changes/*	21	NCAC	06F	.0103
<u>Instructors</u> Readopt without Changes/*	21	NCAC	06F	.0104
<u>Re-Entering School</u> Readopt with Changes/*	21	NCAC	06F	.0109
<u>Roster and Student Records</u> Readopt without Changes/*	21	NCAC	06F	.0110
<u>Copies of Barber School Records</u> Readopt without Changes/*	21	NCAC	06F	.0111
<u>Student Permit</u> Readopt without Changes/*	21	NCAC	06F	.0113
<u>Signatures on Reports</u> Readopt with Changes/*	21	NCAC	06F	.0114
<u>Students with Criminal Records</u> Readopt without Changes/*	21	NCAC	06F	.0116
<u>Fees</u> Readopt without Changes/*	21	NCAC	06F	.0118
<u>Intrastate Transfers</u> Readopt without Changes/*	21	NCAC	06F	.0119
<u>Barber School Curricula</u> Readopt without Changes/*	21	NCAC	06F	.0120

<u>Penal Institutions</u>	21	NCAC	06F	.0121
Readopt with Changes/*				
<u>Uniforms and Identification</u>	21	NCAC	06F	.0122
Readopt without Changes/*				
<u>Time Clock and Recordation of Student Hours</u>	21	NCAC	06F	.0123
Readopt with Changes/*				
<u>Student Hours</u>	21	NCAC	06F	.0124
Readopt with Changes/*				
<u>School Handbooks and Enrollment Agreements</u>	21	NCAC	06F	.0125
Readopt with Changes/*				
<u>Extended Education</u>	21	NCAC	06F	.0126
Adopt/*				

The rules in Subchapter 06G concern barber school instructors.

<u>Grades</u>	21	NCAC	06G	.0103
Readopt without Changes/*				
<u>Instructor Application</u>	21	NCAC	06G	.0106
Adopt/*				

The rules in Subchapter 06H concern barber school owners and managers.

<u>Duties and Responsibilities</u>	21	NCAC	06H	.0101
Readopt without Changes/*				
<u>Student-Instructor Ratio</u>	21	NCAC	06H	.0102
Readopt without Changes/*				

The rules in Subchapter 06I concern out-of-state transfers.

<u>Credit For Out-of-State Training</u>	21	NCAC	06I	.0101
Readopt without Changes/*				
<u>Apprentice Barber</u>	21	NCAC	06I	.0105
Readopt with Changes/*				

The rules in Subchapter 06J concern apprentice barbers.

<u>Registered Apprentice</u>	21	NCAC	06J	.0101
Readopt with Changes/*				
<u>Forfeiture of Fee</u>	21	NCAC	06J	.0102
Readopt without Changes/*				
<u>Renewal as Registered Apprentice; Waiver</u>	21	NCAC	06J	.0103
Readopt without Changes/*				
<u>Student Permission to Barber</u>	21	NCAC	06J	.0106
Readopt without Changes/*				
<u>Examination</u>	21	NCAC	06J	.0108
Readopt without Changes/*				
<u>Identification</u>	21	NCAC	06J	.0109
Readopt without Changes/*				
<u>Notification of Address Change</u>	21	NCAC	06J	.0110
Readopt without Changes/*				

The rules in Subchapter 06K concern registered barbers.

<u>Registered Barber</u>	21	NCAC	06K	.0101
Readopt without Changes/*				
<u>Forfeiture of Fee</u>	21	NCAC	06K	.0103
Readopt without Changes/*				
<u>Out-of-State Applicants</u>	21	NCAC	06K	.0104
Readopt with Changes/*				
<u>Identification</u>	21	NCAC	06K	.0110
Readopt without Changes/*				
<u>Notification of Change of Address</u>	21	NCAC	06K	.0111
Readopt without Changes/*				

The rules in Subchapter 06L concern barber shops.

<u>Measurements of Barber Shop</u>	21	NCAC	06L	.0102
Readopt without Changes/*				
<u>Equipment</u>	21	NCAC	06L	.0103
Readopt without Changes/*				
<u>Shop Permits</u>	21	NCAC	06L	.0104
Readopt with Changes/*				
<u>Fees</u>	21	NCAC	06L	.0105
Readopt without Changes/*				
<u>Separation From Other Businesses; Residential Shops; Mobi...</u>	21	NCAC	06L	.0106
Readopt without Changes/*				
<u>Lavatory</u>	21	NCAC	06L	.0107
Readopt without Changes/*				
<u>Moved Shop</u>	21	NCAC	06L	.0108
Readopt without Changes/*				
<u>Commercial Chemicals</u>	21	NCAC	06L	.0109
Readopt without Changes/*				
<u>Where Barber Services May Be Performed</u>	21	NCAC	06L	.0111
Readopt without Changes/*				
<u>Rented Booth Space</u>	21	NCAC	06L	.0112
Readopt with Changes/*				
<u>Diseases</u>	21	NCAC	06L	.0113
Readopt without Changes/*				
<u>Policy Prohibiting Pets</u>	21	NCAC	06L	.0114
Readopt without Changes/*				
<u>Inspections of Shops</u>	21	NCAC	06L	.0115
Readopt with Changes/*				
<u>Additional Duties of Barber Shop Owners and Managers and ...</u>	21	NCAC	06L	.0116
Readopt with Changes/*				
<u>General Sanitation</u>	21	NCAC	06L	.0117
Readopt without Changes/*				
<u>Sanitary Ratings and Posting of Ratings</u>	21	NCAC	06L	.0118
Readopt with Changes/*				
<u>Systems of Grading Barber Shops</u>	21	NCAC	06L	.0119
Readopt without Changes/*				
<u>Notification of Change of Address</u>	21	NCAC	06L	.0120
Readopt without Changes/*				

The rules in Subchapter 06M concern barbershop inspectors.

<u>Duties and Responsibilities</u>	21	NCAC	06M	.0102
Readopt without Changes/*				

The rules in Subchapter 6N establish fees and provide for the use of various forms.

<u>Fees</u>	21	NCAC	06N	.0101
Readopt without Changes/*				
<u>Form Bar-1</u>	21	NCAC	06N	.0102
Readopt without Changes/*				
<u>Form Bar-2</u>	21	NCAC	06N	.0103
Readopt without Changes/*				
<u>Form Bar-3</u>	21	NCAC	06N	.0104
Readopt with Changes/*				
<u>Form Bar-4</u>	21	NCAC	06N	.0105
Readopt without Changes/*				
<u>Form Bar-5</u>	21	NCAC	06N	.0106
Readopt with Changes/*				
<u>Form Bar-6</u>	21	NCAC	06N	.0107
Readopt without Changes/*				
<u>Form Bar-7</u>	21	NCAC	06N	.0108
Readopt without Changes/*				
<u>Form Bar-8</u>	21	NCAC	06N	.0109
Readopt without Changes/*				
<u>Form Bar-9</u>	21	NCAC	06N	.0110
Readopt without Changes/*				
<u>Form Bar-10</u>	21	NCAC	06N	.0111
Readopt without Changes/*				
<u>Access to Forms</u>	21	NCAC	06N	.0112
Readopt without Changes/*				

The rules in Subchapter 6O govern the assessing of civil penalties.

<u>Schedule of Penalties</u>	21	NCAC	06O	.0101
Readopt without Changes/*				
<u>Licensing of Barber Shops</u>	21	NCAC	06O	.0102
Readopt with Changes/*				
<u>Licensing of Barber Schools</u>	21	NCAC	06O	.0103
Readopt with Changes/*				
<u>Unsupervised Apprentice</u>	21	NCAC	06O	.0104
Readopt with Changes/*				
<u>Unlicensed Barber</u>	21	NCAC	06O	.0105
Readopt with Changes/*				
<u>Display of Current License</u>	21	NCAC	06O	.0106
Readopt with Changes/*				
<u>Fraudulent Misrepresentations or Submission of Fraudulent...</u>	21	NCAC	06O	.0107
Readopt without Changes/*				
<u>Inspections of Shops and Schools</u>	21	NCAC	06O	.0108
Readopt with Changes/*				

<u>Expired License</u>	21	NCAC	06O	.0109
Readopt with Changes/*				
<u>Adequate Premises</u>	21	NCAC	06O	.0110
Readopt with Changes/*				
<u>School Instructors</u>	21	NCAC	06O	.0111
Readopt with Changes/*				
<u>Identification</u>	21	NCAC	06O	.0112
Readopt with Changes/*				
<u>Barber Shops in Residences and Mobile Homes</u>	21	NCAC	06O	.0113
Readopt with Changes/*				
<u>Animals in Barber Shops</u>	21	NCAC	06O	.0114
Readopt with Changes/*				
<u>School Failing to Maintain, Falsifying, or Failing to Sub...</u>	21	NCAC	06O	.0115
Readopt with Changes/*				
<u>Unlicensed School Instructors</u>	21	NCAC	06O	.0116
Readopt with Changes/*				
<u>Barber Failing to Maintain or Produce Exemption Log</u>	21	NCAC	06O	.0117
Readopt with Changes/*				
<u>Unlicensed Barber Student</u>	21	NCAC	06O	.0118
Adopt/*				
<u>Failure to Notify Board of Change Address</u>	21	NCAC	06O	.0119
Adopt/*				
<u>Failure to Notify Board of Change of Supervision Barber o...</u>	21	NCAC	06O	.0120
Adopt/*				
<u>Failure to Display Sanitation Grade and Shop Permit in a ...</u>	21	NCAC	06O	.0121
Adopt/*				
<u>Failure to Notify Board of Change of Barber Shop or School...</u>	21	NCAC	06O	.0122
Adopt/*				

The rules in Subchapter 6P are definitions.

<u>Barbering</u>	21	NCAC	06P	.0101
Readopt without Changes/*				
<u>Barbering Exemptions</u>	21	NCAC	06P	.0102
Readopt without Changes/*				
<u>General Definitions</u>	21	NCAC	06P	.0103
Readopt with Changes/*				

The rules in Subchapter 6Q concern prohibited acts.

<u>Additional Grounds for Denial or Discipline</u>	21	NCAC	06Q	.0101
Readopt with Changes/*				
<u>Effect of Child Support Default on License or Certificate</u>	21	NCAC	06Q	.0102
Readopt without Changes/*				
<u>Registered Sex Offenders</u>	21	NCAC	06Q	.0103
Readopt without Changes/*				
<u>Effect of Notice of Violation on License or Certificate</u>	21	NCAC	06Q	.0104
Readopt without Changes/*				

The rules in Subchapter 6R concern advertising.

Display of Sign or Barber Pole 21 NCAC 06R .0101  
Readopt without Changes/\*

The rules in Subchapter 6S concern examinations.

General Examination Instructions 21 NCAC 06S .0101  
Readopt without Changes/\*

### **INTERPRETER AND TRANSLITERATOR LICENSING BOARD**

The rules in Chapter 25 are from the Interpreter and Transliterater Board including general provisions (.0100); licensing (.0200); moral fitness for licensure (.0300); reporting and disclosure requirements (.0400); continuing education (.0500); administrative procedure (.0600); and sanctions (.0700).

Renewal of a Provisional License 21 NCAC 25 .0205  
Amend/\*

### **RESPIRATORY CARE BOARD**

The rules in Chapter 61 are from the Respiratory Care Board and concern organization and definitions (.0100); application for license (.0200); licensing (.0300); continuing education requirements for license holders (.0400); miscellaneous provisions (.0500); rulemaking and declaratory rulings (.0600); and administrative hearing procedures (.0700).

Exemptions 21 NCAC 61 .0202  
Readopt without Changes/\*

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**CONTESTED CASE DECISIONS**

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

**OFFICE OF ADMINISTRATIVE HEARINGS**

*Chief Administrative Law Judge  
JULIAN MANN, III*

*Senior Administrative Law Judge  
FRED G. MORRISON JR.*

**ADMINISTRATIVE LAW JUDGES**

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

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<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>DATE</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<b><u>ALCOHOLIC BEVERAGE CONTROL COMMISSION</u></b>			
Chief's Inc. v. Alcoholic Beverage Control Commission	13 ABC 18939	02/19/15	
NC Alcoholic Beverage Control Commission v. Partnership T/A Poor Boys	14 ABC 07103	08/21/15	30:08 NCR 918
American Legion, T/A Linton J Sutton Post 223-1 v. Alcoholic Beverage Control Commission	14 ABC 03686	12/23/14	
Alcoholic Beverage Control Commission v. AMH Diana Market Corp., T/A Green's Market	14 ABC 05071	01/14/15	
Alcoholic Beverage Control Commission v. Nick and Nates Pizzeria Inc T/A Nick and Nates Pizzeria	14 ABC 07115	01/14/15	
Alcoholic Beverage Control Commission v. Nick and Nates Pizzeria Inc T/A Nick and Nates Pizzeria	14 ABC 07116	01/14/15	
The Geube Group, Michael K Grant Sr. v. Alcoholic Beverage Control Commission	14 ABC 08696	02/16/15	
Alcoholic Beverage Control Commission v. Bhavesh Corp T/A K and B Foodmart	14 ABC 09023	02/04/15	
Alcoholic Beverage Control Commission v. Greenleaf Food and Beverage Inc T/A Bunker Jacks	14 ABC 09037	03/07/15	
Alcoholic Beverage Control Commission v. S.D.C. Group Inc T/A Perkeo Wine Bistro	14 ABC 09039	02/09/15	
Alcoholic Beverage Control Commission v. Alquasem Mustafa Salameh T/A KP Mini Mart	14 ABC 09231	02/04/15	
Alcoholic Beverage Control Commission v. Ash and Z Inc T/A 5 <sup>th</sup> Ave Speedmart	15 ABC 00355	04/22/15	
Alcoholic Beverage Control Commission v. Monterrey Mexican Restaurant Inc T/A Monterrey Mexican Restaurant	15 ABC00393	04/07/15	
NC Alcoholic Beverage Control Commission v. Greenbox, LLC, T/A Big Shots Sports Bar and Grill	15 ABC 04354	10/29/15	
Alcoholic Beverage Control Commission v. Woodlawn Restaurant and Lounge, LLC T/A O'Hara's Restaurant and Lounge	15 ABC 04355	09/03/15	
Alcoholic Beverage Control Commission v. Ortez Corp. Inc, T/A Pollo Royal Restaurant	15 ABC 04362	09/03/15	
NC Alcoholic Beverage Control Commission v. Rodeo Restaurant Group Corp, T/A Brasilla Churrasco Steakhouse	15 ABC 05010	10/06/15	
NC Alcoholic Beverage Control Commission v. Double K Sports Bar Inc, T/A Double K Sports Bar	15 ABC 05753	12/07/15	
NC Alcoholic Beverage Control Commission v. Jeannine W. Santiago T/A Baileys Tavern	15 ABC 08595	02/10/16	
NC Alcoholic Beverage Control Commission v. S and J Tobacco and Food Mart T/A S and J Tobacco and Food Mart	15 ABC 06629	12/14/15	
NC Alcoholic Beverage Control Commission v. 2Ak Enterprises LLC, T/A Tilt on Trade	15 ABC 06634	12/02/15	
NC Alcoholic Beverage Control Commission v. CCS Charlotte Enterprise LLC, T/A Caldwell Corner Store	15 ABC 06636	12/02/15	
NC Alcoholic Beverage Control Commission v. Fast Track Inc T/A Country Market And Deli	15 ABC 06643	02/22/16	

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**CONTESTED CASE DECISIONS**

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NC Alcoholic Beverage Control Commission v. Pablo Juarez Aguilar T/A La Cueva	15 ABC 07135	02/22/16	
NC Alcoholic Beverage Control Commission v. Santiago Torres Fuentes TA Sabor Latino Restaurante	15 ABC 07251	02/17/16	
NC Alcoholic Beverage Control Commission v. Jeannine W. Santiago T/A Baileys Tavern	15 ABC 08595	02/10/16	
NC Alcoholic Beverage Control Commission v. Mazatlan of Williamston Inc. T/A Mazatlan Mexican Restaurant	16 ABC 00008	03/09/16	
NC Alcoholic Beverage Control Commission v. AJA Mart Inc. T/A AJA Mart	16 ABC 00010	03/21/16	
Club Hush Management Company LLC a North Carolina Limited Liability Corporation	16 ABC 00796	04/04/16	
NC Alcoholic Beverage Control Commission v. Indio Inc T/A Taxico Mexican Grill	16 ABC 01763	04/20/16	
<b><u>BOARD OF ARCHITECTURE</u></b>			
Board of Architecture v. Anthony Hunt	14 BOA 04954	03/03/15	30:01 NCR 77
<b><u>BOARD OF BARBER EXAMINERS</u></b>			
Arthur Donald Darby Jr v. Board of Barber Examiners - Staff	14 BBE 04565	12/05/14	
<b><u>BOARD OF FUNERAL SERVICES</u></b>			
Board of Funeral Services v. Mitchell's Funeral Home, Vivian Cummings, Corrine Culbreth	14 BMS 05389	02/23/15	
Board of Funeral Services v. Mitchell's Funeral Home, Vivian Cummings, Corrine Culbreth	14 BMS 07597	02/23/15	
Board of Funeral Services v. Mitchell's Funeral Home, Vivian Cummings, Corrine Culbreth	14 BMS 08028	02/23/15	
<b><u>BOARD OF SOCIAL WORK</u></b>			
NC Social Work Certification and Licensure Board v. Stephanie Helbeck Cornfield	15 BSW 04491	10/09/15	30:14 NCR 1573
<b><u>BOARD FOR THE LICENSING OF GEOLOGISTS</u></b>			
Robert Payne, P.G. v. NC Board for the Licensing of Geologists	14 BOG 03255	06/11/15	30:07 NCR 780
<b><u>DEPARTMENT OF COMMERCE</u></b>			
Hog Slat, Inc v. Department of Commerce	13 COM 20122	12/05/14	
<b><u>BOARD OF CERTIFIED PUBLIC ACCOUNTANT EXAMINERS</u></b>			
Belinda Johnson v. Board of Certified Public Accountant Examiners	15 CPA 00798	03/09/15	
NC State Board of Certified Public Accountant Examiners v. Linda R. Sharp	15 CPA 04488	01/29/16	30:19 NCR 2112
<b><u>DEPARTMENT OF PUBLIC SAFETY</u></b>			
Kimberly H. Oliver v. Victims Compensation Commission	13 CPS 14371	04/17/15	30:03 NCR 354
Jose Guadalupe Munoz Nunez v. Victims Compensation Commission	14 CPS 02633	02/16/15	
Anne Marie Brandt v. NC Department of Public Safety	14 CPS 05077	08/18/15	30:08 NCR 924
Jack Norris v. Victims Compensation Commission	14 CPS 06019	03/30/15	30:01 NCR 89
Yessika Murga Martinez v. Crime Victims Compensation Commission	14 CPS 07544	05/29/15	
Joanne Sanon v. Department of Public Safety	14 CPS 07995	01/16/15	
Edward Andrew Carder v. NC Division of Victim Compensation Services	14 CPS 08579	08/25/15	30:14 NCR 1561
Bonnie Hall v. Crime Victims Compensation Commission	14 CPS 08618	01/23/15	
Antwon B. Logan v. Victims Compensation Commission	15 CPS 00093	03/11/15	
Dalton James v. Victims Compensation Commission	15 CPS 00463	04/24/15	
Dwight Earl Evans Jr. v. Victims Compensation Commission	15 CPS 03563	08/20/15	
Shawn J. McKay v. NC Department of Public Safety	15 CPS 04164	10/28/15	
Timothy Ryan Revels v. Department of Public Safety, Office of Victim Services	15 CPS 05756	09/22/15	
Sallie Ruth Newton v. NC Crime Victims Rights Act, NC Dept of Public Safety-Office of Admin Hearings	15 CPS 06419	02/11/16	
Kish D. Anderson v. NC Victims Compensation Commission	15 CPS 06451	12/16/15	
Latasha Watkins v. Victim Compensation	15 CPS 06893	11/30/15	
<b><u>DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES</u></b>			
Michelle Starnes v. Patricia Norris, DVM, Director of Animal Welfare Division, North Carolina Department of Agriculture and Consumer Services	15 DAG 03112	06/25/15	
<b><u>DEPARTMENT OF HEALTH AND HUMAN SERVICES</u></b>			
Lakehouse Pub v. NC Department of Health and Human Services	10 DHR 06208	01/19/16	
Strategic Interventions Inc. v. Western Highlands Network A LME-MCO	13 DHR 05119	06/21/13	
Kenneth Terrell Ford v. DHHS, Division of Facility Services	13 DHR 10745	05/04/15	30:03 NCR 360

