

NORTH CAROLINA

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IN THIS ISSUE



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Office of Administrative Hearings
Rules Division
424 North Blount Street (27601)
6714 Mail Service Center
Raleigh, NC 27699-6714
(919) 733-2678
FAX (919) 733-3462

Julian Mann III, Director
Camille Winston, Deputy Director
Molly Masich, Director of APA Services
Dana Sholes, Publication Coordinator
Julie Brincefield, Editorial Assistant
Felicia Williams, Editorial Assistant
Lisa Johnson, RRC Administrative Assistant

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NORTH CAROLINA ADMINISTRATIVE CODE CLASSIFICATION SYSTEM

The North Carolina Administrative Code (NCAC) has four major classifications of rules. Three of these, titles, chapters, and sections are mandatory. The major classification of the NCAC is the title. Each major department in the North Carolina executive branch of government has been assigned a title number. Titles are further broken down into chapters which shall be numerical in order. Subchapters are optional classifications to be used by agencies when appropriate.

NCAC TITLES		TITLE 21 LICENSING BOARDS	TITLE 24 INDEPENDENT AGENCIES
1	ADMINISTRATION	1 Acupuncture	1 Housing Finance
2	AGRICULTURE & CONSUMER SERVICES	2 Architecture	2 Agricultural Finance Authority
3	AUDITOR	3 Athletic Trainer Examiners	3 Safety & Health Review Board
4	COMMERCE	4 Auctioneers	4 Reserved
5	CORRECTION	6 Barber Examiners	5 State Health Plan Purchasing Alliance Board
6	COUNCIL OF STATE	8 Certified Public Accountant Examiners	
7	CULTURAL RESOURCES	10 Chiropractic Examiners	
8	ELECTIONS	11 Employee Assistance Professionals	
9	GOVERNOR	12 General Contractors	
10A	HEALTH AND HUMAN SERVICES	14 Cosmetic Art Examiners	
11	INSURANCE	16 Dental Examiners	
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13	LABOR	18 Electrical Contractors	
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Note: Title 21 contains the chapters of the various occupational licensing boards and Title 24 contains the chapters of independent agencies.

NORTH CAROLINA REGISTER
 Publication Schedule for January 2006 – December 2006

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 (first legislative day of the next regular session)	270 th day from publication in the Register
20:13	01/03/06	12/08/05	01/18/06	03/06/06	03/20/06	05/01/06	05/09/06	09/30/06
20:14	01/17/06	12/21/05	02/01/06	03/20/06	04/20/06	06/01/06	01/07	10/14/06
20:15	02/01/06	01/10/06	02/16/06	04/03/06	04/20/06	06/01/06	01/07	10/29/06
20:16	02/15/06	01/25/06	03/02/06	04/17/06	04/20/06	06/01/06	01/07	11/12/06
20:17	03/01/06	02/08/06	03/16/06	05/01/06	05/22/06	07/01/06	01/07	11/26/06
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20:19	04/03/06	03/13/06	04/18/06	06/02/06	06/20/06	08/01/06	01/07	12/29/06
20:20	04/17/06	03/24/06	05/02/06	06/16/06	06/20/06	08/01/06	01/07	01/12/07
20:21	05/01/06	04/07/06	05/16/06	06/30/06	07/20/06	09/01/06	01/07	01/26/07
20:22	05/15/06	04/24/06	05/30/06	07/14/06	07/20/06	09/01/06	01/07	02/09/07
20:23	06/01/06	05/10/06	06/16/06	07/31/06	08/21/06	10/01/06	01/07	02/26/07
20:24	06/15/06	05/24/06	06/30/06	08/14/06	08/21/06	10/01/06	01/07	03/12/07
21:01	07/03/06	06/12/06	07/18/06	09/01/06	09/20/06	11/01/06	01/07	03/30/07
21:02	07/17/06	06/23/06	08/01/06	09/15/06	09/20/06	11/01/06	01/07	04/13/07
21:03	08/01/06	07/11/06	08/16/06	10/02/06	10/20/06	12/01/06	01/07	04/28/07
21:04	08/15/06	07/25/06	08/30/06	10/16/06	10/20/06	12/01/06	01/07	05/12/07
21:05	09/01/06	08/11/06	09/16/06	10/31/06	11/20/06	01/01/07	01/07	05/29/07
21:06	09/15/06	08/24/06	09/30/06	11/14/06	11/20/06	01/01/07	01/07	06/12/07
21:07	10/02/06	09/11/06	10/17/06	12/01/06	12/20/06	02/01/07	05/08	06/29/07
21:08	10/16/06	09/25/06	10/31/06	12/15/06	12/20/06	02/01/07	05/08	07/13/07
21:09	11/01/06	10/11/06	11/16/06	01/01/07	01/22/07	03/01/07	05/08	07/29/07
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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.

Note from the Codifier: This Section contains public notices that are required to be published in the Register or have been approved by the Codifier of Rules for publication.

NOTICE OF RULE MAKING PROCEEDINGS AND PUBLIC HEARING

NORTH CAROLINA BUILDING CODE COUNCIL

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

Citation to Existing Rule Affected by this Rule-Making: *NC Residential, Plumbing, Fire and Building Codes.*

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

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

Public Hearing: June 12, 2006, 1:00PM, One Renaissance Center, 3301 Benson Drive, Raleigh, NC 27609.

Comment Procedures: Written comments may be sent to Wanda Edwards, Secretary, NC Building Code Council, c/o NC Department of Insurance, 1202 Mail Service Center, Raleigh, NC 27699-1202. Comment period expires on July 14, 2006.

Statement of Subject Matter:

1. (060314 Item B-2) Request by the Staff of the NC Department of Insurance to adopt the 2006 NC Residential Code (2003 IRC with 2006 NC Amendments).

Final Adoption is anticipated on September 12, 2006.

David Smith spoke to the Council regarding this item. Mr. Smith stated that the petition includes modifications made by the Residential ad hoc committee. Tom Avery made a motion to grant this petition. Tom Turner seconded the motion. The motion carried. (March 2006). The 2006 NC Amendment documents for the 2003 International Residential Code will be available online at the following site on or before May 15, 2006:

www.ncbuildingcodes.com (click on Adopted Code Information, NC State Building Codes, Building Code - 2006 Edition – Proposed Amendments)

2. (051213 Item B-1) Request by the NC Building Code Council to add the following Section to the 2006 NC Plumbing Code:

SECTION 614

PARTIAL SPRINKLER PROTECTION IN ONE-AND TWO-FAMILY DWELLINGS

614.1 Partial protection. Nothing herein shall be deemed to prohibit the connection to the domestic water distribution system of a system of one or more fire suppression sprinkler heads in one or more rooms of a one or two family dwelling, nor shall such installation impose additional requirements on said domestic water distribution system with regard to pipe size, water pressure, meter size, monitoring or alarm provided that:

1. The sprinkler heads used are residential fast response type.

2. Each branch feeding one or more sprinkler heads shall be provided with an isolation valve which shall be readily accessible and the function thereof shall be clearly marked.

3. Each isolation valve shall be clearly identified as to function with a tag or other device which shall clearly indicate that the system does

not meet the requirements of NFPA 13.

4. The piping installation and material shall comply with the requirements of the Plumbing Code.

Al Bass made a motion to grant this petition and to send it to the Plumbing Committee for review. Barry Maness seconded the motion. The motion carried (December 2005).

3. (060314 Item B-3) Request by the NC Building Code Council to amend the 2006 NC Fire and Building Codes to incorporate the 2003 IFC/IBC Group R sprinkler requirements as follows:

~~**903.2.7 Group R.** An automatic sprinkler system installed in accordance with Section 903.3 shall be provided throughout all buildings with a Group R-1, R-2 or R-4 fire area as described in this Section.~~

~~**903.2.7.1 Group R-1.** An automatic sprinkler system shall be provided throughout buildings with a Group R-1 fire area.~~

~~**1.Exceptions:**~~

- ~~1. Where guestrooms are not more than three stories above the lowest level of exit discharge and each guestroom has at least one door leading directly to an exterior exit access that leads directly to approved exits.~~
- ~~2. A residential sprinkler system installed in accordance with Section 903.3.1.2 shall be allowed in buildings, or portions thereof, of Group R-1.~~

~~**903.2.7.2 Group R-2.** An automatic sprinkler system shall be provided throughout all buildings with a Group R-2 fire area where more than two stories in height, including basements, or where having more than 16 dwelling units.~~

~~**Exception:** A residential sprinkler system installed in accordance with Section 903.3.1.2 shall be allowed in buildings, or portions thereof, of Group R-2.~~

~~**903.2.7.3 Group R-4.** An automatic sprinkler system shall be provided throughout all buildings with a Group R-4 fire area with more than eight occupants.~~

~~**1.Exceptions:**~~

- ~~1. An automatic sprinkler system is not required in Group R-4 adult and child day care facilities.~~
- ~~2. An automatic sprinkler system installed in accordance with Section 903.3.1.2 or Section 903.3.1.3 shall be allowed in Group I-1 facilities.~~

~~**903.2.7 Group R.** An automatic sprinkler system installed in accordance with Section 903.3 shall be provided throughout all buildings with a Group R fire area.~~

~~**Exception:** An automatic sprinkler system is not required in Group R-3 and R-4 adult and child day care facilities.~~

Al Bass made a motion to grant this petition. Tom Avery seconded the motion. The motion carried (March 2006).

**NORTH CAROLINA DEPARTMENT OF LABOR
DIVISION OF OCCUPATIONAL SAFETY AND HEALTH
RALEIGH, NORTH CAROLINA**

**Order 2005-V-02
Saba Holdings dba Reman Technologies
Permanent Variance**

Order:

In accordance with N.C. Gen. Stat. § 95-132 and 13 NCAC 7A. 0700, Saba Holdings dba Reman Technologies is granted permission to use an LP or LPS forklift inside of a spray booth, in lieu of the requirements of 29 CFR 1910.178(c)(2)(iii) that an EX forklift be used. This permission is limited to the Reman Technologies site located at 11421 Reames Road in Charlotte, Mecklenburg County, North Carolina.

Discussion:

Saba Holding Company dba Reman Technologies ("Reman") is located in Charlotte, Mecklenburg County, North Carolina, and is owned by Volvo. The company remanufactures and paints off road transmissions and engines. Reman has an automotive spray booth that is designed to allow automobiles to be driven into the booth, painted, dried in the booth, and driven back out. Reman utilizes the spray booth to paint transmissions or engines that range in weight from 400 pounds to 3000 pounds, depending on the type of equipment.

On October 11, 2005, Reman filed an application for a permanent variance from 29 CFR 1910.178 (c)(2)(iii), which requires the use of an EX forklift in hazardous atmospheres, such as the interior of a spray booth. EX designated forklifts are electrically-powered units that are designed to be operated in certain atmospheres containing flammable vapors or dusts. By way of contrast, an LP forklift is a liquified-petroleum powered unit that contains minimum acceptable safeguards against inherent fire hazards, and an LPS forklift is a liquified-petroleum powered unit that contains additional safeguards to the exhaust, fuel and electrical systems. Reman requested a variance in order to be able to use an LPS forklift in the spray booth. In support of its variance request, Reman provided supporting documentation to establish that it had established a spray booth maintenance schedule and a set of safe operating procedures that, when followed, would prevent a hazardous atmosphere from existing at the time the forklift enters the spray booth to place or remove parts. The spray booth maintenance schedule and safe operating procedures include the following:

Spray Booth Maintenance Schedule

On a daily basis:

1. The ventilation will be turned on and the manometer checked for proper function.
2. The paint booth floor will be cleaned at the end of the shift.
3. A visual inspection of the interior and exterior of the booth will be conducted to ensure work practices and booth maintenance procedures are followed.

In addition:

1. The overspray filters will be changed at the pressure drop indicated on the booth mounted manometer (1.25") or more often.
2. The fire retardant paper on the floor will be replaced at least weekly or more often if necessary.
3. Other overspray residues will be cleaned up as necessary to prevent accumulation.
4. The spray booth and exhaust system will be maintained and/or repaired in accordance with the manufacturer's instructions to ensure conformance with the design criteria and NFPA 33 - Standard for Spray Application Using Flammable or Combustible Materials.

Safe Operation Procedures for Spray Booth

1. The spray booth maintenance schedule will be followed.
2. At no time will the forklift enter the booth during spray painting or the drying process.
3. There will be no more than a one day supply of paint/other flammable liquids maintained in the booth.
4. All flammable liquids will be kept in closed original or other approved containers while in the spray booth.
5. All flammable liquids not in use or in excess of a one day supply will be stored in an approved flammable liquid cabinet.

IN ADDITION

6. All solvent spills will be cleaned up immediately and the booth adequately ventilated prior to the forklift entering the booth.
7. Rags or other materials soaked or coated with flammable solvents or which are combustible will be removed from the booth and placed in a covered metal receptacle.
8. Only non-sparking tools will be used for cleaning the spray booth.
9. Prior to the forklift entering the booth to position parts:
 - a. The ventilation will be turned on; and
 - b. Flammable materials necessary for spray painting will not be placed in the travel path of the forklift.
10. To remove painted parts from the spray booth:
 - a. The drying process will be complete. A minimum of 15-30 minutes of drying time is required and appropriate due to fast-drying paint; and
 - b. The ventilation system will remain on until the forklift leaves the booth.

