

# NORTH CAROLINA REGISTER

VOLUME 27 • ISSUE 01 • Pages 1 - 161

July 2, 2012

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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.**

Office of Administrative Hearings

Rules Division

1711 New Hope Church Road

(919) 431-3000

Raleigh, North Carolina 27609

(919) 431-3104 FAX

contact: Molly Masich, Codifier of Rules

[molly.masich@oah.nc.gov](mailto:molly.masich@oah.nc.gov)

(919) 431-3071

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[dana.vojtko@oah.nc.gov](mailto:dana.vojtko@oah.nc.gov)

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(919) 431-3073

Tammara Chalmers, Editorial Assistant

[tammara.chalmers@oah.nc.gov](mailto:tammara.chalmers@oah.nc.gov)

(919) 431-3083

### **Rule Review and Legal Issues**

Rules Review Commission

1711 New Hope Church Road

(919) 431-3000

Raleigh, North Carolina 27609

(919) 431-3104 FAX

contact: Joe DeLuca Jr., Commission Counsel

[joe.deluca@oah.nc.gov](mailto:joe.deluca@oah.nc.gov)

(919) 431-3081

Bobby Bryan, Commission Counsel

[bobby.bryan@oah.nc.gov](mailto:bobby.bryan@oah.nc.gov)

(919) 431-3079

### **Fiscal Notes & Economic Analysis and Governor's Review**

Office of State Budget and Management

116 West Jones Street

(919) 807-4700

Raleigh, North Carolina 27603-8005

(919) 733-0640 FAX

Contact: Anca Grozav, Economic Analyst

[osbmruleanalysis@osbm.nc.gov](mailto:osbmruleanalysis@osbm.nc.gov)

(919) 807-4740

NC Association of County Commissioners

215 North Dawson Street

(919) 715-2893

Raleigh, North Carolina 27603

contact: Amy Bason

[amy.bason@ncacc.org](mailto:amy.bason@ncacc.org)

NC League of Municipalities

(919) 715-4000

215 North Dawson Street

Raleigh, North Carolina 27603

contact: Erin L. Wynia

[ewynia@nclm.org](mailto:ewynia@nclm.org)

### **Legislative Process Concerning Rule-making**

Joint Legislative Administrative Procedure Oversight Committee

545 Legislative Office Building

300 North Salisbury Street

(919) 733-2578

Raleigh, North Carolina 27611

(919) 715-5460 FAX

contact: Karen Cochrane-Brown, Staff Attorney

[Karen.cochrane-brown@ncleg.net](mailto:Karen.cochrane-brown@ncleg.net)

Jeff Hudson, Staff Attorney

[Jeffrey.hudson@ncleg.net](mailto:Jeffrey.hudson@ncleg.net)

**NORTH CAROLINA REGISTER**  
 Publication Schedule for January 2012 – December 2012

| 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<br>31st legislative day of the session beginning: | 270 <sup>th</sup> day from publication in the Register |
| 26:13                 | 01/03/12   | 12/08/11            | 01/18/12                         | 03/05/12                       | 03/20/12   | 05/01/12                             | 05/16/12  | 09/29/12   |
| 26:14                 | 01/17/12   | 12/21/11            | 02/01/12                         | 03/19/12                       | 03/20/12   | 05/01/12                             | 05/16/12  | 10/13/12   |
| 26:15                 | 02/01/12   | 01/10/12            | 02/16/12                         | 04/02/12                       | 04/20/12   | 06/01/12                             | 01/30/13  | 10/28/12   |
| 26:16                 | 02/15/12   | 01/25/12            | 03/01/12                         | 04/16/12                       | 04/20/12   | 06/01/12                             | 01/30/13  | 11/11/12   |
| 26:17                 | 03/01/12   | 02/09/12            | 03/16/12                         | 04/30/12                       | 05/21/12   | 07/01/12                             | 01/30/13  | 11/26/12   |
| 26:18                 | 03/15/12   | 02/23/12            | 03/30/12                         | 05/14/12                       | 05/21/12   | 07/01/12                             | 01/30/13  | 12/10/12   |
| 26:19                 | 04/02/12   | 03/12/12            | 04/17/12                         | 06/01/12                       | 06/20/12   | 08/01/12                             | 01/30/13  | 12/28/12   |
| 26:20                 | 04/16/12   | 03/23/12            | 05/01/12                         | 06/15/12                       | 06/20/12   | 08/01/12                             | 01/30/13  | 01/11/13   |
| 26:21                 | 05/01/12   | 04/10/12            | 05/16/12                         | 07/02/12                       | 07/20/12   | 09/01/12                             | 01/30/13  | 01/26/13   |
| 26:22                 | 05/15/12   | 04/24/12            | 05/30/12                         | 07/16/12                       | 07/20/12   | 09/01/12                             | 01/30/13  | 02/09/13   |
| 26:23                 | 06/01/12   | 05/10/12            | 06/16/12                         | 07/31/12                       | 08/20/12   | 10/01/12                             | 01/30/13  | 02/26/13   |
| 26:24                 | 06/15/12   | 05/24/12            | 06/30/12                         | 08/14/12                       | 08/20/12   | 10/01/12                             | 01/30/13  | 03/12/13   |
| 27:01                 | 07/02/12   | 06/11/12            | 07/17/12                         | 08/31/12                       | 09/20/12   | 11/01/12                             | 01/30/13  | 03/29/13   |
| 27:02                 | 07/16/12   | 06/22/12            | 07/31/12                         | 09/14/12                       | 09/20/12   | 11/01/12                             | 01/30/13  | 04/12/13   |
| 27:03                 | 08/01/12   | 07/11/12            | 08/16/12                         | 10/01/12                       | 10/22/12   | 12/01/12                             | 01/30/13  | 04/28/13   |
| 27:04                 | 08/15/12   | 07/25/12            | 08/30/12                         | 10/15/12                       | 10/22/12   | 12/01/12                             | 01/30/13  | 05/12/13   |
| 27:05                 | 09/04/12   | 08/13/12            | 09/19/12                         | 11/05/12                       | 11/20/12   | 01/01/13                             | 01/30/13  | 06/01/13   |
| 27:06                 | 09/17/12   | 08/24/12            | 10/02/12                         | 11/16/12                       | 11/20/12   | 01/01/13                             | 01/30/13  | 06/14/13   |
| 27:07                 | 10/01/12   | 09/10/12            | 10/16/12                         | 11/30/12                       | 12/20/12   | 02/01/13                             | 05/2014   | 06/28/13   |
| 27:08                 | 10/15/12   | 09/24/12            | 10/30/12                         | 12/14/12                       | 12/20/12   | 02/01/13                             | 05/2014   | 07/12/13   |
| 27:09                 | 11/01/12   | 10/11/12            | 11/16/12                         | 12/31/12                       | 01/22/13   | 03/01/13                             | 05/2014   | 07/29/13   |
| 27:10                 | 11/15/12   | 10/24/12            | 11/30/12                         | 01/14/13                       | 01/22/13   | 03/01/13                             | 05/2014   | 08/12/13   |
| 27:11                 | 12/03/12   | 11/07/12            | 12/18/12                         | 02/01/13                       | 02/20/13   | 04/01/13                             | 05/2014   | 08/30/13   |
| 27:12                 | 12/17/12   | 11/26/12            | 01/01/13                         | 02/15/13                       | 02/20/13   | 04/01/13                             | 05/2014   | 09/13/13   |

## 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) notices of rule-making proceedings;
- (3) text of proposed rules;
- (4) text of permanent rules approved by the Rules Review Commission;
- (5) notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165;
- (6) Executive Orders of the Governor;
- (7) 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;
- (8) orders of the Tax Review Board issued under G.S. 105-241.2; and
- (9) 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.

North Carolina Department of Labor  
Division of Occupational Safety and Health  
4 West Edenton Street  
Raleigh, NC 27601

(919) 807-2875

**NOTICE OF VERBATIM ADOPTION OF FEDERAL STANDARDS**

In consideration of G.S. 150-B-21.5(c) the Occupational Safety and Health Division of the Department of Labor hereby gives notice that:

- rule changes have been submitted to update the *North Carolina Administrative Code* at 13 NCAC .0101, .0201, and .0501 to incorporate by reference the occupational safety and health related provisions of Title 29 of the *Code of Federal Regulations* Parts 1910 promulgated as of April 3, 2012, and Part 1915 promulgated as of March 26, 2012, and Part 1926 promulgated as of April 18, 2012, except as specifically described, and
- the North Carolina Administrative Code at 13 NCAC 07A .0301 automatically includes amendments to certain parts of the Code of Federal Regulations, including Title 29, Part 1904-Recording and Reporting Occupational Injuries and Illnesses.

This update encompasses the following recent verbatim adoptions:

- Hazard Communication  
(77 FR 17574 - 17896, March 26, 2012)
- Rigging Equipment for Material Handling Construction Standard; Correction and Technical Amendment  
(77 FR 23117 - 23118, April 18, 2012)
- Bloodborne Pathogens Standard; Corrections and Technical Amendment  
(77 FR 19933 - 19934, April 3, 2012)
- Revising Standards Referenced in the Acetylene Standard  
(77 FR 13969 - 13970, March 8, 2012) (76 FR 75782 - 75786, December 5, 2011)
- Corrections and Technical Amendments to 16 OSHA Standards  
(76 FR 80735 - 80741, December 27, 2011)

The *Federal Registers* (FR), as cited above, contain both technical and economic discussions that explain the basis for the changes.

For additional information, please contact:

Bureau of Education, Training and Technical Assistance  
Occupational Safety and Health Division  
North Carolina Department of Labor  
1101 Mail Service Center  
Raleigh, North Carolina 27699-1101

For additional information regarding North Carolina's process of adopting federal OSHA Standards verbatim, please contact:

Jane Ammons Gilchrist, General Counsel  
North Carolina Department of Labor  
Legal Affairs Division  
1101 Mail Service Center  
Raleigh, NC 27699-1101

**NORTH CAROLINA DEPARTMENT OF LABOR  
OCCUPATIONAL SAFETY AND HEALTH DIVISION  
FEDERAL LAW RULE CERTIFICATION**

**June 11, 2012**

This certification is made in accordance with N.C.G.S. 150B-19.1(g)(1).

(1) OSHA modified its Hazard Communication Standard (HCS) effective May 25, 2012 to conform to the United Nations' Globally Harmonized System of Classification and Labeling of Chemicals (GHS). OSHA determined that the modifications will significantly reduce costs and burdens while also improving the quality and consistency of information provided to employers and employees regarding chemical hazards and associated protective measures. The modifications to the standard include revised criteria for classification of chemical hazards; revised labeling provisions that include requirements for use of standardized signal words, pictograms, hazard statements, and precautionary statements; a specified format for safety data sheets; and related revisions to definitions of terms used in the standard, and requirements for employee training on labels and safety data sheets. OSHA also modified provisions of other standards, including standards for flammable and combustible liquids, process safety management, and most substance specific health standards, to ensure consistency with the modified HCS requirements. The consequences of these modifications will be to improve safety, to facilitate global harmonization of standards, and to produce hundreds of millions of dollars in annual savings.

(2) OSHA corrected its sling standard for construction titled "Rigging Equipment for Material handling" by removing the rated capacity tables and making minor, non-substantive revisions to the regulatory text.

(3) OSHA made a technical amendment to its Bloodborne Pathogens Standard by moving the rule's paragraph on sharps injury log requirements from paragraph (i), entitled "Dates," to paragraph (h), entitled "Recordkeeping."

(4) OSHA confirmed the effective date of its direct final rule that revised the Acetylene Standard for general industry by updating the reference to a standard published by a standards-developing organization, the Compressed Gas Association. In the December 5, 2011 direct final rule (76 FR 75782), OSHA stated that it would withdraw the companion proposed rule and confirm the effective date of the direct final rule if the Agency received no significant adverse comments. OSHA did not receive significant adverse comments on the direct final rule and therefore confirmed that the direct final rule became effective on March 5, 2012.

(5) OSHA corrected typographical errors in, and make non-substantive technical amendments to, 16 OSHA standards. The technical amendments included updating or revising cross-references and updating OSHA recordkeeping log numbers.

The attached amendments of 13 NCAC .0101, .0201, and .0501 are required by 29 CFR 1902.2(a) and G.S. 95-131(a) in order for North Carolina's Occupational Safety and Health program to be as effective as the federal program and to maintain North Carolina's state plan status under the federal Occupational Safety and Health Act of 1970. These rules were adopted in accordance with G.S. 150B-21.5(c). Pursuant to the provisions of G.S. 150B-21.3(e), **the effective date of this action is June 11, 2012.**

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Allen McNeely, Deputy Commissioner / Director  
North Carolina Department of Labor  
Occupational Safety and Health Division

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Jane Ammons Gilchrist, General Counsel  
North Carolina Department of Labor  
Agency Rule-Making Coordinator

Public Notice  
North Carolina Department of Environment and Natural Resources (NCDENR)

Division of Water Resources

1611 Mail Service Center  
Raleigh, North Carolina, 27699-1611

Notice of Recommendation that the Environmental Management Commission  
Approve the Broad River Basin Hydrologic Model

The N.C. Division of Water Resources (DWR), within the N.C. Department of Environment and Natural Resources (DENR), recommends that the Environmental Management Commission approve the Broad River Basin Hydrologic Model. Information and details about the Broad River Basin Hydrologic Model are available on the division's website at [http://ncwater.org/Data\\_and\\_Modeling/Broad](http://ncwater.org/Data_and_Modeling/Broad).

Interested persons may also visit the DWR offices on the 11<sup>th</sup> floor of the Archdale Building, 512 N. Salisbury Street, Raleigh, NC 27604, to review information on file related to the Broad model. Written comments regarding the proposed Broad River Basin Hydrologic Model will be accepted for 60 days after the publication date of this notice and must be received by DWR before close of business August 30, 2012. You can email comments and/or information requests to [dwr-broad-staff@lists.ncmail.net](mailto:dwr-broad-staff@lists.ncmail.net), or mail comments and/or information requests to the DWR, at the address above.

The division will provide training opportunities in the use of the model during the 60-day comment period if there is sufficient interest. If you are interested in participating in a training session, please go to the division's website, review the list of potential dates and check the ones that you could fit your schedule. Additional information on this notice and training opportunities may be found on the division's website at [http://ncwater.org/Data\\_and\\_Modeling/Broad/training.php](http://ncwater.org/Data_and_Modeling/Broad/training.php), or you can contact Daniel Ngandu at [daniel.ngandu@ncdenr.gov](mailto:daniel.ngandu@ncdenr.gov), or (919) 707-9022 for more information.

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 NC Private Protective Services Board intends to adopt the rule cited as 12 NCAC 07D .0114.

Link to agency website pursuant to G.S. 150B-19.1(c): www.ncdoj.gov/PPS.aspx

Proposed Effective Date: October 1, 2012

Public Hearing:

Date: July 17, 2012

Time: 2:00 p.m.

Location: 4901 Glenwood Avenue, Suite 200, Raleigh, NC 27612

Reason for Proposed Action: The reason for the proposed adoption of this rule is to comply with the rule-making requirements of G.S. 93B-2.

Procedure by which a person can object to the agency on a proposed rule: Objections to the proposed rule changes shall be submitted before the end of the comment period in writing to Anthony Bonapart, Deputy Director, Private Protective Services Board, 4901 Glenwood Avenue, Suite 200, Raleigh, NC 27612.

Comments may be submitted to: Anthony Bonapart, PPSB Deputy Director, 4901 Glenwood Avenue, Suite 200, Raleigh, NC 27612

Comment period ends: August 31, 2012

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
Date submitted to OSBM:
Substantial economic impact (≥\$500,000)
Approved by OSBM
No fiscal note required

CHAPTER 07 - PRIVATE PROTECTIVE SERVICES

SUBCHAPTER 07D - PRIVATE PROTECTIVE SERVICES BOARD

SECTION .0100 - ORGANIZATION AND GENERAL PROVISIONS

12 NCAC 07D .0114 SUSPENSION OF AUTHORITY TO EXPEND FUNDS

In the event that the Board's authority to expend funds is suspended pursuant to G.S. 93B-2(d), the Board shall continue to issue and renew licenses, registrations, and certifications and all fees tendered shall be placed in an escrow account maintained by the Board for this purpose. Once the Board's authority is restored, the funds shall be moved from the escrow account into the general operating account.

Authority G.S. 93B-2(d).

\*\*\*\*\*

TITLE 12 – DEPARTMENT OF JUSTICE

Notice is hereby given in accordance with G.S. 150B-21.2 that the Alarm Systems Licensing Board intends to amend the rules cited as 12 NCAC 11 .0102, .0201, .0301, .0307.

Link to agency website pursuant to G.S. 150B-19.1(c): www.ncdoj.gov/ASL.aspx

Proposed Effective Date: November 1, 2012

Public Hearing:

Date: July 18, 2012

Time: 2:00 p.m.

Location: 4901 Glenwood Avenue, Suite 200, Raleigh, NC 27612

**Reason for Proposed Action:** *These proposed changes are to provide the Board's new physical address, change the method by which application photographs may be submitted, and make provisions for the Board's appointment of a provider of out-of-state criminal history records checks.*

**Procedure by which a person can object to the agency on a proposed rule:** *Objections to the proposed rule changes shall be submitted before the end of the comment period in writing to Terry Wright, Director, Alarm Systems Licensing Board, 4901 Glenwood Avenue, Suite 200, Raleigh, NC 27612.*

**Comments may be submitted to:** *Terry Wright, Director, Alarm Systems Licensing Board, 4901 Glenwood Avenue, Suite 200, Raleigh, NC 27612, phone (919)788-5320, fax (919)788-5365*

**Comment period ends:** *August 31, 2012*

**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
- Date submitted to OSBM:
- Substantial economic impact (≥\$500,000)
- Approved by OSBM
- No fiscal note required

**CHAPTER 11 - NORTH CAROLINA ALARM SYSTEMS LICENSING BOARD**

**SECTION .0100 - ORGANIZATION AND GENERAL PROVISIONS**

**12 NCAC 11 .0102 LOCATION**

The administrative offices of the Alarm Systems Licensing Board are located ~~1631 Midtown Place, Suite 104, Raleigh, North Carolina 27609,~~ 4901 Glenwood Avenue, Suite 200, Raleigh, North Carolina 27612, telephone ~~(919) 875-3611.~~ (919) 788-5320.

Authority G.S. 74D-4; 74D-5.

**SECTION .0200 - PROVISIONS FOR LICENSEES**

**12 NCAC 11 .0201 APPLICATION FOR LICENSE**

(a) Each applicant for a license shall complete an application form provided by the Board. This form and one additional copy shall be submitted to the administrator and shall be accompanied by:

- (1) one set of classifiable fingerprints on an applicant card provided by the Board;
- (2) ~~one two~~ head and shoulders ~~color photograph~~ digital photograph of the applicant in JPG format of acceptable quality for identification ~~one inch by one inch in size;~~ and taken within six months prior to submission and submitted by email to PPSB/ASLB-photos@ncdoj.gov or by compact disc;
- (3) for residents of North Carolina statements of the results of a ~~local criminal history records search by the city county identification bureau or clerk of superior court in each county where the applicant has resided within the immediately preceding 48 months or a~~ statewide criminal history records search for the past five years conducted by an Administrative Offices of the Courts' approved firm that conducts criminal history searches and bases its search on the criminal history database maintained by the North Carolina Administrative Offices of the Courts;
- (4) for out-of-state residents, statements of the results of a statewide criminal history records search for the past five years conducted by a Board approved company under contract with, or appointed by, the Board to conduct criminal history searches which bases its search on the criminal history database maintained by the state of residence;
- (4)(5) the applicant's application fee; and
- (5)(6) an Equifax credit check run within 30 days of the license application submission date.

(b) Each applicant must provide evidence of high school graduation either by diploma, G.E.D. certificate, or other equivalent documentation.

(c) Each applicant for a license shall meet personally with either a Board investigator, the Screening Committee, the Director, or a Board representative designated by the Director prior to being issued a license. The applicant shall discuss the provisions of G.S. 74D and the administrative rules during the personal meeting. The applicant shall sign a form provided by the Board indicating that the applicant has reviewed the information with the Board's representative and that the applicant has an understanding of G.S. 74D and the administrative rules.

(d) Each applicant for a branch office license shall complete an application form provided by the Board. This form and one additional copy shall be submitted to the administrator and shall be accompanied by the branch office application fee.

Authority G.S. 74D-2; 74D-3; 74D-5; 74D-7.

SECTION .0300 - PROVISIONS FOR REGISTRANTS

12 NCAC 11 .0301 APPLICATION FOR REGISTRATION

(a) Each licensee or qualifying agent shall submit and sign an application form for the registration of his employee on a form provided by the Board. This form, when sent to the board, shall be accompanied by:

- (1) a one set of classifiable fingerprints on a standard F.B.I. applicant card,
- (2) ~~two photographs~~ one head and shoulders digital photograph of the applicant in JPG format of acceptable quality for identification and ~~made taken~~ within 90 days of the application one inch by one inch in size, six months prior to submission and submitted by email to PPSB/ASLB-photos@ncdoj.gov or by compact disc;
- (3) for residents of North Carolina statements of the results of a local criminal history records search by the city county identification bureau or clerk of superior court in each county where the applicant has resided within the immediately preceding 48 months or a statewide criminal history records search for the preceding 48 months conducted by an Administrative Offices of the Courts' approved firm that conducts criminal history searches and bases its search on the criminal history database maintained by the North Carolina Administrative Offices of the Courts, and and;
- (4) for out-of-state residents, statements of the results of a statewide criminal history records search for the past 48 months conducted by a Board approved company under contract with, or appointed by, the Board to conduct criminal history search which bases its searches on the criminal history database maintained by the state of residence; and
- (4)(5) the registration fee required by 12 NCAC Chapter 11 .0302.

(b) The employer of an applicant who is currently registered with another alarm business shall complete an application form provided by the Board. This form shall be accompanied by the applicant's multiple registration fee.

(c) The employer of each applicant for registration shall retain a copy of the applicant's application in the individual applicant's personnel file in the employer's office.

(d) The employer of each applicant for registration shall complete and submit to the Board a certification of the background and criminal record check of every applicant signed by the licensee or qualifying agent. A copy of this certification shall be retained in the individual applicant's personnel file in the employer's office.

Authority G.S. 74D-5; 74D-8.

12 NCAC 11 .0307 SUSPENSION OF AUTHORITY TO EXPEND FUNDS

In the event that Board's authority to expend funds is suspended pursuant to G.S. 93B-2(d), the Board shall continue to issue and renew licenses and all fees tendered shall be placed in an escrow account maintained by the Board for this purpose. Once the Board's authority is restored, the funds shall be moved from the escrow account into the general operating account.

Authority G.S. 93B-2(b).

TITLE 26 – OFFICE OF ADMINISTRATIVE HEARINGS

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Office of Administrative Hearings intends to amend the rules cited as 26 NCAC 01 .0202; 03 .0101-.0102, .0105, .0127, .0131; .0401; 04 .0101-.0103, .0106-.0108; and repeal the rules cited as 26 NCAC 01 .0104; 03 .0301-.0305, .0403; 04 .0104-.0105, .0109.*

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

**Proposed Effective Date:** November 1, 2012

**Public Hearing:**

**Date:** July 18, 2012

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

**Location:** 1711 New Hope Church Road, Raleigh, NC 27609

**Reason for Proposed Action:**

*26 NCAC 03 .0101-.0102, .0105, .0127, .0131 – The General Assembly enacted S.L. 2011-398 which gives OAH Administrative Law Judges final decision making in contested cases commenced on or after January 1, 2012 under Article 3 of G.S. 150B. OAH is amending rules that are affected by this legislative change and to make better use of technology by adding electronic mail as a means of providing service.*

*26 NCAC 01 .0104; 03 .0301-.0305, .0403; 04 .0104-.0105, .0109 – to repeal rules that are no longer necessary.*

*26 NCAC 01 .0202 – to amend the rule on declaratory rulings to be consistent with the requirements in G.S. 150B-4.*

*26 NCAC 04 .0101-.0103, .0106-.0108 – to clarify and update rules.*

**Procedure by which a person can object to the agency on a proposed rule:**

*Objections may be submitted in writing or via electronic mail during the comment period to Gene Cella, Office of Administrative Hearings, 1711 New Hope Church Road, Raleigh, NC 27609; gene.cella@oah.nc.gov.*

**Comments may be submitted to:** Gene Cella, Office of Administrative Hearings, 1711 New Hope Church Road, Raleigh, NC 27609; email [gene.cella@oah.nc.gov](mailto:gene.cella@oah.nc.gov)

**Comment period ends:** August 31, 2012

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 26 NCAC 03 .0102
Date submitted to OSBM: April 3, 2012
Substantial economic impact (≥\$500,000)
Approved by OSBM
No fiscal note required 26 NCAC 01 .0104, .0202; 03 .0101, .0105, .0127, .0131, .0301-.0305, .0401; 04 .0101-.0109

CHAPTER 01 - GENERAL

SECTION .0100 - GENERAL

26 NCAC 01 .0104 EMPLOYEE INSURANCE COMMITTEE

- (a) The Employee Insurance committee of the Office of Administrative Hearings shall be constituted pursuant to G.S. 58-31-60, to make insurance available to employees through payroll deduction.
(b) Advertisement for submission of proposals shall be published in the following newspapers: Raleigh News and Observer, Charlotte Observer, Asheville Citizen-Times and the Wilmington Star.
(c) Any Insurer wishing to make a presentation to the committee must submit a written proposal outlining its plan no less than 30 days prior to the date of the committee meeting.
(d) All proposals shall be sent to the committee addressed as follows: Chairman, Employee Insurance Committee, Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

Authority G.S. 7A-751(a); 58-31-60.

SECTION .0200 - PETITION FOR RULE-MAKING - DECLARATORY RULINGS

26 NCAC 01 .0202 DECLARATORY RULINGS: AVAILABILITY

Declaratory rulings pursuant to G.S. 150B-4 will be issued by the Office of Administrative Hearings upon written request only on the validity of a rule of the Office of Administrative Hearings or on the applicability of a rule or order of the Office of Administrative Hearings to stipulated facts. A declaratory ruling will not be issued on a matter requiring an evidentiary proceeding.

(a) The Director or his designee may issue declaratory rulings. All requests for declaratory rulings shall be in writing and submitted to:

Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, North Carolina 27609

(b) Every request for a declaratory ruling must include the following information:

- (1) the name and address of the petitioner,
(2) the reference to the statute or rule in question,
(3) a statement as to why the petitioner is a person aggrieved, and
(4) the consequences of a failure to issue a declaratory ruling.

(c) A declaratory ruling shall not be issued on a matter requiring an evidentiary proceeding.

Authority G.S. 150B-4.

CHAPTER 03 - HEARINGS DIVISION

SECTION .0100 - HEARING PROCEDURES

26 NCAC 03 .0101 GENERAL

(a) The rules in this Chapter in effect on January 1, 2012 shall apply to contested cases commenced on or after January 1, 2012. The rules in this Chapter in effect on December 31, 2011 shall apply to contested cases commenced on or before December 31, 2011.

(a)(b) The Rules of Civil Procedure as contained in G.S. 1A-1 and the General Rules of Practice for the Superior and District Courts as authorized by G.S. 7A-34 and found in the Rules Volume of the North Carolina General Statutes shall apply in contested cases in the Office of Administrative Hearings (OAH) unless another specific statute or rule of the Office of Administrative Hearings provides otherwise.

(b)(c) The Office of Administrative Hearings shall supply forms for use in contested cases. These forms shall conform to the format of the Administrative Office of the Courts' Judicial Department Forms Manual.

(c)(d) The Office of Administrative Hearings shall permit the filing of contested case documents and other pleadings by facsimile (fax) or electronic mail by an attached file either in PDF format or a document compatible with Microsoft Word 2007. Electronic mail with attachment shall be sent by electronic transmission to: oah.clerks@oah.nc.gov. The faxed or electronic documents shall be deemed a "filing" within the meaning of 26 NCAC 03 .0102(a)(2) provided the original signed document, one copy and the appropriate filing fee (if a fee is required by G.S. 150B-23.2) is received by OAH within

seven business days following the faxed or electronic transmission. Other electronic transmissions, for example, electronic mail without attached file as specified in this Paragraph, shall not constitute a valid filing with the Office of Administrative Hearings.

~~(d)~~(e) Every pleading and other documents filed with OAH shall be signed by the attorney who prepared the document, if it was prepared by an attorney, and shall contain his name, address, telephone number, and North Carolina State Bar number. An original and one copy of each document shall be filed.

~~(e)~~(f) Except as otherwise provided by statutes or by rules adopted under G.S. 150B-38(h), the rules contained in this Chapter shall govern the conduct of contested case hearings under G.S. 150B-40 when an Administrative Law Judge has been assigned to preside in the contested case.

Authority G.S. 7A-750; 7A-751(a); 150B-23.2; 150B-40(c).

**26 NCAC 03 .0102 DEFINITIONS AND CONSTRUCTION**

(a) The definitions contained in G.S. 150B-2 are incorporated herein by reference. In addition, the following definitions apply:

- (1) "Chief Administrative Law Judge" means the person appointed according to G.S. 7A-752.
- (2) "File or Filing" means to place the paper or item to be filed into the care and custody of the chief hearings clerk of the Office of Administrative Hearings, and acceptance thereof by him, except that the administrative law judge may permit the papers to be filed with him in which event the administrative law judge shall note thereon the filing date. All documents filed with the Office of Administrative Hearings, except exhibits, shall be in duplicate in letter size 8 1/2" by 11".
- (3) ~~"Service or Serve" means personal delivery or, unless otherwise provided by law or rule, delivery by first class United States Postal Service mail or a licensed overnight express mail service, postage prepaid and addressed to the person to be served at his or her last known address. A Certificate of Service by the person making the service shall be appended to every document requiring service under these Rules. Service by mail or licensed overnight express mail is complete upon placing the item to be served, enclosed in a wrapper addressed to the person to be served, in an official depository of the United States Postal Service or upon delivery, postage prepaid and wrapped in a wrapper addressed to the person to be served, to an agent of the overnight express mail service.~~

"Service or Serve" means:

- (A) delivery by electronic mail with an attached file in a format that is readily accessible to the recipient;
- (B) facsimile (fax);

- (C) personal delivery;
- (D) delivery by first class United States Postal Service mail; or
- (E) delivery by overnight express mail service.

(b) A Certificate of Service by the person making the service shall be appended to every document requiring service under these Rules.

(c) Service by mail is complete upon placing the item to be served, enclosed in a wrapper addressed to the person to be served, in an official depository of the United States Postal Service.

(d) Service by overnight express mail is complete upon placing the item to be served, enclosed in a wrapper addressed to the person to be served, in the custody of an overnight express mail service.

(e) Service by electronic mail or fax is deemed to occur one hour after it is sent, provided that:

- (1) documents sent after 5 p.m. are deemed sent at 8 a.m. the following day; and
- (2) documents sent by electronic mail that are not in a format in which the content is readily accessible to the recipient are not deemed served until actually received in a form in which the content is readily accessible to the receiving party.

Service by electronic mail or fax is treated the same as service by mail for the purpose of adding three days to the prescribed period to respond under N.C.R. Civ.P.6(e).

~~(b)~~(f) The rules of statutory construction contained in Chapter 12 of the General Statutes shall be applied in the construction of these Rules.

Authority G.S. 7A-752; 150B-23.

**26 NCAC 03 .0105 DUTIES OF THE ADMINISTRATIVE LAW JUDGE**

In conjunction with the powers of administrative law judges prescribed by G.S. 150B-33 and ~~G.S. 150B-36~~, G.S. 150B-34, the administrative law judge shall perform the following duties, consistent with law:

- (1) Hear and rule on motions;
- (2) Grant or deny continuances;
- (3) Issue orders regarding prehearing matters, including directing the appearance of the parties at a prehearing conference;
- (4) Examine witnesses when deemed necessary to make a complete record and to aid in the full development of material facts in the case;
- (5) Make preliminary, interlocutory, or other orders as deemed appropriate;
- (6) Grant dismissal when the case or any part thereof has become moot or for other reasons;
- (7) Order the State of North Carolina, when it is the losing party as determined by the presiding Administrative Law Judge, to reimburse the filing fee to the petitioner; and
- (8) Apply sanctions in accordance with Rule .0114 of this Section.

Authority G.S. 7A-751(a); 8C-1, Rule 614; 150B-23.2; 150B-33; 150B-34.

**26 NCAC 03 .0127 ADMINISTRATIVE LAW JUDGE'S DECISION**

(a) An administrative law judge shall issue a final decision or order in a contested case within 45 days after the later of the date the administrative law judge receives any proposed findings of fact and written arguments submitted by the parties and the date the contested case hearing ends. ~~The administrative law judge shall serve a copy of the decision on each party. When an administrative law judge issues a decision, the Office of Administrative Hearings shall promptly serve a copy of the official record on the agency making the final decision by hand delivery or certified mail.~~

(b) An administrative law judge's final decision shall be based exclusively on:

- (1) competent evidence and arguments presented during the hearing and made a part of the official record;
- (2) stipulations of fact;
- (3) matters officially noticed;
- (4) any proposed findings of fact and written arguments submitted by the parties under Paragraph (g) of Rule .0119 of this Section; and
- (5) other items in the official record that are not excluded by G.S. 150B-29(b).

(c) An administrative law judge's final decision shall fully dispose of all issues required to resolve the case and shall contain:

- (1) a caption;
- (2) the appearances of the parties;
- (3) a statement of the issues;
- (4) references to specific statutes or rules at issue;
- (5) findings of fact;
- (6) conclusions of law based on the findings of fact and applicable constitutional principles, statutes, rules, or federal regulations;
- (7) in the discretion of the administrative law judge, a memorandum giving reasons for his findings of fact and conclusions of law; and
- ~~(8) a statement identifying the agency that will make the final decision; and~~
- ~~(9)~~(8) a statement that each party has the right to file exceptions to the administrative law judge's decision with the agency making the final decision and has the right to present written arguments on the decision to the agency making the final decision. an appeal of the administrative law judge's final decision by filing a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides, or, where applicable pursuant to G.S. 7A-29(a), a Notice of Appeal to the Court of Appeals.

(d) The chief administrative law judge may extend the 45-day time limit for issuing a decision. An administrative law judge

who needs an extension must submit a request for extension to the chief administrative law judge before the 45-day period has expired.

Authority G.S. 7A-751(a); 150B-34; 150B-47.

**26 NCAC 03 .0131 FINAL DECISIONS IN CONTESTED CASES**

A copy of a final decision issued by an administrative law judge shall be served on each party in accordance with G.S. 150B-36. Rule .0102(a)(3) and (b) through (f) of this Section.

Authority G.S. 150B-45.

**SECTION .0300 - EXPEDITED HEARING PROCEDURES FOR COMPLEX CONTESTED CASES**

**26 NCAC 03 .0301 ORDER DESIGNATING COMPLEX CONTESTED CASES**

~~Upon the joint motion, stipulation, or consent of all parties, the Chief Administrative Law Judge (ALJ) may order any contested case to be designated as complex and eligible for expedited hearing procedures. The Chief ALJ shall issue this order, after reviewing the recommendation of the presiding ALJ, without hearing, within 30 days after the assignment of the contested case. If the Chief ALJ denies the order, the contested case shall remain on the presiding ALJ's regular docket.~~

Authority G.S. 150B-31(b).

**26 NCAC 03 .0302 FACTORS TO BE CONSIDERED**

~~The Chief ALJ shall designate a contested case as complex and eligible for expedited procedures based upon any factors the Chief ALJ deems appropriate, including the following:~~

- ~~(1) the need for special expertise by the presiding ALJ;~~
- ~~(2) the number and diverse interests of the parties;~~
- ~~(3) the amount and nature of anticipated prehearing discovery and motions;~~
- ~~(4) the complexity of evidentiary matters and legal issues involved;~~
- ~~(5) the efficient administration of justice; and~~
- ~~(6) the economic value of the claims to be litigated.~~

Authority G.S. 150B-31(b).

**26 NCAC 03 .0303 VENUE**

~~In order to comply with the time requirements of the expedited hearing procedures, venue for all contested cases designated as complex shall be Wake County, North Carolina, unless otherwise ordered by the presiding ALJ.~~

Authority G.S. 150B-31(b).

**26 NCAC 03 .0304 EXPEDITED HEARING PROCEDURES FOR COMPLEX CONTESTED CASES**

~~(a) Scheduling Order By Consent. Within 15 days after the Chief ALJ has designated a contested case as complex, the~~

parties shall submit to the presiding ALJ a scheduling order by consent. If the parties are unable to agree upon a consent scheduling order during this time period, the presiding ALJ shall remove the case from the expedited docket and return it to the regular docket.

(b) ~~Content of the Scheduling Order. The Scheduling Order shall include the following:~~

- ~~(1) dates and time limits for filing motions, responses to motions, and disposition of prehearing motions;~~
- ~~(2) dates and time limits for completion of discovery;~~
- ~~(3) dates for prehearing conference and orders on final prehearing conference; and~~
- ~~(4) any other stipulation controlling the disposition of the contested case, including any agreement regarding abbreviated hearing procedures.~~

(e) ~~Hearing and Decision. The hearing for a complex contested case shall commence within 90 days of the filing of the petition. Absent a contrary agreement between the parties, the maximum length allowed for a hearing shall be five days, and the time shall be allocated equitably between the parties. The presiding ALJ shall issue a decision within 30 days of the close of the hearing. The Office of Administrative Hearings shall deliver the official record to the agency making the final decision within 15 days after the presiding ALJ has filed a recommended decision.~~

Authority G.S. 150B-31(b).

**26 NCAC 03 .0305 RULES AND PROCEDURES**

The rules contained in 26 NCAC 3 .0100 shall govern the hearing of complex contested cases except as modified by this Section.

Authority G.S. 150B-31(b).

**SECTION .0400 - SIMPLIFIED PROCEDURES FOR MEDICAID APPLICANT AND RECIPIENT APPEALS**

**26 NCAC 03 .0401 HEARING PROCEDURES RULES**

(a) The rules in 26 NCAC 03 .0100 apply to contested Medicaid cases commenced by Medicaid applicants or recipients under S.L. 2008-107, s. 10.15A.(h1) as rewritten by S.L. 2008-118, s. 3.13 except:

- (1) 26 NCAC 03 .0101(a);
- (2) 26 NCAC 03 ~~.0102(3)~~; .0102(a)(3), (b) – (e);
- (3) 26 NCAC 03 .0103(a);
- (4) 26 NCAC 03 .0104;
- (5) 26 NCAC 03 .0107;
- (6) 26 NCAC 03 .0108;
- (7) 26 NCAC 03 .0109;
- (8) 26 NCAC 03 .0112(b), (c), (e), (f), (g);
- (9) 26 NCAC 03 .0115;
- (10) 26 NCAC 03 .0117;
- (11) 26 NCAC 03 .0118;
- (12) 26 NCAC 03 .0120(e);
- (13) 26 NCAC 03 .0123;

- (14) 26 NCAC 03 .0124;
- (15) 26 NCAC 03 .0125; and
- (16) 26 NCAC 03 .0127(a).

(b) Nothing in this Section affects discretionary powers granted to an administrative law judge as set out in G.S. 150B-33(b).

Authority G.S. 7A-751(a); S.L. 2008-107, s. 10.15A.(h1) as rewritten by S.L. 2008-118, s. 3.13.

**26 NCAC 03 .0403 EXPEDITED HEARINGS PROCEDURES FOR COMPLEX CONTESTED CASES**

The rules in 26 NCAC 03 .0300 do not apply to contested Medicaid cases commenced by Medicaid applicants or recipients under S.L. 2008-107, s. 10.15A.(h1) as rewritten by S.L. 2008-118, s. 3.13.

Authority G.S. 7A-751(a); S.L. 2008-107, s. 10.15A.(h1) as rewritten by S.L. 2008-118, s. 3.13.

**CHAPTER 04 – CIVIL RIGHTS DIVISION**

**SECTION .0100 - GENERAL**

**26 NCAC 04 .0101 INTRODUCTION**

The Civil Rights Division shall investigate process all charges filed under G.S. 7A-759 and deferred charges from the Equal Employment Opportunity Commission in accordance with the Federal regulations implementing Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act which are published in 29 C.F.R., Parts 1600 through 1699, 900 through 1899 and are hereby incorporated by reference to include subsequent amendments. Copies of 29 C.F.R., Parts 1600 through 1699 900 through 1899 are available at no a cost of twenty one dollars (\$21.00) from the Government Printing Office website at www.gpoaccess.gov. Superintendent of Documents, Attn: New Orders, PO Box 371954, Pittsburgh, PA 15250-7954.

Authority G.S. 7A-751; 7A-759.

**26 NCAC 04 .0102 CONTENT AND PROCEDURE**

(a) Any person wishing to file a complaint of alleged employment discrimination under G.S. 7A-759 as defined in Rule .0101 of this Section with the EEOC Civil Rights Division shall complete the preliminary intake form found at www.ncoah.com; or submit the complaint in writing or by telephone to: address a petition to:

Director of Civil Rights Division  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714  
(919) 431-3036  
or  
District Director  
EEOC  
129 West Trade Street  
Charlotte, NC 28202

(b) The complaint petition shall include the following information:

- (1) The Full full name, address, address and telephone number (work and home), and email address of person making the charge; complaint;
- (2) The Full full name and address of the person or agency against whom the complaint charge is made (the respondent);
- (3) A statement of the alleged employment discrimination including pertinent dates; A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices;
- (4) A statement of the specific employment issues (e.g. discharge, discipline, promotion) including the name and job title of the decision maker; harm and dates the harm occurred;
- (5) A statement of For each harm a statement specifying the act, policy or practice which is alleged to be unlawful;
- (6) For each act, policy or practice alleged, a statement of the facts which lead the person to believe the act, policy or practice is discriminatory; and
- (7) The approximate number of employees of the respondent employer; employer.
- (8) A statement disclosing whether proceedings involving the alleged unlawful employment practices have been commenced before a state or local agency charged with the enforcement of fair employment practice laws and if so, the date of such commencement and the name of the agency.

(c) Notwithstanding the provisions of this Paragraph (b), a charge is sufficient when the commission receives from the person making the charge a written statement sufficiently precise to identify the parties and to describe the action complained of. A complaint is considered a charge when the Equal Employment Opportunity Commission's Charge of Discrimination form is signed and dated and received by the Civil Rights Division.

(d) ~~The EEOC shall examine the petition and determine its appropriateness. If appropriate, it shall be assigned an EEOC docket number and forwarded to the Office of Administrative Hearings, the designated 706 deferral agency.~~

~~(e)(d) The OAH Civil Rights shall Division shall assess the charge ease to determine if it is within its authority. If the jurisdiction of the Office of Administrative Hearings and if so, the ease it shall be assigned an OAH docket a charge number. If the charge ease is not within the jurisdiction of the Office of Administrative Hearings, OAH's authority the ease it shall be transferred returned to the EEOC. Equal Employment Opportunity Commission.~~

Authority G.S. 7A-759.

**26 NCAC 04 .0103 NOTIFICATION OF INVESTIGATION**

~~(a) Upon When a charge of employment discrimination is filed, the Civil Rights Division shall notify the charging party and respondent that an investigation will commence. Notice shall be served by registered U.S. mail. a determination to investigate a ease the OAH shall notify the complainant and the respondent that an investigation will be commenced.~~

(b) Any correspondence related to a charge must include the name of the charging party and the respondent and the Civil Rights Division's charge number and be submitted to; person involved in a case wishing to submit information regarding the ease must do so through written correspondence and sent to:

Director of Civil Rights Division  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714

The correspondence must state the names of complainant and the respondent and the OAH docket number.

Authority G.S. 7A-759.

**26 NCAC 04 .0104 ADDITIONAL INFORMATION**

~~Persons desiring information in addition to that provided in a particular case may contact:~~

Civil Rights Division  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714

Authority G.S. 7A-759.

**26 NCAC 04 .0105 INVESTIGATION**

(a) All deferred cases received by the OAH will be assigned to an OAH Civil Rights Investigator.

(b) The Civil Rights Investigator will conduct a comprehensive investigation of the charges, interviewing the charging party, appropriate agency personnel and any necessary witnesses. The Civil Rights Investigator will obtain copies of all pertinent policies and documents from the agency and charging party.

(c) The investigation will be conducted in a timely manner.

Authority G.S. 7A-759; 150B-11.

**26 NCAC 04 .0106 INVESTIGATION REPORT**

(a) The Civil Rights Division shall investigate all charges filed pursuant to this Section.

~~(a)(b) A civil rights investigator investigation report will be shall prepare an investigative memorandum setting out the findings and the conclusions of the Civil Rights Division's prepared investigation based on the allegations and appropriate statutes, examining the allegations in the deferral charge and applying the information produced during the investigation.~~

~~(b)(c) The Civil Rights Division Investigator will shall determine whether there is probable "Cause" "cause" or "No Cause" to believe the alleged discrimination has occurred.~~

~~(e)(d)~~ A civil rights investigator shall conduct a pre-decision interview with the charging party prior to the issuance of the Civil Rights Division's decision. ~~If the investigation results in a "No cause" determination the report will be forwarded to the complainant, respondent and EEOC.~~

~~(d)(e)~~ Upon completion of the investigation the civil rights director shall issue a decision which shall be served on the charging party and respondent by US mail. ~~If the investigation results in a "Cause" determination the deferral will go to the conciliation and settlement stage.~~

~~(f)~~ If the investigation results in a determination that there is no probable cause to believe the alleged discrimination has occurred, the Civil Rights Division's director shall inform the charging party of the rights of appeal to the Equal Employment Opportunity Commission.

~~(g)~~ If the investigation results in a determination that there is probable cause to believe the alleged discrimination has occurred, the civil rights director shall invite the parties to participate in pre-settlement discussions and attempt conciliation.

Authority G.S. 7A-759.

**26 NCAC 04 .0107 CONCILIATION AND SETTLEMENT**

~~(a)~~ ~~The A Civil Rights Investigator~~ civil rights investigator will shall contact the charging party complainant and the respondent to schedule a settlement conference with the Civil Rights Division director and compliance manager within 10 days of the service of the decision that there is probable cause to believe discrimination has occurred upon the parties. ~~agency personnel to discuss the findings of the investigation and attempt a settlement of the deferral.~~

~~(b)~~ Where a settlement is reached between the charging party and the respondent and the Civil Rights Division, an agreement shall be prepared by the investigator and executed by the parties. ~~Upon reaching a settlement constituting full relief which is acceptable to both parties, the investigation report, the settlement documentation and the case file will be forwarded to the EEOC.~~

~~(c)~~ Upon notification to the Civil Rights Division by the respondent that all provisions of the settlement agreement have been met, the compliance manager shall close the charge.

~~(d)~~ The compliance manager shall forward the settlement documents to the Equal Employment Opportunity Commission and the Civil Rights Division director shall notify the parties the charge is closed.

~~(e)~~ If conciliation is unsuccessful the charging party must make a declaration of intent within seven days on how to proceed with the charge. The charging party may:

~~(1)~~ File a petition for a contested case hearing with the Hearings Division of the Office of Administrative Hearings;

~~(2)~~ Request that the case be forwarded to the Equal Employment Opportunity Commission for further conciliation;

~~(3)~~ Request a notice of right-to-sue from the Equal Employment Opportunity Commission for the purpose of filing in Federal District Court; or

~~(4)~~ Choose not to pursue the matter any further.

~~(f)~~ Upon receipt of the signed and dated declaration of intent, the Civil Rights Division shall close the charge and forward the case file to the Equal Employment Opportunity Commission.

~~(g)~~ If no declaration of intent is received after seven days, the Civil Rights Division shall close the charge and forward the case file to the Equal Employment Opportunity Commission.

Authority G.S. 7A-759.

**26 NCAC 04 .0108 CONTESTED CASE HEARING**

~~(a)~~ Any determination of probable cause ~~cause determination~~ that has not resulted in ~~settlement or conciliation~~ may ~~will~~ be heard by an Administrative Law Judge. ~~Judge in the Hearings Division.~~ The charging party shall commence the proceedings by filing a petition for a contested case ~~hearing~~ hearing, as provided in G.S. 7A-759. ~~If the charging party has not filed a contested case petition within 60 days of Notice, the Civil Rights Division shall transfer the charging party's file to EEOC. If the charging party files a timely petition, OAH shall conduct a hearing and issue a final decision which is binding upon the parties.~~

~~(b)~~ Pending the investigation, conciliation or settlement of a deferred charge, an The Administrative Law Judge shall enter a stay in contested cases where there is a companion employment discrimination charge under investigation by the Civil Rights Division. The Civil Rights Division director shall notify the judge's assistant when the companion case is closed. ~~any related or ancillary contested case proceedings involving the charging party. If the charging party initiates a contested case as provided in Paragraph (a) of this Rule, the stay shall be lifted and the related proceedings shall be consolidated or joined when appropriate and tried before the presiding Administrative Law Judge.~~

~~(c)~~ The ~~OAH~~ Civil Rights Division's investigative report file, shall be made available to all ~~parties~~ parties, upon request, as provided in Section 83 of the EEOC Compliance Manual, Volume 1 (October, 1987) incorporated herein by reference as well as subsequent amendments thereto. Copies of Section 83 are available upon request from the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714 at no charge.

