

NORTH CAROLINA REGISTER

VOLUME 29 • ISSUE 05 • Pages 490 - 643

September 2, 2014

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Contact List for Rulemaking Questions or Concerns

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

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

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(919) 715-4000

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NORTH CAROLINA REGISTER
Publication Schedule for January 2014 – December 2014

FILING DEADLINES			NOTICE OF TEXT		PERMANENT RULE			TEMPORARY RULES
Volume & issue number	Issue date	Last day for filing	Earliest date for public hearing	End of required comment Period	Deadline to submit to RRC for review at next meeting	Earliest Eff. Date of Permanent Rule	Delayed Eff. Date of Permanent Rule 31st legislative day of the session beginning:	270 th day from publication in the Register
28:13	01/02/14	12/06/13	01/17/14	03/03/14	03/20/14	05/01/14	05/2014	09/29/14
28:14	01/15/14	12/19/13	01/30/14	03/17/14	03/20/14	05/01/14	05/2014	10/12/14
28:15	02/03/14	01/10/14	02/18/14	04/04/14	04/21/14	06/01/14	01/2015	10/31/14
28:16	02/17/14	01/27/14	03/04/14	04/21/14	05/20/14	07/01/14	01/2015	11/14/14
28:17	03/03/14	02/10/14	03/18/14	05/02/14	05/20/14	07/01/14	01/2015	11/28/14
28:18	03/17/14	02/24/14	04/01/14	05/16/14	05/20/14	07/01/14	01/2015	12/12/14
28:19	04/01/14	03/11/14	04/16/14	06/02/14	06/20/14	08/01/14	01/2015	12/27/14
28:20	04/15/14	03/25/14	04/30/14	06/16/14	06/20/14	08/01/14	01/2015	01/10/15
28:21	05/01/14	04/09/14	05/16/14	06/30/14	07/21/14	09/01/14	01/2015	01/26/15
28:22	05/15/14	04/24/14	05/30/14	07/14/14	07/21/14	09/01/14	01/2015	02/09/15
28:23	06/02/14	05/09/14	06/17/14	08/01/14	08/20/14	10/01/14	01/2015	02/27/15
28:24	06/16/14	05/23/14	07/01/14	08/15/14	08/20/14	10/01/14	01/2015	03/13/15
29:01	07/01/14	06/10/14	07/16/14	09/02/14	09/22/14	11/01/14	01/2015	03/28/15
29:02	07/15/14	06/23/14	07/30/14	09/15/14	09/22/14	11/01/14	01/2015	04/11/15
29:03	08/01/14	07/11/14	08/16/14	09/30/14	10/20/14	12/01/14	01/2015	04/28/15
29:04	08/15/14	07/25/14	08/30/14	10/14/14	10/20/14	12/01/14	01/2015	05/12/15
29:05	09/02/14	08/11/14	09/17/14	11/03/14	11/20/14	01/01/15	01/2015	05/30/15
29:06	09/15/14	08/22/14	09/30/14	11/14/14	11/20/14	01/01/15	01/2015	06/12/15
29:07	10/01/14	09/10/14	10/16/14	12/01/14	12/22/14	02/01/15	05/2016	06/28/15
29:08	10/15/14	09/24/14	10/30/14	12/15/14	12/22/14	02/01/15	05/2016	07/12/15
29:09	11/03/14	10/13/14	11/18/14	01/02/15	01/20/15	03/01/15	05/2016	07/31/15
29:10	11/17/14	10/24/14	12/02/14	01/16/15	01/20/15	03/01/15	05/2016	08/14/15
29:11	12/01/14	11/05/14	12/16/14	01/30/15	02/20/15	04/01/15	05/2016	08/28/15
29:12	12/15/14	11/20/14	12/30/14	02/13/15	02/20/15	04/01/15	05/2016	09/11/15

EXPLANATION OF THE PUBLICATION SCHEDULE

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

GENERAL

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

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

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

FILING DEADLINES

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

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

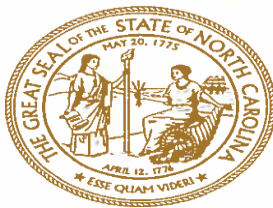
NOTICE OF TEXT

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

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

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

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



State of North Carolina

PAT McCrORY
GOVERNOR

July 28, 2014

EXECUTIVE ORDER NO. 61

NOTICE OF TERMINATION OF EXECUTIVE ORDER NO. 50

WHEREAS, Executive Order No. 50 was issued on April 25, 2014, declaring a State of Emergency in the State of North Carolina due to tornadoes and severe weather in Beaufort, Chowan, Pasquotank and Perquimans counties; and

WHEREAS, the conditions that required the declaration of the State of Emergency have ended.

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

Pursuant to N.C.G.S § 166A-19.20(c) the State of Emergency that was declared by Executive Order 50 is terminated immediately.

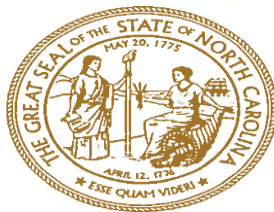
IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this twenty-eighth day of July in the year of our Lord two thousand and fourteen, and of the Independence of the United States of America the two hundred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


Pat McCrory
Governor

ATTEST:


Elaine F. Marshall
Secretary of State





State of North Carolina

PAT McCrORY
GOVERNOR

August 1, 2014

EXECUTIVE ORDER NO. 62

ADDRESSING COAL ASH IN NORTH CAROLINA

WHEREAS, the issue of coal ash storage has not been adequately addressed in North Carolina for more than six decades;

WHEREAS, on February 2, 2014, an estimated 39,000 tons of coal ash was released into the Dan River following the failure of a stormwater pipe under a utility coal ash impoundment pond in Eden, North Carolina;

WHEREAS, addressing the issue of coal ash is necessary for the protection of the health and safety of the public;

WHEREAS, the General Assembly has considered, but has not yet passed, legislation that would address the issue of coal ash in North Carolina;

WHEREAS, as Governor, I have an obligation to protect public health and safety within the existing statutory framework.

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

Section 1. Policy

In order to protect ground water and drinking water from adverse impacts from coal ash impoundments at publicly-owned electric utilities throughout North Carolina, the North Carolina Department of Environment and Natural Resources is hereby instructed to continue to implement all regulations and laws that:

1. Expeditiously assess coal combustion products impoundments at public electric utilities;
2. Immediately initiate a survey of drinking water wells to determine any contamination from coal combustion products impoundments;
3. Take appropriate action to halt any violations of the law where necessary;
4. Mandate remediation plans for all facilities where violations are found;
5. Continue to prosecute active lawsuits in furtherance of this Order;

Section 2. Reports

The Department shall present interim reports to the Governor every 120 days.

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

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this 1st day of August in the year of our Lord two thousand and fourteen, and of the Independence of the United States of America the two hundred and thirty-nine.


Pat McCrory
Governor

ATTEST:


Elaine F. Marshall
Secretary of State



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

Statutory reference: G.S. 150B-21.2.

TITLE 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 rules cited as 12 NCAC 09A .0103; 09B .0203; 09G .0101-.0102, .0202-.0206, .0301-.0304, .0306, .0412, .0504, .0602; and repeal the rule cited as 12 NCAC 09G .0413.

Agency obtained G.S. 150B-19.1 certification:

- ☐ OSBM certified on:
- ☒ **RRC certified on:** June 19, 2014 – 12 NCAC 09A .0103; 12 NCAC 09B .0203; 12 NCAC 09G .0101, .0102, .0202, .0203, .0204, .0205, .0206, .0301, .0302, .0303, .0304, .0306, .0413, .0504, .0602
August 21, 2014 – 12 NCAC 09G .0412
- ☐ Not Required

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: January 1, 2015

Public Hearing:

Date: November 13, 2014

Time: 10:30 a.m.

Location: Wake Technical Community College – Public Safety Training Center, 321 Chapanoke Road, Raleigh, NC 27502

Reason for Proposed Action:

12 NCAC 09B .0203 – The rule revision allows the NC Community College System to administer an optional test (NC Diagnostic Assessment and Placement – NCDAP) assessment to prospective students in meeting the 10th grade reading level requirement of this rule. The NCDAP is not a nationally standardized test, as required in the current rule, but was formally approved as an assessment mechanism by the State Board of Community Colleges on July 8, 2014.

12 NCAC 09A .0103; 12 NCAC 09G .0101, .0102, .0202, .0203, .0204, .0205, .0206, .0301, .0302, .0303, .0304, .0306, .0413, .0504 .0602 – The rules are being revised in order to accurately reflect the correct job classifications and corresponding agency throughout the rules. The Department of Public Safety removed the Probation/Parole Intermediate classification, which is being removed with these revisions. Also, the Department of Correction is being revised to the Public Safety, Division of Adult Correction and Juvenile Justice.

12 NCAC 09G .0412 – The Department of Public Safety, Office of Staff Development and Training revised the curriculum of the

basic probation/parole training course. The revisions were made to keep the training current with industry trends, and include the number of hours of training (increased from 160 to 207); as well as the instructional components of the course. The rule is further revised to reflect the correct title of the agency.

Comments may be submitted to: Trevor Allen, P.O. Drawer 149, Raleigh, NC 27602-0149; phone (919) 779-8205; fax (919) 779-8210; email tjallen@ncdoj.gov

Comment period ends: November 13, 2014

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** – 12 NCAC 09A .0103; 12 NCAC 09G .0101, .0102, .0202, .0203, .0204, .0205, .0206, .0301, .0302, .0303, .0304, .0306, .0413, .0504 .0602
- ☐ **Environmental permitting of DOT affected**
- ☐ **Analysis submitted to Board of Transportation**
- ☐ **Local funds affected**
- ☐ **Substantial economic impact (≥\$1,000,000)**
- ☒ **No fiscal note required by G.S. 150B-21.4** – 12 NCAC 09B .0203, 12 NCAC 09G .0412

CHAPTER 09 – CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS

SUBCHAPTER 09A – CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

SECTION .0100 – COMMISSION ORGANIZATION AND PROCEDURES

12 NCAC 09A .0103 DEFINITIONS

The following definitions apply throughout Subchapters 12 NCAC 09A through 12 NCAC 09F, except as modified in 12 NCAC 09A .0107 for the purpose of the Commission's rule-making and administrative hearing procedures:

- (1) "Agency" or "Criminal Justice Agency" means those state and local agencies identified in G.S. 17C-2(2).
- (2) "Alcohol Law Enforcement Agent" means a law enforcement officer appointed by the Secretary of ~~the Department of Crime Control and~~ Public Safety as authorized by G.S. 18B-500.
- (3) "Chief Court Counselor" means the person responsible for administration and supervision of juvenile intake, probation and post-release supervision in each judicial district, operating under the supervision of the Department of ~~Juvenile Justice and Delinquency Prevention.~~ Public Safety, Division of Adult Correction and Juvenile Justice.
- (4) "Commission of an offense" means a finding by the North Carolina Criminal Justice Education and Training Standards Commission or an administrative body that a person performed the acts necessary to satisfy the elements of a specified criminal offense.
- (5) "Convicted" or "Conviction" ~~means and includes;~~ means, for purposes of this Chapter, the entry of:
 - (a) a plea of guilty;
 - (b) a verdict or finding of guilt by a jury, judge, magistrate, or other adjudicating body, tribunal, or official, either civilian or military; or
 - (c) a plea of no contest, nolo contendere, or the equivalent.
- (6) "Criminal Justice Officer(s)" means those officers identified in G.S. ~~17C-2(3)~~ 17C-2(3), and excluding ~~Correctional officers; officers and Probation/parole probation/parole officers; and Probation/parole officers intermediate officers.~~ The term "Probation/parole officers intermediate," as used in this Chapter has the same meaning as "Probation/parole officers surveillance" used in G.S. 17C-2(3).
- (7) "Criminal Justice System" means the whole of the State and local criminal justice agencies described in Item (1) of this Rule.
- (8) "Department Head" means the chief administrator of any criminal justice ~~agency~~ agency, and specifically includes any chief of police or agency director. "Department Head" also includes a designee appointed in writing by the Department head.
- (9) "Director" means the Director of the Criminal Justice Standards Division of the North Carolina Department of Justice.
- (10) "Educational Points" means points earned toward the Professional Certificate Programs for studies ~~satisfactorily completed~~ completed, with passing scores achieved, for semester hour or quarter hour credit at a regionally accredited institution of higher learning. Each semester hour of college credit equals one educational point and each quarter hour of college credit equals two-thirds of an educational point.
- (11) "Enrolled" means that an individual is currently actively participating in an on-going presentation of a Commission-certified basic training course that has not ~~been~~ concluded on the day probationary certification expires. The term "currently actively participating" as used in this definition means:
 - (a) for law enforcement officers, that the officer is then attending an approved course presentation averaging a minimum of 12 hours of instruction each week; and
 - (b) for Department of ~~Juvenile Justice and Delinquency Prevention~~ Public Safety, Division of Adult Correction and Juvenile Justice personnel, that the officer is then attending the last or final phase of the approved training course necessary for ~~fully~~ satisfying the total course completion requirements.
- (12) "High School" means graduation from a high school that meets the compulsory attendance requirements in the jurisdiction in which the school is located.
- (13) "In-Service Training" means any and all training prescribed in 12 NCAC ~~09E .0102~~ 09B .0105 that must be ~~satisfactorily completed~~ completed, with passing scores achieved, by all certified law enforcement officers during each full calendar year of certification.
- (14) "In-Service Training Coordinator" means the person designated by a law enforcement agency head to administer the agency's in-service training program.
- (15) "Lateral Transfer" means the employment of a criminal justice officer, at any rank, by a criminal justice agency, based upon the officer's special qualifications or experience, without following the usual selection process established by the agency for basic officer positions.
- (16) "Law Enforcement Code of Ethics" means ~~that~~ the code adopted by the Commission on September 19, 1973, that ~~reads;~~ reads as follows:
As a law enforcement officer, my fundamental duty is to serve the community; to safeguard

lives and property; to protect the innocent against deception, the weak against oppression or intimidation, and the peaceful against violence or disorder; and to respect the constitutional rights of all to liberty, equality, and justice.

I will keep my private life unsullied as an example to all, and will behave in a manner that does not bring discredit to me or to my agency. I will maintain courageous calm in the face of danger, scorn, or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed both in my personal and official life, I will be exemplary in obeying the law and the regulations of my department. Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty.

I will never act officiously or permit personal feelings, prejudices, political beliefs, aspirations, animosities or friendships to influence my decisions. With no compromise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities.

I recognize the badge of my office as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of the police service. I will never engage in acts or corruption or bribery, nor will I condone such acts by other police officers. I will cooperate with all legally authorized agencies and their representatives in the pursuit of justice.

I know that I alone am responsible for my own standard of professional performance and will take every reasonable opportunity to enhance and improve my level of knowledge and competence.

I will constantly strive to achieve these objectives and ideals, dedicating myself before God to my chosen profession...law enforcement.

(17) "Juvenile Court Counselor" means a person responsible for intake services and court supervision services to juveniles under the supervision of the chief court counselor.

(18) "Juvenile Justice Officer" means persons designated by the Secretary of the Department of ~~Juvenile Justice and Delinquency Prevention~~ Public Safety, Division of Adult Correction and Juvenile Justice to provide for the care and supervision of juveniles placed in the physical custody of the Department.

(19) "Law Enforcement Officer" means an appointee of a criminal justice agency or of the State or of any political subdivision of the State who, by virtue of his office, is empowered to make arrests for violations of the laws of this State. Specifically excluded from ~~this title~~ the title of "Law Enforcement Officer" are sheriffs and their sworn appointees with arrest authority who are governed by the provisions of G.S. 17E.

(20) "Law Enforcement Training Points" means points earned toward the Law Enforcement Officers' Professional Certificate Program by successful completion of Commission-approved law enforcement training courses. Twenty classroom hours of Commission-approved law enforcement training equals one law enforcement training point.

(21) "LIDAR" means a speed-measuring instrument that electronically computes, from transmitted infrared light pulses, the speed of a vehicle under observation.

(22) "Local Confinement Personnel" means any officer, supervisor or administrator of a local confinement facility in North Carolina as defined in G.S. 153A-217; any officer, supervisor or administrator of a county confinement facility in North Carolina as defined in G.S. 153A-218; or, any officer, supervisor or administrator of a district confinement facility in North Carolina as defined in G.S. 153A-219.

(23) "Misdemeanor" means those criminal offenses not classified under the laws, statutes, or ordinances as felonies. Misdemeanor offenses are classified by the Commission as follows:

(a) "Class A Misdemeanor" means a misdemeanor committed or omitted in violation of any common law, duly enacted ~~ordinance~~ ordinance, or criminal statute of this ~~state~~ State that is not classified as a Class B Misdemeanor pursuant to Sub-item (23)(b) of this Rule. Class A Misdemeanor also includes any act committed or omitted in violation of any common law, duly enacted ordinance, criminal statute, or criminal traffic code of any jurisdiction other than North Carolina, either civil or military, for which the maximum punishment allowable for the designated offense under the laws, statutes, or ordinances of the jurisdiction in which the offense occurred includes imprisonment for a term of not more than six months. Specifically excluded from this grouping of "Class

A Misdemeanor" criminal offenses for jurisdictions other than North Carolina, are motor vehicle or traffic offenses designated as misdemeanors under the laws of other jurisdictions, or duly enacted ordinances of an authorized governmental entity with the exception of the offense of impaired driving ~~which~~ that is ~~expressly~~ included herein as a Class A Misdemeanor if the offender could have been sentenced for a term of not more than six months. Also ~~specifically~~ included herein as a Class A Misdemeanor is the offense of impaired driving, if the offender was sentenced under punishment level three [G.S. 20-179(i)], level four [G.S. 20-179(j)], or level five [G.S. 20-179(k)]. Class A Misdemeanor shall also include acts committed or omitted in North Carolina prior to October 1, 1994 in violation of any common law, duly enacted ~~ordinance~~ ordinance, or criminal statute, of this ~~state~~ State for which the maximum punishment allowable for the designated offense included imprisonment for a term of not more than six months.

- (b) "Class B Misdemeanor" means an act committed or omitted in violation of any common law, criminal statute, or criminal traffic code of this ~~state~~ State that is classified as a Class B Misdemeanor as set forth in the Class B Misdemeanor Manual as published by the North Carolina Department of Justice which is hereby incorporated by reference and shall ~~automatically~~ include any later amendments and editions of the incorporated material as provided by G.S. 150B-21.6. ~~Copies of the publication may be obtained from the North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602. The publication is available from the Commission's website: <http://www.ncdoj.gov/getdoc/60bb12ca-47c0-48cb-a0e3-6095183c4c2a/Class-B-Misdemeanor-Manual-2005.aspx>. There is no cost per manual at the time of adoption of this Rule.~~ Class B Misdemeanor also includes any act committed or omitted in violation of any common law, duly enacted ordinance, criminal statute, or

criminal traffic code of any jurisdiction other than North Carolina, either civil or military, for which the maximum punishment allowable for the designated offense under the laws, statutes, or ordinances of the jurisdiction in which the offense occurred includes imprisonment for a term of more than six months but not more than two years. Specifically excluded from this grouping of "Class B Misdemeanor" criminal offenses for jurisdictions other than North Carolina, are motor vehicle or traffic offenses designated as being misdemeanors under the laws of other jurisdictions with the following exceptions: Class B Misdemeanor does ~~expressly~~ include, either first or subsequent offenses of driving while impaired if the maximum allowable punishment is for a term of more than six months but not more than two years, driving while license permanently revoked or permanently suspended, and those traffic offenses occurring in other jurisdictions which are comparable to the traffic offenses specifically listed in the Class B Misdemeanor Manual. "Class B Misdemeanor" shall also include acts committed or omitted in North Carolina prior to October 1, 1994 in violation of any common law, duly enacted ordinance, criminal statute, or criminal traffic code of this ~~state~~ State for which the maximum punishment allowable for the designated offense included imprisonment for a term of more than six months but not more than two years.

- (24) "Qualified Assistant" means an additional staff person designated as such by the School Director to assist in the administration of a course when a certified institution or agency assigns additional responsibilities to the certified School Director during the planning, development, and implementation of a certified course.
- (25) "Radar" means a speed-measuring instrument that transmits microwave energy in the 10,500 to 10,550 MHZ frequency (X) ~~band band~~, or transmits microwave energy in the 24,050 to 24,250 MHZ frequency (K) ~~band-band~~, and either of which operates in the stationary or moving mode. "Radar" further means a speed-measuring instrument that transmits microwave energy in the 33,400 to 36,000

- MHZ (Ka) band and operates in either the stationary or moving mode.
- (26) "Resident" means any youth committed to a facility operated by the Department of ~~Juvenile Justice and Delinquency Prevention~~. Public Safety, Division of Adult Correction and Juvenile Justice.
- (27) "School" or "criminal justice school" means an institution, college, university, academy, or agency that offers criminal justice, law enforcement, or traffic control and enforcement training for criminal justice officers or law enforcement officers. "School" includes the criminal justice training course curriculum, instructors, and facilities.
- (28) "School Director" means the person designated by the sponsoring institution or agency to administer the criminal justice school.
- (29) "Speed-Measuring Instruments" (SMI) means those devices or systems, including radar time-distance, and LIDAR, approved under authority of G.S. 17C-6(a)(13) for use in North Carolina in determining the speed of a vehicle under observation and particularly includes all named devices or systems as specifically referenced in the approved list of 12 NCAC 09C .0601.
- (30) "Standards Division" means the Criminal Justice Standards Division of the North Carolina Department of Justice.
- (31) "Time-Distance" means a speed-measuring instrument that electronically computes, from measurements of time and distance, the average speed of a vehicle under observation.

(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~~ individual, within one year prior to admission to Basic law Enforcement Training, places into course DRE 098 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 July 18, 2014 (http://www.nccommunitycolleges.edu/sites/default/files/state-board/minutes/approved_minutes_-_16may2014_-_bwj_edits_-_7.8.14.pdf), 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 ~~currently~~ hold general certification or who have held general certification within 12 months prior to the date of enrollment.
- (2) A nationally standardized test is a test that:
 - (A) reports scores as national percentiles, ~~stanines~~ 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 ~~timely~~ 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 graduate or has passed the General Educational Development Test indicating high school equivalency. 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 certified 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

Authority G.S. 17C-2; 17C-6; 17C-10; 153A-217.

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 director 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 as long as the individual turns 20 years of age prior to the date of the State Comprehensive Examination for the course.

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 will 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 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 as specified in Paragraph (i) of this Rule, and such offenses were dismissed or the person was found not guilty, may be admitted into the Basic Law Enforcement Training Course 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 ~~which~~ 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) ~~which~~ 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 ~~specifically~~ 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 which 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 ~~must~~ shall be in writing, ~~must~~ 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), the final disposition, and the date thereof. The notifications required under this Paragraph ~~must~~ shall be received by the School Director within 30 days of the date the case was finally 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.

SUBCHAPTER 09G – STANDARDS FOR CORRECTIONS EMPLOYMENT, TRAINING, AND CERTIFICATION

SECTION .0100 – SCOPE, APPLICABILITY, AND DEFINITIONS

12 NCAC 09G .0101 SCOPE AND APPLICABILITY OF SUBCHAPTER

This Subchapter governs the implementation of minimum standards for employment, training, and certification of ~~three~~ two classes of corrections officers: correctional officers, officers and probation/parole officers, and probation/parole officers-intermediate officers, as well as the standards for corrections schools and the state corrections certificate program. Definitions and procedures contained within 12 NCAC 09A through 09F do not apply to these classes of corrections officers, unless specifically ~~referenced~~ referenced. ~~only~~ Only rules specifically included in Subchapter 09G apply to these employees of the North Carolina Department of ~~Correction~~ Public Safety, Division of Adult Correction and Juvenile Justice.

Authority G.S. 17C-1; 17C-6.

12 NCAC 09G .0102 DEFINITIONS

The following definitions apply throughout this Subchapter only:

- (1) "Commission of an offense" means a finding by the North Carolina Criminal Justice Education and Training Standards Commission or an administrative body that a person performed the acts necessary to satisfy the elements of a specified offense.
- (2) "Convicted" or "Conviction" ~~means and includes~~ means, for purposes of this Subchapter, the entry of:
 - (a) a plea of guilty;
 - (b) a verdict or finding of guilt by a jury, judge, magistrate, or other duly

- constituted, established adjudicating body, tribunal, or official, either civilian or military; or
- (c) a plea of no contest, nolo contendere, or the equivalent.
- (3) "Correctional Officer" means an employee of the North Carolina Department of ~~Correction~~, ~~Division of Prisons~~, Public Safety, Division of Adult Correction and Juvenile Justice, responsible for the custody of inmates or offenders.
- (4) "Corrections Officer" means ~~any or all~~ either or both of the ~~three~~ two classes of officers employed by the North Carolina Department of ~~Correction~~, Public Safety, Division of Adult Correction and Juvenile Justice; ~~correctional officer; officer or probation/parole officer; and probation/parole officer intermediate officer.~~
- (5) "Criminal Justice System" means the whole of the State and local criminal justice agencies including the North Carolina Department of ~~Correction~~, Public Safety, Division of Adult Correction and Juvenile Justice.
- (6) "Director" means the Director of the Criminal Justice Standards Division of the North Carolina Department of Justice.
- (7) "Educational Points" means points earned toward the State Correction Officers' Professional Certificate Program for studies ~~satisfactorily~~ completed with passing grades for semester hour or quarter hour credit at a regionally accredited institution of higher education. Each semester hour of college credit equals one educational point and each quarter hour of college credit equals two-thirds of an educational point.
- (8) "High School" means graduation from a high school that meets the compulsory attendance requirements in the jurisdiction in which the school is located.
- (9) "Misdemeanor" for corrections officers means those criminal offenses not classified under the laws, statutes, or ordinances as felonies. Misdemeanor offenses for corrections officers are classified by the Commission as ~~follows~~; the following as set forth in G.S. or otherwise stated:
- (a) 14-2.5 Punishment for attempt (offenses that are Class A-1 misdemeanor)
- (b) 14-27.7 Intercourse and sexual offenses with certain victims (If defendant is school personnel other than a teacher, school administrator, student teacher or coach)
- (c) 14-32.1(f) Assault on handicapped persons
- (d) 14-32.2(b)(4) Patient abuse and neglect, punishments
- (e) 14-32.3 Exploitation by caretaker of disabled/elder adult in domestic setting; resulting in loss of less than one thousand dollars (\$1000) (August 1, 2001-December 1, 2005. Repealed December 1, 2005)
- (f) 14-33(b)(9) Assault, battery against sports official
- (g) 14-33(c) Assault, battery with circumstances
- (h) 14-34 Assault by pointing a gun
- (i) 14-34.6(a) Assault on Emergency Personnel
- (j) 14-54 Breaking or Entering into buildings generally (14-54(b))
- (k) 14-72 Larceny of property; receiving stolen goods etc.; not more than one thousand dollars (\$1000.00) (14-72(a))
- (l) 14-72.1 Concealment of merchandise (14-72.1(e); 3rd or subsequent offense)
- (m) 14-76 Larceny, mutilation, or destruction of public records/papers
- (n) CH 14 Art. 19A False/fraudulent use of credit device (14-113.6)
- (o) CH 14 Art. 19B Financial transaction card crime (14-113.17(a))
- (p) 14-114(a) Fraudulent disposal of personal property on which there is a security interest
- (q) 14-118 Blackmailing
- (r) 14-118.2 Obtaining academic credit by fraudulent means (14-118.2(b))
- (s) 14-122.1 Falsifying documents issued by a school (14-122.1(c))
- (t) 14-127 Willful and wanton injury to real property
- (u) 14-160 Willful and wanton injury to personal property greater than two hundred dollars (\$200.00) (14-160(b))
- (v) 14-190.5 Preparation of obscene photographs
- (w) 14-190.9 Indecent Exposure
- (x) 14-190.14 Displaying material harmful to minors (14-190.14(b))
- (y) 14-190.15 Disseminating harmful material to minors (14-190.15(d))
- (z) 14-202.2 Indecent liberties between children

(aa)	14-202.4	Taking indecent liberties with a student	(aaa)	14-315.1	Storage of firearms to protect minors
(bb)	14-204	Prostitution (14-207; 14-208)	(bbb)	14-316.1	Contributing to delinquency
(cc)	14-223	Resisting officers	(ccc)	14-318.2	Child abuse
(dd)	14-225	False, etc., reports to law enforcement agencies or officers	(ddd)	14-360	Cruelty to animals
(ee)	14-230	Willfully failing to discharge duties	(eee)	14-361	Instigating or promoting cruelty to animals
(ff)	14-231	Failing to make reports and discharge other duties	(fff)	14-401.14	Ethnic intimidation; teaching any technique to be used for (14-401.14(a) and (b))
(gg)	14-232	Swearing falsely to official records	(ggg)	14-454(a) or (b)	Accessing computers
(hh)	14-239	Allowing prisoners to escape punishment	(hhh)	14-458	Computer trespass (Damage less than two thousand five hundred dollars (\$2500.00))
(ii)	14-255	Escape of working prisoners from custody	(iii)	15A-266.11	Unauthorized use of DNA databank; willful disclosure (15A-266.11(a) and (b))
(jj)	14-256	Prison breach and escape	(jjj)	15A-287	Interception and disclosure of wire etc. communications
(kk)	14-258.1(b)	Furnishing certain contraband to inmates	(kkk)	15B-7(b)	Filing false or fraudulent application for compensation award
(ll)	14-259	Harboring or aiding certain persons	(lll)	18B-902(c)	False statements in application for ABC permit (18B-102(b))
(mm)	CH 14 Art. 34	Persuading inmates to escape; harboring fugitives (14-268)	(mmm)	20-37.8(a) & (c)	Fraudulent use of a fictitious name for a special identification card
(nn)	14-269.2	Weapons on campus or other educational property (14-269.2(d), (e) and (f))	(nnn)	20-102.1	False report of theft or conversion of a motor vehicle
(oo)	14-269.3(a)	Weapons where alcoholic beverages are sold and consumed	(ooo)	20-111(5)	Fictitious name or address in application for registration
(pp)	14-269.4	Weapons on state property and in courthouses	(ppp)	20-130.1	Use of red or blue lights on vehicles prohibited (20-130.1(e))
(qq)	14-269.6	Possession and sale of spring-loaded projectile knives prohibited (14-269.6(b))	(qqq)	20-137.2	Operation of vehicles resembling law-enforcement vehicles (20-137.2(b))
(rr)	14-277	Impersonation of a law-enforcement or other public officer verbally, by displaying a badge or insignia, or by operating a red light (14-277 (d1) and (e))	(rrr)	20-138.1	Driving while impaired (punishment level 1 (20-179(g)) or 2 (20-179(h))
(ss)	14-277.2(a)	Weapons at parades, etc., prohibited	(sss)	20-138.21	Impaired driving in commercial vehicle (20-138.2(e))
(tt)	14-277.3	Stalking (14-277.3(b))	(ttt)	20-141.5(a)	Speeding to elude arrest
(uu)	14-288.2(b)	Riot	(uuu)	20-166(b)	Duty to stop in event of accident or collision
(vv)	14-288.2(d)	Inciting to riot	(vvv)	20-166(c)	Duty to stop in event of accident or collision
(ww)	14-288.6(a)	Looting; trespassing during emergency	(www)	20-166(c1)	Duty to stop in event of accident or collision
(xx)	14-288.7(c)	Transporting weapon or substance during emergency	(xxx)	50B-4.1	Knowingly violating valid protective order
(yy)	14-288.9(c)	Assault on emergency personnel; punishments	(yyy)	58-33-105	False statement in applications for insurance
(zz)	14-315(a)	Selling or giving weapons to minors			

- | | | | | | |
|--------|--------------------------|---|----|--------|--|
| (zzz) | 58-81-5 | Careless | or | (i) | Going Armed to the Terror of the People |
| (aaaa) | 62A-12 | Misuse | of | (ii) | Common-Law Mayhem |
| | | system | | (iii) | False Imprisonment |
| (bbbb) | 90-95(d)(2) | Possession | of | (iv) | Common-Law Robbery |
| | | schedule II, III, IV | | (v) | Common-Law Forgery |
| (cccc) | 90-95(d)(3) | Possession | of | (vi) | Common-Law Uttering of Forged paper |
| | | Schedule V | | (vii) | Forcible Trespass |
| (dddd) | 90-95(d)(4) | Possession | of | (viii) | Unlawful Assembly |
| | | Schedule VI (when punishable as Class 1 misdemeanor) | | (vix) | Common-Law Obstruction of Justice |
| (eeee) | 90-95(e)(4) | Conviction of 2 or more violations of Art. 5 | | (www) | Those offenses occurring in other jurisdictions which <u>that</u> are comparable to the offenses specifically listed in (a) through (vvvv) of this Rule. |
| (ffff) | 90-95(e)(7) | Conviction of 2 or more violations of Art. 5 | | (xxx) | Any offense proscribed by 18 USC 922(g)(8) [Lautenburg Amendment] U.S.C. 922 (1996), (http://www.gpo.gov/fdsys/pkg/USC-ODE-2011-title18/pdf/USCODE-2011-title18-part1-chap44-sec922.pdf), that would prohibit possessing a firearm or ammunition. |
| (gggg) | 90-113.22 | Possession of drug paraphernalia (90-113.22(b)) | | (10) | "Pilot Courses" means those courses approved by the Education and Training Committee, consistent with 12 NCAC 09G .0404, which are utilized to develop new training course curricula. |
| (hhhh) | 90-113.23 | Manufacture or delivery of drug paraphernalia (90-113.23(c)) | | (11) | "Probation/Parole Officer" means an employee of the North Carolina Department of Correction, Division of Community Corrections, <u>Public Safety, Division of Adult Correction and Juvenile Justice</u> whose duties include supervising, evaluating, or otherwise instructing offenders placed on probation, parole, post release supervision, or assigned to any other community-based program operated by the Division of Community Corrections, <u>Adult Correction and Juvenile Justice.</u> |
| (iiii) | 97-88.2(a) | Misrepresentation to get worker's compensation payment | | (12) | "Probation/Parole Officer Intermediate" means an employee of the North Carolina Department of Correction, Division of Community Corrections, other than a regular probation/parole officer who is trained in corrections techniques, and is an authorized representative of the courts of North Carolina and the Department of Correction, Division of Community Corrections, whose duties include supervising, investigating, reporting, and surveillance of serious offenders in an intensive probation, parole, or post release supervision program operated by the Division of Community Corrections. |
| (jjjj) | 108A-39(a) | Fraudulent misrepresentation of public assistance | | (13) | "Qualified Assistant" means an additional staff person designated as such by the School Director to assist in the administration of a course when a certified institution or agency |
| (kkkk) | 108A-53 | Fraudulent misrepresentation of foster care and adoption assistance payments | | | |
| (llll) | 108A-64(a) | Medical assistance recipient fraud; less than four hundred dollars (\$400.00) (108-64(c)(2)) | | | |
| (mmmm) | 108A-80 | Recipient check register/list of all recipients of AFDC and state-county special assistance (108A-80(b)) | | | |
| (nnnn) | 108A-80 | Recipient check register/ list of all recipients of AFDC and state-county special assistance; political mailing list (108A-80(c)) | | | |
| (oooo) | 113-290.1(a)(2) | Criminally negligent hunting; no bodily disfigurement | | | |
| (pppp) | 113-290.1(a)(3) | Criminally negligent hunting; bodily disfigurement | | | |
| (qqqq) | 113-290.1(a)(4) | Criminally negligent hunting; death results | | | |
| (rrrr) | 113-290.1(d) | Criminally negligent hunting; person convicted/suspended license | | | |
| (ssss) | 143-58.1(a) | Use of public purchase or contract for private benefit (143-58.1(c)) | | | |
| (tttt) | 148-45(d) | Aiding escape or attempted escape from prison | | | |
| (uuuu) | 162-55 | Injury to prisoner by jailer | | | |
| (vvvv) | Common-Law misdemeanors: | | | | |

assigns additional responsibilities to the certified School Director during the planning, development, and implementation of a certified course.

(14)(13) "School" means an institution, college, university, academy, or agency which offers penal or corrections training for correctional ~~officers, officers or probation/parole officers, officers, or probation/parole officers intermediate.~~ "School" includes the corrections training course curricula, instructors, and facilities.

(15)(14) "School Director" means the person designated by the Secretary of the North Carolina Department of ~~Correction~~ Public Safety, Division of Adult Correction and Juvenile Justice to administer the "School."

(16)(15) "Standards Division" means the Criminal Justice Standards Division of the North Carolina Department of Justice.

(17)(16) "State Corrections Training Points" means points earned toward the State Corrections Officers' Professional Certificate Program by successful completion of Commission-approved corrections training courses. 20 classroom hours of Commission-approved corrections training equals one State Corrections training point.

Authority G.S. 17C-2; 17C-6; 17C-10; 153A-217.

SECTION .0200 – MINIMUM STANDARDS FOR CERTIFICATION OF CORRECTIONAL OFFICERS, PROBATION/PAROLE OFFICERS, AND PROBATION/PAROLE OFFICERS-SURVEILLANCE

12 NCAC 09G .0202 CITIZENSHIP

Every person employed as a correctional ~~officer, or~~ officer or probation/parole ~~officer, or probation/parole officer intermediate officer~~ by the North Carolina Department of ~~Correction~~ Public Safety, Division of Adult Correction and Juvenile Justice shall be a citizen of the United States.

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

12 NCAC 09G .0203 AGE

(a) Every person employed as a correctional ~~officer, officer or~~ officer or probation/parole ~~officer, or probation/parole officer intermediate officer~~ by the North Carolina Department of ~~Correction~~ Public Safety, Division of Adult Correction and Juvenile Justice shall be at least 20 years of age.

(b) Candidates shall document age through documents issued by any county, ~~State,~~ state, or federal government agency.

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

12 NCAC 09G .0204 EDUCATION

(a) Every person employed as a correctional officer by the North Carolina Department of ~~Correction~~ Public Safety,

Division of Adult Correction and Juvenile Justice shall be a high school graduate or have passed the General Educational Development Test indicating high school equivalency.

(b) Every person employed as a probation/parole officer by the North Carolina Department of Correction shall be a graduate of a regionally accredited college or university and have attained at least the baccalaureate degree.

~~(c) Every person employed as a probation/parole officer intermediate by the North Carolina Department of Correction shall be a high school graduate or have passed the General Educational Development Test indicating high school equivalency.~~

~~(d)(c)~~ Each applicant for employment as a corrections officer shall furnish to the North Carolina Department of ~~Correction~~ Public Safety, Division of Adult Correction and Juvenile Justice documentary evidence that the applicant has met the educational requirements for the corrections field of expected employment.

(1) Documentary evidence of educational requirements shall consist of official transcripts of courses completed or diplomas received from a school ~~which~~ that meets the requirements ~~of~~ of the North Carolina Department of Public Instruction, the Division of Non-Public Instruction, a comparable out-of-state agency, or is a regionally accredited college or university. The Director of the Standards Division shall determine whether other types of documentation ~~will~~ may be permitted in specific cases consistent with this ~~rule.~~ Rule. High school diplomas earned through correspondence enrollment are not recognized toward these minimum educational requirements.

(2) Documentary evidence of completion of the General Educational Development "GED" Test shall be satisfied by a certified copy of GED test results showing successful completion. A certified copy of a military GED diploma may be used as alternate evidence of GED completion.

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

12 NCAC 09G .0205 PHYSICAL AND MENTAL STANDARDS

(a) Every person employed as a correctional ~~officer, officer or~~ officer or probation/parole ~~officer, or probation/parole officer intermediate officer~~ by the North Carolina Department of ~~Correction~~ Public Safety, Division of Adult Correction and Juvenile Justice shall have been examined and certified within one year prior to employment with the North Carolina Department of ~~Correction~~ Public Safety, Division of Adult Correction and Juvenile Justice by a licensed physician, physician's assistant, or nurse practitioner to meet the physical requirements to fulfill ~~properly~~ the officer's particular responsibilities as stated in the essential job functions.

(b) Every person employed as a correctional ~~officer, officer or~~ officer or probation/parole ~~officer, or probation/parole officer intermediate officer~~ by the North Carolina Department of ~~Correction~~ Public

Safety, Division of Adult Correction and Juvenile Justice shall have been administered within one year prior to employment with the North Carolina Department of ~~Correction~~ Public Safety, Division of Adult Correction and Juvenile Justice a psychological screening examination by a clinical psychologist or psychiatrist licensed to practice in North Carolina to determine the officer's mental and emotional suitability to fulfill properly the officer's particular responsibilities as stated in the essential job functions.

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

12 NCAC 09G .0206 MORAL CHARACTER

Every person employed as a ~~correctional officer, officer or probation/parole officer, or probation/parole officer intermediate officer~~ by the Department of Public Safety, Division of Adult Correction and Juvenile Justice shall demonstrate good moral character as evidenced ~~by, but not limited to:~~ by the following:

- (1) not having been convicted of a felony;
- (2) not having been convicted of a misdemeanor as defined in 12 NCAC 09G .0102(9) for three years or the completion of any corrections supervision imposed by the courts whichever is later;
- (3) not having been convicted of an offense that, under 18 USC ~~922~~, (<http://codes.lp.findlaw.com/uscode/18/1/44/922>) U.S.C. 922 (1996), (<http://www.gpo.gov/fdsys/pkg/USCODE-2011-title18-part1-chap44-sec922.pdf>), would prohibit the possession of a firearm or ammunition;
- (4) having submitted to and produced a negative result on a drug test within 60 days of employment or any in-service drug screening required by the Department of Public Safety, Division of Adult Correction and Juvenile Justice ~~which that~~ meets the certification standards of the Department of Health and Human Services for Federal Workplace Drug Testing Programs. A list of certified drug testing ~~labs~~ labs that meet this requirement may be ~~obtained~~ obtained, from National Institute on Drug Abuse, 5600 Fisher Lane, Rockville, Maryland 20857 at no cost, (http://workplace.samhsa.gov/DrugTesting/Level_1_Pages/CertifiedLabs.html) ~~to detect the illegal use of at least cannabis, cocaine, phenylcyclidine (PCP), opiates and amphetamines or their metabolites; at no cost,~~ at http://workplace.samhsa.gov/DrugTesting/Level_1_Pages/CertifiedLabs.html.
- (5) submitting to a background investigation consisting ~~of:~~ of the following:
 - (a) verification of age;
 - (b) verification of education; and
 - (c) criminal history check of local, state, and national files; and

- (6) being truthful in providing ~~all required information as prescribed by the application process.~~ to the Department of Public Safety, Division of Adult Correction and Juvenile Justice and to the Standards Division for the purpose of obtaining probationary or general certification.

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

SECTION .0300 - CERTIFICATION OF CORRECTIONAL OFFICERS, PROBATION/PAROLE OFFICERS, AND INSTRUCTORS

12 NCAC 09G .0301 CERTIFICATION OF CORRECTIONAL OFFICERS AND PROBATION/PAROLE OFFICERS

Every person employed as a ~~correctional officer, officer or probation/parole officer, or probation/parole officer intermediate officer~~ shall be certified as prescribed by the Rules of this Section. The Commission shall certify an officer as either a probationary officer or general officer based on the officer's qualifications and ~~experience.~~ experience, as specified in Rule .0303 and Rule .0304 of this Section.

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

12 NCAC 09G .0302 NOTIFICATION OF CRIMINAL CHARGES/CONVICTIONS

(a) Every person employed and certified as a ~~correctional officer, officer or probation/parole officer, or probation/parole officer intermediate officer~~ shall notify the Standards Division of all criminal offenses for which the officer is charged, arrested, pleads no contest, pleads guilty, or of which the officer is found guilty. Criminal offenses shall include all felony offenses and shall ~~specifically~~ include those misdemeanor offenses delineated in 12 NCAC 09G .0102.

(b) The notifications required under this Rule ~~must~~ shall be in writing, ~~must~~ specify the nature of the offense, the court in which the case was handled, the date of arrest or criminal charge, the final ~~disposition~~ disposition, and the date thereof. The notifications required under this Subparagraph ~~must~~ shall be received by the Standards Division within 30 days of the date the case was disposed of in court.

(c) The requirements of this Rule shall be applicable at all times during which the officer is certified by the Commission.

(d) Officers required to notify the Standards Division under this Rule shall also make the same notification to their employing or appointing executive officer within 20 days of the date the case was disposed of in court. The executive officer, provided he has knowledge of the officer's arrest(s), ~~or~~ criminal charge(s), ~~and or~~ final disposition(s), shall also notify the Standards Division of all arrests or criminal convictions within 30 days of the date of the arrest and within 30 days of the date the case was disposed of in court. Receipt by the Standards Division of a single notification, from either the officer or the executive officer, ~~is~~ shall be sufficient notice for compliance with this Rule.

Authority G.S. 17C-6.

12 NCAC 09G .0303 PROBATIONARY CERTIFICATION

- (a) A prospective employee may commence active service as a correctional ~~officer, officer or~~ probation/parole ~~officer, or~~ officer at the time of employment.
- (b) Within 90 days of appointment to a position for which the ~~commission~~ Commission requires certification, the North Carolina Department of ~~Correction~~ Public Safety, Division of Adult Correction and Juvenile Justice shall submit a completed Report of Appointment/Application for Certification to the Standards Division. The form may be accessed on the Standards Division's website at: <http://www.ncdoj.gov/About-DOJ/Law-Enforcement-Training-and-Standards/Criminal-Justice-Education-and-Training-Standards/Forms-and-Publications.aspx>.
- (c) The Commission shall certify as a probationary officer a person meeting the standards for certification when the North Carolina Department of ~~Correction~~ Public Safety, Division of Adult Correction and Juvenile Justice submits a completed Report of Appointment/Application for Certification to the Standards Division.
- (d) The Standards Division shall issue the ~~person's~~ officer's Probationary Certification to the North Carolina Department of ~~Correction~~ Public Safety, Division of Adult Correction and Juvenile Justice.
- (e) The officer's Probationary Certification shall remain valid for one year from the date the certification is issued by the Standards Division unless sooner suspended or revoked pursuant to Rule .0503 of this Subchapter or the officer has attained General Certification.
- (f) Documentation of Probationary Certification shall be maintained with the officer's personnel records with the North Carolina Department of ~~Correction~~ Public Safety, Division of Adult Correction and Juvenile Justice and the Commission.

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

12 NCAC 09G .0304 GENERAL CERTIFICATION

- (a) The Commission shall grant an officer General Certification when evidence is received by the Standards Division that an officer has ~~successfully~~ completed the training requirements of 12 NCAC 09G .0410, .0411, .0412, or .0413 within the officer's probationary period and the officer has met all ~~other~~ requirements for General ~~Certification~~ as specified in Rules .0202, .0203, .0204, .0205, .0206, .0302, and .0303 of this Subchapter.
- (b) General Certification is continuous from the date of issuance, so long as the certified officer remains ~~continuously~~ employed as a correctional ~~officer, officer or~~ probation/parole ~~officer, officer or~~ officer in good standing with the North Carolina Department of ~~Correction~~ Public Safety, Division of Adult Correction and Juvenile Justice and the certification has not been suspended or revoked pursuant to Rule .0503 of this Subchapter.
- (c) Certified officers who, through promotional opportunities, move into non-certified positions within the Department, may have their certification reinstated without re-completion of the basic training requirements of 12 NCAC 09G .0410, .0411,

.0412, or .0413, and are exempted from reverification of employment standards of 12 NCAC 09G .0202 through .0206 when returning to a position requiring certification if they have maintained ~~continuous~~ employment within the Department.

(d) Documentation of General Certification shall be maintained with the officer's personnel records with the North Carolina Department of ~~Correction~~ Public Safety, Division of Adult Correction and Juvenile Justice and the Commission.

(e) Upon transfer of a certified officer from one type of corrections officer to another, the North Carolina Department of ~~Correction~~ Public Safety, Division of Adult Correction and Juvenile Justice shall submit a Notice of Transfer to the Standards Division.

- (1) Upon receipt of the Notice of Transfer, the Standards Division shall cancel the officer's current General Certification and upon receipt of documentary evidence that the officer has met the requisite standards for the specified type of corrections officer certification, the Commission shall issue Probationary Certification reflecting the officer's new corrections position.
- (2) The Commission shall grant an officer General Certification as the new type of corrections officer when evidence is received by the Standards Division that an officer has successfully completed the training requirements of 12 NCAC 09G .0410, .0411, .0412, or .0413 within the officer's probationary period and the officer has met all other requirements for General Certification.

Authority G.S. 17C-2; 17C-6; 17C-10.

12 NCAC 09G .0306 RETENTION OF RECORDS OF CERTIFICATION

(a) The North Carolina Department of ~~Correction~~ Public Safety, Division of Adult Correction and Juvenile Justice shall place in the officer's certification file the official notification from the Commission of either Probationary or General Certification for each correctional officer, probation/parole ~~officer, officer and~~ officer ~~and~~ employed or appointed by the North Carolina Department of ~~Correction~~ Public Safety, Division of Adult Correction and Juvenile Justice. The certification file shall also contain:

- (1) the officer's Report of Appointment/Application for ~~Certification~~ Certification, including the ~~State Personnel Application; Department of Public Safety Personnel Action Form;~~
- (2) the officer's Medical History Statement and Medical Examination Report;
- (3) documentation of the officer's drug screening results;
- (4) documentation of the officer's educational achievements;
- (5) documentation of all corrections training completed by the officer;

- (6) documentation of the officer's psychological examination results;
- (7) documentation and verification of the officer's age;
- (8) documentation and verification of the officer's citizenship;
- (9) documentation of any prior criminal record; and
- (10) miscellaneous documents ~~to include, but not limited to,~~ including letters, investigative reports, and subsequent charges and convictions.

(b) All files and documents relating to an officer's certification shall be available for examination and utilization at any reasonable time by representatives of the Commission for the purpose of verifying compliance with the Rules in this Subchapter. These records shall be maintained in compliance with the North Carolina Department of ~~Correction's~~ Public Safety, Division of Adult Correction and Juvenile Justice's Records Retention Schedule.

Authority G.S. 17C-2; 17C-6.

SECTION .0400 – MINIMUM STANDARDS FOR TRAINING OF CORRECTIONAL OFFICERS, PROBATION/PAROLE OFFICERS, AND PROBATION/PAROLE SURVEILLANCE

12 NCAC 09G .0412 BASIC TRAINING FOR PROBATION/PAROLE OFFICERS

(a) The basic training course for probation/parole officers shall consist of at least ~~160~~ 207 hours of instruction, as approved by the Commission, designed to provide the trainee with the skills and knowledge to perform those tasks essential to function as a probation/parole officer. The instructional components of this course ~~must~~ shall be listed in the "Basic Probation/Parole Officer Training Manual," and shall include firearms training; administrative matters, review and testing; controls, restraints, and defensive techniques; court processes; case processing and management; arrest procedures; basic life support; employee wellness; professional ethics; personal and professional conduct; and contemporary correctional theory.