A Notice of Request for a Permanent Variance was published in the January 3, 2006 edition of the *N.C. Register* (Volume 20, Issue 13) allowing all interested parties to comment on this proposed variance for a period of time. This Notice of Request was also posted at Reman's place of business for a prescribed period of time. During this time, neither Reman nor the Department received any negative comments regarding the proposed variance.

Based on the information provided and the measurements taken, the Department finds that with adherence to the spray booth maintenance schedule and safe operating procedures referenced above, the spray booth will not contain a hazardous atmosphere at the time the forklift is driven into the spray booth to place and pick up parts. Therefore, Reman can safely use either an LP or LPS forklift. To that end, the Department hereby grants Reman's request for a permanent variance, provided Reman strictly complies with the spray booth maintenance schedule and safe operating procedures referenced above outlined above.

Action:

This order grants Reman's request for a permanent variance. This permanent variance will remain in effect until modified or revoked pursuant to N.C. Gen. Stat. § 95-132(b) and 13 NCAC 07A. 0709.

This the 24th day of April, 2006.

Allen M. McNeely
Director, North Carolina Department of Labor –
Occupational Safety and Health Division

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 02 – DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

Fiscal Impact:

- State
- Local
- Substantive (≥\$3,000,000)
- None

Notice is hereby given in accordance with G.S. 150B-21.2 that the Commissioner of Agriculture intends to adopt the rules cited as 02 NCAC 52K .0101 - .0102, .0201, .0301 - .0302, .0401 - .0407, .0501 - .0502, .0601 - .0604, .0701 - .0703.

CHAPTER 52 - VETERINARY DIVISION

Proposed Effective Date: September 1, 2006

SUBCHAPTER 52K – ANIMAL EXHIBITIONS

Instructions on How to Demand a Public Hearing: (must be requested in writing within 15 days of notice): Any person may request a public hearing on the proposed rules by submitting a request in writing no later than May 30, 2006, to David S. McLeod, 1001 Mail Service Center, Raleigh, NC 27699-1001.

SECTION .0100 – PURPOSE AND SCOPE

02 NCAC 52K .0101 PURPOSE

The purpose of this Subchapter is to establish standards for animal exhibitions at agricultural fairs to reduce the likelihood of the transmission of disease from animals to humans.

Authority G.S. 106-520.3A.

02 NCAC 52K .0102 SCOPE

The rules in this Subchapter apply to animal exhibitions at agricultural fairs where animals are displayed for the purpose of physical contact with humans.

Authority G.S. 106-520.3A.

Reason for Proposed Action: S.L. 2005-191 requires the Commissioner of Agriculture to adopt rules for the operation and permitting of animal exhibitions to prevent the transmission of diseases from animals to humans. The proposed rules establish standards for warning signs, fencing, hand-washing facilities, animal health, disinfection, and permitting.

SECTION .0200 - DEFINITIONS

02 NCAC 52K .0201 DEFINITIONS

As used in this Subchapter:

- (1) "Agricultural fair" or "fair" means a fair required to be licensed by the Commissioner of Agriculture pursuant to G.S. 106-520.3.
- (2) "Animal contact exhibit" means any exhibit at an agricultural fair where there are animals displayed for the purpose of petting, holding, feeding, or other physical contact by humans, including but not limited to, petting zoos, pony rides and poultry handling exhibits.
- (3) "Commissioner" means the Commissioner of Agriculture or the Commissioner's authorized representative.
- (4) "Department" means the North Carolina Department of Agriculture and Consumer Services.
- (5) "Transition area" means the area between an animal contact exhibit exit and the closest hand-washing station.

Authority G.S. 106-520.3A.

Procedure by which a person can object to the agency on a proposed rule: Any person may object to the proposed rules by submitting a written statement of objection(s) to David S. McLeod, 1001 Mail Service Center, Raleigh, NC 27699-1001.

Comments may be submitted to: David S. McLeod, 1001 Mail Service Center, Raleigh, NC 27699-1001, phone (919) 733-7125 extension 249, fax (919) 716-0105, email david.mcleod@ncmail.net

Comment period ends: July 14, 2006

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

SECTION .0300 - SIGNAGE

02 NCAC 52K .0301 SIGNAGE

An animal contact exhibit shall provide clearly visible signage at the entrance and exit of the exhibit to educate the public regarding:

- (1) the fact that animal contact may pose a health risk;
- (2) items that are prohibited in animal areas;
- (3) high risk populations, including:
 - (a) the elderly;
 - (b) children under the age of six; and
 - (c) women who are pregnant; and
- (4) the location of hand-washing stations.

Authority G.S. 106-520.3A.

02 NCAC 52K .0302 MINIMUM SIZE OF LETTERING ON SIGNAGE

All lettering on signs shall be at least 3/8 inch high.

Authority G.S. 106-520.3A.

SECTION .0400 – ANIMAL CONTACT EXHIBITS

02 NCAC 52K .0401 FENCING

- (a) Animals and bedding shall be separated from the public with fencing to minimize contact with manure and bedding. This does not apply to persons riding ponies or horses or adults accompanying children riding ponies or horses.
- (b) Fencing may allow children to reach through or over to pet and feed animals.
- (c) Fencing shall be at least 29 inches high. On the side(s) of the exhibit intended for public contact, the fencing shall have a solid board or panel at the bottom at least eight inches high to contain manure and bedding.

Authority G.S. 106-520.3A.

02 NCAC 52K .0402 PROHIBITED ITEMS

In order to minimize hand to mouth contact, no pacifiers, baby bottles, drink cups, food, drink or smoking shall be allowed in animal contact exhibits.

Authority G.S. 106-520.3A.

02 NCAC 52K .0403 AGE REQUIREMENTS

Unsupervised children less than six years old shall not be permitted in animal contact areas.

Authority G.S. 106-520.3A.

02 NCAC 52K .0404 FEEDING OF ANIMALS

Only food provided by the animal contact exhibit may be fed to the animals. Animal food shall not be provided in containers that are human food items, such as ice cream cones.

Authority G.S. 106-520.3A.

02 NCAC 52K .0405 STAFFING

An animal contact exhibit shall be staffed at all times of operation by at least one person who has the authority to ensure that the exhibit complies with this Subchapter.

Authority G.S. 106-520.3A.

02 NCAC 52K .0406 SURFACES

- (a) Surfaces in the animal contact exhibit that can be touched by both fair patrons and animals shall be made of impervious material, and shall be cleaned and disinfected daily and at any time visible contamination is present.
- (b) All animal fencing, feed troughs, and open watering systems shall be disinfected prior to and at the end of each fair.

Authority G.S. 106-520.3A.

02 NCAC 52K .0407 WASTE DISPOSAL

The fair shall designate a manure disposal area and shall control wastewater runoff. The animal contact exhibit shall have a designated area for temporary storage of animal waste and shall not transport such waste through areas occupied by fair patrons. Manure disposal and storage areas shall be inaccessible to the public, unless waste is bagged and placed in a closeable dumpster.

Authority G.S. 106-520.3A.

SECTION .0500 - TRANSITION AREAS

02 NCAC 52K .0501 HAND-WASHING STATIONS

- (a) Hand-washing stations with soap, running water, paper towels and disposal containers shall be located within ten feet of the exit of an animal contact exhibit.
- (b) Hand-washing stations suitable for small children shall be available in the same area.
- (c) Signage shall be provided to direct patrons to hand-washing stations.
- (d) In order to promote hand-washing with soap and water, dispensers for waterless hand sanitizing lotions, gels or hand wipes shall not be provided in the transition or exhibit area.

Authority G.S. 106-520.3A.

02 NCAC 52K .0502 FOOD AND DRINK

Food and beverages for human consumption shall not be sold, prepared, served, or consumed in transition areas.

Authority G.S. 106-520.3A.

SECTION .0600 - ANIMAL CARE AND MANAGEMENT

02 NCAC 52K .0601 HEALTH CERTIFICATE; VACCINATIONS

- (a) An official certificate of veterinary inspection, a rabies vaccination certificate (when applicable), and any other documentation required by the State Veterinarian for species or state of origin, shall accompany all animals contained in a public contact setting.

(b) Animals for which there is an approved rabies vaccine, but which are too young to receive rabies vaccination, are prohibited from animal contact exhibits.

(c) Rabies vaccination shall be administered at least three months prior to and no more than one year prior to the event.

(d) If no licensed rabies vaccine exists for a particular species (such as rabbits, goats, llamas, and camels), no vaccination is required.

Authority G.S. 106-520.3A.

02 NCAC 52K .0602 DAILY MONITORING

Animals shall be monitored daily by exhibit personnel for signs of illness. Animals that exhibit signs of illness shall be removed from public contact immediately.

Authority G.S. 106-520.3A.

02 NCAC 52K .0603 HIGH RISK ANIMALS

Animals that pose a high disease risk to humans, as determined by the State Veterinarian or his representative, shall not be allowed in animal contact exhibits.

Authority G.S. 106-520.3A.

02 NCAC 52K .0604 BIRTHING ANIMALS

No near-birth or birthing sheep, cattle or goats and no sheep, cattle or goats that have given birth within the previous two weeks shall be allowed in animal contact exhibits.

Authority G.S. 106-520.3A.

SECTION .0700 - PERMITTING; OTHER REQUIREMENTS

02 NCAC 52K .0701 PERMITTING

(a) Each animal contact exhibit shall be inspected and permitted by the Department prior to opening at a sanctioned agricultural fair.

(b) Permitting applications for animal contact exhibits will be included in the annual County Fair Handbook distributed by the Department. Applications and other information shall be forwarded by the fair manager to all contracted animal contact exhibits or completed by fair staff for exhibits operated by the fair.

(c) In order to be permitted when the fair opens, an animal contact exhibit shall be set up and ready for inspection at least two hours before the fair opens.

(d) Permits shall be valid for exhibition at other fairs listed on the permit application, unless the permit has been suspended or revoked.

(e) A permit may be suspended or revoked by the Commissioner or his authorized representative for any violation of this Subchapter or G.S. 106-520.3A, in accordance with the Administrative Procedure Act.

(f) The owner, operator or person in charge of an animal contact exhibit shall be responsible for compliance with this Subchapter, and shall not knowingly permit violations by its employees, agents or patrons.

Authority G.S. 106-520.3A.

02 NCAC 52K .0702 EXHIBIT AREAS

(a) Contact animal exhibits shall be held on concrete or paved areas whenever feasible.

(b) Paved exhibit areas shall be cleaned and disinfected at the end of the fair.

(c) Areas that are not paved shall be cleaned of all manure at the end of the fair and shall not be used at other times of the year for human activities.

Authority G.S. 106-520.3A.

02 NCAC 52K .0703 RECORDS

Each contact animal exhibit shall keep a record of daily disinfection and animal monitoring during each fair. Records shall be maintained for a period of one year and shall be made available for inspection by the Commissioner of Agriculture or his designee.

Authority G.S. 106-520.3A.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

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

Proposed Effective Date: October 1, 2006

Public Hearing:

Date: August 9, 2006

Time: 1:00 p.m.