~~(d)~~ ~~At the conclusion of the contested case hearing, the investigation report, the final decision in the contested case, and the case file will be forwarded to EEOC.~~

Authority G.S. 7A-759; 150B-21.6; 150B-26; 150B-33.

**26 NCAC 04 .0109 AUTHORITY TO ADMINISTER OATHS OR AFFIRMATIONS**

~~When it is necessary to have the power to administer oaths or affirmations in investigating a specific charge, the Director or any employee of the Civil Rights Division may apply to the Chief Administrative Law Judge for such authority setting out the reasons therefore.~~

Authority G.S. 7A-759; 150B-11.

**Note from the Codifier:** *The rules published in this Section of the NC Register are emergency rules reviewed by the Codifier of Rules and entered in the North Carolina Administrative Code. The agency must subsequently publish a proposed temporary rule on the OAH website ([www.ncoah.com/rules](http://www.ncoah.com/rules)) and submit that adopted temporary rule to the Rules Review Commission within 60 days from publication of the emergency rule or the emergency rule will expire on the 60<sup>th</sup> day from publication. This section of the Register may also include, from time to time, a listing of emergency rules that have expired. See G.S. 150B-21.1A and 26 NCAC 02C .0600 for adoption and filing requirements.*

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

**CHAPTER 33 – MIDWIFERY JOINT COMMITTEE**

**Rule-making Agency:** *Midwifery Joint Committee*

**Rule Citation:** *21 NCAC 33 .0109*

**Effective Date:** *June 18, 2012*

**Findings Reviewed and Approved by the Codifier:** *June 8, 2012*

**Reason for Action:** *Certified Nurse Midwives are approved to practice only under a supervisory agreement with a physician. Recently a supervising physician abruptly terminated his supervisory arrangement with seven nurse midwives, all of whom legally attend home births. This action left numerous expectant mothers without a healthcare provider. The Midwifery Joint Committee is filing this emergency rule to protect the public health and safety for the affected mothers and babies by allowing these nurse midwives to continue providing health care to these individuals. The emergency rule will*

*provide for temporary extension of approval to practice to ensure continuity of care until subsequent supervision can be arranged.*

**SECTION .0100 – MIDWIFERY JOINT COMMITTEE**

**21 NCAC 33 .0109          TERMINATION OF APPROVAL  
TO PRACTICE**

The certified nurse midwife approval is terminated when the certified nurse midwife discontinues working within the approved certified nurse midwife collaborative practice agreement, or experiences an interruption in her or his practice and shall notify the Midwifery Joint Committee in writing. Midwifery Joint Committee may temporarily extend the certified nurse midwife's approval to practice whenever the supervising physician unexpectedly terminates the collaborative practice agreement.

*History Note: Authority G.S. 90-178.2; 90-178.3; 90-178.4; 90-178.5;  
Emergency Adoption Eff. June 18, 2012.*

**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 May 17, 2012.

**REGISTER CITATION TO THE  
NOTICE OF TEXT**

**GASOLINE AND OIL INSPECTION BOARD**

Labeling of Dispensing Devices 02 NCAC 42 .0401\* 26:10 NCR

**CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION**

Documentation of Educational Requirements 12 NCAC 09B .0106\* 26:15 NCR

Admission of Trainees 12 NCAC 09B .0203\* 26:15 NCR

Terms and Conditions of Specialized Instructor Certification 12 NCAC 09B .0305\* 26:15 NCR

General Provisions 12 NCAC 09D .0102\* 26:15 NCR

General Provisions 12 NCAC 09D .0202\* 26:15 NCR

Minimum Training Specifications: Annual In-Service Training 12 NCAC 09E .0105\* 26:15 NCR

Moral Character 12 NCAC 09G .0206\* 26:15 NCR

Terms and Conditions of General Instructor Certification 12 NCAC 09G .0309\* 26:15 NCR

Terms and Conditions of Specialized Instructor Certification 12 NCAC 09G .0311\* 26:15 NCR

General Provisions 12 NCAC 09G .0602\* 26:15 NCR

**HEARING AID DEALERS AND FITTERS BOARD**

Time of Examinations 21 NCAC 22F .0101\* 26:14 NCR

Communication of Results of Examinations 21 NCAC 22F .0107\* 26:14 NCR

**REAL ESTATE COMMISSION**

Residential Property and Owners' Association Disclosure S... 21 NCAC 58A .0114\* 26:13 NCR

**STATE PERSONNEL COMMISSION**

Unlawful Workplace Harassment and Retaliation 25 NCAC 01J .1101\* 26:11 NCR

**TITLE 02 – DEPARTMENT OF AGRICULTURE AND  
CONSUMER SERVICES**

**02 NCAC 42 .0401 LABELING OF DISPENSING  
DEVICES**

(a) For the purpose of product identity, each dispensing device used in the retailing of any motor fuel shall, on the front panel of the dispenser and in plain view of the customer, be labeled with the following:

- (1) For gasoline, the registered brand name;
- (2) For diesel fuel, the registered brand name plus a descriptive or generic label if the registered brand name does not identify the type or grade of product;

- (3) For biodiesel and biodiesel blends, the registered brand name plus a descriptive or generic label if the registered brand name does not identify the type or grade of product;
- (4) For gasoline-oxygenate blends other than E85 fuel ethanol containing:
  - (A) At least one percent by volume of methanol, the registered brand name plus an additional label which states that the blend "contains methanol."
  - (B) Ten percent or less by volume of ethanol, the registered brand name plus an additional label which states that the blend "contains 10%

ethanol," "may contain up to 10% ethanol," "contains 10% or less ethanol" or similar wording.

- (C) Greater than 10 percent but no more than 15 percent by volume of ethanol, the registered brand name plus an additional label that states the blend "contains up to 15% ethanol," "contains between 10-15% ethanol," or similar wording.
- (D) Greater than 15 percent but no more than 85 percent by volume of ethanol, the registered brand name plus an additional label which states the specific volume percentage of ethanol present in the blend such as "contains 30% ethanol."

- (5) For E85 fuel ethanol, the registered brand name.

(b) The additional labels required by Subparagraph (a)(4) of this Rule shall be composed of letters at least one inch in height, minimum one-eighth inch stroke, which contrast with the label background and shall be affixed to the dispenser front panel in a position conspicuous from the driver's position. Exceptions to the requirements in Subparagraph (a)(4) of this Rule are:

- (1) For fuels not covered by an EPA waiver, the additional label shall identify the percent by volume of ethanol or methanol in the blend; and
- (2) For fuels meeting the EPA's "Substantially Similar" rule and which do not contain methanol, no additional label is required.

(c) Each dispensing device used in the retailing of products other than motor fuel shall, on the front panel of the dispenser and in plain view of the customer, be labeled as follows:

- (1) Kerosene shall be labeled as either 1-K Kerosene or 2-K Kerosene. In addition, each dispenser shall contain one of the following legends as appropriate:
  - (A) On 1-K kerosene dispensers, the legend "Suitable For Use In Unvented Heaters"; or
  - (B) On 2-K kerosene dispensers, the legend "May Not Be Suitable For Use In Unvented Heaters"; and
- (2) Other products shall be labeled with either the applicable generic name or a brand name which identifies the type of product.

(d) When a motor fuel or other product provided for in this Section is offered for sale, sold, or delivered at retail in barrels, casks, cans, or other containers, each container shall be labeled in accordance with this Section and in accordance with 15 U.S.C. 1451 et. seq., the Fair Packaging and Labeling Act.

(e) If a dispenser is designed so that one or more hoses connected to a common housing dispense more than one type or grade of product, means shall be provided to indicate the identity of the product being dispensed from the hose.

*History Note: Authority G.S. 119-27; 119-27.2;*

*Eff. December 1, 1981;*

*Amended Eff. June 1, 2012; July 1, 2008; August 1, 2002; June 1, 1987; December 1, 1985; November 1, 1983.*

**TITLE 12 – DEPARTMENT OF JUSTICE**

**12 NCAC 09B .0106 DOCUMENTATION OF EDUCATIONAL REQUIREMENTS**

(a) Each applicant for employment as a criminal justice officer shall furnish to the employing agency documentary evidence that the applicant has met the educational requirements for the criminal justice field of expected employment.

(b) Documentary evidence of educational requirements shall consist of official transcripts of courses completed or diplomas received from a school which meets the approval guidelines of either the North Carolina Department of Public Instruction, the Division of Non-Public Instruction, or comparable out-of-state agency. The Director of the Standards Division shall determine whether other types of documentation will be permitted in specific cases. High school diplomas earned through correspondence enrollment are not recognized toward these minimum educational requirements.

(c) Documentary evidence of having passed the General Educational Development Test shall be satisfied by a certified copy of GED test results or GED certificate. A certified copy of a military GED diploma may be used as alternate evidence of GED completion.

*History Note: Authority G.S. 17C-6; 17C-10;*

*Eff. January 1, 1981;*

*Amended Eff. June 1, 2012; August 1, 2000.*

**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.

(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 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 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 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 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 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 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).

*History Note: Authority G.S. 17C-6; 17C-10;*

*Eff. January 1, 1981;  
Amended Eff. June 1, 2012; February 1, 2011; June 1, 2010;  
December 1, 2004; July 1, 2004; August 1, 2002; August 1,  
2000; January 1, 1995; March 1, 1992; July 1, 1989; January 1,  
1985.*

**12 NCAC 09B .0305 TERMS AND CONDITIONS OF  
SPECIALIZED INSTRUCTOR CERTIFICATION**

(a) An applicant meeting the requirements for Specialized Instructor Certification shall be issued a certification to run concurrently with the existing General Instructor Certification, except as set out in (d). The applicant must apply for certification as a specialized instructor within 60 days from the date of completion of a specialized instructor course.

(b) The requirements for certification as a specialized instructor are determined by the expiration date of the existing General Instructor Certification. The following requirements apply during the initial period of certification:

- (1) where certification for both general probationary instructor and Specialized Instructor Certification are issued on the same date, the instructor is required to satisfy the teaching requirement for only the general probationary instructor certification. The instructor may satisfy the teaching requirement for the general probationary instructor certification by teaching any specialized topic for which certification has been issued;
- (2) when Specialized Instructor Certification is issued during an existing period of General Instructor Certification, either probationary status or full general status, the specialized instructor may satisfy the teaching requirement for the general certification by teaching the specialized subject for which certification has been issued;
- (3) where Specialized Instructor Certification becomes concurrent with an existing 36 month period of General Instructor Certification, and there are 12 months or more until the certifications' expiration date, the instructor must teach 12 hours for each specialized topic for which certification has been issued;

(c) The term of certification as a specialized instructor shall not exceed the 36 month period of full General Instructor Certification. The application for renewal shall contain, in addition to the requirements listed in Rule .0304 of this Section, documentary evidence that the applicant has remained active in the instructional process during the previous three-year period. Such documentary evidence shall include the following:

- (1) proof that the applicant has, within the three year period preceding application for renewal, instructed at least 12 hours in each of the topics for which Specialized Instructor Certification was granted and such instruction must be in a Commission-accredited training course or a Commission-recognized in-service training course. Acceptable documentary evidence shall include official Commission

records submitted by School Directors or in-service training coordinators and written certification from a School Director or in-service training coordinator;

- (2) proof that the applicant has, within the three year period preceding application for renewal, attended and successfully completed any instructor updates that have been issued by the Commission. Acceptable documentary evidence shall include official Commission records submitted by School Directors or In-Service Training Coordinators, or copies of certificates of completion issued by the institution which provided the instructor updates; and

(3) either:

(A) a favorable written recommendation from a School Director or In-Service Training Coordinator completed on a Commission Renewal of Instructor and Professional Lecturer Certification Form that the instructor successfully taught at least 12 hours in each of the topics for which Specialized Instructor Certification was granted. Such teaching must have occurred in a Commission-certified training course or a Commission-recognized in-service training course during the three year period of Specialized Instructor Certification; or

(B) a favorable evaluation by a Commission or staff member, based on an on-site classroom evaluation of a presentation by the instructor in a Commission-certified training course or a Commission-recognized in-service training course, during the three-year period of Specialized Instructor Certification. Such evaluation shall be certified on a Commission Instructor Evaluation Form.

Upon submission of the required documentation for renewal the Commission staff shall renew the certification as a Specialized Instructor. Such renewal shall occur at the time of renewal of the General Instructor certification.

(d) Certification as a specialized instructor in the First Responder, Physical Fitness, Explosive and Hazardous Materials, and Juvenile Justice Medical Emergencies topical areas as outlined in Rule .0304(d)(1), (g)(2), (i)(1), and (j)(1) of this Section, specifically those certifications not based upon General Instructor Certification, shall remain in effect for 36 months from the date of issuance. During the 36 month term all non-Commission certificates required in Rule .0304(d)(1), (g)(2), (i)(1), and (j)(1) for specialized instructor certification in

the First Responder, Physical Fitness, Explosive and Hazardous Materials, and Juvenile Justice Medical Emergencies topical areas must be maintained.

(e) All instructors shall remain active during their period of certification. If an instructor does not teach at least 12 hours in each of the topic areas for which certification is granted, the certification shall not be renewed for those topics in which the instructor failed to teach. Any specialized instructor training courses previously accepted by the Commission for purposes of certification shall no longer be recognized if the instructor does not teach at least 12 hours in each of the specialized topics during the three year period for which certification was granted. Upon application for re-certification, such applicants shall meet the requirements of Rule .0304 of this Section.

(f) The use of guest participants in a delivery of the "Basic Law Enforcement Training Course" is permissible. However, such guest participants are subject to the direct on-site supervision of a Commission-certified instructor and must be authorized by the School Director. A guest participant shall be used only to complement the primary certified instructor of the block of instruction and shall in no way replace the primary instructor.

*History Note: Authority G.S. 17C-6; Eff. January 1, 1981;*

*Amended Eff. June 1, 2012; November 1, 2007; January 1, 2006; December 1, 2004; August 1, 2004; August 1, 2000; July 1, 1991; July 1, 1989; December 1, 1987; February 1, 1987.*

**12 NCAC 09D .0102 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 general law enforcement 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 Company and 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 be familiar with and subscribe to the Law Enforcement Code of Ethics;
- (3) The officer shall be a full-time, sworn, paid member of a law enforcement agency within the state;
- (4) Applicants shall be given credit for the satisfactory completion of all in-service law enforcement training which is not mandated by the Commission pursuant to 12 NCAC 09E .0105;
- (5) Applicants shall not be given credit for the satisfactory completion of Commission-mandated Basic Law Enforcement Training courses; and

- (6) Full-time, paid employees of a law enforcement agency within the State who have successfully completed a Commission-accredited law enforcement officer basic training program and have previously held general law enforcement officer certification as specified in Subparagraph (1) of this Paragraph, but are presently, by virtue of promotion or transfer, serving in non-sworn positions not subject to certification are eligible to participate in the professional certificate program. Eligibility for this exception requires continuous employment with the law enforcement agency from the date of promotion or transfer from a sworn, certified position to the date of application for a professional certificate.

(b) Awards are based upon a formula which combines formal education, law enforcement training, and actual experience as a law enforcement 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) Twenty classroom hours of Commission-approved law enforcement training shall equal one point; and
- (3) Only experience as a full-time, sworn, paid member of a law enforcement agency or equivalent experience shall be acceptable for consideration.

*History Note: Authority G.S. 17C-6; Eff. January 1, 1981;*

*Amended Eff. June 1, 2012; August 1, 2002; August 1, 1995; May 1, 1986; April 1, 1984; January 1, 1983.*

**12 NCAC 09D .0202 GENERAL PROVISIONS**

(a) The officer shall presently hold general criminal justice 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 Company and 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.

- (b) The officer shall hold general certification with the Commission in the category of state youth services officer.
- (c) The officer shall be a permanent, paid member of a criminal justice agency within the State.
- (d) Permanent, paid employees of the Department of Public Safety, Division of Juvenile Justice, who have successfully completed a Commission-accredited criminal justice officer basic training program and have previously held general certification as specified in 12 NCAC 09B .0116 and 12 NCAC 09B .0117, 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 Juvenile Justice from the date of promotion or transfer from a certified position to the date of application for a professional certificate.

(e) Each semester hour of college credit shall equal one point and each quarter hour shall equal two-thirds of a point;

(f) Twenty classroom hours of Commission-approved criminal justice training shall equal one point;

(g) Only experience as a permanent, paid member of a criminal justice agency or the equivalent experience as determined by the Commission shall be acceptable of consideration.

(c) Separate sub-programs will be administered as follows: The Youth Services Certificate is appropriate for permanent, paid state youth services officers employed by the Department of Public Safety, Division of Juvenile Justice.

*History Note: Authority G.S. 17C-6; Eff. August 15, 1981; Amended Eff. June 1, 2012; August 1, 2002; December 1, 1987; May 1, 1986; July 1, 1982.*

**12 NCAC 09E .0105 MINIMUM TRAINING SPECIFICATIONS: ANNUAL IN-SERVICE TRAINING**

(a) The following topical areas and specifications are established as minimum topics, specifications and hours to be included in each law enforcement officers' annual in-service training courses. These specifications shall be incorporated in each law enforcement agency's annual in-service training courses:

- (1) Firearms (4):
  - (A) Use of Force: review the authority to use deadly force [G.S. 15A-401(d)(2)] including the relevant case law and materials;
  - (B) Safety:
    - (i) range rules and regulations;
    - (ii) handling of a firearm; and
    - (iii) malfunctions;
  - (C) Review of Basic Marksmanship Fundamentals:
    - (i) grip, stance, breath control and trigger squeeze;
    - (ii) sight and alignment/sight picture; and
    - (iii) nomenclature; and
- (2) Legal Update (4);
- (3) Career Survival: Social Networking and Digital Communications (4);
- (4) Juvenile Minority Sensitivity Training: Interaction Skills in Building Rapport (2);
- (5) Awareness of Issues Surrounding Returning Military Personnel (2); and
- (6) Department Topics of Choice (8).

(b) The "Specialized Firearms Instructor Training Manual" as published by the North Carolina Justice Academy shall be applied as a guide for conducting the annual in-service firearms training program. Copies of this publication may be inspected at the office of the agency:

Criminal Justice Standards Division

North Carolina Department of Justice  
1700 Tryon Park Drive  
Raleigh, North Carolina 27610

(c) The In-Service Lesson Plans as published by the North Carolina Justice Academy shall be applied as a minimum curriculum for conducting the annual in-service training program. Copies of this publication may be inspected at the office of the agency:

Criminal Justice Standards Division  
North Carolina Department of Justice  
1700 Tryon Park Drive  
Raleigh, North Carolina 27610

and may be obtained at cost from the Academy at the following address:

North Carolina Justice Academy  
Post Office Drawer 99  
Salemberg, North Carolina 28385

*History Note: Authority G.S. 17C-6; 17C-10; Eff. July 1, 1989; Amended Eff. January 1, 2005; November 1, 1998; Temporary Amendment Eff. January 1, 2005; Amended Eff. June 1, 2012; February 1, 2011; January 1, 2010; April 1, 2009; April 1, 2008; February 1, 2007; January 1, 2006.*

**12 NCAC 09G .0206 MORAL CHARACTER**

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

- (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/I/44/92>) 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 which 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 may be 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](http://workplace.samhsa.gov/DrugTesting/Level_1_Pages/CertifiedLabs.html)) to detect the illegal use of at least cannabis, cocaine,

- (5) phencyclidine (PCP), opiates and amphetamines or their metabolites; submitting to a background investigation consisting of:
  - (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.

- (2) instructed a minimum of 12 hours in a Commission-certified training course or a Commission-recognized in-service training course; and either:
  - (A) a favorable written recommendation from a School Director accompanied by certification on a Commission Instructor Evaluation Form that the instructor successfully taught a minimum of twelve hours in a Commission-certified training course or a Commission-recognized in-service training course during the three year period of general certification; or
  - (B) a written evaluation by a staff member, based on an on-site classroom evaluation of a presentation by the instructor in a Commission-certified training course or a Commission-recognized in-service training course, during the three year period of General Instructor Certification.

*History Note: Authority G.S. 17C-6; 17C-10; Temporary Adoption Eff. January 1, 2001; Eff. August 1, 2002; Amended Eff. June 1, 2012; April 1, 2009; August 1, 2004.*

**12 NCAC 09G .0309 TERMS AND CONDITIONS OF GENERAL INSTRUCTOR CERTIFICATION**

- (a) An applicant meeting the requirements for certification as a general instructor shall, for the first 12 months of certification, be in a probationary status. The General Instructor Certification, Probationary Status, shall automatically expire 12 months from the date of issuance.
- (b) The probationary instructor shall be eligible for full general instructor status if the instructor, through application at the end of the probationary period, submits to the Commission:
  - (1) a favorable recommendation from a School Director accompanied by certification on a Commission Instructor Evaluation Form that the instructor successfully taught a minimum of twelve hours in a Commission-certified course or a Commission-recognized in-service training course during the probationary year. The results of the students' evaluation of the instructor must be considered by the School Director when determining recommendation; or
  - (2) a written evaluation by a staff member, based on an on-site classroom evaluation of the probationary instructor in a Commission-certified course or a Commission-recognized in-service training course. Such evaluation shall be certified on a Commission Instructor Evaluation Form. In addition, instructors evaluated by a staff member must also teach a minimum of twelve hours in a Commission-certified training course or a Commission-recognized in-service training course.
- (c) The term of certification as a general instructor is three years from the date the Commission issues the certification. The certification may subsequently be renewed by the Commission for three year periods. The application for renewal shall contain, in addition to the requirements listed in 12 NCAC 09G .0308, documentary evidence indicating that the applicant has remained active in the instructional process during the previous three year period. Such documentary evidence shall include the following:
  - (1) proof that the applicant has, within the three year period preceding application for renewal,

- (d) If an instructor does not teach a minimum of 12 hours during the period of certification, the certification shall not be renewed, and the instructor shall file application for General Instructor Certification, Probationary Status. Such applicants shall be required to meet the minimum requirements of 12 NCAC 09G .0308 of this Section.
- (e) All instructors shall have 90 days from the date of the expiration of their instructor certification to submit an application for renewal along with documentation of having met the minimum requirements of Paragraph (c) of this Rule during the previous certification period. The prescribed 90 day period shall not extend the instructor certification period beyond its specified expiration period. If the renewal application is not submitted within 90 days following the expiration of the previous certification, the applicant will be required to meet the minimum requirements for general instructor certification as specified in Rule .0302 of this Section.

*History Note: Authority G.S. 17C-6; Temporary Adoption Eff. January 1, 2001; Eff. August 1, 2002; Amended Eff. June 1, 2012; August 1, 2006; January 1, 2006.*

**12 NCAC 09G .0311 TERMS AND CONDITIONS OF SPECIALIZED INSTRUCTOR CERTIFICATION**

- (a) An applicant meeting the requirements for Specialized Instructor Certification shall be issued a certification to run concurrently with the existing General Instructor Certification. The applicant must apply for certification as a specialized instructor within 60 days from the date of completion of a specialized instructor course.
- (b) The terms of certification as a specialized instructor shall be determined by the expiration date of the existing General

Instructor Certification. The following requirements shall apply during the initial period of certification:

- (1) where certifications for both general probationary instructor and Specialized Instructor Certification are issued on the same date, the instructor shall only be required to satisfy the teaching requirement for the general probationary instructor certification. The instructor may satisfy the teaching requirement for the general probationary instructor certification by teaching any specialized topic for which certification has been issued;
- (2) when Specialized Instructor Certification is issued during an existing period of General Instructor Certification, either probationary status or full general status, the specialized instructor may satisfy the teaching requirement for the General Certification by teaching the specialized subject for which certification has been issued; and
- (3) where Specialized Instructor Certification becomes concurrent with an existing 36 month period of General Instructor Certification, and there are 12 months or more until the certifications' expiration date, the instructor must teach 12 hours for each specialized topic for which certification has been issued;

(c) The term of certification as a specialized instructor shall not exceed the 36 month period of full General Instructor Certification. The certification may subsequently be renewed by the Commission at the time of renewal of the full General Instructor Certification. The application for renewal shall contain, in addition to the requirements listed in 12 NCAC 09G .0310 of this Section, documentary evidence that the applicant has remained active in the instructional process during the previous three year period. Such documentary evidence shall include the following:

- (1) proof that the applicant has, within the three year period preceding application for renewal, instructed at least 12 hours in each of the topics for which Specialized Instructor Certification was granted and such instruction must be in a Commission-certified training course or a Commission-recognized in-service training course. Acceptable documentary evidence shall include official Commission records submitted by School Directors and written certification from a School Director; and
- (2) either:
  - (A) a favorable written recommendation from a School Director accompanied by certification that the instructor successfully taught at least 12 hours in each of the topics for which Specialized Instructor Certification was granted. Such teaching must have occurred in a Commission-certified training course or a

Commission-recognized in-service training course during the three year period of Specialized Instructor Certification; or

- (B) a written evaluation by a staff member, based on an on-site classroom evaluation of a presentation by the instructor in a Commission-certified training course or a Commission-recognized in-service training course, during the three year period of Specialized Instructor Certification.

(d) If an instructor does not teach at least 12 hours in each of the topic areas for which certification is granted, the certification shall not be renewed for those topics in which the instructor failed to successfully teach. Any specialized instructor training courses previously accepted by the Commission for purposes of certification shall no longer be recognized if the instructor does not successfully teach at least 12 hours in each of the specialized topics during the three year period for which certification was granted. Upon application for re-certification, such applicants shall be required to meet the requirements of 12 NCAC 09G .0310.

*History Note: Authority G.S. 17C-6; Temporary Adoption Eff. January 1, 2001; Eff. August 1, 2002; Amended Eff. June 1, 2012; January 1, 2006.*

**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 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 Company and 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;
  - (B) probation/parole officer; or
  - (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.
- (4) Permanent, paid employees of the Department of Public Safety, Division of Adult Correction 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 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 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;
- (3) only experience as a permanent, paid employee of the Department of Public Safety, Division of Adult Correction 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.

*History Note: Authority G.S. 17C-6;*

*Temporary Adoption Eff. January 1, 2001;  
Eff. August 1, 2002;  
Amended Eff. June 1, 2012; August 1, 2004.*

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

**CHAPTER 22 - HEARING AID DEALERS AND FITTERS BOARD**

**21 NCAC 22F .0101 TIME OF EXAMINATIONS**

The Board shall hold qualifying examinations as set forth in G.S. 93D-8 by publicizing each exam on the Board's website at least 90 days in advance, with one exam being offered on a day during the first week in May of each year.

*History Note: Authority G.S. 93D-3(c); 93D-8;  
Eff. April 23, 1976;  
Amended Eff. June 1, 2012; January 1, 1992; May 1, 1988.*

**21 NCAC 22F .0107 COMMUNICATION OF RESULTS OF EXAMINATIONS**

The office of the Board shall issue written notification to each registered applicant by mailing exam results to the physical address provided by the applicant concerning the applicant's performance on the qualifying examination no later than 30 working days after the date of the examination.

*History Note: Authority G.S. 93B-8; 93D-3(c);  
Eff. April 23, 1976;  
Amended Eff. June 1, 2012; February 1, 1996; May 1, 1988.*

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**CHAPTER 58 – REAL ESTATE COMMISSION**

**21 NCAC 58A .0114 RESIDENTIAL PROPERTY AND OWNERS' ASSOCIATION DISCLOSURE STATEMENT**

(a) Every owner of real property subject to a transfer of the type contemplated by Chapter 47E of the General Statutes shall complete the following Residential Property and Owners' Association Disclosure Statement and furnish a copy of the complete statement to a purchaser in accordance with the requirements of G.S. 47E-4. The form shall bear the seal of the North Carolina Real Estate Commission and shall read as follows:

[N.C. REAL ESTATE COMMISSION SEAL]

**STATE OF NORTH CAROLINA  
RESIDENTIAL PROPERTY AND OWNERS' ASSOCIATION DISCLOSURE STATEMENT**

**Instructions to Property Owners**

- 1. The Residential Property Disclosure Act (G.S. 47E) ("Disclosure Act") requires owners of residential real estate (single-family homes, individual condominiums, townhouses, and the like, and buildings with up to four dwelling units) to furnish purchasers a Residential Property and Owners' Association Disclosure Statement ("Disclosure Statement"). This form is the only one approved for this purpose. A disclosure statement must be furnished in connection with the sale, exchange, option and sale under a lease with option to purchase where the tenant does not occupy or intend to occupy the dwelling. A disclosure statement is not required for some transactions, including the first sale of a dwelling which has never been inhabited and transactions of residential property made pursuant to a lease with option to purchase where the lessee occupies or intends to occupy the dwelling. For a complete list of exemptions, see G.S. 47E-2.

2. You must respond to each of the questions on the following pages of this form by filling in the requested information or by placing a check  $\checkmark$  in the appropriate box. In responding to questions, you are only obligated to disclose information about which you have actual knowledge.
  - a. If you check "Yes" for any question, you must explain your answer and either describe any problem or attach a report from an attorney, engineer, contractor, pest control operator or other expert or public agency describing it. If you attach a report, you will not be liable for any inaccurate or incomplete information contained in it so long as you were not grossly negligent in obtaining or transmitting the information.
  - b. If you check "No," you are stating that you have no actual knowledge of any problem. If you check "No" and you know there is a problem, you may be liable for making an intentional misstatement.
  - c. If you check "No Representation," you are choosing not to disclose the conditions or characteristics of the property, even if you have actual knowledge of them or should have known of them.
  - d. If you check "Yes" or "No" and something happens to the property to make your Disclosure Statement incorrect or inaccurate (for example, the roof begins to leak), you must promptly give the purchaser a corrected Disclosure Statement or correct the problem.
3. If you are assisted in the sale of your property by a licensed real estate broker, you are still responsible for completing and delivering the Disclosure Statement to the purchasers; and the broker must disclose any material facts about your property which he or she knows or reasonably should know, regardless of your responses on the Statement.
4. You must give the completed Disclosure Statement to the purchaser no later than the time the purchaser makes an offer to purchase your property. If you do not, the purchaser can, under certain conditions, cancel any resulting contract (See "**Note to Purchasers**" below). You should give the purchaser a copy of the Disclosure Statement containing your signature and keep a copy signed by the purchaser for your records.

**Note to Purchasers**

If the owner does not give you a Residential Property and Owners' Association Disclosure Statement by the time you make your offer to purchase the property, you may under certain conditions cancel any resulting contract without penalty to you as the purchaser. To cancel the contract, you must personally deliver or mail written notice of your decision to cancel to the owner or the owner's agent within three calendar days following your receipt of the Disclosure Statement, or three calendar days following the date of the contract, whichever occurs first. However, in no event does the Disclosure Act permit you to cancel a contract after settlement of the transaction or (in the case of a sale or exchange) after you have occupied the property, whichever occurs first.

5. In the space below, type or print in ink the address of the property (sufficient to identify it) and your name. Then sign and date.

Property Address: \_\_\_\_\_  
Owner's Name(s): \_\_\_\_\_  
*Owner(s) acknowledge having examined this Disclosure Statement before signing and that all information is true and correct as of the date signed.*

Owner Signature: \_\_\_\_\_ Date \_\_\_\_\_, \_\_\_\_  
Owner Signature: \_\_\_\_\_ Date \_\_\_\_\_, \_\_\_\_

*Purchasers acknowledge receipt of a copy of this Disclosure Statement; that they have examined it before signing; that they understand that this is not a warranty by owners or owners' agents; that it is not a substitute for any inspections they may wish to obtain; and that the representations are made by the owners and not the owners' agents or subagents. Purchasers are strongly encouraged to obtain their own inspections from a licensed home inspector or other professional. As used herein, words in the plural include the singular, as appropriate.*

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|                            |                   |
|----------------------------|-------------------|
| Purchaser Signature: _____ | Date _____, _____ |
| Purchaser Signature: _____ | Date _____, _____ |

Property Address/Description: \_\_\_\_\_  
 \_\_\_\_\_

**The following questions address the characteristics and condition of the property identified above about which the owner has actual knowledge. Where the question refers to "dwelling," it is intended to refer to the dwelling unit, or units if more than one, to be conveyed with the property. The term "dwelling unit" refers to any structure intended for human habitation.**

- |  | Yes                      | No                       | No Representation        |
|--|--------------------------|--------------------------|--------------------------|
| 1. In what year was the dwelling constructed? _____<br>Explain if necessary: _____   |                          |                          | <input type="checkbox"/> |
| 2. Is there any problem, malfunction or defect with the dwelling's foundation, slab, fireplaces/chimneys, floors, windows (including storm windows and screens), doors, ceilings, interior and exterior walls, attached garage, patio, deck or other structural components including any modifications to them?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. The dwelling's exterior walls are made of what type of material? <input type="checkbox"/> Brick Veneer <input type="checkbox"/> Wood <input type="checkbox"/> Stone <input type="checkbox"/> Vinyl <input type="checkbox"/> Synthetic Stucco <input type="checkbox"/> Composition/Hardboard <input type="checkbox"/> Concrete <input type="checkbox"/> Fiber Cement <input type="checkbox"/> Aluminum <input type="checkbox"/> Asbestos <input type="checkbox"/> Other _____<br>(Check all that apply)  |                          |                          | <input type="checkbox"/> |
| 4. In what year was the dwelling's roof covering installed? _____<br>(Approximate if no records are available.) Explain if necessary: _____  | <input type="checkbox"/> |                          | <input type="checkbox"/> |
| 5. Is there any leakage or other problem with the dwelling's roof?   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 6. Is there any water seepage, leakage, dampness or standing water in the dwelling's basement, crawl space, or slab?   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 7. Is there any problem, malfunction or defect with the dwelling's electrical system (outlets, wiring, panel, switches, fixtures, generator, etc.)?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 8. Is there any problem, malfunction or defect with the dwelling's plumbing system (pipes, fixtures, water heater, etc.)?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 9. Is there any problem, malfunction or defect with the dwelling's heating and/or air conditioning?  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| 10. What is the dwelling's heat source? <input type="checkbox"/> Furnace <input type="checkbox"/> Heat Pump <input type="checkbox"/> Baseboard<br><input type="checkbox"/> Other _____ (Check all that apply)<br>Age of system: _____  |                          |                          | <input type="checkbox"/> |
| 11. What is the dwelling's cooling source? <input type="checkbox"/> Central Forced Air <input type="checkbox"/> Wall/Window Unit(s)<br><input type="checkbox"/> Other _____ (Check all that apply)<br>Age of system: _____   |                          |                          | <input type="checkbox"/> |
| 12. What is the dwelling's fuel sources? <input type="checkbox"/> Electricity <input type="checkbox"/> Natural Gas <input type="checkbox"/> Propane <input type="checkbox"/> Oil<br><input type="checkbox"/> Other _____ (Check all that apply)<br>If the fuel source is stored in a tank, identify whether the tank is <input type="checkbox"/> above ground or <input type="checkbox"/> below ground, and whether the tank is <input type="checkbox"/> leased by seller or <input type="checkbox"/> owned by seller.<br>(Check all that apply) |                          |                          | <input type="checkbox"/> |
| 13. What is the dwelling's water supply source? <input type="checkbox"/> City/County <input type="checkbox"/> Community System   |                          |                          | <input type="checkbox"/> |

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**APPROVED RULES**

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Private Well  Shared Well  Other \_\_\_\_\_  
(Check all that apply)

14. The dwelling's water pipes are made of what type of material?  Copper  Galvanized   
 Plastic  Polybutylene  Other \_\_\_\_\_  
(Check all that apply)

15. Is there any problem, malfunction or defect with the dwelling's water supply (including water quality, quantity or water pressure)?

16. What is the dwelling's sewage disposal system?  Septic Tank  Septic Tank with Pump   
 Community System  Connected to City/County System  City/County System available  
 Straight pipe (wastewater does not go into a septic or other sewer system [note: use of this type of system violates State law])  Other \_\_\_\_\_  
(Check all that apply)

17. If the dwelling is serviced by a septic system, do you know how many bedrooms are allowed by the septic system permit? If your answer is "Yes," how many bedrooms are allowed? \_\_\_\_\_  No records available.

18. Is there any problem, malfunction or defect with the dwelling's sewer and/or septic system?

19. Is there any problem, malfunction or defect with the dwelling's central vacuum, pool, hot tub, spa, attic fan, exhaust fan, ceiling fans, sump pump, irrigation system, TV cable wiring or satellite dish, garage door openers, gas logs, or other systems?

20. Is there any problem, malfunction or defect with any appliances that may be included in the conveyance (range/oven, attached microwave, hood/fan, dishwasher, disposal, etc.)?

21. Is there any problem with present infestation of the dwelling, or damage from past infestation of wood destroying insects or organisms which has not been repaired?

22. Is there any problem, malfunction or defect with the drainage, grading or soil stability of the property?

23. Are there any structural additions or other structural or mechanical changes to the dwelling(s) to be conveyed with the property?

24. Have you been notified by a governmental agency that the property is in violation of any local zoning ordinances, restrictive covenants, or other land-use restrictions, or building codes (including the failure to obtain proper permits for room additions or other changes/improvements)?

25. Are there any hazardous or toxic substances, materials, or products (such as asbestos, formaldehyde, radon gas, methane gas, lead-based paint) which exceed government safety standards, any debris (whether buried or covered) or underground storage tanks, or any environmentally hazardous conditions (such as contaminated soil or water, or other environmental contamination) which affect the property?

26. Is there any noise, odor, smoke, etc. from commercial, industrial or military sources which affects the property?

27. Is the property subject to any utility or other easements, shared driveways, party walls or encroachments from or on adjacent property?

28. Is the property subject to any lawsuits, foreclosures, bankruptcy, leases or rental agreements, judgments, tax liens, proposed assessments, mechanics' liens, materialmen's



**APPROVED RULES**

34. As of the date this Disclosure Statement is signed, are there any dues, fees or special assessment which have been duly approved as required by the applicable declaration or by-laws, and that are payable to an association to which the lot is subject? If your answer is "yes," please state the nature and amount of the dues, fees or special assessments to which the property is subject:

\_\_\_\_\_

\_\_\_\_\_

35. As of the date this Disclosure Statement is signed, are there any unsatisfied judgments against or pending lawsuits *involving the property or lot to be conveyed*? If your answer is "yes," please state the nature of each pending lawsuit and the amount of each unsatisfied judgment:

\_\_\_\_\_

\_\_\_\_\_

36. As of the date this Disclosure Statement is signed, are there any unsatisfied judgments against or pending lawsuits *involving the planned community or the association to which the property and lot are subject*, with the exception of any action filed by the association for the collection of delinquent assessments on lots other than the property and lot to be conveyed? If your answer is "yes," please state the nature of each pending lawsuit and the amount of each unsatisfied judgment:

\_\_\_\_\_

\_\_\_\_\_

37. Which of the following services and amenities are paid for by the owners' association(s) identified above out of the association's regular assessments ("dues")? (Check all that apply.)

|  | <b>No Representation</b> |                          |                          |
|--|--------------------------|--------------------------|--------------------------|
|  | <b>Yes</b>               | <b>No</b>                | <b>sentation</b>         |
| Management Fees  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Exterior Building Maintenance of Property to be Conveyed           | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Exterior Yard/Landscaping Maintenance of Lot to be Conveyed        | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Common Areas Maintenance   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Trash Removal  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Recreational Amenity Maintenance (specify amenities covered) _____ | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <hr/>  |                          |                          |                          |
| Pest Treatment/Extermination                                       | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Street Lights  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Water  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Sewer  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Storm Water Management/Drainage/Ponds                              | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Internet Service   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Cable  | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Private Road Maintenance   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Parking Area Maintenance   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Gate and/or Security   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Other: (specify) _____   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <hr/>  |                          |                          |                          |

Owner Initials and Date \_\_\_\_\_

Owner Initials and Date \_\_\_\_\_

Purchaser Initials and Date \_\_\_\_\_

Purchaser Initials and Date \_\_\_\_\_

(b) The form described in Paragraph (a) of this Rule may be reproduced, but the form shall not be altered or amended in any way.  
 (c) The form described in Paragraph (a) of this Rule as amended effective January 1, 2013, applies to all properties placed on the market on or after January 1, 2013. The form described in Paragraph (a) of this Rule as amended effective January 1, 2012, applies to all properties placed on the market prior to January 1, 2013. If a corrected disclosure statement required by G.S. 47E-7 is prepared on

or after January 1, 2013, for a property placed on the market prior to January 1, 2013, the form described in Paragraph (a) of this Rule as amended effective January 1, 2013, shall be used.

*History Note: Authority G.S. 47E-4(b), (b1); 93A-3(c); 93A-6; Eff. October 1, 1998;*

*Amended Eff. January 1, 2013; January 1, 2012; July 1, 2010; July 1, 2009; January 1, 2008; July 1, 2006; September 1, 2002; July 1, 2000.*

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**TITLE 25 – OFFICE OF STATE PERSONNEL**

**25 NCAC 01J .1101 UNLAWFUL WORKPLACE HARASSMENT AND RETALIATION**

(a) Purpose. The purpose of this Rule is to establish that the State of North Carolina prohibits in any form unlawful workplace harassment or retaliation based on opposition to unlawful workplace harassment of state employees or applicants and to require that every agency and university with employees subject to the State Personnel Act establish policies and programs to ensure that work sites are free of unlawful workplace harassment and retaliation.

(b) As used in this Rule:

- (1) Unlawful workplace harassment is defined as unsolicited and unwelcome speech or conduct based upon race, sex, creed, religion, national origin, age, color, or disabling condition as defined by G.S. 168A-3 that creates a hostile work environment or circumstances involving quid pro quo.
- (2) Hostile Work Environment is one that both a reasonable person would find hostile or abusive and one that the particular person who is the object of the harassment perceives to be hostile or abusive. Hostile work environment is determined by looking at all of the circumstances, including the frequency of the allegedly harassing conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance.
- (3) Quid Pro Quo harassment consists of unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct when:
  - (A) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or
  - (B) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.
- (4) Retaliation is defined as adverse action taken because of opposition to unlawful workplace harassment.

(c) Policy. No state employee shall engage in conduct that falls under the definition of unlawful workplace harassment or retaliation as defined in Paragraph (b) of this Rule, and no personnel decisions shall be made on the basis of race, sex, creed, religion, national origin, age, color, or disabling condition as defined by G.S. 168A-3.

(d) All employees are guaranteed the right to work in an environment free from unlawful workplace harassment and retaliation.

(e) Grievances. Any current or former state employee who feels he or she has been the victim of unlawful workplace harassment or retaliation in violation of this Rule shall file a grievance through the departmental grievance procedure. Filing such a written complaint is a prerequisite to any further appeal to the Office of Administrative Hearings regarding unlawful workplace harassment or retaliation. After the employee's written complaint is submitted to the agency or university, the department, agency or university shall have 60 days within which to consider the complaint and take any remedial action, unless the department, agency or university has waived the 60-day period, and the employee has acknowledged such waiver. The waiver and acknowledgement shall be in writing. Any current or former state employee who feels that he or she has been subjected to unlawful workplace harassment or retaliation may appeal directly to the Office of Administrative Hearings (such appeal consisting of a contested case hearing under G.S. 150B and a decision by the Office of Administrative Hearings) only after submitting a written complaint through the agency grievance and waiting 60 days or receiving notification of remedial action, if any, by the department, agency or university whichever shall occur first.

(f) Agency or University Plans. Each agency head or university chancellor shall include as a supplement to the Affirmative Action Plan or Equal Employment Opportunity Plan a plan setting forth the steps to be taken to prevent and correct unlawful workplace harassment and retaliation. Each department, agency or university shall submit such a plan to the Office of State Personnel for review, technical assistance, and approval by the Director of the Office of State Personnel. Each plan on unlawful workplace harassment and retaliation shall include:

- (1) publication and dissemination of a policy statement establishing that unlawful workplace harassment and retaliation of employees and applicants is prohibited;
- (2) establishment of internal procedure to handle complaints of unlawful workplace harassment and retaliation. This procedure shall provide investigation and resolution of complaints within the department or university and shall

- (3) offer the employee recourse other than through the immediate supervisor;
- (3) utilization of training and other methods to prevent unlawful workplace harassment and retaliation;
- (4) statement that the department will, in allegations of unlawful workplace harassment or retaliation, review the entire record and the totality of the circumstances, to determine whether the alleged conduct constitutes unlawful workplace harassment or retaliation;
- (5) development of disciplinary actions for conduct determined to constitute unlawful workplace harassment or retaliation, to be implemented on a case by case basis on the facts of each complaint;
- (6) prohibition of internal interference, coercion, restraint or reprisal against any person complaining of alleged unlawful workplace harassment or retaliation; and
- (7) notification to all employees that a complaint or allegation of unlawful workplace

harassment or retaliation must be filed within the department, agency or university and that the department, agency or university has 60 days (or fewer, if waived by the department, agency or university and acknowledged by employee) to take action, if any, in response to the complaint prior to the filing of a complaint of unlawful workplace harassment or retaliation with the Office of Administrative Hearings.

*History Note: Authority G.S. 126-4; 126-16; 126-17; 126-36; 126-36.1;*  
*Eff. December 1, 1980;*  
*Amended Eff. November 1, 1988; April 1, 1983;*  
*Temporary Amendment Eff. February 18, 1999;*  
*Amended Eff. July 18, 2002;*  
*Recodified from 25 NCAC 01C .0214 Eff. December 29, 2003;*  
*Amended Eff. June 1, 2012.*

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**RULES REVIEW COMMISSION**

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*This Section contains information for the meeting of the Rules Review Commission on Thursday July 19, 2012 at 1711 New Hope Church Road, RRC Commission Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-431-3000. Anyone wishing to address the Commission should notify the RRC staff and the agency no later than 5:00 p.m. of the 2<sup>nd</sup> business day before the meeting. Please refer to RRC rules codified in 26 NCAC 05.*

**RULES REVIEW COMMISSION MEMBERS**

**Appointed by Senate**

Addison Bell  
Margaret Currin  
Pete Osborne  
Bob Rippy  
Faylene Whitaker

**Appointed by House**

Ralph A. Walker  
Curtis Venable  
George Lucier  
Garth K. Dunklin  
Stephanie Simpson

**COMMISSION COUNSEL**

Joe Deluca      (919)431-3081  
Bobby Bryan     (919)431-3079

**RULES REVIEW COMMISSION MEETING DATES**

July 19, 2012                      August 16, 2012  
September 20, 2012            October 18, 2012

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**AGENDA**

**RULES REVIEW COMMISSION**

**Thursday, July 19, 2012 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. Child Care Commission – 10A NCAC 09 .0901, .0902, .1702, .1706, .1718 (DeLuca)
  - B. Medical Care Commission – 10A NCAC 13D .2701 (DeLuca)
  - C. Criminal Justice Education and Training Standards Commission – 12 NCAC 09E .0102 (DeLuca)
  - D. Commission for Public Health – 10A NCAC 18A .2608, .2609, .2610, .2611, .2612 (Bryan)
  - E. Commission for Public Health – 10A NCAC 18A .2653 (Bryan)
  - F. Board of Architecture – 21 NCAC 02 .0204 (Bryan)
  - G. Athletic Trainer Examiners – 21 NCAC 03 .0201 (Bryan)
  - H. Hearing Aid Dealers and Fitters Board – 21 NCAC 22F .0103, .0114 (Bryan)
  - I. State Personnel Commission – 25 NCAC 01B .0437, .0438 (Bryan)
- IV. Review of Log of Filings (Permanent Rules) for rules filed between May 22, 2012 and June 20, 2012
- V. Review of Log of Filings (Temporary Rules) for any rule filed within 15 business days of the RRC Meeting
- VI. Commission Business
  - Next meeting: August 16, 2012

**Commission Review  
Log of Permanent Rule Filings  
May 22, 2012 through June 20, 2012**

**CULTURAL RESOURCES, DEPARTMENT OF**

The rules in Chapter 4 are from the Division of Archives and History.