**CONTESTED CASE DECISIONS**

Joyce Carol Hunter v. DHHS, Division of Health Service Regulation	13 DHR 17855	01/03/14	
Rex Hospital v. DHHS, Division of Medical Assistance	13 DHR 18151	05/29/15	30:03 NCR 372
Paul M Stella v. DHHS, Division of Public Health	13 DHR 19269	02/06/14	
UNC Hospitals at Chapel Hill v. DHHS, Division of Medical Assistance	13 DHR 19653	05/29/15	30:03 NCR 387
UNC Hospitals at Chapel Hill v. DHHS, Division of Medical Assistance	13 DHR 19654	05/29/15	30:03 NCR 387
A+ Residential Care, Daniel Saft v. NCDHHS, Division of Health Service Regulation	13 DHR 19835	05/22/15	
Stepping Stone Counseling v. NCDHHS, Division of Medical Assistance	13 DHR 19837	05/12/15	
Carolina Community Support Services, Inc. v. Alliance Behavioral Healthcare, NCDHHS	14 DHR 01500	04/02/15	30:04 NCR 480
Sunrise Clinical Associates PLLC. v. Alliance Behavioral Healthcare, NCDHHS	14 DHR 01503	04/02/15	30:01 NCR 97
Fidelity Community Support Group Inc. v. Alliance Behavioral Healthcare, NCDHHS	14 DHR 01594	04/02/15	30:01 NCR 133
Genesis Project 1, Inc v. DHHS, Division of Medical Assistance, and Mecklink Behavioral Healthcare	14 DHR 02198	06/17/15	30:07 NCR 794
Pamela and Andrew Frederick v. DHHS	14 DHR 04017	08/28/15	
Regina Joyner v. Division of Child Development and Early Education, DHHS	14 DHR 04463	12/10/14	
Cumberland County Hospital System, Inc d/b/a Cape Fear Valley Health System and Hoke Healthcare LLC v. NCDHHS, Division of Health Service Regulation, Certificate of Need Section	14 DHR 04692	01/21/15	
Mariusz Leonard Poppe v. NCDHHS, Division of Medical Assistance	14 DHR 05078	02/15/16	30:20 NCR 2181
Bio-Medical Applications of NC, Inc d/b/a BMA Rocky Mount v. NCDHHS, Division of Health Service Regulation, Certificate of Need Section and Total Renal Care Inc d/b/a Nash County Dialysis	14 DHR 05495	03/26/15	30:02 NCR 196
Bernita Webster v. NCDHHS, Division of Health Service Regulation, Healthcare Personnel Registry	14 DHR 05566	03/10/15	30:02 NCR 229
First Image Grace Court/RHCC and Shirley Williams v. DHHS, Division of Health Service Regulation	14 DHR 06332	02/12/15	
Carrie's Loving Hands, Felicia McGee v. NCDHHS, Division of Health Service Regulation, Certification	14 DHR 06565	02/13/15	
Erica Chante Johnson v. NCDHHS, Division of Health Service Regulation, Healthcare Personnel Registry	14 DHR 06571	03/10/15	30:02 NCR 236
A United Community LLC v. Alliance Behavioral Healthcare as legally authorized contractor of and agent for NC Department of Health and Human Services	14 DHR 06837	07/20/15	30:08 NCR 930
Brenda Buck v. NCDHHS, Division of Health Service Regulation	14 DHR 07027	01/02/15	
Humble Beginnings Child Care Inc v. Division of Child Development and Early Education	14 DHR 07029	05/22/15	
Peace Of Mind Adult Group Home Kimberly Goolsby v. NCDHHS, Division of Health Service Regulation, Mental Health Licensure and Certification Section	14 DHR 07325	05/22/15	
Peace of Mind Adult Group Home and Kimberly Goolsby v. DHHS, Division of Health Service Regulation	14 DHR 07626	08/31/15	
Peace of Mind Adult Group Home Kimberly Goolsby, v. NCDHHS, Division of Health Service Regulation, Mental Health Licensure and Certification Section	14 DHR 07327	05/22/15	
Dennis Reid v. NCDHHS	14 DHR 07992	04/17/15	
Hanna Lawrence v. DHHS	14 DHR 08026	01/09/15	
CMS Agency Inc. v. NC DHHS and Eastpointe human Services LME/PHP	14 DHR 08147	10/30/15	30:12 NCR 1351
Sharda R Wilkes v. NCDHHS, Division of Health Service Regulation	14 DHR 08575	01/21/15	
Sandy's Playschool LLC, Michelle Bailey-Motley v. DHHS, Division of Child Development	14 DHR 08580	02/16/15	
Alicia Staton v. Department of Health and Human Services	14 DHR 08589	02/02/15	
Tiffany Leary v. NCDHHS, Division of Health Services, Health Care Personnel Registry	14 DHR 08785	01/06/15	
Patrician Shearin v. NCDHHS	14 DHR 09012	06/29/15	
Milton's Manor, Hermenia Milton and Milton's Manor #2, Hermenia Milton v. Emery E. Milliken, General counsel, Department of Health and Human Services	14 DHR 09385	04/15/16	
Milton's Manor, Hermenia Milton and Milton's Manor #2, Hermenia Milton v. Emery E. Milliken, General counsel, Department of Health and Human Services	14 DHR 09387	04/15/16	
Milton's Manor, Hermenia Milton and Milton's Manor #2, Hermenia Milton v. Emery E. Milliken, General counsel, Department of Health and Human Services	14 DHR 09389	04/15/16	
Mr. Imad Sider, EMSS Inc d/b/a New Bern Minimart v. NC Department of Health and Human Services, Division of Public Health	14 DHR 09906	07/28/15	30:08 NCR 950
Tomika Jones Moore v. NCDHHS, Division of Health Service Regulation	14 DHR 10137	04/06/15	
Jones Country Mart, Inesar M Ahmad v. NCDHHS, WIC	14 DHR 10138	02/03/15	
Theresa L Greene v. DHHS, Division of Health Service Regulation	14 DHR 10160	02/10/15	
Jeanette Peele v. Health Care Personnel Registry, Nurse Aide I	14 DHR 10162	05/18/15	
The Janice Mae Hawkins Foundation Inc, Sheryl A Lyons v. DHHS, Division of Health Service Regulation, Mental Health Licensure and Certification	14 DHR 10167	04/27/15	
The Janice Mae Hawkins Foundation Inc, Sheryl A Lyons v. DHHS, Division of Health Service Regulation, Mental Health Licensure and Certification	14 DHR 10171	04/27/15	

**CONTESTED CASE DECISIONS**

Shawn Williams v. Rutherford-Polk-McDowell District Health Department, Environmental Health Division	14 DHR 10277	08/21/15	
Sarah M Carr, Agape v. Division of Child Development and Early Learning in DHHS	14 DHR 10278	08/28/15	
Sophia B Pierce and Associates d/b/a Sunny Acres Group Home v. DHHS, Division of Facility Services, Mental Health Licensure and Certification Section	14 DHR 10281	04/02/15	
Freida M. Butler v. DHHS, Division of Health Service Regulation	15 DHR 00009	05/12/15	
Kandice T. Stigger v. DHHS, Division of Health Service Regulation	15 DHR 00271	05/15/15	
Milton's Manor, Hermenia Milton and Milton's Manor #2, Hermenia Milton v. Emery E. Milliken, General counsel, Department of Health and Human Services	15 DHR 00385	04/15/16	
Milton's Manor, Hermenia Milton and Milton's Manor #2, Hermenia Milton v. Emery E. Milliken, General counsel, Department of Health and Human Services	15 DHR 00386	04/15/16	
Mildred R. Walker v. DHHS, Division of Health Service Regulation	15 DHR 00390	05/21/15	
The Janice Mae Hawkins Foundation Inc, Sheryl A Lyons v. DHHS, Division of Health Service Regulation, Mental Health Licensure and Certification	15 DHR 00462	04/27/15	
Phyllis Bryant Duren v. NCDHHS	15 DHR 00578	04/01/15	
New Life Child Care Ctr, Ruby McKinzie v. DHHS, Division of Public Health	15 DHR 00667	03/20/15	
Brown Therapeutic Home Inc. v. DHHS, Division of Health Service Regulation	15 DHR 00707	03/25/15	
Christina Renee Jones v. DHHS, Division of Health Service Regulation	15 DHR 00845	04/30/15	
Samerian Lynn Davis v. Victorian Senior Care, DHHS, DHSR, Health Care Personnel Registry	15 DHR 00991	05/27/15	
Jean's Rest Home Inc., Lula J. McDonald v. DHHS, Division of Health Service Regulation, ACLS Jan Brickley	15 DHR 01123	06/26/15	
Crystal Watson Sanjak v. DHHS, Health Care Personnel Registry	15 DHR 01152	04/29/15	
H. Urquiza Corp., La Esmeralda 2, Hermilo Urquiza v. DHHS, Division of Public Health, WIC	15 DHR 01193	05/22/15	
Donna Lewis v. DHHS, Division of Health Service Regulation	15 DHR 01205	08/07/15	
Tiny Hands of Hope Daye, Felecia Fuller v. DHHS, Division of Child Development and Early Education	15 DHR 01354	05/29/15	
Bridgette Squires v. DHHS, Health Service Regulation	15 DHR 01471	04/08/15	
Strategic Interventions, Inc. v. Smoky Mountain Center Area Authority LME/MCO	15 DHR 01519	08/26/15	30:13 NCR 1435
Gentlehands of North Carolina Inc. John O. Okonji v. DHHS	15 DHR 01546	07/01/15	
Annie Beatrice Christian v. DHHS, Division of Health Service Regulation	15 DHR 01566	06/17/15	
Barbara Combs v. Julian F. Keith ADATC, Division of Mental Health Developmental	15 DHR 01570	05/12/15	
Sharon Renee Quick v. DHHS	15 DHR 01830	06/22/15	
Melissa Ann Peaden v. DHHS, Division of Health Service Regulation	15 DHR 01832	06/03/15	
Ray D. McGee v. DHHS	15 DHR 01906	05/22/15	
Kenneth Grimes v. NC Asbestos Hazard Management Program	15 DHR 01975	07/01/15	
Henry and Barbara Brown and Quality Professional Multiservices LLC v. DHHS, Division of Health Service Regulation	15 DHR 02306	07/01/15	
Daniel Tafesse v. DHHS, Division of Health Service Regulation	15 DHR 02582	06/25/15	
Dr. Najla Ahmed, Pediatric Associates of Cleveland County v. DHHS, Division of Medical Assistance	15 DHR 02635	06/09/15	
Coy and Shelby Miller v. Appalachain District Health Department	15 DHR 02731	03/30/16	30:23 NCR 2500
Michael Darnelle South v. DHHS	15 DHR 02770	06/19/15	
Gemika Steele, First Steps Child Development v. Division of Child Development and Early Education of Health and Human Services	15 DHR 02905	07/09/15	
Sandra Kay Laney Stewart v. Medicaid Estate Recovery, Glana M Surles	15 DHR 03057	07/23/15	
Special K Enrichment and Melanie James v. Partners Behavioral Health Management	15 DHR 03194	08/19/15	
Fredricklyn E. Johnson v. Division of Child Development and Early Education	15 DHR 03217	07/17/15	
Stop-N-Drop Academic Charlotte McLean v. NCDCCDEE	15 DHR 03243	07/17/15	
Cynthia Jones v. Onslow County Department of Social Services, Elaine Lacy, Danielle Kurman	15 DHR 03345	07/31/15	
Christian Prep Academy Inc., Pamela Powell v. DHHS, Division of Public Health, Child and Adult Care Food Program	15 DHR 03347	06/19/15	
Hernando Felix Sanchez Claudia Perales, LA Superior Supermarket v. Department of Health and Human Services Division	15 DHR 03374	07/16/15	
Seon M. Oh, Express international Trading Inc. d/b/a Southside Fish and Grocery V. Nutrition Services, WIC Program, DHHS	15 DHR 03419	07/16/15	
Roshanda McClure v. DHHS, Division of Health Service Regulation	15 DHR 03477	07/17/15	
Tangy Nance v. DHHS	15 DHR 03479	07/01/15	
Emmanuel Baptist Ministries Inc., Debbie Hildreth and Sandy Tarlton v. DHHS, Division of Public Health, CACFP-Program	15 DHR 03562	07/01/15	
Pamela McNeil v. NC Center for Aide Regulation and Education	15 DHR 03570	07/20/15	
Desteni Akira Lucas v. DHHS, Division of Health Service Regulation	15 DHR 03605	07/30/15	

**CONTESTED CASE DECISIONS**

Zakkee Hill Sr. v. DHHS	15 DHR 03739	06/25/15
Donil Marchil Warren v. DHHS, Division of Health Service Regulation	15 DHR 04251	09/16/15
Jehnston Health Pamela L. Pflaum v. DHHS-Hearing Office	15 DHR 04253	08/13/15
Elite Home Health Care Inc. c/o Tara Ellerbe v. NC DHHS	15 DHR 04328	10/30/15
Patrice M. Harris-Powell NC Healthcare Personnel, NC Nurse Aide Registry	15 DHR 04353	08/18/15
Marleen Monique Ore v. DHHS, Division of Child Development and Early Education	15 DHR 04421	08/31/15
Marleen Monique Ore v. Beaufort County Department of Social Services	15 DHR 04423	08/10/15
Hasson Omar Dawkins v. DHHS, Health Service Regulation	15 DHR 04459	09/28/15
Jennifer R. Lewis, Executive Director of Youth Focus Inc. MHL #041-631 v. DHHS, Division of Health Service Regulation, Mental Health Licensure and Certification	15 DHR 04515	09/22/15
Onass Place Inc, Onas Perry v. Smoky Mountain LME/MCO and NC DHHS, Division of Medical Assistance	15 DHR 04658	10/07/15
Onass Place Inc, Onas Perry v. Smoky Mountain LME/MCO and NC DHHS, Division of Medical Assistance	15 DHR 04659	10/07/15
Margaret Jumper v. Medicaid State Recovery	15 DHR 04780	09/01/15
L.I.M.S. MHL #013-176, Sharon Edwards-Berryman v. DHHS, Mental Health Licensure and Certification Section	15 DHR 04842	09/09/15
Kristin N. Kaul, MS LPS (Partner at Albemarle Counseling Group, PLLC)	15 DHR 04881	09/15/15
Gemini Johnson v. East Carolina Behavioral Health (N.K.A Trillium Health Resources)	15 DHR 04882	09/15/15
James E. Kronlage v. East Carolina Behavioral Health (N.K.A. Trillium Health Resources)	15 DHR 04883	09/15/15
Dorothy H. Rosenke v. East Carolina Behavioral Health (N.K.A Trillium Health Resources)	15 DHR 04884	09/15/15
Hilary K. Hunsberger, MSW LCSW (Partner at Albemarle Counseling Group, PLLC) v. East Carolina Behavioral Health	15 DHR 04885	09/15/15
David G. Webb v. DHHS, Office of the Controller	15 DHR 04886	09/24/15
Treasures of Joy, Patricia S. Stinson v. DHHS, Division of Child Development and Early Education	15 DHR 05112	09/24/15
Carolina Community Ventures Inc., Gina Bell	15 DHR 05214	12/03/15
Lawanda D. Bland v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry	15 DHR 05218	10/26/15
Landmark Assisted Living LLC, Licensee D/B/A Grayson Creek of Welcome	15 DHR 05293	10/22/15
Candii Homes, Rosalina Teel v. Eastpointe	15 DHR 05598	10/08/15
Carolyn Rhone v. NC DHHS, Division of Health Service Regulation	15 DHR 05601	10/30/15
Venus I Pitts, Premiere Health and Wellness v. DHHS	15 DHR 05709	03/03/16
Johnny Dale Hooks, Sr. v. NC Department of Health and Human Services	15 DHR 05783	12/02/15
Carolyn Pritchett v. DHHS	15 DHR 06086	12/30/15
Nancy Peace v. NC DHHS, Division of Child Development and Early Education	15 DHR 06231	12/31/15
Linda Maness Garner v. NC DHHS, Division of Child Development and Early Education	15 DHR 06621	12/16/15
Delaine Manly v. NC DHHS, Division of Health Service Regulation, Health Care Personnel Registry Section	15 DHR 06679	10/29/15
Brittany Easton v. Health Care Personnel Registry	15 DHR 06727	10/28/15
Blessing E. Anyebe v. NC DHHS, Division of Health Care Regulation, Health Care Personnel Registry Section	15 DHR 06853	12/15/15
My Lil Friends Childcare (Ashley Slaght Gage) v. NC DHHS	15 DHR 07298	02/17/16
Joan Marjorie Webb v. NC DHHS, Division of Health Service Regulation	15 DHR 07340	03/30/16
Tiffany Bullock v. NC Department of Health and Human Services	15 DHR 07468	02/03/16
Memaw's Lovin Care, Linda W Riddick v. Division of Child Development And Early Education, DHHS	15 DHR 07698	02/25/16
Theresa Curry, Blessings Within Daycare v. Division of Child Development and Early Education, DHHS	15 DHR 07845	03/29/16
Cecilia Nwauche, Healthcare Institute of Charlotte LLC v. Public Consulting Group (PCG) for NC DMA/DHHS	15 DHR 07943	03/29/16
Laura Yvette Hardison v. DHHS, Division of Health Service Regulation	15 DHR 07973	12/11/15
Jackie Mburu, Administrator, Nana's Touch FCH v. DHHS Division of Health Service Regulation, Adult Care Licensure Section, Megan Lamphere, Chief	15 DHR 08056	02/22/16
A Brighter Day Group Home Shannon Hairston v. NCDHSR Mental Health Licensure	15 DHR 08227	02/23/16
Elite Home Health Care Inc C/O Tara Ellerbe v. NC Health and Human Services Hearing Office	15 DHR 08229	02/18/16
Sylvia Noel v. Division of Child Development and Early Education	15 DHR 08230	03/10/16
Rebecca Keith v. Health Care Registry	15 DHR 08280	02/22/16
Courtney Noah Hall v. NC DHHS, Division of Health Service Regulation	15 DHR 08611	02/09/16
Felecia Fuller v. Division of Child Dev and Early Education	15 DHR 08892	03/11/16
Felicia Thompson v. NC DHHS, Division of Health Service Regulation	15 DHR 10005	03/18/16
Montgomery Food Inc DBA Food King Bryan Dozier	15 DHR 10008	02/29/16
Sugar and Spice Child Enrichment Center Inc v. NC DHHS, Division of Public Health, Child and Adult Care Food Program	15 DHR 10088	02/01/16

**CONTESTED CASE DECISIONS**

Reality Counseling v. Eastpointe Mental Health	15 DHR 10195	04/19/16	
Dwight M. Barker v. NC DHHS, Division of Health Service Regulation, Health Care Personnel Registry	15 DHR 10267	04/26/16	
Waymond Jenerette v. NC DHHS, Division of Health Services Regulation	16 DHR 00237	03/29/16	
The 4C Company of NC LLC v. Department of Health and Human Services	16 DHR 00535	04/26/16	
Independent Opportunities Inc. v. DHHS, Division of Health Service Regulation Mental Health Licensure and Certification	16 DHR 00547	04/15/16	
Imaging Systems of the Carolina Ly Stroupe v. Office of Administrative Hearings	16 DHR 00886	04/26/16	
Ori Elekwachi v. DHHS, Division of Health Service Regulation	16 DHR 01754	04/07/16	
<b><u>DEPARTMENT OF JUSTICE</u></b>			
Thomas Eliza Anderson v. Private Protective Services Board	11 DOJ 10367	06/24/14	
Daniel Joseph Steele v. NC Private Protective Services Board	13 DOJ 03346	06/29/15	30:07 NCR 838
Ronnie Earl Smith Jr. v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 04114	04/09/15	30:02 NCR 243
Aisha Christina Burston v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 04118	01/13/15	
Susan Maney v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 05067	04/14/15	30:02 NCR 252
Dewayne Rosean Ward v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 05116	05/16/15	
Tobias La'Trell Clagon v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 05117	07/01/15	
Arthur Randall Griffin v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 05118	04/27/15	
Rachel Elisabeth Hoffman v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 05502	03/11/15	30:04 NCR 513
Rayburn Darrell Rowe v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 05503	04/20/15	30:06 NCR 692
Robert Boyce Sherrill Jr. v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 05504	03/04/15	
Billy Vance Waldroup v. NC Sheriff's Education and Training Standards Commission	14 DOJ 07718	08/24/15	30:08 NCR 958
Michelle Wiggins Morings v. NC Sheriff's Education and Training Standards Commission	14 DOJ 07719	03/17/15	
Timothy McCoy Rogers v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 07923	10/07/15	
Billy Ray Bureson v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 07924	07/28/15	30:09 NCR 1034
Darin Clay Whitaker v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 07925	06/12/15	
Sandy Hargrove Cowan v. NC Sheriffs' Education and Training Standards Commission	14 DOJ 07927	08/19/15	
Ahmad Malik Lance v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 08050	01/27/15	
Christopher J. Weaver v. NC Criminal Justice Education and Training Standards Commission	14 DOJ 08146	09/01/15	
Bobby Andrew Boudreau v. NC Private Protective Services Board	14 DOJ 08155	12/19/14	
Catherine Denise Netter v. NC Sheriff's Education and Training Standards Commission	14 DOJ 08257	07/09/15	
Carol Bernice Manning v. NC Sheriffs' Education and Training Standards Commission	14 DOJ 08258	08/17/15	30:12 NCR 1365
Waseen Abdul-Haqq v. NC Sheriff's Education and Training Standards Commission	14 DOJ 08259	07/21/15	30:06 NCR 699
Donald Earl Schwab v. NC Sheriff's Education and Training Standards Commission	14 DOJ 08347	05/28/15	30:04 NCR 518
Brandon Tyler Josey v. NC Sheriff's Education and Training Standards Commission	14 DOJ 08348	08/08/15	30:09 NCR 1040
Kia Rena Graham v. NC Private Protective Services Board	14 DOJ 08582	01/28/15	
Steven Joseph O'Byrne v. NC Sheriffs' Education and Training Standards Commission	14 DOJ 09954	08/13/15	30:12 NCR 1370
Samuel Jason Bradley v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 00051	03/25/15	
Martin Luther Locklear v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 00052	06/05/15	30:05 NCR 580
Shenikwa Janay Barefield v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 00053	10/15/15	30:13 NCR 1451
Michael Allen Strickland v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 00054	05/07/15	
Ronald Corbett Jr. v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 00055	05/04/15	30:05 NCR 587
Michael Glenn Davis v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 00211	09/11/15	30:13 NCR 1457
Rodrigo Estanol v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 00212	08/03/15	30:13 NCR 1466
George Allen Woodcock v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 00213	04/28/15	
Defferson Luvontae Graham v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 00214	07/17/15	30:10 NCR 1181
Edward Holley v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 00215	07/16/15	30:10 NCR 1186
Christopher Paul Abner v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 00216	08/17/15	30:10 NCR 1194
Kenneth Sinatra Whittington Jr. v. NC Sheriffs' Education and Training Standards Commission	15 DOJ 00388	06/30/15	