(b) The "Basic Probation/Parole Officer Training Manual" as published by the North Carolina Department of ~~Correction~~ Public Safety, Division of Adult Correction and Juvenile Justice ~~is to~~ shall be applied as the basic curriculum for ~~delivery of~~ probation/parole officer basic training courses; courses specified in Paragraph (a) of this Rule. Copies of this publication may be inspected at the office of the agency:

The Office of Staff Development and Training
North Carolina Department of ~~Correction~~ Public Safety
Division of Adult Correction and Juvenile Justice
2211 Schieffelin Road
Apex, North Carolina 27502
With mailing address:
MSC 4213
Raleigh, North Carolina 27699-4213

and may be obtained at the cost of printing and postage from the Department of ~~Correction~~ Public Safety, Division of Adult Correction and Juvenile Justice.

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

12 NCAC 09G .0413 BASIC TRAINING FOR PROBATION/PAROLE OFFICERS-INTERMEDIATE

(a) ~~In addition to the requirements for Basic Training for Probation/Parole Officers contained in Rule .0412 of this Section, every probation/parole officer intermediate shall complete a supplemental course which shall consist of at least 80 hours of instruction, as approved by the Commission, designed to provide the trainee with the skills and knowledge to perform those tasks essential to function as a probation/parole officer intermediate. The instructional components of this course must be listed in the "Basic Probation/Parole Officer Intermediate Training Manual," and shall include firearms training; controls, restraints, and defensive techniques; officer/offender relationships; advanced arrest, search and seizure; DCC specialized equipment operations; and administrative matters, review, and testing.~~

(b) ~~The "Basic Probation/Parole Officer Intermediate Training Manual," as published by the North Carolina Department of Correction is to be applied as the basic curriculum for delivery of probation/parole officer intermediate basic training courses. Copies of this publication may be inspected at the office of the agency:~~

~~The Office of Staff Development and Training
North Carolina Department of Correction
2211 Schieffelin Road
Apex, North Carolina 27502
With mailing address:
MSC 4213~~

~~Raleigh, North Carolina 27699-4213
and may be obtained at cost from the Department of Correction.~~

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

SECTION .0500 – ENFORCEMENT OF RULES

12 NCAC 09G .0504 SUSPENSION: REVOCATION: OR DENIAL OF CERTIFICATION

(a) The Commission shall revoke the certification of a ~~correctional officer, officer or~~ probation/parole officer, or officer ~~probation/parole officer intermediate~~ when the Commission finds that the officer has committed or been convicted of a felony offense.

(b) The Commission may, based on the evidence for each case, suspend, revoke, or deny the certification of a corrections officer when the Commission finds that the applicant for certification or the certified officer:

- (1) has not enrolled in and satisfactorily completed the required basic training course in its entirety within prescribed time periods relevant or applicable to a specified position or job title;
- (2) fails to meet or maintain one or more of the employment standards required by 12 NCAC

- 09G .0200 for the category of the officer's certification or fails to meet or maintain one or more of the training standards required by 12 NCAC 09G .0400 for the category of the officer's certification;
- (3) has committed or been convicted of a misdemeanor as defined in 12 NCAC 09G .0102 after certification;
- (4) has been discharged by the North Carolina Department of ~~Correction~~ Public Safety, Division of Adult Correction and Juvenile Justice for:
- (A) commission or conviction of a motor vehicle offense requiring the revocation of the officer's drivers license; or
- (B) commission or conviction of any other offense involving moral ~~turpitude~~; character, as defined in: re Willis, 299 N.C. 1, 215 S.E. 2d 771 appeal dismissed 423 U.S. 976 (9175); State v. Harris, 216 N.C. 746, 6 S.E. 2d 854 (1940); in re Legg, 325 N.C. 658, 386 S.E. 2d 174(1989); in re Applicants for License, 143 N.C. 1, 55 S.E. 635 (1906); in re Dillingham, 188 N.C. 162, 124 S.E. 130 (1924); State v. Benbow, 309 N.C. 538, 308 S.E. 2d 647 (1983); and their progeny.
- (5) has been discharged by the North Carolina Department of ~~Correction~~ Public Safety, Division of Adult Correction and Juvenile Justice because the officer lacks the mental or physical capabilities to fulfill the responsibilities of a corrections officer;
- (6) has knowingly made a material misrepresentation of any information required for certification or accreditation;
- (7) has knowingly and willfully, by any means of false pretense, deception, fraud, ~~misrepresentation~~—misrepresentation, or cheating whatsoever, obtained or attempted to obtain credit, ~~training~~ training, or certification from the Commission;
- (8) has knowingly and willfully, by any means of false pretense, deception, fraud, ~~misrepresentation~~—misrepresentation, or cheating whatsoever, aided another person in obtaining or attempting to obtain credit, training, or certification from the Commission;
- (9) has failed to notify the Standards Division of all criminal charges or convictions as required by 12 NCAC 09G .0302;
- (10) has been removed from office by decree of the Superior Court in accord with the provisions of G.S. 128-16 or has been removed from office by sentence of the court in accord with the provisions of G.S. 14-230;
- (11) has refused to submit to an applicant drug screen as required by 12 NCAC 09G .0206; or has refused to submit to an in-service drug screen pursuant to the guidelines set forth in the Drug Screening Implementation Guide as required by the Department of ~~Correction~~; Public Safety, Division of Adult Correction and Juvenile Justice;
- (12) has produced a positive result on a drug screen reported to the Commission as specified in 12 NCAC 09G .0206(3), where the positive result cannot be explained to the Commission's satisfaction; or
- (13) has been denied certification or had such certification suspended or revoked by a previous action of the North Carolina Criminal Justice Education and Training Standards Commission, the North Carolina ~~Company~~/~~Campus~~ Company Police Program, the North Carolina Campus Police Program, the North Carolina Sheriffs' Education and Training Standards Commission, or a similar North Carolina, out of state or federal approving, certifying or licensing agency whose function is the same or similar to the aforementioned agencies if such certification was denied, suspended or revoked based on grounds that would constitute a violation of ~~Subchapter 09G- this Subchapter.~~
- (c) Following suspension, revocation, or denial of the person's certification, the person shall not remain employed or appointed as a corrections officer and the person shall not exercise any authority of a corrections officer during a period for which the person's certification is suspended, revoked, or denied.

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

SECTION .0600 – PROFESSIONAL CERTIFICATE PROGRAM

12 NCAC 09G .0602 GENERAL PROVISIONS

(a) In order to be eligible for one or more of the professional awards, an officer shall first meet the following preliminary qualifications:

- (1) The officer shall ~~presently~~ hold a general correctional officer certification. A person serving under a probationary certification is not eligible for consideration. An officer subject to suspension or revocation proceedings or under investigation for possible decertification action by the Commission, the North Carolina Company and Campus Police Program, the North Carolina Campus Police Program, or the North Carolina Sheriffs' Education and Training Standards Commission shall not be eligible for professional awards for the pendency of the proceeding.

- (2) The officer shall hold general certification with the Commission in one of the following categories:

- (A) ~~correctional officer; officer; or~~
 (B) ~~probation/parole officer; or officer.~~
 (C) ~~probation/parole officer intermediate.~~

- (3) The officer shall be a permanent, full-time, paid employee of the Department of Public Safety, Division of Adult ~~Correction.~~ Correction and Juvenile Justice.

- (4) Permanent, paid employees of the Department of Public Safety, Division of Adult ~~Correction~~ and Juvenile Justice who have ~~successfully~~ completed a Commission-certified corrections officer basic training program and have previously held general certification as specified in 12 NCAC 09G .0602(a)(1) and 12 NCAC 09G .0602(a)(2), but are presently, by virtue of promotion or transfer, serving in positions not subject to certification are eligible to participate in the professional certificate program. Eligibility for this exception requires ~~continuous~~ employment with the Department of Public Safety, Division of Adult ~~Correction~~ and Juvenile Justice from the date of promotion or transfer from a certified position to the date of application for a professional certificate.

(b) Awards are based upon a formula ~~which~~ that combines formal education, corrections training, and actual experience as a corrections officer. Points are computed in the following manner:

- (1) each semester hour of college credit shall equal one point and each quarter hour shall equal two-thirds of a point;
- (2) 20 classroom hours of Commission-approved corrections training shall equal one point; and
- (3) only experience as a permanent, paid employee of the Department of Public Safety, Division of Adult ~~Correction~~ and Juvenile Justice or the equivalent experience as determined by the Commission shall be acceptable of consideration.

Point requirements for each award are described in 12 NCAC 09G .0604 and .0605.

(c) Certificates shall be awarded in an officer's area of expertise only. The State Corrections Certificate is appropriate for permanent, paid corrections employees employed by the Department of Public Safety, Division of Adult ~~Correction.~~ Correction and Juvenile Justice.

Authority G.S. 17C-6.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Sheriffs' Education and Training Standards Commission intends to amend the rules cited as 12 NCAC 10B .2005 and .2006.

Agency obtained G.S. 150B-19.1 certification:

- ☐ OSBM certified on:
☒ RRC certified on: July 18, 2014
☐ Not Required

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

Proposed Effective Date: January 1, 2015

Public Hearing:

Date: September 17, 2014

Time: 10:00 a.m.

Location: 1700 Tryon Park Drive, Raleigh, NC 27602

Reason for Proposed Action: *The revisions set out what will be required for in-service training in 2015. These in-service training programs began in 2005 with deputies completing 4 hours of domestic violence training. Since 2006 deputies have been required to complete 24 hours of in-service training. Since 2007 detention officers and telecommunicators have been required to complete 16 hours. In 2015, deputies must likewise complete approximately 24 hours, and detention officers and telecommunicators must complete 16 hours. Effective in 2013, the in-service requirement was no longer based upon hours of instruction received, but based upon the person completion the training and showing proficiency in the topics by passing tests. The purpose of required in-service training is to improve performance, reduce errors and reduce the number of lawsuits, and protect public health, safety and welfare by ensuring each officer remains knowledgeable in the relevant subject areas of enforcement, corrections, or communications.*

Comments may be submitted to: Julia Lohman, Sheriffs' Standards Division, P.O. Box 629, Raleigh, NC 27602; phone (919) 779-8213; fax (919) 662-4516; email jlohman@ncdoj.gov

Comment period ends: November 3, 2014

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

CHAPTER 10 – SHERIFFS' EDUCATION AND TRAINING STANDARDS

SUBCHAPTER 10B – NC SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION

SECTION .2000 – IN-SERVICE TRAINING FOR JUSTICE OFFICERS

12 NCAC 10B .2005 MINIMUM TRAINING REQUIREMENTS

(a) A Sheriff or Department Head may use a lesson plan developed by the North Carolina Justice Academy or a lesson plan for any of the topical areas developed by another entity. The Sheriff or Department Head may also use a lesson plan developed by a certified instructor, provided that the instructor develops the lesson plan in accordance with the Instructional Systems Development model as taught in Criminal Justice Instructor Training in 12 NCAC 09B .0209. Lesson plans shall be designed to be delivered in hourly increments. A student who completes the training shall receive the number of credits that correspond to the number of credits assigned to the number of hours, regardless of the amount of time the student spends completing the course where each hour shall be worth one credit (e.g., "Legal Update" is designed to be delivered in four hours and will yield four credits). With the exception of Firearms Training and Requalification, successful completion of training shall be demonstrated by passing tests as developed by the delivering agency or as written by the North Carolina Justice Academy. A written test comprised of at least five questions per hour of training shall be developed by the delivering agency, or the agency may use the written test developed by the North Carolina Justice Academy, for each in-service training topic. A student shall pass each test by achieving 70 percent correct answers. Firearms Training and Requalification shall be demonstrated qualification with a firearm as set out in Section .2100 of this Subchapter.

~~(b) The 2013 Law Enforcement In-Service Training Program requires 24 credits of training and successful completion in the following topical areas:~~

- ~~(1) Legal Update;~~
- ~~(2) Juvenile Minority Sensitivity Training: Don't Press Send;~~
- ~~(3) Domestic Violence: The Children are Watching;~~
- ~~(4) Firearms Training and Requalification for deputy sheriffs as set out in Section .2100 of this Subchapter; and~~
- ~~(5) Any topic areas of the Sheriff's choosing.~~

~~(c) The 2013 Detention Officer In-Service Training Program requires 16 credits of training and successful completion in the following topical areas:~~

- ~~(1) Inmate Sexual Assaults;~~
- ~~(2) Detention Officer Legal Update;~~
- ~~(3) Awareness of Issues Surrounding Returning Military Personnel; and~~
- ~~(4) Any topic areas of the Sheriff's or Department Head's choosing.~~

~~(d) The 2013 Telecommunicator In-Service Training Program requires 16 credits of training and successful completion in the following topical areas:~~

- ~~(1) Officer Involved Shootings;~~
- ~~(2) Radio Demeanor and Broadcast Techniques; and~~
- ~~(3) Any topic areas of the Sheriff's or Department Head's choosing.~~

~~(b)(e) The 2014 Law Enforcement In-Service Training Program requires 24 credits of training and successful completion in the following topical areas:~~

- ~~(1) Legal Update;~~
- ~~(2) Juvenile Minority Sensitivity Training: A Juvenile – What Now;~~
- ~~(3) Officer Safety: The First Five Minutes;~~
- ~~(4) Firearms Training and Requalification for deputy sheriffs as set out in Section .2100 of this Subchapter; and~~
- ~~(5) Any topic areas of the Sheriff's choosing.~~

~~(c)(f) The 2014 Detention Officer In-Service Training Program requires 16 credits of training and successful completion in the following topical areas:~~

- ~~(1) Surviving In Custody Death;~~
- ~~(2) Detention Officer Intelligence Update; and~~
- ~~(3) Any topic areas of the Sheriff's or Department Head's choosing.~~

~~(d)(g) The 2014 Telecommunicator In-Service Training Program requires 16 credits of training and successful completion in the following topical areas:~~

- ~~(1) Hitting the Wall: Avoiding Complacency;~~
- ~~(2) Customer Service and the 911 Professional; and~~
- ~~(3) Any topic areas of the Sheriff's or Department Head's choosing.~~

~~(e) The 2015 Law Enforcement In-Service Training Program requires 24 credits of training and successful completion in the following topical areas:~~

- ~~(1) Legal Update;~~
- ~~(2) Juvenile Minority Sensitivity Training: What does it have to do with me?;~~
- ~~(3) Domestic Violence: Teen Dating Violence;~~
- ~~(4) Firearms Training and Requalification for deputy sheriffs as set out in Section .2100 of this Subchapter; and~~
- ~~(5) Any topic areas of the Sheriff's choosing.~~

~~(f) The 2015 Detention Officer In-Service Training Program requires 16 credits of training and successful completion in the following topical areas:~~

- ~~(1) Legal Update;~~
- ~~(2) Documenting the Incident;~~

- (3) Emotional Survival for Detention Officers;
and
- (4) Any topic areas of the Sheriff's or Department
Head's choosing.

(g) The 2015 Telecommunicator In-Service Training Program requires 16 credits of training and successful completion in the following topical areas:

- (1) Crisis Negotiation;
- (2) Interpersonal Communications: Team
Building;
- (3) Emotional Survival;
- (4) Tactical Dispatch; and
- (5) Any topic areas of the Sheriff's or Department
Head's choosing.

Authority G.S. 17E-4; 17E-7.

12 NCAC 10B .2006 IN-SERVICE TRAINING PROGRAM SPECIFICATIONS

~~Justice officers who have been active as a deputy sheriff, detention officer, or telecommunicator between January and June of each calendar year must complete the respective In-Service Training Program(s) established by 12 NCAC 10B .2002 by December of each calendar year. For each justice officer holding multiple certifications from the Commission, the Sheriff shall designate the officer's primary duties for the purpose of selecting which one of the in-service training programs the officer must complete for a calendar year. A justice officer who fails to complete in-service training as required, but is either separated or made inactive prior to the end of the calendar year, may be re-activated after completing the in-service training program prescribed for the year immediately preceding the year in which the officer is being activated. Persons applying to receive deputy certification who have prior service as a criminal justice officer as defined in 12 NCAC 09A .0103(6) between January and June of a prior year who failed to complete in-service training for that year, must complete the in-service training program prescribed for the year immediately preceding the year in which the officer is being activated as a deputy.~~

(a) Justice officers who have been active as a deputy sheriff, detention officer, or telecommunicator between January and July of each calendar year shall complete the respective In-Service Training Program(s) established by 12 NCAC 10B .2002 by the end of December of each calendar year.

(b) For each justice officer holding multiple certifications from the Commission with the same office, the Sheriff shall designate the officer's primary duties for the purpose of selecting which one of the in-service training programs the officer shall complete for a calendar year.

(c) A justice officer who fails to complete in-service training as required, but is either separated or made inactive prior to the end of the calendar year, may be re-activated after completing the in-service training program prescribed for the year immediately preceding the year in which the officer is being activated.

(d) Persons who have prior service as a criminal justice officer as defined in 12 NCAC 09A .0103(6) between January and July of the current year, and who then become an active deputy sheriff are required to complete the in-service training program for that year, unless the person is also either a detention officer

or telecommunicator with the same Sheriff's Office and the Sheriff has designated the officer's primary function to be either a detention officer or telecommunicator.

(e) Persons who have prior service as a criminal justice officer as defined in 12 NCAC 09A .0103(6) between January and July of a prior year who failed to complete in-service training for that year, shall complete the in-service training program prescribed for the year immediately preceding the year in which the officer is being activated as a deputy, unless the person was also reported to this Commission as a telecommunicator with the same agency and completed the telecommunicator in-service training for that year.

Authority G.S. 17E-4; 17E-7.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 36 – BOARD OF NURSING

Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Nursing intends to amend the rule cited as 21 NCAC 36 .0228 with changes from the proposed text noticed in the Register, Volume 28 Issue 19, pages 2312-2314.

Agency obtained G.S. 150B-19.1 certification:

- ☐ OSBM certified on:
- ☐ RRC certified on:
- ☒ Not Required

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

Proposed Effective Date: January 1, 2015

Reason for Proposed Action: *Proposed amendments to 21 NCAC 36 .0228 Clinical Nurse Specialist (CNS) Practice will substitute mandatory for voluntary recognition and will clarify the qualifications and scope of the CNS. The Board of Nursing held a Public Hearing on May 30, 2014 and received both written and oral comments on proposed amendments to 21 NCA 36 .0228 Clinical Nurse Specialist Practice as published in the NC Register 28:19 pages 2312-2314. Based on comments received, on July 24, 2014, the Board approved proposed substantial changes to the Rule as follows: change in effective date from March 1 to July 1, 2015; clarify link between educational qualifications and accreditation by an approved national credentialing body; change from 5 years to 2 years for required refresher course; change from reference to paper applications to administrative costs; change in amended effective date from August 1, 2014 to January 1, 2015; and minor edits related to references within Rule. The Board is republishing the Rule and accepting additional comment.*

Comments may be submitted to: Angela H. Ellis, APA Coordinator, NC Board of Nursing, P.O. Box 2129, Raleigh, NC 27602-2129; phone (919) 782-3211 x259; email angela@ncbon.com

Comment period ends: *November 3, 2014*

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. If the Rules Review Commission receives written and signed objections 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)
- ☒ No fiscal note required by G.S. 150B-21.4

Note: *The text in bold indicates the changes to the Rule after the initial public comment period.*

SECTION .0200 – LICENSURE

21 NCAC 36 .0228 CLINICAL NURSE SPECIALIST PRACTICE

(a) ~~A-Effective March~~**July** 1, 2015, only a registered nurse who meets the qualifications as outlined in Paragraph (b) of this Rule ~~may shall~~ be recognized by the Board as a clinical nurse specialist, ~~and to perform advanced practice registered nursing activities at an advanced skill level as outlined in Paragraph (e) (f) of this Rule.~~

(b) ~~In order to be recognized as a Clinical Nurse Specialist, the Board of Nursing shall require recognize an applicant to meet the following qualifications: who:~~

- (1) has an unrestricted license to practice as a registered nurse in North Carolina or a party state;
- (2) has an unrestricted previous approval, registration or license as a clinical nurse specialist if previously approved, registered, or licensed as a clinical nurse specialist in another state, territory, or possession of the United States;
- ~~(2)(3)~~ has successfully completed a master's or higher degree program ~~consisting of a minimum of 500 hours of clinical experience in the clinical nursing specialty as defined in 21 NCAC 36 .0120(41) and consistent with G.S. 90-171.21(d)(4). For a dual track graduate program, if less than 500 hours per track, a requirement that there must be~~

~~documentation of any crossover which would justify less than an additional 500 hours for the second track; and accredited by a nursing accrediting body approved by the U.S. United States Secretary of Education or the Council for Higher Education Accreditation; and Accreditation and meets the qualifications for clinical nurse specialist certification by an approved national credentialing body under Part (b)(4)(A) of this Rule; and~~

(4) either:

~~(3)(A)~~ has current certification ~~in the~~ as a clinical ~~nursing specialty nurse specialist~~ from a national credentialing body approved by the Board of Nursing, as defined in Paragraph ~~(e)~~ ~~(g)~~ **(h)** of this Rule and 21 NCAC 36 ~~.0120(26).~~ **36 .0120(26); or**

(B) if no clinical nurse specialist certification is available in the specialty, meets requirements determined by the Board to be equivalent to national certification. The Board shall determine equivalence based on consideration of an official transcript and course descriptions validating Subparagraph (b)(3) of this Rule, current curriculum vitae, work history and professional recommendations indicating evidence of at least 1,000 hours of clinical nurse specialist practice, and documentation of certificates indicating 75 contact hours of continuing education applicable to clinical nurse specialist practice during the previous five years.

(c) An applicant certified as a clinical nurse specialist by a national credentialing body prior to January 1, 2007 and who has maintained that certification and active clinical nurse specialist practice, and holds a master's or higher degree in nursing or a related field shall be recognized by the Board as a clinical nurse specialist.

(d) New graduates seeking first-time clinical nurse specialist recognition in North Carolina shall hold a Master's, post-master's or higher degree from a clinical nurse specialist program accredited by a nursing accrediting body approved by the U.S. Secretary of Education or the Council for Higher Education Accreditation as acceptable by the Board, and meets all requirements in Subparagraphs (b)(1), (2), (3) and Part (b)(4)(A) Subparagraph (b)(1) and Part (g)(5)(A) of this Rule.

(e) A clinical nurse specialist seeking Board of Nursing recognition who has not practiced as a clinical nurse specialist in more than ~~fivetwo~~ years shall complete a clinical nurse specialist refresher course approved by the Board of Nursing in accordance with 21 NCAC 36 .0220(o) and (p) and consisting of common conditions and their management directly related to the clinical nurse specialist's area of education and certification. A

clinical nurse specialist refresher course participant shall be granted clinical nurse specialist recognition that is limited to clinical activities required by the refresher course.

(e)(f) The scope of practice of a clinical nurse specialist incorporates the basic components of nursing practice as defined in Rule .0224 of this Section as well as the understanding and application of nursing principles at an advanced practice registered nurse level in his/her the area of clinical nursing specialization in which the clinical nurse specialist is educationally prepared and for which competency has been maintained which includes:

- (1) assessing clients' health status, synthesizing and analyzing multiple sources of data, and identifying alternative possibilities as to the nature of a healthcare problem;
- (2) diagnosing and managing clients' acute and chronic health problems within a-an advanced practice nursing framework;
- (3) assessing for and monitoring the usage and effect of pharmacologic agents within an advanced practice nursing framework;
- ~~(3)(4)~~ formulating strategies to promote wellness and prevent illness;
- ~~(4)(5)~~ prescribing and implementing therapeutic and corrective nursing measures; non-pharmacologic nursing interventions;
- ~~(5)(6)~~ planning for situations beyond the clinical nurse specialist's expertise, and consulting with or referring clients to other health care providers as appropriate;
- ~~(6)(7)~~ promoting and practicing in collegial and collaborative relationships with clients, families, other health care professionals and individuals whose decisions influence the health of individual clients, families and communities;
- ~~(7)(8)~~ initiating, establishing and utilizing measures to evaluate health care outcomes and modify nursing practice decisions;
- ~~(8)(9)~~ assuming leadership for the application of research findings for the improvement of health care outcomes; and
- ~~(9)(10)~~ integrating education, consultation, management, leadership and research into the advanced clinical nursing nurse specialist role.

(d)(g) The A registered nurse who seeks seeking recognition by the Board as a clinical nurse specialist shall:

- (1) complete the appropriate application, which shall include:

(A) evidence of the appropriate masters, post-master's certificate or doctoral degree as set out in Subparagraph ~~(b)(2)~~ (b)(3) or (d) of this Rule; ~~and~~ and, either

(B) evidence of current certification in a clinical nursing specialty from a national credentialing body as set out in ~~(b)(3)~~ Part (b)(4)(A) of this Rule; or

(C) meet requirements as set out in Part (b)(4)(B) of this Rule.

(2) submit any additional information necessary to evaluate the application as requested by the Board.

~~(2)(3)~~ submit a processing fee of twenty-five dollars (\$25.00) to cover ~~the costs of duplicating and distributing the application materials; and~~ administrative costs;

(4) renew the recognition every two years at the time of registered nurse renewal; and,

(5) either:

~~(3)(A)~~ submit evidence of initial certification and re-certification by a national credentialing body at the time such occurs in order to maintain Board of Nursing recognition consistent with Paragraphs (b) and ~~(e)(h)~~ of this ~~Rule.~~ Rule; or

(B) if subject to Part (b)(4)(B) of this Rule, submit evidence of at least 1,000 hours of practice and 75 contact hours of continuing education every five years.

(e)(h) The Board of Nursing may shall may approve those national credentialing bodies offering certification and recertification in a clinical nursing specialty which have established the following minimum requirements:

- (1) an unencumbered registered nurse license; and
- (2) certification as a clinical nurse specialist is limited to masters, post-master's certificate or ~~doctoral—doctorally~~ prepared ~~applicant~~ applicant effective January 1, 2010.

Authority G.S. 90-171.20(4); 90-171.20(7); 90-171.21(d)(4); 90-171.23(b); 90-171.27(b); 90-171.42(b).

APPROVED RULES

*This Section includes a listing of rules approved by the Rules Review Commission followed by the full text of those rules. The rules that have been approved by the RRC in a form different from that originally noticed in the Register or when no notice was required to be published in the Register are identified by an * in the listing of approved rules. Statutory Reference: G.S. 150B-21.17.*

Rules approved by the Rules Review Commission at its meeting on July 17, 2014.

**REGISTER CITATION TO THE
NOTICE OF TEXT****MEDICAL CARE COMMISSION**

Required Spaces 10A NCAC 13D .3201* 28:12 NCR

PUBLIC HEALTH, COMMISSION FOR

Reportable Diseases and Conditions 10A NCAC 41A .0101 28:18 NCR

HOME INSPECTOR LICENSURE BOARD

Purpose and Scope 11 NCAC 08 .1103* 28:15 NCR

JUSTICE, DEPARTMENT OF - DIVISION OF CRIMINAL INFORMATION

Name and Location 12 NCAC 04E .0101 28:18 NCR

Function of DCI 12 NCAC 04E .0102 28:18 NCR

Advisory Policy Board 12 NCAC 04E .0103 28:18 NCR

Definitions 12 NCAC 04E .0104 28:18 NCR

Forms 12 NCAC 04E .0105 28:18 NCR

Manuals 12 NCAC 04E .0106 28:18 NCR

Eligibility for Full or Limited Access to the DCI Network 12 NCAC 04E .0201 28:18 NCR

Management Control Requirements 12 NCAC 04E .0202 28:18 NCR

Non-Terminal Access 12 NCAC 04E .0203 28:18 NCR

SBI Task Force Management Control 12 NCAC 04E .0204 28:18 NCR

User Agreement 12 NCAC 04E .0301 28:18 NCR

User Access Fee Agreement 12 NCAC 04E .0302 28:18 NCR

Servicing Agreement 12 NCAC 04E .0303 28:18 NCR

Management Control Agreement 12 NCAC 04E .0304 28:18 NCR

Disclosure Agreement 12 NCAC 04E .0305 28:18 NCR

DCI Terminal Operator 12 NCAC 04E .0401 28:18 NCR

Certification and Recertification of DCI Operators 12 NCAC 04E .0402 28:18 NCR

Suspension and Revocation of Operator Certification 12 NCAC 04E .0403 28:18 NCR

Period of Suspension 12 NCAC 04E .0404 28:18 NCR

Minimum Standards for DCI Terminal Operators 12 NCAC 04E .0405 28:18 NCR

Security of DCI Equipment 12 NCAC 04F .0101 28:18 NCR

Official Use of DCI Information 12 NCAC 04F .0102 28:18 NCR

Documentation and Accuracy 12 NCAC 04F .0201 28:18 NCR

Validations 12 NCAC 04F .0202 28:18 NCR

Hit Confirmation 12 NCAC 04F .0203 28:18 NCR

Arrest Fingerprint Card 12 NCAC 04F .0301 28:18 NCR

Final Disposition Information 12 NCAC 04F .0302 28:18 NCR

<u>Prison Fingerprint Card</u>	12	NCAC 04F .0303	28:18 NCR
<u>Dissemination of CCH Records</u>	12	NCAC 04F .0401	28:18 NCR
<u>Accessing of CCH Records</u>	12	NCAC 04F .0402	28:18 NCR
<u>Use of CCH for Criminal Justice Employment</u>	12	NCAC 04F .0403	28:18 NCR
<u>Individual's Rights to Review</u>	12	NCAC 04F .0404	28:18 NCR
<u>CCH Licensing and Non-Criminal Justice Employment Purposes</u>	12	NCAC 04F .0405	28:18 NCR
<u>Restrictive Use of CCH for Employment Purposes</u>	12	NCAC 04F .0406	28:18 NCR
<u>Research Use and Access of CCH Records</u>	12	NCAC 04F .0407	28:18 NCR
<u>Limitation Requirements</u>	12	NCAC 04F .0408	28:18 NCR
<u>Expungements</u>	12	NCAC 04F .0501	28:18 NCR
<u>Purges</u>	12	NCAC 04F .0502	28:18 NCR
<u>Automated Fingerprint Identification System</u>	12	NCAC 04F .0601	28:18 NCR
<u>Eligibility for Full or Limited Access to the AFIS Network</u>	12	NCAC 04F .0602	28:18 NCR
<u>AFIS Agreement</u>	12	NCAC 04F .0603	28:18 NCR
<u>Available Data</u>	12	NCAC 04F .0604	28:18 NCR
<u>Dissemination of Driver History Information</u>	12	NCAC 04F .0701	28:18 NCR
<u>Audits</u>	12	NCAC 04F .0801	28:18 NCR
<u>Definitions</u>	12	NCAC 04G .0101	28:18 NCR
<u>Penalty Provisions</u>	12	NCAC 04G .0102	28:18 NCR
<u>Notice of Violation</u>	12	NCAC 04G .0201	28:18 NCR
<u>Informal Hearing Procedure</u>	12	NCAC 04G .0301	28:18 NCR

CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

<u>Applicability of Radar/TDS Standards Pre 7/1/82</u>	12	NCAC 09A .0108	28:15 NCR
<u>Certified Instructors Pre 7/1/82</u>	12	NCAC 09B .0311	28:15 NCR
<u>Application for Law Enforcement Employment</u>	12	NCAC 09C .0217	28:15 NCR
<u>Form Order Blank</u>	12	NCAC 09C .0218	28:15 NCR
<u>Acquisition of Forms</u>	12	NCAC 09C .0220	28:15 NCR

COASTAL RESOURCES COMMISSION

<u>Technical Standards for Beach Fill Projects</u>	15A	NCAC 07H .0312*	28:14 NCR
<u>General Conditions</u>	15A	NCAC 07H .1204*	28:14 NCR
<u>Specific Conditions</u>	15A	NCAC 07H .1205*	28:14 NCR
<u>Specific Conditions</u>	15A	NCAC 07H .1305*	28:14 NCR

COSMETIC ART EXAMINERS, BOARD OF

<u>License Waiver for Armed Forces</u>	21	NCAC 14A .0401*	28:12 NCR
<u>Issuance of Declaratory Ruling</u>	21	NCAC 14B .0504	28:12 NCR
<u>Licensees and Students</u>	21	NCAC 14H .0401*	28:12 NCR
<u>Systems of Grading Beauty Establishments</u>	21	NCAC 14H .0504*	28:12 NCR
<u>Rule Compliance and Enforcement Measures</u>	21	NCAC 14H .0505*	28:12 NCR
<u>Application/Licensure/Individuals Who Have Been Convicted...</u>	21	NCAC 14I .0401*	28:12 NCR
<u>Live Model Performances</u>	21	NCAC 14K .0107*	28:12 NCR
<u>Live Model Performances</u>	21	NCAC 14O .0106	28:12 NCR

<u>Operations of Schools of Cosmetic Art</u>	21	NCAC 14P .0113*	28:12 NCR
<u>Continuing Education</u>	21	NCAC 14R .0105*	28:12 NCR
<u>Esthetics Curriculum</u>	21	NCAC 14T .0604*	28:12 NCR
<u>Manicuring Curriculum</u>	21	NCAC 14T .0605*	28:12 NCR
<u>Natural Hair Care Styling Curriculum</u>	21	NCAC 14T .0606*	28:12 NCR
<u>Field Trips</u>	21	NCAC 14T .0615*	28:12 NCR
<u>Additional Hours</u>	21	NCAC 14T .0616*	28:12 NCR
<u>Teacher Trainees</u>	21	NCAC 14T .0617*	28:12 NCR
<u>School Operations/Licensure Maintenance</u>	21	NCAC 14T .0701*	28:12 NCR

PHARMACY, BOARD OF

<u>Medication in Health Departments</u>	21	NCAC 46 .2401*	28:18 NCR
<u>Drugs and Devices to be Dispensed</u>	21	NCAC 46 .2403*	28:18 NCR

ENGINEERS AND SURVEYORS, BOARD OF EXAMINERS FOR

<u>Requirements for Licensing</u>	21	NCAC 56 .0501*	28:14 NCR
<u>Application Procedure: Individual</u>	21	NCAC 56 .0502*	28:14 NCR
<u>Examinations</u>	21	NCAC 56 .0503*	28:14 NCR
<u>Requirements for Licensing</u>	21	NCAC 56 .0601*	28:14 NCR
<u>Application Procedure: Individual</u>	21	NCAC 56 .0602*	28:14 NCR
<u>Examinations</u>	21	NCAC 56 .0603*	28:14 NCR
<u>Procedure</u>	21	NCAC 56 .0802*	n/a G.S. 150B-21.5(a)(3)
<u>Offices</u>	21	NCAC 56 .0901*	28:14 NCR
<u>Opportunity for Licensee or Applicant to have Hearing</u>	21	NCAC 56 .1402*	28:14 NCR
<u>Surveying Procedures</u>	21	NCAC 56 .1602*	28:14 NCR
<u>Classification of Boundary Surveys</u>	21	NCAC 56 .1603*	28:14 NCR
<u>Mapping Requirements for Boundary Surveys</u>	21	NCAC 56 .1604*	28:14 NCR
<u>Specifications for Topographic and Planimetric Mapping, I...</u>	21	NCAC 56 .1606*	28:14 NCR
<u>Classification/Land Information System/Geographic Informa...</u>	21	NCAC 56 .1608*	28:14 NCR
<u>Requirements</u>	21	NCAC 56 .1703*	28:14 NCR
<u>Units</u>	21	NCAC 56 .1704	28:14 NCR
<u>Determination of Credit</u>	21	NCAC 56 .1705*	28:14 NCR

REAL ESTATE COMMISSION

<u>Extensions of Time to Complete Continuing Education</u>	21	NCAC 58A .1709*	28:15 NCR
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TITLE 10A - DEPARTMENT OF HEALTH AND HUMAN SERVICES

10A NCAC 13D .3201 REQUIRED SPACES

(a) In a facility, the floor area of a single bedroom shall not be less than 100 square feet and the floor area of a room for more than one bed shall not be less than 80 square feet per bed. The 80 square feet and 100 square feet requirements shall be exclusive of closets, toilet rooms, vestibules, or wardrobes. When a designated single room exceeds 159 net square feet in floor area,

it shall remain a single bedroom and shall not be used as a multi-bedroom unless approved in advance by the Division as meeting the requirements of G.S. 131E, Article 9.

(b) The total space set aside for dining, activity, and other common use shall not be less than 25 square feet per bed for a nursing facility and 30 square feet per bed for the adult care home portion of a combination facility. Physical therapy, occupational therapy and rehabilitation space shall not be included in this total.

(c) In nursing facilities, included in the total square footage required by Paragraph (b) of this Rule, a separate dining area or areas with a minimum of 10 square feet per bed shall be provided and a separate activity area or areas with a minimum of 10 square feet per bed shall be provided. The remainder of the total required space for dining and activities square footage required by Paragraph (b) of this Rule may be in a separate area or combined with either of the separate dining and activity areas required by this Paragraph. If a facility is designed with patient and resident household units for 30 or less patients and residents, the dining and activity areas in the household units are not required to be separate.

(d) In combination facilities, included in the total square footage required by Paragraph (b) of this Rule, a separate dining area or areas with at least 14 square feet per adult care home bed shall be provided. The adult care home dining area or areas may be combined with the nursing facility dining area or areas. A separate activity area or areas for adult care home beds shall be provided with at least 16 square feet per adult care home bed. The adult care home activity area shall not be combined with the activity area or areas required for nursing beds.

(e) Dining, activity, and living space shall be designed and equipped to provide accessibility to both patients or residents confined to wheelchairs and ambulatory patients or residents. Dining, activity, and living areas required by Paragraph (b) of this Rule shall have windows with views to the outside. The gross window area shall not be less than eight percent of the floor area required for each dining, activity, or living space.

(f) Closets and storage units for equipment and supplies shall not be included as part of the dining, activity, and living floor space area required by Paragraph (b) of this Rule.

(g) Outdoor areas for individual and group activities shall be provided and shall be accessible to patients and residents with physical disabilities.

(h) For nursing beds, separate bedroom closets or wardrobes shall be provided in each bedroom to provide each occupant with a minimum of 36 cubic feet of clothing storage space at least half of which is for hanging clothes.

(i) For adult care home beds, separate bedroom closets or wardrobes shall be provided in each bedroom to provide each adult care home resident with a minimum of 48 cubic feet of clothing storage space at least half of which is for hanging clothes.

(j) Some means for patients and residents to lock personal articles within the facility shall be provided.

(k) A toilet room shall be directly accessible from each patient and resident room and from each central bathing area without going through the general corridor. One toilet room may serve two patient or resident rooms but not more than eight beds. The lavatory may be omitted from the toilet room if one is provided in each patient and resident room. One tub or shower shall be provided for each 15 beds not individually served. For each 120 beds or fraction thereof the following shall be provided:

- (1) at least one bathtub or a manufactured walk-in bathtub or a similar manufactured bathtub designed for easy transfer of patients and residents into the tub. All bathtubs must be accessible on three sides; and

- (2) a roll-in shower designed and equipped for unobstructed ease of shower chair entry and use.

(l) For each nursing unit, or fraction thereof on each floor, the following shall be provided:

- (1) a medication preparation area with a counter, a sink, a medication refrigerator, eye level medication storage, cabinet storage and a double locked narcotic storage area under the visual control of nursing staff. The sink shall be trimmed with valves that can be operated without hands. If the sink is equipped with blade handles, the blade handles shall not be less than four and one half inches in length. The sink water spout shall be mounted so that its discharge point is a minimum of 10 inches above the bottom of the sink basin;
- (2) a clean utility room with a counter, sink, and storage. The sink shall be trimmed with valves that can be operated without hands. If the sink is equipped with blade handles, the blade handles shall not be less than four and one half inches in length. The sink water spout shall be mounted so that its discharge point is a minimum of 10 inches above the bottom of the sink basin;
- (3) a soiled utility room with a counter, sink, and storage. The sink shall be trimmed with valves that can be operated without hands. If the sink is equipped with blade handles, the blade handles shall not be less than four and one half inches in length. The sink water spout shall be mounted so that its discharge point is a minimum of 10 inches above the bottom of the sink basin. The soiled utility room shall be equipped for the cleaning and sanitizing of bedpans as required by 15A NCAC 18A .1312 Toilet: Handwashing: Laundry: And Bathing Facilities.
- (4) a nurses' toilet and locker space for personal belongings;
- (5) a soiled linen storage room. If the soiled linen storage room is combined with the soiled utility room, a separate soiled linen storage room is not required;
- (6) a clean linen storage room;
- (7) a nourishment station in an area enclosed with walls and doors which contains work space, cabinets and refrigerated storage, and a small stove, microwave oven, or hot plate. If a facility is designed with patient and resident household units, a patient and resident dietary area located within the patient and resident household unit may substitute for the nourishment station. The patient and resident dietary area shall include cooking equipment, a kitchen sink, refrigerated storage and storage areas and shall be for the use of staff, patients, residents, and families;

- (8) an audio-visual nurse-patient call system arranged to ensure that a patient's or resident's call in the facility readily notifies and directs staff to the location where the call was activated.
- (9) a control point with an area for charting patient and resident records, space for storage of emergency equipment and supplies, and nurse-patient call and alarm annunciation systems; and
- (10) a janitor's closet.
- (m) Clean linen storage shall be provided in a separate room from bulk supplies. Clean linen for nursing units may be stored in closed carts, cabinets in the clean utility room, or a linen closet on the unit floor.
- (n) The kitchen area and laundry area each shall have a janitor's closet. Administration, occupational and physical therapy, recreation, personal care, and employee areas shall be provided janitor's closets and may share one as a group.
- (o) Stretcher and wheelchair storage shall be provided.
- (p) Bulk storage shall be provided at the rate of at least five square feet of floor area per licensed bed. This storage space shall be either in the facility or within 500 feet of the facility on the same site. This storage space shall be in addition to the other storage space required by this Rule.
- (q) Office space shall be provided for business transactions. Office space shall be provided for persons holding the following positions:
 - (1) administrator;
 - (2) director of nursing;
 - (3) social services director;
 - (4) activities director; and
 - (5) physical therapist.
- (r) Each combination facility shall provide a minimum of one residential washer and residential dryer in a location accessible by adult care home staff, residents, and residents' families.

*History Note: Authority G.S. 131E-104;
 Eff. January 1, 1996;
 Amended Eff. August 1, 2014; October 1, 2008.*

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) chlamydial infection (laboratory confirmed) - 7 days;
- (8) cholera - 24 hours;

- (9) Creutzfeldt-Jakob disease – 7 days;
- (10) cryptosporidiosis – 24 hours;
- (11) cyclosporiasis – 24 hours;
- (12) dengue - 7 days;
- (13) diphtheria - 24 hours;
- (14) Escherichia coli, shiga toxin-producing - 24 hours;
- (15) ehrlichiosis – 7 days;
- (16) encephalitis, arboviral - 7 days;
- (17) foodborne disease, including Clostridium perfringens, staphylococcal, Bacillus cereus, and other and unknown causes - 24 hours;
- (18) gonorrhea - 24 hours;
- (19) granuloma inguinale - 24 hours;
- (20) Haemophilus influenzae, invasive disease - 24 hours;
- (21) Hantavirus infection – 7 days;
- (22) Hemolytic-uremic syndrome – 24 hours;
- (23) Hemorrhagic fever virus infection – immediately;
- (24) hepatitis A - 24 hours;
- (25) hepatitis B - 24 hours;
- (26) hepatitis B carriage - 7 days;
- (27) hepatitis C, acute – 7 days;
- (28) human immunodeficiency virus (HIV) infection confirmed - 24 hours;
- (29) influenza virus infection causing death – 24 hours;
- (30) legionellosis - 7 days;
- (31) leprosy – 7 days;
- (32) leptospirosis - 7 days;
- (33) listeriosis – 24 hours;
- (34) Lyme disease - 7 days;
- (35) lymphogranuloma venereum - 7 days;
- (36) malaria - 7 days;
- (37) measles (rubeola) - 24 hours;
- (38) meningitis, pneumococcal - 7 days;
- (39) meningococcal disease - 24 hours;
- (40) monkeypox – 24 hours;
- (41) mumps - 7 days;
- (42) nongonococcal urethritis - 7 days;
- (43) novel influenza virus infection – immediately;
- (44) plague - immediately;
- (45) paralytic poliomyelitis - 24 hours;
- (46) pelvic inflammatory disease – 7 days;
- (47) psittacosis - 7 days;
- (48) Q fever - 7 days;
- (49) rabies, human - 24 hours;
- (50) Rocky Mountain spotted fever - 7 days;
- (51) rubella - 24 hours;
- (52) rubella congenital syndrome - 7 days;
- (53) salmonellosis - 24 hours;
- (54) severe acute respiratory syndrome (SARS) – 24 hours;
- (55) shigellosis - 24 hours;
- (56) smallpox - immediately;
- (57) Staphylococcus aureus with reduced susceptibility to vancomycin – 24 hours;

- (58) streptococcal infection, Group A, invasive disease - 7 days;
 - (59) syphilis - 24 hours;
 - (60) tetanus - 7 days;
 - (61) toxic shock syndrome - 7 days;
 - (62) trichinosis - 7 days;
 - (63) tuberculosis - 24 hours;
 - (64) tularemia – immediately;
 - (65) typhoid - 24 hours;
 - (66) typhoid carriage (*Salmonella typhi*) - 7 days;
 - (67) typhus, epidemic (louse-borne) - 7 days;
 - (68) vaccinia – 24 hours;
 - (69) vibrio infection (other than cholera) – 24 hours;
 - (70) whooping cough – 24 hours; and
 - (71) yellow fever - 7 days.
- (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) Monkeypox.
 - (X) *Mycobacterium leprae*, the cause of leprosy.
 - (Y) *Plasmodium falciparum*, *P. malariae*, *P. ovale*, and *P. vivax*, the causes of malaria in humans.
 - (Z) Poliovirus (any), the cause of poliomyelitis.
 - (AA) Rabies virus.
 - (BB) *Rickettsia rickettsii*, the cause of Rocky Mountain spotted fever.
 - (CC) Rubella virus.
 - (DD) *Salmonella* spp., the causes of salmonellosis.
 - (EE) *Shigella* spp., the causes of shigellosis.
 - (FF) Smallpox virus, the cause of smallpox.
 - (GG) *Staphylococcus aureus* with reduced susceptibility to vanomycin.
 - (HH) *Trichinella spiralis*, the cause of trichinosis.
 - (II) Vaccinia virus.
 - (JJ) *Vibrio* spp., the causes of cholera and other vibrioses.
 - (KK) Yellow fever virus.
 - (LL) *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.

History Note: Authority G.S. 130A-134; 130A-135; 130A-139; 130A-141;
Temporary Rule Eff. February 1, 1988, for a period of 180 days to expire on July 29, 1988;
Eff. March 1, 1988;
Amended Eff. October 1, 1994; February 1, 1990;
Temporary Amendment Eff. July 1, 1997;
Amended Eff. August 1, 1998;
Temporary Amendment Eff. February 13, 2003; October 1, 2002; February 18, 2002; June 1, 2001;
Amended Eff. April 1, 2003;
Temporary Amendment Eff. November 1, 2003; May 16, 2003;
Amended Eff. January 1, 2005; April 1, 2004;
Temporary Amendment Eff. June 1, 2006;
Amended Eff. April 1, 2008; November 1, 2007; October 1, 2006;
Temporary Amendment Eff. January 1, 2010;
Temporary Amendment Expired September 11, 2011;
Amended Eff. August 1, 2014; July 1, 2013; April 1, 2011.

TITLE 11 – DEPARTMENT OF INSURANCE

11 NCAC 08 .1103 PURPOSE AND SCOPE

- (a) Home inspections performed according to this Section shall provide the client with an understanding of the property conditions, as inspected at the time of the home inspection.
- (b) Home inspectors shall:
 - (1) provide a written contract, signed by the client, before the home inspection is performed that shall:
 - (A) State that the home inspection is in accordance with the Standards of Practice of the North Carolina Home Inspector Licensure Board as set forth in this Section;
 - (B) Describe what services shall be provided and the cost; and
 - (C) State, when an inspection is for only one or a limited number of systems or components, that the inspection is limited to only those systems or components;
 - (2) inspect readily visible and readily accessible installed systems and components described in Rules .1106 through .1115 of this Section; and
 - (3) submit a written report and summary, pursuant to G.S. 143-151.58(a1), to the client that shall:
 - (A) Describe those systems and components required to be described in Rules .1106 through .1115 of this Section;
 - (B) State which systems and components present at the home and designated for inspection in this Section were not inspected, and the reason for not inspecting;
 - (C) State any systems or components inspected that do not function as intended, allowing for normal wear and tear, or appear not to function as intended, based upon documented tangible evidence;
 - (D) Describe the system or component; state how the condition is defective; explain the implications of conditions listed in the summary; and direct the client to a course of action for repair, further investigation by a specialist, or subsequent observation; and
 - (E) State the name, license number, and signature of the person conducting the inspection.
- (c) This Section does not limit home inspectors from:
 - (1) reporting observations and conditions, including safety or habitability concerns, or rendering opinions of items in addition to those required in Paragraph (b) of this Rule; or

- (2) excluding systems and components from the inspection if requested by the client, and so stated in the written contract.

History Note: Authority G.S. 143-151.49; 143-151.58;
Codifier determined that agency findings did not meet criteria for temporary rule Eff. October 15, 1996;
Temporary Adoption Eff. October 24, 1996;
Eff. July 1, 1998;
Amended Eff. October 1, 2014; October 1, 2011; March 1, 2010; February 1, 2009; February 1, 2007; April 1, 2005; May 1, 2003; July 1, 2000.

Amended Eff. October 1, 1994;
Repealed Eff. August 1, 2014.

12 NCAC 04E .0401 DCI TERMINAL OPERATOR
12 NCAC 04E .0402 CERTIFICATION AND
RECERTIFICATION OF DCI OPERATORS
12 NCAC 04E .0403 SUSPENSION AND
REVOCATION OF OPERATOR CERTIFICATION

History Note: Authority G.S. 114-10; 114-10.1; 150B-3(b); 150B-23(f);
Eff. November 1, 1991;
Amended Eff. August 1, 1998; October 1, 1994; August 1, 1994;
Repealed Eff. August 1, 2014.

TITLE 12 – DEPARTMENT OF JUSTICE

12 NCAC 04E .0101 NAME AND LOCATION
12 NCAC 04E .0102 FUNCTION OF DCI
12 NCAC 04E .0103 ADVISORY POLICY BOARD
12 NCAC 04E .0104 DEFINITIONS
12 NCAC 04E .0105 FORMS
12 NCAC 04E .0106 MANUALS

History Note: Authority G.S. 114-10; 114-10.1;
Eff. November 1, 1991;
Amended Eff. August 1, 1998; October 1, 1995; October 1, 1994;
Temporary Amendment Eff. January 14, 2002;
Amended Eff. April 1, 2003;
Repealed Eff. August 1, 2014.