The rules in Subchapter 4N concern historic sites (.0100); site hours and admission fees (.0200); and Elizabeth II, voyages policy (.0300).

|                       |    |      |     |       |
|-----------------------|----|------|-----|-------|
| <u>Admission Fees</u> | 07 | NCAC | 04N | .0202 |
| Amend/*               |    |      |     |       |

**LABOR, DEPARTMENT OF**

The rules in Chapter 12 concern wage and hour including general provision (.0100); subminimum wages (.0200); wages (.0300); youth employment (.0400); jurisdiction and exemptions (.0500); investigation and enforcement (.0600); civil money penalties (.0700); and recordkeeping (.0800).

|                                  |    |      |    |       |
|----------------------------------|----|------|----|-------|
| <u>Address</u>                   | 13 | NCAC | 12 | .0901 |
| Adopt/*                          |    |      |    |       |
| <u>Definitions</u>               | 13 | NCAC | 12 | .0902 |
| Adopt/*                          |    |      |    |       |
| <u>Presumption of Compliance</u> | 13 | NCAC | 12 | .0903 |
| Adopt/*                          |    |      |    |       |
| <u>Filing of Complaints</u>      | 13 | NCAC | 12 | .0904 |
| Adopt/*                          |    |      |    |       |
| <u>Hearings</u>                  | 13 | NCAC | 12 | .0905 |
| Adopt/*                          |    |      |    |       |
| <u>Civil Penalties</u>           | 13 | NCAC | 12 | .0906 |
| Adopt/*                          |    |      |    |       |

**ENVIRONMENT AND NATURAL RESOURCES, DEPARTMENT OF**

The rules in Chapter 1 are departmental rules.

The rules in Subchapter 1A concern the general organization of the department.

|                                      |     |      |     |       |
|--------------------------------------|-----|------|-----|-------|
| <u>Department Head</u>               | 15A | NCAC | 01A | .0101 |
| Repeal/*                             |     |      |     |       |
| <u>How to Contact the Department</u> | 15A | NCAC | 01A | .0102 |
| Repeal/*                             |     |      |     |       |
| <u>Councils and Committees</u>       | 15A | NCAC | 01A | .0103 |
| Repeal/*                             |     |      |     |       |

The rules in Subchapter 1B concern general administration of the department including rulemaking (.0100); contested case hearing procedures (.0200); purchasing and contracting (.0300); and public records (.0400).

|   |     |      |     |       |
|---|-----|------|-----|-------|
| <u>Model Rules</u>                        | 15A | NCAC | 01B | .0101 |
| Repeal/*                                  |     |      |     |       |
| <u>Definitions</u>                        | 15A | NCAC | 01B | .0201 |
| Repeal/*                                  |     |      |     |       |
| <u>Request for Contested Case Hearing</u> | 15A | NCAC | 01B | .0202 |
| Repeal/*                                  |     |      |     |       |

|  |                    |
|--|--------------------|
| <u>Request for Contested Case Hearing</u>                  | 15A NCAC 01B .0203 |
| Repeal/*   |                    |
| <u>Final Agency Decision in Contested Case Proceedings</u> | 15A NCAC 01B .0204 |
| Repeal/*   |                    |
| <u>Scope of Section</u>                                    | 15A NCAC 01B .0301 |
| Repeal/*   |                    |
| <u>Definitions</u>   | 15A NCAC 01B .0302 |
| Repeal/*   |                    |
| <u>Concession Contracts</u>                                | 15A NCAC 01B .0303 |
| Repeal/*   |                    |
| <u>Definitions</u>   | 15A NCAC 01B .0401 |
| Repeal/*   |                    |
| <u>Public Access</u>                                       | 15A NCAC 01B .0402 |
| Repeal/*   |                    |

The rules in Subchapter 1G concern resolution of submerged land claims including introduction and delegations (.0100); resolution procedures (.0200); and state policies (.0300).

|  |                    |
|--|--------------------|
| <u>Application of Resolution Procedure</u> | 15A NCAC 01G .0201 |
| Repeal/*                                   |                    |
| <u>Initial Review of Claim</u>             | 15A NCAC 01G .0202 |
| Repeal/*                                   |                    |
| <u>Letter of Notification</u>              | 15A NCAC 01G .0203 |
| Repeal/*                                   |                    |
| <u>Response to Letter of Notification</u>  | 15A NCAC 01G .0204 |
| Repeal/*                                   |                    |
| <u>Follow-Up to Unserved Notification</u>  | 15A NCAC 01G .0205 |
| Repeal/*                                   |                    |
| <u>Claims Deemed Complete</u>              | 15A NCAC 01G .0206 |
| Repeal/*                                   |                    |
| <u>Claim Determination</u>                 | 15A NCAC 01G .0207 |
| Repeal/*                                   |                    |
| <u>Introduction</u>                        | 15A NCAC 01G .0301 |
| Repeal/*                                   |                    |
| <u>Filled Lands</u>                        | 15A NCAC 01G .0302 |
| Repeal/*                                   |                    |
| <u>Privately Owned Beds</u>                | 15A NCAC 01G .0303 |
| Repeal/*                                   |                    |
| <u>Marshlands and Swamplands</u>           | 15A NCAC 01G .0304 |
| Repeal/*                                   |                    |
| <u>Limited Rights</u>                      | 15A NCAC 01G .0305 |
| Repeal/*                                   |                    |

The rules in Subchapter 1J concern state clean water revolving loan and grant program including general provisions (.0100); eligibility requirements (.0200); applications (.0300); criteria for evaluation of eligible applications (.0400); priority criteria for wastewater treatment works projects (.0500); priority criteria for wastewater collection system projects (.0600); priority criteria for water supply systems projects (.0700); priority review periods assignment of priorities (.0800); loan and grant award and commitment disbursement of loans and grants (.0900); loan repayments (.1000); inspection and audit of projects (.1100); severability (.1200); and failed low pressure pipe systems (.1300).

|                    |                    |
|--------------------|--------------------|
| <u>Purpose</u>     | 15A NCAC 01J .1401 |
| Repeal/*           |                    |
| <u>Definitions</u> | 15A NCAC 01J .1402 |

|   |                    |
|---|--------------------|
| Repeal/*  |                    |
| <u>Eligible Project Costs</u>                                   | 15A NCAC 01J .1501 |
| Repeal/*  |                    |
| <u>Application Filing Deadlines</u>                             | 15A NCAC 01J .1601 |
| Repeal/*  |                    |
| <u>General Provisions</u>                                       | 15A NCAC 01J .1602 |
| Repeal/*  |                    |
| <u>Common Criteria</u>  | 15A NCAC 01J .1701 |
| Repeal/*  |                    |
| <u>Assignment of Category to Wastewater System Applications</u> | 15A NCAC 01J .1801 |
| Repeal/*  |                    |
| <u>Existing Conditions</u>                                      | 15A NCAC 01J .1901 |
| Repeal/*  |                    |
| <u>Water Quality Improvement Criteria</u>                       | 15A NCAC 01J .1902 |
| Repeal/*  |                    |
| <u>Public Necessity: Health: Safety: and Welfare</u>            | 15A NCAC 01J .2001 |
| Repeal/*  |                    |
| <u>Project Planning</u>   | 15A NCAC 01J .2002 |
| Repeal/*  |                    |
| <u>Source Water Protection</u>                                  | 15A NCAC 01J .2003 |
| Repeal/*  |                    |
| <u>Criteria for Loan Adjustments</u>                            | 15A NCAC 01J .2101 |
| Repeal/*  |                    |
| <u>Repayment of Principal and Interest on Loans</u>             | 15A NCAC 01J .2201 |
| Repeal/*  |                    |

The rules in Subchapter 1K concern the groundwater protection loan fund including program scope (.0100); application (.0200); loan administration (.0300); and loan conditions (.0400).

|  |                    |
|--|--------------------|
| <u>General</u>                             | 15A NCAC 01K .0101 |
| Repeal/*                                   |                    |
| <u>Applicability</u>                       | 15A NCAC 01K .0102 |
| Repeal/*                                   |                    |
| <u>Definitions</u>                         | 15A NCAC 01K .0103 |
| Repeal/*                                   |                    |
| <u>Eligibility</u>                         | 15A NCAC 01K .0201 |
| Repeal/*                                   |                    |
| <u>Application Procedures</u>              | 15A NCAC 01K .0202 |
| Repeal/*                                   |                    |
| <u>Bank Eligibility</u>                    | 15A NCAC 01K .0301 |
| Repeal/*                                   |                    |
| <u>Loan Processing by Banks</u>            | 15A NCAC 01K .0302 |
| Repeal/*                                   |                    |
| <u>Duties of the Loan Fund Coordinator</u> | 15A NCAC 01K .0303 |
| Repeal/*                                   |                    |
| <u>Loan Approval Criteria</u>              | 15A NCAC 01K .0304 |
| Repeal/*                                   |                    |
| <u>Delinquent Accounts</u>                 | 15A NCAC 01K .0305 |
| Repeal/*                                   |                    |
| <u>Loan Administration Fees and Costs</u>  | 15A NCAC 01K .0401 |
| Repeal/*                                   |                    |
| <u>Interest and Term</u>                   | 15A NCAC 01K .0402 |

|                              |                    |
|------------------------------|--------------------|
| Repeal/*                     |                    |
| <u>Additional Conditions</u> | 15A NCAC 01K .0403 |
| Repeal/*                     |                    |
| <u>Funding of Loan</u>       | 15A NCAC 01K .0404 |
| Repeal/*                     |                    |

**TRANSPORTATION, DEPARTMENT OF**

The rules in Chapter 2 are from the Division of Highways.

The rules in Subchapter 2D concern highway operations including standards for design and construction (.0100); landscape (.0200); field operations-maintenance and equipment (.0400); ferry operations (.0500); oversize-overweight permits (.0600); highway design branch (.0700); prequalification advertising and bidding regulations (.0800); regulations for informal construction and repair contracts (.0900); adopt-a-highway program (.1000); and disadvantaged business enterprise, minority business enterprise and women business enterprise programs for highway and bridge construction contracts (.1100).

|   |                    |
|---|--------------------|
| <u>Permits-Weight, Dimensions and Limitations</u> | 19A NCAC 02D .0607 |
| Amend/*   |                    |

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>Employment of Specialized Services</u> | 19A NCAC 02E .0701 |
| Amend/*                                   |                    |

**MEDICAL BOARD**

The rules in Chapter 32 are from the Medical Board.

The rules in Subchapter 32B concern license to practice medicine including general provisions (.0100); license by written examination (.0200); license by endorsement (.0300); temporary license by endorsement of credentials (.0400); resident's training license (.0500); special limited license (.0600); certificate of registration for visiting professors (.0700); medical school facility license (.0800); special volunteer license (.0900) prescribing (.1000); reactivation of full license (.1100); reinstatement of full license (.1200); general (.1300); resident's training license (.1400); and faculty limited license (.1500).

|                               |                   |
|-------------------------------|-------------------|
| <u>Authority to Prescribe</u> | 21 NCAC 32B .1001 |
| Amend/*                       |                   |

|   |                   |
|---|-------------------|
| <u>Application of Resident's Training License</u> | 21 NCAC 32B .1402 |
| Amend/*   |                   |

The rules in Subchapter 32R concern Continuing Medical Education (CME) Requirements.

|  |                   |
|--|-------------------|
| <u>Continuing Medical Education (CME) Required</u> | 21 NCAC 32R .0101 |
| Amend/*  |                   |

|                                   |                   |
|-----------------------------------|-------------------|
| <u>Approved Categories of CME</u> | 21 NCAC 32R .0102 |
| Amend/*                           |                   |

|                   |                   |
|-------------------|-------------------|
| <u>Exceptions</u> | 21 NCAC 32R .0103 |
| Amend/*           |                   |

|                  |                   |
|------------------|-------------------|
| <u>Reporting</u> | 21 NCAC 32R .0104 |
| Amend/*          |                   |

Waiver for Licensees Serving on Active Duty in the Armed ... 21 NCAC 32R .0105  
Repeal/\*

The rules in Subchapter 32S regulate physician assistants including physician assistant registration (.0200).

Prescriptive Authority 21 NCAC 32S .0212  
Amend/\*

**FUNERAL SERVICE, BOARD OF**

The rules in Subchapter 34A concern board functions including general provisions (.0100); and fees and other payments (.0200).

Purpose of Board 21 NCAC 34A .0102  
Repeal/\*

Public Inspection of Materials 21 NCAC 34A .0105  
Repeal/\*

**OPTOMETRY, BOARD OF EXAMINERS IN**

The rules in Subchapter 42B concern license to practice optometry including license by examination (.0100); responsibility to supply information (.0200); and professional corporations and limited liability companies (.0300).

Application for Licensure by Reciprocity 21 NCAC 42B .0104  
Repeal/\*

The rules in Subchapter 42D concern optometric assistants and technicians.

Application 21 NCAC 42D .0103  
Repeal/\*

Registration 21 NCAC 42D .0104  
Repeal/\*

Annual Renewal 21 NCAC 42D .0105  
Repeal/\*

Accreditation 21 NCAC 42D .0106  
Repeal/\*

Termination of Registration 21 NCAC 42D .0108  
Repeal/\*

**SOCIAL WORK CERTIFICATION AND LICENSURE BOARD**

The rules in Chapter 63 deal with Social Work Certification including general rules (.0100); certification (.0200); examinations (.0300); renewal of certification (.0400); ethical guidelines (.0500); disciplinary procedures (.0600); adoption of rules (.0700); and professional corporations and limited liability companies.

Application Fee 21 NCAC 63 .0208  
Amend/\*

Provisional Licenses 21 NCAC 63 .0210  
Amend/\*

Renewal Fees 21 NCAC 63 .0403  
Amend/\*

Reinstatement 21 NCAC 63 .0404  
Amend/\*

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**CONTESTED CASE DECISIONS**

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

**OFFICE OF ADMINISTRATIVE HEARINGS**

*Chief Administrative Law Judge  
JULIAN MANN, III*

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

**ADMINISTRATIVE LAW JUDGES**

|                        |                 |
|------------------------|-----------------|
| Beecher R. Gray        | Randall May     |
| Selina Brooks          | A. B. Elkins II |
| Melissa Owens Lassiter | Joe Webster     |
| Don Overby             |                 |

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| <u>AGENCY</u>  | <u>CASE<br/>NUMBER</u> | <u>DATE</u> | <u>PUBLISHED<br/>DECISION<br/>REGISTER<br/>CITATION</u> |
|--|------------------------|-------------|---|
| <b><u>ALCOHOLIC BEVERAGE CONTROL COMMISSION</u></b>  |                        |             |   |
| James Ivery Smith, Ivy Lee Armstrong v. ABC Commission   | 11 ABC 08266           | 04/12/12    |   |
| Trawick Enterprises LLC v. ABC Commission  | 11 ABC 08901           | 05/11/12    | 27:01 NCR 39  |
| Dawson Street Mini Mart Lovell Glover v. ABC Commission  | 11 ABC 12597           | 05/23/12    |   |
| ABC Commission v. Christian Broome Hunt T/A Ricky's Sports Bar and Grill   | 11 ABC 13161           | 05/03/12    |   |
| Alabarati Brothers, LLC T/A Day N Nite Food Mart, v. ABC Commission  | 11 ABC 13545           | 05/01/12    |   |
| Playground LLC, T/A Playground v. ABC Commission   | 11 ABC 14031           | 05/16/12    | 27:01 NCR 64  |
| ABC Commission v. D's Drive Thru Inc. T/A D's Drive Thru   | 12 ABC 00060           | 05/29/12    |   |
| ABC Commission v. Choudhary, LLC T/A Speedway  | 12 ABC 00721           | 05/01/12    |   |
| <b><u>DEPARTMENT OF HEALTH AND HUMAN SERVICES</u></b>  |                        |             |   |
| Bright Haven Residential and Community Care d/b/a New Directions Group Home v. Division of Medical Assistance, DHHS  | 10 DHR 00232           | 04/27/12    |   |
| Warren W Gold, Gold Care Inc. d/b/a Hill Forest Rest Home, v. DHHS/Division of Health Service Regulation, Adult Care Licensure Section                       | 10 DHR 01666           | 05/18/12    |   |
| Warren W Gold, Gold Care Inc. d/b/a Hill Forest Rest Home v. DHHS, Division of Health Service Regulation, Adult Care Licensure and Certification Section     | 10 DHR 05801           | 05/18/12    |   |
| Gold Care Inc. Licensee Hill Forest Rest Home Warren W. Gold v. DHHS, Adult Care Licensure Section   | 10 DHR 05861           | 05/18/12    |   |
| Powell's Medical Facility and Eddie N. Powell, M.D., v. DHHS, Division of Medical Assistance   | 11 DHR 01451           | 03/05/12    | 27:01 NCR 75  |
| Julie Sadowski v. DHHS, Division of Health Service Regulation  | 11 DHR 01955           | 04/03/12    |   |
| Teresa Diane Marsh v. DHHS, Division of Health Service Regulation  | 11 DHR 11456           | 04/27/12    |   |
| Timothy John Murray v. DHHS, Division of Health Service Regulation   | 11 DHR 12594           | 06/15/12    |   |
| Holly Springs Hospital II, LLC v. DHHS, Division of Health Service Regulation, CON Section and Rex Hospital, Inc., Harnett Health System, Inc. and WakeMed   | 11 DHR 12727           | 04/12/12    |   |
| Rex Hospital, Inc., v. DHHS, Division of Health Service Regulation, CON Section and WakeMed, Holly Springs Hospital II, LLC, and Harnett Health System, Inc. | 11 DHR 12794           | 04/12/12    |   |
| Harnett Health System, Inc., v. DHHS, Division of Health Service Regulation, CON Section and Rex Hospital, Inc., Holly Springs Hospital II, LLC, and WakeMed | 11 DHR 12795           | 04/12/12    |   |
| WakeMed v. DHHS, Division of Health Service Regulation, CON Section and Holly Springs Hospital II, LLC, Rex Hospital, Inc., and Harnett Health System, Inc   | 11 DHR 12796           | 04/12/12    |   |
| Cynthia Tuck Champion v. DHHS, Division of Health Service Regulation   | 11 DHR 14283           | 06/15/12    |   |
| Alice M. Oakley v. Division of Child Development, DHHS   | 11 DHR 14571           | 05/15/12    |   |

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**CONTESTED CASE DECISIONS**

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|  |              |          |
|--|--------------|----------|
| Althea L. Flythe v. Durham County Health Department  | 12 DHR 00242 | 05/17/12 |
| Jessica Lynn Ward v. DHHS  | 12 DHR 00643 | 05/17/12 |
| Angela C Jackson v. DHHS   | 12 DHR 01097 | 06/19/12 |
| Paula N Umstead v. DHHS  | 12 DHR 01098 | 05/11/12 |
| ACI Support Specialists Inc. Case #2009-4249 v. DHHS   | 12 DHR 01141 | 06/06/12 |
| AriLand Healthcare Service, LLC, NCMHL #018-092, Shawn Kuhl Director of Operations v. DHHS, Emery E. Milliken, General Counsel | 12 DHR 01165 | 05/25/12 |
| Kenneth Holman v. DHHS   | 12 DHR 01244 | 06/05/12 |
| Hillcrest Resthome Inc. (\$2000 penalty) v. DHHS   | 12 DHR 01289 | 05/30/12 |
| Hillcrest Resthome Inc. (\$4000 penalty) v. DHHS   | 12 DHR 01290 | 05/30/12 |
| Vivian Barrear v. DHHS, Division of Medical Assistance DHHS  | 12 DHR 01296 | 06/06/12 |
| Clydetta Dickens v. Nash Co DSS  | 12 DHR 01625 | 05/15/12 |
| Robert Lee Raines v. DHHS  | 12 DHR 01736 | 05/30/12 |
| Ms. Antoinette L. Williams v. DHHS   | 12 DHR 01739 | 06/15/12 |
| Tricia Watkins v. DHHS, Division of Medical Assistance, Office of Medicaid TLW-Auditing Office                                 | 12 DHR 01807 | 06/01/12 |
| First Path Home Care Services Gregory Locklear v. DHHS   | 12 DHR 01878 | 06/22/12 |
| Madeline Brown v. DHHS, Division of Health Service Regulation  | 12 DHR 02257 | 06/01/12 |
| Precious Haven Inc. Melissa McAllister v. DHHS, Program Integrity  | 12 DHR 02430 | 05/18/12 |

**DEPARTMENT OF JUSTICE**

|   |              |          |
|---|--------------|----------|
| Greary Michael Chlebus v. Criminal Justice Education and Training Standards Commission  | 11 DOJ 4829  | 04/27/12 |
| Barbara Renay Whaley v. Criminal Justice Education and Training Standards Commission    | 11 DOJ 10316 | 04/25/12 |
| Robert Kendrick Mewborn v. Criminal Justice Education and Training Standards Commission | 11 DOJ 10318 | 04/23/12 |
| Athena Lynn Prevatte v. Sheriffs' Education and Training Standards Commission           | 11 DOJ 13148 | 05/25/12 |
| Ko Yang v. Sheriff's Education and Training Standards Commission                        | 11 DOJ 13153 | 06/14/12 |
| Walter Scott Thomas v. Sheriff's Education and Training Standards Commission            | 11 DOJ 13155 | 05/10/12 |
| Darryl Howard v. Criminal Justice Education and Training Standards Commission           | 11 DOJ 13157 | 04/12/12 |
| Steve Michael Galloway, Jr, Private Protective Services Board                           | 11 DOJ 14434 | 04/23/12 |
| Justin Thomas Medlin v. Alarm Systems Licensing Board                                   | 11 DOJ 14493 | 04/23/12 |
| Angela Louise Giles v. Private Protective Services Board                                | 12 DOJ 00557 | 04/18/12 |
| Michael Wayne McFalling v. Private Protective Services Board                            | 12 DOJ 00814 | 05/21/12 |
| Robert John Farmer v. Alarm Systems Licensing Board                                     | 12 DOJ 00887 | 05/04/12 |
| Ricky Lee Ruhlman v. Private Protective Services Board                                  | 12 DOJ 01211 | 04/18/12 |
| Leroy Wilson Jr., Private Protective Services Board                                     | 12 DOJ 01293 | 04/18/12 |
| Clyde Eric Lovette v. Alarm Systems Licensing Board                                     | 12 DOJ 01498 | 05/02/12 |
| Ryan Patrick Brooks v. Private Protective Services Board                                | 12 DOJ 01696 | 06/05/12 |
| Dustin Lee Chavis v. Private Protective Services Board                                  | 12 DOJ 01697 | 06/01/12 |
| Jeffrey Adam Hopson v. Sheriffs' Education and Training Standards Commission            | 12 DOJ 01761 | 06/07/12 |
| John Henry Ceaser v. Sheriff's Education and Training Standards Commission              | 12 DOJ 01762 | 06/18/12 |
| Jerome Douglas Mayfield v. Private Protective Services Board                            | 12 DOJ 02381 | 06/15/12 |
| Elijah K. Vogel v. Private Protective Services Board                                    | 12 DOJ 02619 | 06/05/12 |

**DEPARTMENT OF STATE TREASURER**

|  |              |          |
|--|--------------|----------|
| Marsha W Lilly, Robert L Hinton v. Retirement System | 12 DST 01108 | 05/22/12 |
|--|--------------|----------|

**STATE BOARD OF EDUCATION**

|   |              |          |
|---|--------------|----------|
| Myra F. Moore v. NC Board of Education                          | 11 EDC 11927 | 05/01/12 |
| North Carolina Learns Inc. d/b/a North Carolina Virtual Academy | 12 EDC 01801 | 05/18/12 |

**DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

|  |              |          |              |
|--|--------------|----------|--------------|
| Pamlico-Tar River Foundation, NC Coastal Federation, Environmental Defense Fund, and Sierra Club v. DENR, Division of Water Quality and PCS Phosphate Company, Inc | 09 EHR 1839  | 04/26/12 | 27:01 NCR 87 |
| Don Hillebrand v. County of Watauga County Health Dept   | 10 EHR 00933 | 05/10/12 |              |
| House of Raeford Farms, Inc., v. DENR  | 10 EHR 05508 | 05/31/12 | 27:01 NCR 99 |
| Lacy H Caple DDS v. Division of Radiation Protection Bennifer Pate   | 11 EHR 11454 | 05/09/12 |              |

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**CONTESTED CASE DECISIONS**

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**MISCELLANEOUS**

|  |              |          |  |
|--|--------------|----------|--|
| Richard Lee Taylor v. City of Charlotte              | 11 MIS 14140 | 05/15/12 |  |
| Lloyd M Anthony v. New Hanover County Sheriff Office | 12 MIS 01803 | 06/07/12 |  |

**OFFICE OF STATE PERSONNEL**

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| Dorothy H. Williams v. DHHS, Central Regional Hospital  | 10 OSP 5424  | 03/28/12 | 27:01 NCR 119 |
| Larry F. Murphy v. Employment Security Commission of North Carolina                             | 10 OSP 03213 | 06/04/12 |               |
| Walter Bruce Williams v. Dept. of Crime Control and Public Safety Butner Public Safety Division | 10 OSP 03551 | 04/23/12 | 27:01 NCR 148 |
| Daniel Chase Parrott v. Crime Control and Public Safety, Butner Public Safety Division          | 10 OSP 04792 | 05/30/12 |               |
| Beatrice T. Jackson v. Durham County Health Department  | 11 OSP 3835  | 06/08/12 |               |
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| Fredericka Florentina Demmings v. County of Durham  | 11 OSP 11498 | 06/12/12 |               |
| William C. Spender v. Dept. of Agriculture & Consumer Services, Veterinary Division             | 11 OSP 12479 | 04/27/12 |               |
| Terrence McDonald v. NCSU   | 11 OSP 12682 | 05/21/12 |               |
| Terrence McDonald v. DHHS, Emery Milliken   | 11 OSP 12683 | 05/18/12 |               |
| Raeford Quick v. DOC  | 11 OSP 14436 | 05/22/12 |               |
| Bon-Jerald Jacobs v. Pitt County Department of Social Services                                  | 12 OSP 00634 | 06/12/12 |               |
| Natalie Wallace-Gomes v. Winston-Salem State University   | 12 OSP 01627 | 05/15/12 |               |
| Clark D. Whitlow v. UNC-Chapel Hill   | 12 OSP 01740 | 06/12/12 |               |
| Sheila Bradley v. Community College System Sandhills Community College                          | 12 OSP 02473 | 06/06/12 |               |

**DEPARTMENT OF REVENUE**

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| Brian Daniel Reeves v. Department of Revenue | 12 REV 01539 | 06/04/12 |  |
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Filed

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

2012 MAY 11 PM 3:23

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
11 ABC 08901

Office of  
Administrative Hearings

|   |   |                 |
|---|---|-----------------|
| Trawick Enterprises LLC                     | ) |                 |
| Petitioners,                                | ) |                 |
|   | ) |                 |
| vs  | ) | <b>DECISION</b> |
|   | ) |                 |
| N. C. Alcoholic Beverage Control Commission | ) |                 |
| Respondent                                  | ) |                 |

On February 6-8 and March 20-22, 2012 Administrative Law Judge Joe L. Webster heard this contested case in Raleigh, North Carolina. Judge Webster and counsel for both parties traveled to 1731 Trawick Road in Raleigh to view the premises on March 22, 2012, prior to final arguments.

**APPEARANCES**

For Petitioner:                   Glenn B. Lassiter, Jr.  
  Attorney at Law

For Respondent:                 Timothy W. Morse  
  Assistant Counsel  
  NC ABC Commission

**STATUTES**

N.C. G. S. §18B-901 (c) and (d), N.C.G.S. Section 150B-23(a)

**EXHIBITS ADMITTED INTO EVIDENCE**

For Petitioner:                 3, 5, 7-28, 30-36, 39, 41-42, 44, 47, 52- 53, 63-66, 71-78  
  and Exhibit A

For Respondent:                 1-7, 9-12, 13-29,

**ISSUES**

Whether in denying the Petitioner's application for ABC permits the Respondent deprived Petitioner of property, substantially prejudiced the Petitioner's rights and

- (1) Exceeded its authority or jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;
- (4) Acted arbitrarily or capriciously; or
- (5) Failed to act as required by law or rule, pursuant to N.C.G.S. Section 150B-23(a)  
Or failed to exercise proper discretion pursuant to N.C.G.S. Section 18B-901(d) .

**FINDINGS OF FACT**

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

1. On April 28, 2010, Mr. McDougald, on behalf of Petitioner, entered a lease with HM & HN, LLC, owners of a building located at 1731 Trawick Road, Raleigh, for the lease of approximately 3600 square feet for the location of its business, such footage consisting of Suites #105, #106 and #107 at the above address. Petitioner's (Pet. Ex. 72.) Petitioner's plans were to operate a restaurant/sports bar to cater to a mid to high-end clientele. Petitioner spent approximately \$80,000.00 in preparations for opening his business.
2. Madhussudan Surti, a principle in HM & HN, LLC executed the lease the same day on behalf of the Lessor.
3. Petitioner's business is located in a mixed-use commercial district that is properly zoned for Petitioner's business as a neighborhood business area. (Pet. Ex. 32.) Starbar is part of a multi-use building that also contains a Salon, a Braiding Shop; Barber Shop, an African Grocery and a Business Center/Sweepstakes Store which are all part of a shopping center. The business is bounded on the North by a Hess Service Station, on the South by a former tire/wheel shop and then a former Pizza Hut, on the West by a strip shopping center containing a Food Lion and various other businesses, and on the East by Trawick Road. Across Trawick Road there is a large commercial nursery. (Petitioner's Exhibit A.) There are large residential neighborhoods located close by to the east and northeast of Trawick Road (Skycrest Drive) and on Lake Woodard Drive to the north. (Deans T. 1003) Also to the north is a small residential neighborhood, Votive Lane. (Miller T. 590, Brandon) Votive Lane is 100 yards from the Starbar. (Miller T. 586) The parking area of the Hess Station lies between the Votive Lane neighborhood and the Starbar building.

4. The parking area for the building surrounds the entire building and is not exclusive to the Petitioner.

5. Petitioner's licensed premises did not include the parking area, but only the interior of the building.

6. Based upon the view of the premises, the nearest residential area to Petitioner's business is approximately 300 feet away. That area is a small condominium development where the homes are mostly individually owned. Woodard Lane intercedes between the Hess store and that housing area.

7. The ABC Commission ("Commission") is the only entity that handles permitting for the state of North Carolina. (Cowick T. 409) Essentially six persons are involved in evaluating permitting issues and determining Commission actions for the entire State. (Cowick)

8. Commission staff possessing over 69 years of permitting experience were involved in making decisions during the application process for Starbar, beginning with application on June 17, 2010, running continuously through issuance of temporary permits on July 21, 2010, through the remainder of 2010 and into 2011 until the temporary permits were revoked and Petitioners' application was denied on May 20, 2011. (Res. Ex. 22)

9. The Commission staff uses the provisions of N.C.G.S. §18B and the ABC Rules as guidelines in processing applications for permits and for evaluating the qualifications of applicants, as well as the suitability of proposed business locations. Applications are handled on a case by case basis. (Johnson and Cowick)

10. The Commission required the Petitioner to provide in its application all information required of every similarly situated applicant. (Johnson) The application includes the following:

a. The Applicant was required to complete an application which included contact information. (Res. Ex. 1)

b. Documentation was required to establish the applicant's ownership structure (Res. Ex. 3) and that it had legal possession of the property (Res. Ex. 2)

c. The Petitioner was required to provide proof of compliance with zoning requirements (Res. Ex. 4) and was required to submit a Local Governmental Opinion Form to the City for the City to complete and return to the Commission. (Res. Ex. 5)

d. Petitioner submitted the required information to the Commission on June 17, 2010. The City submitted the completed Governmental Opinion Form to the Commission on June 14, 2010.

11. As required by statute, the Commission allows the City of Raleigh 15 days from the time the notice was mailed or delivered to file written objection to the issuance of the permit. (complete and respond through the Local Governmental Opinion form. (Johnson) Through its

designee, Major S. Deans (Raleigh Police Department, "RPD"), the City objected to both the location and to the applicant. (Res. Ex 5) The City cited as their basis for objection concerns about the actual ownership of the business; the prior work history of the Petitioner; as well as the Petitioner's connection to Tex Carter, a person involved in other businesses in Raleigh of concern to the RPD as problem ABC locations. (Res. Ex 5, Letter) (Deans T. 1003, 1050) (Cowick T. 357) The Petitioner wrote a letter to the Commission in response to the City's objection. (T. 396) The letter was reviewed by Ms. Cowick and placed in the file.

12. Pursuant to existing Commission policy, the Petitioner was initially denied a temporary permit based upon the City's objection. Again under existing Commission policy, Petitioner was offered as an alternative the option of paying the application fee and having North Carolina Alcohol Law Enforcement ("NCALE") do an expedited ("21-day") permit investigation (Cowick T. 325). Petitioner took the expedited option and the investigation was completed in less than 21 days.

13. As standard procedure, the Commission never issues a permanent ABC permit to any applicant immediately upon receiving a completed application. All qualifying applicants and their businesses must undergo a permit investigation. NCALE has up to 60 days to complete an investigation where a temporary permit has been issued. (Cowick T. 324, Johnson T. 223) The expedited permit investigation (21-day) is offered as an option only to applicant's whose application has been denied because the Commission has concerns, but the concerns do not rise to a level that warrants an immediate application rejection. (Cowick T. 324-325 )

14. Following completion of the 21-day investigation, R. Cowick ("Cowick"), Assistant Commission Counsel, and Commission's staff evaluated the City's objections (Res. Ex. 5) (Cowick T. 360), as well as, NCALE's written investigative report (Res. Ex. 7) and found the evidence insufficient to "in good faith" reject Petitioner's application. Cowick had concerns based on the City's objections, but not enough to justify a refusal to issue a temporary permit. (Cowick T. 359) Cowick directed the permit division to issue temporary permits to the Petitioner on July 21, 2010 over the City's objection. (Res. Ex. 10 and T. 333)

15. Cowick has been employed by the Respondent for over eight years. Her duties involve evaluating nearly 1200 violation reports per year for evidentiary sufficiency. Cowick returns reports to law enforcement when found to be insufficient.

a. Cowick prosecutes ABC violation cases which include assigning proposed penalties, negotiating and settling alleged violations as well as litigating violations if necessary.

b. These cases include Summary Suspensions, No Longer Suitable allegations, Application cases as well as other generic ABC violations.

c. Cowick is tasked with advising local law enforcement on the Respondent's evidentiary requirements and its procedure in Summary Suspensions, No Longer Suitable allegations and Application cases.

d. Cowick becomes involved in 3 or 4 application cases per year, cases that cannot be resolved by the Permit Director, A. Johnson ("Johnson"). In comparison, thousands of applications of a more generic nature, many without government objections, are handled by Johnson and the Permit Division each year. (Cowick 394-395)

16. Petitioner applied for Malt Beverage, Unfortified Wine, Fortified Wine and Mixed Beverages Restaurant permits. As a Mixed Beverage Restaurant permittee, Petitioner was informed that it was required, according to statute, to produce at least 30% of its gross receipts from food. (Res. Ex. 15 & 18 & T. Smith 267) Due to difficulty in contacting the Petitioner, the Commission's Audit Division ("Audit") placed a "Hold" on Petitioner's temporary permits on August 24, 2010. (Res. Ex. 12) An Audit Hold placed upon temporary permits has the effect of preventing issuance of permanent permits until Audit can determine if the applicant actually qualifies for the temporary permits held. (Smith T. 277)

17. A food percentage below 30%, as well as late quarterly reporting by the Petitioner for the 3<sup>rd</sup> and 4<sup>th</sup> quarters of 2010, prompted Audit to continue the Hold on Petitioner's temporary permits. Petitioner was warned on two occasions about late reporting. (Res. Ex. 15 & 18 & Smith T. 274, 283) Upon evaluating Petitioner's 2010, 4<sup>th</sup> Quarter reports, Audit released its Hold on the temporary permits on March 30, 2011. (Res. Ex. 20)

18. Temporary permittees who have problems or have pending ABC violations are placed in the "Problem Location" drawer for monitoring purposes. Information on the location is noted on a "Blue Sheet" cover to the permittee's permit file. (Cowick T. 329)

19. Petitioner was again late in reporting for the 1<sup>st</sup> Quarter of 2011. The reports were due on April 15, 2011, but not submitted until May 22, 2011 two days after the Commission issued its Notice of Rejection citing various problems with the business including audit reporting. (Res. Ex. 22) Audit Director V. Smith ("Smith") stated that the audit report submitted for the 1<sup>st</sup> Quarter of 2011 would have triggered an audit by her staff to establish whether the business was actually functioning as a Mixed Beverages Restaurant. (Smith T. 293-294)

20. The undersigned finds as a fact and as a matter of law that the Quarterly Report Forms used by the ABC audit division contributed to some small degree in Petitioner's late filing of the Reports. (Respondent Exhibits 15, 18). Petitioner twice submitted late reports because of a misunderstanding whereby he believed that Petitioner was supposed to submit annual reports when he was supposed to submit quarterly reports.

21. Notwithstanding the late reports filed by Petitioner, the undersigned finds as a matter of fact and law that the late audit reports should not have been a significant factor in whether Petitioner's permit was denied. Vera Smith of the Audit Division sent a memo to Ann Johnson of the Permits Division dated March 30, 2011 with the following statement: "This permittee does not appear as though they will have any problems reference Audit Division concerns and should be issued permanent permits. This recommendation is only from an Audit Division standpoint and I have no information at this time as to law enforcement concerns or pending violations. If

any problems occur in the future due to reports, audits, inspections, complaints, etc., the Audit Division will deal with them through negotiation or the violation process.” (Pet. Ex. 53)

22. From a business point of view, there is no difference between a permittee holding a permanent ABC permit or a temporary permit concerning the right to sell alcoholic beverages (Smith T. 268)

23. Standards for reporting for a Mixed Beverage Restaurant permittee whether the permittee is on temporary permits or has permanent permits and the punishment for failure to report or failure to maintain 30% food sales are the same (cancellation – loss of permit). (Smith T. 312 and Cowick T. 399) The Commission has one standard of appropriate conduct for permittee’s whether they are on permanent or temporary permit status. (T. 398-399)

24. In May of 2011 and subsequent to an alleged stabbing at the business, Sgt. Austin (RPD) requested a meeting with the Commission to bring to the Commission’s attention increased Calls for Service (CFS) and continuing problems at Starbar. (Cowick T. 324 & 346) There were two meetings in mid-May. The first meeting involved representatives of RPD and Cowick. At the close of the meeting, Cowick told the RPD she would need evidence in writing to consider. (T. 425)

25. The second meeting in May 2011 was attended by Lt. Sholar and Sgt. Austin (RPD), a representative from Wake County ABC Law Enforcement (Lew Nuckles) and NCALE (B. Pearson), Smith and Cowick. Cowick asked Wake ABC Law Enforcement and NCALE to attend the meeting and share any other information regarding Starbar. (T. 414)

a. At the second meeting, RPD presented written information to Cowick under a cover entitled “Net Forces Report on Starbar” consisting of CFS, a memo regarding undue use of RPD resources (the number of man-hours RPD was spending on this one location) and police incident reports.

b. An additional “Net Forces Meeting Memo” was also given to Cowick. (Res. Ex. 23) Cowick offered to review the materials, but made no promise to reject Petitioner’s permits. (T. 346, 426)

26. Other than Audit violations, the Commission uses incident and violation reports from various law enforcement agencies as the basis for its Notices of Alleged Violation. The Commission does not have an investigative division and depends upon sworn law enforcement officers to do investigations and submit incident reports. (Cowick T. 351) The Commission does not request an outside entity to conduct investigations to determine the veracity of the police incident reports or violation reports it receives from local police departments, NCALE and local ABC Law Enforcement. (T. 351)

27. The Commission takes facts submitted in an incident report or violation report submitted by a sworn law enforcement officer as true unless shown otherwise. Cowick stated that she gives less credibility or no credibility at all to the reports of certain agents based upon her evaluation of their credibility. (T. 393) Cowick evaluates the facts based upon what the officer

could properly testify to at a hearing under the rules of evidence and the exceptions thereto. (T. 350, 363-364, 392, 434)

28. After reviewing the information presented, looking at a map of the area, examining a Google image of the area, (T. 406) Cowick drafted a Notice of Rejection on May 20, 2011 denying Petitioner's application for permanent permits and revoking their temporary permits. (Res. Ex 22) Cowick used the ABC statutes as a guideline for evaluating whether the Starbar ought to keep its permits. (T. 352) Cowick evaluated the "whole picture" of evidence presented applying her knowledge and experience using the same method and analysis to reach her decision in Starbar as would be used in every other case. (T. 354)

29. The Notice of Rejection ("NOR") was based upon:

- a. Evidence showing that the Petitioners would not comply with the law.
- b. Questions about whether the business qualified as a Restaurant.
- c. Evidence that the business location was not suitable to hold ABC permits due to parking problems generated by the business.
- d. Evidence that the operation of the business was detrimental to the neighborhood due to illegal drug activity, fighting, disorderly conduct and other dangerous activities.
- e. The objections of the local governing body, which were based upon the Petitioners prior employment with a problem location in Raleigh, his lack of cooperation during the application process, whether applicant was the actual owner and in control of the location, and that the location was a drain on the resources of the RPD.

30. Cowick testified that after reviewing CFS data submitted to her by the RPD, she concluded that the problems at the business were escalating as evidenced by a spike in the number of calls generated from the business. 17 calls were made in the first 5 or 6 months the business was operating in 2010. In comparison, over 300 calls were received in 2011. Cowick stated that "even if some are securing checks," the increase was an escalating problem. (T. 413)

31. Petitioner had held temporary permits from July 21, 2010 to May 20, 2011.

32. When in operation, Starbar's parking lot was routinely full. People would then park in the parking lots of the adjacent businesses, the Hess Gas Station, the Tire Shop (40 yards away), the old Pizza Hut (a football field distance away) and the Food Lion (60 yards away). (Kopcsak T. 577) These adjacent business lots are within a football field length (100 yards) from the business. (Kopcsak T. 575) "The area we work is a big shopping center, so it's one parking lot of the shopping center that's attached to another parking lot of another shopping center." (T. 574) Further overflow parking was observed along both Trawick and Lake Woodard Roads. (Etheridge T. 442-443, Morrison T. 482, Albert T. 550).

33. Petitioner's parking lot is actually a shared parking lot with several other businesses.
34. Bissette of NCALE did the permit application inspection for the Starbar. Bissette determined that the business had adequate parking for a Mixed Beverage Restaurant with a seating capacity of 76 persons. (T. 781) In making his assessment, Bissette assumed that the parking lots adjacent to the Starbar, lots owned by other businesses, would also be used by Starbar patrons. (T. 782)
35. The City of Raleigh's ordinances disallows issuance of a certificate of occupancy to business without adequate parking. The City of Raleigh's zoning laws address parking for businesses. (Petitioner Exhibit 31.) The City of Raleigh signed the ABC form indicating Petitioner was compliant with all zoning laws on May 3, 2010. (Petitioner Exhibit 71.) The city of Raleigh also issued a certificate of occupancy to the space occupied by Petitioner's business on May 3, 2010. (Petitioner's Exhibit 7). Petitioner was not fully aware of the complaints of the City and ABC Commission concerning the parking situation until the application was rejected.
36. Petitioner was not fully aware of the complaints of the City and the ABC Commission concerning the parking situation at its business until this application was rejected.
37. Petitioner has since met with its landlord and has formulated a plan including obtaining a grading estimate to allow additional on site controlled parking should this permit be issued, and is prepared to implement that plan. (Pet. Exs. 64, 73.)
38. The new parking area will encompass approximately 40-50 additional parking spaces.
39. Petitioner also has made provisions for employee parking in the nearby Food Lion parking lot. (Pet. Ex. 65.)
40. Parking on the public street, when it occurred, was lawful.
41. If patrons of Petitioner's business did park in adjoining lots, those lots are somewhat out of control of the Petitioner and absent no parking signs being erected by owners, police could look to those business owners to deal with issues in those parking lots should complaints arise.
42. The business would routinely stay open past 3:00 AM, sometimes past 4:00 AM and was the only business in the vicinity open beyond 1:00 AM on a regular basis. (T. Etheridge 451) A hair salon in the same strip shopping center as the Starbar was sometimes open until 1:00 AM. The nearby Food Lion closes at 11:00 PM. (Etheridge T. 451, Morrison T. 482)
43. RPD made numerous arrests in the vicinity of the Starbar during the late night and early morning hours when Starbar was the only business open. (Cowick T. 364)
44. During the time period following a January Net Forces inspection and continuing through the spring of 2011 the RPD responded to 160 CFS (not counting security checks) from the vicinity of the business property. (Sholar, Austin) In making the decision as to whether to reject Petitioner's permit application, Cowick further reduced the number of incidents considered when drafting the NOR. (Cowick T. 384)

45. Logistically, officers were sent by their superiors to focus on businesses where large numbers of people were gathered (Mollere T. 513 & 516) (Morrison T. 474-475), where the number of CFS were more than average and those calls were excessively violent. (Hourigan T. 463)

46. Patrol officers are tasked with going out and answering calls and being proactive. The officers in the area knew from past history that they were going to have to be at the Starbar when the crowd let out. (Deans T. 1031)

47. T. Brandon lives in a small neighborhood (Votive Lane) off of Lake Woodard Drive just north of the Starbar. Ms. Brandon testified to three major concerns about how the presence of the Starbar negatively affected her life; the noise, the trash and the parking. Patrons opening and closing car doors, setting car alarms, loitering and talking in the street and playing car radios disturbed Ms. Brandon's rest. Much of this noise occurred in the early hours of the morning when only the Starbar was open. (T. 603)

48. Patrons would park in the limited parking area of Votive Lane until the neighborhood started towing. However, problems persisted as patrons continued to park along Lake Woodard drive adjacent to the neighborhood. Brandon testified to the presence of trash littering the area after a night that the Starbar operated. Further, Brandon testified about being disturbed by loud music coming directly from the Starbar. The bass of the music could be heard throughout her house even with the windows closed. (Brandon T. 240-262)

49. Other than T. Brandon, no other residents testified about any complaints regarding noise, the presence of trash littering area or had complaints about problems related to parking. The undersigned also finds that evidence of trash in the area was seen only "one" night after the Starbar had operated.

50. Referring to Petitioner's private security, City of Raleigh official, Chadwick Goss commented in a memo to Michael Peterson, as follows: "...They have actually done a good job of patrolling their lot and make everyone go inside or leave...." (Pet. Ex. 26)

51. *Specific Incidents*

(a) On January 30, 2011, at 1:15 AM while on patrol, police officers were investigating a woman sitting alone in a vehicle in the Hess Gas Station parking lot adjacent to the Starbar. The parking lot was full as was Starbar's lot. No business in the area was open other than the Starbar. The woman had open containers of alcohol and a marijuana blunt in the car. Shortly after approaching the woman a fight broke out nearby in a portion of the Starbar lot nearest to the Hess. Multiple people were fighting. (T. 453) When the officers diverted to the fight, they were alerted to the possibility of a gun being present and as the fighters were being detained, the officers heard a gunshot behind them. Officers responded and found a man beside a car in possession of two handguns, one loaded with ammunition matching a shell dropped beside the car. The man was

arrested for Carrying a Concealed Weapon and Discharging a Firearm inside the City Limits. (Etheridge T. 438-455)

- (b) On February 6, 2011, a Sunday, at 11:30 PM Officer Hourigan heard gun shots coming from the Starbar parking area as he was driving past the property. (T. 458) While the officer was speaking to a person in the Starbar lot, the person identified the driver of a car exiting the lot as the person who fired the shots. The officer was able to make eye contact with the driver and observe the car for a few seconds. (T. 459) The officer pursued the shooter who drove off at a high speed and found the car wrecked within a mile to a mile and one-half from Starbar. A canine officer searched and found the driver. The weapon, three magazines of bullets and other ammunition were found in the car. The driver was charged with DWI, Resist Delay and Obstruct, Discharging a Gun in the City Limits and Going Armed to the Terror of the Public. (T. 456-467) No other business in the area of the Starbar was open. (T. 473) Hourigan testified that he had been called to the Starbar on numerous occasions for arguments and fights. (T. 456-457)
- (c) On April 11, 2011, at 3:39 AM Officer Miller was called to the Starbar by an employee reporting gun shots coming from behind the bar. (T. 585) The shooter was not found. Officer Miller, a patrol officer in the Northeast District had experience working at the Starbar 30 to 40 times while on duty. He had responded to 911 calls from the area for trespassing, loud noise, loud music, shots-fired calls and crowd-control calls. (T. 583) Miller testified that crowd-control consisted of supervising the traffic exiting the area around Starbar's closing time. Overcrowding became the norm and the police were present to deal with any traffic, loitering or trespassing issues. (T. 588-589) The Starbar lot is limited and the crowds attending the business were consistently large requiring help to clear the adjacent lots. (T. 587) Miller testified that he had personally taken part in crowd-control at closing 30 times and that most of the time Starbar security stayed by the door and did not work the parking lots. (T. 599)
- (d) On February 7, 2011, at about 2:30-3:00 AM Officer Morrison noticed a vehicle leave the front of the Starbar and exit the lot. (T. 489-490) He pursued and stopped the vehicle for tinted windows and noticed a strong smell of Marijuana. The driver was charged with possession, Driving While License Revoked and had two outstanding warrants for his arrest. (T. 479-481)
- (e) On February 13, 2011, at 11:00 PM Officers Mollere approached a person suspected of Marijuana possession seated in a parked car in the lot close to the Starbar (T. 500). The person was cited for Marijuana possession and was also found to be carrying a concealed weapon.
- (f) On February 20, 2011, officers cited persons in the Food Lion parking lot adjacent to the Starbar lot for possession of Marijuana. (Mollere T. 515) On February 27, 2011 at 10:00 PM another person was cited for Marijuana possession (10 Grams) near the Starbar.