**CONTESTED CASE DECISIONS**

Billy-Dee Greenwood v. NC Private Protective Services Board	15 DOJ 00520	06/02/15	30:07 NCR 833
Kendrix Lavel Mace v. NC Private Protective Services Board	15 DOJ 00708	06/04/15	
Donald Lee Lucas v. NC Sheriffs' Education and Training Standards Commission	15 DOJ 01031	09/16/15	
Jose Antonio Perez III v. NC Sheriffs' Education and Training Standards Commission	15 DOJ 01032	11/23/15	30:15 NCR 1694
John Charles Lavergne Jr. v. NC Sheriffs' Education and Training Standards Commission	15 DOJ 01033	07/22/15	
Tod Leslie Bonello v. NC Sheriffs' Education and Training Standards Commission	15 DOJ 01107	08/03/15	
Harfel Clementa Davis v. NC Sheriffs' Education and Training Standards Commission	15 DOJ 01533	08/05/15	30:13 NCR 1478
Shavonne Tawanna Collins v. NC Sheriffs' Education and Training Standards Commission	15 DOJ 01535	07/07/15	
Joseph Larry Wyatt v. NC Sheriff's Education and Training Standards Commission	15 DOJ 01536	02/02/16	30:21 NCR 2317
Inah Latonna York v. NC Sheriffs' Education and Training Standards Commission	15 DOJ 01537	05/26/15	
Clonzie Lee Nealy Jr. v. NC Sheriffs' Education and Training Standards Commission	15 DOJ 01539	07/22/15	
Sheila Lauvedia Banks v. NC Sheriffs' Education and Training Standards Commission	15 DOJ 01542	05/26/15	
Rion Neil Ferguson v. NC Sheriffs' Education and Training Standards Commission	15 DOJ 01543	07/13/15	
James Alvin Hunt v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 02028	08/19/15	
Joseph Thomas Burris v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 02029	10/01/15	30:11 NCR 1241
Hugh George Luster v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 02530	08/18/15	
Roger Lee Inge Jr. v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 02534	10/22/15	
Matthew John Steeno v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 02691	08/07/15	
Andre Deshaud Pickens v. NC Private Protective Services Board	15 DOJ 02730	06/19/15	30:10 NCR 1202
William Micah Jernigan v. NC Sheriffs' Education and Training Standards Commission	15 DOJ 02958	07/23/15	
Brianna Coneese Billups v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 03111	10/26/15	
Donnelle Farrar v. NC Private Protective Services Board	15 DOJ 03448	08/27/15	30:10 NCR 1206
Ashley Bryant Helms v. NC Sheriffs' Education and Training Standards Commission	15 DOJ 03885	11/13/15	30:15 NCR 1700
Nathaniel Shayne Hobbs v. NC Sheriffs' Education and Training Standards Commission	15 DOJ 03886	01/21/16	
Rae Marie Bishop v. NC Sheriffs' Education and Training Standards Commission	15 DOJ 03888	10/13/15	
John Paul Melki v. NC Private Protective Services Board	15 DOJ 03983	10/01/15	
Matthew Dixon Lawhorn v. NC Sheriffs' Education Training Standards Commission	15 DOJ 03987	11/24/15	
Brandon Lee Hargrave Sr. v. NC Alarm Systems Licensing Board	15 DOJ 04292	07/30/15	
Michael Ross Pitchford v. NC Private Protective Services Board	15 DOJ 04293	09/25/15	
Frank Shipley Heberer v. NC Alarm Systems	15 DOJ 04294	08/04/15	30:11 NCR 1249
Stanley Colt Robbins v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 04637	02/01/16	30:20 NCR 2190
Michael L. Thompson v. NC Private Protective Services Board	15 DOJ 04661	09/18/15	
Alecia Catherine Nolan v. NC Private Protective Services Board	15 DOJ 04662	09/18/15	30:23 NCR 2513
Samer Muneer Al-Russan v. NC Private Protective Services Board	15 DOJ 04663	09/18/15	
William Elmore Burwell Jr. v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 04849	01/19/16	30:18 NCR 2010
Larry Thompson v. NC Sheriffs' and Training Standards Commission	15 DOJ 05259	02/04/16	
Timothy T.J. Conterras v. NC Private Protective Services Board	15 DOJ 05300	09/30/15	30:11 NCR 1254
Greg Wayne Galloway v. Criminal Justice Education and Training Standards Commission	15 DOJ 05370	02/03/16	30:20 NCR 2198
Timothy Arnold Ruffin v. Crminal Justice Education and Training Standards Commission	15 DOJ 05371	02/26/16	30:20 NCR 2207
Phillip Joel Trivette v. NC Sheriffs' Education and Training Standards Commission	15 DOJ 05546	01/13/16	30:18 NCR 2016
Walter Thaltan Graham v. NC Sheriffs' Education and Training Standards Commission	15 DOJ 05547	01/25/16	
David Wayne Holland v. NC Private Protective Services Board	15 DOJ 05712	09/18/15	
Travis Lee Richmond v. NC Sheriffs' Education and Training Standards Commission	15 DOJ 05790	11/02/15	
Steven Voyed Warr v. NC Sheriffs' Education and Training Standards Commission	15 DOJ 05791	02/18/16	
Richard Waverly Merritt v. NC Private Protective Services Board	15 DOJ 05829	12/01/15	
Tracey Renee Thorpe v. NC Private Protective Services Board	15 DOJ 05830	12/01/15	
Justin Charles Guffey v. NC Private Protective Services Board	15 DOJ 05832	12/08/15	
Weston Jerome Samuels v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 06037	02/19/16	
Joseph Mark Karaszewski v. NC Private Protective Services Board	15 DOJ 06328	02/19/16	
Randy Orlanda Williams Sr v. NC Private Protective Services Board	15 DOJ 06491	01/26/16	
Ushica Lee Burns v. NC Private Protective Services Board	15 DOJ 06492	01/27/16	
Scott Christopher Baucom v. NC Private Protective Services Board	15 DOJ 07051	01/26/16	30:18 NCR 2021
Bryan Keith Epps v. Criminal Justice Education and Training Standards Commission	15 DOJ 07443	02/02/16	30:20 NCR 2214
William Dale Aaronson v. NC Criminal Justice Education and Training Standards Commission	15 DOJ 07779	02/05/16	
James William Banks v. NC Sheriffs' Education and Training Standards Commission	15 DOJ 07802	03/22/16	
Tommy Lee Hudson v. NC Private Protective Services Board	15 DOJ 08234	02/04/16	
Sherman Lamonte Meekins v. NC Sheriffs' Education and Training Standards Commission	15 DOJ 08605	02/26/16	
David Antonio Bowman v. NC Alarm Systems Licensing Board	15 DOJ 08970	02/02/16	
Stacy Elmer Guthrie v. NC Private Protective Services Board	15 DOJ 09270	02/22/16	
Gary Dean Brooks v. NC Private Protective Services Board	15 DOJ 09336	02/01/16	
Dexter Mandel Carney v. NC Private Protective Services Board	15 DOJ 09380	02/19/16	

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**CONTESTED CASE DECISIONS**

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Jeremy Edward Guzman v. NC Private Protective Services Board	15 DOJ 10212	04/29/16	
Duane G. Eldreth v. NC Alarm Services Licensing Board	16 DOJ 01284	04/26/16	
Donald Ray Parham v. NC Sheriffs' Education and Training Standards Commission	16 DOJ 01539	04/29/16	
<b><u>DEPARTMENT OF LABOR</u></b>			
Southern Hospitality Home Care LLC, Shiela Robinson v. NC Dept of Labor ID 95008	15 DOL 08363	02/22/16	
Southern Hospitality Home Care LLC, Shiela Robinson v. NC Dept of Labor ID 94705	15 DOL 08364	02/24/16	
<b><u>DEPARTMENT OF TRANSPORTATION</u></b>			
Barnhill Contracting Co. Inc v. Department of Transportation, Division of Highways	12 DOT 04647	02/03/15	
Arturo Barcena v. NC Quick Pass	15 DOT 07492	02/02/16	
Jared Burl Howard v. NC Department of Transportation, Division of Motor Vehicles	16 DOT 01855	04/07/16	
<b><u>DIVISION OF EMPLOYMENT SECURITY</u></b>			
Kendra Marie Halsey v. Elizabeth City State University	14 DSC 09486	03/17/15	
Ruby Anne Beck v. NC Department of Public Safety	15 DSC 01652	06/02/15	
<b><u>DEPARTMENT OF STATE TREASURER</u></b>			
Stephanie T. Treio v. NC Department of State Treasurer	14 DST 06380	05/08/15	30:04 NCR 531
Candace Collins v. NC Retirement Agency	14 DST 06428	12/02/14	
Lloyd McRae Herring v. NC Department of State Treasurer Retirement Systems Division	14 DST 06724	01/20/15	
Trina Parker v. State of NC Department Treasurer Retirement Division Disability Section	14 DST 06732	02/16/15	
James R. Trotter v. State Treasurer, State Retirement Systems Division	14 DST 10143	10/26/15	
Jesus Lopez Jr. v. Department of State Treasurer Retirement	15 DST 00387	02/17/16	30:21 NCR 2325
Revonda E. Nance v. NC Department of State Treasurer Retirement Systems	15 DST 01151	05/27/15	
Selyna Deshazo v. NC Retirement System Disability Section	15 DST 03060	08/20/15	
Holly Ann Bowers v. Disability Retirement Systems Division, Garry Austin	15 DST 05827	10/01/15	
<b><u>STATE BOARD OF EDUCATION</u></b>			
TPS Publishing Inc. v. NC State Board of Education	14 EDC 07610	10/22/15	30:12 NCR 1376
McGraw-Hill School Education LLC v. NC State Board of Education; Textbook Commission; and Department of Public Instruction	14 EDC 08481	11/23/15	30:15 NCR 1673
Danny Lorenzo Scott v. Public Schools of NC, Department of Public Instruction	14 EDC 09883	07/10/15	30:06 NCR 705
Sherry-Lynn Amaral v. DPI NC Financial Licensure and Business Services Licensure Section	14 EDC 10060	10/07/15	30:12 NCR 1395
Allison Rascoe v. NC State Board of Education	15 EDC 00272	08/28/15	30:14 NCR 1580
Partnership Achieving Community Education "PACE" Academy v. NC State Board of Education	15 EDC 03643	08/13/15	30:14 NCR 1586
Timothy M. Maghran v. Department of Public Instruction	15 EDC 05550	11/05/15	
<b><u>DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES</u></b>			
Alcoa Power Generating Inc. v. Division of Water Resources, DENR	13 EHR 18085	05/29/15	30:03 NCR 402
Bannor Michael Macgregor v. Durham County Department of Health, Environmental Health Division	14 EHR 02900	04/13/15	
Brian T Jackson, Rosemary Jackson v. NCDHHS, Environmental Health Section, Doug Mevey and/or Harry Lewis	14 EHR 02843	01/13/15	
David Frank Crisp v. NC Department of Environment and Natural Resources	14 EHR 03870	08/14/15	30:09 NCR 1046
Garrett Adam Couick v. Cabarrus County Health Alliance	14 EHR 07603	07/24/15	
John J. Woodard Jr. v. NC Department of Environment and Natural Resources, Division of Energy, Mineral, and Land Resources	15 EHR 03522	08/20/15	
Premier Builders and Development Co. Inc. Petitioner v. NC Department of Environment and Natural Resources	15 EHR 03567	08/17/15	
Next Generation Academy Inc, v. NC State Board of Education	15 EDC 04160	03/04/16	30:23 NCR 2516
Devang Patel v. Buncombe County Environmental Health	15 EHR 07576	04/24/16	
<b><u>DEPARTMENT OF INSURANCE</u></b>			
Thelma Grant POA Marilyn Howard v. State Health Plan for Teachers and State Employees	13 INS 20396	05/22/15	

**CONTESTED CASE DECISIONS**

Kristin Jean Wilkinson v. State Health Plan for Teachers and State Employees	14 INS 04418	09/01/15	
Angela Joyner-Perry v. NC State Health Plan for Teachers and State Employees Retirement System	15 INS 00208	05/13/15	
Kathy Fields v. NC State Health Plan	15 INS 00799	12/02/15	30:18 NCR 2025
Stacy M. Warner v. NC State Health Plan	15 INS 00833	07/31/15	30:11 NCR 1258
Tiece M. Ruffin v. NC State Health Plan	15 INS 03371	07/20/15	
NC Code Officials Qualification Board v. Christian M Noles	15 INS 06682	01/29/16	
Kristen Jean Wilkinson v. NC State Health Plan, Blue Cross and Blue Shield of NC	15 INS 06986	12/30/15	
<b><u>BOARD OF LICENSED PROFESSIONAL COUNSELORS</u></b>			
Beth Ford v. NC LPC Board	14 LPC 05203	08/01/14	
Beth Ford v. NC Board of Licensed Professional Counselors	14 LPC 07355	05/20/15	
<b><u>MISCELLANEOUS</u></b>			
Thomas Charles Fogarty v. Town of Maggie Valley	13 MIS 19252	01/14/14	
Jeanne McIntosh v. NC Medical Board	14 MIS 05206	09/30/14	
Tornello Faontaine: Pierce the Tribe of El and/or Bey Living Soul and Citizen of the Most High Adonai in Care of Postal Department 49308, Greensboro, NC Non-Domestic	14 MIS 08305	02/19/15	
Dennis Goodson v. Office of Administrative Hearings	14 MIS 10144	02/19/15	
Larsen Pant v. Charlotte Mecklenburg Police Department	15 MIS 05219	10/30/15	
Gloria Caudle v. Town of Enfield	15 MIS 05295	12/02/15	30:18 NCR 2030
<b><u>OFFICE OF STATE HUMAN RESOURCES (formerly OFFICE OF STATE PERSONNEL)</u></b>			
Linda Huggins v. Department of Administration, NC Human Relations Commission	08 OSP 01153	01/23/15	
Lauren Wilson Burch v. NC Alcohol Law Enforcement	12 OSP 08548	04/14/15	30:06 NCR 0681
Deni Crawley v. NCDPS Foothills Correctional Institution	13 OSP 11438	04/28/15	30:01 NCR 62
Sue Michaud v. Kieran Shanahan; Mikael R Gross, Department of Public Safety	13 OSP 14194	08/14/14	
Sue Michaud v. Kieran Shanahan; Mikael R Gross, Department of Public Safety	13 OSP 14195	08/14/14	
Willie Joyce Partin v. DOT, Division of Motor Vehicles, Traffic Records, Crash Report Unit	13 OSP 17728	12/04/13	
Deni Crawley v. NCDPS Foothills Correctional Institution	13 OSP 19135	04/28/15	30:01 NCR 62
Steven Dolinski v. NC Department of Public Safety	14 OSP 01047	02/16/15	
Freddie Wayne Huff II v. NC Department of Public Safety	14 OSP 03402	02/16/15	
Monica Bullard v. NC Department of Public Safety	14 OSP 04724	03/18/15	
Kenneth M. Lloyd Jr. v. State of NC Department of Transportation	14 OSP 05708	01/15/15	
Millie E. Hershner v. NC Department of Administration	14 OSP 06051	10/02/14	
Matthew Lennon v. NC Department of Justice and NC Department of Public Safety	14 OSP 06377	02/16/15	
Oshun G. Williams v. NCDOT Division #5	14 OSP 06561	01/22/15	
Estate of Todd McCracken v. Department of Revenue	14 OSP 07170	08/24/15	30:09 NCR 1076
Clara Rogers v. NC Department of Public Safety/Community Corrections Boyce Fortner, 4 <sup>th</sup> Judicial Division Administrator, Karey Treadway, Asst. Judicial Division Administrator, Kevin Miller, Judicial District Manager District 25	14 OSP 07799	01/14/15	
Raymond Gene Gonzales v. NCDHHS, Division of Vocational Rehabilitation Services	14 OSP 07804	02/27/15	30:04 NCR 534
Joseph Tenhagen v. NC Department of Public Safety, Employee Advisory Committee	14 OSP 07837	03/23/15	30:05 NCR 571
Dr. Tatiana A. Tagirova v. Elizabeth City State University	14 OSP 07929	03/05/15	
Machelle Hamilton v. Caswell Center, Department of Health and Human Services	14 OSP 08082	01/13/15	
Gail Ann Hagen v. Partners Behavioral Health Management	14 OSP 08303	01/21/15	
William Frank Strickland v. NC Department of Health and Human Services	14 OSP 09484	03/17/15	
Teresa Hayes v. University of North Carolina Chapel Hill School of Dentistry	14 OSP 09689	02/12/15	
Stephen Dale Brown v. NC State University	14 OSP 09759	06/25/15	30:07 NCR 812
Zoila Brock v. Nanette Outlaw, Director Duplin County Social Services	14 OSP 10048	04/17/15	30:06 NCR 711
Benham Aryafar V. North Carolina State Board of Community Colleges/South Piedmont Community College	14 OSP 10059	02/19/15	
Robert Jarmon v. North Carolina Central University	14 OSP 10276	06/09/15	
Zeenalyn P. Williams v. NCDHHS, Central Regional Hospital	15 OSP 00006	07/17/15	
Karimah Michelle Bennett v. North Carolina Central University	15 OSP 00470	04/29/15	
Chandra Edwards v. Chapel Hill-Carrboro City Schools	15 OSP 00579	04/01/15	

**CONTESTED CASE DECISIONS**

Denise Brooks v. Polk Correctional Institution	15 OSP 00949	05/18/15	
Joevelyn Heard-Leak v. NC State University Center for Urban Affairs	15 OSP 01091	08/31/15	30:15 NCR 1708
Ronnie Evans v. Angela Tarantini, Department of Correction	15 OSP 01232	07/30/15	
Edward Little v. NC Department of Public Safety	15 OSP 01203	09/04/15	30:21 NCR 2329
Waldo Fenner v. John Unstead Hospital/RJ Blackley Alcohol and Drug Abuse Treatment Center (ADATC)	15 OSP 01648	05/21/15	
Barbara Smith-Lide b. NC Department of Public Safety	15 OSP 01737	12/03/15	
Samuel Avery Furlow v. NC Department of Public Safety, Polk Correctional Institution	15 OSP 02299	09/09/15	30:15 NCR 1712
Savvas Georgiades v. University of North Carolina at Pembroke-Department of Human Resources	15 OSP 02473	09/22/15	
Kimberly A. Sutton v. NC Department of Public Safety, Division of Adult Correction and Juvenile Justice	15 OSP 02512	07/28/15	
Charles L. Simpson Jr. v. North Carolina Central University	15 OSP 02606	03/29/16	30:23 NCR 2531
Kesselly Jahneh Kasiah Sr. v. Guilford County Schools, Shirley Morrission	15 OSP 02826	08/28/15	
Leah Scheuerell v. Harnett Correctional Facility and Raleigh Regional Office	15 OSP 03150	07/14/15	
Samantha Davis v. Caswell Center	15 OSP 03254	07/15/15	
Donald P. Morrison, II v. NC Department of Public Safety/Division of Adult Correction/Harnett Correction Institution	15 OSP 04351	09/08/15	
Michael Glenn Davis v. NC Department of Public Safety, Adult Correction and Juvenile Justice	15 OSP 04607	09/24/15	
Johnnie M Darden Sr. v. Department of Public Safety	15 OSP 05439	12/31/15	
Joyce Lee v. Orange County Department of Social Services	15 OSP 05710	02/09/16	30:21 NCR 2339
Randall Cole v. NC Department of Public Safety	15 OSP 05867	02/09/16	30:21 NCR 2358
John Gomes v. Winston Salem State University	15 OSP 06084	01/27/16	30:19 NCR 2123
Teresa Hayes v. The University of North Carolina Chapel Hill School of Dentistry	15 OSP 06124	11/24/15	
Laketha Latoya Southern v. Robeson County Department of Social Services	15 OSP 06204	03/14/16	30:23 NCR 2547
Jonathan S. Onyenekewe v. NC DHHS, RJ Blackley ADATC	15 OSP 06489	11/10/15	
James Hampton Sr. v. UNC Pembroke	15 OSP 06622	11/20/15	
Ron Hedrington v. Tarheel Challenge Academy (TCA Director Timmons Edward)	15 OSP 07237	12/03/15	
Angela Miles Stephens v. NC Department fo Public Safety	15 OSP 07244	12/02/15	
Christine N. Brewington v. NC Department of Public Safety, State Bureau of Investigation	15 OSP 07614	03/29/16	
April Dawn Johnson v. Broughton Hospital	15 OSP 07723	12/30/15	
Tangee Williams v. NC Department of Public Safety	16 OSP 00474	03/21/16	
Julia Gibbs O'Neal v. County of Hyde and Hyde County Emergency Medical Services	16 OSP 01380	04/18/16	
<b><u>DEPARTMENT OF REVENUE</u></b>			
Donald McPhaul Jr. v. NC Department of Revenue	14 REV 04564	12/05/14	
John David Kimrey Jr. v. NC Department of Revenue	14 REV 04924	07/10/15	
Trumilla L. Howard v. NC Department of Revenue	14 REV 06018	03/09/15	
Ocean Isle Palms, LLC v. NC Department of Revenue	14 REV 08416	02/22/16	
Eagle Point, LLC v. NC Department of Revenue	14 REV 08418	02/22/16	
Coastal Communities at Seawatch, LLC v. NC Department of Revenue	14 REV 08419	02/22/16	
Seawatch at Sunset Harbor, LLC v. NC Department of Revenue	14 REV 08420	02/22/16	
Coastal Communities at Ocean Ridge Plantation, LLC v. Department of Revenue	14 REV 08421	02/22/16	
Rivers Edge Goldf club and Plantation, LLC v. Department of Revenue	14 REV 08422	02/22/16	
Sean Condren v. NC Department of Revenue	14 REV 09184	08/07/15	30:14 NCR 1569
The Pound Cake Company LLC v. NC Department of Revenue	14 REV 09218	04/18/16	
Norman Harvin v. NC Department of Revenue	14 REV 09948	06/19/15	
Cassidy Linker v. NC Department of Revenue	14 REV 09956	02/20/15	
Brenda Wells v. NC Department of Revenue	15 REV 00303	04/13/14	
Jasmine J. Davenport v. NC Department of Revenue	15 REV 00357	05/29/15	
Olethia Davis v. NC Department of Revenue (Lyons Gray, Jerry Coble, Charles H. Helms, Margaret "Beth" Collins, Roderick Anthony Edwards, Thomas "Tommy" Thomas, Joan Kincaid Lawrence)	15 REV 00664	05/12/15	
Forrest Small and Kimberly Mazanec v. Department of Revenue	15 REV 00666	06/23/15	30:11 NCR 1261
Jesse Lee and Kesha Nickerson, v. NC Department of Revenue	15 REV 01088	06/17/15	
Chester L McDowell Sr v. NC Department of Revenue	15 REV 01574	10/06/15	
Cazaly, LLC v. NC Department of Revenue	15 REV 01614	04/07/16	
Michael Park and Yopop South Park LLC. V. NC Department of Revenue	15 REV 02607	07/27/15	
Marva Gillis NC Department of Revenue	15 REV 05754	10/07/15	
Stephane and Natacha Cayatte v. NC Department of Revenue	15 REV 05918	01/05/16	
Mark A Lovely v. NC Department of Revenue	15 REV 06487	01/06/16	