12 NCAC 04E .0201 ELIGIBILITY FOR FULL OR
LIMITED ACCESS TO THE DCI NETWORK
12 NCAC 04E .0202 MANAGEMENT CONTROL
REQUIREMENTS
12 NCAC 04E .0203 NON-TERMINAL ACCESS

History Note: Authority G.S. 114-10; 114-10.1;
Eff. November 1, 1991;
Amended Eff. October 1, 1994;
Repealed Eff. August 1, 2014.

12 NCAC 04E .0204 SBI TASK FORCE
MANAGEMENT CONTROL

History Note: Authority G.S. 114-10; 114-10.1;
Eff. February 1, 1993;
Repealed Eff. August 1, 2014.

12 NCAC 04E .0301 USER AGREEMENT
12 NCAC 04E .0302 USER ACCESS FEE
AGREEMENT
12 NCAC 04E .0303 SERVICING AGREEMENT
12 NCAC 04E .0304 MANAGEMENT CONTROL
AGREEMENT
12 NCAC 04E .0305 DISCLOSURE AGREEMENT

History Note: Authority G.S. 114-10; 114-10.1;
Eff. November 1, 1991;

12 NCAC 04E .0404 PERIOD OF SUSPENSION
12 NCAC 04E .0405 MINIMUM STANDARDS FOR
DCI TERMINAL OPERATORS

History Note: Authority G.S. 114-10; 114-10.1;
Eff. August 1, 1998;
Repealed Eff. August 1, 2014.

12 NCAC 04F .0101 SECURITY OF DCI
EQUIPMENT
12 NCAC 04F .0102 OFFICIAL USE OF DCI
INFORMATION

History Note: Authority G.S. 114-10; 114-10.1;
Eff. November 1, 1991;
Repealed Eff. August 1, 2014.

12 NCAC 04F .0201 DOCUMENTATION AND
ACCURACY
12 NCAC 04F .0202 VALIDATIONS
12 NCAC 04F .0203 HIT CONFIRMATION

History Note: Authority G.S. 114-10; 114-10.1;
Eff. November 1, 1991;
Amended Eff. October 1, 1994;
Repealed Eff. August 1, 2014.

12 NCAC 04F .0301 ARREST FINGERPRINT CARD
12 NCAC 04F .0302 FINAL DISPOSITION
INFORMATION
12 NCAC 04F .0303 PRISON FINGERPRINT CARD

History Note: Authority G.S. 15A-502; 15A-1381; 15A-1382;
15A-1383; 114-10; 114-10.1;
Eff. November 1, 1991;
Repealed Eff. August 1, 2014.

12 NCAC 04F .0401 DISSEMINATION OF CCH
RECORDS
12 NCAC 04F .0402 ACCESSING OF CCH RECORDS
12 NCAC 04F .0403 USE OF CCH FOR CRIMINAL
JUSTICE EMPLOYMENT
12 NCAC 04F .0404 INDIVIDUAL'S RIGHT TO
REVIEW

**12 NCAC 04F .0405 CCH LICENSING AND
NON-CRIMINAL JUSTICE EMPLOYMENT PURPOSES
12 NCAC 04F .0406 RESTRICTIVE USE OF CCH
FOR EMPLOYMENT PURPOSES
12 NCAC 04F .0407 RESEARCH USE AND ACCESS
OF CCH RECORDS
12 NCAC 04F .0408 LIMITATION REQUIREMENTS**

History Note: Authority G.S. 114-10; 114-10.1; 114-16; 114-19; 114-19.1;
Eff. November 1, 1991;
Amended Eff. October 1, 1994;
Repealed Eff. August 1, 2014.

**12 NCAC 04F .0501 EXPUNGEMENTS
12 NCAC 04F .0502 PURGES**

History Note: Authority G.S. 15A-145; 15A-146; 90-96; 90-113.14; 114-10; 114-10.1;
150B-19(5)b.,e.;
Eff. November 1, 1991;
Repealed Eff. August 1, 2014.

**12 NCAC 04F .0601 AUTOMATED FINGERPRINT
IDENTIFICATION SYSTEM**

History Note: Authority G.S. 15A-502; 114-10; 114-10.1; 114-16;
Eff. November 1, 1991;
Amended Eff. October 1, 1992;
Repealed Eff. August 1, 2014.

**12 NCAC 04F .0602 ELIGIBILITY FOR FULL OR
LIMITED ACCESS TO THE AFIS NETWORK
12 NCAC 04F .0603 AFIS AGREEMENT
12 NCAC 04F .0604 AVAILABLE DATA**

History Note: Authority G.S. 15A-502; 114-10; 114-10.1; 114-16;
Eff. October 1, 1992;
Repealed Eff. August 1, 2014.

**12 NCAC 04F .0701 DISSEMINATION OF DRIVER
HISTORY INFORMATION**

History Note: Authority G.S. 114-10; 114-10.1;
Eff. November 1, 1991;
Repealed Eff. August 1, 2014.

12 NCAC 04F .0801 AUDITS

History Note: Authority G.S. 114-10; 114-10.1;
Eff. November 1, 1991;
Repealed Eff. August 1, 2014.

**12 NCAC 04G .0101 DEFINITIONS
12 NCAC 04G .0102 PENALTY PROVISIONS**

History Note: Authority G.S. 114-10; 114-10.1;

Eff. November 1, 1991;
Amended Eff. October 1, 1994;
Repealed Eff. August 1, 2014.

12 NCAC 04G .0201 NOTICE OF VIOLATION

History Note: Authority G.S. 114-10; 114-10.1; 150B-3(b); 150B-23(f);
Eff. November 1, 1991;
Amended Eff. December 1, 1992;
Repealed Eff. August 1, 2014.

**12 NCAC 04G .0301 INFORMAL HEARING
PROCEDURE**

History Note: Authority G.S. 114-10; 114-10.1; 150B-3(b); 150B-23(f);
Eff. November 1, 1991;
Repealed Eff. August 1, 2014.

**12 NCAC 09A .0108 APPLICABILITY OF
RADAR/TDS STANDARDS PRE 7/1/82**

History Note: Authority G.S. 17C-6;
Eff. July 1, 1982;
Repealed Eff. August 1, 2014.

**12 NCAC 09B .0311 CERTIFIED INSTRUCTORS PRE
7/1/82**

History Note: Authority G.S. 17C-6;
Eff. July 1, 1982;
Amended Eff. April 1, 1999;
Repealed Eff. August 1, 2014.

**12 NCAC 09C .0217 APPLICATION FOR LAW
ENFORCEMENT EMPLOYMENT
12 NCAC 09C .0218 FORM ORDER BLANK**

History Note: Authority G.S. 17C-6; 150B-11;
Eff. January 1, 1981;
Repealed Eff. August 1, 2014.

12 NCAC 09C .0220 ACQUISITION OF FORMS

History Note: Authority G.S. 17C-6; 150B-11;
Eff. January 1, 1981;
Repealed Eff. August 1, 2014.

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

15A NCAC 07H .0312 TECHNICAL STANDARDS FOR BEACH FILL PROJECTS

Placement of sediment along the oceanfront shoreline is referred to in this Rule as "beach fill." Sediment used solely to establish or strengthen dunes or to re-establish state-maintained transportation corridors across a barrier island breach in a disaster area as declared by the Governor is not considered a beach fill project under this Rule. Beach fill projects including beach nourishment, dredged material disposal, habitat restoration, storm protection, and erosion control may be permitted under the following conditions:

- (1) The applicant shall characterize the recipient beach according to the following methodology:
 - (a) Characterization of the recipient beach is not required for the placement of sediment directly from and completely confined to a maintained navigation channel or associated sediment basins within the active nearshore, beach or inlet shoal system;
 - (b) Sediment sampling and analysis shall be used to capture the three-dimensional spatial variability of the sediment characteristics including grain size, sorting and mineralogy within the natural system;
 - (c) Shore-perpendicular topographic and bathymetric surveying of the recipient beach shall be conducted to determine the beach profile. Topographic and bathymetric surveying shall occur along a minimum of five shore-perpendicular transects evenly spaced throughout the entire project area. Each transect shall extend from the frontal dune crest seaward to a depth of 20 feet (6.1 meters) or to the shore-perpendicular distance 2,400 feet (732 meters) seaward of mean low water, whichever is in a more landward position. Transect spacing shall not exceed 5,000 feet (1,524 meters) in the shore-parallel direction. Elevation data for all transects shall be referenced to the North American Vertical Datum of 1988 (NAVD 88) and the North American Datum of 1983 (NAD 83);
 - (d) No fewer than 13 sediment samples shall be taken along each beach profile transect. At least one sample shall be taken from each of the following morphodynamic zones where present: frontal dune, frontal dune toe, mid berm, mean high water (MHW), mid tide (MT), mean low water (MLW), trough, bar crest and at

even depth increments from 6 feet (1.8 meters) to 20 feet (6.1 meters) or to a shore-perpendicular distance 2,400 feet (732 meters) seaward of mean low water, whichever is in a more landward position. The total number of samples taken landward of MLW shall equal the total number of samples taken seaward of MLW;

- (e) For the purpose of this Rule, "sediment grain size categories" are defined as "fine" (less than 0.0625 millimeters), "sand" (greater than or equal to 0.0625 millimeters and less than 2 millimeters), "granular" (greater than or equal to 2 millimeters and less than 4.76 millimeters) and "gravel" (greater than or equal to 4.76 millimeters and less than 76 millimeters). Each sediment sample shall report percentage by weight of each of these four grain size categories;
- (f) A composite of the simple arithmetic mean for each of the four grain size categories defined in Sub-Item (1)(e) of this Rule shall be calculated for each transect. A grand mean shall be established for each of the four grain size categories by summing the mean for each transect and dividing by the total number of transects. The value that characterizes grain size values for the recipient beach is the grand mean of percentage by weight for each grain size category defined in Sub-Item (1)(e) of this Rule;
- (g) Percentage by weight calcium carbonate shall be calculated from a composite of all sediment samples along each transect defined in Sub-Item (1)(d) of this Rule. The value that characterizes the carbonate content of the recipient beach is a grand mean calculated by summing the average percentage by weight calcium carbonate for each transect and dividing by the total number of transects. For beaches on which fill activities have taken place prior to the effective date of this Rule, the Division of Coastal Management shall consider visual estimates of shell content as a proxy for carbonate weight percent;
- (h) The total number of sediments and shell material greater than or equal to three inches (76 millimeters) in diameter, observable on the surface of

- the beach between mean low water (MLW) and the frontal dune toe, shall be calculated for an area of 50,000 square feet (4,645 square meters) within the beach fill project boundaries. This area is considered a representative sample of the entire project area and referred to as the "background" value;
- (i) Beaches that received sediment prior to the effective date of this Rule shall be characterized in a way that is consistent with Sub-Items (1)(a) through (1)(h) of this Rule and shall use data collected from the recipient beach prior to the addition of beach fill. If such data were not collected or are unavailable, a dataset best reflecting the sediment characteristics of the recipient beach prior to beach fill shall be developed in coordination with the Division of Coastal Management; and
 - (j) All data used to characterize the recipient beach shall be provided in digital and hardcopy format to the Division of Coastal Management upon request.
- (2) The applicant shall characterize the sediment to be placed on the recipient beach according to the following methodology:
- (a) The characterization of borrow areas including submarine sites, upland sites, and dredged material disposal areas shall be designed to capture the three-dimensional spatial variability of the sediment characteristics including grain size, sorting and mineralogy within the natural system or dredged material disposal area;
 - (b) The characterization of borrow sites shall include sediment characterization data provided by the Division of Coastal Management where available. These data can be found in individual project reports and studies, and shall be provided by the Division of Coastal Management upon request and where available;
 - (c) Seafloor surveys shall measure elevation and capture acoustic imagery of the seafloor. Measurement of seafloor elevation shall cover 100 percent of each submarine borrow site and use survey-grade swath sonar (*e.g.* multibeam or similar technologies) in accordance with current US Army Corps of Engineers standards for navigation and dredging. Seafloor imaging without an elevation component (*e.g.* sidescan sonar or similar technologies) shall also cover 100 percent of each borrow site and be performed in accordance with US Army Corps of Engineers standards for navigation and dredging. Because shallow submarine areas can provide technical challenges and physical limitations for acoustic measurements, seafloor imaging without an elevation component may not be required for water depths less than 10 feet (3 meters). Alternative elevation surveying methods for water depths less than 10 feet (3 meters) may be evaluated on a case-by-case basis by the Division of Coastal Management. Elevation data shall be tide- and motion-corrected and referenced to NAVD 88 and NAD 83. Seafloor imaging data without an elevation component shall be referenced to the NAD 83. All final seafloor survey data shall conform to standards for accuracy, quality control and quality assurance as set forth by the US Army Corps of Engineers (USACE). The current surveying standards for navigation and dredging can be obtained from the Wilmington District of the USACE. For offshore dredged material disposal sites, only one set of imagery without elevation is required. Sonar imaging of the seafloor without elevation is not required for borrow sites completely confined to maintained navigation channels, sediment deposition basins within the active nearshore, beach or inlet shoal system;
 - (d) Geophysical imaging of the seafloor subsurface shall be used to characterize each borrow site and shall use survey grids with a line spacing not to exceed 1,000 feet (305 meters). Offshore dredged material disposal sites shall use a survey grid not to exceed 2,000 feet (610 meters) and only one set of geophysical imaging of the seafloor subsurface is required. Survey grids shall incorporate at least one tie point per survey line. Because shallow submarine areas can pose technical challenges and physical limitations for geophysical techniques, subsurface data may not be required

- in water depths less than 10 feet (3 meters), and the Division of Coastal Management shall evaluate these areas on a case-by-case basis. Subsurface geophysical imaging shall not be required for borrow sites completely confined to maintained navigation channels, sediment deposition basins within the active nearshore, beach or inlet shoal system, or upland sites. All final subsurface geophysical data shall use accurate sediment velocity models for time-depth conversions and be referenced to NAD 83;
- (e) Sediment sampling of all borrow sites shall use a vertical sampling device no less than 3 inches (76 millimeters) in diameter. Characterization of each borrow site shall use no fewer than five evenly spaced cores or one core per 23 acres (grid spacing of 1,000 feet or 305 meters), whichever is greater. Characterization of borrow sites completely confined to maintained navigation channels or sediment deposition basins within the active nearshore, beach or inlet shoal system shall use no fewer than five evenly spaced vertical samples per channel or sediment basin, or sample spacing of no more than 5,000 linear feet (1,524 meters), whichever is greater. Two sets of sampling data (with at least one dredging event in between) from maintained navigation channels or sediment deposition basins within the active nearshore, beach or inlet shoal system may be used to characterize material for subsequent nourishment events from those areas if the sampling results are found to be compatible with Sub-Item (3)(a) of this Rule. In submarine borrow sites other than maintained navigation channels or associated sediment deposition basins within the active nearshore, beach or inlet shoal system where water depths are no greater than 10 feet (3 meters), geophysical data of and below the seafloor are not required, and sediment sample spacing shall be no less than one core per six acres (grid spacing of 500 feet or 152 meters). Vertical sampling shall penetrate to a depth equal to or greater than permitted dredge or excavation depth or expected dredge or excavation depths for pending permit applications. All sediment samples shall be integrated with geophysical data to constrain the surficial, horizontal and vertical extent of lithologic units and determine excavation volumes of compatible sediment as defined in Item (3) of this Rule;
- (f) For offshore dredged material disposal sites, the grid spacing shall not exceed 2,000 feet (610 meters). Characterization of material deposited at offshore dredged material disposal sites after the initial characterization are not required if all of the material deposited complies with Sub-Item (3)(a) of this Rule as demonstrated by at least two sets of sampling data with at least one dredging event in between;
- (g) Grain size distributions shall be reported for all sub-samples taken within each vertical sample for each of the four grain size categories defined in Sub-Item (1)(e) of this Rule. Weighted averages for each core shall be calculated based on the total number of samples and the thickness of each sampled interval. A simple arithmetic mean of the weighted averages for each grain size category shall be calculated to represent the average grain size values for each borrow site. Vertical samples shall be geo-referenced and digitally imaged using scaled, color-calibrated photography;
- (h) Percentage by weight of calcium carbonate shall be calculated from a composite sample of each core. A weighted average of calcium carbonate percentage by weight shall be calculated for each borrow site based on the composite sample thickness of each core. Carbonate analysis is not required for sediment confined to maintained navigation channels or associated sediment deposition basins within the active nearshore, beach or inlet shoal system; and
- (i) All data used to characterize the borrow site shall be provided in digital and hardcopy format to the Division of Coastal Management upon request.

(3) The Division of Coastal Management shall determine sediment compatibility according to the following criteria:

- (a) Sediment completely confined to the permitted dredge depth of a maintained navigation channel or associated sediment deposition basins within the active nearshore, beach or inlet shoal system is considered compatible if the average percentage by weight of fine-grained (less than 0.0625 millimeters) sediment is less than 10 percent;
- (b) The average percentage by weight of fine-grained sediment (less than 0.0625 millimeters) in each borrow site shall not exceed the average percentage by weight of fine-grained sediment of the recipient beach characterization plus five percent;
- (c) The average percentage by weight of granular sediment (greater than or equal to 2 millimeters and less than 4.76 millimeters) in a borrow site shall not exceed the average percentage by weight of coarse-sand sediment of the recipient beach characterization plus 10 percent;
- (d) The average percentage by weight of gravel (greater than or equal to 4.76 millimeters and less than 76 millimeters) in a borrow site shall not exceed the average percentage by weight of gravel-sized sediment for the recipient beach characterization plus five percent;
- (e) The average percentage by weight of calcium carbonate in a borrow site shall not exceed the average percentage by weight of calcium carbonate of the recipient beach characterization plus 15 percent; and
- (f) Techniques that take incompatible sediment within a borrow site or combination of sites and make it compatible with that of the recipient beach characterization shall be evaluated on a case-by-case basis by the Division of Coastal Management.

(4) Excavation and placement of sediment shall conform to the following criteria:

- (a) Sediment excavation depths for all borrow sites shall not exceed the maximum depth of recovered core at each coring location;
- (b) In order to protect threatened and endangered species, and to minimize impacts to fish, shellfish and wildlife resources, no excavation or placement

of sediment shall occur within the project area during times designated by the Division of Coastal Management in consultation with other State and Federal agencies. The time limitations shall be established during the permitting process and shall be made known prior to permit issuance; and

- (c) Sediment and shell material with a diameter greater than or equal to three inches (76 millimeters) is considered incompatible if it has been placed on the beach during the beach fill project, is observed between MLW and the frontal dune toe, and is in excess of twice the background value of material of the same size along any 50,000-square-foot (4,645 square meter) section of beach.

History Note: Authority G.S. 113-229; 113A-102(b)(1); 113A-103(5)(a); 113A-107(a); 113A-113(b)(5) and (6); 113A-118; 113A-124;

Eff. February 1, 2007;

Amended Eff. August 1, 2014; September 1, 2013; April 1, 2008.

15A NCAC 07H .1204 GENERAL CONDITIONS

(a) Piers and docking facilities authorized by the general permit set forth in this Section shall be for the exclusive use of the land owner, or occupant and shall not be leased, rented, or used for any commercial purpose. Piers and docking facilities shall provide docking space for no more than two boats. Docking facilities providing docking space for more than two boats shall be reviewed through the major permitting process because of their greater potential for adverse impacts and, therefore, are not authorized by this general permit, excluding the exceptions described in Rule .1205 of this Section.

(b) Individuals shall allow representatives of the Department of Environment and Natural Resources to make inspections at any time deemed necessary in order to be sure that the activity being performed under the authority of the general permit set forth in this Section is in accordance with the terms and conditions prescribed herein.

(c) There shall be no interference with navigation or use of the waters by the public by the existence of piers and docking facilities.

(d) The permit set forth in this Section shall not be applicable to proposed construction where the Department determines that the proposed activity will endanger adjoining properties or significantly affect historic, cultural, scenic, conservation or recreation values, identified in G.S. 113A-102 and G.S. 113A-113(b)(4).

(e) The permit set forth in this Section does not eliminate the need to obtain any other required state, local, or federal authorization.

(f) Development carried out under the permit set forth in this Section shall be consistent with all local requirements, AEC

Guidelines, and local land use plans current at the time of authorization.

History Note: Authority G.S. 113A-107(a); 113A-107(b); 113A-113(b); 113A-118.1; 113A-124;

Eff. March 1, 1984;

Amended Eff. May 1, 1990;

RRC Objection due to ambiguity Eff. May 19, 1994;

Amended Eff. August 1, 2014; July 1, 2009; August 1, 1998; July 1, 1994.

15A NCAC 07H .1205 SPECIFIC CONDITIONS

(a) Piers and docking facilities may extend or be located up to a maximum of 400 feet waterward from the normal high water line or the normal water level, whichever is applicable.

(b) Piers and docking facilities shall not extend beyond the established pier length along the same shoreline for similar use. This restriction shall not apply to piers and docking facilities 100 feet or less in length unless necessary to avoid interference with navigation or other uses of the waters by the public such as blocking established navigation routes or interfering with access to adjoining properties as determined by the Division of Coastal Management. The length of piers and docking facilities shall be measured from the waterward edge of any wetlands that border the water body.

(c) Piers and docking facilities longer than 200 feet shall be permitted only if the proposed length gives access to deeper water at a rate of at least one foot at each 100 foot increment of pier length longer than 200 feet, or if the additional length is necessary to span some obstruction to navigation. Measurements to determine pier and docking facility lengths shall be made from the waterward edge of any coastal wetland vegetation, that borders the water body.

(d) Piers shall be no wider than six feet and shall be elevated at least three feet above any coastal wetland substrate as measured from the bottom of the decking.

(e) The total square footage of shaded impact for docks and mooring facilities (excluding the pier) allowed shall be 8 square feet per linear foot of shoreline with a maximum of 800 square feet. In calculating the shaded impact, uncovered open water slips shall not be counted in the total.

(f) The maximum size of any individual component of the docking facility authorized by this General Permit shall not exceed 400 square feet.

(g) Docking facilities shall not be constructed in a designated Primary Nursery Area with less than two feet of water at normal low water level or normal water level under the general permit set forth in this Section without prior approval from the Division of Marine Fisheries or the Wildlife Resources Commission.

(h) Piers and docking facilities located over shellfish beds or submerged aquatic vegetation (as defined by the Marine Fisheries Commission) may be constructed without prior consultation from the Division of Marine Fisheries or the Wildlife Resources Commission if the following two conditions are met:

- (1) Water depth at the docking facility location is equal to or greater than two feet of water at normal low water level or normal water level; and

- (2) The pier and docking facility is located to minimize the area of submerged aquatic vegetation or shellfish beds under the structure as determined by the Division of Coastal Management.

(i) Floating piers and floating docking facilities located in Primary Nursery Areas, over shellfish beds, or over submerged aquatic vegetation shall be allowed if the water depth between the bottom of the proposed structure and the substrate is at least 18 inches at normal low water level or normal water level.

(j) Docking facilities shall have no more than six feet of any dimension extending over coastal wetlands and shall be elevated at least three feet above any coastal wetland substrate as measured from the bottom of the decking.

(k) The width requirements established in Paragraph (d) of this Rule shall not apply to pier structures in existence on or before July 1, 2001 when structural modifications are needed to prevent or minimize storm damage. In these cases, pilings and cross bracing may be used to provide structural support as long as they do not extend more than two feet on either side of the principal structure. These modifications shall not be used to expand the floor decking of platforms and piers.

(l) Boathouses shall not exceed a combined total of 400 square feet and shall have sides extending no further than one-half the height of the walls as measured in a downward direction from the top wall plate or header and only covering the top half of the walls. Measurements of square footage shall be taken of the greatest exterior dimensions. Boathouses shall not be allowed on lots with less than 75 linear feet of shoreline.

(m) The area enclosed by a boat lift shall not exceed 400 square feet.

(n) Piers and docking facilities shall be single story. They may be roofed but shall not allow second story use.

(o) Pier and docking facility alignments along federally maintained channels shall also meet Corps of Engineers regulations for construction pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403).

(p) Piers and docking facilities shall in no case extend more than 1/4 the width of a natural water body, human-made canal or basin. Measurements to determine widths of the water body, human-made canals, or basins shall be made from the waterward edge of any coastal wetland vegetation which borders the water body. The 1/4 length limitation shall not apply when the proposed pier and docking facility is located between longer structures within 200 feet of the applicant's property. However, the proposed pier and docking facility shall not be longer than the pier head line established by the adjacent piers and docking facilities nor longer than 1/3 the width of the water body.

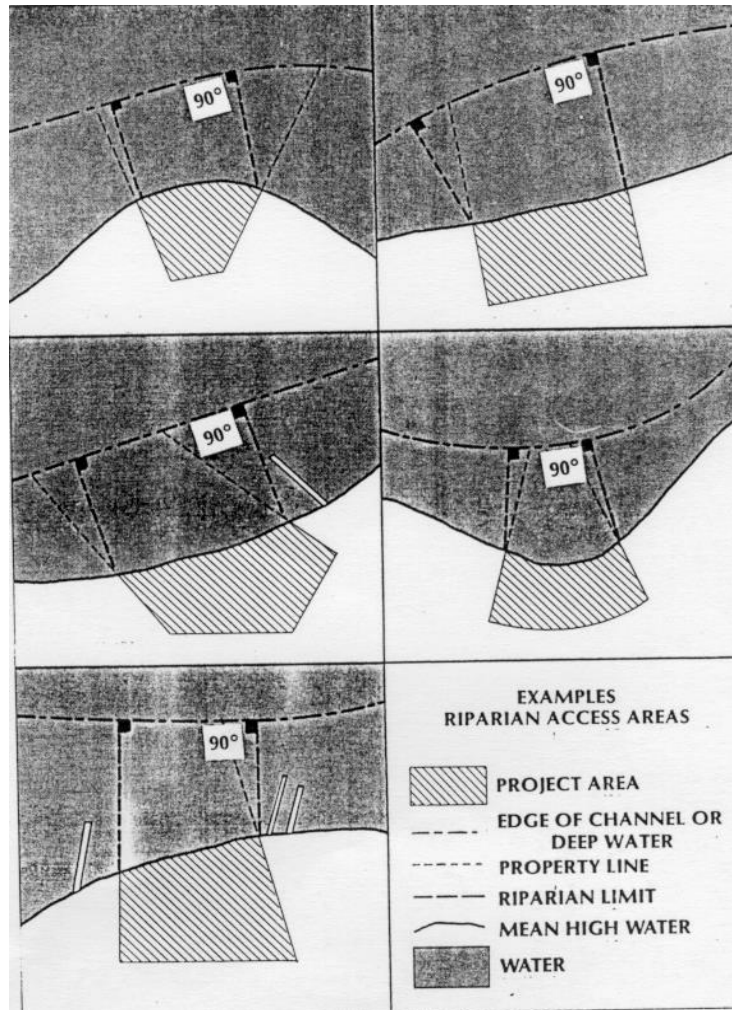
(q) Piers and docking facilities shall not interfere with the access to any riparian property, and shall have a minimum setback of 15 feet between any part of the pier and docking facility and the adjacent property lines extended into the water at the points that they intersect the shoreline. The minimum setbacks provided in this Paragraph may be waived by the written agreement of the adjacent riparian owner(s), or when two adjoining riparian owners are co-applicants. Should the adjacent property be sold before construction of the pier commences, the applicant shall obtain a written agreement with the new owner waiving the minimum setback and submit it to the Division of

Coastal Management prior to initiating any development of the pier or docking facility. The line of division of areas of riparian access shall be established by drawing a line along the channel or deep water in front of the property, then drawing a line perpendicular to the line of the channel so that it intersects with the shore at the point the upland property line meets the water's edge. Application of this Rule may be aided by reference to the approved diagram in Paragraph (t) of this Rule illustrating the rule as applied to various shoreline configurations. Copies of the diagram may be obtained from the Division of Coastal Management website at <http://www.nccoastalmanagement.net>. When shoreline configuration is such that a perpendicular alignment cannot be achieved, the pier or docking facility shall be aligned to meet the intent of this Rule to the maximum extent practicable.

(r) Piers and docking facilities shall provide docking space for no more than two boats (a boat is defined in 15A NCAC 07M .0602(a) as a vessel or watercraft of any size or type specifically designed to be self-propelled, whether by engine, sail, oar, paddle or other means, which is used to travel from place to place by water) except when stored on a platform that has already been accounted for within the shading impacts condition of this general permit. Boats stored on floating or fixed platforms shall not count as docking spaces.

(s) Applicants for authorization to construct a pier or docking facility shall provide notice of the permit application to the owner of any part of a shellfish franchise or lease over which the proposed pier or docking facility would extend. The applicant shall allow the lease holder the opportunity to mark a navigation route from the pier to the edge of the lease.

(t) The diagram shown below illustrates various shoreline configurations:



(u) Shared piers or docking facilities shall be allowed and encouraged provided that in addition to complying with Paragraphs (a) through (t) of this Rule the following shall also apply:

- (1) The shared pier or docking facility shall be confined to two adjacent riparian property owners and the landward point of origination

- of the structure shall overlap the shared property line.
- (2) Shared piers and docking facilities shall be designed to provide docking space for no more than four boats.
- (3) The total square footage of shaded impact for docks and mooring facilities shall be calculated using Paragraph (e) of this Rule and

- in addition shall allow for combined shoreline of both properties.
- (4) The property owners of the shared pier shall not be required to obtain a 15-foot waiver from each other as described in Paragraph (q) of this Rule as it applies to the shared riparian line for any work associated with the shared pier, provided that the title owners of both properties have executed a shared pier agreement that has become a part of the permit file.
- (5) The construction of a second access pier or docking facility not associated with the shared pier shall not be authorized under the general permit set forth in this Section.

History Note: Authority G.S. 113A-107(a); 113A-107(b); 113A-113(b); 113A-118.1; 113A-124; Eff. March 1, 1984; Amended Eff. December 1, 1991; May 1, 1990; March 1, 1990; RRC Objection due to ambiguity Eff. March 18, 1993; Amended Eff. August 1, 1998; April 23, 1993; Temporary Amendment Eff. December 20, 2001; Amended Eff. August 1, 2014; July 1, 2009; April 1, 2003.

15A NCAC 07H .1305 SPECIFIC CONDITIONS

- (a) Boat ramps shall be no wider than 15 feet and shall not extend more than 20 feet waterward of the normal high water level or normal water level.
- (b) Excavation and ground disturbing activities above and below the normal high water level or normal water level will be limited to that absolutely necessary to establish adequate ramp slope and provide a ramp no greater in size than specified by this general permit.
- (c) Placement of fill materials below normal high water level, or normal water level, will be limited to the ramp structure and any associated riprap groins. Boat ramps may be constructed of concrete, wood, steel, clean riprap, marl, or any other suitable equivalent materials approved by the Division of Coastal Management. No coastal wetland vegetation shall be excavated or filled at any time during construction.
- (d) The permit set forth in this Section allows for up to a six-foot wide launch access dock (fixed or floating) immediately adjacent to a new or existing boat ramp. The length shall be limited to the length of the permitted boat ramp (with a maximum length of 20 feet waterward of the normal high water level or normal water level). No permanent slips are authorized by this permit.
- (e) Groins shall be allowed as a structural component on one or both sides of a new or existing boat ramp to reduce scouring. The groins shall be limited to the length of the permitted boat ramp (with a maximum length of 20 feet waterward of the normal high water level or normal water level).
- (f) The height of sheetpile groins shall not exceed one foot above normal high water level or normal water level and the height of riprap groins shall not exceed two feet above normal high water level or normal water level.
- (g) Riprap groins shall not exceed a base width of five feet.

- (h) Material used for groin construction shall be free from loose dirt or any other pollutant. Riprap material must be of sufficient size to prevent its movement from the approved alignment by wave action or currents.
- (i) "L" and "T" sections shall not be allowed at the end of groins.
- (j) Groins shall be constructed of granite, marl, concrete without exposed rebar, timber, vinyl sheet pile, steel sheet pile, or other suitable equivalent materials approved by the Division of Coastal Management.
- (k) Boat ramps and their associated structures authorized under this permit shall not interfere with the access to any riparian property and shall have a minimum setback of 15 feet between any part of the boat ramp or associated structures and the adjacent property owners' areas of riparian access. The minimum setbacks provided in the rule may be waived by the written agreement of the adjacent riparian owner(s), or when two adjoining riparian owners are co-applicants. Should the adjacent property be sold before construction of the boat ramp or associated structures commences, the applicant shall obtain a written agreement with the new owner waiving the minimum setback and submit it to the Division of Coastal Management prior to initiating any development of the boat ramp or associated structures authorized under this permit.

History Note: Authority G.S. 113A-107(a); 113A-107(b); 113A-113(b); 113A-118.1; 113A-124; Eff. March 1, 1984; Amended Eff. August 1, 2014.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 14 – BOARD OF COSMETIC ART EXAMINERS

21 NCAC 14A .0401 LICENSE WAIVER FOR ARMED FORCES

- (a) Licensees in good standing and serving in the armed forces of the United States or the spouse of an individual in good standing and serving in the armed forces of the United States are allowed an extension on the license renewal payment and required continuing education hours as permitted G.S. 93B-15.
- (b) Individuals holding current and valid licensure as determined by G.S. 93B-15.1 may apply for licensure with the Board by providing a copy of the current and valid license along with a the license application, fees and documentation of military experience or training.

History Note: Authority G.S. 93B-15; 93B-15.1; Eff. June 1, 2010; Amended Eff. August 1, 2014.

21 NCAC 14B .0504 ISSUANCE OF DECLARATORY RULING

History Note: Authority G.S. 150B-17; Eff. February 1, 1976;

Repealed Eff. August 1, 2014.

21 NCAC 14H .0401 LICENSEES AND STUDENTS

(a) Notwithstanding Rule .0201 in this Subchapter, this Rule applies to licensees and students in practice in cosmetic art schools and shops. Each licensee and student shall wash his or her hands with soap and water or an equally effective cleansing agent immediately before and after serving each client.

(b) Each licensee and student shall wear clean garments and shoes while serving patrons.

(c) Licensees or students shall not use or possess in a cosmetic art school or shop any of the following:

- (1) Methyl Methacrylate Liquid Monomer, a.k.a. MMA;
- (2) razor-type callus shavers designed and intended to cut growths of skin including skin tags, corns, and calluses;
- (3) FDA rated Class III devices;
- (4) carbolic acid (phenol) over two percent strength;
- (5) animals including insects, fish, amphibians, reptiles, birds, or non-human mammals to perform any service; or
- (6) a variable speed electrical nail file on a natural nail unless it has been designed for use on a natural nail.

(d) A licensee or student shall not:

- (1) use any product, implement, or piece of equipment in any manner other than the product's, implement's, or equipment's intended use as described or detailed by the manufacturer;
- (2) treat any medical condition unless referred by a physician;
- (3) provide any service unless trained prior to performing the service;

(4) perform services on a client if the licensee has reason to believe the client has any of the following:

- (A) fungus, lice, or nits;
- (B) an inflamed, infected, broken, raised, or swollen skin or nail tissue in the area to be worked on; or
- (C) an open wound or sore in the area to be worked on;

(5) alter or duplicate a license issued by the Board;

(6) advertise or solicit clients in any form of communication in a manner that is false or misleading;

(7) use any FDA rated Class II device without the documented supervision of a licensed physician;

(8) use any product that will penetrate the dermis; or

(9) make any statement to a member of the public either verbally or in writing stating or implying action is required or forbidden by Board rules when such action is not required or forbidden by Board rules. A violation of this prohibition is considered practicing or attempting to practice by fraudulent misrepresentation.

(e) In using a disinfectant, the user shall wear any personal protective equipment, such as gloves, recommended by the manufacturer in the Material Safety Data Sheet.

History Note: Authority G.S. 88B-2; 88B-4; 88B-14; 88B-24; Eff. April 1, 2012;

Amended Eff. August 1, 2014; March 1, 2013.

21 NCAC 14H .0504 SYSTEMS OF GRADING BEAUTY ESTABLISHMENTS

The system of grading the sanitary rating of cosmetic art schools and shops based on the rules set out in this subchapter shall be as follows, setting out areas to be inspected and considered, and the maximum points given for compliance:

Sanitation	Point Value
Each licensee and student shall wash his or her hands with soap and water or an equally effective cleansing agent immediately before and after serving each client.	2
Each licensee and student shall wear clean garments and shoes while serving patrons.	2
The cosmetic art facility shall be kept clean.	3
Waste material shall be kept in receptacles with a disposable liner. The area surrounding the waste receptacles shall be maintained in a sanitary manner.	4
All doors and windows shall be kept clean.	2
Furniture, equipment, floors, walls, ceilings and fixtures shall be clean and in good repair.	3
Clean protective capes, drapes, linens, and towels shall be used for each patron.	3
After a cape, drape, linen, or towel has been in contact with a patron's skin, it shall be placed in a clean, closed container until laundered with soap and hot water and dried in a heated dryer.	5
Any paper or nonwoven protective drape or covering shall be discarded after one use.	2
There shall be a supply of clean protective drapes, linens and towels at all times.	2
Clean drapes, capes, linens, and towels shall be stored in a clean area.	5
Bathroom facilities shall be kept cleaned.	3

All implements shall be washed with warm water and a cleaning solution and scrubbed to remove debris and dried.	2
All implements shall be disinfected.	10
All disinfected electrical implements shall be stored in a clean area.	2
Disposable and porous implements and supplies shall be discarded after use or upon completion of the service.	10
Any product that comes into contact with the patron shall be discarded upon completion of the service.	3
Disinfected implements shall be kept in a clean closed cabinet or clean closed container and shall not be stored with any implement or item that has not been disinfected.	10
Lancets, disposable razors, and other sharp objects shall be disposed in puncture-resistant containers.	1
The presence of animals or birds. Fish in an enclosure and animals trained for the purpose of accompanying disabled persons are exempt.	1
All creams, lotions, wax, cosmetics, and other products dispensed to come in contact with patron's skin shall be kept in clean, closed containers and dispensed in a sanitary manner. No product dispensed in portions shall be returned to the container.	10
After each patron's use each whirlpool or footspa shall be cleaned and disinfected.	10
The water in a vaporizer machine shall be emptied daily and the unit disinfected daily.	2
The area where services are performed that come in contact with the patron's skin including chairs, tables, and beds shall be disinfected between patrons.	3

*History Note: Authority G.S. 88B-2; 88B-4; 88B-14; 88B-23; 88B-26;
Eff. April 1, 2012;
Amended Eff. August 1, 2014.*

21 NCAC 14H .0505 RULE COMPLIANCE AND ENFORCEMENT MEASURES

(a) The use of or possession of the following products or equipment in a school or shop shall result in civil penalty in the amount of three hundred dollars (\$300.00) per container of product or piece of equipment:

- (1) Methyl Methacrylate Liquid Monomer a.k.a. MMA; or
- (2) razor-type callus shavers designed and intended to cut growths of skin including skin tags, corns, and calluses.

(b) The use of or possession of the following in a school or shop shall result in civil penalty in the amount of one hundred dollars (\$100.00) per use or possession:

- (1) animals including insects, fish, amphibians, reptiles, birds, or non-human mammals to perform any service; or
- (2) variable speed electrical nail file on the natural nail unless it has been designed for use on the natural nail.

(c) The action of any student or licensee to violate the Board rules in the following manner shall result in civil penalty in the amount of one hundred dollars (\$100.00) per instance of each action:

- (1) use of any product, implement, or piece of equipment in any manner other than the product's, implement's, or equipment's intended use as described or detailed by the manufacturer;
- (2) treatment of any medical condition unless referred by a physician;
- (3) use of any product that will penetrate the dermis;

- (4) provision of any service unless trained prior to performing the service;
- (5) performance of services on a client if the licensee has reason to believe the client has any of the following:
 - (A) fungus, lice, or nits;
 - (B) inflamed infected, broken, raised, or swollen skin or nail tissue in the area to be worked on; or
 - (C) an open wound or sore in the area to be worked on; or
- (6) alteration of or duplication of a license issued by the Board;
- (7) advertisement or solicitation of clients in any form of communication in a manner that is false or misleading; or
- (8) use of any FDA rated Class II device without the documented supervision of a licensed physician.

(d) The failure to record the date and time of each cleaning and disinfecting of a footspa in a cosmetic art school or shop as required by this Subchapter including the date, time, reason, and name of the staff member who performed the cleaning or the failure to keep or make such record available for at least 90 days upon request by either a patron or inspector shall result in civil penalty in the amount of twenty-five dollars (\$25.00) per footspa.

(e) The failure to clean and disinfect a footspa in a cosmetic art shop or school as required by this Subchapter shall result in civil penalty in the amount of one hundred dollars (\$100.00) per footspa.

(f) The failure to maintain in a cosmetic art shop and school antiseptics, gloves or finger guards, and sterile bandages available to provide first aid shall result in civil penalty in the amount of twenty-five dollars (\$25.00) per item.

(g) The failure to maintain a sink with hot and cold running water in the clinic area, separate from restrooms, shall result in civil penalty in the amount of one hundred dollars (\$100.00).

(h) The failure to provide ventilation at all times in the areas where patrons are serviced in cosmetic art shops shall result in civil penalty in the amount of twenty-five dollars (\$25.00).

(i) The failure to screen all doors and windows open for ventilation shall result in civil penalty in the amount of twenty-five dollars (\$25.00).

(j) The failure to maintain equipment and supplies necessary to perform any cosmetic art service offered in the shop shall result in civil penalty in the amount of one hundred dollars (\$100.00).

(k) The failure to maintain a sanitation grade of 80 percent or higher shall result in a civil penalty in the amount of two hundred dollars (\$200.00).

(l) Repeated violations of the rules in this Subchapter exceeding three written notifications of any one rule documented to any one individual, shop, or school shall result in a mandatory disciplinary hearing in accordance with 21 NCAC 14C.

History Note: Authority G.S. 88B-2; 88B-4; 88B-14; 88B-23; 88B-24; 88B-26; 88B-27; 88B-29;

Eff. April 1, 2012;

Amended Eff. August 1, 2014.

**21 NCAC 14I .0401 APPLICATION/
LICENSURE/INDIVIDUALS WHO HAVE BEEN
CONVICTED OF FELONY**

(a) Any applicant convicted of a felony or charged with a felony that is still pending may apply for Board approval upon enrollment in a cosmetic art school. All documentation submitted shall have no effect on an individual's ability to attend a cosmetic art school, take an examination administered by the Board, or apply for a license.

(b) The applicant shall supply the following;

- (1) a statement of facts of the crime, accompanied by a certified copy of the indictment (or, in the absence of an indictment, a copy of the "information" that initiated the formal judicial process), the judgment and any commitment order for each felony for which there has been a conviction;
- (2) at least three letters attesting to the applicant's character from individuals unrelated by blood or marriage;
- (3) a summary of the applicant's personal history since conviction including, if applicable, date of release, parole or probation status, employment, and military service;
- (4) records of any cosmetology, esthetics, natural hair care, or manicurist school disciplinary actions; or a statement from the school indicating no disciplinary actions were taken; and
- (5) any other information that in the opinion of the applicant would be useful or pertinent to the consideration by the Board of the applicant's request.

History Note: Authority G.S. 88B-4; 88B-24(1);

Eff. June 1, 1995;

Amended Eff. August 1, 2014; September 1, 2010; December 1, 2008; April 1, 2001; August 1, 1998.

21 NCAC 14K .0107 LIVE MODEL PERFORMANCES

History Note: Authority G.S. 88B-4; 88B-10;

Eff. July 1, 1990;

Amended Eff. April 1, 1991; December 1, 1990;

Temporary Amendment Eff. January 1, 1999;

Amended Eff. July 1, 2010; December 1, 2008; April 1, 2001; August 1, 2000;

Repealed Eff. August 1, 2014

21 NCAC 14O .0106 LIVE MODEL PERFORMANCES

History Note: Authority G.S. 88B-4;

Temporary Adoption Eff. January 1, 1999;

Eff. August 1, 2000;

Repealed Eff. August 1, 2014.

**21 NCAC 14P .0113 OPERATIONS OF SCHOOLS OF
COSMETIC ART**

(a) The presumptive civil penalty for failure to record student's hours of daily attendance is:

- | | | |
|-----|-------------------------|--------------------|
| (1) | 1 st offense | warning (\$100.00) |
| (2) | 2 nd offense | \$200.00 |
| (3) | 3 rd offense | \$300.00 |

(b) The presumptive civil penalty for failure to report withdrawal or graduation of a student within 30 working days is:

- | | | |
|-----|-------------|-------------------|
| (1) | 1st offense | warning (\$50.00) |
| (2) | 2nd offense | \$100.00 |
| (3) | 3rd offense | \$200.00 |

(c) The presumptive civil penalty for failure to submit cosmetology enrollments within 30 working days or manicurist, natural hair care specialist and esthetician enrollments within 15 working days is:

- | | | |
|-----|-------------|-------------------|
| (1) | 1st offense | warning (\$50.00) |
| (2) | 2nd offense | \$100.00 |
| (3) | 3rd offense | \$200.00 |

(d) The presumptive civil penalty for failure to display a copy of the sanitation rules is:

- | | | |
|-----|-------------------------|-------------------|
| (1) | 1 st offense | warning (\$50.00) |
| (2) | 2 nd offense | \$100.00 |
| (3) | 3 rd offense | \$200.00 |

(e) The presumptive civil penalty for failure to post consumer sign "Cosmetic Art School - Work Done Exclusively by Students" is:

- | | | |
|-----|-------------------------|-------------------|
| (1) | 1 st offense | warning (\$50.00) |
| (2) | 2 nd offense | \$100.00 |
| (3) | 3 rd offense | \$200.00 |

(f) The presumptive civil penalty for allowing a cosmetic art shop to operate within a cosmetic art school is:

- | | | |
|-----|-------------------------|----------|
| (1) | 1 st offense | \$200.00 |
| (2) | 2 nd offense | \$400.00 |
| (3) | 3 rd offense | \$600.00 |

(g) The presumptive civil penalty for a cosmetic art school that is not separated from a cosmetic art shop or other business by a

solid wall, floor to ceiling, with an separate entrance and a door that stays closed at all times is:

- | | | |
|-----|-------------------------|----------|
| (1) | 1 st offense | \$200.00 |
| (2) | 2 nd offense | \$400.00 |
| (3) | 3 rd offense | \$600.00 |

(h) The presumptive civil penalty for failure to have any student wear a clean washable uniform or identification is:

- | | | |
|-----|-------------|-------------------|
| (1) | 1st offense | warning (\$50.00) |
| (2) | 2nd offense | \$100.00 |
| (3) | 3rd offense | \$200.00 |

(i) The presumptive civil penalty for failure to renew or file school bond or bond alternative is:

- | | | |
|-----|-------------------------|----------|
| (1) | 1 st offense | \$200.00 |
| (2) | 2 nd offense | \$400.00 |
| (3) | 3 rd offense | \$600.00 |

History Note: Authority G.S. 88B-4; 88B-16; 88B-29; Temporary Adoption Eff. January 1, 1999; Eff. August 1, 2000; Amended Eff. August 1, 2014; September 1, 2012; July 1, 2010; December 1, 2008; April 1, 2004.

21 NCAC 14R .0105 CONTINUING EDUCATION

(a) This Rule pertains to all cosmetic art licensees. Each licensee wishing to maintain his or her license shall obtain continuing education during each licensing period. The licensee shall maintain records of attendance at a continuing education course including the following information:

- (1) course title and description;
- (2) date conducted;
- (3) address of location where the course was conducted; and
- (4) continuing education hours earned.

(b) At least one-half of the required continuing education hours for each licensee shall be in the cosmetic arts profession in which he or she is licensed.

(c) Each cosmetic art teacher must ensure at least 50 percent of the subject matter in a course taken for the purpose of license renewal relates to teacher training techniques and enhances the ability to communicate.

(d) Continuing education courses shall be approved by the Board providing the courses meet the requirements above.

(e) The Board or an agent of the Board may conduct audits of the licensee's continuing education at any time. Upon the

Board's request, each licensee shall provide completed records to the Board to support the last affirmation given pursuant to Subparagraph (j)(3) of this Rule. Records must be maintained until the end of the next renewal cycle after the affirmation for audit purposes.

(f) Continuing education courses completed prior to an individual's being licensed by the Board shall not qualify for continuing education credit.

(g) Apprentices do not need to earn continuing education for license renewal.

(h) Licensees are exempt from the eight hours of continuing education requirement until the licensing period commencing after their initial licensure.

(i) After completion of the continuing education requirements for any licensing cycle, the licensee shall forward to the Board the following:

- (1) the license renewal application;
- (2) the license renewal fee; and
- (3) affirmation of the following pledge: "I hereby certify that I have obtained all continuing education hours required in accordance with the G.S. 88B-21 and Board rules. I am aware that 1) false or dishonest misleading information may be grounds for disciplinary action against my license; and further that 2) false statements are punishable by law."

(j) Failure to produce documents or file a response to a request for audit from the Board within 30 days of the request shall result in a civil penalty to the licensee in the amount of two hundred fifty dollars (\$250.00).

(k) The presentation of fraudulent continuing education documentation to the Board by a licensee shall result in a civil penalty of five hundred dollars (\$500.00).

(l) Licensees in inactive status may reactivate licensure by taking no fewer than eight hours of continuing education per year of inactivity up to 24 total hours.

History Note: Authority G.S. 88B-2; 88B-4; 88B-21; 88B-24; 88B-29; Eff. April 1, 2012; Amended Eff. August 1, 2014; March 1, 2013.

21 NCAC 14T .0604 ESTHETICS CURRICULUM

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

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

APPROVED RULES

Performance Requirements		Mannequin	Live Model
Facials Manual (skin analysis, cleansing, surface manipulations, packs and masks)		10	30
Facials Electronic (the use of electrical modalitus, including dermal lights, and electrical apparatus for facials and skin care including galvanic and faradic)			30
Eyebrow arching		5	15
Hair removal (hard wax, soft wax, depilatories)		5	25
Makeup application (skin analysis, complete and corrective makeup)		10	20
Eyelash extensions		5	5
Brow and lash color		5	5

- (b) A minimum of 40 hours of theory shall be required prior to conducting live model performances on the public.
- (c) Certification of live model or mannequin performance completions shall be required, along with the graduation form and application for the Board's examination.
- (d) A live model may be substituted for a mannequin for any mannequin service.
- (e) All mannequin services may be performed using a simulated product.
- (f) Simulated product shall not be allowed for credit for live model performance.
- (g) Mannequin services shall not be substituted for live model services.
- (h) Sharing of performance completions shall not be allowed.
- (i) Credit for a performance shall be given to only one student.