- (g) On February 21, 2011, at 1:00 AM Officer Albert observed the Starbar to be busy. The small parking lot of the Starbar was full with the patrons spilling out into other adjacent parking lots around the area. (Albert T. 540) Albert and another officer approached a vehicle in the adjacent Pizza Hut lot. The Pizza Hut business was closed. The persons had outstanding warrants from Vance County and were arrested. (T. 543)
- (h) On February 27, 2011, around 11:25 PM Officers Kopcsak and Gunther were alerted to the presence of persons near their car in the Pizza Hut parking lot. The Pizza Hut was not open. A strong odor of Marijuana was detected. Marijuana was found on both persons. One person possessed 10 grams. More was found on the other. (T. 560) Both persons were charged with possession. Officer Kopcsak testified that he had on other dates personally observed other drug violations (including cocaine possession T. 569) as well as firearm violations and alcohol violations while on duty in the Starbar area. (T. 555-556) Kopcsak also testified from his working experience that people come out of the club or bar to their car to drink alcohol or use drugs. (T. 573)
- (i) On February 28, 2011, Officer Kopcsak charged two persons in their car which was parked in the lot of a closed business adjacent to the Starbar. The Starbar lot was full. The persons were previously seen leaving the Starbar. (T. 573) They were charged with possession of Marijuana and Cocaine. (T. 563)
- (j) On February 21, 2011, around 4:00 AM, Officer Vigeant was assisting another officer in the rear driveway area of the Starbar with a Driving While Impaired arrest. (T. 614-615) Shortly thereafter, Vigeant noticed another vehicle 20 to 30 yards away parked with the motor running. The driver was passed out at the wheel. Vigeant had difficulty rousing the driver who was charged with Driving While Impaired and recorded a breathalyzer reading of .23. Vigeant testified that he had been to the Starbar 10 to 12 times past the hour of 12:00 Midnight. In his experience, the usual closing time was between 3:00 and 4:00 AM. Vigeant testified that patrons would exit the business around closing but remain in the parking areas loitering and hanging out. (T. 603)
- (k) On February 19, 2011, between the hours of 12:30 and 4:00 AM, Officer Reitmeyer was conducting proactive patrol in the parking lots adjacent to Starbar. While Reitmeyer was assisting another officer who was searching a vehicle for a search, Vigeant was alerted to a disturbance coming from the front Starbar lot. 50-100 persons were running in the lot heading south toward the adjacent lot. The officer heard persons yelling "fight". (T. 622-623) When Vigeant was able to reach the area the fight was over. However, the situation was very disorderly and the police wanted the crowd to disperse as it was around 4:00 AM. (T. 623) Starbar security allowed persons to re-enter the business despite the hour.

- (l) On February 21, 2011, at 2:43 AM, Reitmeyer barely avoided a head-on collision with a car traveling north on Trawick Road in the immediate area of the Starbar. (T. 625) The officer pursued the driver into Skycrest Drive, a residential neighborhood located to the northeast within a quarter mile of the Starbar. (T. 627) The driver was charged with Driving While Impaired and Resist Delay and Obstruct.
- (m) On February 28, 2011, at 12:40 AM, Officer Krueger was part of a team conducting covert surveillance in the parking areas used by Starbar patrons. Pursuant to a consent search Marijuana was found in plain view inside the person's car. (T. 635) Kruger testified that in his experience with Starbar on busy nights the patrons would park in the adjacent lots once the Starbar lot was full including in the lot of the Hess Station after it closed for the night (T. 638) and would also park along Lake Woodard Road across from Votive Lane. (T. 639)
- (n) Officer Pekich was on patrol in the Southeast District on January 17, 2011 around 3:14 AM. He was called by the Northeast District to the Starbar on a fight call. (T. 647-648) Several units from the Southeast District responded and when they arrived a total of 20 officers were at the location. Pekich testified that there was evidence of a fight, but that it was over by the time he arrived. (T. 650) Pekich testified that 50 to 100 patrons of Starbar were milling around the lots. "We had an overwhelming amount of people we were trying to deal with". (T. 652) Some patrons were trying to leave and others were trying to get back into Starbar. (T. 649) Starbar security was working their door but not working in the Starbar parking lot at all. (T. 651) Pekich attempted to talk to management about an alleged damage to property claim. Security advised Pekich they had informed the complainant to speak to the shopping center property owner. Pekich asked to speak to management, but management did not respond. (T. 653) Pekich testified that he had been called to come over the District line from the Southeast District to work crowd control at the Starbar 4 or 5 times.
- (o) On February 21, 2011, Officer Conley was working patrol in the Southeast District. Calls were light in his District prompting Conley and 2 other officers from his District to go to Starbar to assist. The officers conducted a foot patrol of the parking lots used by Starbar patrons. Numerous people were in the Starbar lot as well as the adjacent lots. Some were going to the Starbar and some were leaving the Starbar. (T. 657) Pursuant to a consent search, a person was cited for Marijuana possession (11.9 grams). Conley testified that he had come across the District line 3 to 5 times to assist at Starbar. In response to a question by the Court as to why the police did not allocate more officers regularly to the Northeast District to handle the Starbar rather than having officers leave the Southeast District to assist, Conley responded that generally the Northeast District had less crime and therefore had less officers assigned to it. (T. 659)
- (p) On February 28, 2011, at 1:52 AM, Officer Thompson was patrolling in the Starbar area. Thompson, with other officers, was directed to a car occupied by two persons parked in the lot of a closed business immediately to the southeast of

the Starbar lot. The driver possessed Marijuana and was cited. The passenger was found to be in possession of cocaine. He also had an outstanding warrant from another county and was arrested. (T. 666-667)

- (q) On May 16, 2011, at 3:30 AM, Officer Offerding was working proactive foot patrol in the Starbar area. He had just finished working on a Carrying Concealed and contraband action in the lot area between the Hess and the Starbar when he was contacted over the radio regarding an alleged stabbing at the Starbar. (T. 672-673) The victim had been stabbed several times and was at Wake Med in the trauma room. (T. 674) Offerding responded to Wake Med and observed and spoke to the victim. (T. 685) Later Offerding directed investigators to Starbar to search for a crime scene. No crime scene was established. (T. 684-685)
- (r) On February 21, 2011, at 3:30 AM, Officer Wescoe was working in the Starbar parking lot. Wescoe testified that a large party was going on. No other businesses in the area were open at the time. (Lyman T. 711) Wescoe noticed a Hyundai in the northeast corner of the Starbar lot stationary with the engine running. (T. 691) The sole person in the car was asleep behind the wheel. The officer had difficulty rousing the driver, but finally did so. The driver admitted to having consumed 2 beers and a bottle of champagne. He said he had stopped drinking at 2:00 AM and that he came to the car to wait on his friends who were in the Starbar. (T. 702 and Lyman T. 706) The driver was arrested for Driving While Impaired. During Wescoe's investigation of the DWI (February 21, around 3:30-4:00 AM), he was covered by Officer Lyman. During the investigation, a person approached the Hyundai and stated that he and the driver of the Hyundai had traveled together to the Starbar. (T. 706) Futher, the man admitted to having a weapon in the car. A loaded 40-calibre pistol was found concealed under the front passenger side seat of the Hyundai. The passenger was charged with Carrying a Concealed Weapon.
- (s) Earlier on February 21, 2011 (2:23 AM), Officer Lyman was on foot patrol in the old Pizza Hut lot adjacent to Starbar. As Lyman approached a car, she noticed movements indicating to the officer that the person in the car was trying to conceal something. (T. 709) Drawn by the behavior, the officer approached and noticed the odor of Marijuana. The person in the car tried to conceal a portion of a Marijuana cigarette in the driver-side door handle within the plain view of Officer Lyman. A probable cause search garnered 7.9 grams of crack in the person's pocket and Marijuana in the car. The person was arrested and charged with DWI, and the drug offenses. (T.710)
- (t) Just prior to the incident above, Officer Lyman and another officer found three persons in a parked car located in the rear of the Starbar lot (February 21, 2011 around 2:23 AM). As the officers approached, the driver was observed to place a Marijuana cigarette in the car ashtray. When asked, all three persons admitted to just smoking Marijuana. The driver was cited for possession. Further, the persons admitted (and without objection) that they had waited for two hours to get into the Starbar and were so cold they returned to the car. (T. 721)

- (u) On March 6, 2011, between 2:00 and 2:50 AM, Lyman was on foot patrol with Officer Kruger. Lyman and Kruger noticed a Dodge Magnum parked in the front Starbar lot. As the officers approached the car, Lyman noticed the odor of Marijuana. (T. 718) Lyman testified that she noticed the passenger actively smoking what appeared to be Marijuana. Once at the side of the car, Lyman could see in plain view, a half-smoked Marijuana cigarette in a cup in the center console. The driver admitted to possession of more. A total of 9 grams was found on the driver and in the car. The driver was cited. (T. 719)
- (v) Officer Curci was on patrol in the Northeast District on February 27, 2011 at 2:00 AM. He observed a call from the Starbar and went to assist. (T. 726) The call had originated from Templar Security, the private security hired by the Starbar. A patron, intoxicated and belligerent was irate about being told to leave. Starbar security attempted to escort the man to his car, but he struggled with them and in doing so damaged a car in the lot. The man was charged with damaging a motor vehicle.
- (w) On February 27, 2011, just before midnight, Officer Ortiz observed a car parked in the rear parking area for Starbar. (T. 743) Pursuant to a voluntary encounter, subsequent pat down and consent search of the car, Ortiz found 2 dosage-units of Crack Cocaine. The substance field tested positive and the person was arrested. (T. 746)
- (x) Officer Mead was working patrol at Starbar and the surrounding lots on February 28, 2011 around 1:00 AM. The officer noticed a car with a taillight out, leave the Starbar and proceed 2 blocks to Bastion Lane. The driver parked the car in a deserted lot for a business that was closed for the night. (T. 767) As the officer drove into the lot the other car tried to leave. Mead approached the car and noticed the odor of Marijuana. (T. 769) The driver admitted to smoking Marijuana and additional Marijuana was found on the driver's seat in plain view. (T. 770) The driver was cited. (T. 774)

52. There were 17 violations were included in the materials presented to Renee Cowick during her meeting with police officials on May 17, 2011, including the police reports.

53. There was testimony from various officers during the trial concerning approximately 24 incidents that occurred in the vicinity of Petitioner's business while it was operating during this time.

54. Thirteen of those incidents involved illegal drugs, twelve of which involved amounts of drugs normally considered to be possessed for personal use. Twelve of the incidents resulted in arrests.

55. Only five or six of those incidents occurred in what were considered the Petitioner's parking lot by police. The parking lot is shared by other businesses. None of those incidents involved other than personal use amounts of illegal drugs. Of those five or six incidents, three of

those involved seizure of drugs during a police search of a vehicle. None of these incidents occurred on Petitioner's licensed premises.

56. The record is devoid of any evidence that Petitioner or any of its employees or security observed any of these incidents.

57. The Raleigh Police Department assigned dozens of officers to patrol for hundreds of hours in the vicinity of Petitioner's business, but only observed three drug violations in the common parking lot used by Petitioner's patrons, despite the hundreds of security checks and suspicious person calls the Police Department relies on in its conclusion that Petitioner's business is a problem location.

58. No police officer ever observed Giovanni McDougald or any other person employed or acting on behalf of Petitioner commit or tolerate any drug offense.

59. At one concert at Time Warner Pavilion last summer, there were 11 underage drinking arrests, 32 felony drug charges and 62 misdemeanor drug charges made by a joint Alcohol Law Enforcement/Raleigh Police Department operation.

60. During that operation, officers generally only cited persons openly violating the law, whereas in the vicinity of Petitioner's business, Raleigh Police routinely conducted searches of vehicles by consent absent cause or suspicion. There is no evidence in the record that Petitioner having an ABC permit at his business in any way contributed to any of these incidents.

61. There was police testimony concerning two incidents around the business involving fights. One of those incidents occurred at the corner of the building far from Petitioner's entrance. While there was a scuffle or fight of some kind, there was no evidence that anyone was injured or arrested in that incident. The second incident involved a situation whereby an unruly Patron was being ejected from Petitioner's business and a scuffle ensued. Again, there was no evidence anyone was injured or arrested in that incident. There is no evidence in the record that Petitioner was aware of these incidents. There is no evidence in the record that Petitioner's holding ABC permits in any way contributed to these incidents. Neither of these incidents occurred on Petitioner's licensed premises.

62. There was police testimony concerning two incidents of gunshots in the vicinity of Petitioner's business. During one incident, a person that may have earlier been a patron of Petitioner's business discharged a gun into the air on the ABC licensed premises of a nearby Hess service station. That person was arrested and charged with a felony. The other incident involved an officer hearing a gunshot somewhere around the parking area of Petitioner's business. A bystander identified a man driving off as the possible shooter. That man was chased by police, then crashed and abandoned his vehicle. A pistol was found in the car that had been fired once and then jammed. The suspect was located and arrested and also charged with a felony. There were no injuries in either incident. The guns seized in both incidents were lawful to possess, if openly displayed or if the owner had a concealed carry permit. There is no evidence in the record that any affiliate or employee of Petitioner had any knowledge of or ability to prevent

either of these incidents. Neither of these incidents occurred on the Petitioner's licensed premises.

63. Officer Todd Jordan had previously faced a gunman near the Waffle House which is located down the street from Petitioner's location. That Waffle House had some issues with loitering in the past when operating without an ABC permit. That incident occurred before Petitioner's business opened.

64. The clerk at the nearby Hess station was shot and killed during a robbery, also before Petitioner's business opened.

65. There is no evidence that the operation of Petitioner's Business with an ABC permit contributed to or caused these incidents.

66. There was testimony of two fights with weapons. There is no evidence in the record that any such events occurred in the vicinity of Petitioner's business.

67. There was testimony about six disturbances. However there is no evidence in the record that any such events occurred in the vicinity of Petitioner's business.

68. There was testimony about four assaults. However there is no evidence in the record that any such events occurred in the vicinity of Petitioner's premises.

69. There was an incident that occurred where pepper spray was discharged on or near the premises and the Petitioner's security requested police assistance with crowd control.

70. Provision of crowd control of this type is a normal police department function that occurs at many businesses in the Raleigh area.

71. On May 16, 2011 at approximately 3:21 am, Raleigh Police Department Officers responded to a stabbing call that allegedly occurred at applicant's location. There is no evidence in the record that a stabbing ever occurred at or in the vicinity of Petitioner's business while it was in operating. This was unsubstantiated and should not have been used as a basis to deny Petitioner's permits.

72. N.C.G.S §18B-901 (b) required the ABC Commission to allow the local governing body 15 days to file an objection to an applicant's ABC application.

73. N.C.G.S. §18B-904(f) allows the local governing body to designate an official to provide that opinion.

74. In this case, Captain Deans provided that opinion as has been previously set out on or about June 14, 2010.

75. Renee Cowick, from the ABC Commission concluded on July 20, 2010 that the objection from Captain Deans was not sufficient legally for the Respondent to reject Petitioner's ABC permit application.
76. The City of Raleigh, through its meeting with Cowick on May 17, 2011, provided information to Cowick that had to do with incidents occurring in the vicinity of Petitioner's business, but that had nothing to do with the original objection filed with the ABC by Captain Deans.
77. Captain Deans was not at the meeting on May 17, 2011, nor did he ever supplement his original objection from June, 2010 in writing.
78. Under N.C.G.S. 18B-901(b), to be considered, the local governmental objection shall be in writing and shall contain the specific reasons for the objection.
79. The primary reasons for the City's objection to Petitioner's application had to do with allegations that Tex Carter was the actual owner of Petitioner's business and that Mr. McDougald was somehow responsible for some problems at another club formerly owned or operated by Tex Carter in Raleigh.
80. There is no credible evidence in the record that Tex Carter is associated with Petitioner's business in any manner or that he ever set foot in Petitioner's business when it was in operation.
81. There is no credible evidence in the record that Giovanni McDougald ever contributed to any problems at any prior ABC permittee where he was employed.
82. The information presented to Renee Cowick by Sergeant Austin and Lieutenant Sholar at the meeting at the ABC Commission on May 17, 2011 was not submitted by Captain Deans nor did it state the specific reasons there was an objection to the Petitioner's application.
83. On March 18, 2010, over a month before Petitioner submitted his Local Government Opinion Form to the City of Raleigh, Joette Holman, conducted an inspection at what would become Petitioner's premises.
84. Holman said she conducted that inspection because there was a complaint that work was being performed there without appropriate building permits.
85. Upon arriving at the premises with a fire official, Ms. Holman never inquired about building permits but instead allegedly questioned some workers on the premises concerning Tex Carter. The undersigned finds this testimony to be unreliable and not trustworthy. The failure to obtain the name of the alleged worker(s) spoken to bolstered this conclusion.
86. There were valid building permits issued and all work being performed at the premises at that time was being done so legally.

87. Ms. Holman exclusively testified Mr. McDougald was not cooperative with her and misled her.

88. All other evidence in the record, other than Holman's testimony, indicates that Mr. McDougald was polite and cooperative and committed no violations, other than the aforementioned mistake with regard to a report concerning relative food and beverage sales.

89. Ms. Holman also testified that she met with Mr. McDougald after an issue with his amplified entertainment permit in an attempt to "help him keep his business" open and out of trouble. The undersigned finds this testimony to be unreliable and not trustworthy.

90. Prior to and subsequent to that meeting, Holman and the Raleigh Police Department made great efforts to keep Petitioner from obtaining an ABC permit.

91. Police patrols in the vicinity of Petitioner's business to help with crowd control and other issues associated with a successful business are normal police functions that occur all over the City of Raleigh at many different business locations and types.

92. Some of the additional patrols assigned to the area in the vicinity of Petitioner's business were due to the Raleigh Police Department prohibiting its officers from working off duty at Petitioner's business.

93. RPD staff became aware of growing problems at Starbar in the middle of December 2011 through:

- a. Watch Commander Updates,
- b. CFS data from the area of Starbar,
- c. Noise complaints, and
- d. Monthly crime reporting stats run by RPD's information center (the "RIC").

(Austin T. 890, Deans T. 1004)

94. Watch Commander Updates are done twice a day at the end of each 12-hour shift. Under RPD's model Watch Commanders are in charge of the city during their 12-hour shift. They can summon any police resource they feel necessary to handle a situation and are responsible for keeping the entire city safe. The Watch Commander gives an update of events at the end of their shift to officers coming on for the next shift. The Commanders are a primary source of information. (Deans T. 1005)

95. Using the information available to them from the sources described above (p. 9), the RPD identifies "hotspots" and then directs its resources to the locations where police presence is needed. This is also called "Cops on Dots". The dots are the problem locations. The cops are deployed to that location to deter the negative activity or at least to be there if it happens. (Austin

T. 891, 895) District Commanders look at the data and the crime maps that are generated from the data to decide how resources should be assigned. (Sholar T. 975) Major Deans stated the RPD relied on the data produced by the CFS system as a “good way to track what’s going on and what our officers are doing and where calls for services are coming out.” (Deans 1009)

96. In May 2011, prompted by departmental information and alleged events occurring at the Starbar, Lt. Sholar (RPD) asked for qualified experts within her chain of command to run data records for Starbar in anticipation of a meeting with Cowick. Sholar and Sgt. Austin analyzed the listing, taking the raw list of over 300 calls for service (Res. Ex. 24, December 2010 – May 16, 2011 and Res. Ex. 25 - January 6, 2011 through May 16, 2011) and winnowed through the data reducing the number for presentation to Cowick to 116. These were the calls RPD deemed potentially most significant, 56 of the calls resulted in written reports, while the remainder consisted of calls for service of a violent nature, but without a report. (Sholar T. 947-948, 953) Sholar summarized the calls for service in memos to her supervisor informing him that they were looking into what was felt to be a problem location. (Sholar T. 949-951) (Res. Ex.’s 26 & 27)

97. Many calls eliminated from the list were security checks. A security check is an officer getting out of his car at a location to check and make sure everybody is safe. They are intended to deter crime. (Deans T. 1010)

98. All calls into the 911 system, including security checks logged in by officers, are entered into the RPD system and become an official record of the RPD. The officer’s radio is directly linked into the system. The time spent on a check or a call can be documented. (Sholar T. 958-959)

99. When it has been recognized that a location(s) has an increase in illegal activity (as in Starbar), officers might be pulled “out of service” to sit at the location to prevent crime. These officers could be drawn from existing duty within their own district, from duty in another district or from a specialized unit not assigned to a specific task at that time in order to focus on the location. (Austin T. 891, 897)

100. “Out of Service” means that while the officer is checking the problem location, the officer would at that time be unable to respond to a 911 call. (Austin T. 907)

101. The RPD relies on data compiled from the 911 system (“Calls for Service System”) and other police department information sources as valid and reliable tools for directing police resources and for evaluating the use of those resources (Deans T. 1009) The data from the system is also used to identify when the RPD no longer has to “pull resources” to a given location due to lower call activity. Officers then can be put in areas where they are needed. (Austin T. 915-916) The District Commander “audits” the system by examining a problem location, the reason officers are assigned there and determines whether the calls have decreased. (Sholar T. 977) Major Deans described CFS data as a tool that can be determinative of how the RPD responds to an event or location. (Deans T. 1032)

102. The RPD often must plan for the “worst case scenario”, in order to act quickly and if possible, preventively. (Deans T. 1006, 1008) Police resources are directed to a location because

the RPD has information leading them to believe criminal activity is taking place. (Austin T. 934) The way the system works is there is a precipitating event or past problems and sometimes predictive models enable the police to see where there may be an uptick in problems. (Deans T. 1008) Police Department resources are not arbitrarily sent to a location with zero calls. Some event happens, the call for service comes in and officers are dispatched or respond to the location. (Sholar T. 964-965, 967) "Had we not had problems at the Starbar, we would not have been out there in the manner in which we were." (Deans T. 1014)

103. Sgt. Goss stated that the size of the crowds (Jordan T. 1072) in relation to number of police available, the extensive parking areas to patrol, the illegal activity occurring and poor lighting posed safety issues for his officers working in the parking lots adjacent to the Starbar's lot. (T. 1082, 1085-1088)

104. Goss and the officers under his command worked regularly at Starbar. Goss stated that he was always asking for assistance from the other side of the Northeast District, "because of the crowd that was there, the large crowd, the number of problems that we had from, the drug calls, the gun calls, the DWI's that were leaving the area, complaints from citizens up and down Lake Woodard". (T. 1081-1082 & Pet. Ex. 22)

105. Lt. Jordan, District Commander for the Northeast District, testified that activity at the Starbar required him to deploy an inordinate number of officers to that location leaving "essentially everything north of Trawick Road all the way to Wake Forest uncovered, and that is a significant portion of my district that is now not receiving police services". (T. 1068)

106. Due to the number of officers having to be out of service and due to the number of proactive patrols conducted by the Raleigh Police Department, the Starbar significantly impacted police resources.

#### CONCLUSIONS OF LAW

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

2. The parties received adequate notice of the hearing.

3. The Petitioner carries the burden of proof in this administrative proceeding. The Petitioner must prove by a preponderance of the evidence that Respondent has deprived Petitioner of property, has ordered the Petitioner to pay a fine or penalty or has otherwise substantially prejudiced the Petitioner's rights and that the agency:

1. Exceeded its authority or jurisdiction;
2. Acted erroneously;
3. Failed to use proper procedure;

4. Acted arbitrarily or capriciously; or
5. Failed to act as required by law or rule pursuant to N.C.G.S. Section 150B-23(a) or that Respondent failed to exercise proper discretion pursuant to N.C.G.S. Section 18B—901(d).

4. Respondent's evidence of Applicant's unsuitability was not supported by material and substantial evidence sufficient to support its determination that Petitioner was not suitable for an ABC Permit. Petitioner proved by a preponderance of the evidence that Respondent acted erroneously, acted arbitrarily or capriciously or failed to act as required by law or rule regarding Petitioner's unsuitability to hold an ABC permit. Petitioner proved by a preponderance of the evidence that He was suitable to hold an ABC permit.

5. The undersigned finds as a matter of law that the physical location of the Starbar was suitable, as it was located in a mixed use development, where such Clubs are allowed to be located. A view of the interior and exterior of the premises by the undersigned and counsel for the parties supports this conclusion. The undersigned finds that the location of the premises is ideally located among mostly other businesses and a reasonable distance away from residential homes. Residents choosing to live in a mixed use developments that are zoned for night clubs or other businesses open at night should expect some inconvenience to occur, including late night talking and automobile traffic.

6. While Respondent's decision regarding the unsuitability of the location based upon evidence of illegal drug activity on or about the licensed premises or evidence of fighting, disorderly conduct, and other dangerous activities on about the licensed premises pursuant to N.C.G.S. Section 18B-901©(9)(b)(c), is not sufficient as a matter of law to reject Petitioner's ABC application. The evidence of criminal activity in the record is of grave concern to the undersigned; it is mostly of an individual basis occurring in or off the premises of Starbar. Many of the arrests were the results of consensual searches and are of the same nature that would be found at most night clubs or other locations where young people congregate. Almost all of the evidence took place on the parking lot or adjoining parking lots or streets within several hundred yards of the Club. The undersigned finds that most of the incidents involving possessing marijuana or other drugs or firearms were not related whatsoever to the Starbar possessing an ABC permit and absent the Petitioner being given the legal authority to search the passengers and vehicles, is without to totally remedy this problem.

7. Respondent's evidence that Petitioner's business was detrimental to the neighborhood was not supported by substantial and material evidence. The record is void of break-ins or other destruction of property. There was scarce evidence of littering of discarded cans and other trash on the premises and adjoining properties often found in such ABC permit cases. There was only one witness, residential neighbor, who testified to only one occasion where she observed trash in the area the day after a night the Club was open. The same witness testified to hearing loud music being heard with her closed doors. This fact in and of itself does not amount to detriment to the neighborhood. Loud talking of guests leaving the Club would ordinarily take place in any location. All reasonable efforts on the part of Petitioner could not completely remedy this

problem. Petitioner proved by a preponderance of the evidence that it's business was not detrimental to the neighborhood.

8. Notwithstanding the conclusions of law set forth herein, the undersigned does find that are serious societal problems occurring in the vicinity of the Starbar during hours of operation and finds that additional reasonable steps should be taken to assist with these grave concerns of Based upon the foregoing the undersigned orders that an ABC permit for the licenses applied for be issued to Petitioner under the following conditions:

9. The Petitioner shall abide and observe the following conditions and practices on the permitted premises:

a The Petitioner shall ensure that all alcohol and the containers in which it was vended shall be cleared from all tables and counters in compliance with 4 N.C.A.C. 2S.0202, and shall have on hand sufficient staff and other resources to promptly accomplish this task. Petitioner shall commence this process by no later than 2:15 am.

b The Petitioner shall allow no patron entry into his establishment after 2:00 am.

c The Petitioner shall close by 2:30am, and shall then promptly direct all patrons to vacate the permitted premises, and shall take all reasonable action necessary to enforce this direction, but without unnecessarily causing any breach of the peace.

d The Petitioner shall, by posting noticeable signage at the door, and by clearly audible verbal announcement made no later than 2:00 am and again at 2:15 am notify and remind all patrons that the establishment will close promptly at 2:30 am and that all patrons must then be off the premises or in the act of leaving.

e Petitioner shall cause the parking lot to be monitored at all times after 9:00 pm and continuously until the establishment has closed and all patrons have left the premises. Such monitoring shall include at least one person who shall actively patrol the parking lot and who shall direct persons to either promptly make their way into the establishment or vacate the premises, and who shall promptly direct persons violating any drug or alcohol laws or regulations to vacate the premises.

f Petitioner shall employ sufficient security staff to promptly come to the aid of any patron, inside or in the parking lot, who appears to be or is in danger from any assault or aggressive behavior, and shall require any patron exhibiting such behavior to vacate the premises.

g Petitioner shall not permit any patron to possess a weapon inside the establishment, nor in the parking lot, and shall take reasonable precautions to prevent patrons or others present from possessing any weapon. Petitioner shall not be required to search or inspect the interior of any vehicle. If any person or patron is seen possessing or displaying any weapon, Petitioner shall direct the violator to

immediately vacate the premises and Petitioner shall call for assistance from law enforcement if necessary.

h Petitioner shall also request the assistance of the local law enforcement agencies as necessary to ensure the safety of patrons and to assist in the removal of patrons or other persons who refuse the Petitioner's directions to vacate the premises. Such calls for assistance shall not be proof or evidence of any failure to abide the conditions imposed herein. If removal of loiterers and others who are directed to leave requires the Petitioner or his employees to swear out charges against such persons, Petitioner shall agree to do so in as prompt a manner as is reasonable, but Petitioner shall not be required to do so immediately if such action would leave the premises less secure than is contemplated by this order.

i The Petitioner shall follow the written recommendations of ALE officers with regard to increased lighting in the parking lot, and in regard to other matters directly affecting the safety and security of the premises, and shall do so with reasonable promptness.

j Petitioner shall supervise his licensed premises as required by ABC rules and statutes and, in particular, shall take such action as necessary to prevent or terminate the possession and use of marijuana, or other illegal drugs or substances, on or in his licensed premises.

k Petitioner shall construct additional parking space on the premises as indicated in Petitioner's evidence before the Court. (Petitioner's Exhibit 64, 73)

l Petitioner shall seek professional advice and follow any recommendations regarding the Club's sound system that might lessen the impact of loud music emanating from the inside of the Club to the outside.

m Petitioner shall meet with the City of Raleigh to discuss whether off street parking is legal for its patrons in the vicinity of the Starbar and to determine whether the City desires to take any action regarding designating certain off street parking such as posting no parking signs in the area.

#### **DECISION**

The Respondent substantially prejudiced Petitioner's rights and acted erroneously in denying Petitioner's application for ABC permits. The Respondent's decision is reversed and the Petitioner's application for malt beverage, fortified wine, unfortified wine and mixed beverage permits should be granted with the conditions set forth in the Conclusions of Law herein.

#### **ORDER AND NOTICE**

Pursuant to N.C. Gen. Stat. 150B-36(a), the agency making the final decision in this case, the N. C. Alcoholic Beverage Control Commission, is required to give each party an opportunity

to file exceptions to this recommended decision and to present written arguments to it. The agency making the final decision is required to serve a copy of the final decision on all parties and to furnish a copy of the final decision to the parties or their attorneys of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C. Gen. Stat. 150B-36(b).

The N. C. Alcoholic Beverage Control Commission will make the Final Decision in this contested case. N.C. Gen. Stat. 150B-36(b), (b1), (b2) and (b3) provide the standard of review and procedures the agency shall follow in making its Final Decision, and adopting and/or not, adopting the Findings of Fact and Decision of the ALJ.

This the 11<sup>th</sup> day of May, 2012.

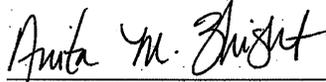
  
Joe L. Webster  
Administrative Law Judge

A copy of the foregoing was mailed to:

Glenn B. Lassiter Jr.  
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ATTORNEY FOR RESPONDENT

This the 11<sup>th</sup> day of May, 2012.



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Filed

STATE OF NORTH CAROLINA

IN THE OFFICE OF

COUNTY OF WAYNE

2012 MAY 16 PM 1:52

ADMINISTRATIVE HEARINGS  
11 ABC 14031

Playground LLC,  
T/A Playground,  
Petitioner,

Office of  
Administrative Hearings

vs.

**DECISION**

N. C. Alcoholic Beverage Control  
Commission,  
Respondent.

THIS MATTER was heard before Beecher R. Gray, Administrative Law Judge, on April 24, 25, and 27, 2012, in the Office of Administrative Hearings building in Raleigh, North Carolina.

**APPEARANCES**

For Petitioner: Thomas F. Loflin III, Esq.  
P.O. Box 1315  
Durham, North Carolina 27702

For Respondent: LoRita K. Pinnix, Esq., Assistant Counsel  
N.C. Alcoholic Beverage Control Commisison  
Raleigh, North Carolina

**ISSUES**

Whether Petitioner should be granted an on-premises permit for the sale of alcoholic beverages, where the recommendation of the local governing body is that the location is not a suitable place to hold an ABC permit because operation of the business with an ABC permit would be detrimental to the neighborhood.

**FINDINGS OF FACT**

From the official documents in the file, sworn testimony of the witnesses, and other competent admissible evidence, the Court finds the following facts:

A. **Procedural Background**

1. On June 22, 2011, the City of Goldsboro granted Petitioner an Occupancy Permit for the premises located at 1927 N. William Street, Goldsboro, North Carolina.

2. On June 27, 2011, the City of Goldsboro granted Petitioner a Permanent Water Authorization and granted Petitioner's Agent, Shannon Omelia, permission to obtain a business license for the premises located at 1927 N. William Street, Goldsboro, North Carolina. Also on June 27, 2011, Petitioner, as Organizer of Playground, LLC, submitted an Application For ABC Retail Permit for malt beverages to Respondent, the N.C. Alcohol Beverage Control Commission, for the premises located at 1927 N. William Street, Goldsboro, North Carolina.
3. On June 28, 2011, the City of Goldsboro sent a letter to Respondent objecting to issuance of an ABC permit for Plaground, LLC, located at 1927 N. William Street, Goldsboro, North Carolina, based on the location of the establishment.
4. On October 3, 2011, Respondent sent Petitioner an Official Notice of Rejection. The Notice cites as its reasons for rejection the recommendation of the local governing body and that the location is not a suitable place to hold ABC permits, as operation of the business would be detrimental to the neighborhood.
5. On November 30, 2011, Petitioner requested a contested case hearing.
6. This matter was called for hearing on April 24, 2012. The parties received notice of hearing by certified mail more than 15 days prior to the hearing and each stipulated on the record that notice was proper.

B. Petitioner's Business

7. Petitioner's business is located in a commercial strip mall facility located at 1927 N. William Street, Goldsboro, North Carolina.
8. The premises located at 1927 N. William Street, Goldsboro, North Carolina, has been operated by various owners as a night club business since at least 1990, under various names, originally as Mother's and most recently operated as Playground.
9. The property from which Petitioner operates is zoned for general business and the property is an existing nonconforming use. The property is surrounded by (i) multiple heavy and light industrial establishments and (ii) various other commercial establishments including approximately seven (7) other commercial business that are permitted to and do sell alcoholic beverages. These businesses include night clubs, bars, and retail stores.
10. The front of Petitioner's business is immediately adjacent to N. William Street, a four-lane road which merges nearby with Highway 117 Business.
11. The rear of Petitioner's business is adjacent to a residential neighborhood.

12. There is a private night club next door to Petitioner's business--which has been in operation since approximately 1996--as well as various other clubs in close proximity to Petitioner's business.
  13. Petitioner shares with other commercial businesses a common parking area that is open to vehicular traffic. Petitioner does not have exclusive control of its parking area. Petitioner's common parking area joins or is otherwise connected to the parking areas of several other commercial properties.
  14. Petitioner operates its business on an occasional basis for special events. Petitioner does not operate its business under any set hours.
  15. On the nights Petitioner's business is open for business, Petitioner employs security personnel. Petitioner's security personnel monitor the common parking area, as well as the business interior.
  16. It is the custom and practice of Respondent Commission to conduct an investigation of all applicants before it either approves or denies applications of this sort. Among other things, Respondent uses the results of this investigation to form an opinion as to whether the applicant's business is located on a site that is suitable for the sale of alcoholic beverages and whether the applicant's business will be detrimental to the neighborhood and community surrounding the applicant's business. If Respondent forms the opinion that the applicant's business is not located on a suitable site or that the applicant's business may pose a detriment to the surrounding neighborhood and community, Respondent may deny the applicant's application and not issue alcoholic beverage permits to the applicant.
- C. Prior Playground Ownership.
17. From September 2006 until approximately December 31, 2010, a night club establishment known as The Playground operated under totally different ownership at the premises at issue.
  18. With the exception of two minor violations in October 2006, approximately one month after acquiring its ABC permit (which resulted in minor fines), prior ownership of The Playground was not cited for any substantive ABC violations.
  19. Law enforcement officials testified that activities in the common parking area shared by The Playground under prior ownership resulted in a larger-than-average number of service calls to the Goldsboro Police Department. Law enforcement officials were required to respond to calls to the common parking area involving the alleged conduct of persons within same.

D. Suitability of Site and Surrounding Neighborhood Detriment.

20. At the hearing, Respondent called seven (7) witnesses: Three (3) civilian witnesses: Ms. Tanya Blount, Ms. Clara Blount, and Mr. Hubert Harris; three (3) law enforcement witnesses: Charles Bennett of the N.C. Alcohol Law Enforcement Agency, Jeffrey R. Stewart, Interim Chief of Police of the Goldsboro Police Department, Sgt. Michael Sweet of the Goldsboro Police Department; and one (1) witness employed by the City of Goldsboro: James P. Rowe, Assistant Planning Director. Petitioner called three (3) witnesses: Attorney William H. Potter, Jr., Ms. Alpha B. Vinson, and Ms. Shannon Omelia. The undersigned provides the following summary of evidence given by these individuals.
21. James P. Rowe is employed by the City of Goldsboro as Assistant Planning Director and has been so employed for more than twenty (20) years. As part of his job, Director Rowe receives and processes ABC requests for the City of Goldsboro's opinions as to site suitability.
22. Director Rowe testified that he received information from the Goldsboro Police Department tending to show that there were 117 calls to the parking lot that The Playground shares with other businesses. Director Rowe did not state the period of time over which the calls were made.
23. Director Rowe testified that according to the information that he received from the Goldsboro Police Department, neither the applicant's nor the manager's reputation, character, or background were objectionable to the City of Goldsboro.
24. Interim Chief of Police Jeff Stewart is employed by the Goldsboro Police Department and has been so employed for twenty-five (25) years in various capacities.
25. Chief Stewart testified that he was familiar with Petitioner's location from his time with the Goldsboro Police Department. Chief Stewart stated that Sgt. Peters of the Goldsboro Police Department performed a background check on the premises of Petitioner's business and that--based upon information provided to him by Sgt. Peters--Chief Stewart opposed Petitioner's application for an ABC permit.
26. Chief Stewart testified that each morning he reviews the daily calls activity log for calls coming in to the Goldsboro Police Department. Chief Stewart reported that, since The Playground ceased to exist under prior ownership, calls for police assistance at the location had decreased.
27. Chief Stewart testified that he did not compare the call volume at Teaser's--on the opposite side of Goldsboro--with the call volume at The Playground site, despite their similarity in business type (i.e. nightclubs that operate into the early morning hours).
28. Ms. Tanya Blount is a resident at 1905 Victor Place, the last house on a cul-de-sac to the rear of The Playground premises. Ms. Blount stated that on weekend nights, music

coming from the building that includes The Playground premises is so loud that it shakes her windows. She further testified, however, that she leaves her bedroom window facing the club open during warm weather. She testified that she assumed the music came from both The Playground premises and Sid's Showgirls, which also is a nightclub within the building of the commercial shopping center housing The Playground. When Ms. Blount acquired her house at 1905 Victor Place, the present location of Petitioner's nightclub was in use as a bar or nightclub.

29. Tanya Blount reported that she has heard bottles being dumped into a dumpster behind The Playground premises around 2:00 or 3:00 a.m. in the past.
30. Tanya Blount further testified that she can see over the wooden fence between the cul-de-sac and The Playground premises and that she saw a man fire a gun approximately two (2) to three (3) years ago.
31. Tanya Blount stated that the noise has subsided some in the past year.
32. Ms. Clara Blount is the mother of Tanya Blount and is a resident at 1903 Victor Place, next door to the home of Tanya Blount and one home farther away from The Playground premises than Tanya Blount's home. Clara Blount testified that she was unsure when the solid wood fence between the premises housing The Playground and the houses occupied by her and her daughter was constructed.
33. Clara Blount recounts that when she first moved into her home, there was a lot of noise, including breaking glass, but that in the past two (2) years, it has gotten quieter at the premises where The Playground is located. Clara Blount further stated that the area was just noisy.
34. Ms. Clara Blount testified that prior to an event in 2009 in which an unidentified woman ran into her home and hid from police in her closet, she felt so safe that she left her back door unlocked.
35. Mr. Hubert Harris resides at Lot 27 of Carolina Pines mobile home park. Mr. Harris has lived at Lot 27 for the past four (4) years. Prior to residing at his present lot, he lived on another lot for three and one half (3 1/2) years and has resided at the mobile home park for approximately eleven (11) years total. Mr. Harris can see the entrance to Petitioner's premises and to Sid's Showgirls from his front door.
36. Mr. Harris reported that it has sounded as if Sid's was playing loud, bass-filled music right inside his bedroom. He noted that the former Playground closed around or just after Christmas of 2010 and that since that time, he has noticed a decrease in night-time noise volume.
37. Charles Bennett is employed by the state of North Carolina Alcohol Law Enforcement agency. Agent Bennett has been assigned to the Wayne County area for slightly more

than one year. Agent Bennett performed an investigation to determine site suitability for the premises at issue. Agent Bennett interviewed witnesses and visited the premises.

38. Agent Bennett viewed the rear of the shopping center housing The Playground premises from Ms. Tanya Blount's bedroom window.
39. Agent Bennett reported that he had no knowledge of any ABC violations at The Playground location.
40. Agent Bennett found that there is what appeared to be an assisted living facility called Greenleaf approximately two blocks away from The Playground premises.
41. Sgt. Michael Sweet is employed by the Goldsboro Police Department and has been so employed for thirteen (13) years. Part of Sgt. Sweet's duties includes assigning officers to various areas based, in part, upon call volume.
42. Sgt. Sweet testified that as a uniformed officer and as a supervisor, he is aware of The Playground premises and surrounding area. Sgt. Sweet testified that he has been to The Playground premises more times than he could count over his career.
43. Sgt. Sweet stated that from 2000 through the present, there were twenty-four (24) incident reports generated for alleged crimes attributed to Sid's address at the shopping center, but the police were actually called to the common parking area.
44. Sgt. Sweet testified that from 2000 through the present, there were fifty-three (53) incident reports generated for alleged crimes attributed to The Playground premises when police were called to the common parking area at the shopping center. On cross-examination, Sgt. Sweet acknowledged that one incident report using The Playground's address actually involved an alleged victim who had been inside Sid's. Sgt. Sweet acknowledged that he did not know whether reporting police officers made the same mistake in other incident reports.
45. Sgt. Sweet reported that in the time period beginning January 2010 through the present, there had been no calls for service attributable to the premises housing The Playground.
46. Sgt. Sweet could not recall receiving a call for service to the inside of The Playground premises.
47. Attorney William H. Potter, Jr. testified that he has represented the shopping center for approximately fifteen (15) years. Attorney Potter testified about numerous photographs he took showing the premises housing The Playground and the surrounding area, including not fewer than seven (7) other businesses which possess ABC permits. The photographs were offered and received into evidence and show that the neighborhood where The Playground is located is a mixed-use neighborhood containing heavy industry; lighter industrial businesses; commercial businesses such as garages, retail businesses, nightclubs, and bars; and residences.

48. Ms. Alpha Vinson testified that she organized the entity Playground, LLC to run a club business at the premises located at 1927 N. William Street, Goldsboro, N.C. and that she, in fact, opened said business without an ABC permit on June 29, 2011, and has been operating said business there since that time.
49. Ms. Vinson reported that she owns the majority of stock in the corporation that operates Sid's Showgirls and has done so since that business opened in 1996.
50. Ms. Shannon Omelia has managed Sid's Showgirls for Alpha Vinson since 1997. Ms. Omelia testified that she knows Ms. Vinson and is friendly with her and her son, Paul Vinson, who is the landlord for both Sid's and The Playground and the other commercial businesses that occupy the shopping center.
51. Ms. Omelia testified that in her capacity as manager of Sid's for approximately fifteen (15) years, she has noticed noise in the surrounding neighborhood. Ms. Omelia reported that the Country Time Tavern--diagonally across N. William Street from the shopping center housing Sid's and The Playground's premises--is a bar catering to motorcycle enthusiasts and has live outdoor music on the weekends that continues until between 11:00 p.m. and 12:00 midnight. She further testified that the Safeway Quick Mart at the intersection of N. William Street and East Hooks Road has a lot of loitering, often through at least 1:00 a.m., where individuals drink alcohol outside and talk loudly. She testified that this intersection is frequented by individuals cruising in automobiles with loud music systems until 1:00 a.m. and after.
52. Ms. Omelia testified that from 2000 through the present time, no one associated with Sid's has been cited for a violation of the City of Goldsboro's noise ordinance. She stated that she knows of no one associated with the former ownership of The Playground being cited for a violation of the City of Goldsboro's noise ordinance, nor has anyone connected with the present ownership of The Playground been cited for violations of the noise ordinance.
53. Ms. Omelia reported that on every single night that Sid's has been open during her tenure as manager, she has employed security to monitor the club and the common parking area. She further stated that security was responsible for clearing the common parking area of patrons after Sid's closed and also for cleaning up any trash left in the common parking area. She testified that her security personnel do not allow people to sit in cars parked in the shopping center's parking lot while the nightclubs are open or after they have closed for the night.
54. Ms. Omelia testified that she was aware of a parking agreement between the landlord of the shopping center in which Sid's and The Playground's premises are contained and Brian's Transmission, located in the adjacent lot. Ms. Omelia testified that the agreement allowed customers of the shopping center to park in the Brian's Transmission parking area during times that Brian's Transmission is closed, and the two clubs are open. Additionally, Ms. Omelia stated that should there be no available parking spaces in the common area or Brian's Transmission, the parking area behind the shopping center would

be opened to customers of the shopping center, and security would be present to patrol the rear parking area.

55. Ms. Omelia stated that the only public telephone at the shopping center had been inside the lobby area of the premises housing The Playground.
56. Ms. Omelia reported that the Greenleaf facility opened in the neighborhood within the past two (2) to three (3) years.
57. Ms. Omelia testified that prior to 2006, a solid wooden fence at least six (6) feet high was constructed by the shopping center's owner between the rear parking lot and the neighborhood containing the Blount residences. She stated that there were vines and other plant material growing on top of the wooden fence.
58. The undersigned finds from the evidence that the neighborhood in which Petitioner's business is located experienced problems with some disorderly and illegal activity since at least the year 2000 and that Petitioner's business has not led to any appreciable increase of disorderly or illegal activity in this neighborhood.
59. Respondent did not introduce any documentary evidence of a single disorderly, violent, or illegal act taking place within Petitioner's business or any such act that was caused or condoned by Petitioner. Moreover, to the degree Respondent's witnesses described a general type of illegal or disorderly conduct, all of this conduct occurred before Petitioner began operating its business in June 2011. Prior to Petitioner's opening her present business called The Playground, almost all--if not all--of this conduct occurred in a parking area that is not within the exclusive control of Petitioner or the prior owners of The Playground, and Petitioner should not be held responsible for acts that occurred before it opened for business or for acts that occurred in a location that is not within Petitioner's exclusive control. Further, to the degree any such acts occurred, Respondent failed to present any evidence tending to show these acts were related to or caused by the sale of alcoholic beverages.
60. To the degree general acts of disorderly or illegal activities were described by Respondent's witnesses, the undersigned does not find them to be qualitatively or substantively different from the garden-variety types of problems attributable to the neighborhood in which Petitioner is located or from the same types of acts that typically occur in or near establishments that sell alcoholic beverages.
61. In pertinent part, N.C.G.S. § 18B-901(c)(7) and (9) provide as follows:

Factors in Issuing Permit. –

- (c) Before issuing a permit, the Commission shall be satisfied that the applicant is a suitable person to hold an ABC permit and that the location is a suitable place to hold the permit for which the applicant has applied. To be a suitable place, the local governing

body shall return a Zoning and Compliance Form to the Commission on a form provided by the Commission to show the establishment is in compliance with all applicable building and fire codes and, if applicable, has been notified that it is located in an Urban Redevelopment Area as defined by Article 22 of Chapter 160A of the General Statutes and as required by G.S. 18B-904(e)(2). Other factors the Commission shall consider in determining whether the applicant and the business location are suitable are all of the following:

- (7) The recommendations of the local governing body.
- (9) Whether the operation of the applicant's business at that location would be detrimental to the neighborhood, including evidence admissible under G.S. 150B-29(a) of any of the following:
  - a. Past revocations, suspensions, and violations of ABC laws by prior permittees related to or associated with the applicant, or a business with which the applicant is associated, within the immediate preceding 12-month period at this location.
  - b. Evidence of illegal drug activity on or about the licensed premises.
  - c. Evidence of fighting, disorderly conduct, and other dangerous activities on or about the licensed premises.