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**CONTESTED CASE DECISIONS**

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Dwayne Lavern Clark v. North Carolina Department of Revenue	15 REV 09752	04/05/16	
Heather Swanner Photography v. NC Department of Revenue	15 REV 10018	03/18/16	
Ellis Jermaine Rodgers v. NC Department of Revenue	16 REV 01544	04/18/16	
<b><u>SUBSTANCE ABUSE PROFESSIONAL PRACTICE BOARD</u></b>			
North Carolina Substance Abuse Professional Practice Board v. John Patrick Craven	14 SAP 05713	01/06/15	
NC Substance Abuse Professional Practice Board v. Keith Edward Green	15 SAP 00750	08/24/15	30:16 NCR 1853
<b><u>OFFICE OF THE SECRETARY OF STATE</u></b>			
Carolyn Marie Aikens v. Secretary of State, Notary Public	13 SOS 15500	11/05/13	
Jamel Byrd-El v. Department of the Secretary of State	14 SOS 06624	01/26/15	
Marvin Ray Sparrow v. Secretary of State	14 SOS 07416	05/05/15	
Sharron Marie Glover v. Ozie Stallworth Director, Notary Certification Enforcement Section and filing Division Department of the NC Secretary of State	14 SOS 07998	01/28/15	
Deborah T. Godfrey v. Secretary of State Notary Division	14 SOS 09902	03/09/15	
John Bradford Pittman v. NC Department of the Secretary of State	15 SOS 02354	10/19/15	
Qadir El Bey, Mesu El Bey, Asas Ashu El Bey, Fatama El Bey v. State of North Carolina Department of Secretary of State	15 SOS 02377	07/21/15	
Rasul Kheshu-Sadiq Bey	15 SOS 03219	08/21/15	
Chena Conroy v. NC Department of the Secretary of State	15 SOS 05173	10/28/15	
Cabell J. Regan v. NC Department of the Secretary of State	15 SOS 06035	02/26/16	
Jason Gold v. NC Department of the Secretary of State; Notary Section	15 SOS 07346	12/03/15	
William Stark McNeer III v. North Carolina Notary Public Commission	15 SOS 10162	03/18/16	
<b><u>UNIVERSITY OF NORTH CAROLINA HOSPITALS</u></b>			
Deloris Young v. University of North Carolina Hospitals	15 UNC 01408	07/06/15	
Barbara Snipes v. University of North Carolina Hospitals	15 UNC 01927	07/16/14	
Deborah H. Justice v. University of North Carolina Hospitals	15 UNC 02347	05/21/15	
John Walker v. UNC Hospitals	15 UNC 02639	07/16/15	
Bernardine Fox v. UNC Hospitals	15 UNC 02692	08/24/15	

FILED  
OFFICE OF ADMINISTRATIVE HEARINGS  
03/30/2016 9:38 AM

STATE OF NORTH CAROLINA  
COUNTY OF WATAUGA

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
15 DHR 02731

COY AND SHELBY MILLER PETITIONER,  V.  APPALACHIAN DISTRICT HEALTH DEPARTMENTRESPONDENT. RESPONDENT.	<b>FINAL DECISION</b>
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A contested case hearing was heard in this matter on November 10, 2015 and November 24, 2015, at the Watauga County Courthouse, in Boone, North Carolina, before J. Randall May, Administrative Law Judge.

**APPEARANCES**

For Petitioners, Coy and Shelby Miller:

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**BURDEN OF PROOF**

Petitioners bear the burden of proof in this matter.

**ISSUES**

The issues identified by Petitioners to be resolved in this matter are as follows:

1. Whether Respondent unjustly and unlawfully denied Petitioners' request for a septic permit.
2. Whether Respondent failed to adequately notify Petitioners of the denial and offer Petitioners the proper appeal procedures pursuant to N.C.G.S. § 130A-335(g).
3. Whether Respondent failed to follow N.C.G.S. § 130A-334 and N.C.G.S. § 130A-336 by requiring Petitioners to obtain a permit to do work on their original septic system.

**FINDINGS OF FACT**

1. On-site wastewater permitting and enforcement in Watauga County, North Carolina, is carried out by environmental health specialists in the Appalachian District Health Department (hereinafter "ADHD"), who act as authorized agents of North Carolina Department of Health and Human Services. (*See* Order on Pre-Trial Conference)
2. Petitioners have owned and lived in their Watauga County house for roughly 55 years. Their house used a cinderblock septic system, which was installed prior to the adoption of North Carolina statewide on-site wastewater laws and rules in 1977. (Trp., pp. 14, 37, 29-30, 42)
3. When Petitioners' house was built, their lot was excavated to allow the construction of a basement, and the excavated dirt from the basement was spread out to level the property. Petitioners' original septic tank was installed adjacent to the basement stairs of their house, roughly fifteen to twenty feet from the house. (Trp., pp., 15, 18, 46, 97)
4. Petitioners' original septic system malfunctioned and as a result, Petitioners wanted to repair their system by installing a new system. (Trp., pp. 16, 42-3)
5. As testified by Petitioner Coy Miller, to remedy the problems he experienced with his original septic system, he used a backhoe to dig into the side of the septic tank, which caused at least eight blocks to fall off of the side of the septic tank. (Trp., p. 43)

**Petitioners' Application**

6. Petitioners wanted a permit to install a new wastewater system because their original system was over fifty years old and had ceased to function properly. It had backed-up and emitted a noxious odor. In order to do so, Petitioner Shelby Miller submitted an Application for Well and On-Site Wastewater Permits (hereinafter "Application") to ADHD. On the Application, Petitioner Shelby Miller identified that the purpose of the application was for a repair. In Section 4 of the Application, Petitioner Miller did not indicate a system preference. (Trp., pp. 17, 43; Respondent's Exhibit 1)

7. As testified by Mr. Miller, and supported by Respondent's testimony, Petitioner wanted to install a *new* wastewater system to replace his initial system; he did not want to use his initial system. (Trp., pp. 43, 191)

8. On March 18, 2014, the ADHD received the Application. (*See* Order on Pre-Trial Conference)

9. At the time of the Application, Petitioners only had one system (their original septic tank system) installed on their property. (Trp., p. 41)

**March 24, 2014 Site Evaluation**

10. On March 24, 2014, Jon Swaim and Aaron Winters, employees of ADHD and agents of Respondent, conducted a site visit of Petitioners' property. Mr. Miller was present during this site evaluation. (Trp., pp. 95, 199; Order on Pre-Trial Conference)

11. During the March 24, 2014 site visit to Petitioners' property, ADHD made observations that a large hole had been knocked into the side and top of the original septic tank. ADHD observed wastewater in the tank and on the gravel beside the tank. (Trp., pp. 95, 201)

12. During their evaluation, Mr. Swaim and Mr. Winters used augers to bore holes and sample the soil between the Petitioners' house and Aho Road, hereinafter referred to as "the front of Petitioners' property" or "front of the property". Although Mr. Swaim and Mr. Winters found the borings to be unsuitable because of the presence of fill material and soil wetness, either of these findings alone would have been enough to determine that the borings were unsuitable.

13. Petitioner Coy Miller testified that he had been informed by Mr. Winters that wastewater system regulations had changed over the past 20 to 25 years. He also testified that he was informed by ADHD that his property contained fill dirt and that he explained to ADHD that when his basement was dug that dirt was spread out to level the ground. (Trp., pp. 46, 65)

14. According to Respondent's testimony, dirt that is dug for a basement is considered fill material for purposes of permitting an on-site wastewater system in North Carolina. (Trp., pp. 128, 242)

15. During the March 24, 2014 site evaluation Mr. Miller was informed by Respondent that he could consider installing a pump system onto his property, locating it behind his house, but he did not want to consider that option. (Trp., p. 204) Petitioner was also informed that the front of his property was found to be unsuitable, but that he could have pits dug on his property to allow a further evaluation of the front of his property. After the March 24, 2014, Petitioner did in fact have pits dug by a backhoe on his property. (Trp., pp. 46, 204, 218,)

**April 2, 2014 Site Evaluation**

16. On April 2, 2014, Mr. Swaim conducted an evaluation of the pits that had been dug in the front of Petitioners' property. During the evaluation of the pits, Mr. Miller was present. (Trp., p. 102; Order on Pre-Trial Conference)

17. Mr. Swaim determined that the pits were unsuitable because of the presence of fill material and soil wetness. Mr. Swaim informed Petitioner that the site was unsuitable in the front of Petitioners' property but that he could consider an off-site pump system. Petitioner told Mr. Swaim that he definitely did not want to look elsewhere to put the septic system. (Trp., pp. 105-6, 135)

18. On April 2, 2014, Petitioner had a phone conversation with Mr. Swaim after the site evaluation. During the phone conversation, Mr. Miller told Mr. Swaim that he did not want to install a pump system and that he was going to take care of it himself. Mr. Swaim discussed with Petitioner whether Petitioners wanted a second opinion from his supervisor, Andrew Blethen. Petitioner informed Mr. Swaim that there was no need for a supervisor review if the supervisor was going to make the same finding. Petitioner did not request a supervisor review. Petitioner informed Mr. Swaim that "he had spoken to his attorney and that there was nothing that [ADHD] could do to keep him from doing what he wanted to on his own land." (Trp., pp. 47, 106, 107, 136)

19. The evidence supports that on April 2, 2014, Mr. Miller was informed that Mr. Swaim's supervisor could offer a second opinion as to whether Petitioners' property was suitable for a wastewater system. Petitioners did not testify that they requested a second opinion from a supervisor. The evidence also supports that Respondent did not receive a request for a supervisor review. (Trp., pp. 47, 106, 107, 136)

20. Although Petitioners did not request a second opinion by Mr. Blethen, the Environmental Health Supervisor at ADHD, Mr. Blethen did meet with Mr. Miller at ADHD sometime in April or May of 2014. During the meeting Petitioner did not request that a supervisor provide a second opinion of his property. Mr. Blethen testified that Petitioner requested that Respondent find a way to permit a repair in the front of Petitioners' property. Mr. Blethen testified that based on the evaluations of Petitioners' property, he told Petitioner that he could consider installing a pump system for an off-site area. Respondent offered testimony that permitting off-site system and repairs is not an uncommon practice. Mr. Blethen further testified that Petitioner was not interested in an off-site pump system, and was only interested in installing a new system in the front of the property. The parties were unable to reach a resolution during the meeting. (Trp., pp. 47, 106, 107, 136, 219)

21. On June 9, 2014, Mr. Swaim saw plastic chambers, which are used for wastewater drain fields, stacked in the front of Petitioners' property. As a result, that day Respondent issued a Notice of Violation to Petitioners in part because Respondent believed that Petitioners were attempting to repair their system without a permit. Petitioners were given until August 9, 2014 to obtain a permit for the repair of their system. The Notice of Violation contained ADHD's contact

information and included a statement that informed the Petitioners that they could contact the ADHD office. (Trp., p. 107)

22. In defiance of Respondent's June 9, 2014 Notice of Violation, and during the timeframe that Petitioners were given to comply with said notice, Mr. Miller installed an illegal system in the front of his property, which Respondent had informed him was unsuitable for a wastewater system. Petitioner testified that the illegal system has been in use since July of 2014. (Trp., pp. 30,34, 50, 54-5)

23. Petitioners' son testified for Petitioners that the septic tank of the illegal system was installed directly beside the original septic tank. (Trp., pp. 29, 30)

**July 28, 2014 Site Evaluation**

24. On July 28, 2014, Mr. Blethen drove by Petitioners' property on his way to conduct a compliance inspection for another site and noticed that the front of Petitioners' property was disturbed. Mr. Blethen stopped at Petitioners' property and questioned Mr. Miller about the work that was being conducted. Petitioner admitted to installing an illegal system without a permit. Petitioner directed Mr. Blethen to leave his property and Mr. Blethen complied. (Trp., pp. 51, 220-23)

**July 30, 2014 Site Evaluation**

25. Because Petitioner did not want Mr. Blethen on his property, Mr. Blethen contacted Mr. Alan McKinney, Regional Soil Scientist for Respondent, to assist with Petitioners' property. (Trp., pp. 304, 272)

26. On July 30, 2014, Mr. McKinney and Mr. Joe Holder, ADHD Environmental Health Specialist, conducted a site evaluation of Petitioners' property to determine what permitting options were available. (Trp., p. 305; Order on Pre-Trial Conference) Despite Petitioners installation of an illegal system, ADHD continued to serve Petitioners by evaluating the illegal system to determine whether the system could be brought into compliance with the North Carolina laws and rules for on-site wastewater systems.

27. Mr. McKinney and Mr. Holder evaluated an area between the two illegal drainfield lines that Petitioner installed on the front of Petitioners' property. The auger boring contained fill material to four feet and chroma 2 or less at thirteen inches, indicating soil wetness. The borings did not contain Group One soils; specifically, the borings did not contain sand or sandy loam. Due to these findings, Mr. McKinney and Mr. Holder determined that the front of Petitioners' property was unsuitable for a wastewater system and determined that the illegal system that Petitioner installed could not be permitted. (Trp., pp. 349, 280, 274, 156)

28. Mr. McKinney testified that placing a system in an area that has a soil wetness condition diminishes the ability of the soil to treat and dispose of the resulting effluent. He further testified that fill material does not have the same natural porosity and the natural ability of soil to treat effluent. (Trp., pp. 275, 277)

29. Respondent never observed surfacing effluent around the illegal system, but testimony offered by Respondent suggested that if the illegal drain lines were installed as deep as six feet, then effluent could still end up in the groundwater without surfacing. Mr. McKinney testified that the illegal system was in fact discharging directly into the water table at thirteen inches between the two illegal drainlines. (Trp., pp. 143, 321)

30. During the July 30, 2014 site visit, Mr. Miller gave Mr. McKinney and Mr. Holder permission to evaluate a cattle lot that was on a separate piece of property that Petitioners owned. Before the evaluation of the cattle lot was completed, Petitioner directed Mr. McKinney and Mr. Holder to stop their evaluation and they complied. Petitioner informed Mr. McKinney and Mr. Holder that he did not want to consider a pump system, which would be needed if a system was installed in the cattle lot. (Trp., pp. 157-8, 278, 280, 339, 345)

31. After the expiration of the first Notice of Violation, ADHD issued a second Notice of Violation to Petitioners on August 11, 2014. The second Notice of Violation ordered Petitioners to disconnect their illegal septic system and obtain a repair permit. (Trp., p. 158)

32. In attempt to get Petitioners to comply with Respondent's Notice of Violation and to cease use of the illegal system that Petitioner had installed, Respondent pursued criminal penalties. Respondent's witnesses testified that pursuing criminal penalties is an available enforcement mechanism that is not uncommon for them to pursue when someone is non-compliant with North Carolina wastewater laws and rules.

#### **February 11, 2015 Site Evaluation**

33. On February 11, 2015, Mr. Blethen, Mr. Holder, Mr. McKinney, Petitioner and Petitioners' attorney, and ADHD's attorney, Ed Woltz, met at Petitioners' property to discuss permitting options. (Trp., p. 281; Order on Pre-Trial Conference)

34. At the time of the February 11, 2015 site visit, a letter denying the Petitioners' Application had not been issued. ADHD did not send a notice of application denial because there were other possible options that could be considered if Petitioners would allow Respondent to evaluate other adjacent property that Petitioners owned. Because Petitioners lived in the house that was connected to the system that needed to be repaired, ADHD wanted to try to work with Petitioners to find a permitting option, which Respondent, in good faith, believed could be found; so that Petitioners would not be placed in a situation where the notice of application denial would cause them to be displaced from their house. (Trp., pp. 163, 165, 245-6)

35. Petitioners' expert witness, Avery Lee Jackson, reviewed photographs of Petitioners' original septic tank taken by Mr. Blethen on February 11, 2015, and opined that a permit was needed to replace or fix the tank. Mr. Jackson further testified for Petitioners that their illegal system could be contaminating the water strata. Mr. Jackson's testimony corroborated Mr. McKinney's testimony that a repair permit is necessary to replace a septic tank. (Trp., pp. 362, 367)

36. Mr. McKinney testified that replacing a pipe is not analogous to replacing a septic tank, and that the latter would be considered a repair that required a permit.

37. During the February 11, 2015 meeting it was determined that because Petitioner had damaged the initial septic tank in a way that removed the structural integrity and caused it to no longer be watertight, that the initial tank could not be used unless an engineer proposed a way to remedy the lack of structural integrity and water tightness. The expert witnesses for both Petitioners and Respondent testified that it is possible that there is additional damage to the interior of the initial septic tank. In order for the initial tank to be put back in use, it would have to be repaired and would require a permit. (Trp., pp. 282-3, 369)

38. Petitioner's installation of the illegal septic tank complicated the matter because before the initial septic tank could be replaced or repaired and put back into use, Respondent would have to ensure that the initial drainfield was still present and able to properly function. Mr. McKinney testified that old drain fields typically start immediately at the end of the septic tank and because he observed the presence of work at the end of the initial septic tank, that the initial drainfield may have been encroached upon during the installation of the illegal system. In order for Respondent to evaluate whether the initial drainfield could properly function, someone would need to find the old system. These options were not previously evaluated because Petitioner was not interested in repairing his old system because he wanted to install a new septic tank and drainfield. (Trp., pp. 326, 329-30, 311)

39. During the February 11, 2015 evaluation, Petitioner reconsidered Respondent's continued offer to evaluate other property that he owned and gave them permission to evaluate a new area that was uphill from their house. As a result of Respondent's evaluation of the property upslope from Petitioners' house, Respondent was able to locate an area for a repair wastewater system that complied with North Carolina laws and rules.

40. Petitioner and his attorney requested that a repair permit for the upslope property be issued and Respondent did in fact issue a repair permit for a pump system on Petitioners' upslope property. (Trp., p. 286)

41. On February 13, 2015, Respondent issued a repair permit to Petitioners in response to their Application, as noted by the CDP File Number, which is used by ADHD for tracking purposes. (Trp., p. 166)

42. The evidence presented did not indicate that Petitioners requested or desired a notice of an application denial.

43. At an Appalachian District Health Board meeting, Perry Yates, a County Commissioner and member of the Appalachian District Health Board, suggested that prior to the installation of the wastewater system (February 13, 2015 permit), that Petitioners' illegal system be inspected by Respondent for twenty-four months, at which time a permit would be issued if the illegal system worked. Mr. Yates did not have any training in the State Wastewater laws and rules, but was aware that if a system fails, it has to be repaired. Respondent knew of nothing in North Carolina law or rule that would allow Mr. Yates' suggestion to be used. (Trp., pp. 81-2, 288)

44. Mr. Yates, Petitioners' witness, testified that the Appalachian District Health Board voted to support ADHD's enforcement of the general statutes of the State of North Carolina that a permit is necessary to install a system. (Trp., pp. 85-86)

45. During this entire episode, it would seem that the matter could have been handled more gracefully by both sides; however, the undersigned cannot allow Petitioner to install an ad hoc system, which ignores the rule of law.

**CONCLUSIONS OF LAW**

To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein as Conclusions of Law. Based upon the foregoing Findings of Fact, the undersigned makes the following Conclusions of Law:

1. The North Carolina General Assembly enacted laws to regulate wastewater systems because the installation of "septic tank systems and other types of wastewater systems in a faulty or improper manner and in areas where unsuitable soil and population density adversely affect the efficiency and functioning of these systems, has a detrimental effect on the public health and environment through contamination of land, groundwater and surface waters." N.C.G.S. § 130A-333.

2. A septic tank system is a type of wastewater system. N.C.G.S. § 130A-333(15).

**Whether Respondent failed to follow N.C.G.S. § 130A-334 and N.C.G.S. § 130A-336 by requiring Petitioners to obtain a permit to do work on their initial septic system.**

3. Under North Carolina law, an on-site wastewater system can be maintained without a permit. (N.C.G.S. § 130A-336(b)) "Maintenance" means normal or *routine* maintenance including replacement of broken pipes, cleaning, or adjustment to an existing wastewater system. (N.C.G.S. § 130A -334(3a))

4. However, a permit is required to repair an on-site wastewater system. N.C.G.S. § 130A-336. "Repair" means "the extension, alteration, replacement, or relocation of existing components of a wastewater system." N.C.G.S. § 130A-334(9a)

5. A wastewater system is considered to be malfunctioning if either of the following occur: (1) "a discharge of sewage or effluent to the surface of the ground, the surface waters, or directly into groundwater at any time;" or (2) "a back-up of sewage or effluent into the facility, building drains, collection system, or freeboard". 15A NCAC 18A .1961(a)(1)

6. Contrary to the argument that a repair permit was not needed, Petitioners willfully submitted an Application for Well and On-Site Wastewater Permits in which they requested that Respondent issue a repair permit.