*History Note: Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17;
Eff. January 1, 2012;
Amended Eff. August 1, 2014.*

21 NCAC 14T .0605 MANICURING CURRICULUM

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

Theory and Performance Requirements	Hours	Services	
Beginners: Manicuring theory, disinfection, first aid, trimming, filing, shaping, decorating, arm and hand manipulation, sculptured and artificial nails; and pedicuring	25		
Advance: Styles and techniques for the care, treatment and decoration of fingernails, toenails, cuticles, nail extensions and artificial nails; electric file; business management; and professional ethics	275		
Performance Requirements		Mannequin	Live Model
Manicures including trimming, filing, shaping, decorating, and arm and hand manipulations		5	10
Applications or repair of sculptured or artificial nail sets		5	15
Pedicures			10

- (b) A minimum of 25 hours theory shall be required prior to conducting live model performances on the public.
- (c) Certification of live model or mannequin performance completions shall be required, along with the graduation form and application for the Board's examination.
- (d) A live model may be substituted for a mannequin for any mannequin service.
- (e) All mannequin services may be performed using a simulated product.
- (f) Simulated product shall not be allowed for credit for live model performance.
- (g) Mannequin services shall not be substituted for live model services.
- (h) Sharing of performance completions shall not be allowed.
- (i) Credit for a performance shall be given to only one student.
- (j) A "nail set" means one hand including all four fingers and thumb.

History Note: Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17;
Eff. January 1, 2012;
Amended Eff. August 1, 2014.

21 NCAC 14T .0606 NATURAL HAIR CARE CURRICULUM

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

Theory	Hours	Services	
Beginners: Sanitation, bacteriology, disinfection, first aid, shampooing, draping, anatomy, disorders of the hair and scalp, client consultation.	25		
Advanced: Styles and techniques of natural hair styling including twisting, wrapping, extending, locking, blowdry and thermal iron; business management; and professional ethics.	275		
Performance Requirements		Mannequin	Live Model
Braids		5	5
Twists		5	5
Knots		3	2
Corn rows		3	2
Hairlocking		5	5
Artificial hair and decorations		5	5
Blow dry and thermal iron		5	5
Braid Removal		5	5

- (b) A minimum of 25 hours of theory shall be required prior to conducting live model performances on the public.
 (c) Certification of live model or mannequin performance completions shall be required, along with the graduation form and application for the Board's examination.
 (d) A live model may be substituted for a mannequin for any mannequin service.
 (e) All mannequin services may be performed using a simulated product.
 (f) Simulated product shall not be allowed for credit for live model performance.
 (g) Mannequin services shall not be substituted for live model services.
 (h) Sharing of performance completions shall not be allowed, unless the live model service consists of 20 or more lengths of hair.
 (i) Credit for a performance shall be given to only one student.
 (j) A performance shall consist of 10 or more lengths of hair.

History Note: Authority G.S. 88B-2; 88B-4; 88B-16;
Eff. January 1, 2012;
Amended Eff. August 1, 2014; June 1, 2013.

21 NCAC 14T .0615 FIELD TRIPS

(a) Cosmetic art schools shall notify the Board prior to any field trip and record the field trip hours of each student. Cosmetic Art Educational Field Trips include the following locations or activities:

- (1) cosmetic art shops;
- (2) cosmetic art conventions;
- (3) competition training;
- (4) other Schools;
- (5) state Board Office;
- (6) supply Houses;
- (7) college or Career Day at School;
- (8) fashion Shows;
- (9) rest Homes/Nursing Homes;
- (10) hospitals; and
- (11) funeral Homes.

- (b) An instructor shall be present during the educational field trips listed in Paragraph (a) of this Rule for credit to be given to students, with a ratio of one instructor per 25 students present.
 (c) The maximum number of hours a student may earn for field trips is 40 credit hours for cosmetology students, 20 credit hours

for esthetician students, and 10 credit hours for manicurist or natural hair care students.

- (d) Students may earn up to four additional hours of credit for curriculum requirements for interviews at a licensed cosmetic art shop.
 (e) Students may not earn credit for any service performances completed outside of the school.

History Note: Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17;
Eff. January 1, 2012;
Amended Eff. August 1, 2014.

21 NCAC 14T .0616 ADDITIONAL HOURS

(a) Notwithstanding any other provision of the rules in this Subchapter, pursuant to G.S. 88B-18(d) a cosmetologist, apprentice, esthetician, manicurist, natural hair care specialist, or teacher candidate who has failed either section of the examination three times, shall complete the following amounts of study at an approved cosmetic art school before the Board may accept an application:

- (1) Cosmetologist 200 hours;

- (2) Apprentice 150 hours;
- (3) Esthetician 80 hours;
- (4) Manicurist 40 hours;
- (5) Natural Hair Care Specialist 40 hours; and
- (6) Teacher:
 - (A) cosmetology 100 hours;
 - (B) esthetician 80 hours; and
 - (C) manicurist 40 hours.

(b) Schools shall evaluate students returning to complete additional hours in accordance with Paragraph (a) of this Rule and shall provide remedial assistance or training in the areas of deficiency.

History Note: Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17; 88B-18;

Eff. January 1, 2012;

Amended Eff. August 1, 2014.

21 NCAC 14T .0617 TEACHER TRAINEES

- (a) A cosmetic art teacher trainee may not perform clinical services on a client at the cosmetic art school.
- (b) A cosmetic art teacher trainee shall be supervised by a cosmetic art teacher at all times when the trainee is at a cosmetic art school except as set out in Paragraph (c) of this Rule.
- (c) A manicurist, natural hair care or esthetician teacher may supervise a cosmetic art teacher trainee with regard to manicuring, natural hair care, or esthetics.
- (d) A cosmetic art teacher trainee program may be a full time program or a part time program. A cosmetic art teacher trainee, however, may not receive credit for more than 10 hours per day.
- (e) Teacher trainees may present lessons they have prepared under the direct supervision of a licensed cosmetic art teacher as long as the supervising teacher is present in the classroom.
- (f) Persons receiving teacher training in a cosmetic art school shall be furnished a teacher's manual and shall spend all of their training time under the direct supervision of a licensed cosmetic art teacher and shall not be left in charge of students or the school at any time.

History Note: Authority G.S. 88B-2; 88B-4; 88B-16; 88B-17; 88B-18;

Eff. January 1, 2012;

Amended Eff. August 1, 2014.

21 NCAC 14T .0701 SCHOOL OPERATIONS/ LICENSURE MAINTENANCE

- (a) No individual shall be given credit for any hours earned in a cosmetic art school before the date the school is granted a license, before the student is enrolled, or after graduation or withdrawal of the student without a new enrollment.
- (b) All Cosmetic Art schools shall submit hours of operation per cosmetic art discipline to the Board. Any changes to the hours of operation shall be submitted to the Board. A school will be considered open by the Board when cosmetic art instruction, services, or performances are provided.
- (c) Students may be required to clean and disinfect work areas, reception areas, implements, and the dispensary. Students shall not be required to perform regular maintenance.
- (d) All cosmetic art schools shall adhere to all Board sanitation regulations located in 21 NCAC 14H Sanitation.

(e) Cosmetic art schools may permit students to leave the cosmetic art school during instructional time to visit on campus libraries and other educational resource rooms such as computer labs for research and study under the supervision of a cosmetic art instructor.

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

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

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

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

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

(j) All cosmetic art schools shall provide:

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

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

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

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

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

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

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

- cosmetology teacher or a licensed natural hair care teacher;
- (C) esthetics courses may be taught by either a licensed cosmetology teacher or a licensed esthetician teacher.
- (2) A licensed cosmetologist not licensed as a cosmetology teacher may substitute for a cosmetology, esthetician, natural hair care or manicurist teacher; a licensed manicurist not licensed as a manicurist teacher may substitute for a manicurist teacher; a licensed natural hair care specialist not licensed as a natural hair care teacher may substitute for a natural hair care teacher; and a licensed esthetician not licensed as an esthetician teacher may substitute for an esthetician teacher.

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

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

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

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

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

History Note: Authority G.S. 88B-2; 88B-4; 88B-16; Eff. February 1, 2012; Amended Eff. August 1, 2014; June 1, 2013; October 1, 2012

CHAPTER 46 – BOARD OF PHARMACY

21 NCAC 46 .2401 MEDICATION IN HEALTH DEPARTMENTS

A registered nurse employed by a local health department may dispense prescription drugs or devices under the following conditions:

- (1) Drugs or devices may be dispensed only to health department patients, with the exception of opioid antagonists, which may be dispensed

- either to health department patients or to others as permitted by G.S. 90-106.2;
- (2) No drugs or devices may be dispensed except at health department clinics;
- (3) The health department shall secure the services of a pharmacist-manager who shall be responsible for compliance with all statutes, rules, and regulations governing the practice of pharmacy and dispensing of drugs at the health department;
- (4) Only the general categories of drugs or devices listed in Rule .2403 may be dispensed by a health department registered nurse;
- (5) All drugs or devices dispensed pursuant to G.S. 90-85.34A and these rules shall be packaged, labeled, and otherwise dispensed in compliance with state and federal law, and records of dispensing shall be kept in compliance with state and federal law. The pharmacist-manager shall verify the accuracy of the records at least weekly, and where health department personnel dispense to 30 or more patients in a 24-hour period per dispensing site, the pharmacist-manager shall verify the accuracy of the records within 24 hours after dispensing occurs.

History Note: Authority G.S. 90-85.6; 90-85.34A; 90-106.2; Eff. March 1, 1987; Amended Eff. August 1, 2014; May 1, 1989.

21 NCAC 46 .2403 DRUGS AND DEVICES TO BE DISPENSED

(a) Pursuant to the provisions of G.S. 90-85.34A(a)(3), prescription drugs and devices included in the following general categories may be dispensed by registered nurses in local health department clinics when prescribed for the indicated conditions:

- (1) Anti-tuberculosis drugs, as recommended by the North Carolina Department of Health and Human Services in the North Carolina Tuberculosis Policy Manual (available at www.ncdhhs.gov), when used for the treatment and control of tuberculosis;
- (2) Anti-infective agents used in the control of sexually-transmitted diseases as recommended by the United States Centers for Disease Control in the Sexually Transmitted Diseases Treatment Guidelines (available at www.cdc.gov);
- (3) Natural or synthetic hormones and contraceptive devices when used for the prevention of pregnancy;
- (4) Topical preparations for the treatment of lice, scabies, impetigo, diaper rash, vaginitis, and related skin conditions;
- (5) Vitamin and mineral supplements; and
- (6) Opioid antagonists prescribed pursuant to G.S. 90-106.2.

(b) Regardless of the provisions set out in this Rule, no drug defined as a controlled substance by the United States Controlled Substances Act, 21 U.S. Code 801 through 904, or regulations enacted pursuant to that Act, 21 CFR 1300 through 1308, or by the North Carolina Controlled Substances Act, G.S. 90-86 through 90-113.8, may be dispensed by registered nurses pursuant to G.S. 90-85.34A.

History Note: Authority G.S. 90-85.6; 90-85.34A; 90-106.2; Eff. March 1, 1987; Amended Eff. August 1, 2014; May 1, 1989.

CHAPTER 56 – BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS

21 NCAC 56 .0501 REQUIREMENTS FOR LICENSING

(a) Education. The education of an applicant shall be considered in determining eligibility for licensing as a Professional Engineer. The terms used by the Board for the specific educational requirements to be eligible to be licensed as a Professional Engineer are defined as follows:

- (1) "Engineering curriculum of four or more years approved by the Board" is defined as a program that has been accredited by the Engineering Accreditation Commission (EAC) of the Accreditation Board for Engineering and Technology (ABET). This program is incorporated by reference including subsequent amendments and editions. This material is available at www.abet.org/accreditation-criteria-policies-documents/ or for inspection at the office of the North Carolina Board of Examiners for Engineers and Surveyors. Copies may be obtained at the Board office at a cost of five dollars (\$5.00) per copy.
- (2) "Engineering or related science curriculum of four or more years other than ones approved by the Board" is defined as a curriculum, although not accredited by ABET, of technical courses which contains engineering or scientific principles.
- (3) "Equivalent education satisfactory to the board" is defined as:
 - (A) A graduate degree in Engineering from an institution in which the same discipline undergraduate engineering program has been accredited by ABET (EAC) shall be considered equivalent to an engineering curriculum of four or more years approved by the Board.
 - (B) A bachelor's degree in Engineering Technology, whether or not accredited by the Technology Accreditation Commission (TAC) of

ABET, shall be considered equivalent to an engineering or related science curriculum of four or more years other than one approved by the Board.

- (C) Until June 30, 2016, an associate degree in an engineering related curriculum with an additional two years of progressive engineering experience shall be considered equivalent to an engineering or related science curriculum of four or more years other than one approved by the Board and may be used until that date as a basis for admission to the principles and practice of engineering examination. Once admitted to the examination, an applicant may continue to re-take the examination until required to submit a new application as set out in Rule .0503 of this Section. After June 30, 2016 an associate degree shall no longer be used as a basis for admission to that examination, unless the individual has passed the fundamentals of engineering examination prior to June 30, 2016, in which case the individual may continue the process to take the principles and practices exam based upon the associate degree and it will not be necessary to qualify for admission to the principles and practice of engineering examination prior to June 30, 2016.

- (D) Foreign degrees are considered equivalent only after receipt of an evaluation report that the degree is substantially equivalent to an EAC/ABET accredited engineering curriculum from the Center for Professional Engineering Education Services, an affiliate of the National Council of Examiners for Engineering and Surveying (NCEES), or from the American Association of Collegiate Registrars and Admissions Officers (AACRAO). The Board shall equate the degree to an EAC/ABET accredited engineering curriculum of four or more years approved by the Board in Subparagraph (a)(1) of this Rule if it receives a substantially equivalent evaluation.

(b) Experience. The experience of an applicant shall be considered in determining whether an applicant is eligible to be licensed as a Professional Engineer.

- (1) Required Experience. In evaluating the work experience required, the Board shall consider the total experience record and the progressive nature of the record. Not less than half of required engineering experience shall be of a professional grade and character, and shall be performed under the responsible charge of a licensed Professional Engineer, or if not, a written explanation shall be submitted showing why the experience should be considered acceptable and the Board shall approve if satisfied of the grade and character of the progressive experience. Experience gained under the technical supervision of an unlicensed individual shall be considered if the appropriate credentials of the unlicensed supervisor are submitted to the Board. Experience gained in the armed services, usually while serving in an engineering or engineering related group, shall be considered if of a character equivalent to that which would have been gained in the civilian sector doing similar work.
- (2) Definition. The terms "progressive nature of the record," "progressive engineering experience" or "progressive experience on engineering projects" mean that during the period of time that an applicant has made a practical utilization of acquired knowledge, continuous improvement, growth and development have been shown in the utilization of that knowledge as revealed in the complexity and technical detail of the work product or work record. The applicant shall show continuous assumption of greater individual responsibility for the work product over that period of time. The progressive experience on engineering projects shall be of a grade and a character that indicates to the Board that the applicant is competent to practice engineering.
- (3) Specific Credit for Experience. In evaluating progressive engineering experience, the Board shall give credit for experience in the following areas of work:
 - (A) Graduate schooling or research in an engineering program resulting in award of a master's degree from an institution that offers EAC/ABET-accredited programs – one year;
 - (B) Graduate schooling or research in an engineering program resulting in award of an earned doctoral degree in engineering from an institution that offers EAC/ABET-accredited programs – two years, with or without a master's degree, but includes the one year for the master's degree, if obtained;

- (C) Progressive land surveying - maximum two years; and
- (D) Teaching of engineering subjects at the university level in an engineering program offering a four year or more degree approved by the Board.

The Board shall not accept combinations of the categories in this Subparagraph as fulfilling all the necessary statutory experience requirements. Every applicant for licensure as a Professional Engineer, as part of the total experience requirement, shall show a minimum of one year experience of a progressive engineering nature in industry, government, or under a licensed Professional Engineer offering service to the public.

Full-time engineering faculty members who teach in an engineering program offering a four year or more degree approved by the Board, may request and shall be granted waiver of the minimum one year experience in industry, government, or private practice if they demonstrate consulting or research work of at least one year's duration, which was pursued to fruition, and which is of a progressive engineering nature. The faculty applicant shall document the work and demonstrate that the work meets the Board's requirement.

- (5) Other experience is considered if it is:
 - (A) Experience obtained prior to graduation as part of an ABET accredited engineering program shown on the transcript, with a maximum credit of one year; or
 - (B) Experience obtained in a foreign country that is performed under direct supervision of a Professional Engineer licensed with a member Board of the National Council of Examiners for Engineering and Surveying (NCEES).

History Note: Authority G.S. 89C-10; 89C-13;

Eff. February 1, 1976;

Readopted Eff. September 29, 1977;

Amended Eff. August 1, 2014; August 1, 2011; May 1, 2009; August 1, 2002; August 1, 2000; August 1, 1998; November 2, 1992; April 1, 1989; January 1, 1982.

21 NCAC 56 .0502 APPLICATION PROCEDURE: INDIVIDUAL

(a) General. A person desiring to become licensed as a Professional Engineer must make application to the Board on a form prescribed and furnished by the Board.

(b) Request. A request for an appropriate application form may be made to the Board office or obtained from the website.

(c) Applicable Forms:

- (1) Engineer Intern Certification Form. After passing the fundamentals of engineering examination an applicant may make application to the Board to become certified as

- an "Engineer Intern." This form requires the applicant to set forth personal history, educational background, engineering experience, and character references. A passport-type photographic quality portrait that is adequate for current identification purposes is also required.
- (2) Professional Engineer Form:
- (A) All persons, including comity applicants and certified Engineer Interns, shall apply for licensure using the Professional Engineer form. The submission of this form shall signify that the applicant seeks licensure, and shall result in seating for the principles and practice of engineering examination, when the applicant has met the requirements as set out in Rule .0501 of this Section. This form requires the applicant to set forth personal and educational background, engineering experience and character references. A passport-type photographic quality portrait that is adequate for current identification purposes is required.
- (B) Persons who previously completed the fundamentals examination by use of the Engineering Intern Certification Form shall submit the Professional Engineer Certification Form to request licensure when qualified to take the examination.
- (3) Supplemental Form. Persons who initially applied for the fundamentals of engineering exam using the Professional Engineer form shall supplement the initial application with this form upon applying for the principles and practice examination. The supplemental form requires that engineering experience from the date of the initial application until the date of the supplemental application be listed. Five references shall be submitted that are current to within one year of the examination date.
- (4) Reference Forms:
- (A) Persons applying for certification as an Engineer Intern shall submit to the Board names of three individuals who are familiar with the applicant's work, character and reputation, one of whom is a professional engineer. Persons applying to take the examination for principles and practice of engineering shall submit to the Board names of five individuals who are familiar with the applicant's work, character and reputation. Three of these individuals shall be Professional Engineers.
- (B) In addition to the applicant submitting names to the Board of individuals familiar with the applicant's work, character and reputation, those individuals listed shall submit to the Board their evaluations of the applicant on forms supplied to them by the applicant.
- (C) The reference form requires the individual evaluating the applicant to state the evaluating individual's profession, knowledge of the applicant and information concerning the applicant's engineering experience, character and reputation.
- (D) The Board shall provide the reference forms to the applicant with the application. The reference forms shall then be distributed by the applicant to the persons listed on the application as references. The applicant shall ensure that the individuals listed as references return the reference forms to the Board prior to the filing deadline for the examination.
- (d) Fees:
- (1) Engineer Intern Certification Form. Once the applicant passes the examination on the fundamentals of engineering and makes application to the Board to become certified as an "Engineer Intern" the application fee of one hundred dollars (\$100.00) is payable.
- (2) Professional Engineer Form. The application fee of one hundred dollars (\$100.00) is payable with the filing of the application.
- (3) Comity. The licensure fee of one hundred dollars (\$100.00) is payable with the filing of the application.
- (4) Examination. The examination fee for any applicant is payable to the National Council of Examiners for Engineering and Surveying (NCEES) at the time of registering to take the exam in accordance with G.S. 89C-14.
- (e) The Board shall accept the records maintained by the National Council of Examiners for Engineering and Surveying (NCEES) as evidence of licensure in another state. For comity licensure, the NCEES record shall be accepted in lieu of completing the experience, education and references sections of the application. A comity application, with or without a NCEES record, shall be administratively approved by the Executive Director based upon evidence of current licensure in another jurisdiction based on comparable qualifications, required references and no record of disciplinary action, without waiting for the next regular meeting of the Board at which time the action shall be reported to the Board for final approval.
- (f) Model Law Engineer. The term "Model Law Engineer" refers to a person who meets the requirements of this Section by meeting the requirements of NCEES and has a current NCEES

record on file and is designated as a "Model Law Engineer." A "Model Law Engineer" application shall be administratively approved by the Executive Director based upon the designation, without waiting for the next regular meeting of the Board at which time the action shall be reported to the Board for final approval.

(g) Personal interview. During the application process, the applicant may be interviewed by the Board members if the members have questions regarding the applicant's education, experience or character, based upon the information submitted in the application.

History Note: Authority G.S. 89C-10; 89C-13; 89C-14; 89C-15; Eff. February 1, 1976; Readopted Eff. September 29, 1977; Amended Eff. May 1, 1994; November 2, 1992; April 1, 1989; December 1, 1984; RRC Objection due to lack of Statutory Authority Eff. November 17, 1994; Amended Eff. August 1, 2014; May 1, 2009; August 1, 2002; August 1, 2000; August 1, 1998; January 1, 1995.

21 NCAC 56 .0503 EXAMINATIONS

(a) Fundamentals of Engineering. This examination is designed to test the applicant's proficiency and knowledge of the fundamentals of engineering.

(b) Principles and Practice of Engineering. This examination is designed to test the applicant's proficiency and knowledge of engineering principles and practices.

(c) Examination Aids. Examinees may utilize examination aids as specified by the exam preparer.

(d) Preparation of Examination. The examinations in the fundamentals of engineering and in the principles and practice of engineering are national examinations provided by the National Council of Examiners for Engineering and Surveying (NCEES), of which the Board is a member.

(e) Examination Sequence. Before the applicant shall be permitted to be examined on the principles and practice of engineering, the applicant shall pass the examination on the fundamentals of engineering, unless the applicant can evidence 20 years of progressive engineering experience, or as a full-time engineering faculty member, or possesses an earned doctoral degree in engineering to be exempt from taking the fundamentals of engineering exam. NCEES administers the fundamentals of engineering examination as a computer-based exam. Application shall be made directly to NCEES to take the exam.

(f) Examination Filing Deadline. The applicant who wishes to take the principles and practice of engineering examination shall deliver the completed application, including all necessary references, transcripts, and verifications, to the Board office prior to August 1 for Fall examinations and January 2 for Spring examinations.

(g) Seating Notice. After approval of an application the applicant shall be sent a seating notice. This notice shall inform the applicant of the date, time and location of the examination and the seat number assigned.

(h) Unexcused Absences. After a seating notice has been issued for a scheduled examination by the Board, if the applicant fails to appear, that applicant's record shall reflect "unexcused absence," unless the absence was for jury duty or the applicant was not physically able to be present, as indicated by a doctor's certificate. The examination fee shall be forfeited.

(i) Re-Examination. A person who failed an examination may apply to take the examination again at the next regularly scheduled examination period by making written request and submitting the required exam fee. A person having a combined record of three failures or unexcused absences shall be eligible only after submitting a new application with appropriate application fee, and shall be considered by the Board for reexamination at the end of 12 months. After the end of the 12-month period, the applicant may take the examination no more than once every calendar year. The applicant shall demonstrate to the Board that actions, such as additional courses of study, have been taken to improve the applicant's chances for passing the exam.

(j) Reasonable Accommodation. An applicant may make a written request, before the application deadline, for reasonable accommodation for the exam. Reasonable accommodation shall be granted based upon meeting the Guidelines for Requesting Religious and ADA Accommodations published by the National Council of Examiners for Engineering and Surveying (NCEES), which are hereby incorporated by reference, including subsequent amendments and editions. Copies are available at no cost at www.ncees.org.

(k) Exam Results. Exam results shall be supplied in writing as pass or fail. No results will be given in any other manner.

(l) Review of Failed Exams. An applicant who fails to make a passing score on an exam shall receive an exam analysis by NCEES.

History Note: Authority G.S. 89C-10; 89C-13; 89C-14; 89C-15; Eff. February 1, 1976; Readopted Eff. September 29, 1977; Amended Eff. August 1, 2014; September 1, 2009; May 1, 2009; April 1, 2001; August 1, 1998; November 2, 1992; April 1, 1989; January 1, 1982.

21 NCAC 56 .0601 REQUIREMENTS FOR LICENSING

(a) Education. The terms used by the Board for the specific education requirements to be eligible to be licensed as a Professional Land Surveyor are defined as follows:

- (1) "B.S. in surveying or other equivalent curriculum." These degrees shall contain a minimum of 45 semester hours, or their quarter-hour equivalents, of subjects directly related to the practice of surveying. Of the 45 semester hours, a minimum of 12 semester hours of surveying fundamentals, 12 semester hours of applied surveying practice and 12 semester hours of advanced or theoretical surveying courses are required. The remainder of the required surveying courses may be

- elective-type courses directly related to surveying; and
- (2) "Associate degree in surveying technology." This degree shall contain a minimum of 20 semester hours, or quarter-hour equivalents, of subjects directly related to the practice of surveying. Courses in surveying practices, subdivision design and planning, surface drainage and photogrammetry must be completed with a passing grade.
- (b) Experience:
- (1) Definition. As used in the North Carolina Engineering and Land Surveying Act, the term "progressive practical surveying experience" means that during the period of time in which an applicant has made a practical utilization of the knowledge of the principles of geometry and trigonometry in determining the shape, boundaries, position and extent of the earth's surface, continuous improvement, growth and development in the utilization of that knowledge have been shown. In addition, the applicant shall show the continuous assumption of greater individual responsibility for the work product over that period of time.
- (2) Experience Accepted. In evaluating the work experience required, the Board shall consider the total experience record and the progressive nature of the record. Half or more of the required land surveying experience shall be of a professional grade and character, performed under the responsible charge of a Professional Land Surveyor. If the work was not under the responsible charge of a Professional Land Surveyor, the applicant shall submit a written explanation to the Board explaining why the experience should be considered acceptable and the Board shall approve if satisfied of the grade and character of the progressive experience.
- (3) Other Experience. Work done in the following areas requires evidence to the Board of its equivalency to land surveying:
- (A) construction layout;
- (B) engineering surveying; or
- (C) part-time surveying work.
- (c) Exhibits, Drawings, Plats:
- (1) Required Exhibit Before Principles and Practice of Surveying Examination:
- (A) General. The applicant shall submit, along with the application, an actual plat of a boundary survey of an actual project prepared by, or under the direct supervision of, the applicant that shows that applicant is knowledgeable of the contents of the Standards of Practice for Land Surveying in North Carolina as set forth in Section .1600 of this Chapter,

and is able to apply this knowledge by preparing a plat in accordance with the various legal and professional requirements of land surveying.

- (B) Physical Requirement. The map submitted shall be a clean, clear, legible print of an original map in the file of a Professional Land Surveyor.
- (2) Specific Requirements. The specific details that shall be evaluated are those applicable to the particular project as described in the Standards of Practice for Land Surveying in North Carolina as set forth in Section .1600 of this Chapter, and as described in G.S. 47-30. In addition, the exhibit shall contain a statement that the field work, calculation and mapping were performed by the applicant under the supervision of a Professional Land Surveyor, attested to by that Professional Land Surveyor.
- (3) Requirements for Comity Applicant. The map submitted by an applicant under comity may be a sample plat of a project or work performed in the state of licensure. It shall be evaluated in accordance with legal requirements of North Carolina.

History Note: Authority G.S. 47-30; 89C-10; 89C-13; Eff. February 1, 1976; Readopted Eff. September 29, 1977; Amended Eff. August 1, 2014; July 1, 2009; August 1, 2000; August 1, 1998; November 2, 1992; April 1, 1989; December 1, 1984; January 1, 1982.

21 NCAC 56 .0602 APPLICATION PROCEDURE: INDIVIDUAL

- (a) General. A person desiring to become a Professional Land Surveyor must make application to the Board on a form prescribed and furnished by the Board.
- (b) Request. A request for the application form may be made to the Board office or obtained from the website.
- (c) Application Forms:
- (1) Surveyor Intern Certification Form. After passing the fundamentals of surveying examination an applicant may make application to the Board to become certified as a "Land Surveyor Intern." This form requires the applicant to set forth personal history, educational background, surveying experience, character references and exhibit. A passport-type photographic quality portrait that is adequate for current identification purposes is also required.
- (2) Professional Land Surveyor Form:
- (A) All persons, including comity applicants and certified Land Surveyor Interns, shall apply for licensure using the Professional Land

Surveyor form. The submission of this form shall signify that the applicant seeks licensure, and shall result in seating for the principles and practice of surveying examination, when the applicant has met the requirements as set out in Rule .0601 of this Section. This form requires the applicant to set forth personal and educational background, surveying experience, character references and exhibit. A passport-type photographic quality portrait that is adequate for current identification purposes is also required.

- (B) Persons who have previously completed the fundamentals examination by use of the Land Surveying Intern Application Form shall submit the Professional Land Surveyor Application Form to request licensure when qualified to take the examination.

(d) Supplemental Form. Persons who applied for licensure as a land surveyor, but were not eligible to be admitted to the examination for principles and practice of surveying shall supplement their initial applications upon applying for the examination. The applicant shall supplement the initial application by using the supplemental form, which requires the listing of land surveying experience from the date of the initial application to the date of the supplemental application. Five references shall be submitted that are current to within one year of the examination date.

(e) Reference Forms:

- (1) Persons applying to be certified as a Surveyor Intern or to take the examination for principles and practice shall submit to the Board names of individuals who are familiar with the applicant's work, character and reputation. The names shall be submitted by the applicant on the application form.
- (2) Persons applying for certification as a Surveyor Intern must submit three references, one of whom shall be a Professional Land Surveyor. Persons applying for the principles and practice examination shall submit five references, three of whom shall be Professional Land Surveyors.
- (3) In addition to the applicant submitting names to the Board of such individuals, those individuals shall submit to the Board their evaluations of the applicant on reference forms supplied them by the applicant.
- (4) The reference form requires the individual evaluating the applicant to state the evaluating individual's profession, knowledge of the applicant and information concerning the applicant's land surveying experience, character and reputation.

- (5) The Board shall provide the reference forms to the applicant along with the application for licensure. The reference forms shall then be distributed by the applicant to the persons listed on the application as references. The applicant shall ensure that the individuals listed as references return the forms to the Board prior to the filing deadline for the examination applied for by the applicant.

(f) Fees:

- (1) Land Surveyor Intern Certification Form. Once the applicant passes the examination on the fundamentals of surveying and makes application to the Board to become certified as a "Land Surveyor Intern" the application fee of one hundred dollars (\$100.00) is payable.
- (2) Professional Land Surveyor Form. The application fee of one hundred dollars (\$100.00) and examination fee for those applying for licensure based upon examination, experience, character and exhibit are payable with the filing of the application.
- (3) Comity. The licensure fee of one hundred dollars (\$100.00) and appropriate examination fee for those applying for licensure based upon comity are payable with the filing of the application.
- (4) Examination. The examination fee for any applicant shall be payable to the National Council of Examiners for Engineering and Surveying (NCEES) at the time of registering to take the exam in accordance with G.S. 89C-14.

(g) The Board shall accept the records maintained by the National Council of Examiners for Engineering and Surveying (NCEES) as evidence of licensure, in another state. For comity licensure the NCEES record shall be accepted in lieu of completing the experience, education and references sections of the application. A comity application, with or without a NCEES record, shall be administratively approved by the Executive Director based upon evidence of current licensure in another jurisdiction based on comparable qualifications, required references, and having passed the two-hour North Carolina portion of the exam and no record of disciplinary action, without waiting for the next regular meeting of the Board. At that time the action shall be reported to the Board for final approval.

(h) Personal Interview. During the application process, the applicant may be interviewed by Board members if the members have questions regarding the applicant's education, experience or character, based upon the information submitted in the application.

History Note: Authority G.S. 89C-10; 89C-13; 89C-14; 89C-15;

Eff. February 1, 1976;

Readopted Eff. September 29, 1977;

Amended Eff. August 1, 2014; May 1, 2009; August 1, 2002; August 1, 2000; August 1, 1998; May 1, 1994; April 1, 1989; January 1, 1982.

21 NCAC 56 .0603 EXAMINATIONS

- (a) Fundamentals of Surveying. This examination is designed to test the applicant's proficiency and knowledge of the fundamentals of surveying. Reference to Fundamentals of Surveying is the revised name of the national exam that is the Fundamentals of Land Surveying in G.S. 89C.
- (b) Principles and Practice of Surveying. This examination is designed to test the applicant's proficiency and knowledge of land surveying practices and procedures generally and specifically within North Carolina.
- (c) Examination Aids. Examinees may utilize examination aids as specified by the national exam preparer.
- (d) Preparation of Examination. The examination in the fundamentals of surveying and of the examination in the principles and practice of surveying are national examinations provided by the National Council of Examiners for Engineering and Surveying (NCEES), of which the Board is a member, or other examinations as adopted by the Board. The North Carolina portion of the principles and practice of surveying examination shall be provided by the Board. NCEES administers the fundamentals of surveying examination as a computer-based exam. Application is made directly to NCEES to take the exam.
- (e) Examination Filing Deadline. The applicant who wishes to take the principles and practice of surveying examination shall deliver the completed application, including all necessary references, transcripts, and verifications, to the Board office prior to August 1 for Fall examinations and January 2 for Spring examinations.
- (f) Seating Notice. After approval of an application, the applicant shall be sent a seating notice by NCEES. This notice shall inform the applicant of the date, time and location of the examination and the seat number assigned.
- (g) Unexcused Absences. After a seating notice for a scheduled examination has been issued, if applicant fails to appear, the applicant's record shall reflect "unexcused absence," unless the absence was for jury duty or the applicant was not physically able to be present, as indicated by a doctor's certificate. The examination fee shall be forfeited.
- (h) Re-Examination. A person who failed an examination may apply to take the examination again at the next regularly scheduled examination period by making written request and submitting the required exam fee. A person having a combined record of three failures or unexcused absences shall be eligible only after submitting a new application with appropriate application fee, and shall be considered by the Board for re-examination at the end of 12 months. After the end of the 12-month period, the applicant may take the examination no more than once every calendar year. The applicant shall demonstrate to the Board that actions, such as additional courses of study, have been taken to improve the applicant's chances for passing the exam.
- (i) Reasonable Accommodation. An applicant may make a written request, before the application deadline, for reasonable accommodation for the exam. Reasonable accommodation shall be granted based upon meeting the Guidelines for Requesting Religious and ADA Accommodations published by the National Council of Examiners for Engineering and Surveying (NCEES).
- (j) Exam Results. Exam results shall be supplied in writing as pass or fail. No results shall be given in any other manner.

- (k) Review of Failed Exams. An applicant who fails to make a passing score on an exam shall receive an exam analysis. An applicant who fails to make a passing score on the two-hour North Carolina portion of the exam may request in writing within thirty days of receiving the result to have an opportunity to review that portion of the exam. The review shall be done in the Board Office under supervision of staff and is limited to one hour.

History Note: Authority G.S. 89C-10; 89C-15;

Eff. February 1, 1976;

Readopted Eff. September 29, 1977;

Amended Eff. August 1, 2014; May 1, 2009; April 1, 2001; August 1, 1998; November 2, 1992; April 1, 1989; January 1, 1982.

21 NCAC 56 .0802 PROCEDURE

- (a) Professional Corporations and Limited Liability Companies:
- (1) Request. A request for an application for licensure as a professional corporation or professional limited liability company engaged in the practice of engineering or land surveying may be made at the Board office at 4601 Six Forks Road, Suite 310, Raleigh, NC 27609 or obtained from the website at www.ncbels.org.
 - (2) Applicable Form. All professional corporations and professional limited liability companies complying with the statutory requirements of G.S. 89C, G.S. 55B and G.S. 57D that desire to practice engineering or land surveying shall apply by using a form prepared by the Board. This form shall require the applicant, by and through an officer, director and shareholder of the professional corporation or limited liability company who is licensed with the North Carolina Board of Examiners for Engineers and Surveyors in a profession of the services to be offered, to certify that it and the stockholders of the corporation or members of the limited liability company have complied with the provisions of the applicable provisions of the General Statutes. The form shall also require that the officers, directors, shareholders, members and professional employees be listed on that application.
 - (3) Certificate of Licensure:
 - (A) Upon receiving the application with application fee of one hundred dollars (\$100.00), the Board, after determining that the firm has complied with the statutory requirements, shall issue a certificate of compliance.
 - (B) The firm shall forward the certificate of compliance to the Secretary of State along with its articles of

incorporation or articles of organization.

- (C) Upon approval by the Secretary of State, the firm shall forward to the Board a certified copy of its articles of incorporation or articles of organization.
- (D) Upon receipt of the certified copy of the articles of the firm, if all statutory requirements have been met, the Board shall approve the application and issue the firm a certificate of licensure.

(b) Business Firms and Chapter 87 Corporations:

- (1) **Request.** A request for an application for licensure as a business firm or Chapter 87 corporation, as defined in G.S. 55B-15(a)(2), engaged in the practice of engineering or land surveying may be made at the Board office or obtained from the website. A sole proprietorship owned and operated by the individual licensee in the licensee's name as reflected in the Board's records is exempt from firm licensure.
- (2) **Applicable Form.** All business firms or Chapter 87 corporations that desire to practice engineering or land surveying shall apply by using a form prepared by the Board. The form shall require the applicant, through a principal officer, partner or owner, to certify that the business firm will be operated in compliance with the laws of the State of North Carolina and the rules of the North Carolina Board of Examiners for Engineers and Surveyors.
- (3) **Certificate of Licensure.** Upon receiving the application with application fee of one hundred dollars (\$100.00), the Board, after determining that the firm has complied with the statutory requirements, shall issue a certificate of licensure.

History Note: Authority G.S. 55B-4; 55B-10; 55B-15; 57D-2-02; 89C-10; 89C-24;
Eff. February 1, 1976;
Readopted Eff. September 29, 1977;
Amended Eff. August 1, 2014; Amended Eff. May 1, 2009;
August 1, 2000; February 1, 1996; May 1, 1994; April 1, 1989;
January 1, 1982.

21 NCAC 56 .0901 OFFICES

(a) **Professional Engineering Services.** Every firm, partnership, corporation or limited liability company that performs or offers to perform engineering services in the State of North Carolina shall have a resident Professional Engineer in responsible charge in each separate office located in North Carolina where professional engineering services are performed or offered to be performed. Out-of-state office locations where engineering services are performed or offered to be performed for North Carolina projects shall have Professional Engineers in

responsible charge of only the specific projects in compliance with Rule .0701(c)(3) of this Chapter.

(b) **Land Surveying Services.** Every firm, partnership, corporation or limited liability company that performs or offers to perform land surveying services in the State of North Carolina shall have a resident Professional Land Surveyor in responsible charge in each separate office located in North Carolina where land surveying services are performed or offered to be performed. Out-of-state office locations where surveying services are performed or offered to be performed for North Carolina projects are only required to have Professional Land Surveyors in responsible charge of the specific projects in compliance with Rule .0701(c)(3) of this Chapter.

(c) **Resident.** The terms "resident Professional Engineer" or "resident Professional Land Surveyor" as used in this Rule, means a licensee who spends a majority of the licensee's normal working time in that office. Such time shall not be less than a majority of the operating hours of the business. A Professional Engineer or Professional Land Surveyor shall be the resident licensee at only one place of business at one time unless each business is at least one-third owned by the resident professional. This arrangement shall be specifically approved by the Board after a determination that the businesses are integrated in operation, ownership, office location and that the licensee will be in responsible charge of the professional services.

(d) No firm, partnership, corporation or limited liability company shall practice, offer to practice, or market either land surveying or engineering unless there is a licensed resident for that service in responsible charge at that office. Advertisements, signs, letterheads, business cards, directories, or any other form of representation shall avoid any reference to any service that cannot be provided under the responsible charge of a properly qualified resident professional. The licensed entity shall give notice to the Board of a change of resident professional within 30 days after the change and shall not practice, offer to practice, or market the professional service during any period of time without a resident professional.

History Note: Authority G.S. 57D-2-02; 89C-10; 89C-24;
Eff. February 1, 1976;
Readopted Eff. September 29, 1977;
Amended Eff. August 1, 2014; August 1, 2002; April 1, 2001;
August 1, 1998; May 1, 1994; January 1, 1992; April 1, 1989.

21 NCAC 56 .1402 OPPORTUNITY FOR LICENSEE OR APPLICANT TO HAVE HEARING

Every licensee or applicant for a license shall be afforded notice and an opportunity to be heard on any action, where the effect would be:

- (1) to deny permission to take an examination for licensing for which application has been duly made;
- (2) to deny a license based on comity;
- (3) to deny a license after an applicant has taken and passed an examination;
- (4) to require re-examination for licensing;
- (5) to withhold the renewal of a license for any cause other than failure to pay a statutory renewal fee;

- (6) to suspend a license;
- (7) to revoke a license;
- (8) to impose a civil penalty;
- (9) to issue a reprimand;
- (10) to refuse to renew;
- (11) to refuse to reinstate; or
- (12) to require additional education.

History Note: Authority G.S. 89C-10; 89C-21; 89C-22; 150B-38;
Eff. February 1, 1976;
Readopted Eff. September 29, 1977;
Amended Eff. August 1, 2014; April 1, 1989; January 1, 1982.

21 NCAC 56 .1602 SURVEYING PROCEDURES

(a) A Professional Land Surveyor shall spend the necessary time and effort to make investigation to determine if there are encroachments, gaps, lappages, or other irregularities along each line surveyed. Points may be placed on the line from closed or verified traverses and the necessary investigations made from these points. If these investigations are not made, then the surveyor shall not certify to an actual survey of that line and the plat shall contain the appropriate qualifications in accordance with the rules in this Section.

(b) Any and all visible or determined encroachments or easements on the property being surveyed shall be accurately located and indicated.

(c) With respect to investigation of property boundaries and recorded easements, the surveyor shall examine the most recent deeds and recorded plats adjacent to the subject property as well as all deeds and plats recorded after the date of the deed or plat upon which the survey is being based (the survey reference deed or plat).

(d) Except as provided in Paragraph (e) of the Rule, metal stakes or materials of comparable permanence shall be placed at all corners.

(e) Where a corner falls in a right-of-way, tree, stream, or on a fence post, boulder, stone, or similar object, one or more monuments or metal stakes shall be placed in the boundary so that the inaccessible point may be located accurately on the ground and the map.

(f) The results of a survey shall be reported to the user of that survey as a map or report of survey and, whether in written or graphic form, shall be prepared in a clear and factual manner. All reference sources shall be identified. Artificial monuments called for in such reports shall be described as found or set. When no monument is found or set for points described in Paragraph (e) of this Rule, that fact shall be noted.

(g) Tie lines defined. Where the results of a survey are reported in the form of a plat or a written description, one or more corners shall, by a system of azimuths or courses and distances, be accurately tied to and coordinated with a horizontal control monument of some United States or State Agency survey system, such as the North Carolina Geodetic Survey, where such monument is within 2000 feet of the subject property, right-of-way, easement or other surveyed entity. Where the North Carolina grid system coordinates of said monument are on file in the Department of Public Safety, Emergency Management, Geodetic Survey office, the coordinates of both the referenced

corner or point and the monument(s) shall be shown in X (easting) and Y (northing) coordinates on the plat or in the written description or document. The coordinates shall be identified as based on "NAD 83," indicating North American Datum of 1983 or as "NAD 27," indicating North American Datum of 1927. The datums of the National Geodetic Survey (NGS) are incorporated by reference including subsequent amendments and editions, and may be accessed free of charge at www.ngs.noaa.gov. The tie lines to the monuments shall be sufficient to establish true north or grid north bearings for the plat or description if the monuments exist in pairs. Control monuments within a previously recorded subdivision may be used in lieu of grid control. In the interest of bearing consistency with previously recorded plats, existing bearing control may be used where practical. In the absence of grid control, other natural or artificial monuments or landmarks shall be used. In all cases, the tie lines shall be sufficient to accurately reproduce the subject lands from the control or reference points used.

(h) Area is to be computed by double meridian distance or equally accurate method and shown on the face of the plat, written description, or other document. Area computations by estimation, by planimeter, by scale, or by copying from another source are not acceptable methods, except in the case of tracts containing inaccessible areas and in these areas the method of computation shall be stated.

History Note: Authority G.S. 89C-10; 89C-20;
Eff. July 1, 1989;
Amended Eff. August 1, 2014; August 1, 2012 (see S.L. 2012-143, s.1.(f)); September 1, 2011; May 1, 2009; August 1, 2000; August 1, 1998; February 1, 1996.

21 NCAC 56 .1603 CLASSIFICATION OF BOUNDARY SURVEYS

General. "Boundary surveys" are defined as surveys made to establish or to retrace a boundary line on the ground, or to obtain data for constructing a map, plat, or report showing a boundary line. For the purpose of this Rule, the term refers to all surveys, including "loan" or "physical" surveys, that involve the determination or depiction of property lines. For the purpose of specifying minimum allowable surveying standards for boundary surveys, the following four general classifications of lands in North Carolina are established from the standpoint of their real value, tax value, or location. Each map shall contain a statement of the calculated ratio of precision before adjustments or a statement of positional accuracy.

- (1) Local Control Network Surveys (Class AA). Local control network surveys are traverse networks utilizing permanent points for the purpose of establishing local horizontal control networks for future use by local surveyors. For Class AA boundary surveys in North Carolina, the angular error of closure shall not exceed ten seconds times the square root of the number of angles turned. The ratio of precision shall not exceed an error of closure of one foot per 20,000 feet of perimeter of the parcel of land (1:20,000). When using

positional accuracy standards for Class AA control and boundary surveys, neither axis of the 95 percent confidence level error ellipse for any control point or property corner shall exceed 0.05 feet or 0.015 meters measured relative to the position(s) of the horizontal control points used and referenced on the survey.

- (2) Urban Land Surveys (Class A). Urban surveys include lands that normally lie within a town or city. For Class A boundary surveys in North Carolina, the angular error of closure shall not exceed 20 seconds times the square root of the number of angles turned. The ratio of precision shall not exceed an error of closure of one foot per 10,000 feet of perimeter of the parcel of land (1:10,000). When using positional accuracy standards for Class A control and boundary surveys, neither axis of the 95 percent confidence level error ellipse for any control point or property corner shall exceed 0.10 feet or 0.030 meters measured relative to the position(s) of the horizontal control points used and referenced on the survey.
- (3) Suburban Land Surveys (Class B). Suburban surveys include lands in or surrounding the urban properties of a town or city. For Class B boundary surveys in North Carolina, the angular error of closure shall not exceed 25 seconds times the square root of the number of angles turned. The ratio of precision shall not exceed an error of closure of one foot per 7,500 feet of perimeter of the parcel of land (1:7,500). When using positional accuracy standards for Class B control and boundary surveys, neither axis of the 95 percent confidence level error ellipse for any control point or property corner shall exceed 0.12 feet or 0.037 meters measured relative to the position(s) of the horizontal control points used and referenced on the survey.
- (4) Rural and Farmland Surveys (Class C). Rural and farmland surveys include lands located in rural areas of North Carolina and generally outside the suburban properties. For Class C boundary surveys in North Carolina, the angular error of closure shall not exceed 30 seconds times the square root of the number of angles turned. The ratio of precision shall not exceed an error of closure of one foot per 5,000 feet of perimeter of the parcel of land (1:5,000). When using positional accuracy standards for Class C control and boundary surveys, neither axis of the 95 percent confidence level error ellipse for any control point or property corner shall exceed 0.15 feet or 0.046 meters measured relative to the

position(s) of the horizontal control points used and referenced on the survey.

History Note: Authority G.S. 89C-10; 89C-20; Eff. July 1, 1989; Amended Eff. August 1, 2014; May 1, 2009; August 1, 2000; August 1, 1998; November 2, 1992; January 1, 1992.

21 NCAC 56 .1604 MAPPING REQUIREMENTS FOR BOUNDARY SURVEYS

- (a) The size of a map shall be such that all details are legible on a copy.
- (b) Any lines that are not actually surveyed shall be indicated on the map and a statement included revealing the source of information from which the line is derived.
- (c) All surveys based on the North Carolina grid system shall contain a statement identifying the coordinate system referenced datum used.
- (d) All plats (maps), unless marked as "Preliminary Plat - Not for recordation, conveyances, or sales" shall be sealed, signed and dated by the Professional Land Surveyor and shall contain the following:

- (1) An accurately positioned north arrow coordinated with any bearings shown on the plat. Indication shall be made as to whether the north index is true, magnetic, North Carolina grid ('NAD 83' and realization (date of adjustment of coordinate system) or 'NAD27'), or is referenced to old deed or plat bearings. If the north index is magnetic or referenced to old deed or plat bearings, the date and the source (if determined) shall be indicated.
- (2) The azimuth or courses and distances of every property line surveyed shall be shown. Distances shall be in feet or meters and decimals thereof. The number of decimal places shall be appropriate to the class of survey required in Rule .1603 of this Section.
- (3) All plat lines shall be horizontal or grid measurements. All lines shown on the plat shall be correctly plotted to the scale shown. Enlargements of portions of a plat are acceptable in the interest of clarity, where shown as inserts. Where the North Carolina grid system is used, the combined grid factor shall be shown on the face of the plat. If grid distances are used, they shall be shown on the plat.
- (4) Where a boundary is formed by a curved line, the following data must be given: actual survey data, or as a series of subchords with bearings and distances around the curve. If standard curve data is used, the bearing and distance of the long chord (from point of curvature to point of tangency) must be shown on the face of the plat.
- (5) Where a subdivision of land is set out on the plat, all streets and lots shall be accurately

- plotted with dimension lines indicating widths and all other information pertinent to retracing all lines in the field. This shall include bearings and distances sufficient to form a continuous closure of the entire perimeter.
- (6) Where control corners have been established in compliance with G.S. 39-32.1, 39-32.2, 39-32.3, and 39-32.4, as amended, the location and information as required in the referenced statute shall be shown on the plat. All other corners that are marked by monument or natural object shall be so identified on all plats, and where practical, all corners of adjacent owners along the boundary lines of the subject tract that are marked by monument or natural object shall be shown.
- (7) The surveyor shall show one of the following where they could be determined:
- (A) The names of adjacent land owners;
 - (B) The lot, block, parcel and subdivision designations; or
 - (C) Other legal reference where applicable.
- (8) All visible and apparent rights-of-way, easements, watercourses, utilities, roadways, and other such improvements shall be accurately located where crossing or forming any boundary line of the property shown.
- (9) Tie lines as required and defined in Rule .1602(g) of this Section shall be accurately shown on the face of the plat, whether or not the plat is to be recorded.
- (10) A vicinity map (location map) shall appear on the face of the plat.
- (11) Each map shall contain:
- (A) the property designation;
 - (B) the name of owner or prospective owner;
 - (C) the location (including township, county, and state);
 - (D) the date or dates the survey was conducted;
 - (E) a scale of the drawing listed in words or figures;
 - (F) a bargraph;
 - (G) the title source; and
 - (H) a legend depicting nomenclature or symbols not otherwise labeled.
- (12) Any map not certified for recording under G.S. 47-30, and all reports of survey, shall contain this certificate signed by the Professional Land Surveyor in substantially the following form:
 "I certify that this map was drawn under my supervision from an actual survey made under my supervision (deed description recorded in Book _____, page _____ or other reference source _____); that the boundaries not surveyed are indicated as drawn from information in Book _____, page

_____ or other reference source _____; that the ratio of precision or positional accuracy is _____; and that this map meets the requirements of The Standards of Practice for Land Surveying in North Carolina (21 NCAC 56.1600)."