CONCLUSIONS OF LAW

- 1. The Office of Administrative Hearings has jurisdiction of the subject matter and of the parties in this contested case.
- 2. After reviewing the facts presented by Petitioner and Respondent, the undersigned concludes by a preponderance of the evidence that the location occupied by Petitioner is a suitable place to hold ABC permits.
- 3. After reviewing the facts presented by Petitioner and Respondent, the undersigned concludes by a preponderance of the evidence that the operation of Petitioner's business with ABC permits at its 1927 N. William Street, Goldsboro, N.C. location is not detrimental to the surrounding neighborhood.

4. The undersigned concludes that, based upon the preponderance of the evidence produced in this contested case, Petitioner should be granted approval of its ABC permit application.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Administrative Law Judge finds that Respondent's decision denying Petitioner's ABC permit application because Petitioner's business location is not a suitable location is not supported by a preponderance of competent and is REVERSED.

NOTICE AND ORDER

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

As the petition for a contested case in this matter was filed prior to January 1, 2012, the decision of the Administrative Law Judge in this contested case will be reviewed by the agency making the final decision according to the standards found in now-repealed N.C.G.S. §150B-36(b1) - (b2). The agency making the final decision is required to give each party an opportunity to file exceptions to the decision of the Administrative Law Judge and to present written arguments to those in the agency who will make the final decision under now-repealed N.C.G.S. § 150B-36(a).

The agency that will make the final decision in this contested case is the North Carolina Alcoholic Beverage Control Commission.

This the 16 day of May, 2012.

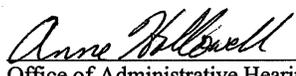
  
\_\_\_\_\_  
Beecher R. Gray  
Administrative Law Judge

A copy of the foregoing was mailed to:

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ATTORNEY FOR PETITIONER

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This the 17<sup>th</sup> day of May, 2012.

  
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Filed

STATE OF NORTH CAROLINA

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IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
11 DHR 01451

COUNTY OF SAMPSON

Office of  
Administrative Hearings  
POWELL'S MEDICAL FACILITY and )  
EDDIE N. POWELL, M.D., )

PETITIONERS, )

v. )

NORTH CAROLINA DEPARTMENT OF )  
HEALTH AND HUMAN SERVICES, )  
DIVISION OF MEDICAL ASSISTANCE )

Respondent. )

**DECISION**

**THIS MATTER** came on for hearing on October 31, 2011, before the Honorable Donald W. Overby, Administrative Law Judge presiding, in Fayetteville, North Carolina.

**APPEARANCES**

For Petitioner: R. Jonathan Charleston  
Jose A. Coker  
Michael R. Porter  
William W. Aycock, Jr.  
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For Respondent: Tracy J. Hayes  
Special Deputy Attorney General  
Neal T. McHenry  
Assistant Attorney General  
N.C. Department of Justice  
P.O. Box 629  
Raleigh, NC 27602

**ISSUE**

Whether Respondent's decision to terminate Petitioner's enrollment in the North Carolina Medicaid program was erroneous, contrary to law, rule or policy, or arbitrary and capricious.

**EXHIBITS**

For Petitioner: Exhibits 1 – 8, and 10-11 were admitted.

For Respondent: Exhibits 1 – 4 were admitted.

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

**FINDINGS OF FACT**

1. The Department of Health and Human Services (“DHHS”) is the single state agency charged with administering the North Carolina Medicaid program. Respondent, the Division of Medical Assistance (“DMA”), is a Division of DHHS and is responsible for the enrollment and monitoring of NC Medicaid providers into the NC Medicaid program.
2. Petitioner, Dr. Eddie Powell, has been licensed to practice medicine in the State of North Carolina since 1979, with his principle office in Roseboro, North Carolina. Dr. Powell has been enrolled as a provider in the North Carolina Medicaid program since approximately February, 1980.
3. Petitioner was convicted in Superior Court of the felonies of incest and of taking indecent liberties with a minor on August 12, 1990. Petitioner appealed his convictions to the North Carolina Court of Appeals, which upheld his convictions on September 7, 1993.
4. Petitioner’s license to practice medicine was revoked from September 27, 1993 through October 15, 1993 by a Consent Order to which Dr. Powell agreed.
5. Petitioner presented no evidence to demonstrate that he disclosed his convictions to the North Carolina Medicaid program at any time. The only documentation concerning this matter in his DMA provider enrollment record is a computer printout which refers only to the action taken by the Medical Board, and merely contains a handwritten notation dated April 29, 1994 that unspecified “charges were dropped.” The criminal charges against Dr. Powell were never dropped. These notes do not demonstrate that Dr. Powell notified DMA of his conviction or the fact that it was subsequently upheld by the Court of Appeals, and cannot be relied upon to satisfy the condition that Dr. Powell notified DMA of his conviction.

6. Computer Sciences Corporation ("CSC"), the contractor for Respondent responsible for enrollment, verification, and credentialing of North Carolina Medicaid providers, began a process of re-verification for all Medicaid providers in 2009. The process was intended to re-credential current Medicaid providers to ensure that they meet the criteria for participation in the Medicaid program.

7. As part of the re-verification process, Dr. Powell submitted a verification packet to CSC on August 27, 2009.

8. Dr. Powell signed and dated the submission on August 17, 2009, which stated that:

All information submitted by me or on my behalf pursuant to this Consent to release information is true and complete to the best of my knowledge and belief. I fully understand that any misstatement or omission related thereto may constitute cause for the summary dismissal/denial of such participation in the Medicaid Program. I understand and agree that I have the burden of producing adequate information for proper evaluation of my professional competence, character, ethics, and other qualifications and for resolving any doubts about such qualifications.

("Consent to Credential," Respondent's Response in Opposition to Petitioner's Motion for Preliminary Injunction, Exh. 4).

9. Ms. Kimberly Carter, DMA Provider Enrollment Supervisor, was the only witness to testify in this contested case hearing. She testified that this paragraph required Dr. Powell to affirmatively disclose his convictions to the North Carolina Medicaid program. Ms. Carter's testimony was credible and is supported by the greater weight of the evidence.

10. The verification packet completed and submitted by Dr. Powell includes the Provider Participation Agreement, which Dr. Powell likewise signed and dated August 17, 2009.

11. The 2009 Provider Participation Agreement provides in pertinent part:

8. The Department may summarily terminate without giving 30 days written notice under the following circumstances:

e. The Provider has been convicted of an offense under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, or crime of moral turpitude...

12. This provision speaks to three separate types of “offenses” or crimes. It is abundantly clear that a crime of moral turpitude is not related in nature to the other delineated offenses. The clause “or crime moral turpitude” does not relate back to previous parts of the sentences. The clear intention of the verification/ re-verification process is for Providers to divulge convictions of such crimes independently of financial crimes or crimes in connection with delivery of health care services.

13. While the Federal regulations in effect at the time of the 2009 verification application by the Petitioner refers specifically to a limitation regarding crimes that affected the delivery of services to Medicare and Medicaid recipients, the regulations also give the individual States the ability and discretion to place other restrictions on the providers.

14. The Provider Participation Agreement sets forth the terms and conditions of the contractual agreement between the parties, including the terms upon which the contract may be terminated. The terms upon which the contract may be terminated include making misstatements or omissions to Medicaid and being convicted of a crime of moral turpitude.

15. Petitioner did not provide any information on the August 2009 verification submission to CSC concerning his criminal history despite the requirement to submit all information concerning his qualifications.

16. Dr. Powell submitted a second verification application in September 2010. Dr. Powell did not sign that application, it contained errors, and it also contained no admission of his prior convictions.

17. The 2010 Provider Participation Agreement provides in pertinent part:

8. Termination

b. The Department may summarily terminate without giving 30 days’ notice under the following circumstances...

iii. Any person with ownership or controlling interest in the Provider, or managing employee of the Provider, has been convicted of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct, or crime of moral turpitude...

18. Inasmuch as the September 2010 verification application was submitted with the intention of the Petitioner continuing his Medicaid enrollment, even without signatures, it is appropriate for Respondent to rely on that 2010 application in undertaking the action to terminate. Alternatively, if the 2010 application is not operative, then the only other document for consideration would be the August 2009 application. The August 2009 application has effect only to the degree that it would remain operative until a new enrollment period would begin based on a subsequent application; otherwise, it would expire at the end of its terms.

19. In either event, it is specifically found that Dr. Powell had an affirmative duty to disclose his convictions to DMA and he did not. The fact that he may have reported his convictions to the North Carolina Medical Board, or any other State agency, is of no effect. The

knowledge of one state agency cannot be imputed to all of state government.

20. On September 13, 2009, Petitioner and a partner, Dr. James R. Sowell, submitted a separate and new application for a group practice number in the name of P & S Med. In responding to the question asking if the “applicant, owners, or agents” have ever been convicted of any crime other than minor traffic violations, the Petitioner answered “No.” Upon receipt of the application, CSC ran a criminal background check on Dr. Powell and discovered his prior criminal convictions and that his response to this question was false. Petitioner has offered no evidence to dispute the fact that his response to this question was false.

21. Ms. Carter testified that the first time DMA became aware of Dr. Powell’s criminal convictions was when CSC performed the criminal background check in response to the P&S Med application. Ms. Carter’s testimony was credible and is supported by the greater weight of the evidence.

22. The P&S Med application was denied based on Petitioner’s failure to disclose his prior criminal convictions. Dr. Powell appealed that denial to an informal hearing. Dr. Sowell did not participate in the informal hearing appeal. The denial was affirmed by the informal appeal hearing officer in the Notice of Decision dated May 6, 2010. Neither Petitioner nor his partner appealed the decision of the hearing officer.

23. As a result of the discovery of Dr. Powell’s convictions, DMA terminated all billing numbers associated with Dr. Powell. DMA properly notified Dr. Powell of its action in a November 23, 2010 letter which stated that a criminal background check revealed that Dr. Powell had been convicted of the felonies of incest and indecent liberties with a minor. The letter went on to note that Dr. Powell could be terminated for his conviction of a crime of moral turpitude or for failing to disclose his convictions. The letter also states that the background check caused DMA to review all applications and enrollment numbers associated with Dr. Powell, which revealed that the information concerning convictions had not been disclosed to DMA as required.

24. The essence of the action was to terminate Dr. Powell’s Medicaid participation effective with the discovery of the convictions. The action was to stop all participation by Dr. Powell, commencing with the giving of notice. The relevance of the convictions is applicable to the 2009 verification application, which had either expired or at least was expiring, as well as any prospective application, including the 2010 application, which had been submitted but not signed. Therefore, it was not error to rely on section 8.b. of the 2010 Provider Participation Agreement. Assuming *arguendo* that Respondent should have relied on the language of the 2009 agreement, as set forth herein, the effect is the same.

25. The language of paragraph 8 plainly states that the Respondent has the authority to summarily terminate the provider agreement without giving 30 days written notice if it is found that the provider meets one of the specified circumstances.

26. The language of paragraph 3 of both the 2009 and 2010 Agreements plainly state that “All provider administrative participation agreements with the Department are terminable at

will. Nothing in these regulations creates in the provider a property right or liberty right in continued participation in the Medicaid Program.”

27. Ms. Carter described the routine procedure that is followed by DMA after it is notified by CSC that a criminal background check revealed a felony conviction of an owner, operator or managing employee of a provider or provider applicant, including the fact that she and the other two Provider Enrollment supervisors frequently confer to ensure that actions taken against providers are consistent and are not arbitrary or capricious. Decisions to terminate a provider must be approved by Ms. Carter’s supervisor prior to CSC sending a termination notice. Ms. Carter’s testimony was credible and is supported by the greater weight of the evidence.

28. In this case, Ms. Carter testified that she made the decision and basically ran it by her supervisor who agreed with her recommendation to terminate Dr. Powell’s Medicaid numbers. There was no evidence her supervisor looked at the file or gave it one iota of consideration, but rather off-handedly agreed with her recommendation.

29. Ms. Carter repeatedly and adamantly stated that the revocation or termination of a provider based on a felony conviction was “automatic” once the conviction was discovered. She repeatedly and adamantly stated that it was mandatory (or words to that effect) based on policy. At one point she equated the DMA “business rules” to policy and that it was in writing that the termination or revocation was mandatory and automatic once the conviction was discovered.

30. Once confronted with the Participation Agreement which clearly states that the revocation or termination is discretionary, using the word “may”, Ms. Carter seemed somewhat surprised and then offered up rather clumsily that “exceptions” to the automatic mandatory termination are available through a process of which she has absolutely no knowledge, nor how it works or how one might avail themselves of the exceptions.

31. It is clear from her testimony that no consideration is given to any provider once a felony conviction is discovered and that she and others at her level of decision making view it as automatic and mandatory. The fifteen-plus years of continuous providing for Medicaid patients by Dr. Powell was not considered at all in making the decision to terminate him. The fact that Dr. Powell was a current Medicare provider was not considered at all in making the decision to terminate him. No other factor, good or bad, was considered in termination of Dr. Powell once it was discovered that he had a felony conviction.

32. Respondent acted erroneously, failed to use proper procedure, or failed to act as required by law or rule when it terminated Petitioner’s enrollment in the NC Medicaid program by not giving any consideration to any circumstances which might have been in mitigation. Respondent treated Dr. Powell’s conviction of a felony as an automatic and mandatory revocation when it clearly was discretionary. Respondent’s agent, Ms. Carter, is clear that there is no discretion in consideration of Dr. Powell or like situated providers.

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

CONCLUSIONS OF LAW

1. The North Carolina Office of Administrative Hearings has jurisdiction over the parties and subject matter of this contested case pursuant to N.C. Gen. Stat. §150B-23 *et seq.* All necessary parties have been joined. The parties received proper notice of the hearing in this matter.

2. To the extent that the findings of facts contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels. *Bonnie Ann F. v. Callahan Indep. Sch. Bd.*, 835 F. Supp. 340 (1993).

3. The DHHS Division of Medical Assistance has the sole responsibility for approval, denial or termination of provider enrollment in the North Carolina Medicaid program.

4. 10 N.C.A.C. § 22F.0605 states that there is no right to be a Medicaid provider in the State of North Carolina. Provider participation in the NC Medicaid program is contract-based. In North Carolina, all provider “contracts are terminable at will” and nothing in the regulations governing the NC Medicaid program “creates in the provider a property right or liberty right in continued participation in the Medicaid program.” 10 N.C.A.C. § 22F.0605.

5. Without addressing 10 N.C.A.C. § 22F.0605 at length, contentions that Dr. Powell’s contract was terminable at will is not applicable under the limited facts and circumstances of this case in that he was specifically given notice of the reasons for terminating his participation and he was given his appeal rights, which he exercised. It would be incongruous to set forth with particularity the reasons for terminating his participation and give him his appeal rights based upon those particularities and then contend that his participation was “at will”; i.e., terminable for no reason at all.

6. In order to prevail on his administrative appeal, the Petitioner must be able to show that the “respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner’s rights and that the agency: (1) Exceeded its authority or jurisdiction; (2) Acted erroneously; (3) Failed to use proper procedure; (4) Acted arbitrarily or capriciously; or (5) Failed to act as required by law or rule.” N.C.G.S. § 150B-23(a).

7. The burden of proof rests on the petitioner challenging an agency decision. *Overcash v. N.C. Dep’t of Env’t & Natural Res.*, 635 S.E. 2d 442, 448 (N.C. Ct. App. 2006), *cert. denied*, 361 N.C. 220 (2007).

8. The Petitioner’s convictions of the crimes of incest and indecent liberties with a minor are crimes of moral turpitude. *See, e.g., Dew v. State ex rel. N.C. Dep’t of Motor Vehicles*, 127 N.C. App. 309, 311, 488 S.E. 2d 836, 837 (1997) (quoting *Jones v. Brinkley*, 174 N.C. 23, 27, 93 S.E. 372, 373 (1917)) (“Crimes of moral turpitude include ‘[a]cts of baseness, vileness, or depravity in the private and social duties that a man owes to his fellowman or to society in general.’”)

9. Dr. Powell had an affirmative duty to disclose his convictions to DMA and he did not. The fact that he may have reported his convictions to the North Carolina Medical Board, or any other State agency, is of no effect.

10. Petitioner did not provide any information on the August 2009 verification submission to CSC concerning his criminal history despite the requirement to submit all information concerning his qualifications. Dr. Powell submitted a second verification application in September 2010. Dr. Powell did not sign that application, it contained errors, and it also contained no admission of his prior convictions.

11. 42 C.F.R. §1002.2(b) states that “Nothing contained in this part should be construed to limit a State’s own authority to exclude an individual or entity from Medicaid for any reason or period authorized by State law.”

12. Pursuant to 42. C.F.R. § 431.10 (e), the authority of the State Medicaid agency “must not be impaired if any of its rules, regulations, or decisions are subject to review, clearance, or similar action by other offices or agencies of the State. If other State or local agencies or offices perform services for the Medicaid agency, they must not have the authority to change or disapprove any administrative decision of that agency, or otherwise substitute their judgment for that of the Medicaid agency with respect to the application of policies, rules, and regulations issued by the Medicaid agency.”

13. The Provider Participation Agreement sets forth the terms and conditions of the contractual agreement between the parties, including the terms upon which the contract may be terminated. The terms upon which the contract may be terminated include making misstatements or omissions to Medicaid and being convicted of a crime of moral turpitude.

14. Petitioner contractually agreed that Respondent can terminate his enrollment as a Medicaid provider with thirty (30) days’ notice for any reason. Similarly, petitioner contractually agreed that Respondent can terminate his enrollment as a Medicaid provider, without thirty (30) days’ notice, if the Petitioner has been convicted of a crime of moral turpitude. The Provider Participation Agreement also establishes that the termination or denial of a provider’s participation in Medicaid is discretionary.

15. The Respondent could possibly have properly terminated the Petitioner’s participation as a Medicaid provider when the Petitioner’s undisclosed felony convictions for the crimes of incest and indecent liberties with a minor were discovered because the Petitioner failed to disclose the convictions to Medicaid and because the Petitioner was convicted of crimes of moral turpitude.

16. Respondent DMA is entitled to deference in its interpretation of its own policies and procedures, including its interpretation of the Medicaid Provider Administrative Participation Agreement and Consent to Credential. “It is well established ‘that an agency’s construction of its own regulations is entitled to substantial deference.’” *Morrell v. Flaherty*, 338 N.C. 230, 237-238, 449 S.E.2d 175, 179-180 (1994), citing *Martin v. OSHRC*, 499 U.S. 144, 150-51, 113 L. Ed. 2d 117, 127, 111 S.Ct. 1171 (1991). Moreover, the “agency’s interpretation

must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Id.*, citing *Udall v. Tallman*, 380 U.S. 1, 16-17, 13 L. Ed. 2d 616, 625-26, 85 S. Ct. 792 (1965).

17. Pursuant to N.C.G.S. §108C-4 [Session Law 2011-0399], the State Medicaid agency may terminate or deny enrollment to any provider who has been convicted of a criminal offense set forth in Article 26, Offenses Against Public Morality and Decency, which includes the crimes of incest (N.C.G.S. §14-178) and taking indecent liberties with a minor (N.C.G.S. §14-202.1). (Emphasis added) Respondent may only terminate after it has reviewed "the seriousness of the offense, age, and other circumstances involving the offense" and only if Respondent "determines it is in the best interest of the integrity of Medicaid".

18. The plain language of the Provider Participation Agreement entered into between Petitioner and Respondent required Respondent to exercise discretion as opposed to automatically terminating Petitioner's participation in the Medicaid program. James v. Jacobson, 6 F.3d 233, 239 (4th Cir.1993).

19. Ms. Carter repeatedly testified that Respondent did not exercise discretion, and instead terminated automatically based upon the mere existence of Dr. Powell's felony criminal convictions.

20. It is an abuse of discretion to actually fail to exercise discretion. James v. Jacobson, 6 F.3d 233, 239 (4th Cir.1993). In North Carolina, "[a]n agency's decision is arbitrary and capricious if it lacks fair and careful consideration...[or] fail[s] to indicate 'any course of reasoning and exercise of judgment.'" Cape Medical Transport, Inc. v. N.C. Dept of Health and Human Svcs., Division of Facility Svcs., 162 N.C. App. 14, 590 S.E.2d 8 (2004) (citing State ex rel. Com'r of Insurance v. Rate Bureau, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (1980)).

21. "In determining whether an agency decision is arbitrary or capricious, the reviewing court does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law." Mann Media, Inc. v. Randolph County Planning Bd., 356 N.C. 1, 565 S.E.2d 9 (2002). "The 'arbitrary or capricious standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are 'patently in bad faith,' [*Burton v. City of Reidsville*, 243 N.C. 405, 407, 90 S.E.2d 700, 702 (1956),] or 'whimsical' in the sense that "they indicate a lack of fair and careful consideration' or 'fail to indicate [] any course of reasoning and the exercise of judgment. []' [*State ex rel. Com'r of Ins. v. [N.C.] Rate Bureau*, 300 N.C. [381,] 420, 269 S.E.2d [547,] 573 [(1980)]." Lewis v. N.C. Dep't of Human Resources, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989). Petitioner has not demonstrated any evidence to suggest that DMA's decision was not exercised in good faith.

22. Petitioner has met his burden of proof to the extent that it was shown that Respondent exercised no discretion in terminating Dr. Powell's Medicaid provider number. Petitioner has failed to meet his burden in that Respondent would otherwise have properly terminated his rights to continued Medicaid participation.

23. Respondent should have given "fair and careful" consideration of the fact that Dr. Powell continued to provide the Medicaid services for fifteen plus years without any problems, continued to be a Medicare provider apparently without problems, and maintained his medical license without apparent problems. Dr. Powell was not given that consideration, or any other consideration either positive or negative.

24. Pursuant to N.C. Gen. Stat. § 150B-34, based upon the preponderance of the evidence and "giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency" the Respondent DMA did act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule only to the extent that it terminated Petitioner's enrollment in the NC Medicaid program without exercising any discretion and treating his termination as automatic and mandatory.

**DECISION**

**NOW, THEREFORE**, based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned determines that the Respondent's decision to terminate the Petitioner's enrollment in the North Carolina Medicaid program was erroneous, contrary to law, rule or policy, or arbitrary and capricious to the extent that it was shown that Respondent exercised no discretion in terminating Dr. Powell's Medicaid provider number, and otherwise proper. Petitioner's participation as a Medicaid provider should be suspended for a period of one (1) year.

**NOTICE**

The agency making the final decision in this contested case shall adopt the Decision of the Administrative Law Judge unless the agency demonstrates that the Decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record. The agency is required to give each party an opportunity to file exceptions to this Decision issued by the Undersigned, and to present written arguments to those in the agency who will make the final decision. N.C.G.S. §150B-36(a).

In accordance with N.C.G.S. §150B-36, the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the Administrative Law Judge to evaluate the credibility of witnesses. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency. Every finding of fact not specifically rejected as required by Chapter 150B shall be deemed accepted for purposes of judicial review. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency establishing that the new finding of fact is supported by a preponderance of the evidence in the official record.

The agency that will make the final decision in this case is the North Carolina Department of Health and Human Services. This agency is required by N.C.G.S. §150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorneys of record and to the Office of Administrative Hearings.

**IT IS SO ORDERED.**

This is the 5<sup>th</sup> day of March, 2012.

  
\_\_\_\_\_  
Donald W. Overby  
Administrative Law Judge

A copy of the foregoing was mailed to:

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This the 5th day of March, 2012.

  
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Filed

STATE OF NORTH CAROLINA

IN THE OFFICE OF

COUNTY OF WAKE

2012 APR 26 PM 3:45

ADMINISTRATIVE HEARINGS

09 EHR 1839

PAMLICO-TAR RIVER FOUNDATION, NORTH CAROLINA COASTAL FEDERATION, ENVIRONMENTAL DEFENSE FUND, AND SIERRA CLUB,

Petitioners,

v.

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

Respondent,

and

PCS PHOSPHATE COMPANY, INC.,

Respondent-Intervenor.

DECISION

This matter came before the undersigned Temporary Administrative Law Judge Eugene J. Cella on August 5, 2010, upon Petitioners' motion for summary judgment and Respondent-Intervenor's motion for summary judgment. Petitioners, Pamlico-Tar River Foundation, North Carolina Coastal Federation, Environmental Defense Fund, and Sierra Club were represented by Derb S. Carter, Jr. and Geoffrey R. Gisler. Respondent Division of Water Quality ("DWQ") was represented by John A. Payne. Respondent-Intervenor PCS Phosphate ("PCS") was represented by George W. House and William P. Cary. Petitioners' Motion is DENIED and PCS's Motion is GRANTED.

ISSUES

Petitioners raised three issues in their motion for summary judgment:

- 1. Whether the DWQ properly issued the 401 Certification pursuant to the Tar-Pamlico Riparian Buffer Rules (the "Buffers Claim"); and
2. Whether DWQ correctly authorized impacts to wetlands pursuant to 15A NCAC 2H .0506(e) (the "2H .0506(e) Claim"); and
3. Whether DWQ correctly found that the impacts to wetlands and streams met PCS's basic project purpose (the "Alternatives Claim").

PCS moved for summary judgment in its favor on those three Claims and on the remaining two Claims in the Petition:

4. Whether Respondent correctly found that the 401 Certification provides adequate assurance that the applicable state and federal water quality standards will not be violated (the "Adequacy Claim"); and
5. Whether Respondent properly issued the Modified 401 Certification in January 2009 without an additional public notice and comment period after issuing the December 2008 401 Certification (the "Notice Claim").

#### UNDISPUTED FACTS

Based upon the entire record in this matter, including discovery, the filed pleadings, briefs submitted by Petitioners, DWQ, and PCS, this Court finds the following facts are undisputed:

1. This contested case involved the issuance of 401 Water Quality Certification No. 3711 to PCS on December 5, 2008, and re-issuance on January 15, 2009 as Modified 401 Certification No. 3711 (collectively, the "401 Certification") with respect to PCS's planned project to continue operating a phosphate ore mining facility near Aurora, North Carolina.
2. In November of 2000, PCS submitted applications to the United States Army Corps of Engineers ("Corps") under Section 404 of the federal Clean Water Act (33 U.S.C. § 1344) to obtain a 404 Permit, and to DWQ under Section 401 of the Clean Water Act (33 U.S.C. § 1341) to obtain a 401 certification.

#### BUFFERS CLAIM

3. The 401 Certification certifies the 404 Permit with impacts up to a maximum of 3,953 acres of jurisdictional wetlands, 25,727 feet of streams and 47.87 acres of riparian buffers, subject to impact limitations in the 401 Certification and further impact reductions prescribed by the 404 Permit. The 401 Certification mandates mitigation at certain buffer restoration sites that DWQ approved, providing about 24.4 acres of existing buffer mitigation credit.
4. The 404 Permit authorizes road relocation and a mine plan. PCS Ex. 9 (404 Permit). In the initial "impact areas," up to and including the 2014 impact area, PCS Ex. 9 at Condition E; PCS Ex. 8 (Corps Record of Decision) at Fig. 2, the 404 Permit authorizes impacts to 10.57 acres of buffers, Cooper Aff. at Ex. B., and 30.33 acres in the later remaining impact areas. Cooper Aff. at Ex. B. There are no practical alternatives that would reduce these 40.90 acres of buffer impacts. See PCS Ex. 8 (Corps Record of Decision); PCS Ex. 12 (DWQ Memo to file).
5. Condition #7 of the 401 Certification establishes a mitigation strategy that has two primary elements: (1) a mitigation mandate – that buffer restoration be conducted at certain DWQ-approved sites (totaling about 24.4 acres); and (2) an impact prohibition – preventing

disturbance of buffers that are located “beyond the limits of the 2014 impact area,” unless more mitigation sites are approved by DWQ. Pet. Ex. 1 (401 Certification) at Condition 7.

6. The mitigation required for the initial 10.57 acres of buffer impact authorized by the 404 Permit, *see* 15A NCAC 2B .0259(3) and .0260(3)(b), is less than the mitigation credit under the mitigation mandate of Condition #7 authorized by the 401 Certification. *See* Cooper Aff. Ex. B.

7. The DWQ-approved mitigation sites are all located in the same 8-digit hydrologic unit code (“HUC”) as the buffer impacts. PCS Ex. 12 (DWQ Memo to file).

**15A NCAC 2H .0506(e) CLAIM**

8. The 2009 National Heritage Program (“NHP”) Biennial Protection Plan SNHA list (PCS Ex. 25) includes two tracts of land owned by PCS (collectively the “Properties”) which are within the project area that is the subject of this contested case: the “Bonnerton NWHF”<sup>1</sup> (“nonriverine wet hardwood forest”), identified by NHP as a “nationally” significant 260 acre tract; and the “Sparrow Road NWHF,”<sup>2</sup> identified by NHP as a “state” significance 125 acre tract.

9. Under the terms of the 401 Certification, the Bonnerton Tract qualifies as an exceptional state or nationally significant area under this rule.

10. DWQ’s Director issued a Clarification Statement acknowledging that NHP’s listing decisions are not “a classification or designation under 15A NCAC 02H .0506(e).” *See* PCS Ex. 15 (Clarification Statement), item no. 1.

11. DWQ reviewed the 401 Application and concluded the public need element had been demonstrated. PCS Ex. 15; Resp. Ex. 4.

**BASIC PROJECT PURPOSE (Alternatives Claim)**

12. The Project Purpose was defined by the Corps in an FEIS, analyzed and accepted by DWQ. The project purpose was defined as follows: “to continue mining of its phosphate reserves in an economically viable fashion. More specifically . . . [t]o implement a long-term, systematic and cost-effective mine advance within the project area.”

13. The US Army Corps of Engineers found Alternative L to be practicable, but also the “most restrictive and therefore avoids the most aquatic resource.” The FEIS provided that PCS could terminate mining at the end of the Bonnerton tract.

14. DWQ used the Corps’s Alternatives Analysis in making a determination under 15A NCAC 2H .0506(b) as to the existence of any practical alternatives. PCS Ex. 23.

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<sup>1</sup> Bonnerton NWHF is within and only a portion of the larger Bonnerton Tract discussed in the overall EIS and permitting context.

<sup>2</sup> Sparrow Road NWHF is within and only a portion of the S33 Tract.

15. DWQ reviewed the Corps's Alternatives Analysis, and carefully considered the FEIS and accompanying documents before issuing the 401 Certification. *Id.* DWQ required that the impacts from the proposed project be reduced even further from the least environmentally damaging alternative identified by the Corps before it would issue the 401 Certification. *Id.*

**ADEQUACY CLAIM**

16. The 401 Certification contains provisions addressing each of the regulatory elements required for issuance of a certification under DWQ's regulations.

17. At the time DWQ issued the 401 Certification, it had in its files and otherwise before its consideration adequate data and information to allow it to fully evaluate the proposed impact and potential impact on water quality, and to make the other determinations that were required to make the decision to issue the 401 Certification. The information presented at the summary judgment hearing served to corroborate and further explain and support the information before DWQ.

18. The 401 Certification not only requires PCS to "conduct construction activities in a manner consistent with state water quality standards," it also empowers DWQ to "reevaluate and modify this certification to include conditions appropriate to assure compliance with such standards" if DWQ "determines that such standards or laws are not being met (including the failure to sustain a designated or achieved use) or that state or federal law is being violated." Condition 5. DWQ concluded: ". . . condition number 5 is available to ensure that DWQ can take any required measures to modify or reopen the Certification as needed to protect downstream waters." PCS Ex. 12 (DWQ Memo to File) at 2.

19. DWQ found that PCS's "application and supporting documentation provide adequate assurance that the proposed work will not result in a violation of applicable Water Quality Standards and discharge guidelines." Pet. Ex. 1, 401 Cert. Petitioners did not proffer any evidence in support of their allegation that DWQ failed to make this determination.

**NOTICE CLAIM**

20. The Corps published its FEIS on May 22, 2008. 73 Fed. Reg. 30094 (May 23, 2008); PCS Ex. 10.

21. The Corps also published a Public Notice on May 22, 2008 in which the Corps requested public comment on the FEIS and on PCS's application to DWQ for a Section 401 water quality certification. PCS Ex. 10A at 3.

22. DWQ treated the May 22, 2008 Public Notice as the public notice for PCS's application for an individual Section 401 water quality certification as required by 15A NCAC 2H .0503. Pet. Ex. 1.

23. DWQ issued a water quality certification to PCS on December 5, 2008. Pet. Ex. 2.

24. Later in December 2008, PCS notified DWQ that PCS objected to certain provisions of the December 5, 2008 401 Certification. PCS Ex. 24. Thereafter, DWQ and PCS exchanged information and discussed possible alternative provisions. DWQ kept Petitioners informed of PCS's objections and of the discussions between DWQ and PCS to resolve PCS's objections.

25. On January 15, 2009, DWQ issued a Modified 401 Certification containing revised conditions, which replaced the 401 Certification dated December 5, 2008. Pet Ex. 1.

26. PCS could not begin construction or mine preparation activities pursuant to the 401 Certification dated January 15, 2009 until after the Corps issued its Record of Decision (PCS Ex. 8) and signed the Section 404 permit in June 2009. (PCS Ex. 9).

#### STANDARD OF REVIEW AND LAW

1. The North Carolina Administrative Procedure Act ("APA") APA, provides that "[t]he Administrative Law Judge shall decide the case based upon a preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." N.C. Gen. Stat. § 150B-34(a). Actions by State officials are presumed to be made lawfully and in good faith. *Painter v. Wake County Bd. of Ed.*, 288 N.C. 165, 217 S.E.2d 650 (1975); *see also Huntley v. Potter*, 255 N.C. 619, 122 S.E.2d 681 (1961); *Albemarle Elec. Membership Corp. v. Alexander*, 282 N.C. 402, 192 S.E.2d 811 (1972).

2. There is a rebuttable presumption that an administrative agency has acted properly in performing its official duties. *In re Appeal from Civil Penalty*, 92 N.C. App. 1, 373 S.E.2d 572 (1988), *rev'd on other grounds*, 324 N.C. 373, 379 S.E.2d 30 (1989). The burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence. *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 703, 635 S.E.2d 442, 447 (2006), *disc. rev. denied*, 361 N.C. 220, 635 S.E.2d 442 (2007); *see also Styers v. Phillips*, 277 N.C. 460, 178 S.E.2d 583 (1971).

3. An agency's interpretation of its own regulations are accorded deference, unless such interpretation is clearly erroneous. *Elliot v. N.C. Psychology Board*, 126 N.C. App. 453, 456, 485 S.E. 2d 882, 884 (1997), *rev'd in part on other grounds*, 348 N.C. 230, 498 S.E.2d 616 (1998). Moreover, NC DENR's interpretation of its own rules and regulations are "entitled to some judicial deference because the General Assembly made [DENR] responsible for administering the statute." *Hensley v. NC DENR*, 364 N.C. 285, 294, 698 S.E.2d 42, 47 (2010).

4. The burden is on Petitioners to show that, in denying its request for a 401 Certification, that the agency: (1) exceeded its authority; (2) acted erroneously; (3) failed to use proper procedure; (4) acted arbitrarily or capriciously; or (5) failed to act as required by law or rule. N.C.G.S. § 150B-23(a) (in pertinent part).

5. Summary judgment is properly granted when the pleadings, depositions, answers to interrogatories, admissions, and affidavits show no genuine issue of material fact exists, and the

moving party is entitled to judgment as a matter of law. *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 665, 449 S.E.2d 240, 242 (1994), *disc. rev. denied*, 339 N.C. 737, 454 S.E.2d 648(1995). An issue is material only if its resolution would prevent the party against whom it is resolved from prevailing. *Bone International, Inc. v. Brooks*, 304 N.C. 371, 283 S.E.2d 518 (1981). The party moving for summary judgment has the burden of showing a lack of a triable issue of fact. *Pembee Mfg. Corp. v. Cape Fear Construction Co.*, 313 N.C. 448, 491, 329 S.E.2d 350, 353 (1985). The moving party may meet this burden by showing an essential element of the opposing party's claim is nonexistent, or that the opposing party will be unable to produce evidence to support an essential element of the claim. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992). "G.S. 1A-1, Rule 56(c) does not require that a party move for summary judgment in order to be entitled to it." *McNair Constr. Co. v. Fogle Bros. Co.*, 64 N.C. App. 282, 289, 307 S.E.2d 200, 205 (1983).

**CONCLUSIONS OF LAW**

1. The Southern Environmental Law Center timely filed this Petition on behalf of Petitioner, and OAH has jurisdiction to hear this case pursuant to N.C.G.S. § 150B-23.
2. PCS is a necessary party to this contested case and was properly added as a Respondent-Intervenor.
3. Pursuant to federal regulations, when issuing a 401 Certification, the State reviewing agency must be able to affirmatively state that "there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." 40 CFR 121.2(a)(3).
4. When issuing a 401 Certification, North Carolina rules require that DWQ "determine if the proposed activity has the potential to remove or degrade those significant existing uses which are present in the wetland or surface water." 15A NCAC 2H.0506(a). DWQ may issue a 401 Certification only after determining that water quality standards, including the protection of existing uses of wetlands or surface waters, are met. *Id.*

**BUFFER MITIGATION CLAIM**

5. Pursuant to 15A NCAC 2B.0259(3), the Tar-Pamlico Buffer Rules apply to "50-foot wide riparian buffers directly adjacent to surface water in the Tar-Pamlico River Basin (intermittent stream, perennial streams, lakes, ponds, and estuaries), excluding wetlands."
6. Potential impacts to the riparian buffer areas are categorized and designated into four separate categories: exempt, allowable, allowable with mitigation and prohibited. 15A NCAC 2B .0259(7).
7. A table of uses sets forth the uses and their designations under the rule. 15A NCAC 2B

.0259(6). Uses that are “allowable with mitigation” are authorized if DWQ determines there are no practical alternatives available, approves mitigation, and provides written authorization. 15A NCAC 2B. 0259(7)(c).

8. 15A NCAC 02B. 0260(4) states that the riparian buffer mitigation location “shall be located the same distance from the Pamlico River estuary as the proposed impact, or closer to the estuary than the proposed impact, and as close to the location of the impact as feasible.” DWQ determined that this rule is satisfied if the impacts and mitigation are located in the same eight-digit HUC, which comports with the current General Statutes §143-214.11(b) and the history of the rule itself. *See* Pet. Ex. 3 (1999 Report of Proceedings on Proposed Rules for Protection and Maintenance of Riparian Areas in the Tar-Pamlico River Basin); PCS Exhibit – served at oral argument (1994 Tar-Pamlico River Basinwide Water Quality Management Plan); EMC Agenda Item No. 0511, Tar Pamlico Nutrient Sensitive Waters Implementation Strategy: Phase III, April 14, 2005, pages 6-7, available at [http://portal.ncdenr.org/c/document\\_library/get\\_file?uuid=70df9b63-dea1-4d14-8eec-df620dc3bb7b&groupId=38364](http://portal.ncdenr.org/c/document_library/get_file?uuid=70df9b63-dea1-4d14-8eec-df620dc3bb7b&groupId=38364)) As this is an agency interpretation of its own rules, DWQ is accorded deference. *See Hensley v. NC DENR*, 364 N.C. 285, 294, 698 S.E.2d 42, 47 (2010).

9. DWQ will review with the U.S. Army Corps of Engineers any additional mitigation sites proposed by PCS to determine whether the PCS mitigation is conformity with the Tar-Pamlico Buffer Rules. Future mitigation determinations are bound by ratios found in 15A NCAC 2B. 0260(3)(b).

10. The mitigation strategy established by Condition #7 is an appropriate mitigation strategy that complies with the Tar-Pamlico Buffer Rules.

11. The 401 Certification provides reasonable assurance that the activities authorized by the 404 Permit will not violate the Tar-Pamlico Riparian Buffer Rules.

**15A NCAC 2H. 0506(e) CLAIM**

12. 15A NCAC 2H. 0506(e) states:

The Director shall issue a certification upon determining that significant existing uses are not removed or degraded by a discharge to wetlands of exceptional state or national ecological significance including but not limited to Class UWL wetlands, and wetlands that have been documented to the satisfaction of the Director as habitat essential for the conservation of state or federally listed threatened or endangered species, provided that the wetlands have been so classified or designated prior to the date of application for certification or a draft environmental impact statement has been submitted to the Director, for an activity which satisfies Subparagraphs (c)(2)-(5) and (d)(1)-(2) and:

- (1) the wetland impacts are necessary for the proposed project to meet a demonstrated public need; and

(2) provides for replacement of existing uses through wetland mitigation under U.S. Army Corps of Engineers requirements, or as described in Subparagraphs (h)(1)-(7) and (10) of this Rule.

13. NHP's listing of the Properties as SNHAs is not a "classification or designation" within the meaning of 2H .0506(e). PCS See Ex. 15 ("Clarification of the PCS Certification Process by the Director of Water Quality, NC DENR," February 12, 2010 ("Clarification Statement")).

**BASIC PROJECT PURPOSE (ALTERNATIVES CLAIM)**

14. Pursuant to 15A NCAC 2H. 0506(b)(1) and (c)(1), the Director shall issue a certification upon determining that existing uses are not removed or degraded by a discharge to classified surface waters for an activity which: (1) has no practical alternative, and (2) will minimize adverse impacts to the surface waters. No practical alternatives may be shown "by demonstrating that, considering the potential for a reduction in size, configuration or density of the proposed activity and all alternative designs the basic project purpose cannot be practically accomplished in a manner which would avoid or result in less adverse impact to surface waters or wetlands." 15A NCAC 2H. 0506(f).

15. DWQ regulations state that "[DWQ] shall not duplicate the site-specific application of any guidelines employed by the United States Army Corps of Engineers in evaluating permit applications under [§ 404] and applicable federal regulations." 15A NCAC 2H .0506(i) (emphasis added).

16. Petitioners have failed to raise any genuine issue of material fact as to whether DWQ exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in relying on the Corps's Alternatives Analysis to make the practical alternatives determination pursuant to 15A NCAC 2H .0506. N.C.G.S. §150B-23(a)(1)-(5).

17. As a matter of law, DWQ is entitled to summary judgment in its favor with respect to Petitioners' Alternatives Claim.

18. Petitioners' motion for summary judgment with respect to Petitioners' Alternatives Claim is denied.

19. PCS's motion for summary judgment with respect to Petitioners' Alternatives Claim is granted.

**ADEQUACY CLAIM**

20. In the Petition and through their testimony, Petitioners failed to proffer any specific allegations as to how the construction, operation and mining of the area in question would violate water quality standards. Petitioners' challenges focused primarily on the conditional nature of the conditions contained in the 401 Certification and potential or hypothetical conditions that might occur in the future.

21. Petitioners' reliance on evidence previously submitted to and evaluated by DWQ during the multi-year 401 Certification process failed, as a matter of law, to create a genuine issue of material fact with respect to the issue at this stage, which is not whether DWQ's evaluation is factually correct, but whether Petitioners have demonstrated that DWQ's decision was arbitrary and capricious – "patently in bad faith" or "whimsical." *Richardson v. N.C. Dept. of Public Instruction, supra*.

22. The 401 Certification conditions for monitoring (Conditions 12 and 13) coupled with DWQ's power to modify the Certification to require PCS to take additional steps "appropriate to assure compliance with [the State Water Quality] standards," Condition 5, provide sufficient adequate assurances to support issuance of this 401 Certification as a matter of law. *Deep River Citizens' Coalition v. N.C. Dep't of Env't & Nat. Res.*, 165 N.C. App. 206, 598 S.E.2d 565 (2004). Petitioners have failed to raise any genuine issues of material fact as to the adequacy of this system of safeguards, which are in addition to the other requirements of the 401 Certification.

23. Petitioner has brought forth no genuine issues of material fact for which this Court could grant summary judgment in its favor.

24. As a matter of law, DWQ is entitled to summary judgment in its favor with respect to Petitioners' Adequacy Claim.

25. PCS' motion for summary judgment with respect to Petitioners' Adequacy Claim is granted.

**NOTICE CLAIM**

26. The May 22, 2008 Public Notice (PCS Ex. 10A) was a joint notice by the Corps for PCS's application for a Section 404 permit and by DWQ for PCS's application for an individual Section 401 water quality certification which was published in accordance with the established procedures of the Corps. Petitioners have not alleged or provided evidence otherwise. The May 22, 2008 Public Notice satisfied the requirements of 15A NCAC 2H .0503 for providing public notice of PCS's application for an individual Section 401 water quality certification.

27. Since the December 5, 2008 401 Certification was modified and replaced within 60 days of its issuance, the December 5, 2008 401 Certification never became "final and binding" by its own terms (PCS Ex. 57 at 7) and pursuant to the North Carolina Administrative Procedure Act. Therefore, Condition 5 of the December 5, 2008 certification did not require additional public notice of PCS's application for an individual water quality certification beyond the May 22, 2008 Public Notice, PCS Ex. 10A.

28. Alternatively, even if the December 5, 2008 401 Certification became effective and DWQ was required to comply with its provisions, Condition 5 did not require any additional public notice of DWQ's decision to withdraw the December 5, 2008 certification and issue a new

certification with revised conditions because PCS had not yet begun any "construction activities" within the meaning of Condition 5.

29. Petitioners' evidence does not raise a genuine issue of material fact that DWQ acted erroneously, used improper procedure, acted arbitrarily, or otherwise violated the law when DWQ determined that it had met the requirements of 15A NCAC 2H .0503 for giving public notice of PCS's application for an individual Section 401 water quality certification and that no further public notice was required.

30. PCS's motion for summary judgment with respect to Petitioners' Notice Claim is granted.

31. As a matter of law, DWQ is entitled to summary judgment in its favor with respect to Petitioners' Notice Claim.

32. DWQ is granted summary judgment based upon the evidence presented. *See McNair Constr. Co. v. Fogle Bros. Co.*, 64 N.C. App. 282, 289, 307 S.E.2d 200, 205 (1983) ("G.S. 1A-1, Rule 56(c) does not require that a party move for summary judgment in order to be entitled to it.").

BASED UPON the foregoing UNDISPUTED FACTS and CONCLUSIONS, the undersigned makes the following:

**DECISION**

BASED UPON THE FORGOING, the undersigned concludes that summary judgment, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, and Rule .0105 of the Rules of the Office of Administrative Hearings, should be DENIED for Petitioners and GRANTED to PCS and DWQ, because there is no genuine issue of material fact, as a matter of law, that DWQ properly issued the 401 Certification pursuant to the Tar-Pamlico Riparian Buffer Rules, correctly authorized impacts to wetlands pursuant to 15A NCAC 2H .0506(e), found that the impacts to wetlands and streams met PCS's basic project purpose, properly issued the January 2009 401 Certification without re-issuing public notice after the December Certification, and correctly found that the 401 Certification contained adequate assurances that the applicable state and federal water quality standards would not be violated.

**NOTICE**

Before making its FINAL DECISION, the Agency that will make the final decision in this contested case, is required to give each party an opportunity to file exceptions to this DECISION and to present written arguments to those in the agency who will make the final decision. N.C. G.S. § 150B-36(a).

The Agency is required by N.C. Gen. Stat. § 150B-36(b3) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorneys of record and to the Office of Administrative Hearings. The Agency that will make the final decision in this contested case is the Environmental Management Commission.

This the 26<sup>th</sup> day of April 2012.