Location: Cardinal Room, 5605 Six Forks Road, Raleigh, NC 27609

Reason for Proposed Action: *These rules are necessary in order to ensure that the Division of Public Health is informed promptly of diseases and medical conditions that constitute serious public health risks, particularly that of a worldwide influenza pandemic. It is essential that the Division of Public Health is informed promptly of such conditions if it is to take appropriate measures to protect public health.*

Procedure by which a person can object to the agency on a proposed rule: *Objections may be submitted in writing to Chris G. Hoke, JD, the Rule-Making Coordinator, during the public comment period. Additionally, objections may be made verbally and/or in writing at the public hearing for this rule.*

Comments may be submitted to: *Chris G. Hoke, JD, 1931 Mail Service Center, Raleigh, NC 27699-1931, phone (919) 715-5006, email Chris.Hoke@ncmail.net*

Comment period ends: August 9, 2006

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact:

- State
- Local
- Substantive (≥\$3,000,000)
- None

CHAPTER 41 – HEALTH: EPIDEMIOLOGY

SUBCHAPTER 41A – COMMUNICABLE DISEASE CONTROL

SECTION .0100 – REPORTING OF COMMUNICABLE DISEASES

10A NCAC 41A .0101 REPORTABLE DISEASES AND CONDITIONS

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

- (1) acquired immune deficiency syndrome (AIDS) -7 days;
- (2) anthrax ~~-24 hours;~~ - immediately;
- (3) botulism ~~-24 hours;~~ - immediately;
- (4) brucellosis -7 days;
- (5) campylobacter infection -24 hours;
- (6) chancroid -24 hours;
- (7) chlamydial infection (laboratory confirmed) -7 days;
- (8) cholera -24 hours;
- (9) Creutzfeldt-Jakob disease - 7 days;
- (10) cryptosporidiosis - 24 hours;
- (11) cyclosporiasis - 24 hours;
- (12) dengue -7 days;
- (13) diphtheria -24 hours;
- (14) Escherichia coli, shiga toxin-producing -24 hours;
- (15) ehrlichiosis - 7 days;
- (16) encephalitis, arboviral -7 days;
- (17) foodborne disease, including but not limited to Clostridium perfringens, staphylococcal, and Bacillus cereus -24 hours;
- (18) gonorrhea -24 hours;

- (19) granuloma inguinale -24 hours;
- (20) Haemophilus influenzae, invasive disease -24 hours;
- (21) Hantavirus infection - 7 days;
- (22) Hemolytic-uremic ~~syndrome/thrombotic thrombocytopenic purpura~~ syndrome - 24 hours;
- (23) Hemorrhagic fever virus infection ~~-24 hours;~~ - immediately;
- (24) hepatitis A -24 hours;
- (25) hepatitis B -24 hours;
- (26) hepatitis B carriage -7 days;
- (27) hepatitis C, acute - 7 days;
- (28) human immunodeficiency virus (HIV) infection confirmed -7 days;
- (29) influenza virus infection causing death in persons less than 18 years of age - 24 hours;
- (30) legionellosis -7 days;
- (31) leprosy - 7 days;
- (32) leptospirosis -7 days;
- (33) listeriosis - 24 hours;
- (34) Lyme disease -7 days;
- (35) lymphogranuloma venereum -7 days;
- (36) malaria -7 days;
- (37) measles (rubeola) -24 hours;
- (38) meningitis, pneumococcal -7 days;
- (39) meningococcal disease -24 hours;
- (40) monkeypox - 24 hours;
- (41) mumps -7 days;
- (42) nongonococcal urethritis -7 days;
- (43) novel influenza virus infection; - immediately;
- ~~(43)~~(44) plague ~~-24 hours;~~ - immediately;
- ~~(44)~~(45) paralytic poliomyelitis -24 hours;
- ~~(45)~~(46) psittacosis -7 days;
- ~~(46)~~(47) Q fever -7 days;
- ~~(47)~~(48) rabies, human -24 hours;
- ~~(48)~~(49) Rocky Mountain spotted fever -7 days;
- ~~(49)~~(50) rubella -24 hours;
- ~~(50)~~(51) rubella congenital syndrome -7 days;
- ~~(51)~~(52) salmonellosis -24 hours;
- ~~(52)~~(53) severe acute respiratory syndrome (SARS) - 24 hours;
- ~~(53)~~(54) shigellosis -24 hours;
- ~~(54)~~(55) smallpox ~~-24 hours;~~ - immediately;
- ~~(55)~~(56) Staphylococcus aureus with reduced susceptibility to vancomycin - 24 hours;
- ~~(56)~~(57) streptococcal infection, Group A, invasive disease - 7 days;
- ~~(57)~~(58) syphilis -24 hours;
- ~~(58)~~(59) tetanus -7 days;
- ~~(59)~~(60) toxic shock syndrome -7 days;
- ~~(60)~~ toxoplasmosis, congenital ~~-7 days;~~
- (61) trichinosis -7 days;
- (62) tuberculosis -24 hours;
- (63) tularemia ~~-24 hours;~~ - immediately;
- (64) typhoid -24 hours;
- (65) typhoid carriage (Salmonella typhi) -7 days;
- (66) typhus, epidemic (louse-borne) -7 days;
- (67) vaccinia - 24 hours;

- (68) vibrio infection (other than cholera) - 24 hours;
- (69) whooping cough -24 hours;
- (70) yellow fever -7 days.
- (b) For purposes of reporting confirmed human immunodeficiency virus (HIV) infection is defined as: a positive virus culture; repeatedly reactive EIA antibody test confirmed by western blot or indirect immunofluorescent antibody test; positive nucleic acid detection (NAT) est; or other confirmed testing method approved by the Director of the State Public Health Laboratory conducted on or after February 1, 1990. In selecting additional tests for approval, the Director of the State Public Health Laboratory shall consider whether such tests have been approved by the federal Food and Drug Administration, recommended by the federal Centers for Disease Control and Prevention, and endorsed by the Association of Public Health Laboratories.
- (c) In addition to the laboratory reports for Mycobacterium tuberculosis, Neisseria gonorrhoeae, and syphilis specified in G.S. 130A-139, laboratories shall report:
- (1) Isolation or other specific identification of the following organisms or their products from human clinical specimens:
 - (A) Any hantavirus or hemorrhagic fever virus.
 - (B) Arthropod-borne virus (any type).
 - (C) Bacillus anthracis, the cause of anthrax.
 - (D) Bordetella pertussis, the cause of whooping cough (pertussis).
 - (E) Borrelia burgdorferi, the cause of Lyme disease (confirmed tests).
 - (F) Brucella spp., the causes of brucellosis.
 - (G) Campylobacter spp., the causes of campylobacteriosis.
 - (H) Chlamydia trachomatis, the cause of genital chlamydial infection, conjunctivitis (adult and newborn) and pneumonia of newborns.
 - (I) Clostridium botulinum, a cause of botulism.
 - (J) Clostridium tetani, the cause of tetanus.
 - (K) Corynebacterium diphtheriae, the cause of diphtheria.
 - (L) Coxiella burnetii, the cause of Q fever.
 - (M) Cryptosporidium parvum, the cause of human cryptosporidiosis.
 - (N) Cyclospora cayetanesis, the cause of cyclosporiasis.
 - (O) Ehrlichia spp., the causes of ehrlichiosis.
 - (P) Shiga toxin-producing Escherichia coli, a cause of hemorrhagic colitis, hemolytic uremic syndrome, and thrombotic thrombocytopenic purpura.
 - (2) Isolation or other specific identification of the following organisms from normally sterile human body sites:
 - (A) Group A Streptococcus pyogenes (group A streptococci).
 - (B) Haemophilus influenzae, serotype b.
 - (C) Neisseria meningitidis, the cause of meningococcal disease.
 - (3) Positive serologic test results, as specified, for the following infections:
 - (A) Fourfold or greater changes or equivalent changes in serum antibody titers to:
 - (i) Any arthropod-borne viruses associated with meningitis or encephalitis in a human.
 - (ii) Any hantavirus or hemorrhagic fever virus.
- (Q) Francisella tularensis, the cause of tularemia.
 - (R) Hepatitis B virus or any component thereof, such as hepatitis B surface antigen.
 - (S) Human Immunodeficiency Virus, the cause of AIDS.
 - (T) Legionella spp., the causes of legionellosis.
 - (U) Leptospira spp., the causes of leptospirosis.
 - (V) Listeria monocytogenes, the cause of listeriosis.
 - (W) Monkeypox.
 - (X) Mycobacterium leprae, the cause of leprosy.
 - (Y) Plasmodium falciparum, P. malariae, P. ovale, and P. vivax, the causes of malaria in humans.
 - (Z) Poliovirus (any), the cause of poliomyelitis.
 - (AA) Rabies virus.
 - (BB) Rickettsia rickettsii, the cause of Rocky Mountain spotted fever.
 - (CC) Rubella virus.
 - (DD) Salmonella spp., the causes of salmonellosis.
 - (EE) Shigella spp., the causes of shigellosis.
 - (FF) Smallpox virus, the cause of smallpox.
 - (GG) Staphylococcus aureus with reduced susceptibility to vanomycin.
 - (HH) Trichinella spiralis, the cause of trichinosis.
 - (II) Vaccinia virus.
 - (JJ) Vibrio spp., the causes of cholera and other vibrioses.
 - (KK) Yellow fever virus.
 - (LL) Yersinia pestis, the cause of plague.

- (iii) Chlamydia psittaci, the cause of psittacosis.
- (iv) Coxiella burnetii, the cause of Q fever.
- (v) Dengue virus.
- (vi) Ehrlichia spp., the causes of ehrlichiosis.
- (vii) Measles (rubeola) virus.
- (viii) Mumps virus.
- (ix) Rickettsia rickettsii, the cause of Rocky Mountain spotted fever.
- (x) Rubella virus.
- (xi) Yellow fever virus.
- (B) The presence of IgM serum antibodies to:
 - (i) Chlamydia psittaci
 - (ii) Hepatitis A virus.
 - (iii) Hepatitis B virus core antigen.
 - (iv) Rubella virus.
 - (v) Rubeola (measles) virus.
 - (vi) Yellow fever virus.
- (4) Laboratory results from tests to determine the absolute and relative counts for the T-helper (CD4) subset of lymphocytes that have a level below that specified by the Centers for Disease Control and Prevention as the criteria used to define an AIDS diagnosis.

Tennessee River Basin, are proposed to be reclassified from Class B, C Tr, WS-IV Tr CA, WS-IV Tr, and WS-IV & B CA to Class B ORW, C Tr ORW, WS-IV Tr ORW CA, WS-IV Tr ORW, and WS-IV & B ORW CA, respectively.

The purpose of these rule amendments would be to provide supplementary protection for the resources and quality of the subject waters. Water quality studies conducted in August 2005 show that the waters proposed to be reclassified meet Class ORW criteria. The land along the waters to be reclassified exists solely within the jurisdiction of Swain County and is entirely located within the Great Smokey Mountains National Park (GSMNP). The area proposed for reclassification measures approximately 83,000 acres, and approximately 124 miles of waterbodies are proposed to be reclassified.

Acid-producing rock in the proposed ORW area could be a threat to water quality if waters in the area receive drainage from excavation of this rock. In addition, there are plans for development in the proposed ORW area that solely consist of potential federal road construction and associated visitor amenities along the northern shore of Fontana Lake. In light of these potential threats to the waters' quality and resource values, extra protections in addition to the ORW standard management strategies are proposed for the subject waters. These extra protections consist of control and treatment of stormwater generated for and by any new development and adding conditions to 401 water quality certification in the proposed ORW area to address runoff from excavation of acid-producing rock. Please note that the ORW standard management strategies do not allow new or expanded wastewater discharges, which are not planned for the subject waters, and NC DOT regulations for many types of road and bridge activities in ORW watersheds require use of Best Management Practices (BMPs) associated with sediment and erosion control.

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

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Environmental Management Commission intends to amend the rules cited as 15A NCAC 02B .0225, .0303.

Proposed Effective Date: *November 1, 2006*

Public Hearing:

Date: *Monday, June 5, 2006*

Time: *6:00 p.m.*

Location: *Swain County Center for the Arts at Swain High School, 1415 Fontana Road, Bryson City, NC*

Reason for Proposed Action: *Proposed Reclassification of the Entire Watersheds of All Creeks that Drain to the North Shore of Fontana Lake Between Eagle and Forney Creeks (including Eagle and Forney Creeks):*

Session Law 2005-0097 (House Bill 1189) states that "The Environmental Management Commission shall initiate a rule-making proceeding...to adopt rules to reclassify the entire watersheds of all creeks that drain to the north shore of Fontana Lake between Eagle and Forney Creeks, including Eagle and Forney Creeks, as outstanding resource waters..." The above-mentioned waters, which are located in Swain County, Little

Procedure by which a person can object to the agency on a proposed rule: *You may attend the public hearing and make relevant verbal comments, and/or submit written comments, data or other relevant information by July 14, 2006. The Hearing Officer may limit the length of time that you may speak at the public hearing, if necessary, so that all those who wish to speak may have an opportunity to do so.*

The EMC is very interested in all comments pertaining to the proposed reclassification. All persons interested and potentially affected by the proposal are strongly encouraged to read this entire notice and make comments on the proposed reclassification. The EMC may not adopt a rule that differs substantially from the text of the proposed rule published in this notice unless the EMC publishes the text of the proposed different rule and accepts comments on the new text (See G.S. 150B-21.2(g)). Written comments may be submitted to Elizabeth Kountis of the Water Quality Planning Section at the postal address, e-mail address, or fax number listed in this notice.

Comments may be submitted to: *Elizabeth Kountis, DENR/Division of Water Quality, Planning Section, 1617 Mail Service Center, Raleigh, NC 27699-1617, phone (919) 733-5083 extension 369, fax (919) 715-5637, email elizabeth.kountis@ncmail.net*

Comment period ends: July 14, 2006

Procedure for Subjecting a Proposed Rule to Legislative Review:

If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact:

- State
- Local
- Substantive (≥\$3,000,000)
- None

SUBCHAPTER 2B - SURFACE WATER AND WETLAND STANDARDS

SECTION .0200 - CLASSIFICATIONS AND WATER QUALITY STANDARDS APPLICABLE TO SURFACE WATERS AND WETLANDS OF NORTH CAROLINA

15A NCAC 02B .0225 OUTSTANDING RESOURCE WATERS

(a) General In addition to the existing classifications, the Commission may classify unique and special surface waters of the state as outstanding resource waters (ORW) upon finding that such waters are of exceptional state or national recreational or ecological significance and that the waters have exceptional water quality while meeting the following conditions:

- (1) that the water quality is rated as excellent based on physical, chemical or biological information;
- (2) the characteristics which make these waters unique and special may not be protected by the assigned narrative and numerical water quality standards.