This _____ day of _____, 2_____.
 Seal _____

Professional Land Surveyor

History Note: Authority G.S. 89C-10; 89C-16; 89C-20;

Eff. July 1, 1989;

Amended Eff. August 1, 2014; May 1, 2009; August 1, 2000; August 1, 1998; February 1, 1996; November 2, 1992; January 1, 1992.

21 NCAC 56 .1606 SPECIFICATIONS FOR TOPOGRAPHIC AND PLANIMETRIC MAPPING, INCLUDING GROUND, AIRBORNE, AND SPACEBORNE SURVEYS

(a) General.

- (1) "Topographic surveys" are defined as surveys that have as their major purpose the determination of the configuration (relief) of the earth (ground) and the location of natural or artificial objects thereon.
- (2) "Planimetric mapping" is defined as producing a map that presents the horizontal positions only for the features represented. This is distinguished from a topographic map by the omission of relief in measurable form.
- (3) "Airborne and spaceborne surveys" are defined as the use of photogrammetry, LIDAR, IFSAR, or other similar measurement technologies for obtaining reliable information about physical objects and the environment, including terrain surface, through the process of recording, measuring, and interpreting images and patterns of electromagnetic radiant energy and other phenomena. This Rule establishes minimum allowable photogrammetric production procedures and standards for photogrammetric mapping and digital data production.

(b) Production procedures for topographic and planimetric mapping surveys shall be in accordance with the standards established by Part 3 of the Federal Geographic Data Committee (FGDC) Geospatial Positioning Accuracy Standard and applicable extensions and revisions. These standards are incorporated by reference including subsequent amendments and editions. The material is available from the FGDC at www.fgdc.gov at no cost. Reporting accuracy shall be in accordance with Part 1 of the FGDC geospatial standards.

(c) Topographic or planimetric maps, orthophotos, and related electronic data, unless marked as "Preliminary Map," shall meet one of the below classes, as contractually specified to FGDC Standards, or National Agriculture Imagery Program of the US Department of Agriculture (NAIP) Standards, or to State

adopted base mapping standards for horizontal and vertical accuracies. The NAIP imagery standards are incorporated by reference including subsequent amendments and editions and may be accessed free of charge at http://www.fsa.usda.gov/Internet/FSA_File/naip_info_sheet_2013.pdf. In the absence of a specified standard, the surveyor shall conform the survey to the requirements for a Class B survey.

- (1) For horizontal accuracy, the five general classifications are:
 - (A) Class AA surveys. For Class AA surveys in North Carolina, the relative accuracy shall be equal to or no less than 0.033 meter (0.10 feet);
 - (B) Class A surveys. For Class A surveys in North Carolina, the relative accuracy shall be equal to or less than 0.5 meter (1.64 feet);
 - (C) Class B surveys. For Class B surveys in North Carolina, the relative accuracy shall be equal to or less than 1.0 meter (3.28 feet);
 - (D) Class C surveys. For Class C surveys in North Carolina, the relative accuracy shall be equal to or less than 2 meters (6.56 feet); and
 - (E) Class D surveys. For Class D surveys in North Carolina, the relative accuracy shall be equal to or less than 5 meters (16.40 feet).
- (2) For vertical accuracy, the three general classifications are:
 - (A) Urban and suburban vertical control surveys (Class A). Urban and suburban vertical control surveys include lands that lie within or adjoin a town or city. For Class A vertical control surveys in North Carolina, the vertical error in feet shall not exceed 0.10 times the square root of the number of miles run from the reference datum.
 - (B) Other vertical control surveys (Class B). Other vertical control surveys include all lands which are not covered by Class A as described in Part (A) of this Subparagraph. For Class B vertical control surveys in North Carolina, the vertical error in feet shall not exceed 0.20 times the square root of the number of miles run from the reference datum.
 - (C) Trigonometric vertical control surveys (Class C). Trigonometric vertical control surveys shall be used for vertical control for aerial and topographic mapping. The vertical error in feet shall not exceed 0.3 times the square root of the number

of miles run from the reference datum.

(d) When the resulting product is a digital (electronic) data set, or a map or document that consists of more than one sheet or otherwise cannot be certified, a project report shall be certified. The report shall be marked "Preliminary" if applicable.

(e) Ground control for topographic and planimetric mapping projects shall be in North Carolina State Plane Coordinate System grid coordinates and distances when the project is tied to grid. A minimum of one permanent project vertical control point shall be shown.

(f) The project map or report shall contain the following information:

- (1) Date of original data acquisition;
- (2) Altitude of sensor and sensor focal length, as applicable;
- (3) Date of document or data set compilation;
- (4) If hard copy product is produced, the maps shall contain a north arrow, map legend, final document scale, including bargraph, and contour interval, as applicable;
- (5) Coordinate system for horizontal and vertical denoting SI or English units (i.e., NAD83, assumed, or other coordinate system);
- (6) A list or note showing the control points used for the project. The minimum data shown for each point shall include: physical attributes (e.g. iron rod, railroad spike), latitude and longitude (or X and Y Grid coordinates), and elevation, as applicable;
- (7) If other data is included, the source and accuracy of those items shall be indicated;
- (8) For topographic maps or data sets, contours in areas obscured by man-made or natural features shall be uniquely identified or enclosed by a polygon identifying the obscured area. The accuracies of the contours or of features in this obscured area shall be noted "No reliance is to be placed on the accuracy of these contours;"
- (9) A vicinity map depicting the project location on the first sheet of all hard copy maps or in the report accompanying digital files; and
- (10) The name of the client for whom the project was conducted.

(g) Nothing in this Rule shall be construed to negate or replace the relative accuracy standards found in Rules .1601 through .1608 of this Section.

(h) A certificate, substantially in the following form, shall be affixed to all maps or reports:

" I, _____, certify that this project was completed under my direct and responsible charge from an actual survey made under my supervision; that this _____ (insert as appropriate: ground, airborne or spaceborne) survey was performed at the ____ percent confidence level to meet Federal Geographic Data Committee Standards; that this survey was performed to meet the requirements for a topographic/planimetric survey to the accuracy of Class ____ and vertical accuracy when applicable to the Class ____ standard,

and that the original data was obtained on ____ (date) ____; that the survey was completed on ____ (date) ____; that contours shown as [broken lines] may not meet the stated standard; and all coordinates are based on ____ 'NAD 83' and realization (date of adjustment of coordinate system) or 'NAD 27' and all elevations are based on ____ (NGVD 29, NAVD 88, or other)."

(i) Documents transmitted electronically shall have the computer-generated seal removed from the original file and a copy of the project report shall be certified and sent to the client. The electronic data shall have the following inserted in lieu of the signature and date:

"This document originally issued and sealed by (name of sealer), (license number), on (date of sealing). This electronic media shall not be considered a certified document. See the project report for certificate and seal."

History Note: Authority G.S. 89C-10; 89C-16; 89C-20;

Eff. November 2, 1992;

Amended Eff. August 1, 2014; August 1, 2011; May 1, 2009; August 1, 2002; August 1, 2000.

21 NCAC 56 .1608 CLASSIFICATION/LAND INFORMATION SYSTEM/GEOGRAPHIC INFORMATION SYSTEM SURVEYS

(a) General: "Land Information System/Geographic Information System (LIS/GIS)" surveys are defined as the measurement of existing surface and subsurface features for the purpose of determining their accurate geospatial location for inclusion in an LIS/GIS database. All LIS/GIS surveys as they relate to property lines, rights-of-way, easements, subdivisions of land, the position for any survey monument or reference point, the determination of the configuration or contour of the earth's surface or the position of fixed objects thereon, and geodetic surveying that includes surveying for determination of the size and shape of the earth both horizontally and vertically and the precise positioning of points on the earth utilizing angular and linear measurements through spatially oriented spherical geometry, shall be performed by a Land Surveyor who is a licensee of this Board unless exempt by G.S. 89C-25. For the purpose of specifying minimum allowable surveying standards, five general classifications of LIS/GIS surveys are established, any of which may be specified by the client. In the absence of a specified standard, the surveyor shall conform the survey to the requirements for a Class B survey.

(1) For horizontal accuracy, the five general classifications are:

- (A) Class AA LIS/GIS Surveys. For Class AA LIS/GIS surveys in North Carolina, the relative accuracy shall be equal to or no less than 0.033 meter (0.10 feet);
- (B) Class A LIS/GIS surveys. For Class A LIS/GIS surveys in North Carolina, the relative accuracy shall be equal to or less than 0.5 meter (1.64 feet);
- (C) Class B LIS/GIS surveys. For Class B LIS/GIS surveys in North Carolina,

the relative accuracy shall be equal to or less than 1.0 meter (3.28 feet);

- (D) Class C LIS/GIS surveys. For Class C LIS/GIS surveys in North Carolina, the relative accuracy shall be equal to or less than 2 meters (6.56 feet); and
- (E) Class D LIS/GIS surveys. For Class D LIS/GIS surveys in North Carolina, the relative accuracy shall be equal to or less than 5 meters (16.40 feet).

(2) For vertical accuracy, the three general classifications are:

- (A) Urban and suburban vertical control surveys (Class A). Urban and suburban vertical control surveys include lands that lie within or adjoin a town or city. For Class A vertical control surveys in North Carolina, the vertical error in feet shall not exceed 0.10 times the square root of the number of miles run from the reference datum.
- (B) Other vertical control surveys (Class B). Other vertical control surveys include all lands which are not covered by Class A as described in Part (A) of this Subparagraph. For Class B vertical control surveys in North Carolina, the vertical error in feet shall not exceed 0.20 times the square root of the number of miles run from the reference datum.
- (C) Trigonometric vertical control surveys (Class C). Trigonometric vertical control surveys shall be used for vertical control for aerial and topographic mapping. The vertical error in feet shall not exceed 0.3 times the square root of the number of miles run from the reference datum. The vertical error in Global Navigation Satellite System (GNSS) surveys shall not exceed five centimeters relative to the referenced benchmark(s) at the 95 percent confidence level (2 sigma) accuracy as defined in Federal Geographic Data Committee Standards.

(b) Nothing in this Rule negates or replaces the relative accuracy standards found in Rules .1601 through .1607 of this Section.

(c) The Professional Land Surveyor in responsible charge of the LIS/GIS boundary or geodetic control survey shall certify all of the following in either written or digital form:

- (1) Class of LIS/GIS survey. The method of measurement used to evaluate the accuracy shall be described as either statistical testing or least squares adjustment results, comparison with values of higher accuracy, and repeat

measurements. The reporting standard in the horizontal component is the radius of a circle of uncertainty, such that the true or theoretical location of the point falls within that circle 95 percent of the time;

- (2) Method of measurement (*i.e.* global navigation satellite systems, electronic scanners, theodolite and electronic distance meter, transit and tape);
- (3) Date(s) of the survey; and
- (4) Datum used for the survey.

(d) A certificate, substantially in the following form, shall be affixed to all maps or reports:

"I, _____, certify that this project was completed under my direct and responsible charge from an actual survey made under my supervision; that this survey was performed to meet the requirements for an LIS/GIS survey [21 NCAC 56.1608] to the accuracy of Class ____ and vertical accuracy; when applicable to the Class ____ standard method used to evaluate the accuracy was _____; method of measurement _____; date(s) of survey _____; datum used for survey _____; and all coordinates are based on _____ ['NAD 83' and realization (date of adjustment of coordinate system) or 'NAD 27'] and all elevations are based on _____ (NGVD 29, NAVD 88, or other)."

History Note: Authority G.S. 89C-10; 89C-20;
Eff. February 1, 1996;
Amended Eff. August 1, 2014; August 1, 2011; July 1, 2009;
May 1, 2009; August 1, 2002; August 1, 2000.

21 NCAC 56 .1703 REQUIREMENTS

Every licensee shall obtain 15 PDH units during the renewal period. If a licensee exceeds the annual requirement in any renewal period, a maximum of 15 PDH units may be carried forward into the subsequent renewal period. Selection of courses and activities that meet the requirements of Rule .1702(4) of this Section is the responsibility of the licensee. Licensees may select courses other than those offered by sponsors. Post evaluation of the courses may result in non-acceptance by the Board. PDH units may be earned as follows:

- (1) Completion of college courses;
- (2) Completion of continuing education courses, seminars, or workshops;
- (3) Completion of correspondence, televised, Internet, videotaped, audiotaped, and other courses or tutorials, provided an exam is required for completion. No exam is required for attendance at a webinar presentation if attendance is documented;
- (4) Presenting or attending seminars, in-house courses, workshops, or professional or technical presentations made at meetings, conventions or conferences;
- (5) Teaching or instructing in Items (1) through (4) of this Rule;
- (6) Authoring published papers, articles, or books;

- (7) Active participation in professional or technical societies as defined in Rule .1705(f) of this Section;
- (8) Patents;
- (9) Authoring exam questions accepted for use in the engineering or land surveying exams; or
- (10) Active participation on boards, commissions, committees or councils of private, local, state or federal government entities as defined in Rule .1705(g) of this Section.

History Note: Authority G.S. 89C-10(a); 89C-17;
Eff. December 1, 1994;
Amended Eff. August 1, 2014; August 1, 2011; May 1, 2009;
August 1, 2000; August 1, 1998.

21 NCAC 56 .1704 UNITS

The conversion of units of credit set forth in Rule .1703 of this Section to PDH units is as follows:

- | | | |
|------|--|--------|
| (1) | 1 College or unit semester hour. | 45 PDH |
| (2) | 1 College or unit quarter hour. | 30 PDH |
| (3) | 1 Continuing Education Unit. | 10 PDH |
| (4) | 1 Contact hour of professional development in course work, seminars, or professional or technical presentations made at meetings, conventions or conferences, and for correspondence, televised, Internet, videotaped, audiotaped, and other courses or tutorials. Contact hours equal the actual time of instruction and shall be credited to the nearest one-third of an hour. | 1 PDH |
| (5) | For teaching in Items (1) – (4) of this Rule, PDH credits are doubled. Teaching credit is valid for teaching a course or seminar for the first time only. Teaching credit does not apply to full-time faculty, as defined by the institution where a licensee is teaching. | |
| (6) | Each published paper, article or book. | 10 PDH |
| (7) | Active participation in professional and technical society. (Each society) | 2 PDH |
| (8) | Each patent. | 10 PDH |
| (9) | Each question used. | 2 PDH |
| (10) | Active participation on boards, commissions, committees or councils of private, local, state or federal government entities. (Each entity) | 2 PDH |

History Note: Authority G.S. 89C-10(a); 89C-17;
Eff. December 1, 1994;
Amended Eff. August 1, 2014; May 1, 2009; August 1, 2000;
August 1, 1998.

21 NCAC 56 .1705 DETERMINATION OF CREDIT

(a) The Board of Examiners has final authority with respect to approval of courses, sponsors, credit, PDH value for courses, and other methods of earning credit. Such determination shall meet Rule .1702(4) of this Section.

(b) Credit for college or community college courses shall be based upon course credit established by the college.

(c) Credit for continuing education courses, seminars and workshops shall be based on one PDH unit for each hour of attendance. Attendance at programs presented at professional and technical society meetings shall earn PDH units for the actual time of each program.

(d) Credit for correspondence, televised, Internet, videotaped, audiotaped, and other courses or tutorials, provided an exam is required for completion, shall be based upon one PDH unit for each hour assigned to the course, provided such hours are a reasonably estimated time for an average professional to complete the course.

(e) Credit determination for published papers, articles and books and obtaining patents is the responsibility of the licensee.

(f) Credit for active participation in professional and technical societies (limited to 2 PDH per society), requires that a licensee serve as an officer or participate in a committee of the society. PDH credits are not earned until the end of each year of service is completed.

(g) Credit for active participation on boards, commissions, committees or councils of private, local, state or federal government entities (limited to 2 PDH per entity) requires utilizing engineering or land surveying knowledge (as applicable) in the active participation. PDH credits are not earned until the end of each year of service is completed.

History Note: Authority G.S. 89C-10(a); 89C-17; Eff. December 1, 1994; Amended Eff. August 1, 2014; August 1, 2011; May 1, 2009; August 1, 2000; August 1, 1998.

CHAPTER 58 – REAL ESTATE COMMISSION

21 NCAC 58A .1709 EXTENSIONS OF TIME TO COMPLETE CONTINUING EDUCATION

(a) A broker on active status may request and be granted an extension of time to satisfy the continuing education requirement for a particular license period if the broker provides evidence to the Commission that he or she was unable to obtain the necessary education due to an incapacitating illness, military

deployment, or other circumstance that existed for a substantial portion of the license period and that constituted a severe hardship evidenced by supporting documentation, such as a written physician's statement, deployment orders, or other corroborative evidence, such that compliance with the continuing education requirement would have been impossible or burdensome.

(b) The Commission shall not grant an extension of time to satisfy the continuing education requirement for reasons of business or personal conflicts.

(c) The Commission shall not grant such an extension of time when the broker's inability to obtain the required education in a timely manner was unreasonable delay on the part of the broker in obtaining such education.

(d) If an extension of time is granted, the broker shall be permitted to renew his or her license on active status but the license shall be automatically changed to inactive status at the end of the extension period unless the broker satisfies the continuing education requirement prior to that time.

(e) If an extension of time is not granted, the broker may either satisfy the continuing education requirement prior to expiration of the license period or renew his or her license on inactive status.

(f) In no event shall an extension of time be granted that extends the continuing education deadline beyond June 10 of the license year following the license year in which the request is made.

(g) The broker's request for an extension of time shall be submitted on a form prescribed by the Commission and must be received by the Commission on or before June 10 of the license year for which the extension is sought. The form for requesting an extension of time to satisfy the continuing education requirement shall include the broker's name, mailing address, license number, telephone number, email address, and a description of the incapacitating illness or other circumstance upon which the request for extension of time is based. The form can be obtained on the Commission's website at www.ncrec.gov, or upon request to the Commission.

History Note: Authority G.S. 93A-3(c); 93A-4.1; Eff. July 1, 1994; Amended Eff. August 1, 2014; October 1, 2000.

RULES REVIEW COMMISSION

This Section contains information for the meeting of the Rules Review Commission on September 18, 2014 at 1711 New Hope Church Road, RRC Commission Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-431-3000. Anyone wishing to address the Commission should notify the RRC staff and the agency no later than 5:00 p.m. of the 2nd business day before the meeting. Please refer to RRC rules codified in 26 NCAC 05.

RULES REVIEW COMMISSION MEMBERS

Appointed by Senate

Margaret Currin (Chair)
Jeff Hyde
Jay Hemphill
Faylene Whitaker

Appointed by House

Garth Dunklin (1st Vice Chair)
Stefanie Simpson (2nd Vice Chair)
Jeanette Doran
Ralph A. Walker
Anna Baird Choi

COMMISSION COUNSEL

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

RULES REVIEW COMMISSION MEETING DATES

September 18, 2014 October 16, 2014
November 20, 2014 December 18, 2014

AGENDA

RULES REVIEW COMMISSION

Thursday, September 18, 2014 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. Department of Public Safety – 14B NCAC 07A .0116 (Reeder)
 - B. Dental Examiners, Board of – 21 NCAC 16D .0104, 0103, .0104, (Reeder)
- IV. Review of Log of Filings (Permanent Rules) for rules filed between July 22, 2014 and August 20, 2014.
 - Office of the Commissioner of Banks (Hammond)
 - State Board of Elections (May)
 - Commissioner of Insurance (May)
 - Coastal Resources Commission (May)
 - Department of Transportation (Hammond)
 - Board of Podiatry Examiners (May)
 - Respiratory Care Board (Hammond)
- 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
 - C. 04 NCAC 24 - Seafood Industrial Park Authority
 - D. 15A NCAC 01A - Environment and Natural Resources
 - E. 15A NCAC 01S - Office of Environmental Education
 - F. 18 NCAC 03 - Publications Division
 - G. 18 NCAC 05 - Uniform Commercial Code Division
 - H. 21 NCAC 01 - Acupuncture Licensing Board
 - I. 21 NCAC 30 - Massage and Bodywork Therapy, Board Of

J. 21 NCAC 45 - Examiners Of Fee-Based Practicing Pastoral Counselors

◊ Not Scheduled For Review This Month

◊ 04 NCAC 14 – Department of Commerce

VII. Commission Business

- Next meeting: Thursday, October 16, 2014
-

Commission Review
Log of Permanent Rule Filings
July 22, 2014 through August 20, 2014

BANKS, OFFICE OF THE COMMISSIONER OF

The rules in Subchapter 3C concern banks including organization and chartering (.0100); branches and limited service facilities (.0200); change of location (.0300); consolidation of banks (.0400); operations (.0900); loan administration and leasing (.1000); capital (.1100); bank personnel (.1300); legal reserve (.1400); fees (.1600); nonresident banks (.1700); and courier services (.1800).

<u>Application</u>	04 NCAC 03C .0101
Repeal/*	
<u>Examination by Commissioner</u>	04 NCAC 03C .0102
Repeal/*	
<u>Report to Banking Commission</u>	04 NCAC 03C .0103
Repeal/*	
<u>Review by Banking Commission</u>	04 NCAC 03C .0104
Repeal/*	
<u>Bank Certificate</u>	04 NCAC 03C .0107
Repeal/*	
<u>National Bank Conversion</u>	04 NCAC 03C .0111
Repeal/*	
<u>Elimination of Director Liability</u>	04 NCAC 03C .0112
Repeal/*	
<u>Establishment of Branches</u>	04 NCAC 03C .0201
Repeal/*	
<u>Investigation</u>	04 NCAC 03C .0403
Repeal/*	
<u>Order</u>	04 NCAC 03C .0404
Repeal/*	
<u>Review by the Banking Commission</u>	04 NCAC 03C .0405
Repeal/*	
<u>Waiver by Commissioner</u>	04 NCAC 03C .0407
Repeal/*	
<u>Books and Records</u>	04 NCAC 03C .0901
Amend/*	
<u>Required Accounts</u>	04 NCAC 03C .0902
Amend/*	
<u>Retention: Reproduction and Disposition of Bank Records</u>	04 NCAC 03C .0903
Amend/*	
<u>Letters of Credit</u>	04 NCAC 03C .0904
Amend/*	
<u>Investment Authority</u>	04 NCAC 03C .0905
Adopt/*	

<u>Loan Documentation</u> Amend/*	04	NCAC	03C	.1001
<u>Leasing of Personal Property</u> Amend/*	04	NCAC	03C	.1002
<u>Basis for Computation and Maintenance</u> Amend/*	04	NCAC	03C	.1402
<u>Fees, Copies and Publication Costs</u> Amend/*	04	NCAC	03C	.1601
<u>Establishment of a Non-Branch Banking Business Office (NBBO)</u> Amend/*	04	NCAC	03C	.1702
<u>Establishment of Courier Services</u> Amend/*	04	NCAC	03C	.1801
<u>Compliance and Disclosure Requirements</u> Repeal/*	04	NCAC	03C	.1802

ELECTIONS, STATE BOARD OF

The rules in Chapter 15 concern rulemaking.

<u>Instruction for Filing a Petition for Rule-making</u> Adopt/*	08	NCAC	15	.0101
<u>Declaratory Rulings: Availability</u> Adopt/*	08	NCAC	15	.0102

The rules in Chapter 16 concern multipartisan assistance teams.

<u>Multipartisan Assistance Teams</u> Adopt/*	08	NCAC	16	.0101
<u>Team Members</u> Adopt/*	08	NCAC	16	.0102
<u>Training and Certification of Team Members</u> Adopt/*	08	NCAC	16	.0103
<u>Visits by Multipartisan Assistance Teams</u> Adopt/*	08	NCAC	16	.0104
<u>Removal of Team Members</u> Adopt/*	08	NCAC	16	.0105

INSURANCE, COMMISSIONER OF

The rules in Chapter 6 are from the Agent Services Division.

The rules in Subchapter 6A cover general provisions (.0100); forms (.0200); examinations (.0300); licensing (.0400); license renewals and cancellations (.0500); license denials (.0600); prelicensing education (.0700); continuing education (.0800); and public adjusters (.0900).

<u>Approval of Courses</u> Amend/*	11	NCAC	06A	.0809
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The rules in Chapter 11 are from the Department of Insurance and concern financial evaluation of insurance companies. The rules in Subchapter 11F are actuarial rules including general provisions (.0100); health insurance minimum reserve standards (.0200); actuarial opinion and memorandum (.0300); commissioner's reserve valuation method (.0400); new annuity valuation mortality tables (.0500); recognition of the 2001 CSO mortality table for use in determining minimum reserve liabilities and non-forfeiture benefits (.0600); determining minimum reserve liabilities for

credit life insurance (.0700); and preferred class structure mortality table (.0800).

<u>Definitions</u>	11	NCAC	11F	.0501
Repeal/*				
<u>Individual Annuity or Pure Endowment Contracts</u>	11	NCAC	11F	.0502
Repeal/*				
<u>Group Annuity or Pure Endowment Contracts</u>	11	NCAC	11F	.0503
Repeal/*				
<u>Application of the 1994 GAR Table</u>	11	NCAC	11F	.0504
Repeal/*				
<u>Model Rule for Recognizing a New Annuity Mortality Table ...</u>	11	NCAC	11F	.0505
Adopt/*				

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>Purpose</u>	15A	NCAC	07H	.2601
Amend/*				
<u>Approval Procedures</u>	15A	NCAC	07H	.2602
Amend/*				
<u>General Conditions</u>	15A	NCAC	07H	.2604
Amend/*				
<u>Specific Conditions</u>	15A	NCAC	07H	.2605
Amend/*				

TRANSPORTATION, DEPARTMENT OF

The rules in Chapter 2 are from the Division of Highways. The rules in Subchapter 2E concern miscellaneous operations including tort claims (.0100); outdoor advertising (.0200); junkyard control (.0300); general ordinances (.0400); selective vegetation removal policy (.0600); professional or specialized services (.0700); solicitation of contributions for religious purposes at rest areas (.0800); distribution of newspapers from dispensers at rest areas and welcome centers (.0900); scenic byways (.1000); tourist-oriented directional sign program (.1100); private property owners (.1200).

<u>Eligibility for Program</u> Amend/*	19A	NCAC	02E	.0219
<u>Solicitation and Award of Contract</u> Amend/*	19A	NCAC	02E	.0702
<u>Pregualifying to Award - Professional Services Firms</u> Adopt/*	19A	NCAC	02E	.0703

PODIATRY EXAMINERS, BOARD OF

The rules in Chapter 52 concern Board of Podiatry Examiners including organization of the Board (.0100); examination and licensing (.0200); professional corporations (.0300); revocation or suspension of license (.0400); certification of podiatric assistants (.0500); general provisions (.0600); petitions for rules (.0700); notice of rulemaking hearings (.0800); rulemaking hearings (.0900); declaratory rulings (.1000); administrative hearing procedures (.1100); administrative hearings decisions related rights and procedures (.1200); nominations for podiatrist members of the board of podiatry examiners; the board of podiatry examiners constituting a board of podiatry elections; and procedures for holding an election (.1300); and scope of practice (.1400).

<u>Temporary License for Clinical Residency/Fellowship</u> Adopt/*	21	NCAC	52	.0213
<u>Forms and Applications</u> Amend/*	21	NCAC	52	.0611

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).

<u>Board Office</u> Amend/*	21	NCAC	61	.0102
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CONTESTED CASE DECISIONS

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

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Chief Administrative Law Judge
JULIAN MANN, III

Senior Administrative Law Judge
FRED G. MORRISON JR.

ADMINISTRATIVE LAW JUDGES

Melissa Owens Lassiter Don Overby J. Randall May	A. B. Elkins II Selina Brooks Craig Croom
J. Randolph Ward	

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ABC Commission v. Demetrius Earl Smith, T/A Smith's Convenient Store	14 ABC 01354	08/18/14	
Melody Locklear McNair v. ABC Commission	14 ABC 02323	06/25/14	
Marcus L. Bellamy T/A Bellas Grill v. ABC Commission	14 ABC 03485	07/24/14	
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AHB Psychological Services v. DHHS and Alliance Behavioral Healthcare	13 DHR 08874	01/06/14	29:02 NCR 202
Sheryl A. Lyons v. DHHS	13 DHR 10228	05/12/14	29:05 NCR 559
Kenneth Terrell Ford v. DHHS, Division of Facility Services	13 DHR 10745	02/12/14	29:03 NCR 356
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Susan Arrowood, OLPC v. DHHS, Division of Medical Assistance and its agent Partners Behavioral Health Management	13 DHR 19981	01/08/14	29:03 NCR 366
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STATE OF NORTH CAROLINA
COUNTY OF CUMBERLAND

Filed
2014 MAY 12 PM 2:48

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 DHR 10228

SHERYL A. LYONS,

Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Respondent.

Office of
Administrative Hearings

FINAL DECISION

On January 14, 2014, Administrative Law Judge Melissa Owens Lassiter heard this contested case in Fayetteville, North Carolina pursuant to Petitioner's petition for a contested case hearing filed with the Office of Administrative Hearings on March 6, 2013. In such petition, Petitioner appealed Respondent's January 15, 2013 decision to recoupment of \$98,333.00 in Medicaid payments paid to Petitioner for providing personal care services to Medicaid recipients.

On January 8, 2014, the undersigned granted partial Summary Judgment for Respondent as Respondent complied with N.C. Gen. Stat. § 108C-5(j) in credentialing PCG's auditors prior to extrapolation. The undersigned granted partial Summary Judgment for Petitioner as Respondent violated N.C. Gen. Stat. § 108C-5(i) by failing to give Petitioner proper notice prior to extrapolation of the results. The undersigned ruled that Respondent could not recoup the extrapolated amount from Petitioner based on the Summary Judgment ruling.

APPEARANCES

For Petitioner: Joy Rhyne Webb
Merritt, Webb, Wilson & Caruso, PLLC
2525 Meridian Parkway, Suite 300
P.O. Box 2247
Durham, North Carolina 27702

For Respondent: Brenda Eaddy
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629

ISSUE

Whether Respondent is entitled to recoup \$3555.24 in alleged Medicaid overpayments for personal care services rendered by Petitioner to Medicaid recipients?

APPLICABLE LAW

N.C. Gen. Stat. Chapter 150B, Article 3
N.C. Gen. Stat. Chapter 108C, Articles 1, 2, and 3
10A NCAC 22F.

BURDEN OF PROOF

Respondent bears the burden of proof in this case pursuant to N.C. Gen. Stat. § 108C-12(d).

EXHIBITS

For Petitioner: 1-3 & 7

For Respondent: 1, 4, 8-10, 12, 13, 16, 17, 19 & 21

WITNESSES

For Petitioner: Sheryl Lyons

For Respondent: Mary Jane Plowman
Sheryl Lyons

FINDINGS OF FACT

1. Petitioner Sheryl Lyons is the President and owner of The Janice Mae Hawkins Foundation, Inc., d/b/a S & S Associates Home Health Care Agency ("S & S Associates." S & S Associates provides care to North Carolina Medicaid recipients pursuant to a Medicaid Participation Agreement with Respondent's Division of Medical Assistance. S & S Associates provides personal care services (PCS) to its clients, including Medicaid recipients, in their homes. Beneficiary eligibility and provider responsibilities for payment for PCS are located in Medicaid Clinical Coverage Policy 3C.

2. Respondent's Division of Medical Assistance (hereinafter referred to as "DMA") operates the North Carolina Medicaid program, including conducting post-payment reviews of Medicaid services under 42 CFR §§ 544 *et seq.* and 10A NCAC 22F.

3. In a PCS post-payment review audit, Respondent reviews the provider's records and documentation to determine whether the provider requested payment for services rendered pursuant to the duties, obligations, and responsibilities contained in Clinical Coverage Policy 3C.

4. By letter dated September 15, 2011, Respondent notified Petitioner that S & S Associates was the subject of a post-payment review audit by DMA's agent, PCG. Respondent audited PCS claims of Medicaid services provided by Petitioner for dates between January 1, 2009 and June 30, 2010 (the "Audit Period"). Respondent reviewed a random sample of 101 PCS claims during the Audit Period submitted by Petitioner. (Pet Exh 1)

5. By follow-up letter dated September 11, 2012, Respondent notified Petitioner that it had not received the requested records from S & S Associates, and requested S & S Associates provide such records to PCG so that it could conduct the post-payment review audit. (Pet Exh 2)

6. Petitioner received a Tentative Notice of Overpayment ("TNO"), dated October 5, 2012, informing Petitioner that PCG had tentatively identified the total amount of improperly paid claims in the sample to be \$3,555.24, and that PCG had extrapolated those results to determine that the total Medicaid overpayment amount that S & S Associates had received was \$125,365.00. The overpayment was based on PCG's review of 101 claims paid to S & S Associates.

7. By letter dated October 12, 2012, Petitioner requested a reconsideration of the TNO overpayment amounts. On December 3, 2012, Respondent's Hearing Officer Alison Weatherman conducted a reconsideration review hearing.

8. On January 15, 2013, Respondent's Hearing Officer issued a Notice of Decision, upholding PCG's recommendations, but modifying the total Medicaid recoupment amount from \$125,365.00 to \$98,333.00. (Resp Exh 12)

9. Petitioner did not submit any revised claims or new documentation to Respondent after the Hearing Officer's Reconsideration Review Decision.

10. Before all OAH hearings, Respondent reviews its findings and updates them to reflect currently existing policy and procedure. If during that review, claims that were at one time deemed to be out-of-compliance, now pass review due to existing policy, Respondent credits the overpayment amount for that claim to Petitioner, and no longer considers that claim in error.

11. Mary Jane Plowman is a Registered Nurse and the appeal team lead at PCG who performed the audit in this case for DMA. Ms. Plowman reviewed this case before the OAH hearing to make sure she agreed with the Notice of Decision by Alison Weatherman, and to determine if any new guidance may have been provided by DMA that would change the results of the decision.

12. Following her review of this case, Plowman prepared a Revised Summary Report, dated December 18, 2013. (Resp Exh 13) Plowman identified the following types of errors in her report:

- a. Ordered tasks not being performed by Nurse Aides;
- b. Invalid PACT forms due to Assessments not being completed timely;
- c. No PACT form submitted for review;
- d. Providing PCS to beneficiaries who do not qualify for the service;
- e. Providing PCS without a physician's order;
- f. Invalid PACT forms due to not obtaining the physician's signature in a timely manner;
- g. Providing PCS tasks not ordered by the physician;
- h. Providing PCS on days not ordered by the physician; and,
- i. Plan of Care not matching the assessed needs of the beneficiary.

13. At hearing, Respondent acknowledged that it did not provide the Revised Summary Report to Petitioner before this contested case hearing. Ms. Plowman opined that if the provider submitted documentation, following the Notice of Decision, which refuted the reason for seeking recoupment, then she could reverse the recoupment decision on that item, and could also find new reasons in her subsequent audit to find recoupment due. In such cases, the provider would not be provided an opportunity to rebut any new alleged reasons for the claimed recoupment.

14. On the Notice of Decision, Respondent found 5/11/09, 5/22/09, 6/16/09, 7/23/09 and 2/23/10 Dates of Service for recipient Sonya Barkley out of compliance because the PACT form dated 4/26/2010 did not cover the Dates of Service.

15. However, on November 21, 2012, Petitioner sent a PACT form dated 4/21/09 to Hearing Officer Weatherman, which covered the Dates of Service at issue, and such a 4/21/09 PACT form was included in the documents of Respondent's Exhibit 19. Once the 4/21/09 PACT form was located, Respondent's reason for finding a recoupment of these claims, no longer existed. (Resp Exh 9, 10)

16. Respondent sought recoupment for services rendered to Sonya Barkley for two additional reasons. First, the RN, Sheryl Lyons, scored ambulation and feeding as 0/0 on the PACT form, but assigned 60 minutes to the plan of care for those services. Second, while Petitioner scored dressing as 3/2 and checked dressing as a need, she failed to list any actual dressing duties on the plan of care.

17. Plowman further explained that when the RN assessment does not address a need, and yet it is provided, then there is a complete recoupment for that Date of Service. Ms. Plowman claimed this was the case regarding Sonya Barkley, even if there were other services provided that had been correctly identified and performed for the particular date in question.

18. Clinical Coverage Policy 3C Section 7.7 states "Medicaid payment for in-home aide services is limited to the tasks identified on the plan of care." Plowman did not cite a section in the Clinical Coverage Policy 3C supporting her position that when the RN assessment does not address a need, and yet Petitioner provides for that need, then Respondent is entitled to a complete recoupment for the Date of Service.

19. Plowman noted that not all items on the Plan of Care for Sonya Barkley were performed on 6/16/09, 7/23/09, and 2/23/10. However, she acknowledged, that S & S Associates did not bill for the full amount of hours listed on the Plan of Care for Sonya Barkley.

20. Neither did Plowman identify the exact amount of recoupment Respondent was seeking from Petitioner for services provided for client Sonya Barkley.

21. At hearing, Plowman changed the alleged recoupments for client Frances Davis to a full pass, and stated that no overpayments were due from S & S Associates for the Dates of Service for Frances Davis of 3/14/09, 3/17/09, 5/5/09, and 6/24/09.

22. For client Denise Elliott, Respondent sought recoupment for Dates of Service 7/3/09, 7/28/09, 10/12/09, and 10/22/09 because Petitioner billed for services provided on those Dates of Services, even though Petitioner failed to check off that any activities of daily living tasks were performed for those Dates of Service. Plowman asserted that she could only look to the Date of Service selected for the audit, and could not look at the rest of the days in that week to see if all tasks on the Plan of Care for the week were completed. She did not look at the weekly ratio of activities of daily living (ADLs) tasks performed in relation to the number of incidental activities of daily living tasks (IADLs) performed.

23. Ms. Plowman acknowledged that Attachment F in Clinical Coverage Policy 3C requires that services provided must be directly related to the condition of the client, but did not provide any reference for how this makes all services rendered on the dates in question subject to recoupment.

24. DMA's Frequently Asked Questions, dated 7/31/2007, included the following question:

On a particular day documented on the POC, can IADL time exceed ADL time? Answer: Yes, so long as ADL time exceeds IADL time on a weekly basis. See *Policy #5.7*.

(Pet Exh 7, p. 2)

25. Plowman opined that because client Denise Elliott's prior PACT form was dated October 30, 2008, she needed a new PACT form completed by October 30, 2009. Plowman claimed that because a new PACT form was not signed within 60 days of the assessment, the payments made for services rendered on 11/17/09, 12/3/09, 12/16/09,

12/24/09 and 1/21/10 should be recouped. However, DMA's Frequently Asked Questions dated 7/31/2007, stated:

[i]f you have a verbal order to start the services after the assessment you can certainly start. If your PACT is not signed within 60 days, you are at risk of noncompliance from day 61 till the day it is signed.

(Pet Exh 7, p. 3) The only Date of Service for client Diane Elliott that was after day 60 was the 1/21/10 date.

26. Ms. Plowman did not identify an exact amount of recoupment Respondent was seeking from Petitioner for services provided for client Denise Elliott.

27. Plowman noted that no PACT form covered the Dates of Service for client Kenesha Evrard for 10/14/09, 10/28/09, and 12/11/09. However, the information provided by Petitioner in Respondent's Exhibit 9 showed that Kenesha Evrard's physician had ordered personal care services for her.

28. Ms. Plowman did not identify an exact amount of recoupment Respondent was seeking from Petitioner for services provided for client Kenesha Evrard.

29. Ms. Plowman explained that documentation for client Louise Hicks lacked two unmet activities of daily living for which she required assistance, and did not meet the criteria for personal care services for Dates of Service 8/17/09, 8/19/09, 8/31/09, 9/24/09, 12/7/09, 1/8/10, 1/18/10, 2/5/10, and 3/5/10. However, Louise Hicks' physician signed the PACT form indicating that Hicks needed PCS services. Petitioner provided evidence (Respondent's Exhibit 10) that Louise Hicks did have two unmet activities of daily living for which she required assistance, but RN Sheryl Lyons had incorrectly completed the PACT form due to her inexperience with completing PACT forms.

30. Plowman did not identify the exact amount of recoupment Respondent was seeking from Petitioner for services provided for client Louise Hicks.

31. Respondent sought recoupment for Date of Service 12/18/09 for client Easter Hill, because there were no activities of daily living checked on the nurse aide log for that Date of Service. Ms. Plowman did not look to see if the ADL time exceeded the IADL time for the week.

32. Respondent sought recoupment for client Easter Hill's Date of Service 2/11/10, because there was no PACT form in place authorizing services within 60 days from the order initiating services. However, there was a PACT form dated 1/5/10 that was signed by Ms. Hill's physician on 4/23/10. Ms. Hill's doctor issued a verbal order. According to the above-cited DMA's Frequently Answered Questions, verbal orders were allowed. Since the 2/11/10 Date of Service was within the first 60 days of the verbal order, Petitioner is entitled to payment for that Date of Service.

33. Plowman did not offer any testimony supporting the reasons Respondent based its recoupment action for services rendered to client Easter Hill on Dates of Service 2/6/09, 3/4/09, and 4/21/09. In the Notice of Decision, Hearing Officer Weatherman upheld recoupment for those Dates of Service, as "plan of care does not match RN assessment." (Resp Exh 12, p 5)

34. Plowman did not identify an exact amount of recoupment Respondent was seeking from Petitioner for services provided for client Easter Hill.

35. Ms. Plowman opined that Petitioner had not checked, on the aide log for client Annie Humphrey, that tasks #19, #23, and #24 were performed on Dates of Service of 2/20/09 and 4/16/09, and that a 6-unit recoupment for each Date of Service was appropriate. However, Ms. Plowman did not consider that the aide did not bill for the fully allotted time on the Plan of Care for these Dates of Service.

36. Neither did Ms. Plowman identify an exact monetary amount of recoupment Respondent was seeking from Petitioner for services provided for client Annie Humphrey.

37. Plowman explained that recoupment was proper for client Lisa Martinez for Dates of Service on 2/24/09, 3/18/09, 4/22/09, 5/26/09, 6/15/09, 6/24/09, 7/8/09, 8/21/09, 10/5/09, 10/12/09, 12/23/09, 1/18/10, 1/22/10, 2/2/10, 2/25/10, 4/8/10, and 5/7/10, because the PACT forms submitted, dated 9/5/08 and 9/4/09, were both incomplete and missing pages.

38. Yet, Ms. Plowman's explanation why recoupment was proper for Martinez is a different reason than the reason Hearing Officer Weatherman upheld recoupment for services provided to Martinez. Weatherman upheld recoupment for client Martinez because the doctor's signature on the PACT order was more than 60 days from the date of order for assessment.

39. Ms. Plowman did not identify the exact amount of recoupment Respondent was seeking from Petitioner for services provided for client Lisa Martinez.

40. Plowman opined that for client DaShonna McDougald, Dates of Service on 10/19/09 and 11/13/09, task #19 was allocated 30 minutes on the plan, but task #19 was not identified as a client need on the PACT form, and the aide log did not show that task #19 was performed for the client. However, this reason was not the reason for the alleged overpayment in Notice of Decision by Hearing Officer Weatherman. Additionally, there was no evidence presented that Petitioner was paid for 2 units of time (30 minutes) for Task #19. The documentation showed that Petitioner was allowed to bill for 12 units of services (or 3 hours, 45 minutes) provided to this client, yet Petitioner only billed Respondent for 45 minutes of services.

41. Ms. Plowman did not identify an exact amount of recoupment Respondent was seeking from Petitioner for services provided for client DaShonna McDougald.

42. Ms. Plowman claimed Respondent was entitled to recoup 6 units of services for client Estelle McMillan for 8/12/09 Date of Service, because tasks #22, #23, and #24 were not documented on the aide log. Documentation showed the nurse aide did not work for the full amount of approved time on 8/12/09. Plowman did not identify the exact amount of recoupment Respondent was seeking from Petitioner for services provided for client Estelle McMillan.

43. Plowman explained that Respondent sought recoupment for client Eurina McPherson, on Date of Service 11/8/09, because that day was a Sunday and services were not authorized for this client on the weekends. She also noted that the services provided on 3/27/10 and 5/15/10 were on Saturdays, and the services provided on 6/6/10 was on a Sunday.

44. Section 7.10 of Clinical Care Policy 3C provides that if the PCS In-Home Aide Service Log does not reflect the plan of care, the reason for this discrepancy must be documented in the recipient's record. However, Section 7.10 of Clinical Care Policy 3C does not state that failure to so document this discrepancy will result in recoupment of all amounts paid for the services provided.

45. At no time, however, did the services provided by S & S Associates Home Health Care Agency exceed the weekly totals approved by Eurina McPherson's physician.

46. The reason Plowman gave for seeking recoupment does not match the reason Hearing Officer Weatherman gave in the Notice of Decision. Weatherman upheld recoupment for each date of service listed for client McPherson, because the "plan of care does not match RN assessment." The plan of care and PACT form support Weatherman's findings, but there was no testimony presented at hearing regarding that finding.

47. Plowman further explained that Petitioner's aide Elaine Lyons provided services for client Eurina McPherson on 2/26/10 and 3/17/10, but Petitioner failed to provide credentials for aide Lyons. However, this was not the reason given for the alleged overpayment in Notice of Decision by Hearing Officer Alison Weatherman.

48. Plowman did not identify the exact amount of recoupment Respondent was seeking from Petitioner for services provided for client Eurina McPherson.

49. Plowman opined that for client Skylar Moultrie-Lewis, Dates of Service on 4/14/09, 5/6/09, 5/12/09, 6/14/09, 7/13/09, 7/31/09, 8/4/09, 8/16/09, 9/3/09, 11/18/09, 1/31/10, 5/18/10, 5/11/10, 5/26/10, 6/13/10, and 6/28/10, Task #20 was not completed in the aide log, so 2 units recoupment was appropriate. However, the aide did not work for the full number of allotted hours on any of these days, so there was no evidence presented by Respondent that time to complete Task #20 was actually billed on any of these Dates of Service.

50. Plowman also noted for recoupment was proper for client Skylar Moultrie-Lewis, as each Date of Service 6/14/09, 08/16/09, 1/31/10 and 6/13/10, was on a Sunday, and the client was only authorized to receive personal care services Monday through Friday.

51. At no time, however, did the services provided by S & S Associates Home Health Care Agency exceed the weekly totals approved by Skylar Moultrie-Lewis' physician.

52. Plowman also indicated that a new PACT form was prepared for client Skylar Moultrie-Lewis on 1/1/10, but was not signed by her physician until 4/26/10. However, Sheryl Lyons noted on the PACT form that she had received a doctor's verbal order for services for this client on 1/1/10. The client's doctor signed a Medical Order form on 3/11/10, and signed the PACT on 4/26/10.

53. Plowman did not identify the exact amount of recoupment Respondent was seeking from Petitioner for services provided for client Skylar Moultrie-Lewis.

54. For patient Amos Shaw, Plowman explained that there was nothing checked on Task #25 and Task #27 on the PACT form, but 1 unit of time was allotted to each of these tasks on the plan of care. Therefore, Plowman claimed that two units should have been recouped for each of these tasks for the 4-9-09 and 9-25-09 Dates of Service. However, on 4-9-09, the aide log shows that multiple items under Tasks #25 and #27 were performed for patient Amos Smith. The aide log for 9-25-09 also shows multiple items under Tasks #25 and #27 were performed. Amos Smith's physician certified that he needed PCS services for both of these tasks.

55. Plowman also asserted that Task #19 was not completed for the 4-9-09 and 9-25-09 Dates of Service for patient Amos Smith. However, the aide logs showed that assisting with toilet and bed/sponge bath were checked, which would involve transferring the patient, for the 4-9-09 Date of Service. For the 9-25-09 Date of Service for Amos Smith, turn/position was checked on the aide log, which is an item under Task #19. In addition, bed/sponge bath was checked as was PT/Exercises for the 9-25-09 Date of Service.

56. Plowman did not identify the exact amount of recoupment Respondent was seeking from Petitioner for services provided for client Amos Smith.

57. Plowman explained that no recoupment was due for patient Jenna Smith from S & S Associates Home Health Care Agency for the 12-2-09 Date of Service.

58. Plowman opined that for client Earnest Williams, Dates of Service 11/3/09, 11/10/09, and 5/2/10, he lacked two unmet activities of daily living for which he required assistance, and did not meet the criteria for personal care services. Plowman admitted

that Earnest Williams' physician had signed the PACT form, and indicated that he needed PCS services.

59. Ms. Plowman did not identify the exact amount of recoupment Respondent was seeking from Petitioner for services provided for client Earnest Williams.

60. Plowman admitted that the standard for whether recoupment is due from a Medicaid Provider is not zero error, but that substantial compliance with the laws, regulations and policies is what is required.

61. Respondent did not present testimony of the exact monetary amounts of recoupment it alleged was due from S & S Home Health Care Agency.

62. After the hearing, Respondent filed a Motion for Reconsideration of Partial Summary Judgment based on the grounds that the undersigned had ruled differently on the same extrapolation issue in another Medicaid case. Petitioner filed a response objecting to such reconsideration.

CONCLUSIONS OF LAW

1. All parties are properly before the Office of Administrative Hearings as the Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to Chapters 108C and 150B of the North Carolina General Statutes. To the extent, To the extent that the Findings of Fact contain Conclusions of Law or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

2. Respondent is the single State agency responsible for administering North Carolina's program of Medical Assistance ("the Medicaid program"). N.C. Gen. Stat. §§ 108-25(b), 108A-54. Respondent's Program Integrity unit and its authorized agents, Public Consulting Group (PCG), conduct post-payment reviews of paid Medicaid claims to identify program abuse and overpayments in accordance with 42 USC § 1396a, 42 CFR 455 & 456, and 10A NCAC 22F.