  
Eugene J. Cella  
Temporary Administrative Law Judge

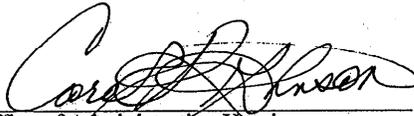
A copy of the foregoing was mailed to:

Geoffrey R. Gisler  
Derb S. Carter Jr.  
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601 W Rosemary St  
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John A. Payne  
Assistant Attorney General  
NC Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
ATTORNEY FOR RESPONDENT

This the 2<sup>nd</sup> day of April, 2012.



Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh NC 27699-6714  
Phone: 919/431-3000  
Fax: 919/431-3100



.0211(3)(b) and 15A NCAC 2B .0211(3)(c) per the notice of Civil Penalty Assessment signed August 10, 2010, by Respondent.

**WITNESSES**

**For Petitioner:** George Clayton Howard, Jr.  
James K. Holley, P.G.  
Kenneth Wayne Register, Jr.  
Davey Wayne Cavanaugh

**For Respondent:** Linda Willis  
Kenneth Rhame  
Robert Poindexter  
Geoffrey Kegley  
Stephanie Garrett  
Richard Shiver  
Jeffrey O. Poupart  
Joseph Teachey  
James Bushardt  
Bongkeun Song, Ph.D.

**EXHIBITS**

**For Petitioner:**

|        |   |
|--------|---|
| Ex. 1  | Civil Penalty Assessment  |
| Ex. 2  | Notice of Violation to Petitioner dated 10/15/09  |
| Ex. 3  | Letter from R. Johnson to R. Shiver dated 10/23/09  |
| Ex. 4  | Letter from C. Howard to M. Rechtman dated 03/18/10   |
| Ex. 5  | Register's Septic Tank Pumping Statement dated 09/21/09; Purchase Order to Register's; Check to Register's dated 10/22/09 |
| Ex. 6  | Report of Environmental Chemists dated 10/08/10; Chain of Custody dated 09/28/10  |
| Ex. 7  | Report of Environmental Chemists dated 09/30/10; Chain of Custody dated 09/07/10  |
| Ex. 8  | Photographs labeled U and V   |
| Ex. 9  | Photographs labeled W and X   |
| Ex. 10 | Curriculum Vitae of James K. Holley, P.G.   |
| Ex. 11 | Document regarding monitoring results at Valley Protein, 03/26/06 – 01/15/09  |
| Ex. 12 | Handwritten document entitled "Storm Water Permit & Site Inspection"  |
| Ex. 13 | Notice of Violation to Valley Proteins dated 05/11/09 and Compliance Inspection Report dated 04/22/09                     |
| Ex. 14 | Letter to R. Shiver from D. Frey dated 05/27/09   |

|        |  |
|--------|--|
| Ex. 15 | Letter to L. Willis and J. Conway from E. West dated 06/16/09, with aerial photograph              |
| Ex. 16 | Letter to DWQ from D. Frey dated 06/26/09, with monitoring report                                  |
| Ex. 17 | DWQ Laboratory Results dated with handwritten date 10/06/09, with sample information from 09/24/09 |
| Ex. 18 | Compliance Inspection Report for Duplin Wine Cellars dated 04/21/09                                |
| Ex. 19 | Compliance Inspection Report for Duplin Wine Cellars dated 06/23/09                                |
| Ex. 20 | Compliance Inspection Report for Duplin Wine Cellars dated 07/08/09                                |
| Ex. 21 | Compliance Inspection Report for Duplin Wine Cellars dated 09/23/09                                |
| Ex. 22 | Compliance Inspection Report for Duplin Wine Cellars dated 09/24/09                                |
| Ex. 23 | Compliance Inspection Report for Duplin Wine Cellars dated 07/22/10                                |
| Ex. 24 | Compliance Inspection Report for Duplin Wine Cellars dated 09/15/10                                |
| Ex. 25 | Notice of Violation to Duplin Winery dated 10/15/10  |
| Ex. 26 | PowerPoint presentation by James K. Holley, P.G.   |
| Ex. 27 | Handwritten Field Notes of Rufino Salgado  |
| Ex. 28 | Summary of DWQ Sampling Data   |
| Ex. 29 | Summary of DWQ and EPA Sample Data   |
| Ex. 30 | Civil Penalty Assessment Factors prepared by Jeff Poupart 08/10/10                                 |
| Ex. 31 | Civil Penalty Assessment Factors by M. Matthew, not signed or dated                                |
| Ex. 32 | Photographs labeled Y and Z  |
| Ex. 33 | Cavanaugh Invoice dated 09/14/09; Check to Cavanaugh dated 09/16/09                                |
| Ex. 34 | DWS Memorandum re Fish Kill on Beaverdam Branch dated 04/07/09                                     |
| Ex. 35 | Email from S. Pettergarrett to L. Willis dated 09/25/09  |
| Ex. 36 | Email from R. Salgado to L. Willis dated 10/02/09  |
| Ex. 37 | Email from S. Pettergarrett to R. Salgado and L. Willis dated 10/14/09                             |
| Ex. 38 | DWQ Memorandum re Enforcement Recommendation dated 11/13/09 [redaction in original exhibit]        |
| Ex. 39 | Letter from C. Howard to C. Stehman dated 08/12/10, unsigned                                       |
| Ex. 40 | Larger aerial photograph of site, image dated 03/19/07   |
| Ex. 41 | Smaller aerial photograph of site, image date 03/06/10   |
| Ex. 42 | PowerPoint presentation by James K. Holley, P.G. – Rebuttal Testimony                              |

**For Respondent:**

|        |   |
|--------|---|
| Ex. 1  | Corporate information on Petitioner                               |
| Ex. 2  | Permit Extension and Return of Renewal Application dated 12/23/09 |
| Ex. 3  | [Not Admitted]  |
| Ex. 4A | DWQ and EPA Sample Data   |
| Ex. 4B | EPA Beaver Dam Release Summary and Report [Redacted]              |
| Ex. 5A | Calibration Records, 09/10/09                                     |
| Ex. 5B | Calibration Records, 09/15/09                                     |
| Ex. 5C | Calibration Records, 09/18/09                                     |
| Ex. 5D | Calibration Records, 09/21/09                                     |
| Ex. 5E | Calibration Records, 09/23/09 by Salgado                          |

|                    |  |
|--------------------|--|
| Ex. 5F             | Calibration Records, 09/23/09 by Willis  |
| Ex. 5G             | Calibration Sheet, 09/23/09  |
| Ex. 5H             | Environmental Chemists Report with Chain of Custody, 09/23/09                          |
| Ex. 5I             | Environmental Chemists Report with Chain of Custody, 09/24/09                          |
| Ex. 5J             | Environmental Chemists Report with Chain of Custody, 09/25/09<br>(sampled 09/18/09)    |
| Ex. 5K-1           | Environmental Chemists Report with Chain of Custody, 09/25/09<br>(sampled 09/23/09)    |
| Ex. 5K-2           | Environmental Chemists Report with Chain of Custody, 09/30/09                          |
| Ex. 6              | Figure 1 - Dissolved oxygen levels on 09/10/09   |
| Ex. 7              | Figure 2 - Dissolved oxygen levels on 09/15/09   |
| Ex. 7A1 -<br>7A10  | DWQ Lab Results  |
| Ex. 8              | Figure 3 - Dissolved oxygen levels on 09/23/09   |
| Ex. 9              | Figure 4 - Physical parameters on 09/10/09 and 09/15/09                                |
| Ex. 10             | Figure 5 - Photo locations   |
| Ex. 11A –<br>11B   | Figures 6 and 7 - Photo locations  |
| Ex. 12             | Figure 8 – Stream identification and sample locations                                  |
| Ex. 13,<br>13A-13U | Cabin Branch Stream Walk photographs and maps  |
| Ex. 14A-<br>14AA   | Photographs  |
| Ex. 15<br>(LW1-32) | Photographs  |
| Ex. 16             | Northeast Cape Fear by Land  |
| Ex. 17A            | Field Notes  |
| Ex. 17B            | Travel Log and information   |
| Ex. 18             | Chain of Custody, 09/23/09   |
| Ex. 19A            | Resume of Bongkeun Song  |
| Ex. 19 B           | [Not Admitted]   |
| Ex. 19C            | Email correspondence   |
| Ex. 20             | Notice of Violation dated 10/15/09   |
| Ex. 21             | Letter to R. Shiver from R. Johnson dated 10/23/09                                     |
| Ex. 22             | DWQ Memorandum re Enforcement Recommendation dated 06/22/10                            |
| Ex. 23             | Civil Penalty Assessment Factors by M. Matthews, unsigned and<br>undated               |
| Ex. 24A            | Civil Penalty Assessment Factors by Jeff Poupart dated 08/10/10                        |
| Ex. 24B            | Assessment History run date 10/24/11   |
| Ex. 24C            | Notice of Violation dated 09/007/04 with Compliance Inspection Report                  |
| Ex. 24D            | Letter to R. Johnson from T. Croft dated 03/23/07 with Compliance<br>Inspection Report |
| Ex. 24E            | Letter to T. Croft from C. Murray dated 04/23/07                                       |
| Ex. 24F            | Letter to R. Johnson from E. Carey dated 01/05/09 with Compliance<br>Inspection Report |

|                          |  |
|--------------------------|--|
| Ex. 24G                  | Notice of Violation dated 08/06/10 with Compliance Inspection Report                                   |
| Ex. 25                   | Letter to R. Johnson from C. Sullins dated 08/10/10 re Assessment of Civil Penalties, with attachments |
| Ex. 26                   | Petition for Contested Case Hearing with attachments   |
| Ex. 27,<br>27A –<br>27KK | PowerPoint presentation by James K. Holley, P.G.   |
| Ex. 28A                  | Map  |
| Ex. 28B                  | Map  |
| Ex. 29                   | Resume of James B. Bushardt, P.E.  |
| Ex. 30                   | Resume of Richard “Rick” Shiver  |
| Ex. 31                   | Non-Discharge Application Report Spray Irrigation Sites  |
| Ex. 31A                  | Spray Irrigation Records   |
| Ex. 32                   | Handwritten log of Joseph Teachey  |
| Ex. 33                   | Excerpts of Teachey Deposition   |
| Ex. 34                   | Resume of James B. Bushardt, P.E.  |

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

**FINDINGS OF FACT**

1. Petitioner is a corporation organized and existing under the laws of the State of North Carolina. Petitioner, House of Raeford Farms, Inc., operates a chicken processing facility, the Rose Hill Fresh, IQF Chicken Plant, located at 3333 US Highway 117 South, Rose Hill, NC in the County of Duplin. Petitioner does not have a National Pollutant Discharge Elimination System Permit that allows the discharge of treated or untreated process wastewater to surface waters of the State.

2. Respondent, North Carolina Department of Environment and Natural Resources, Division of Water Quality (DWQ), monitors and regulates discharges into waters of the State pursuant to N.C. Gen. Stat. § 143-215.1.

3. On or about August 10, 2010, Jeff Poupart, Point Source Branch Chief of the Division of Water Quality, Surface Water Protection Section, issued a Findings and Decision and Assessment of Civil Penalties against House of Raeford Farms, Inc. (HORF) arising out of an alleged discharge from a HORF facility into Cabin Branch Creek. The Respondent, by and

through Mr. Poupart, assessed a total civil penalty against HORF in the amount of \$75,000.00 plus enforcement costs of \$1,357.95. (Pet. Ex. 1.)

4. A penalty of \$25,000.00 was assessed for an alleged violation of N.C. Gen. Stat. § 143-215.1(a)(6) for causing or permitting waste to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications or in violation of any effluent standards or limitations established for any point source, unless allowed as a condition of any permit, special order or other appropriate instrument issued or entered into by the Commission. A penalty of \$25,000.00 was assessed for violation of 15A NCAC 2B .0211(3)(b) for violating the dissolved oxygen water quality standard for Class C-Sw waters of the State. A penalty of \$25,000.00 was assessed for violation of 15A NCAC 2B .0211(3)(c) for allowing settleable solids and sludge in excess of the water quality standard for Class C-Sw waters of the State. (Pet. Ex. 1.)

5. As part of Petitioner's plant operations, Petitioner maintains a wastewater system to treat the water that is used to carry the offal produced in the rendering process out of the plant. Water is utilized in various portions of the processing operation, including in moving solids from the chicken processing plant to a diffused air floatation (DAF) system. At the DAF, solids are separated from the water and pumped into a tanker trailer that goes to Valley Protein (sometimes referred to as Carolina By-Products).

6. Some of the water going to the DAF is transported away with the material being carried to Valley Protein, and some evaporates. The remaining water is pumped to the Facility's primary lagoon (Lagoon 1), which is approximately 795 feet long and 329 feet wide. At Lagoon 1, remaining solids separate out, and water is gravity fed into a secondary lagoon and then pumped approximately two miles away to a third lagoon. HORF then land applies water from the third lagoon to its spray fields. The secondary lagoon (Lagoon 2) is approximately 790 feet long and 324 feet wide.

7. The Facility is permitted to operate a non-discharge wastewater system that involves the DAF, lagoons and spray fields, along with various components related to the same. (Resp. Ex. 2.)

8. The primary lagoon is located closest to the Petitioner's processing building, and the secondary lagoon is located closest to Cabin Branch Creek. Cabin Branch Creek (Cabin Branch) flows from its headwaters, which are located in the vicinity of Valley Protein, downstream through several sharp turns and eventually runs behind the HORF Facility. Two ponds that were formerly limestone quarries are located immediately downstream of the HORF Facility and Cabin Branch flows through these ponds. Cabin Branch thereafter joins with Beaverdam Branch and flows toward Sheffield Road.

9. An operator in charge (ORC) could see the creek behind the HORF facility because it is so close to Petitioner's lagoon. An ORC, among other things, has a duty to inspect. He or she is responsible for checking the lagoon(s) and looking for burrowing by rodents, trees that are problematic, wet areas, freeboard levels and other threats to the lagoon. Petitioner's ORC is Joe Teachey.

10. Both Cabin Branch and Beaverdam Branch are classified as Class C-Sw waters of the State and are located in the Cape Fear River Basin. Class C-Sw, or swamp waters, are characteristically slow flowing. Class C-Sw waters are fed by wetland and low-lying areas. These types of streams are subject to low flow and backing up.

11. Water from all of the upstream areas of Cabin Branch flows behind the HORF facility. The size of the drainage basin for Cabin Branch that would contribute to flow behind HORF is approximately 5.6 square miles.

12. Valley Protein is located upstream of the HORF Facility. Valley Protein is a rendering facility that accepts offal from the slaughtering of animals and transforms the offal into other usable products. Offal consists of the innards of chickens, turkeys and swine. Valley Protein also takes feathers and blood as well as skimmings from DAF units. The skimmings include grease and oils and solids. Valley Protein accepts animal by-products from HORF. Valley Protein produces a wastewater stream from their operations and has a series of lagoons to treat the wastewater, as well as a nondischarge permit to spray irrigate on adjacent lands, in a similar manner to what HORF does at their facility.

13. Duplin Winery is also located upstream of HORF, adjacent to the Valley Protein facility, in the Cabin Branch drainage area.

14. On September 9, 2009, late in the workday, DWQ received an anonymous call which complained of something in the creek and a foul smell at the Beaverdam Branch crossings of Sheffield Road and Brooks Quinn Road.

15. This anonymous complaint was directed to DWQ's Linda Willis' attention. Ms. Willis is an environmental engineer for DWQ. Her main duties involve inspecting industrial facilities and municipal wastewater treatment facilities that have NPDES wastewater and NPDES stormwater permits, including those located in Duplin County.

16. Geoffrey Kegley is a hydrogeologist with DWQ's Aquifer Protection Section. The majority of his duties as a hydrogeologist are to conduct permitting and compliance monitoring as part of the NPDES program for non-discharge wastewater treatment systems.

17. On September 10, 2009, DWQ's Willis and Kegley, began an investigation of the anonymous caller's report at the Beaverdam Branch crossing of Brooks Quinn Road. At that location, they observed a greasy, brown film or biomass floating over the surface of the water. In an effort to isolate the source of the greasy, brown film or biomass floating on the surface, DWQ investigated all of Beaverdam Branch and its tributaries upstream from the Brooks Quinn Road. At the Johnson Parker Road crossing of an unnamed tributary that feeds into Beaverdam Branch upstream of the Brooks Quinn Road crossing, the greasy, brown film or biomass floating on the surface of the water was not observed.

18. Two hog farms along the unnamed tributary were investigated by DWQ and were determined not to be the source. The operator at the farms reported no incidents of overtopping

of their lagoons. The lagoons had adequate freeboard, there was no evidence of any breach of the lagoons' walls, and the ditches that drain from the lagoons to Beaverdam Branch were dry.

19. Upstream from the unnamed tributary and the Brooks Quinn Road crossing, at the Sheffield Road crossing of Beaverdam Branch, a floating, brown, greasy, sludge-type material was observed on the surface of the water and trapped in the vegetation in and around the Sheffield bridge and along the banks of the creek. The Sheffield Road crossing of Beaverdam Branch is just downstream of the House of Raeford facility.

20. DWQ investigated Cabin Branch as it passed behind the Parker Bark facility, Parker Bark is downstream of House of Raeford Farms on Cabin Branch. DWQ could see Cabin Branch as it passed behind the facility. Cabin Branch converges with Beaverdam Branch at the northeast corner of the Parker Bark property.

21. During the investigation, DWQ representatives met with Joseph Teachey, wastewater manager for HORF, who escorted them to the south side of the HORF lagoons to view the creek. DWQ investigated Cabin Branch as it passed behind the House of Raeford facility. At Cabin Branch, immediately behind the House of Raeford, DWQ and Teachey observed a "sludgy," greasy, "light brownish-tannish" material in the creek that appeared thick and solid. (T p. 642) The material looked like sludge or waste water and contained oils and grease.

22. The sludge covered the creek from bank to bank, a width of nearly 20 feet. The sludge had formed ridges and made it impossible to see the water beneath it. Ms. Willis testified that the amount of sludge in the creek was unlike anything she had ever seen and appeared to her to look like the sludge in the Petitioner's primary lagoon. Joseph Teachey testified that the material was not greasy like the material in Lagoon 1 and was not the same color. Ms. Willis stated that the material did not have an odor. Joseph Teachey testified that the material smelled like mud. He stated the material in Lagoon 1 and the DAF smelled bad. There was no definitive evidence regarding how long the material had been in the creek at the time of the anonymous call.

23. The sludge observed behind the House of Raeford facility was very thick and fresh looking. It was a light brownish-tannish color and it floated on the surface of the water. DWQ observed that the sludge in the House of Raeford's primary lagoon looked like the sludge in the creek.

24. DWQ observed no sludge upstream of the House of Raeford facility. The water upstream from the House of Raeford facility was reflective and clear. There was no oily, greasy material, and nothing in the vegetation.

25. Clay Howard was the Operations Manager for the House of Raeford at the time. In his October 23, 2009 letter to Rick Shiver, Regional Supervisor of the Wilmington Regional Office, Mr. Howard stated that a representative of HORF met with DWQ (Ms. Willis) on September 9<sup>th</sup>, and though the origin of the sludge was unknown, "our company engaged a contractor with a tanker truck to pump the foreign matter out of the creek and into one of our two

lagoons.” He went on to say that “the contractor pumped two loads of material out of the creek that day,” and that “on the following Friday, the contractor pumped a total of four loads from the creek into the lagoon.” (Pet. Ex. 4)

26. Though there was no direct evidence of a HORF discharge, Mr. Howard felt that as a family man and member of the community, he wanted the sludge cleaned up and out of the creek.

27. On September 15, 2009, Ms. Willis, Mr. Howard and Kenneth Rhame, a U.S. Environmental Protection Agency (EPA) representative met in Mr. Howard’s office. Ms. Willis testified that Mr. Rhame took the lead at the meeting. Mr. Rhame testified that the sludge in the creek appeared to be the same as in the primary lagoon. He also stated that there was a double digit recent fish kill. EPA Investigator Rhame requested that HORF attempt to remediate the creek. He testified that Mr. Howard agreed to take the material out of the creek. Mr. Rhame testified that the State was the lead agency and that HORF was not cited by EPA.

28. There are conflicting accounts of when House of Raeford began to clean the creek. Mr. Howard noted that his dates may be in contrast to other dates and he deferred to DWQ Willis’ dates. Joe Teachey, HORF Waste Water Manager, testified that the clean-up first began on September 14, 2009 and that it continued for four days. This notation was in his logbook that clean-up of the creek had begun on September 14, 2009. He testified that Linda Willis suggested it would be to HORF’s benefit to get the matter in the creek cleaned up.

29. Register’s Septic Tank Pumping, operated by Kenneth Register, was hired by HORF to remove material from Cabin Branch Creek behind the HORF facility. Pumping from the creek began by September 14, 2009. Mr. Register initially used a hose to bring material from the creek to his tanker truck, which was located about 100 feet away. He then drove his truck to Lagoon 1 and discharged it into the lagoon via a hose that was about 25 feet long. Later in the week, material was placed into Lagoon 2. Approximately 1,000,000 gallons of liquid and material were pumped from the creek. About 90% of what was pulled out of the creek consisted of water. There was a difference in what was left of the floating material on the top of the water after pumping by Register’s. The Creek began to clear the first day, but the material on the bottom would then resurface. The cleanup performed by HORF did help to alleviate the impact of the material in the Creek.

30. Mr. Register did not own a hose that was long enough to run from Lagoon 1 to the creek. Mr. Register did not see any hose on the HORF property that was long enough to run from Lagoon 1 to the creek, nor did he see any pump on the HORF property capable of pumping material from Lagoon 1 to the creek.

31. Mr. Register charged HORF \$20,000.00 for the work he performed at Cabin Branch Creek, and he was paid \$20,000.00 by HORF. In assessing penalties against HORF, DWQ did not consider the \$20,000.00 that HORF paid to assist in cleanup of the Creek.

32. DWQ’s Jeffrey O. Poupart, the Point Source Branch Chief for DWQ, testified that it is unheard of to accept unknown contaminants, such as sludge, back into lagoons without

characterizing the contaminant first. Unknown contaminants are not accepted by treatment systems due to the potential for unknown materials in the contaminants to cause an imbalance in the lagoon's biological system as well as the risk to the lagoon-owner of liability for clean-up of potentially restricted materials.

33. Between Lagoon 1 and Lagoon 2 is a valve that is opened and closed by physically turning a wheel. A change in elevation between Lagoon 1 and Lagoon 2 allows water to flow via gravity through a transition pipe from Lagoon 1 into Lagoon 2 when the valve is in an open position.

34. Funds were requested in May of 2009 by Joseph Teachey to replace the valve and pipe because the valve had gotten harder to open and close and there was some corrosion on the end of the transfer pipe. Work was performed on the valve and pipe around September 8 to September 11, 2009.

35. Prior to the actual work being performed on the pipe and valve, Mr. Teachey began lowering Lagoon 1 to aid in that work. Teachey testified that he began to lower the level in the primary lagoon about a week to 10 days prior to beginning work on the pipe. In Mr. Teachey's log book, the first notation that he had begun to lower the level in the primary lagoon was on September 4, 2009. Teachey stated that lowering the level of the primary lagoon began on September 1, 2009, and ended on September 8, 2009. House of Raeford was able to lower the level in the primary lagoon by approximately one foot.

36. The work to replace the transition pipe and valve was performed by Davey Cavanaugh, a third party contractor. Before replacing the pipe and valve, Mr. Cavanaugh used clay to build a semicircular dike off the side of Lagoon 1 to close off the area immediately in front of the existing pipe and valve. After the newly created temporary dike was built, the existing valve was opened to let water within the diked area flow to Lagoon 2. The water that was left was pumped from Lagoon 1 to Lagoon 2 using a small pump with two hoses, one that was 15 feet long and one that was 15 to 20 feet long. The hoses used by Mr. Cavanaugh to pump the small amount of water from Lagoon 1 to Lagoon 2 were not long enough to stretch from Lagoon 1 to Cabin Branch Creek. Mr. Cavanaugh did not own a hose long enough to stretch from Lagoon 1 to the Creek.

37. The entire construction process took three to four days from start to finish, but the temporary dike, transfer pipe and valve were replaced in one day. Other work was performed to build a treated wood barrier or bulkhead around the valve and to dress up the road.

38. Water was able to flow from Lagoon 1 to Lagoon 2 except for the single day where the pipe and valve were replaced. Mr. Teachey stated that the primary lagoon continued to receive between 650,000 to 700,000 gallons a day for the three days between the construction of the berm on September 8, 2009, and the completion of the work on September 11, 2009.

39. James K. Holley, PG, provided extensive information regarding his credentials as a hydrogeologist, based upon both his education and experience. (Pet. Ex. 10.) Mr. Holley was accepted without objection as an expert in the field of hydrogeology.

40. In January 2011, HORF hired Mr. Holley to perform an independent review of the circumstances leading to DWQ citing and fining HORF as a result of the September 9, 2009 anonymous call complaining of materials in the creek originally sighted at the Beaverdam Branch crossings. Mr. Holley testified that there was evidence of potential upstream contributors to the conditions observed in Cabin Branch Creek in September 2009 as well as certain physical characteristics of Cabin Branch Creek that may explain the accumulation of sludge behind the HORF facility.

41. As water enters the Cabin Branch Creek drainage system, materials in the headwaters and further upstream are flushed into downstream areas and eventually conveyed to the area located behind the HORF facility. Immediately downstream of the HORF Facility, Cabin Branch Creek exhibits features that trap floating materials, including numerous fallen trees, sharp turns in the stream channel, and entry of the channel into an abandoned quarry pond. The narrower creek channel flowing behind the HORF facility opens up into a pond formed by a former limestone quarry. As water exits the narrow stream and hits the large pond feature, the velocity of the water drops, which causes backing up of water flow from that point and areas immediately upstream. These characteristics cause a condition that allows trapping of floating material and settleable solids. Mr. Holley opined that it would be possible for matter to accumulate over a period of time at this natural trapping point from the release of materials further upstream.

42. Beavers tend to cut down trees and limbs and build dams which impound waters. Beavers create significant drainage problems for creeks like Cabin Branch by impounding large areas and causing excess water buildup in areas upstream of the beaver dams which can cause stagnation of water. A letter dated June 16, 2009, from the Natural Resources Conservation Service to Linda Wills with DWQ indicates that "the volume of standing water in this drainage system has been improved by removal of beavers and beaver dams obstructing the flow of water. The Beaver Management Assistance Program (BMAP) was employed to trap the creek from the railroad to HWY 117." (Vol. 2, pp. 222, 269; Pet. Ex. 15.) This area is downstream from Valley Protein between the railroad tracks and the headwaters of Cabin Branch toward Highway 117, but upstream from HORF.

43. Carolina By-Products (CBP) or Valley Proteins is a rendering facility that accepts offal from facilities in the area, including the House of Raeford facility. CBP has an NPDES stormwater permit, but does not have a NPDES Permit that allows discharge of process waters to surface waters. CBP's waste is deposited onto a lagoon on-site; CBP is located upstream from the House of Raeford facility.

44. A Notice of Violation from DWQ to Valley Proteins, Inc. dated May 11, 2009 indicated that "Illicit discharges occur from the offal parking/staging area. The offal staging area does not provide sufficient containment to prevent the leakage of offal to the ground exposed to stormwater. The offal area has a discharge point at the southeast corner of the parking area. Structural BMPs will need to be provided to contain and treat this wastewater properly." (Vol. 2, pp. 215-216, 269; Pet. Ex. 13.) The Compliance Inspection Report prepared by DWQ dated April 22, 2009, attached to the May 11, 2009 Notice of Violation indicated the "ditch adjacent to

the offal truck staging area appeared to have wastewater characteristics. . . . It had an appearance of septicity and perhaps some organic content.” (Pet. Ex. 13.) That Report also stated: “Evidence of wastewater discharges from the open tank offal trucks parked in the staging/parking area was observed. The contents of these trucks are considered ‘wastewater’ and therefore any spoilage to the area that does not provide 100% containment, becomes comingled with stormwater and is allowed to discharge to surface waters via the ditch adjacent to that parking area. This type of discharge is considered an ‘illicit discharge.’” (Vol. 2, pp. 217-218; Pet. Ex. 13.)

45. A water sample collected by DWQ upstream of HORF on September 24, 2009, indicated a substandard dissolved oxygen (DO) measurement of 1.01 mg/L located at the railroad tracks at Valley Protein.

46. Duplin Winery is a winery located upstream from House of Raeford. It produces a wastewater from the “washdown of the fermenters after the wine has been made,” which then goes into a small lagoon on the back of their facility. (T p. 612)

47. A Compliance Inspection Report for Duplin Wine Cellars prepared by DWQ dated April 21, 2009, stated that “This facility has been discharging a wastewater from their wine processing operations to a lagoon with an overflow structure that discharges to the ditch behind the facility. The ditch is part of the headwaters to Cabin Branch. The ditch travels to the west to the train tracks, turns north and empties into a wetland that is the headwaters to Cabin Branch. DO was taken in the stream and was 0.5 mg/L. The ditch was full of black septic wastewater with putrid odor.” (Vol. 2, p. 232-33, 271; Pet. Ex. 18.)

48. A Compliance Inspection Report for Duplin Wine Cellars prepared by DWQ dated June 23, 2009, indicated that there was still a discharge to the ditch. “The facility still had a discharge from their lagoon that takes wastewater from the winery. The contacts (Geno Kelly and Patrick Fussell) did not know where all the pipes to the lagoon were coming from.” (Vol. 2, p. 234; Pet. Ex. 19.) The summary to the Report states that “Neither the consultant nor Mr. Fussell knew how much wastewater discharges to the ditch during the course of the month. It is likely the discharge is not continuous throughout the year. The greatest volumes are generated during the grape season August – November.” (Vol. 2, pp. 235, 271; Pet. Ex. 19.)

49. A Compliance Inspection Report for Duplin Wine Cellars prepared by DWQ dated September 23, 2009, indicated continuing noncompliance issues. “The illicit discharge from the lagoon appeared to have been removed, however, the ditch was full of wastewater again.” (Vol. 2, pp. 239, 271-272; Pet. Ex. 21.) A Compliance Inspection Report for Duplin Wine Cellars prepared by DWQ dated September 24, 2009, also indicated “the waste remains in the ditch.” (Vol. 2, p. 241; Pet. Ex. 22.)

50. A water sample collected by DWQ upstream of HORF on September 25, 2009, indicated a substandard DO measurement of 0.35 mg/L located in the ditch behind the Duplin Wine facility.

51. From July until early August 2009, there were only small rainfall events. The weather was abnormally dry, minimal drought conditions. In August, two significant rain events occurred, 2.5 inches on or about August 12, and 3 inches on or about August 31. Large rain events can also serve to mobilize trapped, upstream material and flush it downstream. Mr. Holley stated that material could have been transported from upstream areas within the water column, reached the trapping point behind the HORF facility, and begun to surface and accumulate. He testified that the material could have accumulated over a period of days, weeks or months.

52. Carolina By-Products (CBP) or Valley Proteins was excluded as a source of the sludge material because: (1) DWQ's upstream investigation revealed no evidence of sludge or greasy film; (2) there was no staining upstream which would have revealed a discharge; and (3) DWQ observed good maintenance measures in place at CBP. CBP testified that they had no discharges in any of their four lagoons during the relevant time periods.

53. Duplin Winery was excluded as a source of the sludge. Their waste is a plant waste and the characteristics of their waste are not the same as what was seen behind HORF. It is initially a greenish colored liquid that turns black in color as it sets and becomes septic. DWQ excluded Duplin Winery because: (1) there was no material observed upstream; (2) the waste produced by Duplin Winery is not similar to what was observed; and (3) the waste produced by Duplin Winery may have a foul odor if it is not aerated.

54. The waste water behind HORF was "fresh" waste water. It had not been sitting or stagnating for months. In the instant matter the wastewater started out fresh and turned septic.

55. Parker Bark is a mulch facility located adjacent to the House of Raeford facility. Parker Bark does not generate waste water, but the facility does have storm water runoff that does not have the appearance or characteristics of what was found behind Parker Bark or upstream behind HORF.

56. Cow farms were excluded as a possible source because: (1) the cow farms were located upstream, and there was no material observed upstream from the House of Raeford; and, (2) cow farms could not have produced the quantity of material observed in the creek. In addition, cows do not produce the type of sludge-like material that was observed in Beaverdam Branch.

57. Two hog farms are located on a tributary to Beaverdam Branch downstream from the House of Raeford facility. DWQ excluded the hog farms as a source because: (1) although hog farms produce a waste, the waste is different from the sludge observed; (2) The hog farms reported to DWQ that they had had no recent discharges, and DWQ did not observe any signs of over-topping or spills on September 9, 2009, when they visited the hog farms; and (3) DWQ did not observe anything in the tributary adjacent to the farms.

58. There is no direct evidence that HORF discharged sludge into Cabin Branch Creek. There was no direct evidence of any failure of the HORF wastewater system, clogging of pipes, or problems with the irrigation system. There was no direct evidence that any truck

hauled in sludge to deposit behind the HORF Facility. There was no direct evidence of sludge or waste material in the ditch running parallel to the lagoons, except at the point where the ditch met Cabin Branch Creek. There was no evidence of sludge or waste material further up in the ditch. According to field notes taken by Linda Willis of DWQ, the ditch was “clear of sludge.” (Resp. Ex. 17.)

59. As part of its permit from DWQ, the Petitioner is required to maintain adequate freeboard in all three of its lagoons. Several witnesses testified that prior to September 9, 2009, Petitioner had consistently high freeboard in its primary lagoon. DWQ’s Geoffrey Kegley testified that “The primary lagoon in all of my visits to House of Raeford prior to [September 10, 2009] and on this [September 10, 2009] have always appeared high.” (T pp. 1046-1047) Mr. Teachey testified that the freeboard in the primary lagoon was “running high” and “less than one foot” in violation of HORF’s permit on September 10, 2009. (T pp. 1281-1282) DWQ’s James Bushardt testified that there were high freeboards in the lagoons and he observed floating sludge on the primary lagoon. Mr. Howard testified that the freeboard in the primary lagoon is “always pretty high in parts.” (T pp. 152-155) Mr. Howard stated in testimony that on or around September 10, 2009, the Petitioner’s primary lagoon was filled with a lot of solids.

60. Dissolved oxygen (DO) level readings are one way to determine the presence of pollutants in a stream. For Class C-Sw waters, such as Beaverdam Branch, the DO standard listed in 15A NCAC 2B .0211(3)(b) is not less than a daily average of 5.0 milligrams per liter with a minimum instantaneous value of not less than 4.0 milligrams per liter. However, swamp waters, lake coves or backwaters, and lake bottom waters may have lower values caused by natural conditions. Conditions that can impact the DO level readings include the temperature, the flow in the stream, and the amount of fresh water entering the stream. Low DO levels are common in coastal waters in warm months. It would not be unusual for DO levels to be low in a Class C-Sw during the summer, and it would not be unusual for DO levels to be low in Cabin Branch Creek and Beaverdam Branch in September 2009. Low DO levels are also more likely to be seen during a drought.

61. Prior to September 9, 2009, in the vicinity of Petitioner’s facility the weather had been very dry and drought-like conditions persisted.

62. During September 2009, dissolved oxygen (DO) levels of 0.35, 1.01, 1.65, 2.2 and 3.2 mg/L were observed in areas of Cabin Branch Creek upstream of the HORF facility. (Vol. 2, p. 275; Pet Ex. 26, p. 6.) The DO standard for Class C-Sw waters like Cabin Branch Creek is 4.0 mg/L. (Vol. 4, p. 637.) All of those measurements were below the 4.0 mg/L standard.

63. During September 2009, DO levels of 0.6, 1.3, and 2.7 mg/L were observed in unnamed tributaries and waters draining into Beaverdam Branch. In adjacent but separate drainage subbasins, DO levels of 0.3 and 0.1 mg/L were recorded. (Vol. 2, pp. 277-278; Pet. Ex. 26, p. 6.)

64. The test results performed by DWQ in September 2009, throughout the drainage basin for Cabin Branch Creek, from its headwaters to the downstream reaches, showed low DO

levels that could not be assigned to the presence of the matter found in the creek behind the HORF facility. Low dissolved oxygen was a systemic problem throughout Cabin Branch and its tributaries.

65. When assessing penalties for a violation, DWQ Poupart considered the circumstances surrounding the discharge, including, the Notice of Violation, the facility's response, sampling data, maps, photographs, and the opinions of others involved in the investigation.

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

**CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. The parties received proper notice of the hearing in 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. The Petitioner, is a person within the meaning of North Carolina Gen. Stat. § 143-215.6A, pursuant to North Carolina Gen Stat. § 143-212(4).

3. Pursuant to N.C. Gen. Stat. § 143 Article 21, Respondent is vested with the statutory authority to enforce the State's environmental laws, including laws enacted to protect the waters of the State.

4. The North Carolina courts have generally allocated the burden of proof in any dispute on the party attempting to show the existence of a claim or cause of action, and if proof of his claim includes proof of negative allegations, it is incumbent on him to do so. *Peace v. Empl. Sec. Com'n of N.C.*, 349 N.C. 315, 507 S.E.2d 272 (1998) citing *Johnson v. Johnson*, 229 N.C. 541, 50 S.E.2d 569 (1948). Generally, a Petitioner bears the burden of proof on the issues. To meet this burden, Petitioner must show that Respondent substantially prejudiced its rights and exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule. "The party with the burden of proof in a contested case must establish the facts required by G.S. 150B-23(a) by a preponderance of the evidence." *Britthaven v. N.C. Dept. of Human Resources*, 118 N.C. App. 379, 455 S.E. 2d 455, rev. den., 341 N.C. 418, 461 S.E. 2d 754 (1995). Petitioner in this case carries the burden of proof.

5. In accordance with *Painter v. Wake County Bd of Ed.*, 217 S.E.2d 650, 288 N.C. 165 (1975), absent evidence to the contrary, it will be presumed that "public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and

purpose of the law. Every reasonable intendment will be made in support of the presumption." See also *Huntley v. Potter*, 122 S.E.2d 681, 255 N.C. 619 (1961). The burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rusher v. Tomlinson*, 119 N.C. App. 458, 465, 459 S. E. 2d 285, 289 (1995), aff'd, 343 N.C. 119, 468 S.E. 2d 57 (1996); *Comm'r of Insurance v. Fire Insurance Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). "It is more than a scintilla or a permissible inference." *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 177 (1982). In weighing evidence which detracts from the agency decision, "[i]f, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand" *Little v. Bd. of Dental Examiners*, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983)(citations omitted).

6. Based on an evaluation of all the evidence, the Petitioner has failed in its required burden of proof to show that Respondent was unreasonable in finding Petitioner violated North Carolina Gen. Stat. § 143-215.1(a)(6) by causing or permitting a waste, directly or indirectly, to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications without a permit.

7. Though there is not direct evidence of a release of sludge material from the House of Raeford Farms, in weighing evidence which detracts from the agency decision on the above two matters including analysis and hypothesis presented founded on studies some 16 months after the incident cited, the Undersigned finds that competent evidence is found to support the agency's ruling regarding a discharge of waste into the waters of the State without a permit. Besides the similarities of material found in the lagoon(s) of Petitioner and Cabin Branch Creek, the Undersigned finds persuasive two further facts. First, DWQ observed no sludge upstream of the House of Raeford facility. The water upstream from the House of Raeford facility was reflective and clear and there was no oily, greasy material, and nothing in the vegetation. Second, though Petitioner is applauded for voluntarily offering and indeed cleaning up the creek, the Undersigned is struck with the fact that Petitioner, rather than hauling the material away, chose to place the material into its own lagoons. Testimony revealed that it is unheard of to accept unknown contaminants, such as sludge, back into lagoons without characterizing the contaminant first. Unknown contaminants are not accepted by treatment systems due to the potential for unknown materials in the contaminants to cause an imbalance in the lagoon's biological system as well as the risk to the lagoon owner of liability for clean-up of potentially restricted materials.

8. The testimony and evidence at the hearing showed low dissolved oxygen (DO) levels could not be assigned only to the presence of the matter found in the creek behind the House of Raeford Farms (HORF) facility. Low dissolved oxygen was a systemic problem throughout Cabin Branch and its tributaries. Conditions that impact the DO level readings include the temperature, the flow in the stream, and the amount of fresh water entering the stream. It was not unusual for DO levels to be low in a Class C-Sw during the summer, and it was not unusual for DO levels to be low in Cabin Branch Creek and Beaverdam Branch in September 2009. As such, the preponderance of the evidence for these reasons and others cited in the finding of facts above yields the conclusion that Respondent was in error when citing

Petitioner for causing the depletion of oxygen in Cabin Branch and Beaverdam Branch below the water quality standard for class C-Sw waters of the State.

9. DWQ acted erroneously, arbitrarily and capriciously, and failed to act as required by law or rule in assessing a civil penalty for both a violation of N.C. Gen. Stat. § 143-215.1(a)(6) and a violation of 15A NCAC 2B .0211(3)(c).

10. N.C. Gen. Stat. § 143-215.1(a)(6) prohibits anyone from causing or permitting waste “directly or indirectly, to be discharged . . . in violation of the water quality standards applicable to the assigned classifications” without a permit.

11. N.C. Gen. Stat. § 143-215.6A(a)(2) allows for the enforcement of a civil penalty not to exceed \$25,000 against anyone “who violates or fails to act in accordance with the terms, conditions, or requirements of such permit or any other permit or certification issued pursuant to authority conferred by [G.S. 143-215.1]”

12. The Agency sets forth its authority for civil penalties in 15A NCAC 2J.0104. This regulation provides that penalties may be assessed for “water violations as prescribed in N.C. Gen. Stat. § 143-215.6(a).” (G.S. 143-215.6 has been recodified as §§ 143-215.6A to 143-215.6C) The regulation derives its authority from the statute authorizing penalties as cited above, which refers back to N.C. Gen. Stat. § 143-215.1.

13. 15A NCAC 2B.0211 only sets the water quality standards for Class C waters, with a caveat that “additional and more stringent standards applicable to other specific freshwater classifications are specified in Rules .0212, .0214, .0215, .0216, .0217, .0218, .0219, .0223, .0224 and .0225 of this Section.”

14. The regulation the Agency is citing to fine Petitioner for “allowing settleable solids and sludge in excess of the water quality standard for Class C-Sw waters of the State,” is simply a water standard. The violation of this water standard is governed by the statute which sets the authority for violations and fining. Fining the agency under both the water standard regulation and the statute is misplaced, and, in truth and fact, is fining Petitioner twice for the same violation.

15. DWQ impermissibly assessed a \$25,000 penalty for violation of the statute and an additional penalty for violation of the water quality standards upon which the statutory offense rests. Doing so constituted an impermissible excessive penalty given that Petitioner was penalized twice for the same violation and the maximum penalty of \$25,000 had already been reached.

16. A penalty of \$25,000.00 assessed by Respondent was reasonable and proper for violation of N.C. Gen. Stat. § 143-215.1(a)(6) for causing or permitting waste to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications. In assessing the amount of the penalty, DWQ properly considered the factors required by law. As competent evidence is found which would support the agency assessment amount, that amount must stand.

17. A penalty of \$25,000.00 assessed by Respondent for violation of 15A NCAC 2B .0211(3)(c) for allowing settleable solids and sludge in excess of the water quality standard for Class C-Sw waters of the State was in error.

18. The penalty of \$25,000.00 assessed by Respondent for violation of 15A NCAC 2B .0211(3)(b) for violating the dissolved oxygen water quality standard for Class C-Sw waters of the State was in error. Besides the preponderance of the evidence showing the dissolved oxygen was low for the reasons cited above, the same reasoning regarding 15A NCAC 2B.0211(3)(c) applies to violation of 15A NCAC 2B .0211(3)(b); regarding the dissolved oxygen water quality standard for Class C-Sw waters of the State.

19. As each of the original three penalties assessed by Respondent was for the same amount it is proper and correct that the enforcement costs of \$1,357.95 be reduced by two thirds or \$905.30

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

**DECISION**

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

Based on those conclusions and the facts in this case, The Undersigned holds that Petitioner failed to carry its burden of proof by a greater weight of the evidence that Respondent was unreasonable in finding Petitioner violated North Carolina Gen. Stat. § 143-215.1(a)(6) by causing or permitting a waste, directly or indirectly, to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications without a permit. Further Petitioner failed to carry its burden of proof that Respondent's fine of \$25,000 plus \$452.65 in investigation costs was unreasonable. The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side. Petitioner's evidence does not overbear in that degree required by law the weight of evidence of Respondent in this regard.

Based on the conclusions of law and the facts in this case cited above, the Undersigned holds that the Petitioner has carried its burden of proof by a greater weight of the evidence that violation and fines relating to settleable solids and sludge, and dissolved oxygen standards was erroneous, was arbitrary or capricious, and was not in accordance with the applicable laws and State standards.

NOTICE

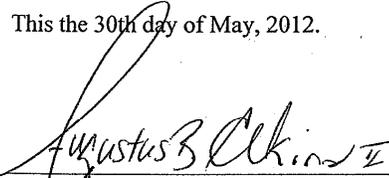
The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this decision, and to present written arguments to those in the agency who will make the final decision.

In accordance with N.C. Gen. Stat. § 150B-36 (for cases filed before January 1, 2012) the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

The agency that will make the final decision in this case is the North Carolina Department of Environment and Natural Resources.

**IT IS SO ORDERED.**

This the 30th day of May, 2012.

  
Augustus B. Elkins II  
Administrative Law Judge

A copy of the foregoing was mailed to:

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ATTORNEY FOR RESPONDENT

This the 31st day of May, 2012.



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**Witnesses called by Respondent**

1. Shirley Gardner
2. Kenneth Thomas
3. Ron McDowell
4. Whitney Rogers
5. Vidya Kumar
6. Pamela Humphrey-Stokes
7. Marilyn Keith
8. David Burton
9. Angela McKnight
10. Averille Tulloch
11. Crystal Laney-Speller

**EXHIBITS**

**Exhibits admitted on behalf of Petitioner except as otherwise indicated (“Pet.’s Ex. \_\_\_”)**

1. Deposition Exhibit 1 - Statement of Whitney Rogers 4-29-10 Bates 131
2. Deposition Exhibit 2 - HCT Pass records GSU 4-18 & 19-2010 Bates 1088-1113\*
3. Deposition Exhibit 3 - MPU assignment sheet 4-19-10 Bates 908-78\*
4. Deposition Exhibit 4 - Bates 1-117\*
5. Deposition Exhibit 5 - Bates 118-255\*
6. Deposition Exhibit 6- Hand Off Care Policy 12-09 Bates 342-43
7. Deposition Exhibit 7 - Hand Care Policy 12-09 Bates 1459-61
8. Deposition Exhibit 8 - Diagram of Central Regional Hospital Bates 300—Admitted for illustrative purposes
16. Staff Reeducation document May 4-7, 2010
30. Observation flow sheets for misc. patients at CRH Bates 1471-1758\*
31. Petitioner paycheck stubs 1/10, 2/10, and 4/10
32. Submitted as an Offer of Proof : CRH Hand Care Policy effective August 2010.
33. Transcript of the Deposition of Whitney Rogers taken on \_\_\_\_\_, 2011.
34. Transcript of the Deposition of Ronald McDowell taken on \_\_\_\_\_, 2011.

**Exhibits admitted on behalf of Respondent except as otherwise indicated (“Res.’s Ex. \_\_\_”)**

1. Job Description
2. Levels of Patient Observation Policy, CPM-L 0020 (effective January 12, 2010)
3. Training Roster, Levels of Observation Policy with Policy dated February 1, 2010
5. Training Roster, New Policies Effective 1/11/2010, six attached policies
6. Training Roster, 2/12/09 – Responsibilities for PCU/Wards with two memos
7. Adverse Sentinel Event Management Investigation Summary Report\*
8. MPU Third Shift Assignment Sheet 4/22/10\*
9. Letter from Whitney Rogers to Advocacy
10. Q15 Observation Flowsheet for Patient R.Y.\*

11. Q15 Observation Flowsheet for Patient B.T.\*
12. April 25-26, 2010 emails
13. April 29, 2010 email with Marilyn Keith handwritten notes
14. Advocacy investigation for Patient R.Y.\*
15. Advocacy investigation for Patient B.T.\*
16. Petitioner Work Plan 2008-2009, Midcycle Review 01/2010
17. Observation Flowsheets March and April 2010 prepared by Angela McKnight\*
18. Official Notice of 25 N.C.A.C. 1J.0604
19. Official Notice of 25 N.C.A.C. 1J.0614
20. DHHS Directive No. III-8 effective January 12, 2009
21. Investigatory Status letter to Petitioner, April 23, 2010\*
22. Pre-Disciplinary Conference Memo to Petitioner, May 4, 2010\*
23. Dismissal Letter to Petitioner, May 5, 2010\*
26. Letter from DHHS Secretary, August 16, 2010 received without any attachments
27. Warnings and documented counseling notices for Petitioner\* offered but not received
28. Petitioner's Discovery Responses\* offered but not received

\* Under seal pursuant to protective order.