(b) Outstanding Resource Values. In order to be classified as ORW, a water body must exhibit one or more of the following values or uses to demonstrate it is of exceptional state or national recreational or ecological significance:

- (1) there are outstanding fish (or commercially important aquatic species) habitat and fisheries;
- (2) there is an unusually high level of water-based recreation or the potential for such recreation;
- (3) the waters have already received some special designation such as a North Carolina or National Wild and Scenic River, Native or Special Native Trout Waters, National

- (4) Wildlife Refuge, etc, which do not provide any water quality protection;
- (5) the waters represent an important component of a state or national park or forest; or
- (5) the waters are of special ecological or scientific significance such as habitat for rare or endangered species or as areas for research and education.

(c) Quality Standards for ORW

(1) Freshwater: Water quality conditions shall be maintained to protect the outstanding resource values of waters classified ORW. Management strategies to protect resource values shall be developed on a site specific basis during the proceedings to classify waters as ORW. No new discharges or expansions of existing discharges shall be permitted, and stormwater controls for all new development activities requiring an Erosion and Sedimentation Control Plan in accordance with rules established by the NC Sedimentation Control Commission or an appropriate local erosion and sedimentation control program shall be required to follow the stormwater provisions as specified in 15A NCAC 02H .1000. Specific stormwater requirements for ORW areas are described in 15A NCAC 02H .1007.

(2) Saltwater: Water quality conditions shall be maintained to protect the outstanding resource values of waters classified ORW. Management strategies to protect resource values shall be developed on a site-specific basis during the proceedings to classify waters as ORW. New development shall comply with the stormwater provisions as specified in 15A NCAC 02H .1000. Specific stormwater management requirements for saltwater ORWs are described in 15A NCAC 02H .1007. New non-discharge permits shall meet reduced loading rates and increased buffer zones, to be determined on a case-by-case basis. No dredge or fill activities shall be allowed if those activities would result in a reduction of the beds of submerged aquatic vegetation or a reduction of shellfish producing habitat as defined in 15A NCAC 03I .0101(b)(20)(A) and (B), except for maintenance dredging, such as that required to maintain access to existing channels and facilities located within the designated areas or maintenance dredging for activities such as agriculture. A public hearing is mandatory for any proposed permits to discharge to waters classified as ORW.

Additional actions to protect resource values shall be considered on a site specific basis during the proceedings to classify waters as ORW and shall be specified in Paragraph (e) of this Rule. These actions may include anything within the powers of the Commission. The Commission shall also consider local actions

which have been taken to protect a water body in determining the appropriate state protection options. Descriptions of boundaries of waters classified as ORW are included in Paragraph (e) of this Rule and in the Schedule of Classifications (15A NCAC 02B .0302 through 02B .0317) as specified for the appropriate river basin and shall also be described on maps maintained by the Division of Water Quality.

(d) Petition Process. Any person may petition the Commission to classify a surface water of the state as an ORW. The petition shall identify the exceptional resource value to be protected, address how the water body meets the general criteria in Paragraph (a) of this Rule, and the suggested actions to protect the resource values. The Commission may request additional supporting information from the petitioner. The Commission or its designee shall initiate public proceedings to classify waters as ORW or shall inform the petitioner that the waters do not meet the criteria for ORW with an explanation of the basis for this decision. The petition shall be sent to:

Director
DENR/Division of Water Quality
1617 Mail Service Center
Raleigh, North Carolina 27699-1617

The envelope containing the petition shall clearly bear the notation: RULE-MAKING PETITION FOR ORW CLASSIFICATION.

(e) Listing of Waters Classified ORW with Specific Actions
Waters classified as ORW with specific actions to protect exceptional resource values are listed as follows:

- (1) Roosevelt Natural Area [White Oak River Basin, Index Nos. 20-36-9.5-(1) and 20-36-9.5-(2)] including all fresh and saline waters within the property boundaries of the natural area shall have only new development which complies with the low density option in the stormwater rules as specified in 15A NCAC 2H .1005(2)(a) within 575 feet of the Roosevelt Natural Area (if the development site naturally drains to the Roosevelt Natural Area).
- (2) Chattooga River ORW Area (Little Tennessee River Basin and Savannah River Drainage Area): the following undesignated waterbodies that are tributary to ORW designated segments shall comply with Paragraph (c) of this Rule in order to protect the designated waters as per Rule .0203 of this Section. However, expansions of existing discharges to these segments shall be allowed if there is no increase in pollutant loading:
 - (A) North and South Fowler Creeks;
 - (B) Green and Norton Mill Creeks;
 - (C) Cane Creek;
 - (D) Ammons Branch;
 - (E) Glade Creek; and
 - (F) Associated tributaries.
- (3) Henry Fork ORW Area (Catawba River Basin): the following undesignated waterbodies that are tributary to ORW designated segments shall comply with

Paragraph (c) of this Rule in order to protect the designated waters as per Rule .0203 of this Section:

- (A) Ivy Creek;
 - (B) Rock Creek; and
 - (C) Associated tributaries.
- (4) South Fork New and New Rivers ORW Area [New River Basin (Index Nos. 10-1-33.5 and 10)]; the following management strategies, in addition to the discharge requirements specified in Subparagraph (c)(1) of this Rule, shall be applied to protect the designated ORW areas:
- (A) Stormwater controls described in Subparagraph (c)(1) of this Rule shall apply to land within one mile of and that drains to the designated ORW areas;
 - (B) New or expanded NPDES permitted wastewater discharges located upstream of the designated ORW shall be permitted such that the following water quality standards are maintained in the ORW segment:
 - (i) the total volume of treated wastewater for all upstream discharges combined shall not exceed 50 percent of the total instream flow in the designated ORW under 7Q10 conditions, which are defined in Rule .0206(a)(1) of this Section;
 - (ii) a safety factor shall be applied to any chemical allocation such that the effluent limitation for a specific chemical constituent shall be the more stringent of either the limitation allocated under design conditions (pursuant to 15A NCAC 02B .0206) for the normal standard at the point of discharge, or the limitation allocated under design conditions for one-half the normal standard at the upstream border of the ORW segment;
 - (iii) a safety factor shall be applied to any discharge of complex wastewater (those containing or potentially containing toxicants) to protect for chronic toxicity in the ORW segment by setting the whole effluent toxicity limitation at the

- higher (more stringent) percentage effluent determined under design conditions (pursuant to 15A NCAC 02B .0206) for either the instream effluent concentration at the point of discharge or twice the effluent concentration calculated as if the discharge were at the upstream border of the ORW segment;
- (C) New or expanded NPDES permitted wastewater discharges located upstream of the designated ORW shall comply with the following:
- (i) Oxygen Consuming Wastes: Effluent limitations shall be as follows: BOD = 5 mg/l, and NH₃-N = 2 mg/l;
 - (ii) Total Suspended Solids: Discharges of total suspended solids (TSS) shall be limited to effluent concentrations of 10 mg/l for trout waters and to 20 mg/l for all other waters;
 - (iii) Emergency Requirements: Failsafe treatment designs shall be employed, including stand-by power capability for entire treatment works, dual train design for all treatment components, or equivalent failsafe treatment designs;
 - (iv) Nutrients: Where nutrient overenrichment is projected to be a concern, effluent limitations shall be set for phosphorus or nitrogen, or both.
- (5) Old Field Creek (New River Basin): the undesignated portion of Old Field Creek (from its source to Call Creek) shall comply with Paragraph (c) of this Rule in order to protect the designated waters as per Rule .0203 of this Section.
- (6) In the following designated waterbodies, no additional restrictions shall be placed on new or expanded marinas. The only new or expanded NPDES permitted discharges that shall be allowed shall be non-domestic, non-process industrial discharges. The Alligator River Area (Pasquotank River Basin) extending from the source of the Alligator River to the U.S. Highway 64 bridge including New Lake Fork, North West Fork Alligator River, Juniper Creek, Southwest Fork Alligator River, Scouts Bay, Gum Neck Creek, Georgia Bay, Winn Bay, Stumpy Creek Bay, Stumpy Creek, Swann Creek (Swann Creek Lake), Whipping Creek (Whipping Creek Lake), Grapevine Bay, Rattlesnake Bay, The Straits, The Frying Pan, Coopers Creek, Babbitt Bay, Goose Creek, Milltail Creek, Boat Bay, Sandy Ridge Gut (Sawyer Lake) and Second Creek, but excluding the Intracoastal Waterway (Pungo River-Alligator River Canal) and all other tributary streams and canals.
- (7) In the following designated waterbodies, the only type of new or expanded marina that shall be allowed shall be those marinas located in upland basin areas, or those with less than 10 slips, having no boats over 21 feet in length and no boats with heads. The only new or expanded NPDES permitted discharges that shall be allowed shall be non-domestic, non-process industrial discharges.
- (A) The Northeast Swanquarter Bay Area including all waters northeast of a line from a point at Lat. 35E 23N 51O and Long. 76E 21N 02O thence southeast along the Swanquarter National Wildlife Refuge hunting closure boundary (as defined by the 1935 Presidential Proclamation) to Drum Point.
 - (B) The Neuse-Southeast Pamlico Sound Area (Southeast Pamlico Sound Section of the Southeast Pamlico, Core and Back Sound Area); (Neuse River Basin) including all waters within an area defined by a line extending from the southern shore of Ocracoke Inlet northwest to the Tar-Pamlico River and Neuse River basin boundary, then southwest to Ship Point.
 - (C) The Core Sound Section of the Southeast Pamlico, Core and Back Sound Area (White Oak River Basin), including all waters of Core Sound and its tributaries, but excluding Nelson Bay, Little Port Branch and Atlantic Harbor at its mouth, and those tributaries of Jarrett Bay that are closed to shellfishing.
 - (D) The Western Bogue Sound Section of the Western Bogue Sound and Bear Island Area (White Oak River Basin) including all waters within an area defined by a line from Bogue Inlet to the mainland at SR 1117 to a line across Bogue Sound from the southwest side of Gales Creek to

- (E) Rock Point, including Taylor Bay and the Intracoastal Waterway.
- (E) The Stump Sound Area (Cape Fear River Basin) including all waters of Stump Sound and Alligator Bay from marker Number 17 to the western end of Permuda Island, but excluding Rogers Bay, the Kings Creek Restricted Area and Mill Creek.
- (F) The Topsail Sound and Middle Sound Area (Cape Fear River Basin) including all estuarine waters from New Topsail Inlet to Mason Inlet, including the Intracoastal Waterway and Howe Creek, but excluding Pages Creek and Futch Creek.
- (8) In the following designated waterbodies, no new or expanded NPDES permitted discharges and only new or expanded marinas with less than 10 slips, having no boats over 21 feet in length and no boats with heads shall be allowed.
 - (A) The Swanquarter Bay and Juniper Bay Area (Tar-Pamlico River Basin) including all waters within a line beginning at Juniper Bay Point and running south and then west below Great Island, then northwest to Shell Point and including Shell Bay, Swanquarter and Juniper Bays and their tributaries, but excluding all waters northeast of a line from a point at Lat. 35E 23N 51O and Long. 76E 21N 02O thence southeast along the Swanquarter National Wildlife Refuge hunting closure boundary (as defined by the 1935 Presidential Proclamation) to Drum Point and also excluding the Blowout Canal, Hydeland Canal, Juniper Canal and Quarter Canal.
 - (B) The Back Sound Section of the Southeast Pamlico, Core and Back Sound Area (White Oak River Basin) including that area of Back Sound extending from Core Sound west along Shackelford Banks, then north to the western most point of Middle Marshes and along the northwest shore of Middle Marshes (to include all of Middle Marshes), then west to Rush Point on Harker's Island, and along the southern shore of Harker's Island back to Core Sound.
 - (C) The Bear Island Section of the Western Bogue Sound and Bear Island Area (White Oak River Basin) including all waters within an area defined by a line from the western most point on Bear Island to the northeast mouth of Goose Creek on the mainland, east to the southwest mouth of Queen Creek, then south to green marker No. 49, then northeast to the northern most point on Huggins Island, then southeast along the shoreline of Huggins Island to the southeastern most point of Huggins Island, then south to the northeastern most point on Dudley Island, then southwest along the shoreline of Dudley Island to the eastern tip of Bear Island.
 - (D) The Masonboro Sound Area (Cape Fear River Basin) including all waters between the Barrier Islands and the mainland from Carolina Beach Inlet to Masonboro Inlet.
- (9) Black and South Rivers ORW Area (Cape Fear River Basin) [Index Nos. 18-68-(0.5), 18-68-(3.5), 18-68-(11.5), 18-68-12-(0.5), 18-68-12-(11.5), and 18-68-2]: the following management strategies, in addition to the discharge requirements specified in Subparagraph (c)(1) of this Rule, shall be applied to protect the designated ORW areas:
 - (A) Stormwater controls described in Subparagraph (c)(1) of this Rule shall apply to land within one mile of and that drains to the designated ORW areas;
 - (B) New or expanded NPDES permitted wastewater discharges located one mile upstream of the stream segments designated ORW (upstream on the designated mainstem and upstream into direct tributaries to the designated mainstem) shall comply with the following discharge restrictions:
 - (i) Oxygen Consuming Wastes: Effluent limitations shall be as follows: BOD = 5 mg/l and NH3-N = 2 mg/l;
 - (ii) Total Suspended Solids: Discharges of total suspended solids (TSS) shall be limited to effluent concentrations of 20 mg/l;
 - (iii) Emergency Requirements: Failsafe treatment designs shall be employed, including stand-by power capability for entire treatment works, dual train design for all treatment components, or equivalent failsafe treatment designs;