7. Substantial and overwhelming evidence was presented to support that Petitioners' original septic tank system had malfunctioned and was in need of repair at the time of Respondent's first site visit. Testimony offered by Petitioners' own witnesses corroborated Respondent's testimony that the initial septic system required a repair, not maintenance. Both parties offered evidence that Petitioners' initial septic tank was damaged and it would be considered a repair to fix or replace the initial tank. As a result, Petitioners' were required by law to obtain a repair permit.

8. Neither fixing the extensively damaged septic tank, nor installing a new septic tank, is a matter of routine or normal maintenance; both of these acts would require a repair permit.

9. Therefore, Respondent did not fail to follow N.C.G.S. §§ 130A-334 or -336 by requiring Petitioners to obtain a permit to do work on their initial septic tank system.

10. Because "No person shall commence or assist in the installation, construction, or repair of a wastewater system unless an improvement permit and an authorization for wastewater system construction have been obtained from the Department or the local health department", Petitioner Coy Miller acted in violation of N.C.G.S. § 130A-336 when he installed an illegal system on his property without an improvement permit or repair permit. N.C.G.S. § 130A-336(b).

**Whether Respondent unjustly and unlawfully denied Petitioners' request for a septic permit.**

11. Prior to issuing an improvement permit, "an authorized agent of the State must determine that the site is suitable or provisionally suitable and that a system can be installed so as to meet the provisions of [Section .1900 of Subchapter 18A of Chapter 15A of the North Carolina Administrative Code]." 15A N.C.A.C. 18A .1937(f).

12. In response to Petitioners' Application and in accordance with 15A N.C.A.C. 18A .1939 and related rules, Respondent conducted multiple site evaluations of Petitioners' property to determine whether their site was suitable for a wastewater system repair.

13. 15A NCAC 18A .1947 states that "(a)ll of the criteria in rules .1940 through .1946 of this Section shall be determined to be SUITABLE, PROVISIONALLY SUITABLE, or UNSUITABLE, as indicated. If all criteria are classified the same, that classification shall prevail. Where there is a variation in classification of the several criteria, the most 5 limiting uncorrectable characteristics shall be used to determine the overall site classification."

14. Aside from the requirements in N.C.G.S. § 130A-341 and related rules, giving due deference to the expertise of the agency, for a site to be suitable for a wastewater system, it must contain "naturally occurring soil", which is "soil formed in place due to natural weathering processes and being unaltered by filling, removal, or other man-induced changes other than tillage." 15A N.C.A.C. 18A .1935 (25)

15. The overwhelming weight of the evidence presented at the hearing establishes that the front of Petitioners' property is unsuitable due to the presence of non-naturally occurring soil,

which is fill material. Petitioners did not offer any evidence to rebut the findings that the front of their property was unsuitable for a wastewater system.

16. The evidence offered during the hearing suggested that the non-naturally occurring soil, or fill material, on Petitioners' property could have been the result of dirt that was excavated for Petitioners' basement and used to relevel the site.

17. Under N.C.G.S. § 130A-341, "a site that has existing fill, including one on which fill material was placed prior to July 1, 1977, and that has sand or loamy sand for a depth of at least 36 inches below the existing ground surface, shall be evaluated for an on-site wastewater system". Because the fill material on Petitioners' property did not consist of sand or loamy sand and the site does not meet the requirements of 15A N.C.A.C. 18A .1957, their property does not meet the requirements for an existing fill system pursuant to N.C.G.S. § 130A-341.

18. Even if Petitioners' property did not contain the non-naturally occurring soil, or fill material, their property is also unsuitable because of a soil wetness condition.

19. Soil wetness is determined by "the indication of colors of chroma 2 or less (Munsell Color Charts) at [greater than or equal to] 2% of soil volume in mottles or matrix of a horizon or horizon subdivision." 15A N.C.A.C. 18A .1942(b)(1) "Sites where soil wetness conditions are less than 36 inches below the naturally occurring soil surface shall be considered UNSUITABLE with respect to soil wetness." 15A N.C.A.C. 18A .1942(c).

20. The scientific evidence and expert testimony presented supported the conclusion that Petitioners' property contains chroma 2 or less at a depth of less than 36 inches from the naturally occurring soil surface, indicating an unsuitable soil wetness condition on the site in violation of 15A NCAC 18A .1942. Petitioners did not produce any conflicting evidence to suggest that the front of Petitioners' property does not have an unsuitable soil wetness condition. Therefore, the site was properly classified as UNSUITABLE.

21. Deference is given to policy and methodology used by the agency in concluding that Petitioner's site is unsuitable pursuant to North Carolina wastewater laws and regulations.

22. Substantial and overwhelming evidence was presented to support that Respondent's classification of the front of Petitioners' property as UNSUITABLE. Respondent's decision to not issue a repair permit for the front of Petitioners' property was made pursuant to proper procedure and was neither arbitrary nor capricious.

23. Petitioners' argument as to why Respondent should have issued a repair permit for the front of their property was largely premised on the fact that they had lived in their home with their initial septic system for over 50 years, in the same area that Respondent recently determined to be unsuitable for a wastewater system. Alan McKinney, recognized by the Court as an expert in soils and site evaluations for onsite wastewater treatment systems, without objection by Petitioner, refuted Petitioners' proposition and provided credible and convincing testimony that Petitioners' original system predated the permitting requirements for onsite wastewater systems. Further, the only applicable requirements in Section .1900 of Subchapter 18A of Chapter 15A of

the North Carolina Administrative Code that apply to “properly functioning sewage collection, treatment, and disposal systems in use . . . prior to July 1, 1977” are the requirements in Rule .1961 for system operation, maintenance, and management. (15A N.C.A.C. 18A .1962) Once Petitioners’ initial septic tank system malfunctioned, their system no longer met the criteria for the Rule .1962 exception, and as a result, their initial system was required to meet all the requirements in Section .1900 of Subchapter 18A of Chapter 15A of the North Carolina Administrative Code. After Petitioners’ initial system malfunctioned, it could not meet the requirements in Section .1900 of Subchapter 18A of Chapter 15A of the North Carolina Administrative Code, Respondent acted properly by not issuing a repair permit for the front of Petitioners’ property.

24. The evidence and testimony presented does not support a finding that Respondent should have issued a repair permit for the front of Petitioners’ property; therefore, Respondent did not unjustly or unlawfully deny Petitioners’ request for a septic permit.

**Respondent failed to adequately notify Petitioners of the denial and offer Petitioners the proper appeal procedures pursuant to N.C.G.S. § 130A-335(g).**

25. N.C.G.S. § 130A-335 requires that, “When an improvement permit is denied, the local health department shall issue the site evaluation in writing stating the reasons for the unsuitable classification. The evaluation shall also inform the applicant of the right to an informal review by the Department, the right to appeal under G.S. 130A-24, and to have the appeal held in the county in which the site for which the improvement permit was requested is located.”

26. “Any person appealing an *action* taken by the Department pursuant to this Chapter or rules of the Commission shall file a petition for a contested case with the Office of Administrative Hearings as provided in G.S. 150B-23(a). The petition shall be filed not later than 30 days after *notice* of the action which confers the right of appeal unless a federal statute or regulation provides for a different time limitation. The time limitation imposed under this subsection shall commence when notice of the agency decision is given to all persons aggrieved.” N.C.G.S. § 130A-24(a1), emphasis added

27. A notice of an application denial itself does not confer a right to appeal, rather it is an *action* taken by Respondent that confers the right to appeal. The purpose of a notice of an application denial is to *inform* the applicant of the right to appeal and to establish a timeframe in which a person can appeal an action by Respondent.

28. Because Respondent did not issue a notice of an application denial to Petitioners’ application for a repair permit, the 30-day timeframe in which Petitioners had to appeal Respondent’s decision had yet to run.

29. Petitioners have failed to demonstrate how, if at all, they were harmed from Respondent’s non-issuance of a notice of an application denial. Petitioners were not denied the right to a contested case and, even though this Court finds that Petitioners have not met their burden of proof, Petitioners were afforded the opportunity to challenge actions taken by Respondent.

30. Respondent's non-issuance of a notice of an application denial prior to the issuance of a repair permit did not justify Petitioner's action of installing an illegal system in an area of his property that Respondent informed him was unsuitable for a wastewater system. Petitioner Miller acted in a manner that disregarded the wellbeing of others and the environment when he installed the illegal system.

31. Petitioner's installation of an illegal system was not justified based on Petitioners' allegation that Respondent was non-responsive. Although Petitioner claimed that he had no contact with Respondent during a two and a half month gap, the evidence shows that Petitioner told ADHD in April that he did not want a supervisor review if the same result would be reached; and that he only wanted a new system located on the front of his property. Petitioner made it clear to Respondent that he was not interested in a pump system prior to the February 11, 2015 site evaluation; he made it clear to ADHD that he would take care of things with his attorney. Shortly thereafter, in April or May, Petitioner and Mr. Blethen met at ADHD to discuss available options to the Petitioners, but Petitioner wanted only to put a system in the front of Petitioners' property, which was not an available option. ADHD made no further contact with Petitioners because Petitioners were not interested in the suggested options. Mr. Blethen testified that ADHD does not always immediately issue denials in order to give an opportunity to reconsider available options. Respondent was not being non-responsive, as alleged by Petitioners; rather Respondent was simply respecting Petitioners' wishes as understood by ADHD. ADHD made contact with Petitioners through the use of a Notice of Violation when it appeared that the Petitioners were installing an illegal system.

32. The evidence presented did not indicate that Petitioners had requested or desired a notice of an application denial. Respondent was unaware that Petitioners wanted to appeal any action taken by Respondent and that during the February 11, 2014 meeting Petitioners, who at the time were represented by counsel, requested that a permit, not a denial, be issued.

33. Petitioners have not been substantially prejudiced by Respondent's non-issuance of a denial notice of their application because they were able to file a petition for a contested case with the Office of Administrative Hearings and have a hearing on the merits.

34. Furthermore, although Respondent was unable to issue a repair permit for the front of Petitioners' property, Respondent had a good faith belief that a repair permit could be issued and did in fact issue a repair permit on property owned by Petitioners and in response to Petitioners' Application.

35. Respondent presented compelling evidence to show that Respondent's actions were not improper, erroneous, arbitrary, or capricious.

36. Substantial and overwhelming evidence was presented to support that the illegal system that Petitioner installed on his property does not meet the on-site wastewater system permitting laws or rules in North Carolina.

**FINAL DECISION**

Respondent justly and lawfully denied Petitioners' request for a septic permit, as requested. Respondent's actions did not harm Petitioners or deny Petitioners a right to appeal any action taken by Respondent. Respondent followed N.C.G.S. § 130A-334 and N.C.G.S. § 130A-336 by requiring Petitioners to obtain a permit to do work on their initial septic system.

Respondent's decision to classify the front of Petitioners' property as unsuitable, and not issue a repair permit for the front of their property, is AFFIRMED.

**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 30th day of March, 2016.



J Randall May  
Administrative Law Judge

NORTH CAROLINA  
WAKE COUNTY

OFFICE OF ADMINISTRATIVE HEARINGS  
15 DOJ 4662

ALICIA CATHERINE NOLAN )

Petitioner )

v )

NC PRIVATE PROTECTIVE )  
SERVICES BOARD )

Respondent )

PROPOSED FINAL  
DECISION

2015 SEP 18 AM 9:21  
Office of  
Administrative Hearings  
Filed

This matter coming on to be heard and being heard August 25, 2015, and the Petitioner appeared pro se, and the Respondent was represented by attorney Mr. Jeffrey P. Gray, and based upon the evidence presented and the arguments of the parties, the undersigned makes the following findings of fact:

1. Petitioner is a citizen and resident of Onslow County, North Carolina, and applied to Respondent for a Security Guard and Patrol License.
2. Respondent Board is established pursuant to N.C. Gen. Stat. §74C-1, *et seq.*, and is charged with licensing and registering individuals engaged in the security guard and patrol business.
3. Respondent denied the Petitioner's application due to lack of good moral character and temperate habits as demonstrated by Petitioner's negative employment history.
4. Petitioner was notified by letter on October 27, 2014 that her application was denied.
5. Petitioner timely requested a hearing regarding the denial of her application.
6. Respondent's evidence showed that Petitioner was employed by the North Carolina Department of Corrections as a correctional officer from 2005 until 2012.
7. Respondent reviewed Petitioner's personnel file with DOC, which revealed that she was dismissed from her employment. The dismissal appears to have resulted from an internal investigation regarding video games in the control room and a written warning for dozing off in a patrol vehicle, along with declining performance reviews.

8. Respondent's Exhibit 2 provided Petitioner's response to these allegations, and Petitioner testified that there were personality conflicts with supervisors while she was at DOC.

9. Petitioner has worked with Federal Security Services in Swansboro, North Carolina for more than 4 years, where she has supervisory responsibility for more than 70 employees.

10. Mr. Walter Pylypiw, owner of Federal Security Services, testified that he has known the Petitioner for approximately 20 years. According to Mr. Pylypiw, she is a person of good character whom he trusts with running his business. Petitioner is left in charge of Federal Security when he is unavailable. In fact, Mr. Pylypiw intends for Petitioner to take over his business when he retires.

11. Mr. Pylypiw stated that Petitioner handled scheduling, site inspections, human resources, billing, and other essential business functions for the company.

12. Mr. Pylypiw recommended that Petitioner be granted the Security Guard and Patrol License.

Based upon the foregoing findings of fact, the undersigned concludes as a matter of law:

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter herein.

2. Under G.S. §74C-12(a)(25), Respondent may refuse to grant a registration if it determines that an applicant has demonstrated intemperate habits or lacks good moral character.

3. Respondent presented evidence that Petitioner had demonstrated intemperate habits and lacked good moral character through incidents that occurred while she was an employee with the Department of Corrections.

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

5. Petitioner presented sufficient evidence that she is in a position of trust and responsibility in the security industry, and that she is an honest, hard-working individual.

6. Petitioner has proven by a preponderance of the evidence that she is of good moral character and temperate habits.

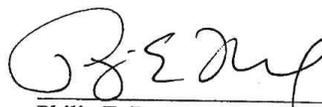
Based upon the foregoing findings of fact and conclusions of law, the undersigned hereby recommends that Petitioner be issued a Security Guard and Patrol License.

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 18<sup>th</sup> day of September, 2015.



Philip E. Berger, Jr.  
Administrative Law Judge

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**CONTESTED CASE DECISIONS**

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OFFICE OF ADMINISTRATIVE HEARINGS  
03/04/2016 4:06 PM

STATE OF NORTH CAROLINA  
COUNTY OF GUILFORD

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
15 EDC 04160

Next Generation Academy Inc., Petitioner,  v.  N.C. State Board of Education, Respondent.	<b>FINAL DECISION</b>
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THIS MATTER came on to be heard before the Hon. J. Randolph Ward, Administrative Law Judge, on September 30, 2015, in High Point, North Carolina.

APPEARANCES

For the Petitioner: Philip S. Adkins, Atty.  
Adkins Law Group  
Snow Camp, N.C.

For the Respondent: Tiffany Y. Lucas, Asst. Attorney General  
NC Department of Justice  
Raleigh, N.C.

ISSUES

Whether the Respondent arbitrarily or erroneously denied Petitioner's application to open a Charter School.

STATUTES AND RULES AT ISSUE

N.C. Const. art. IX, sec. 5; N.C. Gen. Stat. §§ 115C-2; 115C-12(9); 115C-218 - 115C-218.110; 115C-218(a); 115C-218(b)(1) & (10)a.; 115C-218.1(b) (1), (2) & (3); 115C-218.2(a); 115C-218.5; 115C-218.5(a); 115C-218.5(b); 115C-238.29A - 115C-238.29J (repealed); 150B-1(e); 150B-2(7a) & (8)a.c.; 150B-23(a); 150B-23(f); 150B-29(a); 150B-33(b)(11); 150B-34(a); and, 150B-51(c).

WITNESSES

For Petitioner:        Dr. Samuel W. Misher, Board Chair  
Next Generation Academy, Inc.

                                 Fmr. Sen. W. Edward Goodall, Jr., Executive Director  
N.C. Public Charter Schools Association

For Respondent:        Mr. Eric Sanchez, Member  
Charter School Advisory Board

                                 Ms. Becky Taylor, Member  
N.C. State Board of Education

                                 Dr. Deanna Townsend-Smith, Lead Education Consultant  
Office of Charter Schools

                                 Ms. Helen Nance, Fmr. Chair  
Charter School Advisory Board

EXHIBITS

For Petitioner:        Petitioner’s Exhibits 3 through 8

For Respondent:        Respondent’s Exhibits 2 through 21

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

FINDINGS OF FACT

1.        On September 26, 2014, an application to open a Charter School in August 2016 was submitted to the Office of Charter Schools (hereinafter, “OCS”) of the North Carolina Department of Public Instruction (“DPI”) by the Petitioner Next Generation Academy, Inc. (“Petitioner”), a nonprofit corporation organized for this purpose. *See*, “North Carolina Charter School Application [of] Next Generation Academy,” Petitioner’s Exhibits 3 and 4 (hereinafter, “P Ex 3 & 4”).

2. At all times pertinent hereto, the work of the Charter School Advisory Board (“CSAB”) was staffed by OCS. CSAB was housed in the Department of Public Instruction, but made recommendations to the State Board of Education on charter school issues, including whether to approve Charter School applications. *See*, “Transcript of Administrative Hearing,” page 10 (hereinafter, “Tr p 10”).
3. OCS staff reviewed Petitioner’s application in October 2014, and deemed it “incomplete.” (Tr p 15.)
4. Based on OCS’s recommendation, and following a review by its own committee, the Charter School Advisory Board (“CSAB”) voted to deny the application on November 13, 2014, because it was considered “incomplete.”
5. The Chair of CSAB sent the Petitioner a “Notification of Incomplete Application,” dated November 14, 2014, indicating that its application would not be further considered during the 2014 “round” of evaluations. *See*, Petitioner’s Exhibit 5 or Respondent’s Exhibit 17 (hereinafter, “P Ex 5 or R Ex 17”).
6. CSAB’s November 14, 2014 letter did not include any statement or notice of Petitioner’s appeal rights, or an opportunity to seek administrative remedies for the denial of its application. However, Petitioner sent a letter to CSAB on December 3, 2014, encouraging reconsideration of the adverse decision. (R Ex 17 & 18.)
7. CSAB did not meet to consider Petitioner’s appeal. (Tr p 59 & 181-82.) Without consulting the remainder of the Board, the Chair of CSAB sent Petitioner an “Incomplete Application Appeal Notification,” dated December 15, 2014, stating that the “CSAB stands by its decision to deem the application incomplete.” (R Ex 19.)
8. In its Pretrial Statement, Respondent contended that CSAB’s December 15, 2014 letter was the “document constituting agency action.” However, this letter did not include any statement or notice of Petitioner’s appeal rights, or an opportunity to seek administrative remedies for the denial of its application.
9. At its June 3, 2015 meeting, the Respondent North Carolina State Board of Education (hereinafter, “SBE” or “Respondent”) discussed and voted on eighteen (18) charter school applications recommended for approval by CSAB, and considered various other matters brought forward by CSAB. (R Ex 21, pgs. 35-41.) SBE did not approve Petitioner’s application to open a charter school, and effectively acquiesced in its rejection. SBE did not provide Petitioner with a notice of its appeal rights, nor an opportunity to seek administrative remedies for the denial of its application.
10. Next Generation Academy, Inc. filed the Petition initiating this contested case hearing on June 8, 2015.
11. Dr. Samuel Misher, Chair of Petitioner’s Board of Directors, testified that he and other volunteers spent “hundreds” of hours in research and planning to submit Petitioner’s

application. (Tr p 73.) Former State Senator W. Edward Goodall, Jr., the Executive Director of the N.C. Public Charter Schools Association, testified that his organization devoted approximately one hundred hours assisting Petitioner with the preparation of the application. (Tr p 101.)

12. The revised application form used by Petitioner, and the “2015 Charter Application Timeline and Process” (“Timeline”), were approved by SBE on June 5, 2014. These required the submission of applications, with a \$1,000 nonrefundable fee, by September 26, 2014 for new charter schools seeking to open in August 2016.

13. The Timeline indicates that an “Application Completeness Screening” would take place in October, prior to “Application Initial Review,” during the period “November 2014 - January 2015 (Tentative).” Referring to the “completeness screening,” the Timeline states that, “The initial screening rubric used by OCS ensures all parts of the application is complete (*sic*).” There is no suggestion in the Timeline that a clerical error will result in an irreparable rejection of an application. (R Ex 6 p 1, and R Ex 8 p 4.)

14. CSAB’s “Sample Application Preliminary Evaluation Packet” furnished to applicants describes the characteristics of passing and failing applications as follows:

Pass: The response demonstrates an understanding of key issues and the ability to start a charter school successfully *although minimal clarification may be needed in places*. It addresses the topic with clear, specific and accurate information that reflects thorough preparation. The application meets the minimum components as evidenced by the checkboxes of the rubric [evaluation packet].

Fail: The response *either fails to entirely address the selection criteria or addresses some of the criteria*. The responses lack adequate detail and/or raise substantial concerns about the applicant’s preparation for and ability to start or operate a charter school successfully. The application *fails to address all of the minimum components* as evidenced by the check boxes of the rubric.

(Emphasis added.) R Ex 10, p 1.

15. Respondent’s evidence shows that applications considered “incomplete” by OCS were evaluated by CSAB only to determine that question, and if CSAB agreed that an application was incomplete, it was rejected before the “Preliminary Evaluation” stage, without any opportunity to correct even a minor oversight or clerical error.