**ISSUE**

Whether Respondent had just cause to terminate Petitioner from her employment as a Health Care Technician at Central Regional Hospital for Unacceptable Personal Conduct in accordance with State Personnel Policy for willful violation of a known or written work rules, i.e., Central Regional Hospital's Clinical Practice Manual (CPM – L.0020) Levels of Observation and Central Regional Hospital's Nursing Administrative Policy (NA-H-05) Hand-Off Care Communication.

**PRELIMINARY MATTERS**

Prior to beginning the hearing, the Respondent moved to seal the record to protect the confidentiality of the residents of Central Regional Hospital ("CRH") and certain personnel records of witnesses testifying at the hearing, or in the alternative, redaction of records introduced into evidence so that first initials are used. The motion was granted.

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

**FINDINGS OF FACT**

1. This matter is properly before the Office of Administrative Hearings ("OAH"), which has both personal and subject matter jurisdiction. The parties were properly noticed for hearing.

2. During April 2010, Central Regional Hospital (CRH) was and still is a state run psychiatric hospital in Butner, North Carolina. CRH is organized into a number of different patient care units (PCU's). Those units include, among others, the acute care unit (ACU), the geriatric services unit (GSU), and the medical psychiatric unit (MPU). *Id.*

3. Patient care at CRH was and still is provided by physicians who are assisted by other professional staff that includes, but is not limited to, Registered Nurses (RN's), Licensed Professional Nurses (LPN's), and Health Care Technicians (HCT's). Res.'s Ex. 2, pp. 3-5; and Tr. 571, and 517-19.

4. In the GSU, at all times relevant to this action, CRH regularly uses and has used RN's, LPN's, and HCT's. Tr. 517-19.

5. In the MPU, at all times relevant herein, CRH regularly uses and has used RN's and LPN's to assist the physicians working in that unit. The medical unit does not have regularly assigned health care technicians like the other units. The MPU uses the technicians from the GERO [GSU] unit when they are needed and available. Res.'s Ex. 14, p. 64.

6. During the time relevant to the incident at issue, HCT's were and still are responsible for providing direct care to CRH's patients on assigned PCU's and to carry out other specific assignments as related to unit activities. HCT's work hours according to assigned shifts and work every other weekend. The 1<sup>st</sup> shift hours were from 7:00 a.m. to 3:30 p.m., the 2<sup>nd</sup> shift hours were from 3:00 p.m. to 11:30 p.m., and the 3<sup>rd</sup> shift hours were from 11:00 a.m. to 7:30 a.m.. Res.'s Ex. 1, p. 1. The overlap in the times allows for the on-coming shift to engage in "shift report" wherein the on-coming shift is informed by the out-going shift of what has occurred with the patients during the ending shift as more fully set forth below.

7. At all times relevant to this proceeding, Petitioner Dorothy Williams ("Petitioner") was a career state employee, as defined by N.C. Gen. Stat. § 126-1, and was subject to the provisions of the State Personnel Act. Pet.'s Ex. 4, p. 17; Pet.'s Ex. 5, pp. 205-255; and Res.'s Ex. 16.

8. Petitioner was employed as a Health Care Technician (HCT) at John Umstead Hospital (JUH) and then Central Regional Hospital (CRH) from May 5, 2000 until her dismissal from CRH on May 10, 2010 for unacceptable personal conduct. R. Ex. 1, 23.

9. On September 2, 2010, Petitioner filed a Petition for a Contested Case Hearing with OAH, alleging that she was discharged without just cause from her position as Health Care Technician from Central Regional Hospital ("CRH") on May 5, 2010 based upon an incident that occurred in the morning of April 23, 2010. Her petition also alleges discrimination based on race and retaliation.

10. Petitioner was regularly assigned to work in the Geropsychiatry Unit (Gero). The patient population on Gero generally consists of patients sixty-five years old or older who are psychiatrically ill. Petitioner occasionally worked on CRH's Medical Service Unit (MPU), when needed because patient acuity required additional staff. The patient population on the MPU consists of patients who are medically, as well as, psychiatrically ill. Burton, T. 44-45; Kumar, T. 300.

11. The skill set for a HCT needed on the MPU is no different from the skill set needed for a HCT on Gero. In addition, there is no difference in hospital policies between the MPU and Gero Units. Burton, T. 57-58.

12. HCTs work under the supervision of a Registered Nurse (RN). The HCT's duties are delegated by and completed under the supervision of the charge nurse covering the patient care unit. Petitioner's nurse supervisor on Gero was Marilyn Keith. Burton, T. 45, 47, 85. Petitioner's nurse supervisor when she worked on the MPU was Vidya Kumar, RN. Burton, T. 45, 47, 85; Burton, T. 45, 47, 85; Kumar, T. 299.

13. Petitioner's job duties as a HCT included, "Documents on progress notes, flow sheets, unit worksheets according to hospital policy" and "Employees must demonstrate skills in providing: Ability to document per CRH policy including admission HCT checklist, progress notes, monthly HCT note, Medical or Behavioral restraint, intervention flow sheets, levels of observation flow sheet." Petitioner's job description states in regard to the work environment at CRH, "Psychiatric hospitals are by nature dynamic environments. Changes in patient behaviors are not predictable and the patient population changes. Changes are made in policies and procedures from time-to-time which impact directly on the role of HCT." Williams, T. 661-662; R. Ex 1.

14. Petitioner received training on, among other things, CRH's Levels of Patient Observation Policy, CPM-L.0020; Hand-off Care Communication Policy, NA-H-08; and Responsibilities for PCU's/Wards Memorandum. Petitioner's signature appears on the training rosters which accompany these policies. Williams, T. 663-664; R. Ex. 3, Ex. 5, Ex. 6. The Clinical Practice Manual requirements are much the same as those spelled out in the Nursing Administrative Manual.

#### POLICIES

15. Pursuant to CRH's Levels of Patient Observation Policy, CPM-L.0200, the CRH written policy effective since at least January 2010, regardless of the shift and unit involved, CRH always has a charge RN who is responsible for, among other things, assuring that the level of observation prescribed by the physician is implemented for all patients on the ward and that staff are appropriately interacting with the patients and engaging them in activities for that shift. The charge RN is responsible for ensuring that assignments are clear on ward assignment sheets, and that staff are assigned to relieve staff for breaks or meals for that shift. The petitioner signed a training roster before April 2010 indicating that he had reviewed this Memo. Tr. 663-64; and Res.'s Ex. 2, Ex. 3.

16. At all times relevant to the incident in April 2010, in the MPU at CRH at least three RN's or LPN's were assigned to work each shift. One RN's is assigned to work as the charge RN. The other two RN's or LPN's are to work as the "treatment" RN or the "medication" RN. *See, e.g., Res.'s Ex. 8, and Pet.'s Ex. 3, pp. 910-12, 918-20, 925-27, 935-37, 945-47, 956-58, and 967-69, and Tr. 60-61, 135, 150, and 610.*

17. CRH's Levels of Patient Observation Policy, CPM-L.0200, contains a section which relates to Hand-offs and Hand-off Care Communication, Section E. Hand-off care communication is defined in this policy as, "a real time interactive process of passing patient[s] specific information from one caregiver or team to another for the purpose of ensuring the continuity and safety of the patient's care." Specifically for health care technician's, the policy provides, "health care technician staff will pass on the patient's information card to the oncoming HCT as well as give a verbal report of any significant changes in the patient." This policy is a hospital-wide policy and is available to staff in hard-copy on any patient unit. It is also available on-line. The phrase "real time, interactive process" is interpreted to mean a face-to-face communication. This is a regular practice as well as being a known and/or written work rule. *R. Ex. 2, 3. Burton, T. 108, 127; Keith, T. 270- 271, 295; Rogers, T. 171; Speller, T. 212, 215-216, 241; Kumar, T. 308; McKnight, T. 333-334.*

18. In CRH, a physician is responsible for and required to set the level of observation for all patients in any PCU in CRH. According to CRH written policy, these levels of patient observation include the following:

1. "Q 30 Minute Observation Level"
2. "Q 15 Minute Close Observation Level"
3. "1:1 E (Eye view) and 1:1 A (Arm's length) observation levels"

*Res.'s Ex. 2, p. 3*

19. A patient's physician writes an order for a patient to be on Q-fifteen level of observation if the patient has a high risk for falls, has unpredictable behavior, or is on fluid restriction. When a patient is on Q-fifteen for fluid restriction, this requires the nursing staff assigned to the patient to monitor the patient's fluid intake to ensure they do not receive excessive fluids. *Burton, T. 100; Kumar, T. 301.*

20. CRH's Levels of Patient Observation Policy defines Q-fifteen minute observation level as staff must interact with, observe and document the location and activities of their assigned patient every 15 minutes on the patient's "Observational Flow Sheet" at the time they observed the patient. *Ex. 2, 3.*

21. A patient observations flow sheet informs the nursing staff of the patient's assigned level of observation, such as Standard Q-30 where the patient is observed and documented every thirty minutes and Close Q-fifteen where the patient is observed and documented every fifteen minutes. The observations flow sheet contains a chart where observations of the patient can be documented every fifteen or thirty minutes as required.

22. Under CRH policy, Q-fifteen observation does not require that the HCT or other professional observer be constantly observing or constantly in the presence of the patient. It only requires that the patient be observed for safety at least once every 15 minutes. Tr. 99-100, and 581.

23. The time chart lists the hour of the day in military time in the left hand column along the vertical line. Across the top of the chart along the horizontal line each hour is broken into fifteen minute blocks where the staff member assigned to the patient indicates in that block the location of the patient at that time and the staff member signs their initials. This chart documents that a patient has been observed per their assigned level of observation and indicates where the patient is located and what they are doing at the time of observation. Edwards, T. 512-14; R. Ex. 10, 11; P Ex. 30.

24. CRH's Hand-Off Care Communication Policy, NA-H-05, is a nursing department policy which standardized the hospital's process of hand-off communication between caregivers at CRH. Although labeled as a "Nursing Administrative Policy", the stated purpose of this policy "is to standardize the approach to 'hand off' communications among caregivers, including an opportunity to ask and respond to questions." Keith, T. 270; Ex. 5.

25. Petitioner is not a nurse; however the Hand-off Care Communication Policy specifically addresses HCTs and the hand-off communication process. The policy states, "[h]ealth care technician (HCT) staff will pass on the patient's information card to the oncoming HCT as well as give a verbal report of any significant changes in the patient." Hand-off care communication is a process performed face-to-face and this is both a written and a known work rule. If hand-off is not properly executed, then patient safety can be compromised. R. Ex. 5. Burton, T. 41; Speller, T. 215-216, 241; Keith, T. 271; McKnight, 333-334. Kumar, T. 308.

26. Hand-off communication occurs at shift change and when temporary responsibility for a patient is transferred to another nursing staff member when the assigned nursing staff member leaves the patient unit for a period of time, such as meals or breaks. Burton, T. 41 Ex. 5.

27. The language pertaining to HCTs and hand-offs which appears on the Levels of Patient Observation Policy and the Hand-off Care Communication Policy is identical. There is nothing new or different about what is required of HCTs performing hand-off care communication as it relates to the two policies. Petitioner's signature appears on the training rosters for CRH's Levels of Patient Observation Policy and Hand-off Care Communication Policy to indicate she read and understood the policies. R. Ex's. 2, 3, 5. Burton, T. 41; Keith, T. 261, 271; Thomas, T. 451; Edwards, T. 534.

28. The hand-off care communication policy requires that a staff member assigned a Q-fifteen patient to hand-off their patient clipboard to the other staff member at shift change or when they need to take a break. Rogers, T. 170; McKnight, T. 333-334.

29. If a nursing staff member wishes to leave the unit prior to the end of their shift, the individual must seek permission from the charge nurse and perform hand-off communication with another staff member who accepts the hand-off communication as evidenced by receiving information regarding the patient and the clipboard with the patient's observation flow chart. Burton, T. 60; Rogers, T. 156; Keith, T. 275.

30. Each shift has a charge nurse and the charge nurse is the head nurse for the shift. The charge nurse is ultimately responsible for supervision of all staff and patients during the shift and coordinates each patient's care during the shift. This written work rule is set forth in CRH's "Responsibilities for PCU's/Wards Memo" to the nursing staff, effective February 10, 2009. Stokes, T. 390-395; Ex. 6; Kumar, T. 301-302; Burton, T. 38-40.

31. The "Responsibilities for PCU's/Wards Memo" provides that the charge nurse has ultimate responsibility for the planning, delegation, supervision, and evaluation of the patient care provided by staff on the PCUs/Wards. It also provides that all staff should report to the charge nurse prior to changing assignments with another staff member or before leaving the patient care unit. This memo applies to nurses, licensed practical nurses, and HCTs working on the patient care units. R. Ex's. 2, 5, 6; Stokes, T. 393.

32. Petitioner's signature appears on the training roster for the "Responsibilities for PCU's/Wards Memo" to indicate she read and understood the memo. R. Ex. 6

33. When a policy was revised or new policy was put into place, the unit nurse managers would circulate the policy and a training roster to the nursing staff members on each shift as part of staff training. The policy and its accompanying training roster were typically attached to a clipboard and circulated to each shift at varying times, but often at the beginning or end of the shift. Each nursing staff member is asked to read the policy and sign the training roster which indicates they were trained on the policy. CRH policies in effect are available to staff in hard-copy on the unit and internally on-line. Additionally, nursing staff members who wish to have a personal copy of new or revised policies use the copy machine on the unit to make a copy. Staff members with questions regarding new or revised policy are provided answers when addressed to their supervisors. Mele, T. 598; Reed, T. 632, 635; Keith, T. 260-263, 270, 295; Edwards, T. 504; Bailey, T. 573, 577, 582; Smythe, T. 615-616, 618.

34. Third shift is from 11:00 p.m. to 7:30 a.m. and first shift is from 7:00 a.m. to 3:30 p.m. Ex. 1. During the one-half hour shift overlap in the shift time period on or before April 23, 2010, the charge nurse conducted what was referred to as "shift report" or "report" in which outgoing staff shared patient care information with incoming staff in a staff meeting run by the charge nurse assigned to each shift. Shift report for the first shift is scheduled to begin at 7:00 a.m. It is not and was not unusual for shift reports in the MPU to sometimes run for more than the one-half hour shift overlap. In contrast, shift reports in the GSU normally did not last for more than the one-half hour shift overlap. Tr. 123, 516-17, 334-35, 522, 527, and 579; and Res.'s Ex's. 1, 9; Burton, T. 77.

35. During shift report, the outgoing shift's charge nurse reviews each patient's information for the past twenty-four hours with the oncoming shift's nursing staff including each

patient's behaviors, vital signs, fluid intake, nutrition, and medication changes. Burton, T. 123; Kumar, T. 303-304; Rogers, T. 152; Keith, T. 290.

36. While shift report is occurring, the outgoing shift's staff is covering the floor. Per hand-off communication policy, at the end of shift report, the HCTs are supposed to hand-off their assigned patient's to the oncoming nursing staff by passing along the clipboard with the patient information card and verbally exchange information regarding their assigned patients. Burton, T. 123; Rogers, T. 152, 153; Kumar, T. 305; McKnight, T. 333-335, 341, 344.

37. If shift report ran past 7:30 a.m. and hand-off care communication has not occurred between the outgoing shift and oncoming shift, then the outgoing third shift staff member is responsible for observing and documenting their Q-fifteen patient's observational flow chart until the oncoming first shift has relieved them and hand-off care communication has occurred. Kumar, T. 306; McKnight, T. 335-337; Speller, T. 204, 237; Burton, T. 80; Reed, T. 633-634.

38. The court took official notice of 21 NCAC 36 .0217(c)(9), which is applicable to the N.C. Board of Nursing, states, "Abandoning or neglecting a client who is in need of nursing care, without making reasonable arrangements for the continuation of such care" constitutes grounds for discipline for licensed nurses.

#### **The Events Surrounding Incident of April 23, 2010**

39. On the night of April 22, 2010 and morning of April 23, 2010, Petitioner was assigned to work the third shift from 11:00 p.m. to 7:30 a.m. on the Medical Unit (MPU) and was assigned to two patients with Q-fifteen level of patient observation, Patient Y and Patient T.

40. On April 23, 2010, first shift began to arrive and report to shift report. Shift report did not begin promptly at 7:00 a.m. because first shift nurse Donna Anderson was late for her shift. First shift report lasted past 7:30 a.m. until approximately 7:45 a.m. Rogers, T. 152, 156; R. Ex. 9.

41. According to the MPU First Shift Assignment Sheet for the morning of April 23, 2010, Nurse Toy Blevins was assigned as Charge Nurse. Veronica Reed was still in training and working as Ms. Blevins "orientee." According to the schedule, Nurse Anderson was scheduled to be responsible for patients T and Y and she would be responsible for their Q-fifteen observations. It does not appear that a HCT was scheduled for the 1<sup>st</sup> shift in the MPU for that day. Ms. Blevins did not testify in this contested case hearing. Pet.'s Ex. 3, p. 945.

42. At approximately 7:15 a.m., Nurse Pettaway left the MPU floor complaining of a headache with the knowledge and consent of the third shift charge nurse, Ms. Whitney Rogers. At the time Ms. Pettaway left the floor, she was the medication nurse for the 3<sup>rd</sup> shift whose general responsibility included patients T and Y who were also under Q-fifteen observation by the petitioner. Res.'s Ex's. 8, 9; Pet.'s Ex. 33, pp. 9-11; and Tr. 77-78.

43. Ms. Rogers replaced Ms. Pettaway with an unidentified nurse from the 1<sup>st</sup> shift who assumed the medication nurse duties of Ms. Pettaway and ostensibly her status as the nurse whose general responsibility included patients T and Y. Pet.'s Ex. 33, pp. 9-11 (transcript of the deposition of Whitney Rogers); and Res.'s Ex. 8. Nurse Pettaway's shift would have ended in fifteen minutes or as soon as the shift report for first shift ended.

44. When Nurse Donna Anderson arrived late for shift report, it was after the need to replace Ms. Pettaway had been resolved. Ms. Anderson and the petitioner both saw and verbally acknowledged each other before the petitioner left the MPU. Res.'s Ex. 9, and Pet.'s Ex. 33, pp. 9-11.

45. Because Ms. Anderson had not arrived in shift report until after Ms. Pettaway left due to illness, Ms. Anderson was not the nurse who originally replaced Ms. Pettaway.

46. On the morning of April 23, 2010, Ms. Reed arrived on time for the shift report. Ms. Reed was still in training at that time, was working with nurse Blevins, and was not independently assigned responsibility for any patients; however, the Observations Flow sheet show that Ms. Reed made the observations from 0800 (8:00 a.m.) through 1545 (3:45 p.m.) for Q-15 Patient T. For Patient Y, the observations were made by both Toy Blevins and Ms. Reed for those same times. There are no initials indicating observations for either patient for 7:30 a.m. or 7:45 a.m. on the morning of April 23, 2010. Res. Exs. 10, 11, Pet's Ex. 3.

47. Petitioner contends that whoever replaced Ms. Pettaway assumed the role of the medication nurse on the floor of the MPU for the 3<sup>rd</sup> shift with that nurse's "primary patients" being patients T and Y. Pet.'s Ex. 33, pp. 9-11; and Res.'s Ex. 8. It is important to note that the Petitioner does not know the nurse's name and yet this is the person who would be responsible for relieving her. In other words, the Petitioner does not know who was to relieve her from the duties of those two patients, and therefore, obviously did not "hand off" to that person.

48. Whomever the nurse was who relieved Nurse Pettaway was in that position only to finish third shift, and there was a HCT assigned to those patients for third shift—the Petitioner. Nothing about Nurse Pettaway leaving early obviates Petitioner's responsibility for properly handing off the care of those two patients.

49. At approximately 7:10 a.m., Petitioner answered the telephone at the horse-shoe shaped work station on the Medical Unit (MPU). The call was from a Doctor on another unit who needed someone to draw blood, so Petitioner passed the telephone call to Mr. McDowell. After hanging up, Mr. McDowell went to the room where report was taking place and told the third shift charge nurse Whitney Rogers that he was going to another unit to draw blood from a patient as requested by a doctor on that unit. Ms. Rogers approved Mr. McDowell's performing this task. Mr. McDowell took the blood-draw cart and left the MPU a few minutes later through double doors. McDowell, T. 136-137, 140,142-143; Williams, T. 651; R. Ex. 15, pg. 126; Rogers, T. 152.

50. Petitioner asserts that after Mr. McDowell finished his conversation and hung up the phone they had a conversation where she told him she was leaving. Specifically, Petitioner testified she said to Mr. McDowell, "Ron, I will be leaving as soon as we finish with the trays

and everything.” Petitioner claims that Mr. McDowell responded by saying, “Leaving” to which she again said, “I be going home soon.” Williams, T. 648, 667.

51. Mr. McDowell had no recollection that Petitioner told him that she was about to leave. In her written statement, Petitioner acknowledges that Mr. McDowell may not have heard her. Petitioner’s contention of the conversation with Mr. McDowell above is not consistent with her statements and other credible evidence. McDowell, T. 139.

52. Petitioner has admitted that she left the unit before the end of her shift. At one point she has said she left about five minutes before the shift ended. She has contended that she left at approximately 7:25 am; however, part of her contentions has been that shift ends at 7:15 am. While there has been some question concerning the time stamp on the photographs entered into evidence, the time stamp showing Petitioner leaving the unit is approximately 7:18 a.m. Williams, T. 674; R. Ex. 14, pg. 78; 15, pg. 134.

53. There was no other staff person remaining on the floor after Petitioner left the unit. Mr. McDowell returned from drawing blood approximately twenty to twenty-five minutes later when shift report was just finishing. McDowell, T. 137; R. Ex. 15, pg. 133.

54. During shift report the call bell alarm went off because a HCT needed to use the restroom. R. Ex. 9. A nurse from first shift went to relieve the HCT and it was at that time that Ms. Rogers became aware that Petitioner may have left the MPU. Ms. Rogers did not see Petitioner at the nurse’s station or on the floor. Petitioner did not report off to Ms. Rogers or anyone else prior to leaving the MPU. Rogers, T. 152-154, 156; R. Ex. 9.

55. While shift report was occurring, Petitioner remained responsible for her two patients with the Q-fifteen minute levels of observation, as well as, being responsible for covering the floor and assisting other HCTs when shift report is in progress. According to the Observations Flow Sheet, Petitioner performed the majority of Q-fifteen observations for her two assigned patients, including the 7:15 a.m. check; however, Petitioner did not record the 7:30 a.m. Q-fifteen observation and documentation. Burton, T. 52-53; Rogers, T. 153-154, 157; Williams, T. 657; R. Ex. 10, p. 3; Ex. 11; McKnight, T. 334-335.

56. While there are several examples of other nurses and HCTs not properly documenting Q-fifteen observations on the Observations Flow Sheet, Petitioner failing to document this particular observation is consistent with the other credible and believable testimony, including her own statements, which indicate that she left the unit and did not make the 7:30 a.m. Q-fifteen observation.

57. Upon discovering Petitioner left without reporting off to her, Ms. Rogers informed the Unit Nurse Manager, Ms. Kumar. Ms. Kumar informed her supervisor, Mr. David Burton; Petitioner’s supervisor, Ms. Marilyn Keith; and the patient advocate, Ms. Crystal Laney-Speller. Kumar, T. 309; Rogers, T. 154; R. Ex. 9.

58. Mr. Burton also informed Ms. Shirley Gardner, the Associate Chief Nursing Officer for CRH, about the incident. Ms. Gardner asked Mr. Burton to contact her when the advocacy investigation was complete in order to review the findings. Mr. Burton and Ms. Keith also initiated an investigation on the unit which included talking to individual staff members and Petitioner about the incident. Burton, T. 47-48; Keith, T. 272-273; Gardner, T. 413.

59. On April 23, 2010, Ms. Keith met with Petitioner to discuss the allegations against her and to take Petitioner's statement of the incident. At that time, Petitioner was placed on investigatory leave with pay due to alleged abandonment; it was reported that Petitioner did not report off to the charge nurse prior to leaving, thus, leaving the floor unsupervised. During that meeting, Petitioner gave Ms. Keith a written statement which stated she left the unit at 7:25 a.m. Keith, T. 272- 274; Williams, T. 673-674; R. Ex. 14, pg. 78; R. Ex.15, pg. 134; R. Ex. 21.

60. On April 25, 2010, Petitioner wrote an email to Ms. Keith and Mr. Burton referring to the meeting on April 23, 2010. In the email, Petitioner writes she left the unit without telling the charge nurse but that she told Mr. McDowell she was leaving. She qualifies her statement by stating that she cannot state for sure whether or not he heard her statement. In addition, Petitioner wrote that for as long as she has worked on the MPU, the first shift nurses told her she could leave at the end of her shift and that she did not have to wait around and that techs on the MPU would leave at the end of their shift regardless of there being someone on the unit or not. Burton, T. 55-56, Williams, T. 673-674; R. Ex. 12. Her contentions that others had told her for some time that it was alright for her to leave early were not borne out by other credible and believable evidence.

61. Patient Advocate, Ms. Speller, received a report that Petitioner neglected two patients on April 23, 2010. Ms. Speller was informed that two patients were left unattended for a short period of time at the end of third shift. On April 28, 2010, Ms. Speller and Mr. Burton met with Petitioner to discuss the events of April 23, 2010. In that meeting, Petitioner stated she passed out breakfast trays at 7:00 a.m. Petitioner stated she answered the telephone and gave the telephone to Mr. McDowell. After he hung up, Petitioner claims that she told Mr. McDowell that she would be leaving soon and he walked away without replying. Petitioner stated she observed and documented her patients at 7:15 a.m. and left the unit at 7:25 a.m. according to the wall clock. Petitioner stated she gave her patient information to Mr. McDowell who was standing in the triage room. Speller, T. 179-183; R. Ex. 14, pg. 64, R. Ex. 14, pg. 117. Burton, T. 57;

62. Petitioner's contention that she gave the patient information to Mr. McDowell is not borne out by the photographs and other competent and credible evidence.

63. Mr. McDowell does not recall Petitioner telling him that she was leaving. Mr. McDowell did not see Petitioner after he returned to the unit from performing the blood draw. Mr. McDowell did not accept responsibility for Petitioner's patients. McDowell, T. 138-139.

64. Video cameras are located throughout CRH and are present on the MPU. It is a regular practice during an advocacy investigation to review the video footage and produce still images from relevant video frames. Speller, T. 194. Although the accuracy of the time stamp

has been questioned, the still frame photographs produced from the video shows the following:

- Petitioner walks by the horse-shoe shaped work station holding what appears to be a bag walking towards an area of the MPU where there are chairs and a TV at 7:10:29 a.m. Speller, T. 197, 253; R. Ex. 14, pg. 69; R. Ex. 15, pg. 130.
- Mr. McDowell appears to be leaning over the horse-shoe shaped work station at 7:13:20 a.m. Speller, T. 198; R. Ex. 14, pg. 70, R. Ex. 15, pg. 129.
- Mr. McDowell is walking away from the horse-shoe shaped work station and Petitioner is sitting in the day room against the wall where her leg is visible at 7:13:25 a.m. Speller, T. 253; R. Ex. 14, pg. 71; R. Ex. 15, pg. 128.
- Mr. McDowell is seen walking down a hall to get the blood draw cart at 7:13:48 a.m. Speller, T. 198; R. Ex. 14, pg. 72, R. Ex. 15, pg. 127.
- Petitioner leans over the horse-shoe shaped station in this still frame to place her clipboard with patient information face down on it at 7:17:34 a.m. Speller, T. 198, 254; Thomas, T. 461, 474-475; Williams, T. 650; R. Ex. 14, pg. 75, R. Ex. 15, pg. 124. Ms. Williams placed the clipboard upside down on a small shelf on the horseshoe so it could not be observed by someone passing by. Williams, T. 658.
- Petitioner leaves the unit through a door at the end of the hallway while the clipboard remains on the horse-shoe shaped work station at 7:18:19 a.m. Speller, T. 198, 254-255; R. Ex. 14, pg. 76; R. Ex. 15, pg. 123. The clipboard does not appear to be on the small shelf as Petitioner alleged, but on the desk portion of the horseshoe. R. Ex. 14, pg. 76, 75; R. Ex. 15, pg. 123, 122.

65. There is no indication from the photographs taken from the video tape that Mr. McDowell returned to the area prior to Petitioner leaving the area, or that Petitioner stopped at any other room on her way out of the unit to talk to anyone.

66. The location of the video camera, along with the date and the time of the still frame, appears on the printout. The date and time may not be manipulated by individual(s) reviewing the video. While reviewing the video, Ms. Speller compared the ward's wall clock to the time on the video and the times are approximately within one minute of each other. Speller, T. 194, 196, 206; R. Ex. 14, pg. 130.

67. While Petitioner raises the issue of the exact time of her departure, the exact time is not critical in resolving the issues herein. Petitioner admits leaving early. The issue then becomes what if any policy violations have occurred and what if any consequence follows.

68. During the course of the advocacy investigation, Ms. Speller conducted interviews and obtained written statements from the Petitioner, Ms. Kumar, Ms. Rogers, Ms. Tulloch, Ms. Anderson, Mr. McDowell, Ms. Blevins, and Ms. McKnight. Ms. Speller also

reviewed video surveillance footage. Speller, T. 179; R. Ex. 14, pgs. 69-76; R. Ex. 15, pgs. 122-130.

69. Based on interviews with staff and witnesses, a review of video surveillance footage, and a review of policies and procedures, Ms. Speller substantiated the allegation that Petitioner neglected both Patient Y and Patient T. In addition, Ms. Speller substantiated two policy violations against Petitioner for violating the Hand-off Care Communication Policy and Levels of Patient Observation Policy. Speller, T. 192-193, 199-200; R. Ex. 14; R. Ex. 15.

70. Following advocacy's investigation, Ms. Gardner, Associate Chief Nursing Officer, reviewed the video footage and advocacy's findings with Mr. Burton. Mr. Burton recommended Petitioner be dismissed based on Petitioner leaving prior to the end of her shift, Petitioner not reporting off, and Petitioner leaving her patients unattended. Ms. Gardner felt Petitioner violated the Levels of Patient Observation Policy by not handing her patients off to another staff member thereby leaving them unattended and in danger. Ms. Gardner also considered the unit and patient population on which Petitioner was working at the time of the incident, in that the patients on the medical unit (MPU) have serious medical conditions in addition to their psychiatric conditions. Gardner, T. 415- 417,425.

71. Ms. Gardner spoke with Ken Thomas in Human Resources to review the details of the incident and to discuss with him the appropriate disciplinary action. Mr. Thomas reviewed the video to ensure Petitioner was being treated fairly and to determine if the allegations against Petitioner actually occurred. After reviewing the video, Mr. Thomas determined Petitioner did not perform hand-off communication before leaving the unit. Mr. Thomas did not see Petitioner engage in dialogue with another staff member, including Mr. McDowell, prior to leaving the unit. Mr. Thomas and Ms. Gardner discussed other instances at CRH where an employee was dismissed for failing to perform hand-off communication. Thomas, T. 437-438, 445, 461-462. Gardner, T. 415.

72. CRH has a zero tolerance policy for abuse, neglect, and exploitation of patients. After reviewing information about the incident and considering the zero tolerance policy, it was determined that dismissal would be the appropriate disciplinary action because Petitioner failed to perform hand-off communication prior to leaving the unit, thereby, leaving her patients unattended constituting neglect. Gardner, T. 415-416; Thomas, T. 438-439.

73. Reeducation is typically the first thing management does after an incident where a staff member is disciplined for violating a policy. Staff is reeducated on the policy or policies at issue to ensure they have a clear understanding of the policy and procedures in order to prevent the same policy violation from occurring again. Gardner, T. 418; Ex. 7. Burton, T. 122, 125; Gardner, T. 418. Reeducation implies that staff has already been previously educated on the policy or procedure.

74. A pre-disciplinary conference was held on May 4, 2010 at 10:30 a.m. by telephone. A pre-disciplinary conference is an opportunity for the employee to provide

additional information about the allegations against them. Petitioner did not present any information in mitigation of her actions. Burton, T. 64-65, 67; R. Ex. 22.

75. Petitioner was dismissed via letter that effective May 5, 2010 for unacceptable personal conduct for the willful violation of a known or written work rules, specifically, violation of CRH Level of Patient Observation Policy CPM-L.0200 which sets out the procedure for hand-offs as set forth above. Burton, T. 66-67, Thomas, T. 436; R. Ex. 23.

76. Following dismissal, Petitioner properly appealed her dismissal through an internal grievance process and exhausted her administrative remedies. The Secretary of DHHS upheld her dismissal based on "just cause" via letter dated August, 16, 2010. Thomas, T. 442; R. Ex. 26.

77. At different times throughout this process, Petitioner had requested her union representative to be present. Per DHHS Directive III-8, an employee may not have a representative, including their union representative, present at any step of the internal grievance process. Thomas, T. 453-455. R. Ex. 20.

78. Petitioner's petition alleged discrimination, but Petitioner did not present evidence to support that claim, and therefore, the Petitioner's claim based on discrimination should be dismissed.

#### **RELEVANT PERSONNEL**

##### **Respondent's Witnesses**

79. David Burton, RN, has been employed for over twenty-seven (27) years with John Umstead Hospital ("JUH") and CRH after JUH closed. On April 23, 2010, he was employed by Central Regional Hospital as a Unit Nurse Director/Interim Chief Nursing Officer covering both the GSU and the MPU.

80. Mr. Burton's duties include overseeing staff training on CRH policies and procedures, direct supervision of unit nurse managers and clinical nurse specialists, and indirect supervision of the nurses, licensed practical nurses, and unlicensed staff. Burton, T. 13-15.

81. Mr. Burton also conducts internal investigations when disciplinary actions are being considered. The investigations include interviewing staff, witnesses, and patients. After completing an investigation, Mr. Burton along with the Associate Chief Nursing Officer and a Human Resources Officer jointly make a decision regarding the appropriate disciplinary action following an investigation, which is the procedure followed in this case. Burton, T 15, 119.

82. Mr. Burton is familiar with CRH's hospital-wide Levels of Patient Observation Policy. According to Mr. Burton, the purpose of the Levels of Patient Observation Policy is to provide staff with guidelines to ensure patient safety. Mr. Burton prepared and circulated a training roster for CRH's hospital-wide Levels of Patient Observation Policy for the shift charge

nurses. After receiving training on the policy, the first, second and third shift GSU staff members signed the training roster in January 2010. The content of the Levels of Patient Observation Policy which took effect January 12, 2010 does not differ from the content of the Levels of Patient Observation Policy which took effect February 1, 2010. Originally, training was to be completed on this policy by February 1, 2010. However, training was completed earlier than expected and the policy went into effect January 12, 2010. Burton, T. 16-17, 22-24, 26, 37; R. Ex's. 2, 3.

83. Mr. Burton is also familiar with CRH's Nursing Administrative Policy Hand-off Care Communication Policy, NA-H-05. HCTs engage in hand-off care communication at a change of shift. The Hand-off Care Communication Policy requires off-going staff to provide information about an assigned patient face to face or to physically pass on the patient cards to the oncoming HCT at shift change. Off-going HCTs are expected to give a verbal report of the patient status to the oncoming nursing staff. Hand-off communication is important to ensure patient safety and continuity of care. Burton, T. 20-21, 40-41; R. Ex's 2, 3, 5.

84. Ronald McDowell, RN, is employed by CRH as an RN. Mr. McDowell has worked at JUH and CRH for about ten years. Prior to becoming an RN, Mr. McDowell was a HCT for four years. Mr. McDowell is assigned to work the third shift on the MPU where he alternates in the roles of charge nurse, treatment nurse, or medication nurse. On the night of April 22, 2010 through the morning of April 23, 2010, Mr. McDowell was the treatment nurse on the Medical Unit (MPU). McDowell, T. 133-135.

85. Although his statements were somewhat equivocal, Mr. McDowell's sworn testimony was that he did not accept responsibility for Petitioner's two Q-fifteen patients and that Petitioner did not say anything to him about her leaving prior to his leaving the area to draw blood. At no point in any statement has he said that he heard her say she was leaving and that he accepted responsibility for her patients.

86. Whitney Rogers, RN, is a former employee of CRH. Ms. Rogers was assigned to work the third shift on the MPU where she alternated in the roles of charge nurse, treatment nurse, and medication nurse. On the night of April 22, 2010 through the morning of April 23, 2010, Ms. Rogers was the charge nurse on the MPU. McDowell, T. 135; Rogers, T. 150- 151; Ex. 9. She confirmed that Mr. McDowell came to her to report that he was leaving the unit to go draw blood.

87. Ms. Rogers' testimony between her deposition and testimony at the hearing was somewhat equivocal; however, she was clear that some form of handing off had to occur between the off-going to the in-coming shifts. She also stated that it was not absolutely clear as to who was responsible for the 7:30 a.m. observation, but it had to occur and would be dictated by whether or not the hand-off had occurred.

88. Crystal Laney-Speller is employed by CRH as a patient advocate. Ms. Speller has been employed as a patient advocate for two years and is a certified investigator. Patient advocates ensure that the rights of the patients are protected and that patients are not subject to

abuse, neglect, and/or exploitation. When there is a report of patient abuse, neglect, and/or exploitation, patient advocates conduct investigations. Ms. Speller is familiar with CRH's Hand-off Care Communication Policy. Ms. Speller is familiar with CRH's Levels of Patient Observation Policy and with CRH's policy regarding Abuse, Neglect, or Exploitation of Patients. Failing to provide a required level of observation is an example of neglect. Speller, T. 177-178, 191-192, 241-242; Ex. 14, 15.

89. Ms. Speller conducted the investigation into this matter. Ms. Speller was adamant that Petitioner should have reported to the Charge Nurse that she was leaving. Petitioner told Ms. Speller that she saw the next shift coming on and assumed that her replacement was there—but in actuality she was not. Ms. Speller stated that the policy does not require one to tell the charge nurse but it does require proper handing off, and telling Mr. McDowell under the facts of this case was not it.

90. Ms. Speller says that she has never told anyone that they could leave a shift without reporting off.

91. Marilyn Keith, RN, is employed by CRH as a Unit Nurse Manager (UNM) on the GSU. Ms. Keith has been employed for 25 years first, at JUH, and then, at CRH after JUH closed. Ms. Keith has worked as a HCT, a lead nurse, a supervisor and a UNM at JUH/CRH. As the UNM, Ms. Keith supervises the RNs and indirectly the LPNs and HCTs on all three shifts. The UNM is responsible for scheduling and maintaining employee time sheets and training staff on CRH policies and procedures. Ms. Keith is familiar with CRH's Hand-off Care Communication Policy. Ms. Keith is familiar with CRH's Levels of Patient Observation Policy. Keith, T. 258, 261, 270-271, 281.

92. As part of Ms. Keith's normal practice for staff training on a policy, she created a training roster to accompany the policy and left the policy and the roster in a binder for the third shift charge nurse to review with third shift staff members. After all unit staff members sign the roster, it is returned to Ms. Keith. Ms. Keith keeps a copy and she gives the original to Mr. Burton.

93. Ms. Keith oversaw Petitioner's training on new CRH policies effective January 11, 2010, which specifically included Hand-off Care Communication Policy, NA-H-05. Petitioner signed Ms. Keith's training roster to acknowledge she was trained on the Hand-off Care Communication Policy. Further, Ms. Keith oversaw Petitioner's training on the Levels of Patient Observation Policy which was signed off on as well. Keith, T. 259-263, 268-269. R. Ex. 2, 3, 5.

94. Ms. Keith testified that in her twenty five years of experience, handing off face to face has always been the practice. She disagrees with Petitioner's contention that HCTs could leave once the shift report started and if the floor was covered. In this instance, the floor was not covered which to Ms. Keith is abandonment.

95. Vidya Kumar, RN, is employed by CRH as the Unit Nurse Manager (UNM) of the Medical Unit (MPU). Ms. Kumar has been employed at JUH/CRH for eleven years. Ms. Kumar is familiar with CRH's Levels of Patient Observation Policy and with CRH's Hand-off Care Communication Policy. As the UNM of the MPU, Ms. Kumar will sit in on advocacy interviews with MPU staff members when an advocacy investigation is occurring but Ms. Kumar does not otherwise participate in the investigation. Kumar, T. 298 -306, 309.

96. Ms. Kumar observed that the on-coming shift has no responsibility until the shift report has been completed. She further noted that the last Q-fifteen observation for which the out-going shift would be responsible would ordinarily be the 7:15 a.m. check; however, they are still responsible until they are relieved. Shift actually ends at 7:30 a.m.

97. Ms. Kumar has never seen a clipboard left unattended at the horseshoe and says that it should not happen. Clipboards should not be left lying around unattended.

98. Angela McKnight has been employed at JUH/CRH as a HCT for thirteen years. She worked at JUH as a Medical HCT. When CRH opened the Medical Unit, HCTs were assigned to the GSU. Ms. McKnight is trained to work on a Medical Unit and occasionally works the third shift on the MPU. Ms. McKnight is familiar with Q-fifteen levels of patient observation and with the process of handing off a Q-fifteen patient to another staff member. Ms. McKnight does not have supervisory authority over other HCTs and has not given another HCT permission to leave toward the end of a shift. McKnight, T. 332-333, 338-339; R. Ex. 14, pg. 84; 15 pg. 137.

99. Ms. McKnight very clearly and forthrightly testified that she had never seen other staff leave clipboards on the horseshoe when they went off duty. Ms. McKnight testified that:

[I]f the report actually happens to go over sometimes and if they have more than one healthcare technician coming in for first [shift] or if they have a technician assigned to work up there, I would actually go in the report room and hand my documentations off to who was assigned to those patients.

McKnight, T. 342-344.

100. Ms. McKnight was the most experienced HCT working third shift on the medical unit, and she testified that she would regularly do the 7:30 a.m. and possibly 7:45 a.m. observation checks. McKnight, T. 337.

101. Pamela Humphrey-Stokes, RN, is employed by CRH as a UNM on the GSU. Ms. Stokes has been employed at JUH/CRH for twenty years. In February 2009, Ms. Stokes was the third shift supervisor on GSU and was responsible for training third shift nurses and HCTs on CRH policies and practices. Ms. Stokes would either conduct training during shift report or in small groups of three or four persons over the course of the shift. Afterwards, Ms. Stokes would have the staff members sign the training roster. Specifically, Ms. Stokes conducted training for the third shift GSU staff members regarding the "Responsibilities for the PCU's/Wards" memo and "Supervision of Patients at all Times" in February, 2009. Ms. Stokes orally read this memo

to third shift GSU staff; had staff read and review the memo themselves; and made the memo available to staff to copy. Petitioner was one of the employees who signed the training roster for those memos and reviewed them. Ms. Stokes does not recall Petitioner indicating that she needed more training in order to work on the Medical Unit (MPU). Stokes, T. 384-385,388-390, 393, 400; Ex. 6.

102. Ms. Stokes also testified that staff cannot change assignment or leave without consulting the charge RN.

103. Shirley Gardner, RN, is employed by CRH as a staff consultant in the staff development office. Ms. Gardner has worked at JUH/CRH for fifteen years. In April 2010, Ms. Gardner was the Associate Chief Nursing Officer. Prior to that, Ms. Gardner was the Interim Director of Nursing at CRH. As the Associate Chief Nursing Officer, Ms. Gardner's duties included overseeing disciplinary actions. Ms. Gardner is familiar with CRH's Hand-off Care Communication Policy. The Hand-off Care Communication Policy is a practice she has observed throughout her career. Gardner, T. 410-412.

104. Ms. Gardner acknowledged that the policy does not require staff to specifically report off to the charge nurse, but it does require an affirmative act to hand off the patients to another person.

105. Kenneth Thomas is employed as an Employee Relations Specialist at CRH. As an employee relations specialist, Mr. Thomas facilitates disciplinary actions and employee grievance process; mediates disagreements and conflicts between management and employees; facilitates implementation of policies and procedures; conducts internal investigations; and conducts employee education. Mr. Thomas's primary responsibility is to ensure employee disciplinary actions and internal grievance proceedings are conducted in a timely manner and are consistently applied to each employee in accordance with the grievance procedures. Mr. Thomas also works with employees to facilitate their understanding of their rights during each step of the internal grievance process. Mr. Thomas met with Petitioner to explain DHHS Directive III-8, Employee Grievance Policy, to ensure she timely filed her appeals at each step. Thomas, T. 432-434; Ex. 20.

106. As with Ms. Gardner, Mr. Thomas acknowledged that the policy does not require staff to specifically report off to the charge nurse, but it does require an affirmative act to hand off the patients to another person.

107. Mr. Thomas watched the video and contends that it does not appear to have been any dialogue between Petitioner and Mr. McDowell.

108. Averille Tullock, RN, is employed by CRH as an RN on the Medical Unit (MPU). Ms. Tullock has been a RN for more than 38 years and has worked for nine years at JUH/CRH. She has worked as a nurse on the Medical Unit at both JUH and CRH. Ms. Tullock usually works the first shift on the MPU; however, she has worked the third shift on the MPU. Tullock, T. 347-351.

109. Ms. Tullock was not Petitioner's supervisor and never told Petitioner that she could leave the patient care unit (PCU) before the end of her shift. Tullock, T. 357.

110. Ms. Tullock testified that, although it was rare, she has seen a clipboard left on the horseshoe but she did not personally witness who placed it there. Ms. Tullock indicated that other nursing staff members were present at the horseshoe when this has occurred. She also stated that one has to report off before leaving.

**Petitioner's Witnesses**

111. Patricia Edwards, RN, is employed by CRH as a registered nurse and is assigned to the Medical Unit (MPU). Ms. Edwards has been employed at JUH and then at CRH for approximately five years. She has been a registered nurse for approximately 30 years. Ms. Edwards usually acts as a charge nurse. As a charge nurse, Ms. Edwards has reported nursing staff members for violating CRH policies. Ms. Edwards is familiar with the memorandum to the nursing staff titled "Responsibilities for PCU's/Wards" and Ms. Edwards signature appears on the training roster indicating she read that memo. Ms. Edwards is also familiar with CRH's Levels of Observation policy. Edwards, T. 529. Ms. Edwards was not working the third shift on the MPU the morning of April 23, 2010 and does not have personal knowledge of the events of that morning. Edwards, T. 499-500, 532, 541-542567-68; R. Ex. 3.

112. Ms. Edwards implied that nursing supervisors were only concerned with getting staff members to sign the training rosters without regard to whether or not they have read and understand the various policies. She also testified that she believes policies are put in place for a reason and that all staff members, including HCTs and RNs, should follow the policies as written. Edwards, T. 530.

113. Ms. Edwards stated that in her personal experience and the practice at CRH is that HCTs do not engage in hand-off care communication as stated in CRH's Hand-Off Care Communication policy. She contends that the third shift staff are usually gone by the time first shift gets out of the shift report. She contends that such is still the case and that there is still a problem with HCTs leaving. Ms. Edwards also testified that HCTs are supposed to comply with this policy and if they do not follow the policy then they are in violation of that policy. Edwards, T. 523, 531, 540-541.

114. According to Ms. Edwards the outgoing third shift may be responsible for performing the 7:30 a.m. observation and documentation in some circumstances. She further stated that if hand-off has not occurred during shift report, then the outgoing staff member remains responsible for caring for the assigned patient. She also testified that when the outgoing shift is required to stay to do the 7:30 a.m. observation then that is considered overtime, which is frowned upon. Edwards, 515, 550-551.

115. Ms. Edwards is familiar with the Nursing Practice Act. Abandonment is leaving a patient alone without supervised care. If a licensed nursing staff member left a patient knowing

that there was not another nursing staff member to observe that patient it would be considered abandonment. As provided in CRH's hand-off care policy, it is not permissible for a HCT to leave the unit knowing there was not another nursing staff member on the floor to cover their patients. Edwards, T. 536, 539-40; Bailey, T. 578, 583-584; P. Ex. 17, pg. 297-99.

116. Suzanne Bailey, Licensed Practical Nurse ("LPN"), is employed by CRH as a LPN. Ms. Bailey has been employed by CRH since 2009 and is assigned to the GSU. Ms. Bailey was trained on CRH's Hand-off Care Communication Policy, NA-H-05; Levels of Observation Policy, CPM-L.0020; and Responsibilities for PCU's/Wards Memo and her signature appears on these training rosters. Ms. Bailey stated that staff would be given a chance to read all the policies before signing and that she would usually go back and read them at some point.