- (iv) Nutrients: Where nutrient overenrichment is projected to be a concern, effluent limitations shall be set for phosphorus or nitrogen, or both.
 - (v) Toxic substances: In cases where complex discharges (those containing or potentially containing toxicants) may be currently present in the discharge, a safety factor shall be applied to any chemical or whole effluent toxicity allocation. The limit for a specific chemical constituent shall be allocated at one-half of the normal standard at design conditions. Whole effluent toxicity shall be allocated to protect for chronic toxicity at an effluent concentration equal to twice that which is acceptable under flow design criteria (pursuant to 15A NCAC 02B .0206).
- (10) Lake Waccamaw ORW Area (Lumber River Basin) [Index No. 15-2]: all undesignated waterbodies that are tributary to Lake Waccamaw shall comply with Paragraph (c) of this Rule in order to protect the designated waters as per Rule .0203 of this Section.
- (11) Swift Creek and Sandy Creek ORW Area (Tar-Pamlico River Basin) [portion of Index No. 28-78-(0.5) and Index No. 28-78-1-(19)]: all undesignated waterbodies that drain to the designated waters shall comply with Paragraph (c) of this Rule in order to protect the designated waters as per Rule .0203 of this Section and to protect outstanding resource values found in the designated waters as well as in the undesignated waters that drain to the designated waters.
- (12) Fontana Lake North Shore ORW Area (Little Tennessee River Basin and Savannah River Drainage Area) [Index Nos. 2-96 through 2-164 (excluding all waterbodies that drain to the south shore of Fontana Lake) consists of the entire watersheds of all creeks that drain to the north shore of Fontana Lake between Eagle and Forney Creeks, including Eagle and Forney Creeks. In addition to the requirements specified in Paragraph (c)(1) of this Rule, any person conducting development activity disturbing greater than or equal to 5,000 square feet of land area in the designated ORW area shall, at a minimum, undertake the following actions to protect the outstanding resource values of the designated ORW and downstream waters:
- (A) investigate for the presence of and identify the composition of acid-producing rocks by exploratory drilling or other appropriate means and characterize the net neutralization potential of the acid-producing rocks prior to commencing the land-disturbing activity;
 - (B) avoid areas to the maximum extent practical where acid-producing rocks are found with net neutralization potential of -5 or less;
 - (C) establish background levels of acidity and mineralization prior to commencing land-disturbing activity, and monitor and maintain baseline water quality conditions for the duration of the land-disturbing activity and for any period thereafter not less than two years as determined by the Division as part of a certification issued in accordance with 15A NCAC 02H .0500 or stormwater permit issued pursuant to this Rule;
 - (D) obtain a National Pollutant Discharge Elimination System permit for construction pursuant to Rule 15A NCAC 02H .0126 prior to initiating land-disturbing activity;
 - (E) design stormwater control systems to control and treat stormwater runoff generated from all surfaces generated by one inch of rainfall in accordance with 15A NCAC 02H. 1008; and
 - (F) replicate pre-development runoff characteristics and mimic the natural and unique hydrology of the site, post development.

Authority G.S. 143-214.1; S.L. 2005-97.

SECTION .0300 - ASSIGNMENT OF STREAM CLASSIFICATIONS

15A NCAC 02B .0303 LITTLE TENN RIVER BASIN AND SAVANNAH RIVER DRAINAGE AREA

- (a) The schedule may be inspected at the following places:
- (1) Clerk of Court:
Clay County
Graham County
Jackson County
Macon County
Swain County
Transylvania County
 - (2) North Carolina Department of Environment and Natural Resources

Asheville Regional Office
~~Interchange Building~~ 2090 US Highway 70
~~59 Woodfin Place~~
 Asheville, Swannanoa, North Carolina.

(b) Unnamed Streams. Such streams entering Georgia or Tennessee shall be classified "C Tr." Such streams in the Savannah River drainage area entering South Carolina shall be classified "B Tr."

(c) The Little Tennessee River Basin and Savannah River Drainage Area Schedule of Classifications and Water Quality Standards was amended effective:

- (1) February 16, 1977;
- (2) March 1, 1977;
- (3) July 13, 1980;
- (4) February 1, 1986;
- (5) October 1, 1987;
- (6) March 1, 1989;
- (7) January 1, 1990;
- (8) July 1, 1990;
- (9) August 1, 1990;
- (10) March 1, 1991;
- (11) August 3, 1992;
- (12) February 1, 1993;
- (13) August 1, 1994;
- (14) September 1, 1996;
- (15) August 1, 1998;
- (16) August 1, 2000;
- (17) April 1, ~~2003~~; 2003;
- (18) November 1, 2006.

(d) The Schedule of Classifications of Water Quality Standards for the Little Tennessee Basin and Savannah River Drainage Area was amended effective March 1, 1989 as follows:

- (1) Nantahala River (Index No. 2-57) from source to the backwaters of Nantahala Lake and all tributary waters were reclassified from Class B-trout, Class C-trout and Class C to Class B-trout ORW, Class C-trout ORW and Class C ORW.
- (2) Chattooga River (Index No. 3) including Scotsman Creek, Overflow Creek, Big Creek, Talley Mill Creek and all tributary waters were reclassified from Class B-trout, Class C-trout and Class C to Class B-trout ORW, Class C-trout ORW and Class C ORW and Clear Creek and all tributary waters were reclassified from Class C-trout and Class C to Class B-trout and Class B.

(e) The Schedule of Classifications and Water Quality Standards for the Little Tennessee River Basin and Savannah River Drainage Area was amended effective January 1, 1990 as follows:

- (1) North Fork Coweeta Creek (Index No. 2-10-4) and Falls Branch (Index No. 2-10-4-1) were reclassified from Class C to Class B.
- (2) Burningtown Creek (Index No. 2-38) was reclassified from C-trout to B-trout.

(f) The Schedule of Classifications and Water Quality Standards for the Little Tennessee River Basin and Savannah River Drainage Area was amended effective July 1, 1990 by the

reclassification of Alarka Creek (Index No. 2-69) from source to Upper Long Creek (Index No. 2-69-2) including all tributaries from Classes C and C Tr to Classes C HQW and C Tr HQW.

(g) The Schedule of Classifications and Water Quality Standards for the Little Tennessee River Basin and Savannah River Drainage Area was amended effective March 1, 1991 as follows:

- (1) Cartoogechaye Creek [Index Nos. 2-19-(1) and 2-19-(16)] from Gibson Cove Branch to bridge at U.S. Hwy. 23 and 441 and from the bridge at U.S. Hwy. 23 and 441 to the Little Tennessee River was reclassified from Classes WS-III Tr and C Tr to Classes WS-III and B Tr and B Tr respectively.
- (2) Coweeta Creek (Index Nos. 2-10) from its source to the Little Tennessee River including all tributaries except Dryman Fork (Index No. 2-10-3) and North Fork Coweeta Creek (Index No. 2-10-4) was reclassified from Classes C and C Tr to Classes B and B Tr.

(h) The Schedule of Classifications and Water Quality Standards for the Little Tennessee River Basin and Savannah River Drainage Area was amended effective August 3, 1992 with the reclassification of all water supply waters (waters with a primary classification of WS-I, WS-II or WS-III). These waters were reclassified to WS-I, WS-II, WS-III, WS-IV or WS-V as defined in the revised water supply protection rules, (15A NCAC 2B .0100, .0200 and .0300) which became effective on August 3, 1992. In some cases, streams with primary classifications other than WS were reclassified to a WS classification due to their proximity and linkage to water supply waters. In other cases, waters were reclassified from a WS classification to an alternate appropriate primary classification after being identified as downstream of a water supply intake or identified as not being used for water supply purposes.

(i) The Schedule of Classifications and Water Quality Standards for the Little Tennessee River Basin and Savannah River Drainage Area has been amended effective February 1, 1993 as follows:

- (1) Bearwallow Creek from its source to 2.3 miles upstream of the Toxaway River [Index No. 4-7-(1)] was revised to indicate the application of an additional management strategy (referencing 15A NCAC 2B .0201(d) to protect downstream waters; and
- (2) the Tuckaseegee River from its source to Tennessee Creek [Index No. 2-79-(0.5)] including all tributaries was reclassified from Classes WS-III&B Tr HQW, WS-III HQW and WS-III to Classes WS-III Tr ORW and WS-III ORW.

(j) The Schedule of Classifications and Water Quality Standards for the Little Tennessee River Basin and Savannah River Drainage Area was amended effective August 1, 1994 with the reclassification of Deep Creek [Index Nos. 2-79-63-(1) and 2-79-63-(16)] from its source to the Great Smokey Mountains National Park Boundary including tributaries from Classes C Tr, B Tr and C Tr HQW to Classes WS-II Tr and WS-II Tr CA.

(k) The Schedule of Classifications and Water Quality Standards for the Little Tennessee River Basin and Savannah River Drainage Area was amended effective September 1, 1996 as follows:

- (1) Deep Creek from the Great Smoky Mountains National Park Boundary to the Tuckasegee River [Index no. 2-79-63-(21)] was reclassified from Class C Tr to Class B Tr; and
- (2) the Tuckasegee River from the West Fork Tuckasegee River to Savannah Creek and from Macks Town Branch to Cochran Branch [Index Nos. 2-79-(24), 2-79(29.5) and 2-79-(38)] was reclassified from Classes WS-III Tr, WS-III Tr CA and C to Classes WS-III&B Tr, WS-III&B Tr CA and B.

(l) The Schedule of Classifications and Water Quality Standards for the Little Tennessee River Basin and Savannah River Drainage Area was amended effective August 1, 1998 with the reclassifications of Thorpe Reservoir (Lake Glenville), Hurricane Creek, and Laurel Branch [Index Nos. 2-79-23-(1), 2-79-23-2, and 2-79-23-2-1 respectively] from classes WS-III&B, WS-III Tr and WS-III to classes WS-III&B HQW, WS-III Tr HQW, and WS-III HQW.

(m) The Schedule of Classifications and Water Quality Standards for the Little Tennessee River Basin and Savannah River Drainage Area was amended August 1, 2000 with the reclassification of Wesser Creek [Index No. 2-79-52-5-1] from its source to Williams Branch from Class C to Class C Tr.

(n) The Schedule of Classifications and Water Quality Standards for the Little Tennessee River Basin and Savannah River Drainage Area was amended April 1, 2003 with the reclassification of a portion of the Little Tennessee River [Index No. 2-(1)] from a point 0.4 mile upstream of N.C. Highway 28 to Nantahala River Arm of Fontana Lake from Class C to Class B.

(o) The Schedule of Classifications and Water Quality Standards for the Little Tennessee River Basin and Savannah River Drainage Area was amended November 1, 2006 with the reclassification of the entire watersheds of all creeks that drain to the north shore of Fontana Lake between Eagle and Forney Creeks, including Eagle and Forney Creeks, [Index Nos. 2-96 through 2-164 (excluding all waterbodies that drain to the south shore of Fontana Lake)] from Class B, C Tr, WS-IV Tr CA, WS-IV Tr, and WS-IV & B CA to Class B ORW, C Tr ORW, WS-IV Tr ORW CA, WS-IV Tr ORW, and WS-IV & B ORW CA, respectively. Additional site-specific management strategies are outlined in Rule 15A NCAC 02B .0225(e)(12).

Authority G.S. 143-214.1; 143-215.1; 143-215.3(a)(1); S.L. 2005-97.

TITLE 18 – SECRETARY OF STATE

Notice is hereby given in accordance with G.S. 150B-21.2 that the Secretary of State intends to adopt the rules cited as 18 NCAC 12 .0101-.0117; 18 NCAC 13 .0101-.0116.

Proposed Effective Date: January 1, 2007

Instructions on How to Demand a Public Hearing: (must be requested in writing within 15 days of notice): Contact: Joal Broun, Secretary of State's Office, 2 South Salisbury Street, Raleigh, NC 27601-2903 or P.O. Box 29622, Raleigh, NC, 27626-0622 telephone (919) 807-2005, e-mail jbroun@sosnc.com.

Reason for Proposed Action:

18 NCAC 12 – To adopt rules according to Chapter 120, Article 9A for the Legislative Branch Lobbying

18 NCAC 13 – To adopt rules according to Chapter 147, Article 9A for the Executive Branch Lobbying

Procedure by which a person can object to the agency on a proposed rule: Written comments may be sent to: Joal Broun, Secretary of State's Office, 2 South Salisbury Street, Raleigh, NC 27601-2903 or P.O. Box 29622, Raleigh, NC, 27626-0622, telephone (919) 807-2219, e-mail jbroun@sosnc.com

Comments may be submitted to: Joal Broun, Secretary of State's Office, 2 South Salisbury Street, Raleigh, NC 27601-2903 or P.O. Box 29622, Raleigh, NC, 27626-0622, telephone (919) 807-2005, fax (919) 807-2010, e-mail jbroun@sosnc.com

Comment period ends: July 14, 2006

Procedure for Subjecting a Proposed Rule to Legislative Review:

If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact:

- State
- Local
- Substantive (≥\$3,000,000)
- None

CHAPTER 12 – LEGISLATIVE BRANCH LOBBYING

18 NCAC 12 .0101 DEFINITIONS

For the purpose of these Rules and regulations, terms shall have those meanings set out in Article 9A of Chapter 120 of the General Statutes of North Carolina listed below as well as other definitions adopted by the Secretary of State pursuant to G.S. 120-47.11 also set forth in these Rules.