3. N.C. Gen. Stat. §108C-12 requires this tribunal to issue a final agency decision within 180 days of the date of filing of the contested case petition. "The time to make a final decision shall be extended in the event of delays caused or requested by the Department."

4. Because Respondent requested continuances in these cases, and did not object to Petitioner's request for continuances in order to address discovery issues, the time for making the final agency decision was extended both as a result of and at the request of the Agency. Under N.C. Gen. Stat. § 108C-12 this final decision is timely.

5. Respondent bears the burden of proof in this matter pursuant to N.C. Gen. Stat. § 108C-12(d).

6. Respondent's Motion for Reconsideration is hereby Denied.

7. 10 NCAC 22F .0103 states in part:

The Division shall develop, implement and maintain methods and procedures for preventing, detecting, investigating, reviewing, hearing, referring, reporting and disposing of cases involving fraud, abuse, error, overutilization or the use of medically unnecessary or medically inappropriate services.

8. 10 NCAC 22F .0402 provides that:

Upon notification of a tentative decision, the provider will be offered, in writing, by certified mail, the opportunity for a reconsideration of the tentative decision and the reasons thereof.

9. In this case, there are no allegations that Petitioner committed any fraud.

10. Petitioner was not given an opportunity prior to the hearing in this case to refute many of the reasons given by Respondent to justify recoupment, as Respondent changed its purported reasons once Petitioner presented evidence to refute the reasons outlined in the Tentative Notice of Overpayment. Respondent's failure to provide Petitioner with an opportunity to address the alleged reasons it contends Petitioner was overpaid was in violation of 10 NCAC 22F .0402.

11. Respondent failed to meet its burden of proof to establish that Petitioner did not substantially comply with applicable laws, rules, and policies.

12. Respondent failed to meet its burden of proving that full recoupment was due from Petitioner for a Date of Service when the RN assessment did not address a need that was provided.

13. Respondent failed to meet its burden of proving that full recoupment was due from Petitioner for a Date of Service when the IADL time exceeded ADL time for that specific date.

14. Respondent failed to meet its burden of proving that full recoupment was due from Petitioner for services it provided under a physician's order that was entered 60 days after the PACT form was completed.

15. Respondent failed to meet its burden of proving that full recoupment was due from Petitioner for services it provided if the aide log was different from the Plan of Care, and the reason for the discrepancy was not documented.

16. Respondent failed to establish the amount of recoupment it sought. Respondent has failed to meet its burden of proving that Petitioner was overpaid in the amount of \$3,555.24.

17. 10A NCAC 22F .0302(c) states that, when conducting an audit of a Medicaid provider:

The Division shall review the findings, conclusions, and recommendations and make a tentative decision for disposition of the case from among the following administrative actions:

- (1) To place provider on probation with terms and conditions for continued participation in the program.
- (2) To recover in full any improper provider payments.
- (3) To negotiate a financial settlement with the provider.
- (4) To impose remedial measures to include a monitoring program of the provider's Medicaid practice terminating with a "follow-up" review to ensure corrective measures have been introduced.
- (5) To issue a warning letter notifying the provider that he must not continue his aberrant practices or he will be subject to further division actions.
- (6) To recommend suspension or termination.

18. Respondent provided no testimony or evidence to show that either PCG, as Respondent's agent, or Respondent DMA reviewed PCG's findings and made a determination regarding whether recoupment would be the appropriate administrative action.

19. Respondent acted contrary to rule and failed to use proper procedure by not providing evidence or testimony that it reviewed the tentative findings to determine the appropriate administrative action that should have been taken as required by 10A NCAC 22F .0302.

20. Respondent has substantially prejudiced Petitioner's rights by attempting to recoup funds from Petitioner for reasons it had not disclosed prior to the hearing, denied Petitioner the opportunity to effectively refute such reasoning, violated 10 NCAC 22F .0402, and denied Petitioner its full due process rights.

FINAL DECISION

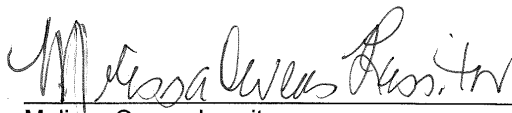
Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **REVERSES** Respondent's decision to recoup \$3,555.24 from Petitioner.

NOTICE

Under the provisions of N.C. Gen. Stat. §150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county in which the party resides. The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. In conformity with 26 N.C. Admin. Code 03.012, and the Rule 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 the 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 Hearing at the time the appeal is initiated in order to ensure the timely filing of the record.

This 19th day of May, 2014.


Melissa Owens Lassiter
Administrative Law Judge

Filed

STATE OF NORTH CAROLINA

2011 MAY 27 PM 4:07

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 DOJ 15453

WAKE COUNTY

Office of
Administrative Hearings

MICHAEL KEITH FOX,

Petitioner,

v.

NC CRIMINAL JUSTICE EDUCATION
AND TRAINING STANDARDS
COMMISSION

Respondent.

PROPOSAL FOR DECISION

On February 3, 2014, Administrative Law Judge Melissa Owens Lassiter conducted an administrative hearing in this contested case in Raleigh, North Carolina after Petitioner requested, pursuant to N.C. Gen. Stat § 150B-40(e), designation of an administrative law judge to preside at the hearing of a contested case under Article 3A, Chapter 150B of the North Carolina General Statutes. In this petition, Petitioner appeals Respondent's June 11, 2013 Proposed Denial of Correctional Officer Certification and Proposed Suspension of Law Enforcement Officer Certification.

APPEARANCES

Petitioner was represented by Allison Pope Cooper, Esq., Bailey & Dixon, LLP, P.O. Box 1351, Raleigh, North Carolina 27602.

Respondent was represented by Catherine F. Jordan, Assistant Attorney General, NC Department of Justice, P.O. Box 629, Raleigh, North Carolina 27602.

ISSUES

1. Whether Respondent's proposed suspension of Petitioner's law enforcement certification, for an indefinite time, for lack of good moral character is supported by a preponderance of the evidence?
2. Whether Respondent's proposed denial of Petitioner's correctional officer certification for lack of good moral character is supported by a preponderance of the evidence?

3. Whether Respondent's proposed denial of Petitioner's correctional officer certification for a knowing material misrepresentation is supported by a preponderance of the evidence?

APPLICABLE STATUTES AND RULES

Official notice is taken of the following:

N.C. Gen. Stat. §17C-10, et seq.
12 NCAC 09B .0101(3)
12 NCAC 09A .0204(b)(2) & (c)
12 NCAC 09A .0205(b)(4) & (c)(2)
12 NCAC 09G .0206
12 NCAC 09G .0504(b)(6) & (c)
12 NCAC 09G .0505(b)(5) & (c)(2)

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 1, 2, and 3.

For Respondent: 1 - 15

WITNESSES

For Petitioner: Marc Edwards, Correctional Administrative Services Manager for Marion Correctional Institution; Michael Fox, Petitioner; Steve Hensley, McDowell Co. Sheriff's Office; Janie Shutz, Chief of Police, Forest City, Oregon and former Sgt. Marion Police Department

For Respondent: Kevin Wallace, Respondent's Investigator; Marion Police Officer Angie Fineberg; Marion Police Officer Randy Seay; Josh Piercy, The Biltmore Company, former Corporal, Marion Police Department; Lt. Marion Police Scott Spratt

FINDINGS OF FACT

1. Pursuant to N.C. Gen. Stat. §17C, *et seq.*, and Title 12 NCAC 9A and 9G respectively, Respondent is charged with the duty of certifying, revoking, or suspending the certifications of law enforcement and correctional officers within this State.

2. Petitioner is a 23-year law enforcement veteran, having received his law enforcement certification from Respondent on August 31, 1988 through the Marion Police Department. (Resp. Exhs. 1, 14)

3. Since 1988, Petitioner has continuously held employment with a number of law enforcement agencies within this State, namely: Marion Police Department, Gaston Co. Sheriff's Department, and the McDowell County Sheriff's Department.

(Resp. Exh. 1, 14)

4. On or about January 25, 1990, Petitioner completed a Personal History Statement Form F-3 to be submitted to the North Carolina Sheriffs' Education and Training Standards Commission for certification through the McDowell County Sheriff's Department. (Resp. Exh. 2) Question 47 on the January 25, 1990 McDowell County Sheriff's Department Form F-3 asked, "Have you ever used marijuana?" Petitioner answered: "one time approx. 10 years ago."

5. On or about October 1, 1995, Petitioner completed a Personal History Statement Form F-3 to be submitted to the North Carolina Sheriffs' Education and Training Standards Commission for certification as a Deputy Sheriff. (Respondent's exhibit 3) On October 1, 1995, Petitioner signed and notarized this Form F-3. The statement "I hereby certify that each and every statement made on this form is true and complete and understand that any misstatement or omission of information may subject me to disqualification or dismissal" existed above Petitioner's signature. Question 44 on the October 1, 1995 Form F-3 stated "Have you ever used marijuana?" Petitioner answered this question "yes" and explained "experimentation."

6. On or about September 30, 1998, Petitioner completed a Personal History Statement Form F-3 to be submitted to Respondent for certification with the Marion Police Department. (Resp. Exh. 5) On October 1, 1998, Petitioner signed and notarized this Form F-3. The following statement was typed above Petitioner's signature:

I hereby certify that each and every statement made on this form is true and complete and I understand that misstatement or omission of information will subject me to disqualification or dismissal.

Question 44 on the September 30, 1998 Form F-3 asked, "Have you ever used marijuana?" Petitioner answered "Yes," and explained "Experimented in High School." (Resp. Exh. 5)

7. On October 16, 1998, Respondent received a Report of Appointment Form F-5A from the Marion Police Department for Petitioner's certification. (Resp. Exh. 4), and issued a general certification for a law enforcement officer to Petitioner. (Resp. Exh. 6)

8. On October 20, 2010, Respondent received a Report of Separation Form F-5B from the Marion Police Department on behalf of Petitioner. (Resp. Exhs. 7, p. 9; 10) The Form F-5B stated that Petitioner resigned and that his date of final separation was on October 15, 2010. The Form F-5B stated that "this agency would not consider this individual for appointment."

9. Following his resignation with the Marion Police Department, Petitioner sought employment with the McDowell County Sheriff's Department. Petitioner is currently employed as a part-time Deputy Sheriff with the McDowell County Sheriff's Department. (Resp. Exh. 14)

10. On or about June 19, 2012, Petitioner submitted Form F-5A, Report of Appointment - Application for Certification, to Respondent for certification as a NC Department of Corrections Correctional Officer. (Resp. Exh. 12)

11. On or about July 1, 2012, Petitioner began employment with the North Carolina Department of Corrections through the Marion Correctional Facility located in McDowell County. (T. p. 189)

12. On or about September 24, 2012, at Respondent's request, Petitioner completed a revised Form F-5A, clarifying his responses on his original Form F-5A. Petitioner particularly clarified his response to Question 3 on Form F-5A regarding prior illegal drug use. (Resp. Exh. 13) On the revised Form F-5A, Petitioner included the following handwritten notations in the explanation section:

2. Oversight. I am not a drug user. Experimented in high school therefore I checked no to the Form F-5A. F3 checked yes because of marijuana experimental use in high school. I have went back and checked yes on the F-5A due to this experimental use in high school. To my knowledge, I checked yes on my Sheriff's Certification forms concerning drug use. . . .

6. Currently on reserves with the McDowell Co. Sheriff's Dept. I am not employed at all with the Rutherford Co. Sheriff's Office. . . .

3. Oversight that I failed to list Marion Police Dept. in approximately 1988 for a year and left on good terms went to the McDowell Co. Sheriff's Dept. Rutherford Co. held my certification however I never worked for the Rutherford Co. Sheriff's Dept. I worked at the Gaston Co. Sheriff's Dept. from approx.. 19 __ (date cut off) to 1998 then returned to the Marion Police Dept. in 1998. I left Marion Police in Oct. 2010. I left Marion Police Dept in Oct. 2010 due to philosophical differences with new Chief.

(Resp. Exh. 13)

13. On March 27, 2013, Respondent's investigator Kevin Wallace drafted and a memorandum to Respondent's probable cause committee proposing denial of Petitioner's correctional officer certification and suspension of Petitioner's law enforcement officer certification. (Resp. Exh. 14) The memorandum was based upon an allegation that Petitioner knowingly made a material misrepresentation on his June 19, 2013 Form F-5A when he answered question 3 and question 1(a). Question 3 asked he had ever used any illegal drug. Question 1(a) asked whether Petitioner had

ever held a position requiring criminal justice certification. The memorandum also alleged that Petitioner lacked the good moral character required of a correctional officer and a law enforcement officer. (Resp. Exh. 14)

14. On May 21, 2013, Petitioner appeared before the Probable Cause Committee of the Commission, and requested approval of his pending correctional officer certification, and reinstatement of his law enforcement certification.

15. On June 11, 2013, Respondent notified Petitioner that the Probable Cause Committee found probable cause to deny Petitioner's correctional officer certification for not less than three years, and to suspend Petitioner's law enforcement officer certification for an indefinite time, because there was probable cause that:

(1) Petitioner knowingly made two material misrepresentations when he submitted his June 19, 2012 Form F-5A to Respondent for certification, and

(2) Petitioner lacked the good moral character required of a correctional officer and a law enforcement officer. (Resp. Exh. 15)

16. On or about August 13, 2013, the North Carolina Department of Corrections/Marion Correctional Facility discharged Petitioner from his position, solely as a result of Respondent's notification of probable cause to deny his certification, and for failure to obtain correctional officer certification from Respondent. (T. p. 192)

17. At the administrative hearing, Respondent's Investigator, Kevin Wallace ("Investigator Wallace") confirmed that Respondent's Probable Cause Committee found probable cause to deny Petitioner's correctional officer certification because:

- a. Petitioner made a material misrepresentation in reference to the drug use on Form F-5A; and
- b. Petitioner made a material misrepresentation in reference to failing to list the Marion Police Department and the Rutherford County Sheriff's Office on Form F-5A; and
- c. Petitioner failed to meet or maintain the minimum employment standards that every correctional officer should demonstrate good moral character due to the circumstances surrounding Petitioner's employment with the Marion Police Department (T. p. 45)

Material Misrepresentation on Form F-5A - (Correctional Officer Certification)

18. At hearing, Investigator Wallace explained that Petitioner made two material misrepresentations in response to Questions 1(a) and (3) on Form F-5A. (T. p. 51-54) However, Question 3 on Form F-5A, unlike Respondent's Form F-3, did not list marijuana as an "illegal drug." The evidence presented by Respondent showed that the law enforcement certification Form F-3 differentiates between "marijuana" and "illegal drug" use by asking the applicant separate questions regarding the same. (T. p. 51)

(Resp. Exhs. 2, 5, 13) Wallace noted that Petitioner had disclosed prior marijuana use to the Respondent on at least four other occasions on his F-3, including his most recent September 1, 2011 Form F-3 Personal History Statement. (T. p. 52) (Resp. Exh. 11)

19. Investigator Wallace corroborated that when Petitioner learned of the inconsistency of his response on Form F-3 to Form F05A, Petitioner corrected his answer, and provided a written explanation that it was an oversight and mistake that he failed to check "yes" for his prior marijuana use. (T. p. 53)

20. Investigator Wallace explained that Petitioner truthfully answered "yes" in response to Question 1(a) on the F-5A question as to whether he had ever held a position requiring criminal justice certification. Wallace indicated that Petitioner was certified as a law enforcement officer with Rutherford County Sheriff's Office with a date of appointment on December 7, 1994 and a date of separation of February 18, 2013. (T. p. 19) However, Wallace noted that Petitioner's incomplete explanation of his prior places of employment where he had held such positions was deemed a material misrepresentation. (T. p. 36 and 47) Wallace testified that truthfulness and honesty are important characteristics of a law enforcement officer. (T. p. 37)

21. The preponderance of the evidence established that Form F-5A, unlike Form F-3, did not require the applicant to list all places of prior employment in the last 10 years, or supplemental information such as the reasons for leaving and date of separation. Question 1(a) on Form F-5A required the applicant to answer "yes" or "no" to the question whether he had ever held a position requiring criminal justice certification, and if the answer was "yes," to explain on a separate page. In response to Question 1(a), Petitioner wrote "Police Department" in the explanation section, but failed to include "Marion" on his original Form F-5A. Petitioner had disclosed his former employment with the Marion Police Department to Respondent on his prior Form F-3, dated September 1, 2011. (Resp. Exh. 11, 13)

22. Investigator Wallace acknowledged that the Rutherford County Sheriff's Department would have been the agency responsible for reporting a law enforcement officer's separation to the Respondent. (T. p. 19-20)

23. At hearing, Petitioner explained that he misread the question about whether he had ever used illegal drugs on his original Form F-5A, and mistakenly marked "no." Petitioner noted that he had previously disclosed prior marijuana use on three or four occasions on prior Personal History Statements (Form F-3) to Respondent. (T. p. 211)

24. Petitioner has never failed a drug test, and his only drug use was experimentation in 1977 when he was in high school. (T. p. 217)

25. Petitioner pointed out that Respondent's Form F-5A did not direct him to list all places where he has held a criminal justice certification, and that his failure to write "Marion" before "Police Department" was an oversight. He never tried to hide his

prior employment with the Marion Police Department. Petitioner did not list the Rutherford County Sheriff's Department as a place in which he has held a certification, because he never actually worked at the Rutherford County Sheriff's Department, and wasn't aware that this certification was active in Respondent's system until it was brought to his attention in 2012 in connection with his correctional officer certification. (T. p. 212-13)

Lack of Good Moral Character

26. Respondent relied solely on documents contained in Petitioner's personnel file that were submitted by the Marion Police Department in determining whether Petitioner lacked good moral character. The Marion Police Department's Notice of Rule Violations by Petitioner listed the following statements as a basis for Petitioner's alleged violations:

'[C]lean the brown off of your nose, you've been running around with your nose up her ass' (Oct. 10, 2010), 'you better hope your shit ain't broken into, out stopping all these cars' (Oct. 1, 2010), 'you're like every other female around here, you're going to keep on til you get your ass beat like Janie, running your mouth,' 'fat ass, your ass has saddle bags, shave your mustache.' MPD Policy 03.01.13 - Conduct Toward Fellow Employees, MPD Policy 0301.30 - Harassment

'If you had a choice to eat Lacy's pussy or shoot yourself, which one would you do?' 'I would jack off a double barrel shotgun in my mouth before I would touch that fat ugly bitch.' 'you need to stop following her around like a fucking dog in heat' (Oct. 11, 2010)

Failure to perform duties as required (Sept. 26, 2010). Failure to back up officer after being requested. (Oct. 1, 2010) MPD Policy 301.10 Performance of Duty: Failure to perform duties as required, 301.1 Neglect of Duty: Failed to back up officer asking for assistance, 305.3 Officers are to respond as promptly as possible to calls for service.

301.1 Standards of Conduct: Failure to conduct himself in a manner becoming the office he holds.

(Resp. Exh. 7)

27. Respondent did not conduct any interviews or speak to any persons, including the Petitioner, before determining that Petitioner lacked good moral character, and recommending suspension of his current law enforcement certification and denial of his correctional officer certification. (Resp. Exh.7-8) (T. p. 55-56)

28. As evidence of Petitioner's lack of good moral character, Respondent presented an October 14, 2010 Marion Police Department Notice of Pre-Disciplinary

Conference. The Notice cited Rule Violations of 301.1 Standards of Conduct, 301.10 Performance of Duty, 301.13 Conduct towards fellow Employees, 302.1 Neglect of Duty, and 301.30 Harassment. (Resp. Exh. 7)

29. The preponderance of the evidence at hearing established that on or about February 8, 2013, Petitioner in connection with Respondent's investigation, provided a notarized, handwritten explanation to Respondent addressing the alleged Marion Police Department Rule Violations, wherein he stated:

- a. 301.1 Standards of Conduct. I feel as though I conducted myself to the best I could in the performance of my job.
- b. 301.10 I performed all duties that was required during my employment.
- c. 301.13 I treated all officers and employees with respect. The only time I used insolent or abusive language was around other officers while goofing around.
- d. 302.1 Neglect of Duty: It was alleged that I did not back up another officer. I did not hear that officer call for back up nor would I have failed to back the officer up if I had heard same.
- e. 301.30 Harassment: Me and other officers were talking and joking around about people. I was not the only one using the language.

(Resp. Exh. 7)

30. Before Respondent found probable cause to deny and suspend Petitioner's certification, Respondent did not interview Petitioner about any of the explanations provided in February 2013, or ask Petitioner to explain any of the records and documents contained in his Marion Police Department personnel file. (T. p. 56)

31. At hearing, Respondent offered a one page Memorandum ("Brooks Memo"), dated October 15, 2010, that summarized Petitioner's Pre-Disciplinary Hearing held on October 15, 2010 before Marion Police Chief Mark. L. Brooks. The memorandum included Brooks' typed name at the bottom of the document, but was not signed by Chief Brooks. The Brooks Memo included five alleged statements made by Petitioner during the disciplinary conference, but did not make any specific findings of fact that corresponded with any of the alleged Rule Violations noted in the October 14, 2010 Notice. (Resp. Exh. 7, page 9). Chief Mark L. Brooks did not testify at the contested case hearing held in this matter.

32. The Brooks Memo does not state any specific findings of fact as to the enumerated Rule Violations noted in Petitioner's Pre-Disciplinary Conference, or provide with specificity what questions Petitioner responded to during the disciplinary conference. (T. p. 55-56) (Resp. Exh. 7)

33. Petitioner did not admit to the alleged misconduct or any of the alleged Rule Violations during his conference held on October 15, 2010.

34. At the contested case hearing, Petitioner explained that this conference lasted approximately 10 minutes, and that he chose to resign from the Department because of disagreements with the Chief of Police. (T. p. 201)

35. Respondent also offered into evidence two statements prepared by Marion Police Officers Randy Seay and Angie Fineberg ("Seay and Fineberg Statements"), dated October 12, 2010. The testimony revealed that the Seay and Fineberg Statements were obtained from Petitioner's personnel file with the Marion Police Department. (Resp. Exhs. 8 and 9). At hearing, Lt. Spratt noted that the Seay and Fineberg Statements were written in conjunction with Petitioner's disciplinary proceedings held on October 15, 2010. (T. p. 174)

36. The evidence clearly established that the Marion Police Department did not give Petitioner any chance to review the Seay and Fineberg Statements before his October 15, 2010 disciplinary conference, and did not provide Petitioner a full opportunity to refute any or all of the allegations contained therein. (T p. 201)

37. The majority of the alleged comments and allegations contained in the Seay and Fineberg Statements were not included, with specificity, in the Marion Police Department October 14, 2010 Notice of Rule Violations (Resp. Exh. 7, 8, and 9). Further, the record is devoid of the actual statement and allegations that were discussed at Petitioner's October 15, 2010 Disciplinary Hearing.

38. At the contested case hearing, Respondent offered the following witnesses from the Marion Police Department who testified as to Petitioner's character: Office Angie Fineberg, Officer Randy Seay, Lt. Scott Spratt, and Josh Piercy.

39. Officer Angie Fineberg was employed with the Marion Police Department from 2004 through 2007, then returned in 2010. (T. p. 67-68) Petitioner was one of her field-training officers in 2004. Fineberg worked on Petitioner's shift when she returned in 2010, and Petitioner supervised her work. (T. p. 69) Petitioner, Corporal Piercy, Officer Seay, and Officer Fineberg worked on a shift together as the only four officers on that shift. (T. p. 70)

40. During her testimony, when Officer Fineberg was unable to recall facts and comments made to her by Petitioner, she testified from her written statement. (Resp. Exh. 9) Officer Fineberg's Statement included a number of allegations and complaints about offensive comments Petitioner made to her. Some of comments included: encouraging her to perform business checks instead of stopping cars; discouraging her from using the term "show me" when calling into dispatch; telling Officer Seay to "Get out of here rookie;" telling Officer Seay to stop following her [Fineberg] around like a dog in heat, and that Seay needed to wipe the brown off of his nose; telling Fineberg that she needed not to park her car crooked, and that she had blonde roots; and telling Fineberg that she had saddlebags.

41. Petitioner made statements to Officer Fineberg such as "you needed to knock it off with stopping any cars." (T. p. 71) Fineberg understood that Petitioner wanted them to quit stopping cars or doing so many vehicle stops. (T. p. 71) She made a statement saying "when we're all productive, it makes our sergeant look good," and he responded, "No, it does not." (T. p. 71) Petitioner made a statement that Frieda is tired of hearing us, and was getting mad for them stopping all these cars. (T. p. 72)

42. Officer Fineberg explained that Petitioner used lewd language. Petitioner called Officer Fineberg names, such as stupid, dummy, stated that she had blonde roots, meaning that she was dumb. He stated that she had saddlebags that she needed to turn sideways to get in the door that she needed to shave her mustache before she came to work. These statements made Officer Fineberg feel angry. (T. p. 99) On one occasion at Marion travel plaza, Petitioner stated that she had saddlebags, that her ass was too wide, that she needed to turn sideways to get in the door. (T. p. 99) Officer Fineberg heard Petitioner call other female officers bitch, whore, and cunt. (T. p. 100) Petitioner also uses language such as "goddamn" and "nigger."

43. She recited, from her October 2010 Statement, a particular incident in which Petitioner allegedly tried to get Officer Seay to ask her whether she would rather "jack off a double-barrel shotgun in my mouth or eat Lacy's pussy," and when Officer Seay wouldn't ask the question, that Petitioner did. Fineberg thought Petitioner was talking about Lacey, Officer Hink's wife. Officer Seay's Statement does not include any mention of Petitioner making this statement. (T. p. 115 and p.146)

44. One Sunday night, Officer Fineberg arrested a suspect on Grayson Street on a warrant. (T. p. 85) This suspect had run from her before, so she thought that he might run again. She called for backup, and asked Petitioner to come to the location. Petitioner arrived at the location after the suspect had been handcuffed. Petitioner stated to her "You're like every other female around here, you're going to keep on till you get your ass beat, like Janie did, running that mouth." He stated "You're just like Kelly and the rest of them can't wait for backup." Petitioner was referring to an occasion when another officer was beat up by a suspect. Officer Fineberg thought that Petitioner's delayed response presented an officer safety issue.

45. Officer Fineberg also heard Petitioner make harassing statements to other females in the office. In particular, she heard Petitioner call Ms. Schutz "fat ass" when Ms. Schutz was in the vicinity. In contrast, Chief Schutz indicated, at hearing, that she never worked with Officer Fineberg as she had left the Marion Police Department by 2004, and thus, it would have been impossible for Officer Fineberg to hear Petitioner make such comments. (T. p. 115 and p. 255)

46. Around 9:45 on September 26, 2010, Officer Seay responded to a call for a domestic dispute. (T. p. 122) At the time, Petitioner was located in the dispatch room watching drag racing. Officer Fineberg asked Petitioner whether he was going to back up Officer Seay, and Petitioner stated that he would back up Officer Seay. A few minutes later, Officer Fineberg noticed that Petitioner's vehicle was still in the parking

lot. Officer Fineberg left to back up Officer Seay. Petitioner eventually arrived at the domestic call. Officer Fineberg and Officer Seay testified that this incident presented an officer safety issue when Petitioner stated that he would back up Officer Seay on a domestic call, and did not back up Officer Seay. Officer Seay was at the call for approximately nine minutes before a backup officer arrived. (T. p. 123)

47. Around 3:00 a.m. on October 1, 2010, Officer Fineberg stopped a vehicle. There were three known drug users in the vehicle. Officer Fineberg prepared to search the vehicle, and her flashlight broke. Officer Fineberg called over the radio for Petitioner to come to her location. He never answered her over the radio. One of the occupants of the vehicle gave her a flashlight from his pocket, and she used that flashlight to perform the vehicle search. Officer Fineberg alleged Petitioner failed to back her up on during this traffic stop.

48. Petitioner was at a stop at the time waiting for a tow truck from Amy's tow truck company to arrive, but the individuals from Petitioner's stop were no longer present. (T. p. 126) Officer Fineberg admitted that Petitioner was on a vehicle stop with Officer Seay at the time she radioed for back up. Officer Fineberg did not believe Officer Seay left the stop with Petitioner to respond to her call. Petitioner admitted that he heard Officer Fineberg call for him. Officer Seay explained that he did in fact leave the stop with Petitioner on October 1, 2010 to assist Officer Fineberg, at the direction of Petitioner. (T. p. 115 and 142)

49. Petitioner and Amy from Amy's tow truck company had a relationship on or around October 6, 2010. (T. p. 128) Officer Seay opined that every time Amy's towing or B&B towing was called, Petitioner would stay and wait on the vehicle even through Officer Seay did not need assistance.

50. Officer Fineberg admitted that she did not know anything about Petitioner's personal life or community involvement, and that her motive in writing the October 12, 2010 report was to make sure nothing happened to Officer Seay when she left the shift. Officer Fineberg acknowledged that before October 2010, she never reported to any other supervisor that Petitioner made her feel uncomfortable (T. p. 115)

51. Officer Fineberg opined that it was not common for other officers or superiors to use the type of language that Petitioner used while on the job. (T. p. 103)

52. The documents submitted from Petitioner's October 15, 2010 disciplinary proceeding is devoid of any of these statements being cited as specific grounds for misconduct, or being admitted to by Petitioner. (T. p. 95-103). Officer Fineberg also admitted to using crude and crass language, including profanity, but stated that she did not "cross the line." (T. p. 115)

53. Officer Randy Seay acknowledged that he had only worked with Petitioner for four months before writing his October 12, 2010 Statement. Officer Seay explained that Petitioner bad mouthed other officers in the department, and did not want him to do

his job. Officer Seay stated that Petitioner called others "pieces of shit," and called pastor Bruce Ward "a piece of shit." (T. p. 121) Petitioner has also called Corporal Piercy a "fat ass" or a "lazy ass." (T. p. 121) Petitioner called Officer Seay and Officer Fineberg "stupid" if they made mistakes or did not do things his way.

54. On one occasion, Petitioner pulled over a vehicle with three underage children who all had alcohol in their system. (T. p. 136) The driver blew .06, and the two other children blew a .03 or a .04. Petitioner had the child with the lowest BAC drive his car about a mile and a half. (T. p. 137) Officer Seay thought that law enforcement officers are meant to protect the public, and that Petitioner failed to protect the public by letting them back in the vehicle to drive the vehicle. (T. p. 137) Officer Seay thought that Petitioner put other people's lives in danger. (T. p. 137)

55. Officer Seay thought that his job was on the line every night. (T. p. 138) He felt like Petitioner was always talking bad about him, and that he was walking on eggshells. He also bragged about the reasons why individuals do not work on the police force. Officer Seay stated Petitioner made inconsistent decisions as his supervisor, and that he used lewd language.

56. Officer Seay also heard other officers employed with the Marion Police Department, other than Petitioner, use profanity. Seay conceded that Seay felt intimidated by Petitioner, and felt that he would lose his job. (T. p. 140)

57. When Officer Seay was questioned as to why his October 12, 2010 Statement (Resp. Exh. 8) failed to mention the alleged comment made by Petitioner regarding "Lacy" that Officer Fineberg included in her report and testimony, Officer Seay responded "...I don't remember exactly what was said and how it was said, and I wasn't going to put something in the report that was going to be a lie." (T. p. 146)

58. Lt. Scott Spratt served as the Patrol Lieutenant for the Marion Police Department. Lt. Spratt participated in the 2010 investigation of Petitioner by gathering information from Officer Fineberg related to the investigation, and drafting the summary of Petitioner's Rules Violation, included as Respondent's Exhibit 7, with Chief Brooks. Sergeant Spratt opined it was a totality of the circumstances type of case. (T. p. 171) He thought that the more egregious statements were the ones about Officer Hink's wife. (T. p. 171) Sergeant Spratt agreed officers using crude and crass language is generally accepted within the Department; that is, "crude and crass is normal . . . that's normal to a point, but there is a line to be drawn. That line was clearly passed [with Petitioner.]" (T. p. 179)

59. Sergeant Spratt noted that the Marion Police Department issued a written warning to Petitioner on June 8, 2009. (T. p. 181) The Marion Police Department investigated Petitioner, because he was dating Amy of Amy's towing service, Petitioner was caught cheating on Amy, and there was friction between Petitioner and Amy's stepsister Kellie Duncan, who was a corporal on a shift with the Marion Police Department. Petitioners told Corporal Duncan that he could not back her up anymore,

or work with her anymore, because of his relationship with Amy, and that led to Petitioner being transferred to night shift and away from Duncan. There were other allegations of Petitioner failing to back up other officers. Failing to back up officers affects everyone, including the officers, and the public in general. (T. p. 181)

60. Lt. Spratt confirmed that Chief Brooks recommended Petitioner's termination at Petitioner's October 15, 2010 hearing. Lt. Spratt could not say what specific statements Marion Police Chief Brooks considered more highly than others during Petitioner's October 15, 2010 hearing, and he couldn't speak for Chief Brooks. Lt. Spratt also verified that Petitioner was not provided a copy of the Seay and Fineberg Statements prior to his disciplinary hearing, and explained that was Chief Brooks' decision. (T. p. 170-175) Lt. Spratt confirmed that crude and crass language was normal in the Marion Police Department, but that a line has to be drawn somewhere. (T. p. 179)

61. Lt. Spratt opined that Petitioner was a good officer that had a good heart. Spratt did not know of any deficiencies in the Petitioner's willingness or ability to back up other officers. (T. p. 173-75) Lt. Spratt thought that Petitioner had a good heart, because he saw Petitioner purchase a bicycle, with his own money, for a kid whose bike had been stolen. Petitioner had done things like this on numerous occasions. (T. p. 178)

62. In 2010, Josh Piercy served as a Corporal under Petitioner, while Piercy supervised Officer Fineberg and Officer Seay on his shift. Mr. Piercy vaguely remembered Petitioner asking the question about "Lacy," but he could not recall exactly the way it was stated. He also recalled Petitioner stating "something about getting the brown off his nose where he's been up [Officer] Fineberg's ass." (T. p. 156) Corporal Piercy remembered Petitioner telling Officer Seay that he needed to quit following Officer Fineberg around like a dog in heat. (T. p. 156)

63. Mr. Piercy believed Petitioner was a good person. Piercy acknowledged that the majority of the personnel in the Marion Police Department would cuss and carry on with each other. He was not aware of any policy that prohibited profanity, and in his opinion, the statements made by Petitioner were said in a joking manner. Mr. Piercy noted that neither Officer Fineberg nor Officer Seay ever came to him, as their supervisor on the shift, to report any misconduct or complaints related to Petitioner. (T. p. 155-159)

64. Petitioner offered the following character witnesses: Marc Edwards, Steve Hensley and Janie Schutz.

65. Marc Edwards is the Correctional Administrative Services Manager for the Marion Correctional Institution ("Marion Correctional") who handles hiring, accounting, and warehouse procedures. Edwards is responsible for keeping and storing personnel records.. Edwards reviewed Petitioner's personnel file. Petitioner's personnel file reflects that he received exemplary evaluations, which included "good" and "very good" ratings by his supervisors, while employed with Marion Correctional (Pet. Exh. 1). Mr.

Edwards indicated there was no evidence of substandard work performance by Petitioner, and no disciplinary action taken against Petitioner while he was employed at Marion Correctional. Mr. Edwards confirmed that Petitioner was recently terminated from Marion Correctional for failure to obtain his certification from Respondent, but that Petitioner would be eligible for employment with Marion Correctional if he were to receive his certification. (T. p. 198)

66. Janie Schutz is the Chief of Police for Forest Grove Police Department who traveled from Oregon to testify in this matter, because she is a firm believer of Petitioner. Chief Schutz has known Petitioner since 1994. She left the Marion Police Department in 2003, and never worked with Officer Fineberg. Chief Schutz worked the same shift with Petitioner while employed at Marion Police Department. She has never known Petitioner to fail to back up any other police officer, and in fact, Petitioner backed her up on many occasions. Chief Schutz explained how Petitioner helped saved her life in September 2003 after she was seriously assaulted at gunpoint on a stop. Petitioner was the first one on the scene. Chief Schutz also explained that Petitioner saved the life of another female Marion Police Officer after quickly responding to a burglary with an operational meth lab. Petitioner risked his own life to get the female officer out of the house. (T. p. 250, 255, 256-262)

67. Chief Schutz witnessed Petitioner act very professional in speaking to victims, and always conducted thorough investigations. Chief Schutz heard Petitioner use inappropriate language within the Department, but that was part of the culture of the Department and generally accepted. Chief Schutz reported that when she was employed with the Marion Police Department she even heard Lt. Spratt use crude language. She opined that while using crude language may not be appropriate, it is a way officers handle stress. (T. p. 262)

68. Chief Schutz also detailed a number of other representative examples of Petitioner's good character, as reflected in her recommendation letter to the Respondent; particularly, Petitioner's willingness to help neighbors and assist his elderly parents. (Pet. Exh. 3).

69. Steve Hensley has known the Petitioner since 1988, and worked with the Petitioner at the McDowell County Sheriff's office and the Marion Police Department. Mr. Hensley opined that Petitioner was an honest person. Hensley never heard any complaints from other officers that the Petitioner failed to back them up. Mr. Hensley acknowledged that all officers use crude and crass language. Mr. Hensley worked with Officer Fineberg, but never heard her express any complaints about Petitioner until this matter. (T. p. 234-246).

70. At hearing, Petitioner explained that he misread the question on the Form F-5A about his drug usage, and that error was an oversight. Petitioner never worked in Rutherford County, and thought that Rutherford County held his certification as inactive. His failure to list the word "Marion" in front of "Police Department" was an oversight.

71. At hearing, Petitioner opined that he is an honest person, and that he goes out of his way to help other people. He has never been arrested or convicted of any crime, and has never been terminated from a position. Petitioner disputed the allegations that were brought to his attention in 2010 when he worked at the Marion Police Department. At his October 15, 2010 disciplinary hearing with Chief Brooks, Petitioner was not afforded a chance to read the Seay and Fineberg Statements, or refute any of the allegations in writing. Neither Brooks nor Lt. Spratt read or reviewed Seay and Fineberg Statements at the October 15, 2010 hearing. Petitioner explained that Chief Brooks and Lt. Spratt just read the Violation Codes during the 10-minute hearing. At the time of his 2010 disciplinary hearing with the Marion Police Department, Petitioner was not advised that his law enforcement certification could be revoked or suspended because of the alleged misconduct at the Marion Police Department. (T. p. 198-201)

72. Petitioner disagreed that he failed to back up fellow officers on two different occasions, and stated that he responded to both calls. Petitioner was shocked to learn, on the evening of October 14, 2010, that he would be subject to a disciplinary hearing, because he was never asked by any officer within the Marion Police Department to refrain from using crude or crass language, and was never reprimanded for the use of such language before his disciplinary proceeding. Petitioner explained that just about everybody at the Marion Police Department, including Officer Fineberg and Seay, joked and cussed with each other. That kind of language was a day-to-day thing that occurred. (T. p. 203-204, 207-208)

CONCLUSIONS OF LAW

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

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

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

4. 12 NCAC 09G .0504(b)(2) states:

The Commission may, based on the evidence for each case, suspend, revoke, or deny the certification of a corrections officer when the

Commission finds that the applicant for certification or the certified officer . . . (2) fails to meet or maintain one or more of the employment standards required by 12 NCAC 09G .0200 for the category of the officer's certification or fails to meet or maintain one or more of the training standards required by 12 NCAC 09G .0400 for the category of the officer's certification[.]

5. 12 NCAC 09G .0505(c)(1) states:

When the Commission suspends or denies the certification of a corrections officer, the period of sanction shall be for an indefinite period, but continuing so long as the stated deficiency, infraction, or impairment continues to exist, where the cause of sanction is . . . (2) failure to meet or maintain the minimum standards for certification.

6. 12 NCAC 09A .0204(b)(2) states:

The Commission may suspend, revoke, or deny the certification of a criminal justice officer when the Commission finds that the applicant for certification or the certified officer . . . (2) fails to meet or maintain one or more of the minimum employment standards required by 12 NCAC 09B .0100 for the category of the officer's certification or fails to meet or maintain one or more of the minimum training standards required by 12 NCAC 09B .0200 or 12 NCAC 09B .0400 for the category of the officer's certification[.]

7. 12 NCAC 09A .0205(c)(2) provides:

When the Commission suspends or denies the certification of a criminal justice officer, the period of sanction shall be for an indefinite period, but continuing so long as the stated deficiency, infraction, or impairment continues to exist, where the cause of sanction is . . . (2) failure to meet or maintain the minimum standards of employment[.]

Material Misrepresentation

8. 12 NCAC 09G .0504(b)(6) provides that the Commission may deny licensure of any applicant when the Commission finds that the applicant for certification or the certified officer has knowingly made a material misrepresentation of any information required for certification or accreditation.

9. 12 NCAC 09G .0505(b)(5) states:

When the Commission suspends or denies the certification of a corrections officer pursuant to 12 NCAC 09G .0504 of this Section, the period of sanction shall be not less than three years; however, the

Commission may either reduce or suspend the period of sanction under Paragraph (c) of this Rule or substitute a period of probation in lieu of suspension of certification following an administrative hearing, where the cause of sanction is

(5) material misrepresentation of any information required for certification or accreditation[.]

10. 12 NCAC 09A .0204(b)(6) states:

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

(6) has knowingly made a material misrepresentation of any information required for certification or accreditation[.]

11. 12 NCAC 09A .0205(b)(4) provides that when the Commission suspends or denies the certification of a criminal justice officer, the period of sanction shall be not less than five years. However, the Commission may either reduce or suspend the period of sanction under Paragraph (b) of this Rule or substitute a period of probation in lieu of suspension of certification following an administrative hearing, where the cause of sanction is material misrepresentation of any information required for certification.

12. In this case, Respondent presented evidence that Petitioner made a misrepresentation regarding his prior illegal drug use on his original Form F-5A application. However, the preponderance of the evidence presented at the hearing established that Petitioner did not knowingly or intentionally make this misrepresentation to Respondent in connection with his Form F-5A correctional officer application, because he admitted to marijuana use on at least four other Forms submitted to Respondent. Additionally, the evidence at hearing showed that the Respondent's forms used inconsistent questions regarding the applicant's prior "illegal drug use" and "marijuana use" and that Petitioner promptly revised his response when the inconsistency on his Form F-5A, as compared to his previous responses on his Form F-3s, was brought to his attention.

13. The preponderance of the evidence established that Petitioner did not make a material misrepresentation to Respondent by failing to list the word "Marion" before the listed words "Police Department," and by failing to list "Rutherford County Sheriff's Department" as prior law enforcement certification on his correctional officer application. In addition, Petitioner truthfully answered "yes" in response to the question as to whether he had ever held law enforcement certification.

Lack of Good Moral Character

14. 12 NCAC 09G .0206(6) provides that every person employed as a

correctional officer shall demonstrate good moral character by "being truthful in providing all required information as prescribed by the application process."

15. 12 NCAC 09B .0101(3) states:

Every criminal justice officer employed by an agency in North Carolina shall . . .

(3) be of good moral character pursuant to G.S. 17C-10 and as determined by a thorough background investigation[.]

16. Pursuant to N.C. Gen. Stat. 17C-10, every criminal justice officer employed by an agency in North Carolina shall be of good moral character. That statute states in pertinent part:

In addition to the requirements of subsection (b) of this section, the Commission, by rules and regulations, shall fix other qualifications for the employment, training, and retention of criminal justice officers including minimum age, education, physical and mental standards, citizenship, good moral character, experience, and such other matters as relate to the competence and reliability of persons to assume and discharge the responsibilities of criminal justice officers, and the Commission shall prescribe the means for presenting evidence of fulfillment of these requirements.

17. Pursuant to 12 NCAC 09A .0204(b)(2), Respondent may suspend, revoke, or deny the certification of a criminal justice officer when the Commission finds that the applicant for certification or the certified officer fails to meet or maintain one or more of the minimum employment standards required by 12 NCAC 09B .0100 for the category of the officer's certification.

18. Good moral character is defined as "honesty, fairness, and respect for the rights of others and for the laws of the state and nation." *In re Willis*, 288 N.C. 1, 10 (1975).

19. Whether an applicant is of good moral character is seldom subject to proof by reference to one or two incidents. Good moral character is something more than the absence of bad character. *In the Matter of David Henry Rogers, Applicant to the 1975 Bar Exam*, 297 NC 48; SE 2d 912 (1979) (reversing judgment of the lower courts on the basis that the applicant's moral character was based on two incidents and the applicant denied involvement in either incident, the board made no finding of fact that the applicant was involved in either incident, and merely recited its evidence presented and stated its conclusion that the applicant had not satisfied the board of his good moral character.)

20. An applicant for admission cannot be denied on the basis of suspicion or

accusations alone. Further, an applicant may only be able to meet a charge of wrongdoing only with his denial. *Id.*, 297 NC at 58.

21. At hearing, Petitioner produced evidence that he was honest and truthful in responding to his prior criminal justice certifications. Petitioner showed by a preponderance of the evidence that he mistakenly checked "no" in response to his prior marijuana use on the subject Form F5A, as evidenced by Petitioner truthfully disclosing his prior marijuana usage on a number of other Forms that Petitioner completed and submitted to Respondent.

22. With respect to the alleged misconduct that occurred while Petitioner was employed with the Marion Police Department, it is unclear from the record which allegation contained in Officer Seay's and Officer Fineberg's Statements were actual Rule Violations, and the extent to which these Statements were considered during Petitioner's October 15, 2010 Marion Police Department disciplinary conference.

23. The undisputed evidence presented by both parties was that Petitioner denied making many of the alleged comments, was not afforded an opportunity to review Seay and Fineberg's Statements before his hearing with Marion Police Chief Brooks, and was not afforded an opportunity by Chief Brooks to respond in writing to all such allegations. Since Petitioner resigned, he was not actually terminated due the alleged Rule Violations.

24. The preponderance of the evidence established that Petitioner's crass or crude language was consistent with language within the Marion Police Department as other officers within the Department frequently participated in using crude and crass language. Assuming Petitioner's language was as crass and crude Officer Seay and Fineberg alleged, Petitioner did not receive a warning or reprimand, prior to his disciplinary hearing on October 15, 2010, for using the alleged crude and crass language. Furthermore, Petitioner produced evidence of motive as to why Officer Fineberg and Officer Seay produced the statements. Petitioner also produced consistent testimony from other witnesses that Petitioner possessed good moral character, and conduct as a law enforcement officer.

25. Respondent failed to prove by a preponderance of the evidence that Petitioner lacks good moral character. The preponderance of the evidence presented at the hearing establishes that Petitioner possesses good moral character that is required of certified law enforcement officers and correctional officers.

26. Given the preponderance of the evidence presented at the administrative hearing, the undersigned concludes that Petitioner possesses the good moral character that is required of law enforcement and correctional officers in this State for the reasons set out herein.

27. In light of the evidence presented and the testimony of the witnesses at the administrative hearing, Respondent's proposed denial of Petitioner's correctional

officer certification, and proposed suspension of his law enforcement certification is not supported by a preponderance of the evidence.

PROPOSAL FOR DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby recommends that the Respondent certify Petitioner as a correctional officer, and not suspend Petitioner's law enforcement certification.

NOTICE

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

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

This 27th day of May, 2014.



Melissa Owens Lassiter
Administrative Law Judge

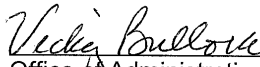
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **PROPOSAL FOR DECISION** was served upon the following persons by depositing same in the U.S. Mail, prepaid postage and addressed as follows:

Allison Pope Cooper
Bailey & Dixon, LLP
P.O. Box 1351
Raleigh, North Carolina 27602-1351
ATTORNEY FOR PETITIONER

Catherine F. Jordan.
Assistant Attorney General
N.C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001
ATTORNEY FOR RESPONDENT

This the 29th day of May, 2014.


Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699

STATE OF NORTH CAROLINA

BEFORE THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 OSP 10036/11386

COUNTY OF WAKE

ANTONIO ASION,

Petitioner,

v.

NC DEPARTMENT OF
PUBLIC SAFETY, et. al.,

Respondent.

FINAL DECISION

This matter was heard before the Honorable Donald Overby, Administrative Law Judge,
on January 21-23, 2014 at the Office of Administrative Hearings in Raleigh, North Carolina.

APPEARANCES

Petitioner: Michael C. Byrne
Law Offices of Michael C. Byrne
150 Fayetteville Street, Suite 1130
Raleigh, NC 27601

Respondent: Tammera S. Hill
Assistant Attorney General
Post Office Box 629
Raleigh, NC 27602

WITNESSES

Called by Petitioner: None (Petitioner called during Respondent case in chief).

Called by Respondent: Antonio Asion, Benjamin Franklin, LaShanda Langley, Timothy Harrell,
Gerald Rudisill, Jeffrey Holmes

EXHIBITS

Petitioner placed the following exhibits into the record:

Petitioner's exhibits Numbered 3, 6, and 8

Respondent placed the following exhibits into the record:

1. Respondent's 1: Investigatory Placement Memo
2. Respondent's 2: Memo to Col. Bell requesting investigation
3. Respondent's 3: Petitioner's statement
4. Respondent's 4: Sgt. Franklin's statement
5. Respondent's 5: Transcript of Petitioner's interview
6. Respondent's 6: Transcript of Sgt. Franklin's interview; hearsay excluded
7. Respondent's 7: Transcript of Lashanda Langley's interview
8. Respondent's 8: Transcript of Sgt. Franklin follow up interview
9. Respondent's 9: Transcript of Petitioner's follow up interview; hearsay excluded
10. Respondent's 10: Transcript of Sgt. Franklin's 2nd follow up interview; hearsay excluded
11. Respondent's 11: Financial Review; conclusory statements excluded, appropriate weight given
12. Respondent's 12: Report of Investigation
13. Respondent's 13: SCP Secondary Employment Policy
14. Respondent's 14: N.C.G.S. 143B-900 (by judicial notice)
15. Respondent's 16: Excerpt of SCP policy manual
16. Respondent's 17: Notification of Pre-disciplinary Conference (PDC); (Stipulated to by Petitioner)
17. Respondent's 18: Petitioner's response to PDC; (Stipulated to by Petitioner)
18. Respondent's 19: PDC transcript; (Stipulated to by Petitioner)
19. Respondent's 20: Dismissal memo; (Stipulated to by Petitioner)
20. Respondent's 21: Appeal to Secretary; (Stipulated to by Petitioner)
21. Respondent's 22: Employee Advisory Committee Report; (Stipulated to by Petitioner)
22. Respondent's 23: Decision of Secretary; (Stipulated to by Petitioner)
23. Respondent's 24: Aimee Fields letter

PRELIMINARY MATTERS

1. Petitioner made a motion to exclude witnesses from the hearing room, which the Court granted.
2. Petitioner made a prehearing motion to exclude from evidence all evidence supporting a dismissal that was not cited in the dismissal letter given to Petitioner as required by law, specifically N.C.G.S. 126-35(a). The Court took this motion under advisement and reserved ruling until such time as any particular issue might arise during the course of testimony.