16. CSAB’s “Notification of Incomplete Application” of November 14, 2014, and “Incomplete Application Appeal Notification” dated December 15, 2014, each stated that Petitioner’s application was deemed “incomplete,” because, “All board member resumes and criminal background checks are not included,” and “The applicant identified a facility and did not include the required Appendix Q.” The evidence presented at the hearing shows that neither of these statements are true.

17. Applicants were statutorily required to provide “the names of the initial members of the board of directors.” N.C. Gen. Stat. §115C-218.1(b)(3). In addition, Respondent required that each member complete a “Charter School Board Member Information Form” questionnaire that asked for resume information, and “encourage[d] members to reflect” on their responsibilities; a criminal background check report; and, “a *one-page* resume” (emphasis original), which essentially restated the highlights of the education and career descriptions included in the “Member Information Form,” i.e., a “brief [listing of] education and employment history,” and “knowledge and experience that [the member] would bring to the board.” (P Ex 4, “Appendix G” p 2 & 4.)

18. A criminal background check report and a one-page resume were prepared for each member of the board. However, due to a clerical error when Petitioner’s 152-page application package was being assembled or electronically submitted, the one-page resume of board member Dr. Craig Rhodes was accidentally omitted from Appendix G. (Tr p 86.) It was sent to OCS after Petitioner was notified that it had been left out of the application package. However, no facts concerning Dr. Rhodes sought in the application process were omitted from Petitioner’s original application.

19. OCS did not notify the Petitioner when the omission of Dr. Rhodes’ resume was discovered in October, because it was the policy of that office and CSAB not to permit an applicant to correct a problem that they concluded made the application “incomplete.” (Tr p 33-34, 59-60 & 65-66.) Petitioner learned of it only after receiving the CSAB’s “Notification of Incomplete Application,” dated November 14, 2014. When Petitioner submitted Dr. Rhodes’ resume in early December 2014 -- approximately 10 weeks into the 23 month process -- CSAB failed to reconsider Petitioner’s application. (Tr p 181-82.)

20. There was no evidence or allegation offered at the hearing that, “All board member resumes and criminal background checks are not included” in Petitioner’s application. The person who drafted the notification testified that she was using the phrase “board member resumes and criminal background checks” to refer to any of these documents. (Tr p 168-69.)

21. Petitioner’s application proposed to have a board consisting of “at least five” members -- an acceptable number, according to DPI’s Charter School Applications Resource Manual (“Manual”) -- but actually had a “preferable” seven members. (R Ex 8, p 18; R Ex 11, p 24.) Petitioner submitted documents for all seven of their members, including six packages that were not found to be complete in every respect. Another 2014 applicant stated “a couple times in their application” that its board of directors had six members, but included Appendix G materials for only five members. OSC recommended rejection of the application for incompleteness. CSAB accepted the application for further consideration at the “Preliminary Evaluation” stage, and the charter it sought was ultimately approved by SBE. (R Ex 18, p 2; Tr p 25-26, 194-95 & 205; R Ex 21, p 28.)

22. Charter school applicants were not required to have final arrangements for facilities to house their proposed charter school nearly two (2) years in advance of opening, but were asked to project revenue and operating costs, including “the cost per square foot for the proposed facility.” Petitioner had not entered into a lease, but had identified four locations that might be suitable. Petitioner’s representatives reached a “verbal agreement,” on the rent for a church facility

currently being used by a charter school on a temporary basis, which enabled them to generate the estimate of “approximately \$8.09 per foot for a year (with utilities),” although the owner reserved “some flexibility.” (R Ex 11, p 38-39 & 44; Tr p 74-75.)

23. The application contained the following, printed together as a single query: “What is your plan to obtain a building? Identify the steps that the board will take to acquire a facility and obtain the Educational Certificate of Occupancy. If a facility has been identified please fill out the Facilities Form (Appendix Q).” Below a space that would accommodate a name and address, the form also makes this request: “Please attach copies of Facilities Inspections as Appendix R.” Petitioner’s application did not state that it had “identified” a facility, or entered into a lease, or mention the name, address or location of any of the four facilities they described in the application. (R Ex 11, p 38-39.) In accordance with the instructions, Petitioner did not attach Appendices Q and R.

24. Referring to the “verbal agreement,” Petitioner put in this facility identity blank that, “We have entered into a contract with the church with a facility that used to be a school ....” before describing its facilities. Below the cost estimate, Petitioner also described the facilities of the three other properties in the space for the “Facility Contingency Plan.” (R Ex 11, p 38-39.) Despite the absence of identifying information, OCS and CSAB erroneously assumed that this “contract” was a lease, and that therefore Petitioner should have attached Appendices Q and R. Consequently, Petitioner’s application was deemed “incomplete” due to the absence of Appendices Q and R. (Tr p 167.) There is no evidence of that OCS or CSAB made any effort to substantiate this assumption, by allowing Petitioner to provide “minimal clarification,” or otherwise.

25. During the same November 13, 2014 CSAB meeting at which Petitioner’s application was found deficient for failing to attach Appendices Q and R, another application that OCS deemed to be incomplete on the same grounds was considered. In that instance, the applicant had “identified a facility, a specific facility,” but had not attached Appendices Q and R. CSAB did not find that application to be “incomplete.” (Tr p 180-81; R Ex 16, p.2; R Ex 18, p.2.)

26. Petitioner’s application had no material omissions. The evidence does not demonstrate any rational relationship between the omission of a one-page resume, or Appendices Q and R, and the Petitioner’s qualifications to operate a charter school.

27. On December 3, 2014, Dr. Misher sent CSAB a letter on behalf of Petitioner protesting the decision to deny its charter school application, and citing inconsistencies in its application of their “completeness” policy. (R Ex 18.) The Chair of the CSAB recognized Petitioner’s letter as an “appeal,” but denied it in an “Incomplete Application Appeal Notification,” dated December 15, 2014, without discussing it with the membership of CSAB, and without offering Petitioner an opportunity to present its arguments for reconsideration. (Tr. 181-82; R Ex 19; P Ex 6.)

28. No effort to consider the statutory criteria for approval of charter schools was involved in the rejection, with finality, of applications in the “completeness” phase of the process. OSC resolutely did not “look at it for quality” when something was deemed missing from an

application, in order to give “consistent” treatment to all applicants. (Tr p 147-48 & 180.) One member of the CSAB thought that absence of Appendices Q and R, as well as the resume, made a stronger case for denying its application; but, he agreed that the omission of Dr. Rhodes’ resume alone was enough reason to reject the application. (Tr p 27, 60 & 64.)

29. When the applications that were reviewed for content were considered deficient, applicants were given written notification and five working days to “provide clarifying information.” (R Ex 6.) In 2014, “each applicant group” that was not eliminated for submitting an “incomplete” application “received five days to provide written clarification on each of the main sections within the application.” (R Ex 21, p 36.) However, if CSAB accepted OSC’s characterization that an application was “incomplete,” it was rejected before the “Preliminary Evaluation” stage, without any opportunity to correct even a minor oversight or clerical error. (Tr p 59-60 & 65-66.) Respondent’s evidence shows that applications considered “incomplete” by OCS were evaluated by CSAB only to determine whether they were “incomplete,” regardless of their merits.

30. In its post-hearing submissions, Respondent noted that, DPI “has established a stringent process” for reviewing charter applications, and that, “Modifications to the procedures have been implemented over the years as circumstances” changed, “including in 2011 after the General Assembly passed Senate Bill 8” that “remove[d] the cap on the number of charter schools in the State which, until then, had limited the number of charter schools ... to 100.” When asked on direct examination “why there is this part of the process ... I mean a completeness screening?,” OCS’s Lead Education Consultant, who headed the application evaluation process for that office, discussed the Legislature’s 2011 decision to remove the “cap,” and that there was then “no limit on the number of applications that the Office of Charter Schools might be required to consider in any given year.” (Tr p 158-60.) The former Chair of CSAB recalled that after “the cap for the charter schools in North Carolina had been lifted” that, “there was some new ways of trying to design the way that this [Charter School Advisory] Board was going to administer its duties” regarding the increase in applications, including greater reliance on the Office of Charter Schools. (Tr p 191-92.)

31. Senator Goodall testified that the prevalence of rejections of charter school applications on similar trivial grounds led to the legislation, effective for applications submitted in 2016, that added N.C. Gen. Stat. § 115C-218.2(a) to the Charter Schools Act to require that SBE and CSAB “shall provide timely notification to an applicant of any format issues or incomplete information in the initial application and provide the applicant at least five business days to correct those issues in the initial application.”

32. Petitioner’s application stated its aspiration to fulfill the “purpose” of the charter school program that the statute gives “special emphasis”, i.e., to provide “expanded learning experiences for students who are identified as “at risk of academic failure.” N.C. Gen. Stat. § 115C-218(a)(2). In the “Mission and Purposes” section of Petitioner’s application, it is observed that the school’s proposed service area, “the East Greensboro community” with 52,000 residents, was “often defined by its statistics,” and cited this socioeconomic data: 60% African-American, 25% poverty rate, families headed by single females outnumbering two-parent families, and that

the community encompassed ZIP Codes in which 31% of the households had \$20,000 or less in income per year. (P Ex 3, p. 7.)

33. DPI's Manual explains that SBE may grant a charter school applicant a "preliminary planning year" once the organization submits information demonstrating the ability to properly operate a school that would meet one or more statutory purposes, and that it could authorize the school "before the applicant has secured its space, equipment, facilities, and personnel," if assured that the applicant showed the ability to raise the necessary capital to fund their acquisition. (R Ex 8, p 6.) Thus, the people involved with starting the school, and their plans and vision for their school, were a major focus of the application.

34. The following background information about the members of Petitioner's founding Board of Directors, and their responses to CSAB's "Charter School Board Member Information Form" questionnaire, were submitted on the application form's "Appendix G" (P Ex 4, Appendix G):

a. Mr. Brian L.G. Moore, CPA

Mr. Moore was the Assurance Senior Associate and Assurance Manager at PriceWaterhouseCoopers' office in Greensboro. He had obtained a B.S. in accounting from North Carolina A&T, and a Masters in accounting from Michigan State, with a concentration in Financial Reporting and Assurance Services. He specialized in healthcare organizations, and had experience preparing quarterly reports for both public and private organizations. A Greensboro native, Mr. Moore had a history of volunteering with local youth and education groups, and his employer supported its executives' efforts to provide professional expertise assisting nonprofit organizations, including providing training on serving effectively on a board of directors. In response to a question on the application form, he indicated that student advancement, teacher retention, and enrollment growth as projected in the school's five-year plan were useful measures of success.

b. Dr. Queenie Sellers-Dalcoe

In addition to her Doctorate in Education, and principal and superintendent's licensure, Dr. Sellers-Dalcoe held a Masters in Secondary Reading, a B.S. in Social Sciences, and certifications in Learning Disabilities and Cross Categorical Education. She worked for 19 years in Guilford County schools as a special education teacher, reading specialist, curriculum facilitator, and school district academic coach. Since 2006, she has been employed as field manager for a Johns Hopkins University project, launching reading programs in various school districts around the State. (Tr p 70) She also held an appointment as an adjunct Professor at the University of the Cumberlands. In the community, she had served as a member of the Board of the State Employees Credit Union for over fourteen (14) years. She envisioned Next Generation Academy as a school that would "meet the needs of all students," with "the STEM model as well as individualized instruction," proceeding from the premise that, "every child is capable of success."

c. Judge James S. Pfaff

Judge Pfaff was educated at Phillips Academy, Andover, MA; the University of North Carolina at Chapel Hill (B.A., History, 1966); and, Wake Forest University

School of Law (J.D., 1970). Professionally, he has been Director of Greensboro Legal Aid; a prosecutor, rising to Chief Assistant District Attorney; District Court Judge for the 18th Judicial District; in private practice for 25 years; and since 2005, Magistrate Judge of Small Claims Court in Guilford County. His service to the community includes leadership positions in legal, artistic, charitable, fraternal, youth, political, consumer, educational, athletic and church organizations, including Greensboro C.A.R.E.S., Gov. Hunt's Commission on Youth, Consumer Credit Counseling Service, First Offenders Program, Republican National Committee, Pony League Baseball, Sunday School Superintendent, Guilford County Board of Elections, Women's Resource Center, and the Moravian Southern Province Board of Christian Education. He served on the founding Board of Greensboro Montessori School as Secretary and Legal Counsel. On his questionnaire Judge Pfaff noted that his wife was a schoolteacher, and wrote: "I have always dreamed of this kind of school."

d. Dr. Samuel W. Misher

Dr. Misher chairs the Board of Next Generation Academy. He has "retired" after 34 years as an educator, beginning as a teacher in 1982, and serving as assistant principal or principal for his last 24 years in the schools. Two of the three schools he served as principal are in the area "where Next Generation is to be located, working with the students of high needs." (Tr p 68 -69) His final assignment was as the first principal of the new Northern Guilford Middle School, which he saw through its start-up phase, and led to "exemplary" status on the statewide measures. Dr. Misher is a graduate of Appalachian State University (B.S. in Mathematics, 1982), North Carolina A & T (Masters in Education Administration, 1991), UNC-Chapel Hill (Assistant Principals Executive Program, 2005), and Nova Southeastern University (Doctorate of Education: Educational Leadership, 1999). He began teaching in 1982, served as an Assistant Principal in the Guilford County and Burlington City Schools 1991-1999, and served as Principal of Allen Middle School, Ben L. Smith High School, and Northern Guilford Middle School, between 1999 and 2014. He is motivated by "a passion for making sure students have the opportunity to have an excellent education experience," and anticipates that New Generation Academy will focus on developing reading skills and "personalizing instruction according to the needs of each child."

e. Dr. Barbara H. Zwadyk

Dr. Zwadyk joined the board to be "involved with a charter school that would support all students, providing equity and 21st century learning." After graduation from UNC-Greensboro, she served as a Teacher, Assistant Principal, Principal, and Instruction Improvement Officer for High Schools in the Guilford County Schools between 1984 and 2005. She obtained Masters degrees in French and Educational Leadership; and, in 1993, was awarded a Doctorate of Education from UNC-G. (Her dissertation concerned the "Impact of Class Size on Retention.") She went to Winston-Salem/Forsyth County Schools in 2006 as Assistant Superintendent of Instructional Services. She returned to the Guilford County Schools in 2009 as Chief Officer for Curriculum and Organizational Development, and retired from that system in 2012 as High School Curriculum Officer. She served the Chatham County schools as Interim Assistant Superintendent for Academic Services and Instructional Support Services for approximately a year. In 2013, she became Director of North Carolina New Schools, and has done leadership coaching on behalf of that organization. She has taught Masters and Doctoral level courses as an adjunct professor at Salem College, UNC-G, Gardner Webb, the University of the

Cumberlands, and High Point University. Dr. Zwadyk had previous experience on the Boards of the N.C. Association for Supervision and Curriculum Development, and other non-profits.

f. Dr. Craig Rhodes

Dr. Rhodes has a Bachelors degree in Electronic and Computer Technology, a Masters degree in Technology Education, and his Ph.D. from the University of Minnesota, in Workplace, Community and Family Education. Dr. Rhodes is a former public school teacher, and a former university education professor instructing future teachers. Dr. Rhodes had served since 2002 as the special assistant to the Provost at North Carolina A&T State University. In that role, he was the University's liaison with early college and middle college principals. His personal mission was to bring to New Generation Academy's Board "knowledge and opportunities for partnership with higher education institutions," to help create "a robust and innovative learning environment" for acquiring "21st century skill sets."

g. Mr. David L. Crandall

Mr. Crandall was serving as Chairman of the Board of the National Association of Middle School Principals when Petitioner's application was filed. He had done public relations work for many years with the Washington, D.C. office of this organization. He held a B.S. in Marketing from Clemson University. He had 22 years of experience serving schools through his positions with photography firms, currently as Director of Sales for Strawbridge Studios since 2012. In his responses to the Appendix G questions, Mr. Crandall knowledgeably discusses the role of the various stakeholders and the governance of successful schools. He explained his desire to serve on the board as a new way to "give back to the community," in an area the city that presently lacked education options. He was also motivated by associating with the school's founders. "The current leadership of NGA is composed of a dream team of educators and professionals, all led by one of the most passionate men in education I have ever met," a reference to Dr. Misher.

35. The OCS, the CSAB, and the Respondent State Board of Education did not evaluate the Petitioner's purpose, Board of Directors, education plan, financial viability, or other merits in reaching the decision to disallow its application.

36. There are several mentions of denying applications for being "incomplete" in CSAB literature, the application, and a SBE Policy, No. TCS-U-012, none of which define the term as including trivial clerical errors. This policy does clearly state that, "The SBE may request information from applicants, their officers, agents or employees ..."; and, that "SBE may give priority consideration to applications that demonstrate the capability to provide comprehensive learning experiences to students identified as at risk of academic failure."

37. While Respondent is ultimately responsible for the disposition of Petitioner's application, the Minutes of SBE's June 3, 2015 meeting fails to show that the general membership of the State Board of Education made a conscious decision to deny it for the reasons given at the hearing. (R Ex 20, p 1; R Ex 21, p 35-41.)

38. The preponderance of the evidence of record shows that Respondent erred in failing to evaluate Petitioner's application to determine whether Next Generation Academy would achieve

one or more of the purposes of charter schools, would likely be educationally and economically sound, and would meet the requirements of the Charter Schools Act and SBE.

39. The preponderance of the evidence of record shows that Respondent arbitrarily rejected the Petitioner's charter school application while accepting other applications with substantially similar "incompleteness."

40. The Respondent's rejection of the Next Generation Academy's application substantially harmed Petitioner by, at a minimum, delaying the opening of the school for a year, and forcing it to at least partially repeat the time-consuming process of submitting a charter school application with current information.

41. Next Generation, Inc. timely filed a Petition for a contested case hearing on June 8, 2015 in the Office of Administrative Hearings, challenging the Respondent's denial of Petitioner's application for a school charter.

BASED UPON the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. To the extent that the foregoing Findings of Fact contain conclusions of law, or that these Conclusions of Law are findings of fact, they should be so considered without regard to their given labels. *In re Helms*, 127 N.C.App. 505, 510, 491 S.E.2d 672, 675 (1997); *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011).

2. All actions of agencies taken pursuant to N.C. Gen. Stat. Chapter 115C, Elementary and Secondary Education, including the approval of applications to open charter schools pursuant to § 115C-218.5, are subject to the requirements of the Administrative Procedure Act, Chapter 150B of the General Statutes. N.C. Gen. Stat. § 115C-2. The Respondent State Board of Education is subject to the contested case provisions of the Administrative Procedure Act. N.C. Gen. Stat. §150B-1(e).

3. Respondent was required to give Petitioner notice in writing of its right to appeal the denial of its application to the Office of Administrative Hearings in order to limit the time within which Petitioner could file a contested case petition. N.C. Gen. Stat. § 150B-23(f). It is axiomatic that this period of limitation does not begin to run until such notice is given as required by statute. Consequently, the Petitioner was entitled to file its petition at any time. *Clay v. Employment Sec. Com'n of North Carolina*, 340 N.C. 83, 87, 457 S.E.2d 725, 728 (1995); *Jordan v. N.C. Dep't of Transp.*, 140 N.C.App. 771, 774, 538 S.E.2d 623, 625 (2000), *disc. rev. den.*, 353 N.C. 376, 547 S.E.2d 412 (2001); *CM v. Bd. of Educ. of Henderson County*, 241 F.3d 374, 386 (4th Cir.), *cert. denied*, 534 U.S. 818, 122 S.Ct. 48, 151 L.Ed.2d 18 (2001).

4. The Petition was timely filed on June 5, 2015, within 60 days of the State Board of Education's *de facto* final agency decision on June 3, 2015. However, as Respondent failed to

give Petitioner due notice of its appeal rights, no limit on the time to file the Petition was imposed, regardless of when the final agency decision may be deemed to have been given. N.C. Gen. Stat. §150B-23(f).

5. The parties and the controversy are properly before the Office of Administrative Hearings. N.C. Gen. Stat. §§ 115C-2, 150B-1 and 150B-23(a).

6. An administrative law judge must decide a contested case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency, and determine whether the petitioner is entitled to the relief sought. N.C. Gen. Stat. §§ 150B-34(a); 150B-51(c). The Petitioner bears the burden of establishing facts required by G.S. 150B-23(a) by the preponderance of the evidence. N.C. Gen. Stat. § 150B-29(a). No exercise of what could reasonably be characterized as the agency's expertise in the field of education was a material factor in the decision to deny Petitioner's application.

7. The finder of facts need not make a finding as to every fact which arises from the evidence, but rather only those facts which are material to the resolution of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, *aff'd*, 335 N.C. 234, 436 S.E.2d 588 (1993); *Green v. Green*, 54 N.C.App. 571, 284 S.E.2d 171 (1981); *In re Custody of Stancil*, 10 N.C.App. 545, 549, 179 S.E.2d 844, 847 (1971).

8. The Respondent North Carolina State Board of Education ("SBE") was created by the Constitution to "supervise and administer" the State's system of free public schools, "and shall make all needed rules ... subject to the laws enacted by the General Assembly." Article IX, Sec. 4 and 5. It "establish[s] policy for the system ..., subject to laws enacted by the General Assembly." N.C. Gen. Stat. § 115C-12(9). SBE has been tasked with the general administration of the charter schools by the Charter Schools Act, initially codified at N.C. Gen. Stat. §§ 115C-238.29A - 115C-238.29J, and recodified effective August 6, 2014 as Chapter 115C, Article 14A, §§ 115C-218 - 115C-218.110.