- (1) Act - The Act means Article 9A of Chapter 120 of the North Carolina General Statutes entitled "Legislative Branch Lobbying."
- (2) Civic Event - Civic event is a public gathering sponsored by a governmental or community agency or unit or community group or not for profit entity or individual for the temporal good of the society or to celebrate and commemorate the historical, cultural and ethnic heritage of a city, state or nation.
- (3) Community event - Community event is a public gathering of people in the same general geographic area sharing common interests for the good of the community.
- (4) Covered Person - Covered person means a legislator, the Governor, or the Lieutenant Governor.
- (5) Diplomatic event - Diplomatic event is a gathering involving governmental officials from the States, Nation or Foreign countries to introduce, honor or entertain individuals with some diplomatic distinction.
- (6) Executive Lobbyist - Executive lobbyist means a lobbyist registered pursuant to Article 4C of Chapter 147 of the General Statutes.
- (7) Expenditure - Expenditure means any advance, contribution (other than a lawful political contribution), conveyance, deposit, distribution, payment, gift, retainer, fee, salary, honorarium, reimbursement, loan, pledge or thing of value greater than ten dollars (\$10.00) per day, or contract, agreement, promise or other obligation whether or not legally enforceable, that directly or indirectly is made to, at the request of, for the benefit of, or on the behalf of a covered person, legislative employee, or that person's immediate family member. For the purpose of reporting, value shall be determined by the total benefit received by the covered person, legislative employee or that person's immediate family member, rather than the prorated expense to the principal or lobbyist.
- (8) Immediate Family Member - Immediate Family Member means spouse, descendant, or ascendant of the covered person or legislative employee.
- (9) Legislative Action - Legislative Action means the preparation, research, drafting, introduction, consideration, modification, amendment, approval, passage, enactment, tabling, postponement, defeat, or rejection of a bill, resolution, amendment, motion, report, nomination, appointment, or other matter, whether or not the matter is identified by an official title, general title, or other specific reference, by the legislature or by a member or employee of the legislature acting or purporting to act in an official capacity. It also includes the consideration of any bill by the Governor for the Governor's approval or veto under Article II, Section 22(1) of the Constitution or for the Governor to allow the bill to become law under Article II, Section 22(7) of the Constitution.
- (10) Legislative Employee - Legislative employee means employees and officers of the General Assembly.
- (11) Legislative Liaison Personnel - Legislative liaison personnel means any State officer whose principal duties, in practice or as set forth in that person's job description, include lobbying the General Assembly.
- (12) Legislative Lobbyist - Legislative lobbyist means any lobbyist for or against legislative action.
- (13) Legislator - Legislator means a member of the General Assembly or a person elected or appointed a member of the General Assembly prior to taking office.
- (14) Lobbying - Lobbying means any of the following:
- (A) Influencing or attempting to influence legislative action through direct communication or activities with a covered person, legislative employee, or that person's immediate family member.
 - (B) Solicitation of others by legislative lobbyists or lobbyists' principals to influence legislative action.
 - (C) Developing goodwill through communications or activities, including the building of relationships, with a covered person, legislative employee, or that person's immediate family with the intention of influencing current or future legislative action, but does not include communications or activities with a covered person, legislative employee, or that person's immediate family member in a business, civic, religious, fraternal, or commercial relationship which is not connected to legislative action.
- (15) Lobbyist - Lobbyist means an individual who meets any of the following criteria:
- (A) Is employed and receives compensation, or who contracts for economic consideration, for the purpose of lobbying.
 - (B) Represents another person and receives compensation for the purpose of lobbying.
 - (C) Is legislative liaison personnel.
- The term lobbyist shall not include those individuals who are specifically exempted by

G.S. 120-47.8 (Rule .0108 of this Chapter). For the purpose of determining whether an individual is a lobbyist, reimbursement of actual travel and subsistence expenses shall not be considered compensation; provided, however, that reimbursement in the ordinary course of business of these expenses shall be considered compensation if a significant part of the individual's duties involve lobbying before the General Assembly.

- (16) Lobbyist's Principal and Principal - Lobbyist's principal and principal mean the person on whose behalf the legislative lobbyist lobbies. In the case where a lobbyist is compensated by a law firm, consulting firm, or other entity retained by a person for legislative lobbying, the principal is the person whose interests the lobbyist represents in lobbying.
- (17) News Medium - News medium means mainstream media providers whose sole purpose is to report events and that does not involve research or advocacy. Media providers considered outside the mainstream are defined as those that exist as a sham, subterfuge or obscure in order to conceal the identity of those seeking to influence legislative action.
- (18) Ordinary Course of Business and Normal Course of Business - Ordinary Course of Business and Normal Course of Business mean conduct of business that is usual, regular, and within normal commercial customs and usages.
- (19) Person - Person means any individual, firm, partnership, committee, association, corporation, business entity, or any other organization or group of persons which has an independent legal existence.
- (20) Quarterly - Quarterly means March 31, June 30, September 30 and December 31.
- (21) Regular Session - The General Assembly is in regular session from the date set by law or resolution that the General Assembly convenes until the General Assembly either:
 - (A) Adjourns sine die; or
 - (B) Recesses or adjourns for more than 10 days.
- (22) Scholarship - Scholarship is a grant or gift of money or other valuables as financial aid to a person for the purpose of helping with the expenses of continuing educational endeavors.
- (23) Solicitation of Others - Solicitation of others is the seeking, approaching, requesting, or petitioning someone else to do or perform some act on your behalf.
- (24) State Officer - State Officer is any person elected or appointed to a position with the State which involves the exercise of a state power, trust or duty, including actions taken in an official capacity which involve a substantial

and material exercise of administrative discretion in the formulation of state policy.

Authority G.S. 120, Article 9A.

18 NCAC 12 .0102 LOBBYIST

(a) Who must register - a legislative lobbyist shall file with the Secretary of State a separate registration statement for each principal the lobbyist represents before engaging in any lobbying. The registration shall indicate whether it is registration as a legislative lobbyist, executive lobbyist, or both. The lobbyist shall use registration form #LE-101, check the appropriate blocks, and have it completed in full and executed at the time of or prior to filing. Each legislative registration statement shall be effective from the date of filing until January 1 of the following year when a new registration statement must be filed and the applicable fee paid to continue being a legislative lobbyist. Each legislative lobbyist shall file an amended registration form with the Secretary of State no later than 10 business days after any change in the information supplied in the legislative lobbyist's last registration form. Each amended registration form shall include a complete statement of the information that has changed. The lobbyist shall use form #LE-101 for an amended registration, check the appropriate blocks, and have it completed in full and executed at the time of or prior to filing.

(b) How and Where to register - Each legislative registration statement with the appropriate fee shall be filed with the Secretary of State in person or by mail or electronically as provided for in Rule .0111 of this Chapter, entitled Manner of Filing Documents and Fees with the Secretary of State.

(c) Registration Form # LE-101 - The registration form shall include the registrant's full name, complete address and telephone number; the registrant's place of business; the full name, complete address and telephone number of each person by whom the registrant is employed or retained; and a general description of the matters on which the registrant expects to act as a legislative lobbyist.

(d) Registration Fees - A fee of one hundred dollars (\$100.00) is due and payable to the Secretary of State by either the lobbyist or the lobbyist's principal at the time of each lobbyist registration. A separate registration fee shall be paid for each separate type of legislative lobbyist or executive lobbyist. There is no fee for an amended registration form. If the lobbyist claims hardship in not being able to pay the fee, the lobbyist shall file with the Secretary of State an affidavit on Form LE-101H setting forth reasons for the hardship, check the appropriate blocks and have it completed in full and executed at the time of or prior to filing. Financial hardship is the only basis on which fees can be waived. Based upon the evidence presented, the Secretary of State may waive all or a portion of the fee if such is deemed justified by the Secretary of State. A waiver is good only for the year in which it is granted.

(e) Expenditure Reports of Legislative Lobbyist:

(1) Who must report and When - Each legislative lobbyist shall file monthly expenditure reports under oath with the Secretary of State, with respect to each lobbyist's principal, while the General Assembly is in regular session, and quarterly thereafter. The lobbyist shall use

Form # LE-101ER, check the appropriate blocks, and have it completed in full and executed at the time of or prior to filing.

(2) Where and How to report - Reports shall be filed with the Office of the Secretary of State in person or by mail or electronically as provided for in Rule .0111 of this Chapter, entitled Manner of Filing Documents and Fees with the Secretary of State.

(3) Report Form #LE-101ER -The expenditure report shall include all expenditures during the reporting period and shall be due 10 business days after the end of the reporting period. The legislative lobbyist shall file expense reports whether or not expenditures are made.

Each expenditure report shall set forth the fair market value (face value if shown), date, a description of the expenditure, name and address of the payee, or beneficiary, and name of any covered person, legislative employee, or that person's immediate family member benefiting from the expenditure. Such expenditures shall be reported using the following categories:

- (A) Transportation and lodging;
- (B) Entertainment, food, and beverages;
- (C) Meetings and events;
- (D) Gifts; and
- (E) Other expenditures;

In addition, expenses for the solicitation of others to lobby, whether or not a covered person, legislative employee, or family member is affected, shall be reportable if such expenses are incurred in connection, or in concert, with other expenditures reportable under this subsection.

When more than 15 covered persons benefit from an expenditure, no names of individuals need be reported provided that the report identifies the approximate number of covered persons benefiting and, with particularity, the basis for their selection, including the name of the legislative body, committee, caucus, or other group whose membership list is a matter of public record in accordance with G.S. 132.1 or including a description of the group that clearly distinguishes its purpose or composition from the general membership of the General Assembly. The approximate number of legislative employees and immediate family members of covered persons and legislative employees who benefited from the expenditure shall be listed separately.

(4) Exemptions from reporting:

- (A) Gifts between an immediate family member or person who is the stepchild, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, or members of the household

of the covered person or legislative employee.

- (B) Lawful campaign contributions.
- (C) Commercially available loans made on terms not more favorable than generally available to the public in the normal course of business if not made for the purpose of lobbying.
- (D) Contractual arrangements or business relationships or arrangements made in the normal course of business if not made for the purpose of lobbying.
- (E) The cost of attendance or participation provided by the sponsoring entity of lodging, and of food and beverages consumed, at events sponsored by or in conjunction with a civic, charitable, community, or diplomatic event if the activity or event does not last longer than three hours. If it does last longer than three hours then such must be reported.
- (F) Academic scholarships made on terms not more favorable than scholarships generally available to the public.

(5) Inclusions in reporting:

- (A) All expenditures made for the purpose of lobbying shall be reported, including the following:
 - (i) Expenditures benefiting or made on behalf of a covered person, a legislative employee, or those persons' immediate family members, in the regular course of that person's non-legislative employment.
 - (ii) Contractual arrangements or direct business relationships between a legislative lobbyist or legislative lobbyist's principal and a covered person, legislative employee, or that person's immediate family member, in effect during the reporting period or the previous 12 months.
 - (iii) Expenditures reimbursed to a legislative lobbyist in the ordinary course of business by the lobbyist's principal or other employer.
- (B) Legislative lobbying with respect to only the legislative actions of the Governor and Lieutenant Governor shall be reported.

(f) Lobbyist Violations, Penalties and Late Filing Fees:

- (1) It shall be unlawful for a person to lobby without registering unless exempted by the Act.
- (2) When a legislative lobbyist fails to file an expenditure report as required, the Secretary of State shall send a certified or registered letter advising the legislative lobbyist of the delinquency and the penalties provided by law. Within 20 days of the receipt of the letter, the legislative lobbyist shall deliver or post by United States mail to or electronically file with the Secretary of State the required report and an additional late filing fee in an amount equal to the late filing fee under G.S. 163-278.34(a)(2) i.e. fifty dollars (\$50.00) per day for each day the filing is late, not to exceed a total of five hundred dollars (\$500.00).
- (3) Filing of the required report and payment of the additional fee within the time extended shall constitute compliance. Failure to file an expenditure report in one of the manners prescribed shall result in revocation of any and all registrations of a legislative lobbyist. No legislative lobbyist may register or reregister until the legislative lobbyist has fully complied.
- (4) Appeal of a decision by the Secretary of State shall be in accordance with Article 3 of Chapter 150B of the General Statutes.
- (5) No penalties or late filing fees will be imposed upon a legislative lobbyist for subsequent failures to comply with these filing requirements if the Secretary of State failed to provide the lobbyist with required notifications of the initial violation. However, this does not apply to a failure by the lobbyist to file an expenditure report in a timely manner.

Authority G.S. 120, Article 9A.