ISSUE

Whether Respondent had just cause to dismiss Petitioner for unacceptable personal conduct.

BURDEN OF PROOF

The burden of proof is on the Respondent to show by the greater weight of the evidence that it had just cause to dismiss Petitioner for disciplinary reasons for unacceptable personal conduct.

PARTY REPRESENTATIVES

The Petitioner's party representative was Petitioner Antonio Asion. The Respondent's party representative was Lt. Jeffrey Holmes of the North Carolina State Highway Patrol.

FINDINGS OF FACT

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

1. Petitioner Antonio "Tony" Asion is a career status employee of Respondent North Carolina Department of Public Safety, State Capitol Police ("SCP"). T. 10. Petitioner was hired by SCP as the deputy chief in August 2012 by Gerald Rudisill, for Deputy Secretary of the Department of Public Safety ("DPS"). At the time Petitioner was hired by DPS, he was working as a Special Agent with the North Carolina State Bureau of Investigation. T. 10. During Petitioner's time with the SBI, he had received no disciplinary action of any kind. T. 100.

2. Prior to moving to North Carolina, Petitioner was employed with the Delaware State Police for 20 years, retiring as a Lieutenant in good standing with that agency. T. 12, 98-99. The mission of the Delaware State Police is both highway safety and criminal investigation, combining the basic missions of what in North Carolina are the Highway Patrol and the SBI. T. 13, 98.

3. Petitioner was hired as Deputy Chief by Gerald Rudisill in August 2012. At the time he was hired, then-Chief Scott Hunter was seriously ill and unable to work. Within a short time of being hired, Petitioner began serving as the acting chief of SCP. T. 13

4. Chief of the SCP, Scott Hunter, passed away in September 2012. T. 13. This was approximately a month after Petitioner was hired. At or about this time, Rudisill named Petitioner as Interim Chief of the SCP. T. 101. Rudisill told Petitioner at the time of this appointment that he was doing a “great job” and he wanted Petitioner to serve as interim chief. T. 101.

5. Because of the rapid series of events, Petitioner had moved very quickly and unexpectedly into the job as Chief of SCP. He had had little to no instruction of what was expected of him. Rudisill had told him to rely on the experience that he brought to the job, especially his experience with the Delaware State Police. T. 15. While the SCP had a policy manual, Petitioner could not recall whether he consulted it in whole or in part. T. 16-17. The administrative assistant who had served under Chief Hunter left SCP shortly after Chief Hunter passed away. Petitioner relied primarily on his more experienced sergeants for advice on day to day practices and policies. T. 17-18.

6. Petitioner met with Rudisill on approximately a weekly basis and spoke to him on other occasions by telephone. Petitioner’s discussions with Rudisill consisted primarily of budgetary matters. T. 18. As to day to day operations and standard practices within the SCP itself, Petitioner tended to rely more on his experienced subordinates within the SCP than on Rudisill. T. 18-19.

7. When Petitioner took over the SCP, the force was suffering from low morale, which concerned the Petitioner. T. 102-103; 215. Petitioner felt that the morale of the officers was very important within a department because it affects how well officers respond, how they perform their work, generally how good an officer they are. T. 103.

8. Different factors contributed to the low morale, including significant budget cuts that reduced the department by fifty percent, and the death of Chief Hunter. T. 103-104. Other factors were poor equipment, the lack of crime books, gloves, and first aid kits. Even their bulletproof vests were expired. T. 104. The issue of the vests was of particular concern to Petitioner because it concerned officer safety and there was no money available to replace the expired bulletproof vests. T. 104-105.

9. A significant factor in this low morale was the low pay received by SCP officers. SCP officers were the lowest paid law enforcement officers within the state government structure, and they were aware of it. T. 106-107. The General Assembly had imposed a freeze, which meant SCP officers were not permitted to be paid overtime. T. 106. One of the issues addressed by Petitioner when he became interim chief was the issue of additional employment opportunities for SCP officers. T. 102-103.

10. When he was hired as interim chief, Petitioner immediately took steps to improve morale. This included soliciting input from officers as to equipment they needed and obtaining grants to provide some of the more critical equipment. T. 108. The General Assembly sets the SCP officer’s pay, and therefore Petitioner was unable to increase their incomes. Likewise the officers were prohibited from earning overtime income from SCP. T. 108. To address the low

pay issue and its effect on morale Petitioner sought additional employment opportunities for SCP officers, particularly "off duty" employment. T. 102-103, 108-110.

11. SCP policies permit officers in that unit to have both "off-duty" employment and "secondary" employment, which are set out in the policy as two entirely separate and distinct entities. R. Ex. 13. The policy acknowledges the distinction by stating "This policy shall apply to both secondary and off-duty employment." R. Ex. 13, p. 110. (Emphasis added)

12. "Secondary employment" in both policy and practice meant employment by an individual officer by a third party. T. 21. This did not have to be law enforcement related, or related to his/her work with SCP in any regard. T. 21. The method of obtaining this secondary employment involved an officer filing a form which would then go up through the chain of command for approval, being authorized by, among others, Rudisill. T. 21. If approval was given, the SCP would have no further involvement in the secondary employment and would neither handle it administratively nor schedule it. The officer performing such employment would not be in SPC uniform. The evidence was that Petitioner more than once sent requests for secondary employment up through the chain of command for approval.

13. "Off-duty" employment is set out in a separate paragraph in the Policy entitled "Off-Duty Law Enforcement Employment." (Emphasis added). "Off-duty" employment was employment for a third party that was sanctioned by the SCP, and which the officers did while in uniform. T. 19. The policy specifically addresses using SCP issued firearms in "off-duty" employment. At the time Petitioner was hired, SCP officers were working "off-duty" employment at various times for weddings, receptions, and events at Museums such as the Museum of Natural History's "Bugfest" festival and the North Carolina Museum of History.

14. At the time Petitioner was hired, "off-duty" work was at buildings within the state government complex, T. 24. The policy does not restrict such employment to state buildings. T. 24, T. 113. In the past SCP officers had worked off-duty employment at private facilities such as the Peace College and the Cardinal Club. T. 210. These events occurred as recently as the year before Petitioner was hired. T. 227. Sgt. Benjamin Franklin testified that prior to Petitioner's arrival SCP previously had off-duty assignments at car lots, bowling alleys, the homeless shelter downtown and a "Hispanic club". T. 235. Franklin had informed Respondent of these past assignments prior to Petitioner being dismissed. T. 235, R. Ex. 10. Likewise, Petitioner had been informed of the "off duty" assignments in other than governmental sites.

15. At the time Petitioner became chief, SCP officers were not being paid through the SCP for off duty employment. The individual officers were being paid individually by the entities themselves. T. 110. The SCP had no way of keeping track of when, how often, and how much an individual officer was getting paid or whether all officers were getting paid the same. T. 111. In fact, the SCP had no involvement in the payment process at all. T. 110-111.

16. The Natural History Museum was a significant part of the SCP off-duty work at the time Petitioner joined the force. The SCP officers were not being paid with State funds for work performed at the Natural History Museum. T. 109. Rather, a non-profit group known as Friends of the Museum paid the individual officers.

17. The manner in which the “off duty” employment was being handled at the time Petitioner became interim chief caused the Petitioner concern. T. 110. In addition to the lack of oversight by SCP provided by this system, there was no way to ensure that the officers were getting IRS form 1099s and other tax information properly. T. 112. Officers were also not being paid promptly. T. 110-111.

18. Petitioner learned that under Chief Hunter’s administration, the Chief’s administrative assistant scheduled off-duty assignments during business hours on state time during her eight hour shift. T. 116, 209. The state derived no benefit from the off-duty assignments. Petitioner thought the practice of compensating a state employee with state funds for work that brought no benefit to the state was inappropriate. T. 116.

19. Petitioner was looking for ways in which to benefit the officers with off duty work, and wanted to replace the inappropriate manner in which the work was being scheduled with a proper system. Petitioner wished to (a) increase oversight of the process, (b) avoid using state time for scheduling the off-duty assignments, and (c), obtain compensation for use of SCP vehicles for such assignments.

20. SCP vehicles were sometimes used for off duty assignments. T. 88. The State was not compensated in any way for the use of these vehicles. The gas, insurance, wear and tear, and other expenses caused by the use of these cars for the third parties were not being compensated in any fashion. T. 89-90, 109, 280. At the time Respondent dismissed Petitioner, Respondent had been informed through the internal investigation that SCP vehicles were used without compensation at off-duty events prior to Petitioner becoming interim chief. T. 234-235, Respondent’s Exhibit 10.

21. Accordingly Petitioner made several changes to the program. Petitioner’s authority for making these changes was the SCP policies and procedures giving authority regarding off-duty employment issues to the Chief. T. 117; R. Ex. 13. Petitioner was never told or directed to any policy or rule contradicting his interpretation of the policy that, as Chief, he was in charge of off-duty employment issues. T. 117. There is no evidence to the contrary. See, e.g. T. 213; 400-401.

22. Under the new system institute by Petitioner, SCP charged third parties an hourly fee for the officers provided, as well as a fee for any vehicles used (\$8.50 per hour per vehicle) and a \$1 administrative fee.

23. Lashonda Langley, who previously did the off-duty scheduling, no longer wished to do the scheduling when Petitioner told her she could no longer do that work during business hours and on state time. T. 121, 273. Langley did not want to work any longer than her eight hour shift. T. 274.

24. Respondent contends that it was alright for the scheduling to be done during on-duty time. In other words, it was an acceptable practice to use state government time to schedule the off duty employment of the officers, which offers no benefit to the state government. The

policy for “secondary employment” even states that the secondary employment may be revoked for the “use of state time and/or resources for the benefit of secondary employment.” R. Ex. 13. Respondent’s position is totally untenable.

25. While Langley implied that the special duty fund was a reason she left the SCP, this was untrue. She wanted to leave SCP even before this matter arose and was already looking for another job even while Chief Hunter was alive. T. 268-269. While Langley said she was uncomfortable about the new practices, she did not bring these concerns to the attention of Petitioner. T. 275-276. Langley’s testimony was not credible.

26. When Langley expressed that she did not want to do the work after hours and on her time, Petitioner asked Sgt. Benjamin Franklin to coordinate the off-duty assignments. Franklin had previously coordinated and scheduled these assignments for some period of time under the previous chief. T. 170.

27. Under Petitioner’s new system, Franklin coordinated assignments, made bank deposits, took the funds, and wrote checks to the officers. T. 175. Franklin did all of this work off-duty. Franklin was paid one dollar per man-hour worked. T. 174; T. 176. Franklin was paid approximately \$700 for this work from the administrative fee. The hiring entity paid a one-dollar per hour administrative fee and that money was used to compensate Franklin. No monies due to officers were used to compensate Franklin for this work.

28. Prior administrations did not pay the scheduler for doing that work because they were doing the non-state function of scheduling off duty employment on state time.

29. To handle oversight of the off duty money, Petitioner set up a bank account called the SPC Special Duty Fund. T. 117. This was the same method of handling off-duty monies that he had used at the Delaware State Police. T. 117. When he was hired at SCP he was told by Rudisill to use his experience, including and perhaps especially from Delaware, to make the SCP better. T. 119.

30. Petitioner was aware that the Museum of Natural History had used a non-profit to pay SCP officers for off-duty work at their events both before and during his tenure with SCP. T. 118. Petitioner contends that he was setting up a non-profit to run the money through; however, little to nothing had been done to accomplish that objective prior to his termination, even though he had sufficient time to have at least made good faith efforts to accomplish that goal. There was no non-profit in existence for this purpose at the time he was terminated. Petitioner did obtain a tax ID number from the Internal Revenue Service.

31. The great bulk of the funds in the Special Duties Fund were paid to the officers themselves. Petitioner personally received no funds from the special duty bank account. T. 119.

32. There was a sum collected from the vehicle usage fees that Petitioner used for various programs that he considered to the benefit of the agency. Petitioner originally planned to use these funds for putting stripes on new SCP vehicles, funds which had not been budgeted, these vehicles had not arrived. Petitioner authorized use of some funds to (a) subsidize a

department Christmas party to boost morale, (b) purchase one (1) meal for a retiring officer and his spouse, (c) purchase a bunch of flowers for a SCP officer who had had a double mastectomy, (d) purchase coffee on one (1) occasion for a sergeant's exam, and (e) purchase sweatshirts for rookie officers who had not been provided with uniforms so that they could perform their duties in clothing that identified them as SCP officers. There was no evidence that any of these funds were used for anything other than things which benefitted SCP.

33. The money collected as vehicle use fees was not repaid to the State of North Carolina. The money was commingled with non-state money which was for the use and personal benefit of the officers of SCP who had worked off duty.

34. Under predecessor administrations, no money was collected for the use of state-owned SCP cars by private, non-state functions such as security.

35. Petitioner's efforts at improving morale, such as the Christmas party, did work to improve the morale of the SCP force. T. 214. Petitioner's leadership was described by Franklin as being fairer, more open, more reasoned, and less authoritarian than his predecessor. T. 214-215.

36. As with the previous off-duty funds paid to SCP officers by third parties, these payments were not run through the State's BEACON system. Prior to Petitioner's changes to the off-duty program, when SCP officers were working at the North Carolina State Fair, there was an attempt to run these payments through BEACON and SCP was informed that this could not be done. There was no evidence presented that Petitioner's actions with the Special Duty Fund, any more than the previous system, was an attempt to "circumvent" the BEACON system as eventually alleged by the Respondent.

37. While the SPC policies on off-duty employment stated that officers could not coordinate off duty employment for a fee, both Petitioner and Benjamin were not aware of this policy. Benjamin testified that the other sergeants were not aware of it, either. T. 172- 173. During the time that Benjamin had been employed with SCP, the actual practices used by the department were very fluid and subject to change according to whomever was in charge of the program at a given time. T. 208. Franklin believed that this policy was intended to prevent officers from profiting at the expense of other officers for arranging off duty assignments. T. 221. Previously the scheduling was being done on state-time for non-state work, an obvious abuse of state resources.

38. In addition to wanting to change the system, Petitioner wanted to increase the number of off-duty work opportunities for SCP officers. One of these opportunities was at an establishment called "Brazilian-Ecuadorian-Dance-Club," or "Club BED". In order to open this establishment, it had received approval from both ABC and the Raleigh Police Department. At the time SCP provided security to Club B-E-D, the club was legally licensed to operate. T. 439.

39. From the totality of the evidence presented in this case it is obvious that the Petitioner's agreement to provide security to Club BED was the catalyst for his termination. All

allegations contained in the pre-dismissal letter, which are adopted by reference in the dismissal letter, are relative to the work at the Club BED.

40. The investigation was initiated by Rudisill after he was informed of a letter from Aimee Fields written on January 30, 2014. It is not clear from the letter to whom the letter was originally addressed, although it is believed that it went to Human Resources and then to Rudisill. Fields did not testify in this hearing. While her letter confirms some contentions of how things were handled in the past and that indeed there had been off-site and non-state functions where she had worked, the primary reason for the letter was to complain about the work at Club BED. R. Ex. 24.

41. When Rudisill learned of the security being provided at Club BED, he placed Petitioner on leave and ordered an investigation. T. 365. Rudisill asked the Highway Patrol to investigate, which it did.

42. Petitioner's decision to provide security to Club BED is the basis for his termination as articulated in the myriad of reasons articulated in the pre-dismissal letter. One of the stated reasons is that Raleigh Police Department responded to 14 calls for service during the time that SCP was providing security to Club BED. There is no evidence to support that contention. In fact, the evidence is that RPD did not respond to the location at any time while SCP was there, even when there was a "shot's fired" report.

43. There is no credible evidence to support Respondent's contention of the reputation of Club BED for a history of violence to the point that the Raleigh Police Department and Wake County Sheriff's Department refused to provide service to the Club. The only evidence provided was hearsay upon hearsay with no substantiation. No one from either agency testified at the hearing.

44. Assuming *arguendo*, however, that there was a history of some violence at the club, it makes no sense that a police agency should be forbidden from providing security to such a business. Common sense would seem to dictate that police presence would lessen the bad behaviors associated with the club. To say that security should not have been offered at all is to acknowledge that the lawlessness prevails and that a police agency should not attempt to enforce the laws, an inconceivable position for law enforcement agency to take. Apparently either Raleigh was offering service and quit and Wake Sheriff's Office took over—or the converse is true. Either way, one picked up after the other with apparent knowledge—rhetorically, why should SCP be held to a different standard?

45. While working at Club BED, SCP officers were involved in only two arrests during their approximate four months working at the Club. Both of these arrests would have resulted in Use of Force reports being sent up the chain of command to the attention of DPS management. The credible evidence is that Petitioner did indeed report those incidences to Mr. Rudisill who did not bother to read them. Respondent's contention to the contrary is not supported by credible evidence.

46. Respondent's contention in the dismissal letter that Petitioner failed to report up the chain of command the fact that ABC Commission had requested information from him is without merit. There is no evidence of any policy of any sort which specifies what is to be reported to superiors. In this instance, Petitioner is the Chief—the superior for the department. As the Chief he assumed the role of supervisor, and a test of reasonableness would show that he should not be expected to report up everything that went on. Many things would fall on his shoulders to decide without the necessity to go to his superiors for every decision, especially for giving reports to a sister agency which would seemingly be a routine matter of course. With no clear delineation of what is to be reported up, how can the Chief be faulted for not reporting anything. From the looks of the dismissal letter he was supposed to report everything to Rudisill, making him a mere conduit for decision-making. As is borne out by Rudisill's testimony, Rudisill had no real clue what was happening at the agency anyway.

47. Rudisill made the decision to dismiss Petitioner. Rudisill was in charge of SCP, among other things, and, therefore, Rudisill became Petitioner's direct supervisor when he became Chief. T. 359, 361.

48. DPS/Rudisill also ordered an audit of the Special Duties fund. DPS asked a financial officer, Timothy Harrell, to do the audit. Harrell testified at the hearing that he was requested by "senior management" to look at the special fund. Deputy Director Benny Akins and Secretary Young had made the request.

49. Harrell began his audit with the assumption that Petitioner's off-duty assignments were "unauthorized". At hearing, he stated that this was based on "approval from management". T. 332-333. It was obvious from Harrell's testimony that "management" had given him a certain set of parameters to review and he was not to go outside that box. He put his blinders on and went to work.

50. Harrell neither read nor considered the SCP Secondary Employment Policy in the course of conducting his audit. T. 333. Instead, Harrell simply accepted the contention of management that the assignments were "unauthorized". T. 333. Harrell was not aware that the policy provided that off duty employment was under the auspices of the Chief.

51. Harrell confirmed that the great bulk of the funds in the Special Duty Account were not "state funds" but rather were funds paid to the officers for the off duty assignments. T. 335. He acknowledged that at most approximately one-eighth of the money in the account was "state" money from the use of the state vehicles.

52. In conducting his audit, Harrell made no attempt to learn or understand how the off-duty assignments were handled prior to Petitioner becoming interim chief. T. 336. For example, Harrell was unaware that prior to Petitioner's change in the system, private parties were getting the use of state vehicles for free. T. 336-337. When asked whether that would create or raise a question in his mind, Harrell replied, "Yes". T. 336-337; 349.

53. Harrell was present during Franklin's interview in which the provision of state vehicles for free was discussed. T. 337-338; 340; P. Ex. 6. When shown the specific portion of

the Franklin interview that confirmed the free vehicle usage, Harrell then confirmed that he heard that information. T. 340. Harrell then claimed that the information had not been “verified”. T. 341. There is no indication that anything that Harrell relied on was “verified.”

54. In response to questions from the Court, Harrell confirmed that the Special Duty Account was able to be reconciled and that all the monies were accounted for going in and out. T. 345-346.

55. In response to questions from the Court, Harrell admitted that providing free automobiles on off-duty assignments and scheduling off duty assignments on state time, both of which occurred under the previous system and both of which were eliminated by the Petitioner, were things that would be of concern to DPS. T. 354-355.

56. Harrell confirmed (in response to questions from the Court) that DPS management’s main concern was that Petitioner had been providing security to Club BED, a Hispanic dance club. T. 352-353.

57. Rudisill received a copy of the investigation from the State Highway Patrol, including all the witness interviews. T. 368. He read it twice. T. 368. After reading the investigation report and witness interviews, Rudisill decided to issue a pre-dismissal letter to Petitioner. T. 369.

58. The pre-dismissal letter to Petitioner contains the enumerated allegations which were adopted by reference in the dismissal letter and thus the basis for Petitioner’s termination. Many of the allegations involve activities that were initiated and conducted for years under the supervision of Petitioner’s predecessor, some of which have been discussed above. Others, for instance:

a. Petitioner is faulted for using state vehicles for off-duty assignments. The evidence shows that this practice was used under Petitioner’s predecessor, the late Chief Hunter. The state was not compensated at all under Chief Hunter for use of these vehicles, thus allowing the third parties use of the vehicles for free.

b. Petitioner is faulted for failing to use written contracts with third parties for off-duty work. Prior to Petitioner becoming interim chief, at no time did SCP use written contracts with third parties to whom they were providing off-duty services. T. 212-213; 237, 268. Franklin was asked about this issue more than once during the internal investigation; accordingly, DPS knew that written contracts had not been used under Chief Hunter. This information was in the report given to Respondent at the time it decided to dismiss Petitioner. T. 212-213. Rudisill admitted that this information was available to him at the time he dismissed Petitioner, at least in part, because he violated policy by failing to do written contracts. Rudisill stated that it was a “surprise” to him that no one had ever used written contracts before, including Chief Hunter.

c. Petitioner is faulted for not using worker’s compensation forms for off-duty work. Petitioner assumed that worker’s compensation would cover all work done in uniform under the

auspices of SCP. Franklin believed the same. T. 218. While the off-duty policy references worker's compensation forms, these forms were likewise never used or required for off-duty work under Chief Hunter. T. 217-218; 237, 267-268.

Rudisill admitted that he had access to the policies yet never checked them. The evidence is that the worker's comp forms have never been used, and have not been used since Petitioner's termination, even to the very day of hearing.

Respondent acknowledges that Petitioner asked Chief Hunter about use of the worker's comp forms, but implies that asking the Chief once was not enough. Rhetorically, how many times should he have to ask his Chief the same question.

d. Petitioner is faulted for not "checking out" Club BED or getting permission to do off-duty work there. However, there was no evidence presented that checking out the club or obtaining prior permission was either required by policy or had been practiced in the past. No evidence was presented of any rule or policy that would have barred Petitioner from permitting SCP officers to work at Club BED even if these other agencies had declined to do so.

59. Respondent's accusation that Petitioner "violated" the SCP Secondary Employment Policy by not getting permission for the officers to do off-duty work is not supported by the evidence. Even at the hearing, Rudisill misconstrued the policy as to the distinction between off-duty employment and secondary employment. Ultimately Rudisill admitted that he had never read the policy. The policy and the evidence do not support a finding that the Club BED and other off-duty employment at issue here constitute "secondary employment" of the type that requires approval up the chain of command.

60. There is no policy or past practice basis for the Respondent's allegation that Petitioner committed wrongdoing by opening a bank account without permission or using that bank account to manage off-duty funds. The evidence was that Petitioner conducted himself in this manner precisely as he had handled previous off-duty assignment funds in his previous leadership position in Delaware. T. 409. Moreover, the practice in place before Petitioner arrived involved SCP officers being paid through private sources (the Friends of the Museum). Rudisill admitted that there was no policy about the bank account but rationalized that you cannot have a policy for everything—yet he seeks to hold Petitioner accountable for that very thing.

61. Further, the evidence showed that Petitioner's actions in reforming the off-duty program put an end to some practices that were undesirable and in some circumstances were admitted by the Respondent's witnesses to be problematic, such as the scheduling of off-duty work on state time and the free provision of state vehicles to private parties. Petitioner brought a new level of oversight to the off-duty program that allowed SPC to ensure its officers were paid for off duty work in a timely and equal fashion, monitor the amount of work being done, and ensure that the officers received a single 1099 form for tax purposes.

62. The evidence showed that Rudisill faulted Petitioner, as noted, for many things that were being done under Hunter's leadership. Rudisill testified that he met regularly with Hunter and had a good working relationship with him. T. 384. He testified that Hunter, to his

knowledge, kept him fully informed as to all aspects of his handling of SCP. T. 384. It is quite obvious that Rudisill did not have any idea what Chief Hunter was doing within the department or how the department was being run in general.

63. Rudisill did not know that under Hunter the SCP did off-duty assignments outside of state government. T. 384. This is despite this information being contained in the interviews that he said that he read "at least twice" before dismissing Petitioner. When asked whether the SCP policy made a distinction between state government and non-statement government for off-duty assignments, Rudisill said, "I don't know."

64. Despite the SCP policy differentiating between secondary employment and off-duty employment, Rudisill contended at hearing and in the dismissal letter that the Club B-E-D assignments were "secondary employment" and that Petitioner violated that policy by not getting permission for that employment. T. 384-385. However, Rudisill said he had not read the policy yet admitted there was a "distinction" between the two. T. 386.

65. Rudisill, when asked whether he recalled that the interviews had shown every SCP witness stating there was a difference between off-duty employment and secondary employment, replied, "I don't remember." T. 386-387.

66. Rudisill said he did not know that under Chief Hunter's leadership off-duty employment was scheduled and managed on state time. T. 388. Rudisill said that this practice, which went on for a significant period of time under Hunter, would not be appropriate. T. 388-389. Rudisill added, "This is all new information to me." T. 389.

67. Rudisill professed to be unaware that Hunter allowed the free usages of SCP state vehicles at off duty events. T. 389. However, again, this information was in the reports that he received and indicated he read, before he dismissed Petitioner.

68. When asked about Hunter sharing the information about the off-duty program with him during their meetings, about which Rudisill previously testified Hunter kept him "fully informed," Rudisill replied, "We didn't cover everything, now." T. 390. Yet Rudisill fired Petitioner, in significant part, for not informing him about the provision of security services to Club BED and the operation of the off-duty program, including things that had previously been done by Chief Hunter for years under Rudisill's supervision.

69. Rudisill agreed that Petitioner had only been on the job for a matter of weeks at the time of the events herein at issue, while Hunter had held the Chief's job for years. T. 391.

70. Rudisill said he did not feel that SCP would be covered under worker's comp unless there was "some sort of contract" for off-duty work. T. 395. However, Rudisill was unaware that written contracts had never been used under Chief Hunter. Rudisill admitted that he failed to check the relevant worker's compensation policies to determine this issue even though he had access to them and could have done so. T. 395.

71. Rudisill was unaware that under Hunter SCP had no oversight into the manner, the rate of compensation and/or timeliness in which officers were paid for off-duty work. T. 398. Rudisill conceded that under the previous system SCP could not tell how much an officer was being paid, if they were being paid the same, or if they were being timely paid. T. 399.

72. When Petitioner's counsel asked Rudisill to confirm that neither his dismissal letter nor his testimony identified a single policy or work rule that prohibited Petitioner from opening a bank account in the manner he did in this case, Rudisill replied, "The only thing I can say is that it's hard to have a policy on everything." T. 401.

73. Rudisill conceded that when he learned about the practices that concerned him he could have simply ordered Petitioner to stop, and that he had no reason to believe that Petitioner would have disobeyed that order. For example, when Rudisill ordered Petitioner not to provide further security for Club BED, Petitioner immediately complied.

74. When asked whether he disputed whether Petitioner handled the off-duty account in the same manner as his prior practice and experience in Delaware, Rudisill answered, "I guess I do not." T. 409.

75. Rudisill said that he had no reason to doubt that SCP had never used either written contracts or worker's comp forms for off-duty assignments. T. 416-417.

76. When asked by the Court, Rudisill admitted that at least to a degree Petitioner was being fired for doing the same things that had been going on at the agency for some time.

77. Under further questions by the Court Rudisill acknowledged that all of the information was at hand, despite the fact that he repeatedly stated that all of this was "new information." He acknowledged that it should not have been new information to him, and that he should have known prior and in order to terminate Petitioner. T. 417- 418.

CONCLUSIONS OF LAW

Based on the Findings of Fact the undersigned makes these Conclusions of Law:

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

2. The parties are properly before the Court and notice of hearing was proper. All parties have been correctly designated and jurisdiction and venue are proper to decide the issue of whether Respondent had just cause to dismiss Petitioner from the North Carolina Department of Public Safety, State Capitol Police Division.

3. Petitioner was a career State employee at the time of his dismissal. Because he is entitled to the protections of the North Carolina State Personnel Act, and has alleged that

Respondent lacked just cause for his dismissal, the Office of Administrative Hearings has jurisdiction to hear this appeal and issue a Final Agency Decision.

4. N.C.G.S. § 126-35(a) provides that “No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.” In a career State employee’s appeal of a disciplinary action, the department or agency employer bears the burden of proving that “just cause” existed for the disciplinary action. N.C.G.S. § 126-35(d) (2007).

5. 25 NCAC 1I. 2301(c) enumerates two grounds for disciplinary action, including dismissal, based upon just cause: (1) unsatisfactory job performance, including grossly inefficient job performance; and (2) unacceptable personal conduct.

6. 25 NCAC 1J .0604(b) also provides that an employer may discipline or dismiss an employee for “just cause” based upon unacceptable personal conduct or unsatisfactory job performance.

7. Pursuant to 25 NCAC 1J .0608(a), an employer may dismiss an employee without warning or prior disciplinary action for a current incident of unacceptable personal conduct.

8. In pertinent part, “Unacceptable personal conduct” is defined by 25 NCAC 1J.0614 (I) as:

- (1) conduct for which no reasonable person should expect to receive prior warning; or
- (4) the willful violation of known or written work rules; or
- (5) conduct unbecoming a state employee that is detrimental to state service.

9. Although “just cause” is not defined by statute or rule, the words are to be accorded their ordinary meaning. Amanini v. Dep’t of Human Resources, 114 N.C. App. 668, 443 S.E.2d 114 (1994) (defining “just cause” as, among other things, good or adequate reason).

10. While “just cause” is not susceptible of precise definition, our courts have held that 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.” NC DENR v. Carroll, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004).

11. In Carroll, 358 N.C. 649, 599 S.E.2d 888 (2004), the Supreme Court states that the fundamental question in determining just cause is whether the disciplinary action taken was just. Citing further, “Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations.” Our Supreme Court said that there is no bright line test to determine “just cause”—it depends upon the specific facts and circumstances in each case.”

12. In Carroll, the Court went on to say that “not every violation of law gives rise to ‘just cause’ for employee discipline.” In other words, not every instance of unacceptable

personal conduct as defined by the Administrative Code provides just cause for discipline. *Id.* at 670, 599 S.E.2d at 901.

13. Further, the Supreme Court held that, “Determining whether a public employee had ‘just cause’ to discipline its employee requires two separate inquiries: First, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes ‘just cause’ for the disciplinary action taken.” NC DENR v. Carroll, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004).

14. In expounding on Carroll, the Court of Appeals articulates the tests for the tribunal and sets forth what this tribunal must consider as to the degree of discipline. It states:

We conclude that the best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis. This avoids contorting the language of the Administrative Code defining unacceptable personal conduct. The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish “just cause” for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to “just cause” for the disciplinary action taken. (Internal cites omitted)

Warren v. N. Carolina Dep't of Crime Control & Pub. Safety, N. Carolina Highway Patrol, 726 S.E.2d 920, 924-925 (N.C. Ct. App. 2012) review denied, 735 S.E.2d 175 (N.C. 2012)

15. Applying the Warren and Carroll tests to the particular facts and circumstances of this case:

Question One: Did the Petitioner Commit The Conduct Alleged?

16. In order to make this determination, the exact language of the termination letter must be tested to determine if the Petitioner did indeed engaged in the conduct as alleged.

17. The first contention is that Petitioner allowed the officers to use the state owned vehicle for “private purposes.” In performing security for Club BED, the officers were in uniform and performing law enforcement duties and were being paid for those services in and off duty capacity. The use of the automobiles was not “private” in that it did not inure to the benefit of the employee. In fact, the procedure initiated by the Petitioner insured that the use of the vehicles would be compensated separately and apart from any compensation for the individual officers.

18. Petitioner did not violate any policy by permitting the use of the state vehicles for off-duty assignments or by having officers provide off-duty security at locations other than state government buildings.

19. The second bullet point concerns the agreement with Club BED. There is nothing wrong with Petitioner having entered into the contract to provide security for Club BED by the off duty work of his officers. The money for use of the automobiles was/is state money and Petitioner did commingle the funds received from Club Bed. He did spend some of the "state" money on items he perceived to be morale boosters. All of the money in the account was accounted for and there was still "state" money remaining in the account when Petitioner was terminated.

20. While the Special Duties Fund account balanced, the sums taken from the "Vehicle Usage Fee" in the Special Duties Fund did constitute "state funds" and should have been turned over to the state.

21. There was no evidence offered concerning officers being compensated by both the state and Club BED as alleged in the third bullet point.

22. Petitioner did not violate the Secondary Employment Policy or other policy, as noted, by having officers work at Club BED, as alleged in the fourth bullet point.

23. Petitioner did obtain and Employment Identification Number (EIN) form the IRS, and he did open a bank account as stated; however, Petitioner did not violate any policy by setting up the Special Duties Fund or by putting Sergeant Franklin in administrative charge of that Fund. The evidence does not support the conclusion that the fund was set up to circumvent the state BEACON system. There is no evidence that Petitioner was trying to make this a "secret" fund and he personally derived no benefit from the fund.

24. Rudisill's rationalization that the bank account was improper, even though there is no policy against it, by stating 'you cannot have a policy for everything' rings hollow if you are going to fire someone on that basis.

25. Franklin was being paid for administering the account from a specific assessment to Club BED for that purpose. Receiving enumeration for doing the scheduling is a violation of policy; however, it should be noted that to this Tribunal it is completely improper to pay a state government employee on state government time to perform a task that is not governmental and does not inure to the benefit of the State. Apparently, Respondent condones such misappropriation of governmental resources.

26. Petitioner did violate policy (R. Ex. 13) by failing to use written contracts or worker's compensation forms, although to this very day no one in SCP has ever used such forms.

27. There was no policy rule violation because Petitioner did not check out the history of Club BED. There is no evidence to support the conjecture that the RPD and Wake County

Sheriff's Office had any involvement with Club BED, let alone a turbulent history. But even if they had, there is no reason SCP should be prohibited from providing the service.

28. Respondent contends that the mission of the SCP as contained in the policy manual focuses on law enforcement security for public officials and visitors to the state government complex. R. Ex. 16. However, the service of the SCP is not limited to just that role.

29. N.C. Gen. Stat. 143B -900 states that the purpose of the SCP is to serve as a special police agency of the Department of Public Safety. Public Safety is then articulated as to include protecting all State buildings and grounds with an exception. It is important to note that the SCP is not limited to only those buildings and grounds, but is tasked in particular with providing that service. N.C. Gen. Stat. 143B -900(d) very specifically states

(d) Jurisdiction of Officers.--Each special police officer of the State Capitol Police shall have the same power of arrest as the police officers of the City of Raleigh. Such authority may be exercised within the same territorial jurisdiction as exercised by the police officers of the City of Raleigh, and in addition thereto the authority of a deputy sheriff may be exercised on property owned, leased, or maintained by the State located in the County of Wake.

N.C. Gen. Stat. § 143B-900

30. By statute, then, the SCP has full authority equal to that of the Raleigh Police Department as well as that of the Wake County Sheriff's Department, and within the same territorial jurisdiction as provided.

31. There is no evidence to support the contention that RPD responded to Club BED 14 times while SCP provided security there. In fact, the contrary is true.

32. The contentions that he had some duty to report various and sundry matters up the chain of command are not supported. He did report the use of force matters. Other matters were within his discretion to report. There was no guidance from Rudisill or anyone else as to what should be reported to his superiors. After all, he was the Chief of the department and it would be a reasonable expectation that he should make decisions.

Question Two: Did Petitioner's Actions Constitute Unacceptable Personal Conduct?

33. As articulated above in answering question one, the Court finds that the Petitioner has violated policy. The Court's next consideration is whether these violations constitute Unacceptable Personal Conduct.

34. It is concluded that none of the transgressions of Petitioner arise to "conduct for which no reasonable person should expect to receive prior warning." The commingling of funds is "conduct unbecoming a state employee that is detrimental to state service." The other violations are willful violations of known or written work rules."

Question Three: Did The Unacceptable Personal Conduct Justify The Discipline Imposed?

35. The next required step in the Warren analysis, upon finding unacceptable personal conduct, is determining whether the discipline imposed for that conduct was just. "If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based "upon an examination of the facts and circumstances of each individual case." The Warren Court refers to this process as "balancing the equities."

36. To this Tribunal determining what is "just" equates to what is "right"—i.e., what is the right thing to do under these facts and circumstances.

37. In "balancing the equities" and trying to determine what the "right" thing to do is, one must look at why Petitioner did the things that he did. Without looking at the totality of the facts and circumstances one cannot fully understand the "why." The "why" is like motive. In criminal cases everyone seemingly wants to know what the motive for the offense is. But motive is not an element to be proven, and does not enter into the decision-making. Under these facts and circumstances the "why" is very important as opposed to just looking coldly and blindly at whether or not Petitioner violated rules or policy. Only then can one determine what is the "right" thing to do for punishment.

38. It is noted that in all of the evaluations and investigations in this matter, those doing the looking were looking at the facts very narrowly and oftentimes consciously avoided looking at matters which might have made a difference. No one seemingly wanted to hear that Chief Hunter had been doing the same things for years.

39. There is no question that things would have continued to run smoothly and perhaps Petitioner would still be employed had it not been for Club BED, which went off like a bomb when brought to management's attention. There was no looking to see if it made sense or was justified. Petitioner was immediately suspended and the investigation with blinders began.

40. Any contention that Petitioner should have sought the counsel of Rudisill is without value. Mr. Rudisill had no clue what was going on in that agency. He trusted everything Chief Hunter did without question but then was taken aback to find out that so much of what Petitioner was doing, much of which was a basis for his termination, was the same thing Hunter had been doing for years.

41. Rudisill told Petitioner to rely on his experience in performing his job and then fired him for doing just that. Rudisill offered no guidance and would seemingly have been of no value had Petitioner even sought his advice.

42. In conducting this Warren/Carroll analysis, the Court notes Petitioner's discipline-free employment history with Respondent, as well as his apparent prior work history. He retired in good standing after twenty years of service with the Delaware State Police, and there is no record of disciplinary problems there. He retired as a Lieutenant. "In reaching this result, the Court examined the petitioner's exemplary employment record as well as the circumstances under which the petitioner exceeded the posted speed limit." Warren, at 666.

43. In looking at the facts and circumstance pertinent to this contested case, one must consider that the Petitioner was new to the job, and he was placed in charge of a dispirited and diminished agency. He was given little to no direction, even though there is a policy manual. He was directed by Rudisill to rely on his experience, which he did. And he relied on the collective experience of his officers many of whom had been with SCP for many years. He even consulted with Chief Hunter. He had nothing but the best of intentions in everything that he did. Everything that he did was for the benefit of the department. He received no personal gain. Most of what he did, with the exception of the special account, was in keeping with what had been done by prior Chief's, including Chief Hunter. The special account was modeled after what he had done or seen done in Delaware, and was an accepted practice. It was also to be modeled after what he had seen other agencies do, i.e., set up special accounts to handle such transactions, usually through a non-profit.

44. It is clear from the testimony of Rudisill that his superior made little or no effort, either prior to or at the time of Petitioner's discipline, to inform himself of the activities of his own agency. It is equally clear that Petitioner relied in his conduct on his prior extensive experience in law enforcement as well as the advice and counsel of the prior service subordinates in his command.

45. Petitioner was fired in large part for continuing practices which were undertaken by his predecessor and which received no complaints from the agency. It is clear that the provision of security services to Club BED was the primary motivation behind the disciplinary action against Petitioner. Petitioner undertook providing service to Club BED in order to try to assist his officer's in making more money because their income was stagnant and relied on the General Assembly for any increases. Morale was low and this was a measure to help improve morale.

46. The management of the money is the most problematic and most egregious violation. It was not appropriate for the "state" money to have been comingled with non-state money. Petitioner should have been cognizant of that. The manner in which he spent the money on the Christmas party and other relatively minor things to benefit the department and its employees was well intended although improvident.

47. Mitigating factors in the employee's conduct should also be considered in this third prong. See Warren, citing Roger Abrams and Dennis Nolan, TOWARD A THEORY OF "JUST CAUSE" IN EMPLOYEE DISCIPLINE CASES, 1985 Duke L.J. 594 (September 1985). The Respondent agrees that Petitioner acted as he did with best of motives and with no intention of profiting personally from these actions. The evidence shows that all of the expenditures were made with the intention to improve the moral and conditions of the Petitioner's command.

Petitioner's changes within the department eliminated at least two inappropriate usages of state resources, specifically the scheduling of off-duty employment on work time and the provision of free vehicles to third parties. Further, Petitioner's changes ensured that the officers were timely and consistently paid for their off duty work. There was no evidence that Petitioner's was doing anything other than at the very least a good or even excellent job as Interim Chief. The evidence was that Rudisill intended to make Petitioner the Chief of the department but for the intervening Club BED controversy.

48. To the extent the policy violations and the co-mingling of the Vehicle Usage Fee state funds with the rest of the funds in the Special Duties Fund constituted unacceptable personal conduct, it does not rise to the level of conduct under the totality of facts and circumstances of this contested case that would justify the severest sanction of dismissal. It is not "just" to terminate Petitioner under the facts and circumstances of this case; it is not the "right" thing to do.

49. Accordingly, the Court finds that there was not just cause to dismiss the Petitioner for unacceptable personal conduct. A proper discipline would be to demote Petitioner to the position for which he was originally hired, Assistant Chief. An appropriate punishment at the time might have been a period of suspension and possibly without pay; however, Petitioner has been without pay for quite some time now.

Based on these Findings of Fact and Conclusions of Law, and the competent evidence at hearing, the Court makes the following:

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, and all the competent evidence at hearing, Respondent's decision to dismiss Petitioner is **REVERSED**. Petitioner shall be retroactively reinstated by Respondent to the position of Assistant Chief of the State Capital Police, with back pay and all accompanying benefits, with 30 days of pay withheld, as well as attorney's fees paid to Petitioner and his attorney by Respondent.

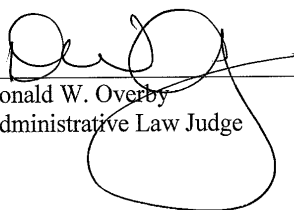
ORDER AND NOTICE

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 9th day of May, 2014.



Donald W. Overby
Administrative Law Judge

STATE OF NORTH CAROLINA

COUNTY OF JOHNSTON

2014 MAY 14 PM 4: 44

Filed

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13 OSP 11968

RICKY WARD,

Petitioner,

v.

NORTH CAROLINA DEPARTMENT
OF PUBLIC SAFETY,

Respondent.

Office of
Administrative Hearings

FINAL DECISION

This contested case was heard before Chief Administrative Law Judge Julian Mann III, at the North Carolina State Bar Building in Raleigh, North Carolina, on October 28, 2013-October 31, 2013. Prior to hearing, by order of the undersigned, this contested case was referenced to an ALJ settlement conference but thereafter remained unresolved. After the conclusion of the contested case hearing, a second opportunity was offered by the undersigned for an ALJ settlement conference but Respondent declined, believing that "further mediation would be futile..."

APPEARANCES

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 Assistant Attorney General
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ISSUE

Whether Respondent North Carolina Department of Public Safety ("NCDPS") met its burden under N.C.G.S. § 126-35 to show "just cause" to demote the Petitioner from a Correctional Training Specialist II to a Correctional Officer for unacceptable personal conduct.

EXHIBITS

Petitioner's exhibits ("P. Exs.") 1-3 & 5-7 were admitted into evidence. Respondent's exhibits ("R. Exs.") 1-24 were admitted into evidence.

WITNESSES

For Respondent: Peggy Littleton, Patrick Berger, Nicole Drake, Ricky Ward, Teresa Alexander, Joseph Hall

For Petitioner: Ronald Perry, Marvin Biggs, Jr., Melanie Shelton, Curtis Hedgepeth, Sylvia Shaw, Eric Ray, Carla Jo Stone, Joseph Hall, Shelby Johnson, Greta Barnes, Patricia Moody, Ricky Ward

In making Findings of Fact, the undersigned has weighed all the evidence and assessed the credibility of the witnesses, taking into account factors for judging credibility of witnesses, including, but not limited to, the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified, the demeanor of the witness, the witness' interests, bias, candor, impartiality, and any prejudice the witness may have, as well as whether the testimony of the witness is reasonable and consistent with the testimony of other believable witnesses in the case. After careful consideration of the sworn witness testimony presented at the hearing, the documents and exhibits admitted into evidence, and the entire record in this proceeding, the undersigned makes the following:

FINDINGS OF FACT

1. The parties are properly before the Office of Administrative Hearings on a Petition pursuant to Chapters 126 and 150B of the General Statutes. The North Carolina Office of Administrative Hearings has jurisdiction over both the parties and the subject matter of this contested case.

2. Petitioner Ricky Ward ("Petitioner") is an employee of Respondent North Carolina Department of Public Safety ("Respondent"). Petitioner began his employment with Respondent as a Correctional Officer in 1989. (Transcript("T") pp. 121). Prior to January 16, 2013, Petitioner was employed as a Correctional Training Specialist II at Johnston Correctional Institute.(R. Ex. 8).

3. By letter dated January 16, 2013, Petitioner was demoted from Correctional Training Specialist II to Correctional Officer for unacceptable personal conduct, resulting in a ten

percent (10%) salary reduction. (R. Ex. 8) Petitioner was also transferred from his facility in Johnston County to Wake County. (R. Ex. 8).

4. The demotion for unacceptable personal conduct was based on Petitioner's alleged conduct and interactions with Peggy Littleton ("Littleton"), an employee of Respondent, for a part of two work days on July 31, 2012 and August 1, 2012. (R. Ex. 8).

5. Littleton has been employed by Respondent since March 5, 2012 as a Correctional Officer. (T. pp. 18). After employment for less than four months as a new Correctional Officer, Littleton was required to complete Basic Training by NCDPS. (T. pp. 18).

6. Littleton attended a Basic Training course on July 31, 2012 in Apex, North Carolina. (T. pp. 19-20).

7. The Basic Training course on July 31, 2012 involved two components, a classroom session and a subsequent hands-on firearms training. (T. pp. 520-521).

8. Curtis Hedgepeth (Mr. Hedgepeth) was the lead instructor for the Basic Training course on July 31, 2012. (T. pp. 520). Mr. Hedgepeth, alone, taught the classroom component of the course. The hands-on firearms training component took place in a different room ("the training room") and was collectively taught by five instructors. The five instructors were Ronald Perry, Marvin Biggs, Jr., Melanie Shelton, Curtis Hedgepeth, and Petitioner, all employees of Respondent. (T. pp. 186).

9. At the conclusion of the classroom component of the Basic Training course, the students transitioned into the training room for the hands-on firearms training. (T. pp. 521). During the transition, Petitioner and Mr. Hedgepeth engaged in a conversation in the original classroom. (T. pp. 521).

10. Littleton approached Mr. Hedgepeth, while he was standing with Petitioner, and inquired about transfer policies. (T. pp. 190; T. pp. 521). Mr. Hedgepeth began to explain the transfer policies when Littleton indicated that she was specifically interested in transferring to Johnston Correctional Institute. (T. pp. 521-522). At that time, Petitioner, instead of Mr. Hedgepeth, continued to explain the transfer policies and procedures to be transferred to Johnston County. Petitioner was currently employed at Johnston Correctional Institute. (T. pp. 522). The undersigned finds Petitioner's testimony that Littleton initiated the conversation to be credible, as it was corroborated by Mr. Hedgepeth. Mr. Hedgepeth is a disinterested party with no motivation to be untruthful. Mr. Hedgepeth was not asked about this interaction when interviewed by the EEO investigator, Theresa Alexander. (T. pp. 523).

Testimony of Littleton T. pp. 25, 26, 27 and 47:

Q Now, Ms. Littleton, did you initiate the conversation with Mr. Ward regarding transferring?

A No.

Q So would you have any reason to want to relocate at that point?
A No. I've never asked for a transfer. I've never talked to any of my lieutenants or anybody on that camp at all for a transfer. That was never my intention, to transfer.

Q Okay. Did you ever ask Mr. Ward – what did you say to Mr. Ward about transferring to Johnston County?

A I didn't say anything to him about transferring. He asked me why I wasn't working at Johnston, why it is I was working at Harnett.

Testimony of Hedgepeth T. pp. 521-523:

Q And during that transition, do you recall having a conversation with Mr. Ward?
A Yes. He came over briefly to tell me that he was going to be helping for the rest of the day.

Q And where did this conversation take place?
A It took place in the front of the classroom where the podium was.

Q Do you recall if Officer Peggy Littleton approached during that conversation?
A Yes.

Q And what did she say?
A She approached and started asking, without specifying who she was directing the question to, so I presumed since I was the lead instructor, it was to myself—she started asking about transferring from one facility to another. I proceeded to start answering the question, and during that process she brought up the transfer to Johnston Correctional.

Q So it was after you began answering the question that she emphasized that she was referring specifically to Johnston Correctional?
A Yes.

Q And at that time what happened?
A At that time, Mr. Ward also entered the conversation and started answering, you know, the specifics with, you know, the transfer to the facility that he was then working at.

Q Did Mr. Ward motion for Ms. Littleton to come towards you and he to have that conversation?
A Not that I am aware of.

Q Did Ms. Littleton voluntarily come up to speak to the two of you?
A As far as I know, it was entirely voluntary on her part.

Q And did Mr. Ward make any comments other than those related to transfer procedures to Ms. Littleton?
A Not within my presence.

Q You were interviewed by the EEO officer; is that right?

A Correct.

Q Did you just have one interview?

A One interview by telephone.

Q And during that interview, did the EEO officer ever ask you if Ms. Littleton initiated any conversations with Mr. Ward?

A No.

Q Did she ask you about that conversation that you had between you, Mr. Ward, and Ms. Littleton regarding the transfer procedures?

A No.

Q If she had, would you have included that in your written statement?

A If I had been asked, yes.