9. At all times pertinent hereto, the Charter School Advisory Board ("CSAB") was "located administratively within the Department of Public Instruction," but "report[ed] to the State Board of Education" and "ma[de] recommendations to the State Board." N.C. Gen. Stat. § 115C-218(b)(1) & (10)a. The State Board of Education is responsible for making the "final decisions on the approval or denial of applications" to open charter schools. N.C. Gen. Stat. § 115C-218.5(b). SBE's decision or acquiescence in the rejection of Petitioner's application was the final agency decision on this matter. The Respondent State Board of Education is ultimately responsible for the actions prejudicial to Petitioner.

10. The Legislature enacted the "Charter Schools Act of 1996" with the stated "purpose" to:

... authorize a system of charter schools to provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that

operate independently of existing schools, as a method to accomplish all of the following:

- (1) Improve student learning;
- (2) Increase learning opportunities for all students, **with special emphasis on expanded learning experiences for students who are identified as at risk of academic failure** or academically gifted;
- (3) Encourage the use of different and innovative teaching methods;
- (4) Create new professional opportunities for teachers, including the opportunities to be responsible for the learning program at the school site;
- (5) Provide parents and students with expanded choices in the types of educational opportunities that are available within the public school system; and
- (6) Hold the schools established under this Article accountable for meeting measurable student achievement results, and provide the schools with a method to change from rule-based to performance-based accountability systems.”

(Emphasis added.) N.C. Gen. Stat. § 115C-218(a).

11. SBE may approve an applicant if it would achieve one or more of the above purposes, would “be likely to operate a school in educationally and economically sound manner,” and meets requirements set out in the Charter Schools Act or promulgated by SBE. N.C. Gen. Stat. § 115C-218.5(a). Applicants were statutorily required to give “names of the initial members of the board of directors,” and descriptions of a “program that implements one or more of the purposes,” and “student achievement goals.” N.C. Gen. Stat. § 115C-218.1(b) (1), (2) & (3).

12. Respondent’s Policy TCS-U-012, was not adopted as a Rule pursuant to the N.C. Administrative Procedures Act. As a “policy,” it is a “nonbinding interpretive statement.” N.C. Gen. Stat. § 150B-2(7a) and (8a)c. Neither may be used as an exception to statutory directives. *Anderson v. North Carolina Dept. of Human Resources*, 109 N.C.App. 680, 682, 428 S.E.2d 267, 269 (1993).

13. Petitioner was not offered administrative remedies or a meaningful opportunity to be heard prior to the final agency decision and, although the SBE, Department of Public Instruction and CSAB are subject to the Administrative Procedures Act, no notice of its right to appeal that decision pursuant to N.C. Gen. Stat. § 150B-23(f) was given at any stage of the agency’s process.

14. An agency action is considered “arbitrary and capricious” when its decision indicates the absence of careful consideration, a course of reasoning, and the exercise of judgment, under circumstances in which the law requires analysis and the application of measured discretion. *State ex rel. Comr. of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (1980); *Watson v. N.C. Real Estate Com’n*, 87 N.C. App. 637, 649, 362 S.E.2d 294, 301 (1987).

A decision “without adequate determining principle,” is arbitrary. Black’s Law Dictionary 134 (rev. 4th ed. 1968).

15. Respondent erred by applying a “completeness” standard that contradicted the Charter Schools Act by preventing some applications from being considered under the statutory criteria for selecting charter school applicants. N.C. Gen. Stat. §§ 115C-218(a); 115C-218.5(a).

16. Respondent erred by failing to consider Petitioner’s application to open a charter school under the statutory criteria of the Charter Schools Act.

17. Respondent erred by imposing, or permitting the imposition, of requirements for approving charter schools designed to reduce the pool of applicants allowed to be considered under the criteria specified by the Charter Schools Act following the repeal the “cap” limiting the number of charter schools in the State. Session Law 2011-164; N.C. Gen. Stat. § 115C-105.37B(a)(2).

18. Respondent arbitrarily applied its “completeness” screening by rejecting the Petitioner’s application while accepting other applications with substantially similar perceived defects.

19. Respondent’s decision substantially prejudiced the Petitioner’s rights to timely consideration of its application under the criteria specified in the Charter Schools Act.

20. An administrative law judge may assess reasonable attorneys’ fees and witnesses’ fees against the State agency upon finding that the respondent agency has acted arbitrarily and substantially prejudiced the Petitioner’s rights. N.C. Gen. Stat. § 150B-33(b)(11).

BASED UPON the foregoing Findings of Fact and Conclusions of Law the undersigned makes the following:

FINAL DECISION

The Petitioner is entitled to have its application evaluated by Respondent for the opening of Next Generation Academy in August 2016, or at such time as Petitioner may otherwise agree, under the same statutorily authorized criteria used in considering those applications received by September 26, 2014 that were not deemed to be “incomplete.”

Counsel for Petitioner shall submit to the undersigned an affidavit concerning his time, services, and expenses in this case, the normal and reasonable fees charged in cases of this nature by attorneys with his relevant skills and experience, and a copy or description of his contract with Petitioner, including any contingencies he wishes to be considered in the determination of a reasonable attorney’s fee pursuant to N.C. Gen. Stat. § 150B-33(b)(11).

Respondent shall compensate Petitioner for a reasonable attorney’s fee, when such is approved by Order of the Office of Administrative Hearings.

So Ordered.

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. Gen. Stat. § 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 4th day of March, 2016.



J Randolph Ward  
Administrative Law Judge

FILED  
OFFICE OF ADMINISTRATIVE HEARINGS  
03/29/2016 12:21 PM

STATE OF NORTH CAROLINA  
COUNTY OF DURHAM

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
15 OSP 02606

Charles L Simpson JR. Petitioner,  v.  North Carolina Central University Respondent.	<b>ORDER</b>
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This matter coming on to be heard and being heard November 5, 2015, in the Office of Administrative Hearings, and it appearing to the undersigned that the Petitioner appears in this matter pro se, and the Respondent is represented by Assistant Attorney General Mr. Matthew Tulchin; this matter was heard more than 180 days from commencement due to extraordinary cause in the form of multiple scheduling issues, as well as attempts to resolve this case short of hearing; and based upon the evidence presented, the undersigned finds the following facts by a preponderance of the evidence:

*Procedural History*

1. Petitioner filed a Petition for a Contested Case Hearing on April 10, 2015. The matter was assigned to Administrative Law Judge Donald W. Overby on April 24, 2015, and an Order for Prehearing Statements was issued that same day.
2. ALJ Overby issued a Scheduling Order on April 24, 2015 which required discovery to be completed by June 8, 2015, and set hearing for the matter during the week of June 22, 2015. A Notice of Hearing was filed on May 19, 2015, setting the hearing for June 24, 2015.
3. Petitioner filed his Prehearing Statement on May 22, 2015, and the Respondent filed its Prehearing Statement on May 28, 2015.
4. A Motion to Continue was filed on June 4, 2015, and ALJ Overby entered an Order Continuing Hearing on June 9, 2015.
5. The hearing was set for the week of August 24, 2015 due to the unavailability of the Respondent's witnesses, Petitioner's unavailability in July, 2015, and because Respondent's counsel was on secured leave from August 10, 2015 through August 14, 2015.

6. The undersigned was assigned this case on June 10, 2015, and because of the numerous cases scheduled for the week of August 24, 2015, this matter was set for September 1, 2015.

7. Petitioner filed a request for a continuance on August 26, 2015, citing the need to complete discovery and a desire to conduct a settlement conference as the reasons for his request.

8. The undersigned entered an order continuing the hearing, but a mediated settlement conference was held at OAH on September 1, 2015. The mediation was not successful, and the matter was scheduled for hearing on November 5, 2015.

9. Hearing on this matter was held November 5, 2015, and the parties requested a transcript of this hearing to review and assist in preparing their proposed decisions.

10. Respondent requested additional time to submit a proposed decision, and an Order extending time was entered on January 13, 2016.

*Background*

11. Petitioner is a State employee as defined by Chapter 126 of the North Carolina General Statutes.

12. Respondent North Carolina Central University is the Petitioner's employer. Respondent is governed by Chapter 126 of the North Carolina General Statutes in its dealings with Petitioner related to this contested case.

13. Petitioner began his employment with the University's Police and Public Safety Department in February, 2001. Petitioner has served as a law enforcement officer with the Respondent since that time, attaining the rank of lieutenant.

14. The Department is an accredited law enforcement agency operating and existing pursuant to the laws of the State of North Carolina.

15. Campus police officers have the same powers in their jurisdiction "as municipal and county police officers." N.C. Gen. Stat. § 74G-6.

16. In performance of their duties, "campus police officers shall apply the standards established by the law of this State and the United States." N.C. Gen. Stat. § 74G-6.

*Initial Dispatch Regarding James Henry Nelson, IV*

17. Shortly after 6:00 pm on September 24, 2014, a female disembarked a shuttle on the campus of North Carolina Central University and approached a white Dodge Charger, believing it belonged to one of her friends. (Resp. Ex. 8, p1).

18. Upon approaching the vehicle, she realized that she did not know the driver.

19. During this brief encounter, the female noticed the driver had a firearm sitting on one leg, with a magazine on the other. (Resp. Ex. 8, p1).

20. The female left and reported to a campus RA that the occupant of the white Dodge Charger with Ohio plates was on campus with a firearm. The RA relayed the information to campus police. (Resp. Ex. 8, p1-2).

21. The occupant of the vehicle, later identified as James Henry Nelson, IV, is a violent and dangerous man based upon his extensive criminal history and his actions in this case, which are more fully set forth herein. (Resp. Ex. 4C).

22. Nelson's duplicate North Carolina Driver License lists his residence as 807 Riverbark Lane, in Durham. (Resp. Ex. 4C).

23. Respondent's evidence showed that Nelson was documented for "Gang Activity" in 2008, and has been charged/convicted of the following offenses:

Offense	Year
Larceny	2008
Narcotics Violation	2010
Larceny	2010
Possession of Drug Paraphernalia	2010
Larceny	2010
PWISD Controlled Substance	2010
Open Container of Alcohol	2011
Weapons Violation	2012
Narcotics Violation	2012
Robbery with a Dangerous Weapon	2012
Att. Robbery with a Dangerous Weapon	2012
AWDWIKISI	2012
Possession of Marijuana	2012
Possession of Drug Paraphernalia	2012
PWISD Controlled Substance	2014

(Resp. Ex. 4C).

24. In fact, Nelson was charged with a felony assault for his actions herein. (The exact charge against Nelson is unclear from the testimony and the exhibits, however, the facts establish possible charges under N.C. Gen. Stat. §14-32 and §14-34.2 at a minimum.) (T., p. 79).

25. At approximately 6:39 pm, Officer Selina Newell of the North Carolina Central University Police Department was dispatched to the area.

26. Reports were also received that there were two individuals in a white vehicle screaming in a potential domestic violence incident. (Resp. Ex. 8, p2).

27. At 6:44 pm, Officer Newell arrived on scene and saw a white Dodge Charger, but the vehicle drove away as she approached the Chidley Hall area on campus. Officer Newell observed no suspicious activity for 10 minutes and left the area.

28. At 7:26 pm on September 24, 2014, Petitioner and Officer Newell rode together in a marked university patrol unit to the Chidley Hall area to assist with a university sanctioned event.

29. Upon arrival, Officer Newell noticed a white Dodge Charger matching the description of the vehicle she had been alerted to earlier in her shift.

*Nelson Uses Vehicle as a Deadly Weapon Against Petitioner*

30. Officer Newell, upon returning that evening, parked her patrol vehicle at the front driver's side of the white Dodge Charger.

31. Officer Newell informed Lt. Simpson about the earlier dispatch regarding the vehicle, and the two officers approached the white Dodge Charger. Officer Newell and Lt. Simpson were not made aware of the RA's report to campus police.

32. Officer Newell went to the rear of the white Dodge Charger to call in the license plate information, while Lt. Simpson approached the driver's side.

33. As Officer Newell walked by the white Dodge Charger, she shined her flashlight into the interior of the vehicle and observed one individual inside.

34. Lt. Simpson tapped on the window and asked Nelson to roll down the window.

35. Nelson initially refused to roll the window down more than an inch to two inches, despite Lt. Simpson's request. (Resp. Exs. 4A, p2-3, 5; 4C; and 8, p2).

36. Lt. Simpson and Officer Newell smelled an odor of marijuana coming from the interior of the white Dodge Charger. (Resp. Exs. 4, p3, and 8, p2).

37. Lt. Simpson asked the Nelson to produce his driver's license, which he did, and then Lt. Simpson again asked Nelson to roll the window down. Nelson attempted to roll the window back up, began questioning the officer, and yelled at him. (Resp. Exs. 4A, p2-3, and 8, p2).

38. Nelson refused to comply with Lt. Simpson's lawful commands.

39. As the Petitioner walked back toward the patrol car to check the driver's license, Nelson revved the engine. (Resp. Ex8, p2).

40. Officer Newell observed the rear lights quickly change on the white Dodge Charger, signaling to her that the vehicle was about to be put in motion. (Resp. Ex. 4A, p5).

41. Nelson caused the white Dodge Charger to accelerate toward Lt. Simpson.

42. Nelson struck Lt. Simpson with the white Dodge Charger, propelling the officer onto the hood of the vehicle.

43. Nelson continued to operate the vehicle in a forward direction after striking Lt. Simpson. The Petitioner was carried approximately ten feet after the Nelson struck the officer. (T., p246).

*Lt. Simpson's Use of Deadly Force*

44. After Lt. Simpson slid off the hood of the vehicle and rolled on the pavement, Nelson stopped the white Dodge Charger.

45. Lt. Simpson observed the illuminated brake lights on Nelson's vehicle.

46. At this point, the Petitioner was in a vulnerable position only six feet from the rear of Nelson's vehicle. (Resp. Ex. 4A, p6).

47. When he saw Nelson's brake lights, Lt. Simpson thought "[Nelson] was backing up to finish the job." (T., p. 246).

48. When Nelson applied his brakes, he was in close proximity to Lt. Simpson and in a position from which he still posed an immediate threat to the officer.

49. Lt. Simpson believed that any individual who would assault a uniformed law enforcement officer posed a threat to the general public "in an effort to get away." (T., p. 246).

50. Lt. Simpson was able to get to a kneeling position and discharged one round from his service weapon in the direction of Nelson's stationary vehicle.

51. Officer Newell testified that the vehicle stopped, Nelson "looked left, and Lieutenant Simpson got up ... shot one time, *and then* the driver went east on Lawson." (Emphasis added) (T., p. 23).

52. The testimony provided by Lt. Simpson and Officer Newell established that Nelson's vehicle was stopped and in close proximity to the Petitioner at the time he fired the weapon.

53. Lt. Simpson provided statements as part of the investigations into this incident. His statements are consistent with his credible and believable testimony in this matter. (Resp. Ex. 4A).

54. These statements do not establish that Nelson was fleeing at the time Lt. Simpson fired his weapon.

55. Captain Alphonso White summarized the Petitioner's statements as follows: "I fired one shot at the vehicle.... I could still see his taillights." (Resp. Ex. 4A).

56. Officer Newell's statement to investigators does not mention if Nelson's vehicle was in motion or stationary at the time Lt. Simpson discharged his weapon. (Resp. Ex. 4A). However, the statement she provided is consistent with her credible and believable testimony.

57. After Lt. Simpson fired the shot at Nelson's vehicle, Nelson then fled the scene, speeding away in an easterly direction on Lawson Street. (Resp. Ex. 8, p3).

58. Lieutenant Simpson then fell to the ground due to his injuries from Nelson's actions, and was later transported to the ER at Duke University Hospital for treatment.

59. One .45 caliber shell casing was recovered at the scene. Respondent presented no evidence that a projectile struck the vehicle, or any other object.

60. Officers who arrived on scene noted that the Petitioner was not talkative because he was in pain. In addition, when the Petitioner was transported to the hospital, he was placed on pain medication.

61. However, at 7:33 pm, the Petitioner did notify Captain Alvin Carter by cell phone that he had discharged his weapon. (Resp. Ex. 4C). Petitioner may not have immediately notified his superior, but his actions were reasonable given the facts and circumstances herein.

62. Evidence presented demonstrated that Petitioner sustained injuries to his abdomen, hip, and hand. (Resp. Ex. 4C). Petitioner also sustained a concussion and an injury to his knee. (T., p.273).

*University's Response to the Incident and Investigation*

63. Respondent issued a press release on September 24, 2015, describing what had transpired. Respondent reported to the public that Nelson "became uncooperative during the investigation and drove off, striking one officer with the vehicle. *In defense of himself*, the officer discharged one round from a service weapon." (Emphasis added) (Resp. Exhibit 4F).

64. The North Carolina Central University Police Department completed an investigation of this incident. The North Carolina State Bureau of Investigation was not contacted.

65. Evidence demonstrates that the Petitioner was cooperative at each stage of the investigation.

66. The narrative in the Department's investigation lists the circumstances surrounding discharge of the firearm as follows: "Officer was struck by a vehicle [and] in the process fired the

weapon as an attempt to arrest and prevent the escape. The black male used a white [D]odge [C]harger as means of deadly force attempting to seriously injury [sic] the officer in attempt to escape.” (Resp. Ex. 4C).

67. In addition, the Department listed the Petitioner as the victim of an assault in the Incident/Investigation report, and Nelson’s vehicle was determined to be a “deadly weapon.” (Resp. Ex. 4C).

68. In fact, the Department’s investigative summary of this incident acknowledges that the white Dodge Charger “became a deadly weapon when the suspect drove the vehicle into Lt. Simpson.” (Resp. Ex. 8, p7).

69. Respondent’s evidence included an alert that Nelson was “Armed and Dangerous.” (Resp. Ex. 4C).

70. On September 27, 2015, the Durham County Sheriff’s Department notified campus police that the white Dodge Charger was abandoned at 3710 Snow Hill Road, Durham, North Carolina, on a dirt path. A sheriff’s deputy confirmed that Nelson had rented the vehicle from Enterprise Rent-a-Car. (Resp. Ex. 4 C).

71. Pursuant to Department policy, Petitioner was immediately placed on administrative leave and Internal Affairs conducted an investigation into the incident. (Resp. Exs. 3-4).

72. At all relevant times herein, Alphonso White was the Administrative Division Captain for the Department. White is currently employed as the Chief of Police for Meredith College.

73. While at NCCU, Chief White was employed as the Training Director and Internal Affairs Director. Prior to working at NCCU, Chief White was a member of the Raleigh Police Department for approximately 30 years. Chief White is an experienced law enforcement officer and has experience conducting internal investigations.

74. On the night of the shooting, White received a call from Captain A. J. Carter concerning possible discharge of Petitioner’s firearm. When it was confirmed that there was a discharge of a weapon, White called the units on campus to make sure they established a crime scene and roped it off so the evidence would remain preserved.

75. Chief White conducted an internal investigation of the shooting as required by Department policy and procedure. White reviewed the scene of the shooting, reviewed the incident reports, and interviewed witnesses, including the Petitioner.

76. Prior to interviewing Petitioner, Chief White explained to Petitioner that he was investigating his discharge of a firearm and read him his administrative rights. Petitioner then acknowledged his rights and signed the Warning for Administrative Investigation form. (Resp. Ex. 4D).

77. Petitioner told White that he fired his weapon based on an imminent threat and to prevent Nelson's escape. (Resp. Ex. 4, T., p. 206-207).

78. Petitioner also stated that he had injuries to his hand, back and stomach and felt justified in firing his weapon based on law and policy. Petitioner provided White with a written statement in addition to his interview statement. (Resp. Ex. 4; T. pp. 206-07).

79. Chief White provided Chief Bell with his findings and analysis in an investigative report prepared at the conclusion of the investigation.

80. Chief White recommended that Petitioner be demoted from the rank of lieutenant and that he receive a five-day suspension. (Resp. Exs. 4, 15; T. pp. 128, 195-96, 199-203).

81. Detective Bryant Hernandez, the Department's criminal investigator, also investigated the incident. Detective Hernandez has been employed with NCCU for nine years as a police officer, two of those years as a detective.

82. At approximately 9:30 p.m. on September 24, 2014, Det. Hernandez received a call from Captain A. J. Carter about the shooting at Chidley Hall. Det. Hernandez arrived on campus and conducted his investigation. (Resp. Ex. 8; T. pp. 55-57).

83. Chief Bell provided a summary of the investigation to the Chancellor on October 16, 2014. (Resp. Ex. 6).

84. The findings submitted to the Chancellor differ from the press release issued to the public on the night of the incident. The October 16, 2014 memorandum states that the Petitioner "did not fire his weapon in self-defense." (Resp. Ex. 6).

85. On November 6, 2014, Chief Bell provided Petitioner with a notice to attend a pre-disciplinary conference due to purported grossly inefficient job performance. In the notice, Chief Bell explained the reasons for the conference; namely Petitioner's discharge of his weapon purportedly in violation of N.C. Gen. Stat. § 15A-401 and General Order 100-02.

86. Petitioner was also informed that he could face disciplinary action, up to and including dismissal, as a result of his grossly inefficient job performance. (Resp. Ex. 9; T., 128-30, 157).

87. A pre-disciplinary conference was held on or about November 10, 2014.

88. Chief Bell informed Petitioner of the purpose of the conference and the allegations against him. Petitioner was provided with an opportunity to respond, and stated that he stood by the statement that he had given Chief White. (Resp. Ex. 9; T., 128-30, 157).

89. Ms. Sylvia Anderson, who is the Director of Employee Relations at the University, learned that the pre-disciplinary conference had been held outside the presence of a human

resources representative. Ms. Anderson informed Chief Bell of this oversight and told him that NCCU's policy and practice require that a HR representative be present during the pre-disciplinary conference. (T. pp. 168-70).

90. A second pre-disciplinary conference was conducted on November 12, 2014.

91. Ms. Anderson presented Petitioner with a letter indicating why the conference was being held. Ms. Anderson asked Petitioner if he had any comments, questions, or more information that he would like to present before Chief Bell and management made a disciplinary decision. Petitioner again indicated that he stood by his prior statement. (T. pp. 129-130, 133, 158-159, 169, 171-172).