18 NCAC 12 .0103 AUTHORIZATIONS FROM LOBBYIST'S PRINCIPAL

- (a) Who Must File - Each legislative lobbyist or principal shall file with the Secretary of State within 10 business days after the filing of the legislative lobbyist's registration a written authorization signed by the "lobbyist's principal" authorizing the lobbyist to represent the principal. The principal shall use authorization form #LE-102, check the appropriate blocks, and have it completed in full and executed at the time of or prior to filing. There shall be no use of a power of attorney for a principal without prior approval of the Secretary of State.
- (b) How and Where to file - Each principal authorization form with the appropriate fee shall be filed with the Secretary of State in person or by mail or electronically as provided for in Rule .0111 of this Chapter, entitled Manner of Filing Documents and Fees with the Secretary of State.
- (c) Authorization Form LE-102 - The authorization form shall include the "principal's full name", complete address and telephone number, name and title of the official signing for the

principal, and the name of each lobbyist registered to represent the principal. An amended authorization shall be filed with the Secretary of State no later than 10 business days after any change in the information supplied on the previous authorization. Each amended authorization shall include a complete statement of the information that has changed. The principal shall use Form #LE-102 for the amended authorization, check the appropriate blocks, and have it completed in full and executed at the time of or prior to filing.

(d) Authorization Fees - A fee of one hundred dollars (\$100.00) is due and payable to the Secretary of State at the time the principal's first authorization statement is filed each calendar year for a legislative lobbyist. The fee for the legislative lobbyist's authorization shall be seventy-five dollars (\$75.00) if an authorization for the principal to be represented by an executive lobbyist is filed at the same time. No additional fee is due for additional authorizations filed for legislative lobbyists. The fee herein shall be reduced to a total of twenty-five dollars (\$25.00) if the principal had annual revenues in its most recent fiscal year of three hundred thousand dollars (\$300,000) or less and is represented by no more than two different lobbyists. This reduced fee covers authorizations filed for the principal's legislative and executive lobbyists. To obtain the reduced fee there must be filed with the Secretary of State evidence of the annual gross revenues being three hundred thousand dollars (\$300,000) or less in its most recent fiscal year. If proper proof is presented to the full satisfaction of the Secretary of State, the reduced fee will apply. The principal shall use Form LE-102RF, check the appropriate blocks and have it completed in full and executed at the time of or prior to filing. There is no fee for amended authorizations.

(e) Expenditure Reports of Principal of Legislative Lobbyist:

- (1) Who Must Report and When - Each legislative lobbyist's principal shall file monthly expenditure reports under oath with the Secretary of State while the General Assembly is in regular session, and quarterly thereafter. The principal shall use Form #LE-101ER, check the appropriate blocks and have it completed in full and executed at the time of or prior to filing.
- (2) Where and How to report - Reports shall be filed with the Secretary of State in person or by mail or electronically as provided for in Rule .0111 of this Chapter, entitled Manner of Filing Documents and Fees with the Secretary of State.
- (3) Report Form #LE-101ER - The expenditure report shall include all expenditures during the reporting period and shall be due 10 business days after the end of the reporting period. The lobbyist's principal shall file the expenditure reports whether or not expenditures are made during a reporting period.
- (4) Each expenditure report shall set forth fair market value (face value if shown), date, a description of the expenditure, name and address of the payee, or beneficiary, and name of any covered person, legislative employee,

or that person's immediate family member affected by the expenditure. Such expenditures shall be reported using the following categories:

- (A) Transportation and lodging;
- (B) Entertainment, food, and beverages;
- (C) Meetings and events;
- (D) Gifts; and
- (E) Other expenditures.

(5) In addition, expenses for the solicitation of others to lobby, whether or not a covered person, legislative employee, or family member is affected, shall be reportable if such expenses are incurred in connection, or in concert, with other expenditures reportable under this subsection.

(6) In addition, the compensation paid or agreed to be paid to all legislative lobbyists shall be reported, whether or not a covered person, legislative employee, or family member is affected. If a legislative lobbyist is a full-time employee of the lobbyist's principal, or is compensated by means of an annual fee or retainer, the lobbyist's principal shall estimate and report the portion of the salary, fee, or retainer that compensates for lobbying. The lobbyist's principal's expenditure report shall include an itemized description of all expenditures reimbursed or paid to legislative lobbyists for lobbying that are not reported on the legislative lobbyists' reports.

(7) When more than 15 covered persons benefit from an expenditure, no names of individuals need be reported provided that the report identifies the approximate number of covered persons benefiting and, with particularity, the basis for their selection, including the name of the legislative body, committee, caucus, or other group whose membership list is a matter of public record in accordance with G.S. 132-1 or including a description of the group that clearly distinguishes its purpose or composition from the general membership of the General Assembly. The approximate number of legislative employees and immediate family members of covered persons and legislative employees who benefited from the expenditure shall be listed separately.

(8) Exemptions from reporting:

- (A) Gifts between an immediate family member or person who is the stepchild, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, or members of the household of the covered person or legislative employee.
- (B) Lawful campaign contributions.
- (C) Commercially available loans made on terms not more favorable than

generally available to the public in the normal course of business if not made for the purpose of lobbying.

(D) Contractual arrangements or business relationships or arrangements made in the normal course of business if not made for the purpose of lobbying.

(E) The cost of attendance or participation provided by the sponsoring entity of lodging, and of food and beverages consumed, at events sponsored by or in conjunction with a civic, charitable, community, or diplomatic event if the activity or event does not last longer than three hours. If it does last longer than three hours then such must be reported.

(F) Academic scholarships made on terms not more favorable than scholarships generally available to the public.

(9) Inclusions in reporting:

(A) All expenditures made for the purpose of lobbying shall be reported, including the following:

(i) Expenditures benefiting or made on behalf of a covered person, a legislative employee, or those persons' immediate family.

(ii) Contractual arrangements or direct business relationships between a legislative lobbyist or legislative lobbyist's principal and a covered person, legislative employee, or that person's immediate family member, in effect during the reporting period or the previous 12 months.

(iii) Expenditures reimbursed to a legislative lobbyist in the ordinary course of business by the lobbyist's principal or other employer.

(B) Legislative lobbying with respect to only the legislative actions of the Governor and Lieutenant Governor shall be reported.

(f) Lobbyist's Principal violations, penalties and Late Filing Fees:

(1) It shall be unlawful for a person to lobby without registering unless exempted by the Act.

(2) When a lobbyist's principal fails to file an expenditure report as required, the Secretary of State shall send a certified or registered letter advising the lobbyist's principal of the

delinquency and the penalties provided by law. Within 20 days of the receipt of the letter, the lobbyist's principal shall deliver or post by United States mail or electronically send to the Secretary of State the required report and an additional late filing fee in an amount equal to the late filing fee under G.S. 163-278.34(a)(2) i.e. fifty dollars (\$50.00) per day for each day the filing is late, not to exceed a total of five hundred dollars (\$500.00).

- (3) Filing of the required report and payment of the late fee within the time extended shall constitute compliance. Failure to file an expenditure report in one of the manners prescribed shall result in revocation of any and all registrations of a lobbyist's principal. No lobbyist's principal may register or reregister until the lobbyist's principal has fully complied.
- (4) Appeal of a decision by the Secretary of State shall be in accordance with Article 3 of Chapter 150B of the General Statutes.
- (5) No penalties or late filing fees will be imposed upon a principal for subsequent failures to comply with these filing requirements if the Secretary of State failed to provide to the principal with required notifications of the initial violation. However, this does not apply to a failure by the principal to file an expenditure report in a timely manner.

Authority G.S. 120, Article 9A.

18 NCAC 12 .0104 POWERS AND DUTIES OF THE SECRETARY OF STATE

(a) Powers:

- (1) The Secretary of State has the authority to adopt any rules, orders, forms and definitions as are necessary to carry out the provisions of Article 9A of Chapter 120 of the General Statutes of North Carolina.
- (2) The Secretary of State may petition the Wake County Superior Court for the approval to issue subpoenas and subpoenas duces tecum as necessary to conduct investigations of violations. The court shall authorize subpoenas when the court determines they are necessary for the enforcement of the Lobbying Act. Subpoenas issued shall be enforceable by the court through contempt powers. Venue shall be with the Superior Court of Wake County for a North Carolina resident and for any nonresident person, or that person's agent, who makes a reportable expenditure and personal jurisdiction may be asserted under G.S. 1-75.4. Complaints of violations and all other records accumulated in conjunction with the investigation of these complaints shall be

considered records of criminal investigations under G.S. 132-1.4.

- (3) The Secretary of State shall report apparent violations to the Attorney General. The Attorney General shall, upon complaint, make an appropriate investigation thereof, and shall forward a copy of the investigation to the district attorney of the prosecutorial district as defined in G.S. 7A-60 of which Wake County is a part, who shall prosecute any person who violates any provisions of the Lobbying Act.

(b) Duties:

- (1) The Secretary of State shall make all registration statements and expenditure reports open to the public except matters in expenditure reports designated by the filer to be payees under protective order issued pursuant to Chapter 50B of the General Statutes or participating in the Address Confidentiality Program pursuant to Chapter 15C of the General Statutes or as provided by any other applicable law which the Secretary of State shall redact and remove that information before making it open to the public.
- (2) The Secretary of State shall perform systematic reviews of reports required to be filed by lobbyist and lobbyist's principals on a regular basis to assure complete and timely disclosure of expenditures.
- (3) The Secretary of State shall make available as soon as practicable the registrations of the lobbyists in an electronic and searchable format.
- (4) The Secretary of State shall make available as soon as practicable the authorizations of the lobbyists' principals in an electronic and searchable format.
- (5) The Secretary of State shall provide public access via the Internet to all filings required or made pursuant to the Act as soon as practicable.
- (6) The Secretary of State shall deposit all fees collected in the General Fund of the State and deposit all fines according to existing law.
- (7) Within 20 days after the convening of each session of the General Assembly, the Secretary of State shall furnish each member of the General Assembly and the State Legislative Library a list of all persons who have registered as executive or legislative lobbyists and whom they represent. Within 20 days after the beginning of the term of a Governor, the Secretary of State shall furnish the Governor, each other member of the Council of State, the head of each principal department of the Executive Branch, and the State Legislative Library a list of all persons who have registered as executive or legislative lobbyists

and whom they represent. A supplemental list of legislative lobbyists shall be furnished periodically each 20 days thereafter as the session progresses. A supplemental list of executive lobbyists shall be furnished periodically each 60 days thereafter. For each special session of the General Assembly, a supplemental list of legislative lobbyists shall be furnished to the State Legislative Library. All lists required may be furnished electronically.

(8) 'No Gifts' registry:

(A) The Secretary of State shall establish a 'No Gifts' registry for persons subject to the Act "Article 9A of Chapter 120" or Article 4C of Chapter 147 of the General Statutes. The 'No Gifts' registry shall be published and updated along with the list of lobbyists and lobbyists' principals required under G.S. 120-47.2.

(B) Except as provided in G.S. 147.54.7A, executive lobbyists, legislative lobbyists, and lobbyists' principals shall not give gifts to persons placing their names on the registry. Gifts of informational directories may be given to persons placing their names on the registry. A violation of this provision will be considered a violation of the Act.

(C) The registration is valid from the time the person registers until January 1 of the following year, unless the person requests in writing the removal of that person's name. The registration shall be in writing.

(D) Gift means any payment, entertainment, advance, services, forgiveness of an obligation or debt, or thing of value, unless consideration of equal or greater value has been given therefore.

Authority G.S. 120, Article 9A.

18 NCAC 12 .0105 PUNISHMENT

(a) Whoever willfully violates any provision of the Act shall be guilty of a Class 1 misdemeanor. In addition, no legislative lobbyist or legislative lobbyist's principal who is convicted of a violation of the provisions of the Act shall in any way act as a legislative or executive lobbyist for a period of two years following conviction.

(b) In addition to the criminal penalties set forth in the Act, the Secretary of State may levy civil fines for willful false or incomplete reporting up to five thousand dollars (\$5,000.00) per violation. An appeal of a decision by the Secretary of State shall

be in accordance with Article 3 of Chapter 150B of the General Statutes.

Authority G.S. 120, Article 9A.

18 NCAC 12 .0106 CONFIDENTIAL INFORMATION

In order to protect confidential information under Chapter 132 related to economic development initiatives or to industrial or business recruitment activities upon proper request in writing from the appropriate authorities, the Secretary of State will keep that information and the request confidential until the State, a unit of local government or the business has announced a commitment by the business to expand or locate a specific project in this State or a final decision not to do so and the business has communicated that commitment or decision to the State or local government agency involved with the project.

Authority G.S. 120, Article 9A.

18 NCAC 12 .0107 PROHIBITIONS

(a) No member or former member of the General Assembly may be employed as an executive or legislative lobbyist by a lobbyist's principal to lobby as defined in the Act or Article 4C of Chapter 147 of the General Statutes within six months after the end of that member's service in the General Assembly.

(b) No person serving as Governor, as a member of the Council of State, or as a head of a principal State department listed in G.S. 143B-6 may be employed as an executive or legislative lobbyist by a lobbyist's principal to lobby as defined in the Act or Article 4C of Chapter 147 of the General Statutes within six months after separation from employment or leaving office.

(c) No individual registered as a legislative lobbyist shall serve as a campaign treasurer under Chapter 163 of the General Statutes for a campaign for election as a member of the General Assembly.