In Respondent's Exhibit #6, the Petitioner states in Paragraph 5, in part, as follows:

...Officer Littleton states that I approached her and stated I could get her transferred to Johnston and she could be my assistant, but I would never get any work done. It also says that I stated Littleton approached me in the hall about this transfer. Both of these statements are inaccurate as indicated in the previous statements I submitted. My very first encounter with C/O Littleton came when the class was dismissed from the classroom and told to report to the big training room. I was standing at the front of the class talking to OSDT instructor, Mr. Curtis Hedgepeth. While talking to him, the students were filing out of the class and C/O Littleton walked up to me and right in front of Mr. Hedgepeth asked me how she could transfer to Johnston. I stated to her "good, I need an assistant." She replied, "I'm your girl." I laughed and said "no, I have been trying for years to get an assistant and they will not give me one." I told her several factors would play into whether or not she could transfer but I would talk to her about it later. At this time, we were trying to get all students into the big training room. She departed the classroom and I didn't speak to her again until we were in the big training room. My question is, did anyone ask Mr. Hedgepeth if this is where the question of transferring occurred?? As I said previously, she initiated this question in conversation with me. (R. Ex. 6).

From Respondent's Exhibit 8 (Demotion), Page 3, the following statement is attributed to the Petitioner:

You requested someone asked Mr. Hedgepeth who initiated the transfer discussion. This would be proof that this and other statements were

embellished. You stated you felt the investigators were not thorough in their questions. (R. Ex. #8)

11. At the conclusion of the conversation between Mr. Hedgepeth, Petitioner, and Littleton, they transitioned into the training room. (T. pp. 523).

12. There were approximately thirty (30) students in the training room and five (5) instructors. (T. pp. 500; t. pp. 518).

13. In the training room, the five instructors, including Petitioner, were positioned at the front of the room and the students were instructed to form lines behind each instructor in order to perform the hands-on firearms training. (T. pp. 453; T. pp. 488-489; T. pp. 523-524).

14. The students were not assigned a specific instructor but, rather, were allowed to choose any instructor's line for the training. (T. pp. 453-454; T. pp. 524, T. pp. 197).

15. Littleton was not assigned to Petitioner's line but, nonetheless, chose Petitioner's line for her hands-on firearms training (T. pp. 545; T. pp. 197).

16. Patrick Berger ("Berger"), Correctional Officer at Harnett Correctional Institute, was one of the thirty (30) students in the training room. (T. pp. 85-86).

17. Berger was not assigned to Petitioner's line but, nonetheless, chose Petitioner's line for his hands-on firearms training. (T. pp. 198).

18. While in Petitioner's line, Littleton began having difficulty removing her gun from her holster. Petitioner assisted Littleton in adjusting her gun holster by adjusting it with an allen wrench. (T. pp. 458; T. pp. 460-462).

19. Littleton provided three (3) written statements during the EEO investigation. (R. Ex. 9, 11, & 12). The first was her EEO Complaint, filed on August 1, 2012. (R. Ex. 9). The second was a Supplemental EEO Statement written on September 21, 2012. (R. Ex. 11). The third was a Supplemental EEO Statement written on September 27, 2012. (R. Ex. 12).

20. Littleton testified at trial that Petitioner put his fingers in the waist band of her pants while adjusting her gun holster. (T. pp. 29-30). Littleton included this allegation in the September 21, 2012 Supplemental Witness Statement. (R. Ex. 11). "When it was realized my holster was to (sic) tight Mr. Ward tried loosening it by putting his fingers in the waist band (sic) of my pants to loosen (sic) screw the allen wrench." This allegation was not included in Littleton's initial complaint filed with the EEO on August 1, 2012. (R. Ex. 9). None of the thirty plus individuals in the training room corroborated Littleton's allegation that Petitioner put his fingers in the waistband of Littleton's pants. The EEO officer's administrative findings concluded: "There is no evidence or witness to substantiate that Ward touched Littleton inappropriately." (R. Ex. 10)

Littleton's testimony T. pp. 29-30

Q At some point, you were having difficulty with your holster?

A Yes, ma'am.

Q And please describe that difficulty to the Court.

A My holster was brand new, out of the package, and as I would try to pull my weapon from the holster, it would stick, almost like a suction cup effect. It did not want to pull out.

And when you shoot and have to qualify at the shooting range, some of the qualifications are under a timed sequence—you know, three seconds, five seconds. So I was having trouble being able to pull it up. And it was because the holster itself was too tight against the gun and it needed to be loosened.

I raised my hand. We were instructed if we had any problems with our weapons, or any problems in general, we were to raise our hand and sound off our number so that the instructor would know to stop and do what needed to be done.

So I did that, and Mr. Ward came up to me. I explained to him what was going on, and he went and got the little allen wrench to unloosen it. And when he did, he slipped his hand in between my shirt and my pants, through my waistband, that way, to grab ahold of the holster.

I did make a comment to him that this was getting inappropriate. And when I said that, he pulled his hand out and called for another instructor, who came over and just grabbed the holster itself, unlocked it and walked away.

21. On direct examination, Berger testified that he witnessed Petitioner "putting his hands like on her [Littleton's] belt loop and like his fingertips were going inside her-like her belt or like her pant." (T. pp. 90). On cross examination, however, Berger contradicted his testimony by stating that he did not witness Petitioner touch Littleton's skin while adjusting Littleton's gun holster. (T. pp. 102). Berger made the following statement concerning this issue in Respondent's Exhibit #16. "What I saw instructor Ward do was (sic) his hands trying to fix Littleton's (sic) gun holster. his (sic) finger tips (sic) to fix Littleton's were possibly (sic) touching the inside of Littleton's (sic) pants (sic) were (sic) the holster was connected."

22. Ronald Perry was standing near Petitioner as he adjusted Littleton's gun holster. (T. pp. 460). Mr. Perry recalled in detail how Petitioner positioned himself while adjusting Littleton's holster. (T. pp. 460-462). The adjustment of Littleton's holster was appropriate in all aspects. (T. pp. 462). Mr. Perry did not witness Littleton make any comment about the interaction with Petitioner being inappropriate. (T. pp. 461-462). The undersigned finds Mr. Perry's testimony to be credible. The adjustment of Littleton's gun holster by Petitioner was appropriate and Littleton did not indicate that she felt uncomfortable or that she perceived the interaction to be inappropriate.

Perry's testimony T. pp. 460-462

Q Do you recall Mr. Ward adjusting Ms. Littleton's holster that day?

A I do.

Q How close were you to Mr. Ward when he was adjusting the holster?

A When I saw him down on his knee, I walked over and I looked down at him and I said, "Ricky Ward, what are you doing?" And he said, "I'm adjusting this holster." And I stood right over his shoulder while he adjusted that holster.

And once he got it adjusted, he kept saying "Try this," and he would hand her the unloaded weapon. She would stick it in there, and if it was still too tight, he would loosen it some more and until he got it where she liked it.

Q Now, about how close were you to him? I know you said you were standing over his shoulder. How close would you say you were---

A (interposing) I would ---

Q --- to him?

A I would say—he was down on his knee and I was right behind him.

Q And how close was Mr. Ward to Ms. Littleton as he was adjusting her holster?

A Arm's reach.

Q Did Mr. Ward ever touch Ms. Littleton while he was doing this adjustment?

A No, ma'am.

Q Did his fingertips ever go inside the waistband of her pants?

A No, ma'am.

Q While Mr. Ward was adjusting her holster, do you recall Ms. Littleton making any comment about this adjustment being inappropriate?

A No, ma'am.

Q Did she appear to be uncomfortable?

A No, ma'am, because like I said, we—Mr. Ward reached around behind the holster, grabbed the holster, and would make his adjustment, would let go of the holster. She would take the weapon, put it in the holster, and pull it straight out. And if she decided it was still to tight, he would do the same thing.

Q Was Mr. Ward able to adjust the holster and have it work properly?

A Yes, ma'am.

Q Did he follow the standard procedures in doing that adjustment?

A Yes, ma'am.

23. Although Mr. Perry was the only instructor, besides Petitioner, who witnessed the adjustment of Littleton's gun holster, he was the only instructor that the EEO investigator, Theresa Alexander, did not interview or request a written statement. (T. pp. 467; R. Ex. 10).

24. Mr. Perry was able to recall, with great detail, the interactions between Petitioner and Littleton. (T. pp. 456-462). Mr. Perry was also able to describe other students who had

selected Petitioner's line for completing their firearms training. (T. pp. 472-473). Mr. Perry is a disinterested party with no motivation to be untruthful. His ability to recall detail and as a neutral perspective make him a credible witness.

24. Littleton's stance was admittedly incorrect. An unidentified instructor, other than Petitioner, also identified a problem with Littleton's shooting stance. Littleton's testimony on direct examination was: "The instructor, the initial instructor that was teaching the class in front of the class, had made a comment that I needed to separate my feet more, so that my stance was sturdier. (T. p. 23)

Petitioner states in Respondent's Exhibit #6 at Paragraph #7, that Petitioner had to correct Littleton's stance four times. "When a student is pointing a gun down range, instructors have commented on student's stances and feet positioning numerous times from the back side of the student. If I said your stance looks good from where I am standing but you need to spread your feet and legs more, then all was correct except for the shoulder width placement of the feet and legs. After about four times of trying to get this right, I probably did say it like that to let her know all was correct except the width apart of her feet. When I told Ms. Alexander this, the other lady with her questioned why I would say this. Being a former employee of DCC, Ms. Alexander told her it made since because she had even had instructors almost kick her feet out from under her to get her to spread her feet!!" (R. Ex. 6)

Petitioner's testimony as to Littleton's stance (T. p. 210)

Q Well, when you say at that moment, what do you—are you saying that she didn't at some other moment?

A Well, I had about four different incidents with her over her stance, and the last time it was real bad, where she—anybody that had been around with the department long enough knows the old T stance we used to do. It was where we were standing with our strong foot directly in a T shape behind our weak foot.

And she was standing in that again, after all the conversation about her stance throughout the day. And I had told her earlier, "If you get your stance right, you're doing everything else great." So—and this one happened in front of Ms. Shelton.

25. Eric Ray, Melanie Shelton, Marvin Biggs, Jr., Ronald Perry, and Curtis Hedgepeth, all firearms instructors with Respondent, testified that it is common for an instructor to instruct a student to spread their legs further in correcting a student's stance for firing a handgun. (T. pp. 457; T. pp. 503; T. pp. 548; T. pp. 556-557) These instructors are disinterested parties with no motivation to be untruthful. Rather, each has a strong interest in being honest and truthful, as "providing false or purposefully misleading information during the course of an internal investigation" is considered "unacceptable personal conduct and is representative of those causes considered for disciplinary action up to and including dismissal." (P.Ex.7)

26. Petitioner admits that he instructed Littleton to spread her legs further in correcting her stance for firing a handgun. (T. pp. 209).

27. Mr. Perry, who was standing approximately 10 feet from Petitioner while Littleton was completing her hands-on training, recalled details of the interaction between Petitioner and

Littleton. (T. pp. 453-457). Mr. Perry testified that he heard Petitioner correct Littleton's firing stance on several occasions but that he never heard Petitioner state that they could work on Littleton's stance in private. (T. pp. 456-458). Mr. Perry, however, was not interviewed by Ms. Alexander or requested to provide a written statement. (T. pp. 467; R. Ex. 10). Based on Mr. Perry's proximity to Petitioner and Littleton and detailed testimony, the Court finds his testimony to be credible with regard to Petitioner's statements to Littleton regarding her stance.

28. Littleton's EEO Complaint alleged that Petitioner stated "your stance is nice to look at from view but you need to spread your legs further. We could work on your stance privately". (R. Ex. 9). Littleton testified, however, that Petitioner referred to her stance as "perfect". (T. pp. 44-46). Littleton was the only witness among thirty plus individuals who were present who testified to hearing Petitioner's alleged comment about correcting her stance in private. Based on the inconsistencies in Littleton's written statements and testimony, the undersigned finds that she is not a credible witness in regards to this statement. No witnesses were presented to corroborate Littleton's allegations regarding these comments.

29. The undersigned finds that Petitioner did not tell Littleton that "we could work on your stance privately." The undersigned finds that Petitioner did tell Littleton to spread her legs further when correcting her stance for firing the handgun, but that this comment is not inappropriate in the context in which it was used.

30. As students completed their hands-on firearms training, they would sit in seats along the back wall of the training room. (T. pp. 212; T. pp. 225).

31. There were two chairs placed on the side wall of the training room, nearest to Petitioner. (T. pp. 212-213; T. pp. 225).

32. When Littleton completed her hands-on training, she chose to sit in the chair on the side wall of the training room, closest to Petitioner. (T. pp. 212-213; T. pp. 225-226). Littleton was not assigned to that particular seat but, rather, had the ability to choose any seat in the room. (T. pp. 213). Littleton's decision to sit in the chair closest to Petitioner discredits her testimony that Petitioner made her uncomfortable or acted inappropriately in their prior interactions that day.

33. When Berger completed his hand-on training, he sat in the chair beside of Littleton on the side wall of the training room. (T. pp. 212-213; T. pp. 225-226).

34. Petitioner approached Littleton and Berger and asked to borrow a pen. (T. pp. 227). Littleton handed Petitioner a pen with his the University of North Carolina logo on it. (T. pp. 227-228). Petitioner then stated "I knew there was something I half way liked about you." (T. pp. 228). Littleton responded "what's the other half that you like?" (T. pp. 228). Petitioner admits then stating "your eyes". (T. pp. 228). Petitioner testified in detail as to this issue. (T. pp. 226-231). Petitioner also testified consistently as to this issue. In Respondent's Exhibit #13, Employee Witness Statement, page 3, 9/24/12, Petitioner writes:

I completed the evaluation of these two students and as I was attempting to complete their paper work my pen stopped writing.

Officer Littleton pulled a pen from her pocket and said "here, you can use mine." The pen had UNC on it and I stated to her "I knew I half way liked you for some reason Littleton." This remark was just a play on words indicating that I was a Carolina fan. Officer Littleton looked at me and smiled and said "oh yeah, what's the other half you like?" I was thrown a bit when she said this because my statement was referring to my favorite team and I hesitated a moment and said "I guess your kind eyes would be the other half." I thought nothing of it and continued to complete the paper work, returned her pen and thanked her and she said you are welcome. (R. Ex. #13)

Again in Respondent's Exhibit #6, Paragraph #2, first documented by Petitioner on 8/1/12, Petitioner offers three means to verify his assertion. One, "I am certain if the test papers were produced, that a difference in ink would indicate that I am telling the truth." Second, Petitioner's statement as to the incident was recorded the day after the event. Third, Petitioner offered to take a polygraph on the issue. Petitioner's full statement:

2. The second bullet is not only inaccurate; it is a flat out lie. I believe I had just completed evaluating the second pair of students I had to evaluate, Both Littleton and Berger were sitting in the two chairs that were very close to me. I stood directly to Littleton's right side and was writing on the score sheet, on the cork board, on the wall for these two students when the pen I was using ran out. I shook the pen and attempted to write again, and again it ran out. Almost simultaneously, Officer Berger and Littleton pulled a pen from their uniform breast pockets and offered them to me. I looked at his, then looked at hers and saw what I am certain was UNC in light blue on the pen. I borrowed the pen and completed my documentation. I am certain if the test papers were produced that a difference in ink would indicate that I am telling the truth; however, this investigator states that both of their testimonies concerning this matter with the pen is credible. I question to what length an investigator went to in determining this credibility? If two people conspire to lie about a matter such as a pen, I believe that much of their testimony is not credible, where I have tried my very best to be truthful to the extent my memory allows me. I documented the incident with the pen and the comments that followed on 08/01/12, when I first learned that a female officer from Harnett had filed a complaint against me. I did this so that I could try to recall as many details as possible. The incident with borrowing the pen was very fresh in my mind because it was a UNC pen and I am a UNC fan and the comments that little made to me. As I reached to borrow the pen from Littleton, I stated "I knew there was something that I half way liked about you Littleton." She replied, "oh yea,

what's the other half you like?" She caught me completely off guard by replying to a rhetorical statement and the tone of her voice when she asked it (sic) sound as if she wanted a "personal" answer. I ran several answers quickly through my mind and then replied "your eyes." I do not to this day remember or believe I said anything about a song and her eyes. I do not know why Berger would corroborate this lie about them not having a pen or her giving me one but if they are willing to take a polygraph on this matter, I most certainly am.

35. Berger and Littleton deny that Petitioner asked to borrow a pen from them. In his witness statement provided to the EEO investigator, Berger stated that he "observed Ward making compliments to [Littleton]". (R. Ex. 15). When testifying, however, Berger contradicted his statement by testifying that "I didn't hear anything." (T. pp. 97-98; T. pp.100). Berger's contradicting statements discredit his testimony.

36. Berger described Littleton as a "mother-figure." (T.pp.104). Berger's father had a massive stroke about a week before graduating from basic training. "... and I mean my mom couldn't be there for me and Littleton is like 30, 35 years older than me." "And, you know, whenever I needed help, she could—she would help me out or talk to me or whatnot..." During the breaks, Littleton would relate to Berger what allegedly Petitioner had whispered to Littleton. (T. pp. 106). The interaction between Littleton and Berger raises questions about a relationship that could produce undue influence and potential bias. (T. pp.108).

37. A sequestration order was entered at the beginning of the hearing. Prior to and during the period of Littleton's testimony at the hearing, Berger remained in contact with Littleton. This continuing interaction raises issues of undue influence and potential bias.

38. Berger left his seat beside of Littleton and Officer Nicole Drake, a Correctional Officer employed by Respondent, took the same seat. (T. pp. 233).

39. While sitting next to one another near Petitioner, Littleton and Ms. Drake laughed at another female student who was struggling with proper firearms technique. (T. pp. 233). Petitioner admits confronting Littleton and Ms. Drake and instructing them to refrain from laughing at the student and stating "not everyone is as good as you." (T. pp. 233-235). Petitioner's comment was referring to Littleton's firearm technique and was not intended in any sexual or inappropriate manner.

40. At some point during a break from the hands-on training, the Petitioner and Littleton engaged in a conversation. This conversation took place in the hallway, outside of the training room. (T. pp. 235-236; T. pp. 238). When the break ended, Petitioner admits instructing Littleton to enter the training room ahead of him so that it would not appear that he was spending "too much personal time with any one student because that was frowned upon" (T. pp. 141-142).

41. Petitioner concedes that he may have referred to Littleton as "darling". (T. pp. 162). Based on Mr. Perry's testimony, it is common for Johnston County employees to refer to other

employees as “darling” and that he has heard numerous employees use the phrase “darling”. (T. pp. 467-468).

42. Petitioner’s statements in Respondent’s Exhibit #13, employs the words, “joke,” “joked” and “jokingly.” The root word permeates the document. Petitioner’s verbal exchanges constitutes unprofessional conduct in an environment and setting designed for firearm instruction and safety. “Joking” has no place in this type of training. (R. Ex. #13).

43. Littleton filed the complaint against Petitioner on August 1, 2012. (R. Ex. 9).

44. Petitioner became aware that a complaint had been filed against him on the morning of August 1, 2012 and immediately went to his office to make a record of every interaction he had with Littleton the day before. (T. pp. 249-251).

45. Petitioner took his record of interactions to Patricia Moody, his immediate supervisor, for her review and advice. (T. pp. 251; T. pp. 616).

46. Ms. Moody has been involved in numerous disciplinary conferences and is familiar with the Respondent’s disciplinary policies. (T. pp. 610-611; T. pp. 614). Ms. Moody did not believe that Petitioner’s actions warranted demotion. (T. pp. 617).

47. Petitioner did not intend for his communications and interactions with Littleton to be offensive or harassing.

48. Petitioner is a career state employee. Over a period of many years he had extensive experience training numerous students. He had an untarnished record. For the Petitioner to have pursued a course of action as alleged on July 31, 2012 involving a student trainee, in the presence of thirty plus witnesses, all of whom were in close proximity in the same room, is conduct inconsistent with Petitioner’s longstanding record.

49. Nicole Drake is a probation and parole officer with NCPDS. Drake in her statements and testimony indicated that on July 31, 2012 Petitioner commented to her on her appearance, describing her as being “pretty.” Although Drake sat close enough to Petitioner to have her conversation overheard and admonished, Drake elected to have instructors, other than Petitioner, provide her training. Petitioner admitted making a comment in the parking lot as to Drake’s appearance but testified that it was in the context of a lecture that Petitioner had just given on “undue familiarity.” Drake denied that topic was brought up in a conversation lasting less than a minute but failed to mention the conversation at all in her initial statement but did so in a later statement. When asked on cross-examination:

Q Okay. Did you ever report anything that Ward said and did to you or relative to you at the training session to anybody in the organization, in the department?

A As far as –

Q a complaint or –

A No.

Q ...or you didn’t file an harassment charge or anything like that?

A No, I didn't.
Q Okay. It didn't rise to that level, did it?
A No.
(T. pp. 114, 118, 242) (R. Ex. #6, #10, #20)

Petitioner Cooperates With Investigation; Requests Polygraph

50. Petitioner fully complied with the EEO investigation, provided numerous written statements, completed all requested interviews, and attended two pre-disciplinary conferences. (R. Ex. 6, 7, 10, 13, & 14).

51. The first pre-disciplinary conference took place on November 15, 2012. (R. Ex. 2). Petitioner, Superintendent Joseph Hall, and Patricia Moody attended the conference. (T. pp. 610-611). Petitioner requested to take a polygraph to disprove the allegations against him. (T. pp. 401, 612-613).

52. Superintendent Hall never requested that Petitioner be provided a polygraph examination. (T. pp. 402; T. pp. 613).

53. Although requested, Respondent never provided Petitioner the opportunity to take a polygraph or any other type of lie detector test. (T. pp. 401; T. pp. 612-613). Failing to submit to a polygraph examination when directed to do so by a Department Official constitutes a violation of the department's "Failure to Cooperate or Hindering an Investigation" policy. (P. Ex. 7).

Treatment of Other Employees for Similar Offenses:

54. Although two complaints were previously filed against an employee of Respondent, Raeford Mitchell, who was employed at Johnston Correctional Institute, this employee was issued only a written warning with no demotion or transfer. (T. pp. 394). Mr. Mitchell's acts included a physical act, pulling the hair of a female co-worker and sitting in her lap. (T. pp. 393; T. pp. 593-594). Mr. Mitchell's actions are more egregious than those alleged against Petitioner, particularly with perpetration of physical acts.

55. A complaint was filed against an employee of Respondent, Pablo Rose, who was working at Johnston Correctional Institute, for calling a co-worker "my love" in Spanish. (T. pp. 394-395). Mr. Rosa received a written warning with no demotion or transfer for his remark. (T. pp. 396).

56. Selective enforcement of agency policy should be considered under State Personnel Policy. See N.C. State Personnel Manual, Section 7, page 11: The employer "should examine a number of factors...[including]...The disciplinary actions received by other employees within the work agency/unit for comparable performance or behaviors." The Respondent's inconsistency in enforcement at Johnston Correctional Institute makes it questionable for Respondent to issue more than a written warning against this Petitioner amid questions as to the validity of Respondent's assertions.

Motivation of Complainant, Peggy Littleton:

57. During Basic Training, Littleton complained of being overheated and left the firing range during handgun training. (R. Ex. 19). During CODT training, Littleton complained of an ankle injury, although she refused medical treatment. (R. Ex. 19). Following shotgun training, she complained of a shoulder injury and was transported by ambulance to the hospital. (R. Ex. 19; T. pp. 507; T. pp. 526-527; T. pp. 549).

58. Training Instructor II, Melanie Shelton, was asked to provide a written statement during the EEO investigation. (T. pp. 505). In her statement, Ms. Shelton indicated that she remembered Littleton "very well due to her being a 'Drama Queen.'" (R. Ex. 19). Ms. Shelton described, in her written statement and in her testimony, several injuries that Littleton alleged to have suffered throughout her Basic Training courses and referred to her as being "needy". (R. Ex. 19; T. pp. 505-510). In Respondent's Exhibit #19, Ms. Shelton on September 24, 2012 made the following statement:

You asked if I knew/remembered an officer Littleton from a basic training school held July 2012 and I said that I did very well due to her being a "Drama Queen." I went on to explain that every psychomotor skill case we held something would happen, you asked what and I told you what I remembered, that being: During the firearms training and the handgun M&P.40, she had to come off the range due to being hot. (I did agree it was a very hot day), during CRDT she claimed to had sprained her ankle and remove(sic) her gym shoe before I could stop her. The ankle did not swell and an ice pack was given, she was asked numerous time as to if she needed to see a doctor and she refused. Stating something about not being quitter and after she proved that she could put her shoe back on and walk unaided Ms. Alston allowed her to continue with the class. During firearms training with the shotgun, I was her primary daytime instructor on the range. The shotgun is known to recoil to the shoulder and that some students who do not hold it correctly have been known to get a bruise. A great deal of emphasis is placed on the correct hold of the weapon. C/O Littleton shot the 3 practice rounds and then went to qualification round. After shooting the required rounds at the 50 and 40- yard lines, she complained about the recoil. When we got to the 25-yard line and the kneeling exercise, she said she had had enough and was going to quit. I spoke with her and told her that it was her choice but she only had 2 more rounds and that from what I could see of the target she was shooting well. She chose to complete the firing order and qualified first time. Due to having to wait for the range to get dark and not waste time after daytime qualifying, I was scheduled to teach the Cultural Awareness class in the classroom at JCI from 3-5pm. At that time, I left the range area. I was informed the next day that C/O Lillington had declared a medical issue and had left the

range via ambulance.

I was scheduled to teach the Friday morning and C/O Littleton was not in class and after checking had not called in. She arrived for class mid-morning when asked where she had been she said at her unit filling out paperwork for her injury. (All students are informed that OSDT is their supervisor not the unit and any paperwork/problems/issues must come directly to OSDT Management not the unit. This is explained at orientation). C/O Littleton was wearing a sling and claimed to me verbally that she had bruised the bone. Her paperwork from the doctor said return to work "contusion" that was all I saw. C/O Littleton then asked me for a copy of my notes, as she could not write. I informed her that I could not give her my notes and that she could get a copy from another student. Ms. A. Alston also informed me that C/O Littleton had complained that we were not empathetic to her situation told me. (R. Ex. #19)

Testimony of Shelton (T. pp. 505-508)

Q In that statement, you refer to Ms. Littleton as a drama queen. Can you explain to the Court why you perceived Ms. Littleton to be a drama queen?

A When dealing with students, maybe every other class or so there's going to be one student who's very needed. She—as I said later on in the statement, every time we did a psychomotor skill, there was an issue; there was a problem.

For example, with the sprained ankle, you know, when she was finally informed, "Okay, we're going to take you to medical and, you know, start filling out form 18s and 19s and send you back to your facility," "No, I'll walk it off. I'll be fine." It was just constant with her.

There was always—and as I said in my statement, towards the end she didn't even want to deal with myself or Ms. Alston. She only wanted to deal with—actually, she wanted to see Mr. Walston because she wanted somebody with more empathy. It was just she walked in and her she comes, you know, so we tried to maintain a little bit of professionalism with her but it was just constant.

When she asked me for my notes, you know, I was like "I cannot give you my instructor notes, my instructor lesson plans." And she was upset about that. I was like, you know, "That would be unethical for me to give you this information.

Q She asked you for your instructor notes?

A Yes, when she came in the last—the day after because she couldn't write anything. I told her she was more than willing—welcome to have one of the other student's photocopy their notes, but, you know, she wanted my notes.

Q And she got angry with you about that?

A I wouldn't say angry. I mean she sat there and—you know, I remember her glaring at me the whole class. You know, I can't do things that—for one student that can't happened for every student. And every student would like to have a copy of my all of my lesson

plans.

Q Would you say that she demanded more attention than other students?
A Yes.

Q Now, take me through a few more details about the injuries that you were describing that Ms. Littleton had. Did these happen during basic training class?
A Yes, ma'am.

Q What was the first injury?
A The first one that I'm—I was aware of was—I don't know if it was an injury per se that was on the range with the M&P 40, and she got dizzy. It was hot. I was horribly hot. It was July on the range. You know, you try and keep giving the students breaks and pushing water and Gatorade, water, Gatorade.

But, you know, we had to—Mr. Hedgepeth had to stop the line a couple of times, call in the line it seemed, to cool her off so that she could rest. And we encourage all of the students—you know, "If you get too hot," you know, "This is a live fire round," you know, "If we need to pull you off line, you need to let us know."

And then came the CODT with the sprained ankle. She never told us she had a sprained ankle until at the end of—we were on break and there she is sitting there taking her shoe off. And I was like, "What's wrong?" "I sprained my ankle." "Why didn't you tell us," you know, "We would have let you take your shoe off," you know. And then of course she walked it out. You know, by the end of it, it's like "Are you hurt or not hurt," you know, "What do you want here from us?"

Q So were you questioning her credibility by the end of it?
A By the end of it, yes, ma'am, I was.

Q Do you remember her ever having a shoulder injury?
A When we shoot the shotgun, I was the primary instructor that day for the day fire. But once they had qualified day shooting, I was the one who—I actually went home. I didn't need to stay for low or limited light.

And it was later on that evening that Ms. Alston called me and said there had been an injury out at the range and I needed to go back to the range. So I went—actually I had to get dressed, and then she called me about, you know, five minutes later and said no, it's okay, the weapons were all secured. But it was Ms. Littleton who had a shoulder injury. I didn't see that happen or anything.

Q And at the end of these training sessions, do you ask the students if there's any injuries?

A Oh, yes. During any psychomotor skills training they are asked.

Q And did she report that injury, that one?
A Not to knowledge. I was told for the shotgun injury---

59. Curtis Hedgepeth corroborated Shelton's description of Littleton as being a "drama

queen” and recalled that Littleton always wanted attention. (T. pp. 525-529).

60. Littleton embellished and exaggerated allegations of injuries. (T. pp. 507-508).

61. Based upon the independent, corroborated, and unbiased testimony of Shelton and Hedgepath, both experienced trainers, Littleton drew unfavorable attention to herself and made several exaggerated claims. This finding, in conjunction with other findings, raises serious questions as to whether Littleton exaggerated the comments and offensiveness of her interaction with Petitioner.

Petitioner’s Work History:

62. Petitioner has been employed by Respondent for approximately twenty-four (24) years and has not received any type of disciplinary action, including written warnings. (T. pp. 631; P. Ex. 1).

63. Petitioner’s performance evaluations throughout his employment, including his evaluations following his demotion, reflect that he is an excellent employee. (P. Ex. 1 & 3).

64. Petitioner is viewed by his co-workers as being professional. Numerous witnesses, who are Petitioner’s co-workers, testified that they have never known Petitioner to make inappropriate comments or engage in inappropriate actions with co-workers. (T. pp. 469; T. pp. 489; T. pp. 510; T. pp. 529; T. pp. 553; T. pp. 557; T. pp. 595-596).

65. By letter of December 21, 1998 Robert Chavis, Regional Director, wrote a “Letter of Commendation,” to Petitioner; on December 9, 1998, Petitioner received the “Department of Corrections Special Award;” on May 5, 1999, Petitioner was awarded “The Correctional Officer of the Year;” and in October 1999, Petitioner was a nominee for the “Governor’s Award For Excellence” for bravery and valor. (P. Ex. #2).

66. Petitioner has instructed numerous students throughout his career and has not had a complaint filed against him. (P. Ex. 1). The complaint as alleged by Littleton is inconsistent with Petitioner’s extensive service record and years of behavior.

Handling of EEO Investigation:

67. Numerous witnesses were interviewed and asked to provide written statements to Ms. Alexander, the EEO investigator. (R. Ex. 10). All of the instructors who taught the basic training course on July 31, 2012 were interviewed, except for Ronald Perry. (R. Ex. 10; T. pp. 334-335). Petitioner identified Mr. Perry as a witness with information relative to the investigation on his Witness Statement Form which was provided to Ms. Alexander. (R. Ex. 13; T. pp. 334-335). Mr. Perry was the only instructor who recalls witnessing the interactions between Petitioner and Littleton, as he stood only ten feet away from Petitioner throughout the most of the hands-on training. (T. pp. 334-335; T. pp. 453-457).

68. Ms. Alexander relied on written and oral admissions that Petitioner made in finding

“just cause” but, when questioned on cross-examination about specific admissions, Ms. Alexander was unable to identify any written or oral admissions that would constitute “just cause.” (T. pp. 327; T. pp. 331-333).

69. At the conclusion of the first pre-disciplinary conference, Petitioner requested a copy of the audio recording of the conference. Due to a malfunctioning recorder a copy could not be made available. (T. pp. 372-373). Notwithstanding that Petitioner desired a copy of the audio-recording, no recording was made of the second pre-disciplinary conference. (T. pp. 373).

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings. The Office of Administrative Hearings has personal and subject matter jurisdiction of this contested cases pursuant to Chapters 126 and 150B of the North Carolina General Statutes.

2. At the time of his demotion, Petitioner was a career state employee subject to the provisions of North Carolina General Statutes Chapter 126, The State Personnel Act.

3. This contested case is governed by N.C.G.S. § 126-35. This contested case addresses whether Petitioner was disciplined by demotion for “just cause” and whether Respondent properly considered and applied the necessary factors and facts in its decision to demote Petitioner.

4. Officer Littleton was the principal complaining witness. After weighing her credible testimony and determining that much of her testimony was not credible, the undersigned concludes that there were trends in her testimony that lacked substantiation for the accusations she made. The biggest hurdle she had to overcome was her denial that she ever mentioned a transfer to Johnston County. Petitioner, corroborated by Officer Hedgepath, who had been sequestered and is a disinterested witness, testified in a convincing fashion that Littleton approached him in a crowded setting, in Petitioner’s presence, and plainly asked him about the procedures necessary to transfer. Littleton’s testimony is inapposite to the Hedgepath testimony. Petitioner in the disciplinary process indicated that Hedgepath was an eyewitness. Crediting the Hedgepath direct and detailed testimony as to this event taints Littleton’s entire and uncorroborated accusations. Littleton’s statements and testimony otherwise lacked many substantive details and independent corroboration. Petitioner’s statements and testimony were detailed and corroborated. Petitioner’s witnesses, who were in a position to see and hear Littleton’s accusations, provided no corroboration of Littleton’s account, and neither did other potential witnesses who numbered in excess of thirty. Her principal corroborating witnesses, Berger and Drake, did not verify key aspects of Littleton’s accusations. Finally, Officer Shelton, corroborated by Hedgepath, portrayed in numerous training situations, how Littleton’s conduct and accusations were strained, embellished, and exaggerated. Shelton vividly remembered and discredited Littleton as a “Drama Queen.”

5. Unacceptable personal conduct is misconduct of a serious nature. *N.C. Dept. of Environment and Natural Resources, Division of Parks and Recreation v. Clifton Carroll*, 358 N.C. 649, 599 S.E. 2d 888 (2004).

6. Respondent has the burden of proof by a preponderance of the evidence that it had just cause to demote Petitioner. Respondent failed to carry its burden of proof.

7. N.C.G.S. § 126-35 does not define “just cause.” “The fundamental question...is whether the disciplinary action taken was ‘just.’ Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations.” *N.C. Dept. of Environment and Natural Resources, Division of Parks and Recreation v. Clifton Carroll*, 358 N.C. 649, 599 S.E. 2d 888 (2004). “‘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.” *Id.*

8. In determining whether just cause exists, “all relevant factors and considerations” must be weighed, including factors of mitigation. Title 25 N.C.A.C. 1B.0413. Consistent with this, a broad review of a number of sub-factors including, but not limited to, an evaluation of the following is necessitated: (i) whether the conduct is isolated or part of a pattern; (ii) the motivation of the employer in taking adverse action and whether there were any improper considerations, (iii) whether the employee intentionally violated clear agency policy and whether the violation was substantial; (iv) whether the employee was acting under any duress or injury that may have contributed to his/her conduct, (v) whether the employee was acting consistently with departmental practice and custom; (vi) the employee’s performance history; and (vii) any other significant mitigating factors. *Hill v. NC Dept. of Crime Control & Highway Patrol*, 04 OSP 1538.

9. The evidence demonstrates that Respondent failed to consider and credit substantial and appropriate mitigation evidence in Petitioner’s favor.

10. Petitioner cooperated throughout the investigation by providing numerous interviews and written statements is a mitigating factor.

11. Petitioner’s candor in admitting that he may have referred to Littleton as “darling” and his admission that he referred to Littleton’s eyes in a response that stemmed from a conversation regarding a pen is a mitigating factor.

12. Respondent’s “Failure to Cooperate During or Hindering an Investigation” policy provides that “failure to submit to a polygraph examination when directed to do so by a Department Official” is considered “unacceptable personal conduct and is representative of those causes considered for disciplinary action up to and including dismissal”. (P. Ex. #7). Clearly Petitioner offered to take a polygraph examination. Respondent failed to follow the intent of its own policies when it refused to give Petitioner a polygraph examination. Petitioner’s willingness to take the polygraph examination is a mitigating factor.

13. Other employees at Johnston Correctional Institute engaged in conduct which was more serious than the conduct attributed to Petitioner, resulting in a written warning. Selective enforcement of agency policy should be considered under State Personnel policy. “...The

supervisor should consider a number of factors to decide the appropriate type of disciplinary action. Among the factors are...The disciplinary actions received by other employees within the agency/work unit for comparable performance or behaviors.” (P.Exh.5) The considerable disparate treatment in this case speaks against finding that Respondent had just cause to demote Petitioner. It would be unreasonable and unjust for Respondent to be able to strictly enforce rules, prohibited unacceptable personal conduct against this Petitioner, under the evidence in this case, in view of Respondent’s history of inconsistency in enforcement at this Correctional Center.

14. The totality of the statements and conduct of Petitioner as found herein were not sufficient to warrant Petitioner’s demotion. The incident was over a brief period of time and does not represent a pattern of behavior by the Petitioner. Clearly, Littleton charged Petitioner with sexual harassment. Based upon the findings herein, the undersigned cannot conclude that Petitioner engaged in any conduct that rose to the level of legally defined sexual harassment nor did the Respondent find sexual harassment nor was there proof of sexual harassment. Petitioner did not create a hostile work environment.

15. In light of the totality of the evidence-including, but not limited to: the refusal to allow Petitioner to take a polygraph examination as he requested; the disparate treatment of other employees for the same or similar misconduct; Petitioner’s cooperation during the preceding months of investigation; Petitioner’s candor regarding his admissions; the inconsistency in Littleton’s statements; the credibility of Littleton as a witness; and the failure to interview key witnesses, that there is not sufficient justifiable basis in law, fact, and reason for the demotion of Petitioner under these allegations.

16. Under the findings contained herein, Respondent’s demotion of Petitioner was neither just nor equitable. Respondent’s demotion of Petitioner did not fit the conduct found herein and was not necessary to uphold Respondent’s “Unlawful Workplace Harassment and Professional Conduct Policy.” (*Wetherington v. N.C. Dept. of Crime Control and Public Safety* __NC App__ 752 S.E. 2d 511 (2013))

17. The foregoing Findings of Fact and Conclusions of Law require Petitioner to be disciplined at a level of a written warning, in order to be consistent with Respondent’s practices at the time Petitioner was demoted. A written warning is justified as found herein. Petitioner engaged in flirtatious and unprofessional conduct admittedly towards Littleton. Firearms and safety instruction requires the highest degree of professionalism instruction which must be administered in a gender-neutral environment. This type of verbal exchange should never take place in this setting because of the danger and harm that can ensue. Management’s tolerance of this type of flirtatious and joking interaction, for whatever reason, in this setting is unacceptable and must now be corrected to avoid potential harm and injury to others.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Respondent has not carried its burden of proof that Petitioner’s conduct rises to the level of “just cause” for demotion. Rather, the undersigned determines that Respondent should discipline Petitioner at a level other than by demotion, as it has done with other employees who

have engaged in similar conduct, and recommends that Petitioner receive a written warning. Accordingly, Respondent's demotion of Petitioner from Correctional Training Officer II to a Correctional Officer is vacated and Petitioner shall be afforded the following remedies:

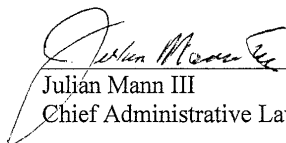
1. Petitioner shall be reinstated to his former position, Correctional Training Officer II.
2. Petitioner shall be awarded, from the date of demotion until his reinstatement, back pay and benefits to which he would have been entitled to had he not been demoted.
3. Petitioner is awarded reasonable attorney's fees and costs under the provisions of N.C.G.S. § 150B-23.2(a) and §150B-33(b)(11).
4. Respondent should correct portions of the information in Petitioner's personnel file to contain only true and accurate information in compliance with N.C.G.S. § 126-25, as stated herein.

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 14th day of May, 2014.


Julian Mann III
Chief Administrative Law Judge

FILED
OFFICE OF ADMINISTRATIVE HEARINGS
12/3/2013 10:54 AM

STATE OF NORTH CAROLINA
COUNTY OF CUMBERLAND

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13OSP13380

HAROLD LEONARD MCKEITHAN PETITIONER, V. FAYETTEVILLE STATE UNIVERSITY RESPONDENT.	FINAL DECISION
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The above-captioned case was heard before J. Randall May, Administrative Law Judge, on October 16, 2013 in Fayetteville, North Carolina.

APPEARANCES

FOR PETITIONER: Kirk J. Angel, Esq.
The Angel Law Firm PLLC
PO Box 1296
Concord, NC 28026

FOR RESPONDENT: Stephanie A. Brennan
Special Deputy Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602

EXHIBITS

Admitted for Petitioner:

Exhibit Number	Document Description
1	Letter to Harold McKeithan dated May 16, 2011
2	Posting for Network Technician Position
3	Petition for a Contested Case Hearing
4	Respondent's Objections and Responses to Petitioner's First Set of Discovery
5	Applications Materials for Harold McKeithan
6	Applicants List
7	Application Materials for Thomas Jones
8	Recommendation for Temporary/Extra Duty Employment for Thomas Jones

9	Structured Cabling Specialist
10	Application Materials for Marquita Adger
11	Application Materials for Asad Tidi

Admitted for Respondent:

Exhibit Number	Document Description
1	RIF Letter
2	FSU Merit Based Recruitment and Selection Plan
3	OSP RIF Policy
4	FSU RIF Policy
7	Networking Technician Posting
8	Applicants List
9	McKeithan Application
12	Jones Application
13	Documents re Jones Temp Position
14	People Admin Information re McKeithan Application
15	Interview Questions
19	Gantt Interview Packet
21	Recommendation to Hire Jones
22	Jones Competency Assessment and Career Development Plan
23	Personnel Action Form

WITNESSES

Called by Petitioner: Harold McKeithan
Nathaniel Gantt
Benjamin Simmons

Called by Respondent: Nathaniel Gantt
Benjamin Simmons

ISSUE

The issue for consideration is whether Respondent improperly denied Petitioner reduction in force ("RIF") priority consideration to which he was entitled when he applied for a position of Network Technician with Respondent in March 2013.

ON THE BASIS of careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the undersigned makes the following findings of fact. In making these findings, the undersigned has weighed all the evidence, or the lack thereof, and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness; any interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know, and remember the facts or occurrences about

which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case pursuant to Chapters 126 and 150B of the North Carolina General Statutes.
2. Until his position was subject to a RIF in 2011, Petitioner Harold McKeithan was a career status employee of Respondent in a position subject to the State Personnel Act.
3. Respondent, Fayetteville State University ("FSU" or "University"), is subject to Chapter 126 of the North Carolina General Statutes, and was Petitioner's employer.
4. On May 26, 2011, Petitioner was notified that his position with FSU was subject to a RIF. (Resp. Ex. 1) At the time of the RIF, Petitioner was in a career-banded ("banded") position of "Network Technician" at the competency level of "contributing." (Resp. Ex. 23) Petitioner's primary responsibilities in the position related to servicing printers, software, and other computer equipment.
5. In March 2013, Petitioner applied for a posted position with FSU. The posted position was a banded position of Network Technician at the competency level of "advanced." (Resp. Ex. 7)
6. The position for which Petitioner applied was in the same band as the one he was in at the time of the RIF (Network Technician), but the new position for which he applied was at a higher competency level than the competency level for the position he was in at the time of the RIF.
7. The position at issue was created to create cost savings to the University by bringing someone on board who could handle large cabling projects that had previously been outsourced to vendors at great expense to the University. In 2012, the University posted a temp position and hired a temporary employee with substantial experience in structured cabling, Thomas Paul Jones, to perform these functions. (Resp. Ex. 13) Jones had previously worked for a vendor who did structured cabling work for FSU.
8. In 2013, the University decided to make the position permanent. The primary purpose for the new position was to hire someone on a permanent basis to perform duties related to structured cabling, including planning that aspect of construction projects, laying cable and so forth. (*E.g.*, Resp. Exs. 7, 15 & 19 (listing position in interview packet as "Network Technician-Advanced (Structured Cabling and Project Management)"))
9. The hiring manager for the position, Nathaniel Gantt, reasonably determined based on Petitioner's application and his knowledge of Petitioner's role at FSU that Petitioner did

not have significant structured cabling experience and did not meet the essential qualifications of the position. (*See* Resp. Ex. 9)

10. A hiring committee was formed and served the function of interviewing selected candidates and making hiring decisions. Petitioner was not selected to interview for the position. Three other candidates were selected to interview. One such candidate, Asad Tidi, was not reached and therefore was not interviewed. Another candidate, Marquita Adger, was interviewed by phone, but the committee determined she also lacked the essential qualifications for the position. The final candidate interviewed was Thomas Paul Jones. During the interviews, the hiring committee asked candidates a series of highly technical questions about structured cabling. (Resp. Ex. 15)
11. Thomas Paul Jones was unanimously selected as the top candidate by the hiring committee. Jones had substantial work experience in the field of structured cabling and was successfully performing jobs related to structured cabling for the University as a temp employee. (Resp. Exs. 12 & 13) Jones was hired and now performs duties related to structured cabling for FSU. (Resp. Exs. 21 & 22)
12. Under applicable RIF policy, Petitioner was not entitled to priority consideration for the position at issue. The new position was in the same band as the position Petitioner held at the time of the RIF but was at a higher competency level. Petitioner was only entitled to RIF priority for positions in the same banded category as the one he held at the time of the RIF at the same or lower competency levels.
13. Petitioner did not meet the essential qualifications for the position. Nor could he have been trained to perform the job in a reasonable period of time, including normal orientation and training given any new employee. Nathaniel Gantt credibly testified that it would have taken more than six months to train Petitioner to perform the job duties for the position. To the finder of facts, Gantt's testimony was credible in illustrating why Thomas Paul Jones was more qualified for the subject position based on prior experience and training with various types of cabling.
14. Petitioner's qualifications were not substantially equivalent to those of Thomas Paul Jones for the position at issue. Jones' experience and qualifications in structured cabling were demonstrably superior, relating to the requirements of this position, to those of Petitioner.
15. Concerning his testimony regarding his belief that he was in a salary graded position; Petitioner testified that he was told years ago that his position was salary graded. However, Petitioner did not present any documents to support his belief that he was in a salary graded position at the time of the RIF and documents presented by Respondent showed this was not the case. (*E.g.*, Resp. Ex. 23) Furthermore, Benjamin Simmons, Assistant HR Director, credibly testified that positions at FSU were switched to banded positions well before 2011 and were banded at the time of the RIF. Concerning Petitioner's testimony that he had years of cabling experience, Petitioner's testimony was not consistent with his primary job duties as described in his work plan and assessments.

The testimony was not supported by any documentary or other evidence. Nor was it consistent with his own description of his primary job duties in his resume and application. Nathaniel Gantt, who supervised structured cabling at FSU since 2006, credibly testified that Petitioner was not performing structured cabling functions for FSU during Gantt's tenure at the University.

16. Nathaniel Gantt and Benjamin Simmons were credible witnesses. Furthermore, key parts of their testimony were supported by documentation.
17. Respondent had no improper motivation for not hiring Petitioner and did not consider any improper factors.

CONCLUSIONS OF LAW

BASED ON the sworn testimony of witnesses, including assessment of the witnesses' credibility, demeanor, interest, bias, and prejudice; assessment of the reasonableness and consistency of each witness's testimony; consideration of the documents admitted into evidence; and the entire record in this proceeding; the undersigned makes the following conclusions of law, as follows:

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over the issue in this contested case pursuant to Chapter 126 and Chapter 150B of the North Carolina General Statutes.
2. N.C.G.S. § 126-7.1(a2) established priority rights for State employees affected by a reduction in force and charged the State Personnel Commission with adopting rules to provide that priority consideration for State employees separated from State employment at a salary grade and rate equal to that held in the most recent position.
3. The State Personnel Commission through the Office of State Personnel (now Office of State Human Resources) developed applicable policies that were set forth in the State Personnel Manual (now the State Human Resources Manual).
4. The version of the State Personnel Manual applicable to employees such as Petitioner who were notified of a RIF prior to July 1, 2011 (Resp. Ex. 3) provides that "RIF applicants shall have priority for positions in the same banded classification at the same competency level or lower as that held at the time of notification" (*Id.*)
5. Under applicable RIF policy, petitioner was not entitled to priority consideration for the position at issue. The new position was in the same band as the position Petitioner held at the time of the RIF but was at a higher competency level. Petitioner was only entitled to RIF priority for positions in the same banded category as the one he held at the time of the RIF at the same or lower competency levels.

6. Even if Petitioner had been entitled to RIF priority for the contested case, Petitioner is not entitled to any relief. Respondent was not required to hire Petitioner for the position at issue.
7. First, even if Petitioner was entitled to RIF priority consideration for the position at issue, Respondent was not required to hire Petitioner because he did not meet the essential qualifications for the position.
8. Second, even if Petitioner was entitled to RIF priority consideration for the position at issue, Respondent was not required to hire Petitioner because Petitioner could not have been trained to perform the job in a reasonable period of time, including normal orientation and training given any new employee.
9. Third, even if Petitioner was entitled to RIF priority consideration for the position at issue, Respondent was not required to hire Petitioner because Petitioner's qualifications were not substantially equivalent to those of Thomas Paul Jones for the specific position at issue.
10. Even if Petitioner was entitled to RIF priority consideration for the position at issue, Respondent was not required to interview Petitioner for the reasons stated above. (See Resp. Ex. 3, Section 2, Page 27) In any event, the failure to interview Petitioner was harmless in light of the fact that Petitioner's qualifications were not substantially equal to those of the successful applicant.

On the basis of the above Conclusions of Law, the undersigned issues the following:

FINAL DECISION

It is hereby ordered that Petitioner has failed to prove that he was improperly denied priority consideration to which he was entitled and the decision not to hire Petitioner is **AFFIRMED**.

NOTICE

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

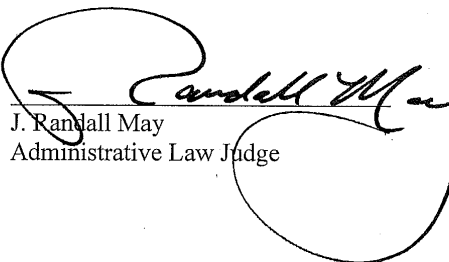
Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case 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.

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IT IS SO ORDERED.

This the 3rd day of December, 2013.


J. Randall May
Administrative Law Judge