117. Ms. Bailey testified she had never seen the hand-off care communication policy until after the events of April 23, 2010 despite her signature appearing on the training rosters. Bailey, T. 587; R. Ex. 3, 5.

118. Ms. Bailey worked the third shift on the MPU the night of April 22, 2010 and morning of April 23, 2010. There are three wall clocks on the MPU. Ms. Bailey does not think the wall clocks are synchronized.

119. Ms. Bailey is familiar with the Nursing Practice Act. She stated that even though Petitioner is a HCT and not a nurse, it is still not appropriate for her to leave the unit unless she tells someone. Ms. Bailey stated that she would not just walk away without telling anyone. She stated that it is not the common practice for the out-going shift to just leave during shift report.

120. Prior to this incident on April 23, 2010, Ms. Bailey did not understand that she was supposed to report to her shift charge RN before she leaving the unit at the end of her shift. "Many times" she's only "told an RN who's not the charge nurse." Ms. Bailey signed the roster to indicate that she had reviewed or had an opportunity to review CRH's written policy to the contrary in February 2009. Bailey, T., 571-572, 579-80, 588, 609-610. Res.'s Ex. 3, 5, 6.

121. Janet Mele is a former employee of CRH who worked as a HCT on the GSU and MPU. Ms. Mele worked regularly on the MPU in 2009. In 2010, Ms. Mele routinely worked on the GSU Unit. Mele, T. 594, 596.

122. Ms. Mele testified if she was notified that the oncoming shift was in a staff meeting or that they would be late, then she would perform the 7:30 a.m. check. Ms. Mele also testified that she recalls holding up her clipboard at shift change and asking the oncoming shift nurses where they would like for her to place the clipboard and they would indicate for her to leave it on the horseshoe. Mele, T. 599, 606-607.

123. Ms. Mele testified that staff is not free to leave until replaced. Her practice was to go to the office and tell someone. She would only leave if it was obvious that there was adequate staff.

124. Ernestine Smythe is a retired, former employee of CRH. Ms. Smythe first began working at JUH as a HCT on the medical unit in 1995 and then transferred over to CRH where she worked on GSU and the MPU. Ms. Smythe received training on CRH's Levels of Patient Observation Policy, CPM-L.0200. Ms. Smythe stated she had to be up to date on policies and know what the policy was stating because patient care came first; however, at times she merely skimmed the policies before signing the training roster indicating she was trained on the policy. Smythe, T. 61-613,618. R. Ex. 3.

125. Veronica Reed, RN, is employed at CRH as a registered nurse on the MPU and is assigned to the first shift. Ms. Reed began working at CRH in March 2010 and spent two to three months in orientation while working on the MPU. Ms. Reed worked the first shift on April 23, 2010. Ms. Reed is familiar with the hand-off of care communication policy and the procedure that the policy requires. Ms. Reed does not recall what time first shift report ended on April 23, 2010. After shift report ended, Ms. Reed observed and documented on Patient T.'s observation flow sheet beginning at 8:00 a.m. Reed, T. 623-625, 629; R. Ex. 11.

#### **CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings ("OAH") has jurisdiction over the parties and the subject matter pursuant to Chapters 126 and 150B of the North Carolina General Statutes. The parties have given proper notice of the hearing and all parties are properly before this Administrative Law Judge.

2. There has not been an issue raised as to procedural defects nor to whether the Petitioner was properly and sufficiently apprised with particularity of the acts which lead to her dismissal.

3. 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.

4. Petitioner was a career state employee at the time of her dismissal and therefore entitled to the protections of the North Carolina State Personnel Act, including the provision that prohibits the termination of her employment except for just cause. N.C. Gen. Stat. §§ 126-1 *et seq.*, 126-35, 126-37(a); 25 NCAC 01J. 0604(a).

5. N.C. Gen. Stat. § 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." Because Petitioner has alleged that Respondent lacked just cause for her termination, the Office of Administrative Hearings has jurisdiction to hear her appeal.

6. Pursuant to N.C.G.S. § 126-35(d) and N.C.G.S. § 150B-29(a), Respondent has the burden of proof by a preponderance of the evidence on the issue of whether it had just cause to discipline, in this instant matter whether to dismiss Petitioner for grossly inefficient job performance and unacceptable personal conduct.

7. "Disciplinary actions . . . are those actions taken in accordance with the disciplinary procedures adopted by the State Personnel Commission and specifically based on unsatisfactory job performance, unacceptable personal conduct or a combination of the two." N.C. Gen. Stat. §126-35(b).

8. 25 NCAC 1J .0604(a) provides that an employer may dismiss an employee for "just cause" based upon unacceptable personal conduct.

"Any employee, regardless of occupation, position or profession may be warned, demoted, suspended or dismissed by the appointing authority. Such actions may be taken against career employees as defined by the State Personnel Act, only for just cause. The provisions of this section apply only to employees who have attained career status. The degree and type of action taken shall be based upon the sound and considered judgment of the appointing authority in accordance with the provisions of this Rule. When just cause exists the only disciplinary actions provided for under this Section are: . . .

- (1) Written warning;
- (2) Disciplinary suspension without pay;
- (3) Demotion; and
- (4) Dismissal.

25 N.C.A.C. 1J .0604(a).

9. 25 N.C.A.C. 1J .0604 further states:

(b) There are two bases for the discipline or dismissal of employees under the statutory standard for "just cause" as set out in G.S. 126-35. These two bases are:

(1) Discipline or dismissal imposed on the basis of unsatisfactory job performance, including grossly inefficient job performance.

(2) Discipline or dismissal imposed on the basis of unacceptable personal conduct.

(c) Either unsatisfactory or grossly inefficient job performance or unacceptable personal conduct as defined in 25 N.C.A.C. 1J. 0614 of this Section constitute just cause for discipline or dismissal. The categories are not mutually exclusive, as certain actions by employees may fall into both categories, depending upon the facts of each case. No disciplinary action shall be invalid solely because the disciplinary action is labeled incorrectly.

10. "Unacceptable Personal Conduct is: (1) conduct for which no reasonable person should expect to receive prior warning; or . . . (4) the willful violation of known or written work rules; . . . 25 N.C.A.C. 1J .0614(8) and R Ex 34 (page of the State Personnel Manual)

11. "Employees may be dismissed for a current incident of unacceptable personal conduct, without any prior disciplinary action." 25 N.C.A.C. 1J. 0608(a).

12. In *North Carolina Department of Environment and Natural Resources, Division of Parks and Recreation v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004) the North Carolina Supreme Court stated that: "That determining whether a public employer had just cause to discipline its employee requires two separate inquiries: first, 'whether the employee engaged in the conduct the employer alleges,' and second, 'whether that conduct constitutes just cause for [the disciplinary action taken].'" *Sanders v. Parker Drilling Co.*, 911 F.2d 191, 194 (9th Cir. 1990), *cert. denied*, 500 U.S. 917, 114 L. Ed. 2d 101 (1991).

13. Nonetheless, the fundamental question in a case brought under N.C.G.S. § 126-35 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. "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. *North Carolina Department of Environment and Natural Resources, Division of Parks and Recreation v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004) (Internal cites omitted).

14. It was CRH's written policy effective February 2009 to protect its patients from abuse, neglect or exploitation and to establish reporting requirements for such incidents as required by law. Under that written policy, neglect is defined to mean the "failure to provide care or services necessary to maintain the mental health, physical health, and well-being of the patient" by any employee of CRH. Under that same written policy, one example of neglect is "failing to provide a required level of observation". Res.'s Ex. 14, pp. 89-96.

15. CRH's Levels of Patient Observation Policy, CPM-L.0200, Section E, relates to Hand-offs and Hand-off Care Communication. Hand-off care communication is defined in this policy as, "a real time interactive process of passing patient[s] specific information from one caregiver or team to another for the purpose of ensuring the continuity and safety of the patient's care." Specifically for health care technician's, the policy provides, "health care technician staff will pass on the patient's information card to the oncoming HCT as well as give a verbal report of any significant changes in the patient." This policy is a hospital-wide policy and is available to staff in hard-copy on any patient unit. It is also available on-line. The phrase "real time, interactive process" means face-to-face communication. This is the regular practice as well as being a known and/or written work rule. R. Ex. 2, 3.

16. CRH's Levels of Patient Observation Policy, CPM-L.0200, also contains a section which relates to RN Responsibilities and Documentation. The "Charge Nurse" is primarily responsible for the staff during his or her shift.

17. CRH's Hand-Off Care Communication Policy, NA-H-05, is a nursing department policy which standardized the hospital's process of hand-off communication between caregivers at CRH. Although labeled as a "Nursing Administrative Policy", the stated purpose of this policy "is to standardize the approach to 'hand off' communications among caregivers, including an opportunity to ask and respond to questions." Keith, T. 270; Ex. 5.

18. Petitioner is not a nurse; however the Hand-off Care Communication Policy specifically addresses HCTs and the hand-off communication process. The policy states, “[h]ealth care technician (HCT) staff will pass on the patient’s information card to the oncoming HCT as well as give a verbal report of any significant changes in the patient.” Hand-off care communication is a process performed face-to-face and this is both a written and a known work rule. If hand-off is not properly executed, then patient safety can be compromised. R. Ex. 5.

19. Hand-off communication occurs at shift change and when temporary responsibility for a patient is transferred to another nursing staff member when the assigned nursing staff member leaves the patient unit for a period of time, such as meals or breaks. Ex. 5.

20. Petitioner had signed off on the training rosters for all the afore-mentioned policies signifying that she read and understood the policies.

21. Petitioner was the HCT assigned to care for two Q-fifteen patients in the Medical Unit (MPU) on third shift from 11:00 p.m. April 22, 2010 to 7:30 a.m. April 23, 2010. Petitioner knew both patients required fifteen minute checks. Petitioner was responsible for documenting those checks on a patient flow sheet which she did properly until she left the unit.

22. Petitioner claimed that with some degree of regularity she did not follow the hand-off policy which required that real time communication occur between the off going staff and the on-coming staff. Petitioner’s assertion that she did not routinely follow the policy is not justification for willfully ignoring the policy.

23. Petitioner admitted that she left the unit as early as 7:25a.m.

24. Petitioner did not communicate to anyone that she was leaving the unit. Her contention that she spoke with RN McDowell is not credible or believable in light of the totality of the evidence, including her own statement that Mr. McDowell may not have heard her. There is no evidence that Mr. McDowell or any other staff member was on the floor for the balance of Petitioner’s shift. Until it was discovered that she had left the unit, her two Q-fifteen patients were left unattended.

25. There was no credible evidence that Petitioner communicated with anyone else about leaving the unit. Petitioner was clearly aware that she was leaving the unit without anyone covering the floor, and without anyone taking on the fifteen minute checks for the individuals to whom she had been assigned.

26. Petitioner failed to follow a known or written work rule, i.e., the CRH Patient Level of Observation policy CPM-L .0020 which stipulates “hand-offs: hand off of care communication is a real time, interactive process of passing patient specific information from one caregiver or team to another for the purpose of ensuring the continuity and safety of the patient’s care.” Petitioner did not perform this function for the two patients for whom she was responsible for performing fifteen minute checks.

27. Respondent's evidence does not demonstrate definitively that the written or known workplace rules commanded staff to report to the charge nurse prior to leaving the unit; however, the overwhelming competent evidence is that the staff member had to report to a nurse that they were leaving. Some responsible person had to know that particular staff person was leaving. While the memo from Betty Paesler dated February 10, 2009 (R. Ex. 6) states that staff should consult with the RN prior to leaving, it is not phrased so as to make it mandatory.

28. There was some evidence that some staff members may not have been following policy concerning proper handing off and communicating to a supervisor nurse and/or the charge nurse that they were leaving; however, these were the exceptions and were not so prevalent as to show a course of conduct obviating the rule. Petitioner had worked third shift on many occasions and there was no testimony that she had just left without telling anyone as she did on this occasion,

29. It is abundantly clear that the hand-off policy required the hand-off to be an in person and interactive procedure. The off-going staff member was not to leave until relieved by the on-coming staff person. To leave a patient without supervision would be "abandonment."

30. There was contradictory testimony as to whether or not the HCTs carried out in actual practice the hand-off communication process which appears in CRH's Levels of Patient Observation Policy and Hand-off Care Communication policy. The abundance of convincing and credible evidence is that the hand-off did in fact occur in accordance with the policy.

31. Some testimony questioned whether or not the nursing staff had sufficient opportunity to read and be familiar with new policies. The abundance of convincing and credible evidence is that staff was given ample opportunity to become familiar with the policies as they came on line to the various units. Staff was given ample opportunity to read them initially as well as the fact that the policies were available on each unit in hard copy and each staff member could have gotten his or her own hard copy. By signing the training rosters, the staff was acknowledging that they had been given ample opportunity and that they were properly trained.

32. There was minimal conflicting testimony that outgoing third shift HCTs left their clipboard with patient information on the horseshoe instead of performing hand-off care communication per the policy. That evidence is found to not be credible. With the exception of Petitioner's own testimony, the other instances of the clip boards being left were rare and only when acknowledged by on-coming staff.

33. While there was some contradictory testimony as to when the outgoing third shift makes their last Q-fifteen check, it is clear that the off-going third shift was to remain until relieved or given permission to leave, even if it meant staying past the time for their shift to end.

34. Whereas reeducation is typically the first thing management does after an incident, there was no evidence that there was any effort to reeducate the Petitioner and the staff

after this incident with Petitioner. Staff is reeducated on the policy or policies at issue to ensure they have a clear understanding of the policy and procedures in order to prevent the same policy violation from occurring again.

35. The greater weight of the credible evidence is shows that there was a known and written policy about handing off the care of the patients in general and the Q-fifteen patients particular to this incident. The policy was in existence at the time and is straight forward. There is not sufficient competent and compelling evidence to show a course of conduct which would permit Petitioner to just up and leave as she did, without properly handing off her patients and without informing anyone.

36. The evidence does not show that Petitioner had a duty to report to the charge nurse in particular, but she had a duty to report to someone that she was leaving. She had an affirmative duty to hand off her patients in actuality so that someone—a person—would know about her patients and would know that she was leaving. Her signature attests to the fact that she had read and understood the policy. The policy clearly required actual personal interaction with another person. Petitioner clearly violated the policy by not getting permission from the charge nurse or in the alternative properly handing off the care of her two Q-fifteen patients. She should not have simply walked away as she did .

37. Respondent met its burden of proof that it had just cause to dismiss the Petitioner. Petitioner's actions constituted unacceptable personal conduct. In this case, dismissal was appropriate because Petitioner left the two patients unattended, abandoning them, without telling anyone and without properly handling off their care, which was neglect, even though neither of the patients suffered actual harm.

38. Respondent did not act erroneously, arbitrarily, capriciously or otherwise prejudice Petitioner' rights.

39. Petitioner's petition alleged discrimination, but Petitioner did not present evidence to support that claim, and therefore, the Petitioner's claim based on discrimination was dismissed.

#### DECISION

It is recommended that the State Personnel Commission **AFFIRM** the Respondents decision to dismiss Petitioner from her employment at Central Regional Hospital as a Health Care Technician.

Petitioner's claim for discrimination is **DISMISSED**.

ORDER

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

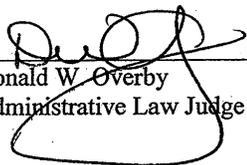
NOTICE

The Decision of the Administrative Law Judge in this Contested Case will be reviewed by the agency making the final decision according to the standards found in N.C. Gen. Stat. 150B-36(b)(b1) and (b2). The agency making the Final Decision in this contested case is required to give each party an opportunity to file exceptions to this Decision and to present written arguments to those in the agency who will make the final decision, in accordance with N.C. Gen. Stat. §150B-36(a).

The agency is required by N.C. Gen. Stat. §150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the North Carolina State Personnel Commission.

This the 28 day of Mar, 2012.

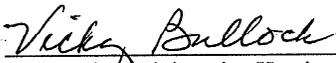
  
Donald W. Overby  
Administrative Law Judge

A copy of the foregoing was mailed to:

Robert J. Willis  
Attorney at Law  
PO Box 1269  
Raleigh, NC 27602  
ATTORNEY FOR PETITIONER

Kathryn J Thomas  
Jonathan Shaw  
Assistant Attorney General  
NC Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001  
ATTORNEYS FOR RESPONDENT

This the 28th day of March, 2012.

  
Office of Administrative Hearings  
6714 Mail Service Center  
Raleigh, NC 27699-6714  
(919) 431 3000  
Fax: (919) 431-3100

Filed

STATE OF NORTH CAROLINA

IN THE OFFICE OF

2012 APR 23 PM 12: 28 ADMINISTRATIVE HEARINGS

COUNTY OF WAKE

10 OSP 03551

|  |                                      |                 |
|--|--------------------------------------|-----------------|
| Walter Bruce Williams,<br>Petitioner,  | Office of<br>Administrative Hearings |                 |
|  | )                                    |                 |
| vs.  | )                                    |                 |
|  | )                                    | <b>DECISION</b> |
| North Carolina Department of Crime Control<br>and Public Safety Butner Public Safety<br>Division,<br>Respondent. | )                                    |                 |

THIS MATTER came on for hearing before Beecher R. Gray, Administrative Law Judge, on February 6-9, 2012, in Raleigh, North Carolina.

**APPEARANCES**

For Petitioner: Michael C. Byrne  
Law Offices of Michael C. Byrne  
150 Fayetteville Street, Suite 1130  
Raleigh, NC 27601

For Respondent: Jess Mekeel, Assistant Attorney General  
Tamara Zmuda, Assistant Attorney General  
North Carolina Department of Justice  
P.O. Box 629  
Raleigh, NC 27602

**WITNESSES**

The following Witnesses appeared and testified on behalf of Respondent:

R. Lynn Rudd  
Anthony Moss  
Daniel Chase Parrott  
Danny Roberts  
Wayne Hobgood  
Reuben F. Young

The following Witnesses appeared and testified on behalf of Petitioner:

Walter Bruce Williams, Petitioner

EXHIBITS

For Respondent:

- 1: CD of Radio/Telephone Communications
- 2: Transcript of Radio/Telephone Recordings
- 3: Notification of Complaint
- 4: Personnel Complaint
- 5: Butner Public Safety Policy E.1
- 6: Butner Public Safety D.14
- 7: Notification of Investigatory Placement
- 8: Transcripts of Taped Interviews (offer of proof)
- 9: Telephone Records
- 10: Hand-written Phone Log from Daniel Parrott
- 11: Verizon Phone Chart
- 12: Best Western Subpoena/Reservation Log
- 13: Sharing of Information
- 14: Highway Patrol Report of Investigation – not admitted to the extent it was not read or considered by Chief Hobgood; the exhibit in its entirety, however, was part of an offer of proof
- 15: Summary of BPS Investigation
- 16: BPS Investigation
- 17: Written Warning (I2009-009)
- 18: Written Warning (I2009-008)
- 19: Pre-disciplinary Conference
- 20: Notification of Pre-disciplinary Conference
- 21: Transcript of Pre-disciplinary Conference
- 22: Disciplinary Dismissal
- 23: Disciplinary Charge Form
- 24: Appeal of Grievance to Secretary
- 25: Employee Advisory Committee Report
- 26: Final Decision of Secretary
- 27: Performance Management Plan
- 29: Stipulation regarding Atul Patel and Exhibit #12
- 30: Map of Butner – admitted through Anthony Moss as illustrative evidence
- 31: Map of Butner – admitted through Petitioner as illustrative evidence

For Petitioner:

1. Interrogatory and Request for Production of Documents Answers/Responses
2. Requests for Admissions responses
8. Deposition of Maj. Anthony Moss
9. Crime Control and Public Safety Performance Management, Competency Assessment, and Career Development Plan reports (subject to stipulation and authenticity)

**ISSUE**

Whether Respondent had just cause to terminate the employment of Petitioner for disciplinary reasons of unacceptable personal conduct and unsatisfactory job performance.

**PROCEDURAL HISTORY**

Prior to hearing, Petitioner filed a Motion for Summary Judgment. This motion was denied by the undersigned via written order. The undersigned granted Petitioner's request to sequester witnesses, except for a representative for each party.

**EVIDENTIARY RULINGS**

Based on the testimony of the relevant witnesses, Petitioner's motion was partially granted to exclude from evidence in support of the dismissal all portions of the Highway Patrol investigation report (R. Ex. 14) that were not relied upon by the decision maker. Respondent's Chief Wayne Hobgood testified that he was not provided a copy of Exhibit 14 prior to dismissing Petitioner and did not read the report or interviews therein prior to dismissing Petitioner. Information in the report that Chief Hobgood testified that he discussed with the Highway Patrol investigator prior to dismissing Petitioner was admitted.

Petitioner's motion partially was granted to exclude Respondent's Exhibit 16, the Butner Public Safety Report of Investigation. The report was admitted into evidence as a business record but allegations within the report that constitute hearsay within hearsay were only considered if they were admitted pursuant to a separate hearsay exception. See *State v. Sisk*, 23 N.C. App. 361; 473 S.E.2d 348 (1996); *review denied*, 345 N.C. 182, 478 S.E.2d 15, 1996 N.C. LEXIS 735 (1996); *Fisher v. Thompson*, 50 N.C. App. 724, 727-28, 275 S.E.2d 507, 511 (1981).

BASED UPON careful consideration of the sworn testimony by witnesses present at the hearing, giving due regard to the opportunity of the administrative law judge to evaluate the credibility of witnesses; the documents and exhibits received and admitted into evidence; and the entire record in this proceeding, I make the following findings of fact:

**FINDINGS OF FACT**

1. Petitioner is a long-term employee of Butner Public Safety ("BPS"). Butner Public Safety is part of Respondent agency, the former North Carolina Department of Crime Control and Public Safety ("Respondent"). BPS provides both police and fire protection to State facilities in and around the town of Butner, North Carolina and for the town of Butner and its residents. Accordingly, most BPS personnel are trained both as law enforcement and as firefighters. BPS operates under the authority set forth in N.C.G.S. 122C-408.
2. 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).

3. As of the night of April 2, 2010, and early morning of April 3, 2010, Petitioner held the rank of Captain with BPS and was the senior officer on duty. Lieutenant Chase Parrot (“Lt. Parrot”) was the second most senior officer on duty on the night of April 2-3. Major Anthony Moss (“Maj. Moss”) was the on-call administrator (“AOC”) at BPS. Maj. Moss was not on duty in Butner that night but was at home.
4. Telecommunicator R. Lynn Rudd (“Dispatcher Rudd”), who is not a law enforcement officer, was in the communications center at BPS and served as dispatcher. All calls made to the communications center--as well as all radio calls with the communications center--are recorded. That calls and radio calls with the communications center are recorded is common knowledge at BPS.
5. Chief M. Wayne Hobgood (“Chief Hobgood”) was--at all times relevant to Petitioner’s disciplinary dismissal--the Director of BPS. Chief Hobgood was not on duty on April 2-3, 2010.
6. On the evening of April 2, 2010, all available BPS officers were called to a residential fire scene. The fire was considered a major event for BPS. Petitioner was in command at the fire scene and also was “safety officer” responsible for the safety of the BPS personnel; the victims of the fire; and area citizens. While the fire was being fought, Petitioner was not wearing the bulky “turnout” or firefighting gear. After the fire was under control, Petitioner released Lt. Parrott to assist with a public request for a bank deposit escort. Petitioner would not have released Lt. Parrott prior to getting the fire under control because--per Petitioner’s testimony--Lt. Parrott was his most experienced firefighter. Petitioner subsequently put on his turnout gear because he had to enter the burned house to conduct and oversee inventory and inspection requirements.
7. As noted, all calls to the BPS communications center are recorded and a time stamp is kept. Petitioner testified as to his belief that the time stamp was off by one minute or more and that this had been the case for some time. Petitioner testified that his own mobile telephone at the time was old and that he was unsure of how accurate it was. Petitioner had no knowledge of how well Lt. Parrott’s phone kept time. Petitioner testified that he did not trust the time estimates or statements given by Major Roberts, as he did not find Maj. Roberts trustworthy in cases pitting personnel against management.
8. On April 3, 2010, at approximately 1:48 a.m. per the BPS time stamp, Petitioner by radio asked Lt. Parrott to bring a camera to the fire scene so that photographs could be taken. However, just before this time, Lt. Parrott had initiated a traffic stop of an older-model Mustang convertible on Interstate 85. Interstate 85 runs through the Town of Butner. While it appears that BPS officers were discouraged from conducting traffic enforcement work on the Interstate, that area of I-85 is--according to the testimony--within their jurisdiction.

9. Thus, at the time Petitioner asked Lt. Parrott to bring the camera to the fire scene, Lt. Parrott was engaged in the traffic stop. Accordingly, Lt. Parrott replied that he could not comply with Petitioner's request, stating by radio, "I got one getting on the interstate now that's extremely 10-56 on the 191. He can't hold her in the road. I'm gonna have to go 10-61 with him." 10-56 is the radio call sign for a suspected intoxicated pedestrian. Lt. Parrott later used 10-55, the correct call sign for a suspected intoxicated driver. 10-61 is the radio call sign for a traffic stop.
10. Shortly afterwards, Lt. Parrott made a radio request for a supervisor to come to his assistance. Lt. Parrott radioed Petitioner and said, "You're going to need to 25 [come] here as soon as possible." The call sign used by Lt. Parrott in that call was a non-emergency request for assistance. Had Lt. Parrott been in danger or facing an emergency assistance situation, the proper call sign would have been 10-33, meaning "Emergency". Petitioner replied that in response to the 10-25 call he was "en route," which he testified meant he would be there as soon as reasonably possible. At the time of this call, Petitioner still was at the scene of the fire; had not yet relinquished command; and was wearing turnout gear.
11. Lt. Parrott also called Petitioner on his cell phone and gave Petitioner more information about the traffic stop. On cross-examination, Lt. Parrott conceded that he must have informed Petitioner whom he had stopped and his impressions of that person during that telephone call. There was no other evidence presented of how Petitioner could have learned any details of the traffic stop prior to arriving at the scene, other than via telephone and radio calls from Lt. Parrott.
12. Respondent cited Petitioner for lack of truthfulness regarding his statements in the radio calls as to his whereabouts when reporting to the traffic stop. In his initial response to Lt. Parrott (R. Ex. 2), Petitioner says, "I'm en route." Petitioner testified, again on the basis of a non-emergent call, that this meant he would respond as soon as he could leave the fire scene in a proper and responsible fashion. This call--which per the BPS time stamp was made about 1:49:37 a.m.--appears from Respondent's evidence to be at the fire scene. Petitioner's subsequent call to BPS (below) about the traffic stop was--per the BPS time stamp--at 1:56 a.m. or about six minutes later. *Id.*
13. Petitioner testified that he was not "at the scene" of the stop when he made this call. Petitioner testified that his intent was to communicate that he was *en route* to the scene or words to that effect--as he had in the earlier call. Petitioner testified that--prior to listening to the recordings--he would have said that he said *en route*. However, Petitioner said that in that statement he simply misspoke.
14. Due to the erratic driving of the person stopped, Lt. Parrott made the initial determination that the driver likely was well-impaired by alcohol. When Lt. Parrott initiated the stop, he found that the car--which was as noted an older model Mustang convertible--was driven by James Williams, a Captain with the North Carolina Highway Patrol ("Trooper Williams").

15. At 1:56 a.m. per the BPS timestamp, Petitioner telephoned BPS and spoke to Dispatcher Rudd saying, "I need you to call Major Moss's home number. Advise him that I have a Trooper stopped. He is a Captain with the Highway Patrol and he is extremely 10-55." Petitioner was relaying information received from Lt. Parrott when he made this call to Dispatcher Rudd, with relay instructions to Maj. Moss. No evidence was presented that Petitioner had an order or a duty to make this telephone call to a senior officer, and it appears to have been wholly discretionary.
16. That Petitioner would not seek to involve a senior officer in a situation he was attempting to conceal appears to be particularly the case, given that the senior officer was Maj. Moss. Maj. Moss testified that he and Petitioner had a poor working relationship and even admitted that he, Maj. Moss, "hated" Petitioner. Maj. Moss also initiated two written warnings against Petitioner and there is some evidence that Maj. Moss attempted to get Petitioner removed from patrol duty to drive a fire truck.
17. At approximately 1:58 a.m. per the BPS time stamp, Dispatcher Rudd called Maj. Moss as Petitioner instructed. Dispatcher Rudd said, "I'm so sorry I have to keep waking you up." Maj. Moss said, "Aah, what you got?" Dispatcher Rudd said, "Are you real awake now?" Maj. Moss said, "Yeah, I am." Dispatcher Rudd then said, "Chase Parrott has a 10-55 stopped 85 southbound, at 191. Capt. [Bruce] Williams [i.e., Petitioner] is out with him, and he was described to me as extremely drunk. He's a Highway Patrol Captain, James Williams, Jr. Capt. [Bruce] Williams [Petitioner] asked me to ask you to call him on his cell phone." Dispatcher Rudd told Maj. Moss he had Petitioner's cell phone number. Maj. Moss interrupted asked, "James Williams, he's a Captain?" Dispatcher Rudd said, "Sorry, I can't hear you." Maj. Moss asked, "You say he's extremely drunk?" Dispatcher Rudd said, "Yes, that's what Capt. [Bruce] Williams told me to tell you."
18. Maj. Moss said that the following morning he became concerned that Petitioner was trying to "set him up" in the situation involving Trooper Williams. However, Maj. Moss made no mention of these suspicions in his first official interview, conducted mere days after the incident. Maj. Moss also, through cross-examination or through testimony in his deposition by Respondent's attorneys, conceded that Petitioner generally was truthful and had a reputation for truthfulness around BPS.
19. Maj. Moss said during his testimony that he did not trust any of his co-workers at BPS, including Maj. Roberts.<sup>1</sup> However, and significantly, on cross-examination at hearing, Maj. Moss stated that knowing what he knew today (in February 2012) about the incidents of the night of April 2-3, 2010, he (a) believed that Trooper Williams was not impaired by alcohol at the time of the traffic stop and also believed that (b) Petitioner was being truthful about the incident.
20. Petitioner testified that when he arrived at the scene, he spoke to Lt. Parrott briefly, though Lt. Parrott does not remember this. As shown below, one of the allegations against Petitioner by Respondent is that Petitioner was untruthful about seeing Heather

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<sup>1</sup> Maj. Moss also testified that Lt. Parrott had a reputation for untruthfulness or exaggeration around BPS, but stated that this knowledge came from others rather than his own observations.

Parrott, Lt. Parrott's wife, in Parrott's car at the scene of Trooper Williams traffic stop. Petitioner has consistently stated that he did not see Heather Parrott at the stop. All witnesses at the scene agreed that Heather Parrott did not get out of Lt. Parrott's patrol car during the traffic stop, did not speak or otherwise identify herself to Petitioner, and was asleep in the front seat. Both Lt. Parrott and Petitioner testified that the section of I-85 where the Trooper Williams traffic stop took place does not have streetlights; is dark; and that the bubble/strobe light bar, headlights, and "takedown light" (a powerful spotlight) were activated and pointing at Trooper Williams' Mustang convertible. Lt. Parrott testified that, in his recollection, the dome or interior light on his patrol car was off.

21. When asked why Petitioner should have seen Heather Parrott under these circumstances, Chief Hobgood testified for Respondent that Petitioner walked right by the car and that Heather Parrott was a distinctively shaped woman with an unusual hairstyle. Respondent offered no other evidence supporting the claim that Petitioner was *untruthful*--i.e., willfully and deliberately untruthful or misleading--about seeing Heather Parrott other than that Petitioner was aware that Heather Parrott had been approved for a ride-along earlier in the evening.
22. Petitioner testified that he did not see Heather Parrott for the reasons set forth above and, additionally, that his duties and focus at the traffic stop had nothing to do with Heather Parrott or ascertaining her whereabouts or status.
23. Upon arriving at the scene, Petitioner undertook his own independent examination of Trooper Williams' condition. Petitioner examined Trooper Williams' car, the Mustang convertible, for evidence of alcohol consumption such as beer cans or bottles, but found nothing. Petitioner consistently stated that when he arrived at the scene, the convertible top of Trooper Williams' car was completely down.
24. The convertible "top up" versus "top down" question became an issue in this case. Respondent charged Petitioner with untruthfulness regarding the status of the convertible top, claiming that Petitioner willfully was untruthful in claiming that the convertible top was down rather than up when Petitioner arrived at the scene, as both Trooper Williams and Buck Morgan ("Wrecker Driver Morgan")--a wrecker driver on the BPS call list who subsequently arrived at the scene--claimed. Petitioner stated that he recalled that the top of the Mustang was down at the time he arrived because the top being down made it easy to search the car for evidence of alcohol consumption.
25. Lt. Parrott also testified at trial and in interviews that the convertible top on the Mustang was down at the time of the traffic stop. Trooper Williams himself did not testify at trial, and his statements to Maj. Roberts about the issue in interviews are somewhat inconclusive about exactly how and when he got the convertible top up and secured.
26. As for Wrecker Driver Buck Morgan, he was not at the scene at the time of the traffic stop and thus had no knowledge of the status of the convertible top on the Mustang at the time of the traffic stop. In his statement, Wrecker Driver Morgan initially claimed the

Mustang top was up when he arrived at the scene of the Trooper Williams traffic stop but then said it was down. Petitioner testified that he paid little or no attention to the Mustang between determining that Trooper Williams was not impaired and the arrival of Wrecker Driver Morgan with the wrecker.

27. It is noted that the allegation of untruthfulness regarding the convertible top does not distinguish at what point in the traffic stop Respondent alleges Petitioner was untruthful about the top status.
28. When he arrived at the stop, Petitioner conducted his own personal observations of Trooper Williams to make a determination about whether the Trooper probably was impaired or not impaired by alcohol. Petitioner got into close physical proximity with Trooper Williams and Trooper Williams did not shy away or attempt to avoid Petitioner. Though Lt. Parrott had noticed a faint odor of alcohol on Trooper Williams, Petitioner--at trial and repeatedly beforehand--stated that Petitioner himself detected no alcohol odor on Trooper Williams.<sup>2</sup> Petitioner likewise observed that Trooper Williams had no glassy eyes, slurred speech, difficulty walking, or any of the traits that Petitioner's training associated with a motorist under alcohol impairment. On cross-examination, Chief Hobgood conceded that if Petitioner conducted this analysis, that would be the appropriate manner of making observations to determine if a motorist were impaired by alcohol.
29. Following and based upon his observations of Trooper Williams and his condition, Petitioner arrived at the conclusion that Trooper Williams was not impaired by alcohol. Petitioner shared this conclusion with Lt. Parrott, who concurred. Petitioner told Lt. Parrott--in these or similar words--"You got nothing."
30. BPS cars are not equipped with video cameras. While BPS was equipped with portable alco-sensor type breath detection devices, they were not in use because no policy had been devised for them. There is no evidence that after actually arriving at the scene and personally evaluating Trooper Williams' condition, Petitioner was confused or unsure of his analysis that Trooper Williams was not impaired by alcohol at the traffic stop.
31. Following his determination that Trooper Williams was not impaired by alcohol, Petitioner altered the stop from a driving while impaired stop to a Stranded Motorist situation. Petitioner communicated with Dispatcher Rudd at BPS that the traffic stop would be cleared "Code 10," meaning no further action. (See R. Ex. 2) Petitioner likewise spoke with Maj. Moss by cell phone and informed Maj. Moss of his conclusions, to which Maj. Moss did not--at the time--object.
32. Petitioner called a wrecker (Wrecker Driver Morgan) for Trooper Williams' car, which was towed to BPS for safekeeping. Lt. Parrott gave Trooper Williams a ride to a nearby

<sup>2</sup> Respondent repeatedly alluded to a statement in one of Petitioner's interviews to the effect of, "I suppose that's why we smelled a faint odor of alcohol on him," suggesting that this statement meant that Petitioner was changing his story or inconsistent regarding an odor of alcohol on Trooper Williams. The Court does not so find, it appearing that the "we" appears more of an issue of less than precise language than anything else.

hotel at his request. Petitioner kept the keys and saw that they were returned to Trooper Williams the next day. While some witnesses for Respondent testified that such an action was not "protocol," there is no evidence that this action violated any known or written work rules or policies, and the incident was not cited in the dismissal letter as a reason for Petitioner's dismissal.

33. Following an investigation, Respondent charged Petitioner with--and ultimately dismissed Petitioner for--five alleged violations. (See R. Ex. 22) One allegation is of unsatisfactory job performance, charging that Petitioner was guilty of this by "failing to ensure that Lt. Parrott took appropriate enforcement action regarding NCSHP Captain James Williams, Jr., who was stopped by Lt. Parrott on April 03, 2010, on suspicion of driving while impaired." *Id.* Significantly, and as discussed further below, the dismissal letter is silent on what enforcement action Petitioner failed to undertake (or failed to ensure that Parrott did take); in fact, the dismissal letter specifies nothing that Petitioner failed to do--or should have done--in supervising Lt. Parrott.
34. State personnel policy requires that dismissal for unsatisfactory job performance requires previous active written warnings for unsatisfactory job performance. Respondent presented Exhibits 18 and 19, over the objection of Petitioner, to demonstrate that Petitioner had two active written warnings for unsatisfactory job performance at the time of the Trooper Williams stop.
35. Respondent's other four allegations against Petitioner were alleged violations of Respondent's Truthfulness policy: that Petitioner was untruthful by (a) falsely saying Trooper Williams was not impaired when he was in fact impaired; (b) giving "conflicting statements as to your whereabouts when you placed the call to BPS about incident," specifically saying "en route" to the scene versus "out at the scene right now;" (c) falsely saying the top on Trooper Williams' car was down when "in fact the top was up" per "Trooper Williams" and "Buck Morgan;" and (d) saying "no" when asked whether Lt. Parrott's wife Heather Parrott was in Lt. Parrott's car at the stop "when Heather Parrott and Lt. Parrott admitted" that Heather Parrott was in the car.
36. The issue of whether Trooper Williams was impaired by alcohol is central to this case. Respondent alleges that Petitioner was untruthful when he stated that Trooper Williams was not impaired by alcohol when, Respondent alleges, Trooper Williams was impaired by alcohol. Further, Respondent alleges that Petitioner committed unsatisfactory job performance by "failing to ensure that Lt. Parrott took appropriate enforcement action" during the traffic stop. (See R. Ex. 22)
37. Respondent's policy on truthfulness says, in pertinent part, that "No member shall willfully report any inaccurate, false, and misleading information." (See R. Ex. 5) This would require Respondent to prove that Petitioner was willfully untruthful about the events cited in the dismissal letter as Truthfulness policy violations.
38. Respondent's witnesses, including Maj. Roberts, Chief Hobgood, and Secretary Reuben Young ("Secretary Young"), each were asked on cross-examination what Respondent's contentions were as to how Petitioner failed to properly supervise Lt. Parrott at the traffic

stop. All three cited Petitioner's failure to give (or have Lt. Parrott) give Trooper Williams "field sobriety tests" as evidence of Petitioner's unsatisfactory job performance.

39. Conducting field sobriety tests at a traffic stop, however, is not required by Respondent's policies. Indeed, Respondent has no policies regarding field sobriety tests at all. Thus, Respondent cites as unsatisfactory job performance by Petitioner a failure to conduct a procedure--or ensure the conducting of a procedure--that neither is required by nor even referenced in Respondent's own policies.
40. No reference to field sobriety tests appears in the dismissal letter, in which Respondent was required to list the specific acts and omissions for which Petitioner was dismissed. Field sobriety tests are not referenced in the pre-disciplinary conference letter, in which Petitioner was by regulation to be put on notice of the deficiencies for which Respondent was contemplating disciplinary action.
41. In multiple interviews with Petitioner as a part of his investigation, Maj. Roberts asked only one question about field sobriety tests: "Do you know of any field sobriety tests were [sic] given to James Williams?" (R. Ex. 8, Interviews with Capt. Bruce Williams, pg. 3) When Petitioner replied in the negative, no follow up questions (such as, "why not") were asked either in that interview or in subsequent interviews.
42. Chief Hobgood and Maj. Roberts gave no specific failure on Petitioner's part other than the field sobriety test issue when asked on cross-examination what Petitioner failed to ensure that Lt. Parrott did. Secretary Young, however, added that Petitioner could have had Trooper Williams take an Intoxilyzer examination to determine if the Trooper was impaired. On cross-examination, Secretary Young conceded that (a) such an event would involve a finding on Petitioner's part of probable cause and an arrest for driving while impaired--unless a pre-arrest test was requested--and (b) Petitioner could not ensure that Trooper Williams took such a test in any event, as the Trooper had a right to refuse it. Secretary Young conceded that if Petitioner already had reached a conclusion that Trooper Williams was not impaired, arresting the Trooper for drunk driving would be unethical and improper.
43. As for the allegation of untruthfulness regarding Trooper Williams being impaired, other than the information received from Lt. Parrott--on the basis of which Petitioner initially described Trooper Williams as impaired prior to conducting his own observations at the scene--there is little evidence in this case as presented to support the premise that Trooper Williams legally was impaired by alcohol at the traffic stop. The evidence suggests that Petitioner conducted a detailed and professional observation of Trooper Williams to assess his condition.

BASED UPON the foregoing Findings of Fact, the undersigned hereby makes the following:

**CONCLUSIONS OF LAW**

1. The parties properly are before the Office of Administrative Hearings.
2. Petitioner was a career State employee at the time of his dismissal, as that phrase is defined in G.S. Chapter 126, the State Personnel Act. Because he is entitled to the protections of the State Personnel Act and has alleged that Respondent lacked just cause for his dismissal, the Office of Administrative Hearings has jurisdiction to hear his appeal and issue a Decision to the State Personnel Commission. N.C.G.S. §§ 126-1 et seq., 126-35, 126-37(a).
3. The State Personnel Act permits disciplinary action against career state employees only for “just cause.” N.C.G.S. 126-35. Although “just cause” is not defined in the statute, 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). “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. L. Clifton Carroll, 358 N.C. 649, 669; 599 S.E. 2d 888, 900 (2004).
4. “‘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. [cites omitted.] “Just cause requires ‘misconduct of a substantial nature’ and does not encompass ‘technical violations of statute or official duty without a wrongful intention’” (emphasis added). Carroll at 669, 901. Reviewing whether disciplinary action is supported by just cause generally requires a two-part inquiry: (1) “whether the employee engaged in the alleged conduct,” and (2) “whether that conduct constitutes just cause for the disciplinary action taken.” N.C. Dep’t of Env’t & Natural Res. v. Carroll, 599 S.E.2d 888, 898 (N.C. 2004) (quoting Sanders v. Parker Drilling, 911 F.2d 191, 194 (9th Cir. 1990)) (internal quotation marks omitted).
5. Respondent has the burden of proof in this contested case hearing to show that it had just cause to dismiss Petitioner in accordance with N.C.G.S. 126-35(d); Teague v. N.C. Dep’t of Transportation, 177 N.C. App. 215, 628 S.E.2d 395, disc. rev. denied, 360 N.C. 581 (2006). Administrative regulations provide two grounds for discipline or dismissal based on just cause: Unsatisfactory job performance and unacceptable personal conduct. N.C. Admin. Code tit. 25 r. U.0604(b).
6. Dismissal for unsatisfactory job performance requires prior active written warnings for unsatisfactory job performance.
7. One definition of “unacceptable personal conduct” is willful violation of known or written work rules, such as the Truthfulness policy at issue here. 25 NCAC 11.2304. This would require, as noted, Respondent proving that Petitioner willfully and deliberately made false statements or reports on the subjects at issue.
8. At the close of Respondent’s evidence, Petitioner made a motion for directed verdict with respect to the Truthfulness allegation on impairment and the Truthfulness allegation on

Heather Parrott. In cases such as this where the Administrative Law Judge sits as fact finder, this effectively is a motion for summary disposition of that issue. The motion was allowed on both counts. Respondent presented very little evidence that Trooper Williams actually was impaired by alcohol at the time of the stop and even less that Petitioner falsely stated that the Trooper was not impaired while knowing or believing that he was impaired, which is the critical question. While Respondent points to Petitioner's statements to Dispatcher Rudd, the evidence is that these statements were made prior to Petitioner arriving at the traffic stop and were based on statements from Lt. Parrott--statements and impressions that Petitioner did not agree with following his own examination of the trooper.

9. The undersigned likewise does not conclude that the facts and evidence as presented by Respondent proved that Petitioner willfully and falsely represented his whereabouts when he said, "I am out at the scene right now" instead of *en route*. While this statement was not accurate as stated, the undersigned believes that a dismissal based on untruthfulness must involve proof of a willfully false statement rather than a simply inaccurate one. To hold otherwise would permit dismissal on Truthfulness grounds of any misstatement that was proven inaccurate, including a misspeaking. As held in Goering v. NC Department of Crime Control and Public Safety, 07 OSP 2256 (2008), a simple misspeaking or verbal slip up without proof of willful or deliberate dishonesty does not constitute grounds for discipline in any event, following North Carolina Dept. of Environment & Natural Resources v. Carroll, 358 N.C. 649, 666, 599 S.E.2d 888, 899 (2004).
  
10. Petitioner's motion on the unsatisfactory job performance issue was allowed for two reasons. Respondent provided no information in the dismissal letter or pre-disciplinary conference letter as to *how* Petitioner failed to supervise Lt. Parrott or what Petitioner *should* have ensured that Lt. Parrott did. The only consistent failure cited by Respondent's witnesses--regarding the lack of field sobriety tests--appears nowhere in the in the dismissal letter or pre-disciplinary conference letter. N.C.G.S 126-35(a) requires that Respondent set forth in numerical order "the specific acts or omissions that are the reasons for the disciplinary action." Notification of the specific reasons for dismissal is a condition *precedent* to the disciplinary action--i.e. it must be complied with prior to the disciplinary action being taken or the disciplinary action itself is fatally defective.<sup>3</sup> This notice is a statutory right of due process for career state employees in non-exempt positions. Leiphart v. N.C. School of the Arts, 80 N.C. App. 339, 351-352, 342 S.E.2d 914, 923, *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986). And, given that it is a condition precedent to dismissal, courts have not hesitated to overturn dismissals based on this lack of notice. See, e.g., Owen v. University of North Carolina at Greensboro Physical Plant, 121 N.C. App. 682, 687, 468 S.E.2d 813, (1996). Simply put, this allegation did not give Petitioner sufficient notice of the allegations against him to properly defend himself on this issue at every stage of the proceedings; indeed, there appears to be nothing in the record showing that field sobriety tests were raised and discussed in detail during any of the internal grievance proceedings conducted by Respondent.

<sup>3</sup> This requirement is also codified as an SPC regulation; see 25 N.C.A.C. 1J.0613 (2008).

11. The remaining two allegations were not subject to summary disposition motions. The evidence as a whole showed that it could not be found as fact that Petitioner was deliberately or willfully untruthful about either his whereabouts at the time of the BPS call or the status of the convertible top. Accordingly, Respondent failed to establish this by the greater weight of the evidence.
12. Respondent has failed to meet its burden of proving it had just cause to dismiss Petitioner in accordance with N.C.G.S 126-35.

BASED UPON the foregoing Findings of Fact and Conclusions of Law, I make the following:

**DECISION**

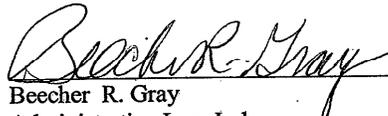
Respondent did not meet its burden of showing, by a preponderance of the evidence, that it had just cause to dismiss Petitioner. Respondent's decision to dismiss Petitioner from his position as a Captain in BPS is **REVERSED**. Petitioner shall be reinstated to his position with Respondent with all back pay and other benefits retroactively, as if he never had been discharged. Petitioner is entitled to reasonable attorney's fees.

**ORDER AND NOTICE**

It hereby is ordered that the agency serve a copy of the FINAL DECISION on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C. Gen. Stat. § 150B-26(b).

The decision of the Administrative Law Judge in this contested case will be reviewed by the agency making the final decision according to the standards found in G.S. 150B-36(b). The agency making the final decision is required to give each party an opportunity to file exceptions to the decision of the Administrative Law Judge and to present written arguments to those in the agency who will make the final decision. N.C.G.S 150B-36(a). The agency making the final decision is the North Carolina State Personnel Commission.

This the 23 day of April, 2012.

  
Beecher R. Gray  
Administrative Law Judge

A copy of the foregoing was mailed to:

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ATTORNEYS FOR RESPONDENT

This the <sup>23rd</sup> 23 day of April, 2012.

  
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