92. Following the second pre-disciplinary conference, Chief Bell consulted with his staff and the Chancellor and the decision was made to suspend Petitioner for two weeks without pay.

93. On or about November 13, 2014, Chief Bell suspended Petitioner for two weeks without pay for grossly inefficient job performance; specifically, firing his duty weapon in violation of N.C.G.S. 15A-401 (d)(2) and Police and Public Safety Department General Order 100-02 R1. (Resp. Exs. 1, 2, 10; T. pp. 98-102, 128, 134, 137, 139-140, 142, 159).

*Respondent's Policies Concerning Use of Force*

94. All employees of the Department are provided with a set of rules and general orders that set forth the Department's authority, employee responsibilities, and code of conduct. These rules and general orders are set out in the North Carolina Central University Police & Public Safety Department Manual and General Orders (the "General Orders"). (Relevant portions of the General Orders were provided in Resp. Exs. 2 and 3).

95. The General Orders set forth guidelines and expectations governing employees within the department, including, but not limited to, information regarding jurisdiction, use of force, appearance, responding to emergencies, active shooter protocol, and traffic enforcement. All Department employees are expected to know, understand, and follow the General Orders.

96. General Order 100-002 R1, which the Petitioner is accused of violating, is entitled "Use of Force" and was in effect at all relevant times herein. (Resp. Ex. 2)

97. Respondent's General Orders contemplate and condone the use of deadly force by law enforcement officers in limited circumstances.

98. General Order 100-002 R1 states the Respondent's policy as follows:

The value of human life is immeasurable in our society. Police officers have been delegated the awesome responsibility to protect life and property and apprehend criminal offenders. The officer's responsibility for protecting life must include his own. It is the

policy of this department to use defensive tactics consistent with “Graham vs. Connor” {The test of reasonableness under the 4<sup>th</sup> Amendment is not capable of a precise definition or mechanical application... Its proper application requires careful attention to the facts of each particular case, including the severity of the crimes a tissue [*sic*], whether the suspect poses an immediate threat to the officer or others and whether or not he is actively resisting arrest or attempting to evade arrest by flight...} and North Carolina State Law. Officers will only use the force reasonably necessary to accomplish lawful objectives and effectively bring an incident under control, while protecting the lives of the officer and others.

99. This policy acknowledges that all life is important and entitled to protection, including lives of law enforcement officers. The policy further provides that *Graham v Connor* and state law guides use of force inquiries.

100. Deadly force is defined in the “Definitions” section of the General Order as “that force which is reasonably likely to cause death or grave injury or which creates some specified degree of risk that a reasonable and prudent person would consider likely to cause death or grave injury.” Deadly force is then defined again in Section I as “force likely to cause serious physical injury or death.” (Resp. Ex. 2).

101. General Order 100-02 R1, I.a. states that:

An officer is justified in using deadly force to effect arrest or prevent escape only when it is or appears to [be] reasonably necessary:

(i) In defense of oneself ... from what the officer reasonably believes to be the use or imminent use of deadly force;

(ii) To arrest or prevent escape of a person who the officer reasonably believes is attempting to escape by the use of a deadly weapon; [and]

(iii) To arrest or prevent escape of a person who by his conduct or any other means indicates he presents an imminent threat of death or serious physical injury to others unless apprehended without delay.

102. General Order 100-02 R1 III provides that officers may not discharge their firearm at or from a moving vehicle unless that action is taken in self-defense or defense of a third party when that “action is reasonable to preserve human life.”

103. At the time of this incident Nelson’s vehicle was a deadly weapon, as acknowledged by the Respondent and as evidenced by the charge against Nelson.

104. Petitioner was aware of the General Orders because he was a member of the accreditation team that drafted the order. Petitioner was responsible for writing many of the Department’s general orders and policies. (Resp. Exs 1-2, 4; T. pp. 185-86).

105. Public Safety Officers are sworn law enforcement officers and are required to have taken Basic Law Enforcement Training (“BLET”) through the State of North Carolina. In addition, firearm training must be completed yearly.

106. Officers must pass night and day firearm training and complete classes concerning laws which govern use of force and firearms. An exam is then taken after the classroom exercise.

107. Officers are taught that the use of deadly force is only permitted: (1) in self-defense from the use or imminent use of deadly force; (2) to prevent the escape of a suspect from custody who is attempting to escape by using a deadly weapon; (3) to effect an arrest of a person who present an imminent threat of death or serious injury to others; and (4) to prevent the escape from custody of a convicted felon. (Resp. Exs. 12, 13, 14; 87-88, 91).

Based upon the foregoing findings of fact, the undersigned makes the following conclusions of law:

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter herein, and extraordinary cause exists for this decision being issued beyond the statutory limit.

2. Respondent North Carolina Central University is the Petitioner’s employer and is subject to Chapter 126 of the North Carolina General Statutes.

3. Petitioner is a career state employee as that term is defined in N.C. Gen. Stat. § 126-1.1, and he is subject to the State Personnel Act.

4. The State employer has the burden of showing by a preponderance of the evidence that there was just cause for suspension. N.C. Gen. Stat. § 150B-29(a).

5. Respondent has not met its burden of proof.

6. A career State employee may only be suspended for just cause. N.C. Gen. Stat. §126-35(a).

7. “Just cause, like justice itself, is not susceptible of precise definition. It is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case.” N.C. Dep’t of Env’t & Natural Res. v. Carroll, 358 N.C. 649, 669 (2004) (internal citations omitted).

8. It would be neither equitable nor fair to suspend Petitioner for his lawful actions which are consistent with the Respondent’s policies.

9. Respondent suspended Petitioner for “grossly inefficient job performance” pursuant to 25 N.C.A.C. 01J .0604(b), claiming that the officer had violated N.C. Gen. Stat. §15A-

401(d)(2) and General Order 100-01 R1. (One section of the November 13, 2014 letter in Respondent's Exhibit 10 references §15A-401(d)(2), while another references §15A-402(d)(2)).

10. Grossly inefficient job performance "occurs in instances in which the employee fails to satisfactorily perform job requirements as specified in the job description, work plan, or as directed by the management of the work unit or agency and that failure results in: (a) the creation of the potential for death or serious harm to a client(s), an employee(s), members of the public or to a person(s) over whom the employee has responsibility; or (b) the loss of or damage to agency property or funds that result in a serious impact or work unit." 25 N.C.A.C. 01J.0614(5); see also *N.C. Dep't. of Corr. v McKimney*, 149 N.C. App. 605, 609 (2002).

11. Grossly inefficient performance need not result in actual death or serious bodily injury, only in the creation of the potential or risk of such harm. *Id.*

12. Here, however, Petitioner cannot be said to have engaged in grossly inefficient job performance as his actions were consistent with management directives in the Respondent's General Orders, with North Carolina law, and with his extensive firearms training.

13. There is no question that Petitioner's lawful and justified actions created the potential for death or serious harm. However, a law enforcement officer's justifiable discharge of his service weapon is contemplated, not only by the nature of his duties, but by Respondent's own policy.

14. The United States Supreme Court in *Tennessee v. Garner*, 471 U.S. 1 (1985), held that deadly force may not be used to prevent the escape of an unarmed felony suspect. In that case, the unarmed, fleeing suspect refused to obey law enforcement commands and was shot when he climbed over a fence in an effort to avoid capture.

15. Here, however, Nelson was not fleeing at the time Lt. Simpson discharged his weapon. Respondent's evidence and the testimony herein clearly established that Nelson stopped the white Dodge Charger and then Lt. Simpson, believing Nelson was going "to finish the job" discharged his weapon at the vehicle. It was only after Lt. Simpson fired that Nelson fled the crime scene.

16. Officer Newell and Lt. Simpson provided statements as part of the investigations into this incident. Those statements are consistent with their credible and believable testimony in this matter.

17. These statements read alone do not establish that Nelson was fleeing when Lt. Simpson acted.

18. Lt. Simpson's October 1, 2014 statement reads, "When the vehicle turned right Lt. Simpson slide [*sic*] off the vehicle to the ground, while on the ground Lt. Simpson fired his duty issued weapon once in an attempt to arrest and prevent the escape."

19. Captain White summarized the Petitioner's statements as follows: "I fired one shot at the vehicle.... I could still see his taillights."

20. Officer Newell testified that after the officer rolled off the hood, Nelson "looked left, and Lieutenant Simpson got up ... shot one time, *and then* the driver went east on Lawson." (emphasis added). It is clear, based upon the competent evidence in this matter, that Nelson stopped his vehicle. While the vehicle was stopped, Lt. Simpson fired his weapon.

21. Respondent has failed to prove by a preponderance of the evidence that the vehicle was in motion and moving away from Petitioner at the time he discharged his firearm. In fact, the credible evidence proves that Nelson stopped his vehicle after the Petitioner slid off the hood, and he was in a position to cause serious bodily injury or death to Lt. Simpson.

22. Lt. Simpson was on the ground only six feet from the rear of Nelson's vehicle. Lt. Simpson reasonably believed that Nelson, who had just committed a violent felony against a law enforcement officer, was positioned and inclined to inflict serious bodily injury or death upon him.

23. Had Nelson wanted to simply flee, he could have done so. Nelson, however, chose to stop the vehicle. It was Nelson's actions which led the officer to fear for his safety.

24. In addition, Officer Newell testified that Nelson "looked left" after assaulting the officer. Without testimony from Nelson, it is not discernable what he was looking at when he "looked left." However, it is possible that in looking to his left, he was attempting to locate the injured officer in the driver's side mirror.

25. Whatever his personal motives for doing so may have been, Nelson's actions in stopping the vehicle go to the officer's reasonable beliefs.

26. Given today's hostile and dangerous climate for law enforcement officers, Lt. Simpson's belief that he was in imminent danger of death or serious bodily injury at the time Nelson stopped his vehicle was reasonable.

27. The Petitioner testified that he believed Nelson was attempting to put the white Dodge Charger in reverse to back up and "finish the job" when he saw the vehicle stop and the brake lights illuminate.

28. "An officer of the law has the right to use such force as he may reasonably believe necessary in the proper discharge of his duties to effect an arrest. Within reasonable limits, the officer is properly left with the discretion to determine the amount of force required under the circumstances as they appeared to him at the time of the arrest." *State v. Anderson*, 40 N.C. App. 318, 321-22, 253 S.E.2d 48, 50-51 (1979) (internal citations omitted).

29. In *Graham v Connor*, 490 U.S. 386 (1989), the case cited in Respondent's use of force policy, the United States Supreme Court determined that "the 'reasonableness' of a particular

use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”

30. N.C. Gen. Stat. § 15A-401(2) provides that law enforcement officers are justified in using deadly force:

“when it is or appears to be reasonably necessary ... (a) To defend himself ... from what he reasonably believes to be the use or imminent use of deadly physical force; [or] (b) To effect an arrest ... of a person who he reasonably believes is attempting to escape by means of a deadly weapon, or who by his conduct or any other means indicates that he presents an imminent threat of death or serious physical injury to others unless apprehended without delay[.]”

31. Consistent with state law, Respondent’s use of force policy contemplates and permits the use of deadly force in General Order 100-02 R1, I.a. which states that:

An officer is justified in using deadly force to effect arrest or prevent escape only when it is or appears to [be] reasonably necessary:  
(i) In defense of oneself ... from what the officer reasonably believes to be the use or imminent use of deadly force;  
(ii) To arrest or prevent escape of a person who the officer reasonably believes is attempting to escape by the use of a deadly weapon; [and]  
(iii) To arrest or prevent escape of a person who by his conduct or any other means indicates he presents an imminent threat of death or serious physical injury to others unless apprehended without delay.

32. Petitioner, an experienced law enforcement officer who was intimately familiar with departmental policy, reasonably believed Nelson would “finish the job.” When Nelson stopped the white Dodge Charger, Lt. Simpson was injured and kneeling six feet from the rear of the vehicle. Petitioner’s belief that the continued use of deadly force against him by Nelson was imminent was reasonable under the facts and circumstances herein.

33. Moreover, upon striking Lt. Simpson with his vehicle, Nelson completed a felony assault against a law enforcement officer and was subject to arrest for the same. Even though the officers may not have known about his extensive criminal history and his illegal possession of a firearm on a college campus, Nelson’s conduct in assaulting an officer with a deadly weapon showed a complete and utter disregard for the safety of others. Nelson’s potentially deadly reaction to a lawful and simple request by Lt. Simpson was not consistent with what an officer could reasonably expect from this type of routine encounter. Nelson’s actions escalated a minor traffic stop and investigation into deadly situation. Nelson, through his behavior, presented an imminent threat of death or serious physical injury to the public at large unless he was immediately

apprehended. The fact that no one else was injured by Nelson at the scene, or while fleeing the same, makes his actions no less dangerous.

34. Respondent's policy permits law enforcement officers to defend themselves.

35. Lt. Simpson and Officer Newell were following up on an earlier dispatch involving an individual in a domestic violence situation. The attempted investigation involved a road-side encounter with an individual who was not cooperating or obeying basic and lawful commands. Without warning, Nelson became an aggressor by causing his rented vehicle to accelerate into a law enforcement officer, striking and injuring Lt. Simpson. After Lt. Simpson fell off the hood, Nelson stopped the vehicle. The brake lights were illuminated and visible to Lt. Simpson who was perilously positioned at the rear of a vehicle.

36. Given the totality of the circumstances, Lt. Simpson's use of deadly force was reasonable. Simpson reasonably believed Nelson posed an imminent threat of serious bodily injury or death, and consistent with state law and the Respondent's policy, discharged his firearm at Nelson's vehicle.

37. Even if Lt. Simpson had not acted in defense of himself, his actions were still consistent with state law and the Respondent's policy. Lt. Simpson's discharge of his weapon was also permitted as an attempt to effectuate the arrest of a dangerous and unpredictable individual using a deadly weapon.

38. Respondent did not have "just cause" to suspend Petitioner for two weeks without pay based on grossly inefficient job performance. Because of the particular facts of this case, the punishment of suspension without pay was inappropriate.

39. Discharge of a firearm under these facts did create the potential for death or serious bodily injury. But, Petitioner's use of deadly force was consistent with state law and the Respondent's policy, and justified under the circumstances. Petitioner is not subject to discipline for his lawful actions that do not run afoul of departmental policy.

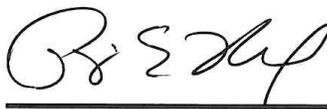
40. Respondent has substantially prejudiced Petitioner's rights, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and abused its discretion when Respondent suspended Petitioner without "just cause."

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Respondent did not have just cause to suspend Petitioner. Petitioner's suspension is overturned and he is entitled to all salary and benefits withheld by Respondent during the period of suspension. Petitioner is the prevailing party, and the costs of this action shall be taxed to the Respondent.

**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 appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing.

This the 29th day of March, 2016.



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Philip E Berger Jr.  
Administrative Law Judge

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**CONTESTED CASE DECISIONS**

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STATE OF NORTH CAROLINA  
COUNTY OF ROBESON

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
15 OSP 06204

<p>Laketha Latoya Southern Petitioner,</p> <p>v.</p> <p>Robeson County Department of Social Services Respondent.</p>	<p><b>FINAL DECISION ORDER OF DISMISSAL WITHOUT PREJUDICE</b></p>
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THIS MATTER came on for hearing before Hon. J. Randolph Ward, Administrative Law Judge, on November 18, 2015 in Fayetteville, North Carolina. Following receipt of the parties' post-hearing submissions, this Decision was prepared.

**APPEARANCES**

For Petitioner:      Anitra K. Brown, Esq.  
                                 Anitra K. Brown Legal and Consulting Services  
                                 Raleigh, N.C.

For Respondent:      Brooke Clark  
                                 Tiffany Powers  
                                 Robeson County DSS Lumberton, N.C.

**ISSUES**

Whether Respondent acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by rule or law, within the meaning of N.C. Gen. Stat. § 150B-23(a), in denying Petitioner's most recent requests for reasonable accommodations.

**STATUTES AT ISSUE**

42 U.S.C. § 2000e-5; 42 U.S.C. §§ 12101 - 12213; 42 U.S.C. § 12117. N.C. Gen. Stat. §§ 7A-759; Chapter 126; Chapter 150B, Art. 3; 168A-3(1b); 168A-4; 168A-5(a)(5) and (b)(4); 168A-10.1; and, 168A-11.

**ORDER**

Petitioner seeks Orders compelling Respondent to grant her “reasonable accommodations” in the conditions of her employment pursuant to the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101 to 12213 (hereinafter, “ADA”). Because these issues have not yet been presented to an authorized agency for the requisite formulation of a charge, informal dispute resolution, investigation, and a finding of reasonable cause, the Office of Administrative Hearings does not have jurisdiction to resolve the controversy by a contested case hearing.

Petitioner Laketha L. Southern has career employee status, having been employed by Respondent Robeson County Department of Social Services since 2008. She testified that she has been diagnosed and treated for many years for hemiplegic migraine headaches, which can be triggered by light, noise, and smells commonly encountered in her work as a Child Protective Services caseworker. The evidence shows that Respondent has made several efforts to accommodate Petitioner over the years. Petitioner testified that since suffering a blow to her head in a fall at work, she has been significantly more susceptible to the environmental irritants, and was on Family Medical Leave Act (“FMLA”) leave from work for nearly two months last year.

Shortly after returning from FMLA leave, Petitioner sought additional accommodations. In a letter dated August 14, 2015, which its authors characterized as Respondent’s “formal response” to Petitioner’s request for “reasonable accommodations” pursuant to the ADA, the attorneys for the Department of Social Services and Robeson County declined Petitioner’s “requests for a permanent office, allowing you to work from home, or additional leave.” The letter contained no notice of rights, or opportunity to pursue the matter, other than a willingness to discuss “any other suggestions” for accommodations. Ms. Southern filed a Petition for a contested case hearing on August 20, 2015.

A State employee has two means of enforcing a right to reasonable accommodation. North Carolina’s Persons With Disabilities Protection Act, Chapter 168A, makes it a “discriminatory practice” for a government agency to fail to provide “reasonable accommodations” to a “person with a disability,” if the accommodations can be accomplished without “undue hardship.” If, after cooperative discussions, the matter is not resolved, an employee can file a civil action in superior court within 180 days, and obtain a bench trial on the issues. N.C. Gen. Stat. §§ 168A-3(1b); 168A-4; 168A-5(a)(5) and (b)(4); 168A-11.

Alternatively, an employee covered under Chapter 126 of the General Statutes may choose to address their complaint to the United States Equal Employment Opportunity Commission (“EEOC”), or its deferral agency in North Carolina, the Civil Rights Division of the Office of Administrative Hearings (“CRD”). N.C. Gen. Stat. §§ 7A-759; 168A-10.1. CRD is typically capable of more promptly preparing a charge. In scenarios such as the present one, CRD will refer the charge to EEOC, which is empowered to investigate ADA complaints against governmental units brought within 300 days of the accrual of the dispute. In cases retained by CRD for investigation and conciliation, a disappointed employee is given the option of pursuing the claim in a contested case hearing, if CRD finds probable cause. The Administrative Law Judge’s “order entered ... after a contested case hearing on the merits ... is a final agency decision and is binding on the parties.” N.C. Gen. Stat. § 7A-759(a), (d) and (e). More commonly, a dissatisfied employee obtains a “right to sue,” and proceeds in federal court.

In the exercise of “all of the powers and authority necessary to function as a deferral agency,” CRD uses the “powers, remedies, and procedures” set out in 42 U.S.C. § 2000e-5 for processing an ADA claim. N.C. Gen. Stat. § 7A-759(a); 42 U.S.C.A. § 12117(a). These include obtaining a charge under oath from the aggrieved party, and pertinent information from both the parties; determining if there is reasonable cause to believe the charge is true, and notifying parties of the findings; and, if reasonable cause is found, endeavoring “to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.” At every stage, CRD seeks to mediate an agreement between the parties. Only after a charge is “not resolved by informal methods of conference, conciliation or persuasion” may the “matter be heard as a contested case as provided in Article 3 of Chapter 150B of the General Statutes.” N.C. Gen. Stat. § 7A-759(d).

As this matter clearly presents a jurisdictional question, there is “an obligation to address the issue *sua sponte* regardless whether it is raised by the parties.” *Heritage Pointe Builders, Inc. v. N.C. Licensing Bd. of Gen. Contractors*, 120 N.C.App. 502, 504, 462 S.E.2d 696, 698 (1995), *disc. review denied*, 342 N.C. 655, 467 S.E.2d 712 (1996).

**DECISION**

Consequently, the Petition must be, and hereby is, **DISMISSED, WITHOUT PREJUDICE** to the Petitioner’s right to raise these issues in any forum with jurisdiction to resolve them.

**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.

**IT IS SO ORDERED.**

This the 14th day of March, 2016.

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

J Randolph Ward  
Administrative Law Judge

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03/16/2016 4:41 PM

STATE OF NORTH CAROLINA  
COUNTY OF ROBESON

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
15 OSP 06204

Laketha Latoya Southern Petitioner,  v.  Robeson County Department of Social Services Respondent.	<b>ORDER AMENDING FINAL DECISION ORDER OF DISMISSAL WITHOUT PREJUDICE</b>
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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 March 14, 2016 is amended as follows:

**DECISION**

Consequently, the Petition must be, and hereby is, **DISMISSED, WITHOUT PREJUDICE** to the Petitioner's right to raise these issues in any forum with jurisdiction to resolve them.

"Due to extraordinary technical difficulties with the recording of the hearing, resulting in slow production of the transcript, and delay exceeding the usual time for delivery of the transcript, the time for filing this decision was extended to and including Monday, March 14, 2016. 26 NCAC 03 .0118(b)."

**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.

Except as otherwise amended, the Final Decision entered on March 14, 2016 remains in effect.

This the 16th day of March, 2016.



J Randolph Ward  
Administrative Law Judge