(d) A legislative or executive lobbyist shall not be eligible for appointment by a State official to any body created under the laws of this State that has regulatory authority over the activities of a person that the lobbyist currently represents or has represented within 60 days after the expiration of the lobbyist's registration representing that person. Nothing herein shall be construed to prohibit appointment by any unit of local government.

(e) No legislative or executive lobbyist or another acting on the lobbyist's behalf shall permit a covered person, legislative employee, executive branch officer, or that person's immediate family member, to use the cash or credit of the lobbyist for the purpose of lobbying unless the lobbyist is in attendance at the time of the expenditure.

(f) No person shall act as a legislative lobbyist for compensation that is dependent upon the result or outcome of any legislative action.

(g) No legislative lobbyist or legislative lobbyist's principal shall attempt to influence the action of any covered person by the promise of financial support of the covered person's candidacy, or by threat of financial support in opposition to the covered person's candidacy in any future election.

Authority G.S. 120, Article 9A.

18 NCAC 12 .0108 EXEMPTED PERSONS FROM THE ACT

Except as otherwise provided in the Act, the provisions of the Act shall not be construed to apply to any of the following:

- (1) An individual solely engaged in expressing a personal opinion or stating facts or recommendations on legislative matters to members of the General Assembly and not acting as a legislative lobbyist.
- (2) A person appearing before a legislative committee at the invitation or request of the committee or a member thereof and who engages in no further activities as a legislative lobbyist.
- (3) Exempted persons:
 - (a) A duly elected or appointed official or employee of the State, the United States, a county, municipality, school district or other governmental agency, when appearing solely in connection with matters pertaining to the office and public duties.
 - (b) Notwithstanding the persons exempted in this Act, the Governor, Council of State, and all appointed heads of State departments, agencies and institutions, shall designate all authorized official legislative liaison personnel on Form L-101L and shall file and maintain current lists of designated legislative liaison personnel with the Secretary of State.
- (4) A person performing professional services in drafting bills or in advising and rendering opinions to clients, or to covered persons on behalf of clients, as to the construction and effect of proposed or pending legislation where the professional services are not otherwise connected with legislative action.
- (5) A person who owns, publishes or is employed by any news medium while engaged in the acquisition or dissemination of news on behalf of the news medium.
- (6) Covered persons and legislative employees.
- (7) A person responding to inquiries from a member of the General Assembly or a legislative employee, and who engages in no further activities as a legislative lobbyist in connection with that or any other legislative matter.
- (8) An employee who represents the employer's interests in legislative action for no more than three hours in a quarter, provided that neither the employee nor the employer makes any expenditure as defined in G.S. 120-47.1. Only the actual time spent directly with a covered

person or legislative employee is to be counted.

- (9) Except as otherwise provided herein, if a trade association or non-profit organization has filed an authorization form with the Secretary of State and hired a lobbyist pursuant to the Act, members of the trade association or non-profit organization are not lobbyists for a trade association or non-profit organization unless they receive reimbursement of actual travel and subsistence expenses from a trade association or non-profit organization in the ordinary course of business and a significant part of their duties involve lobbying before the General Assembly.

Authority G.S. 120, Article 9A.

18 NCAC 12 .0109 EXEMPTED PERSONS EXPENDITURES

- (a) If a covered person or a legislative employee accepts an expenditure made for the purpose of lobbying valued over two hundred dollars (\$200.00) from a person or group of persons acting together, exempted or not otherwise covered by the Act, the person or group of persons making the expenditure shall report the date, a description of the expenditure, the name and address of the person, or group of persons making the expenditure, the name of the covered person or legislative employee accepting the expenditure, and the estimated fair market value of the expenditure. The person giving the gift shall use Form LE-101ER, check the appropriate blocks and have it completed in full and executed at the time of or prior to filing. Failure to file the report shall result in a violation of the Act.
- (b) If the person making the expenditure above is outside North Carolina, and the covered person or legislative employee accepting the expenditure is also outside North Carolina at the time the person accepts the expenditure, then the person accepting the expenditure shall be responsible for filing the report using available information. The person receiving the gift shall use Form LE-101ER, check the appropriate blocks and have it completed in full and executed at the time of or prior to filing. Failure to file the report shall result in a violation of the Act.
- (c) If a covered person or a legislative employee accepts a scholarship valued over two hundred dollars (\$200.00) from a person, or group of persons, acting together, exempted or not covered by the Act, the person or group of persons granting the scholarship shall report the date of the scholarship, a description of the event involved, the name and address of the person, or group of persons granting the scholarship, the name of the covered person or legislative employee accepting the scholarship, and the estimated fair market value. The person giving the scholarship shall use Form LE-101ER, check the appropriate blocks and have it completed in full and executed at the time of or prior to filing. Failure to file the report shall result in a violation of the Act.
- (d) If the person granting the scholarship above outside North Carolina, the covered person or legislative employee accepting the scholarship shall be responsible for filing the report. The

person receiving the scholarship shall use Form LE-101ER, check the appropriate blocks and have it completed in full and executed at the time of or prior to filing. Failure to file the report shall result in a violation of the Act.

(e) Rule .0109(a)-(d) and (f) shall not apply to any of the following:

- (1) Lawful campaign contributions;
- (2) Any gift from a family member to a covered person or legislative employee;
- (3) Gifts associated primarily with the covered person's, legislative employee's or that person's immediate family member's non-legislative employment;
- (4) Gifts, other than food, beverages, travel, and lodging, which are received from a person who is a citizen of a country other than the United States or a state other than North Carolina and given during a ceremonial presentation or as a custom; and
- (5) A thing of value that is paid for by the State.

(f) Reports required by this section shall be filed within 10 business days after the end of the quarter in which the expenditure was made, with the Secretary of State.

Authority G.S. 120, Article 9A.

18 NCAC 12 .0110 AGENCY LEGISLATIVE LIAISON PERSONNEL LIMITATIONS

(a) No State department may use State funds to contract with persons who are not employed by the State to lobby the General Assembly.

(b) No more than two persons in each State department and constituent institution of The University of North Carolina may be registered to lobby the General Assembly or designated as legislative liaison personnel pursuant to the Act.

(c) All persons designated as legislative liaison personnel pursuant to the Act and the State department or constituent institution of The University of North Carolina that employs the legislative liaison personnel shall report on Form LE-101ER all expenditures made for lobbying purposes in the same manner as required for legislative lobbyists under G.S. 120-47.6 and lobbyists' principals under G.S. 120-47.7. The registration and authorization fees required under G.S. 120-47.3 and G.S. 120-47.4 shall not apply to legislative liaison personnel or the State department or constituent institution that employs the legislative liaison personnel.

Authority G.S. 120, Article 9A.

18 NCAC 12 .0111 MANNER OF FILING DOCUMENTS AND FEES WITH THE SECRETARY OF STATE

Personal delivery to:
Secretary of State's Office
2 South Salisbury Street
Raleigh, N. C 27601-2903
Telephone 919-807-2219

Posted mail to:

Secretary of State
P. O. Box 29622
Raleigh, N. C. 27626-0622

Electronically:
Through the internet at www.sosnc.com.

Authority G.S. 120, Article 9A.

18 NCAC 12 .0112 FORMS

All forms required to be used in the Act can be obtained from the Secretary of State in person, by mail, electronically or from the Secretary of State's web site.

Authority G.S. 120, Article 9A.

18 NCAC 12 .0113 DATE DEEMED FILED

Filing of any document or report shall be deemed received by the Secretary of State upon the day of hand delivery, or on the day postmarked if mailed, or on the day electronically received. Documents filed electronically through the internet shall be acknowledged by the Secretary of State through an e-mail sent to the person's e-mail address as it appears in the current registration information for that person. Receipt of the electronic acknowledgment of filing from the Secretary of State shall create a rebuttable presumption that the electronic filing was received by the Secretary of State at the date and time specified in the electronic acknowledgment.

Authority G.S. 120, Article 9A.

18 NCAC 12 .0114 REPORTS UNDER OATH

Any report required to be signed under oath shall be signed by the required person before a Notary Public or any person so authorized by the state in which the report is being signed. Reports signed by an individual with a power of attorney will not be accepted as being signed by the required person without prior approval of the Secretary. If the report is filed electronically and is not electronically notarized, the report shall be subscribed and sworn to in an independent affidavit that shall be delivered to the Secretary of State in person or by mail within 72 hours after the report is electronically filed.

Authority G.S. 120, Article 9A.

18 NCAC 12 .0115 PRESERVATION OF RECORDS

All reports, records, documents and accounts used to file the required reports under the Act shall be preserved and retained by the lobbyist and lobbyist's principal for at least three years counting from the date of the filing of any report.

Authority G.S. 120, Article 9A.

18 NCAC 12 .0116 LAW

The Act will be governed by the laws of North Carolina especially G.S. 1A-1, Rule 4 of the North Carolina Rules of Civil Procedure as it may apply in civil matters.

Authority G.S. 120, Article 9A.

18 NCAC 12 .0117 PROPER FILING

An incomplete and illegible filing will not be considered as a proper filing. However, the Secretary of State may consider an amended filing properly filed, even though late, if the omissions and errors in the original filing are deemed not substantial.

Authority G.S. 120, Article 9A.

CHAPTER 13 – EXECUTIVE BRANCH LOBBYING

18 NCAC 13 .0101 DEFINITIONS

For the purpose of these Rules and regulations, terms shall have those meanings set out in Article 4C of Chapter 147 of the General Statutes of North Carolina listed below as well as other definitions adopted by the Secretary of State pursuant to G.S. 147- 54.44 also set forth in these Rules.

- (1) Act -The Act means Article 4C of Chapter 147 of the North Carolina General Statutes entitled "Executive Branch Lobbying."
- (2) Civic Event -Civic event is a public gathering sponsored by a governmental or community agency or unit or community group or not for profit entity or individual for the temporal good of the society or to celebrate and commemorate the historical, cultural and ethnic heritage of a city, state or nation.
- (3) Community event - Community event is a public gathering of people in the same general geographic area sharing common interests for the good of the community.
- (4) Diplomatic event - Diplomatic event is a gathering involving governmental officials from the States, Nation or Foreign countries to introduce, honor or entertain individuals with some diplomatic distinction.
- (5) Legislative Lobbyist - Legislative lobbyist means a lobbyist registered pursuant to Article 9A of Chapter 120 of the General Statutes.
- (6) Expenditure - Expenditure means any advance, contribution (other than a lawful political contribution), conveyance, deposit, distribution, payment, gift, retainer, fee, salary, honorarium, reimbursement, loan, pledge or thing of value greater than ten dollars (\$10.00) per day, or contract, agreement, promise or other obligation whether or not legally enforceable, that directly or indirectly is made to, at the request of, for the benefit of, or on the behalf of an executive branch officer or that person's immediate family member. For the purpose of reporting, value shall be determined by the total benefit received by an executive branch official or that person's immediate family member, rather than the prorated expense to the principal or lobbyist.
- (7) Immediate Family Member - Immediate Family Member means spouse, descendant, or ascendant of the executive branch official.

- (8) Executive Action - Executive Action means the preparation, research, drafting, introduction, consideration, modification, amendment, approval, passage, enactment, tabling, postponement, defeat, or rejection of a rule, regulation, executive order, resolution, or other quasi-legislative action by the executive branch or by a member or employee of the executive branch acting or purporting to act in an official capacity. This term shall not include an action by an attorney representing a client with respect to the executive action.
- (9) Executive Branch Officers - Executive Branch Officers means the Governor, any member of the Council of State, the heads of those departments listed in G.S. 143B-6, and members of the Board of Governors of the University of North Carolina.
- (10) Executive Lobbyist - Executive lobbyist means any lobbyist for or against executive action.
- (11) Legislator - Legislator means a member of the General Assembly or a person elected or appointed a member of the General Assembly prior to taking office.
- (12) Lobbying - Lobbying means any of the following:
 - (A) Influencing or attempting to influence executive action through direct communication or activities with an executive branch officer.
 - (B) Solicitation of others by executive lobbyists or lobbyists' principals to influence executive action through direct communication or activities with an executive branch officer.
 - (C) Developing goodwill through communications or activities, including the building of relationships, with an executive branch officer, or that person's immediate family with the intention of influencing current or future executive action, but does not include communications or activities with an executive branch officer, or that person's immediate family member in a business, civic, religious, fraternal, or commercial relationship which is not connected to executive action.
- (13) Lobbyist - Lobbyist means an individual who meets any of the following criteria:
 - (A) Is employed and receives compensation, or who contracts for economic consideration, for the purpose of lobbying.
 - (B) Represents another person and receives compensation for the purpose of lobbying.

(C) Is executive liaison personnel. The term lobbyist shall not include those individuals who are specifically exempted by G.S. 147-54.40 (Rule .0108 of this Chapter). For the purpose of determining whether an individual is a lobbyist, reimbursement of actual travel and subsistence expenses shall not be considered compensation; provided, however, that reimbursement in the ordinary course of business of these expenses shall be considered compensation if a significant part of the individual's duties involve lobbying before the General Assembly.

- (14) Lobbyist's Principal and Principal – Lobbyist's principal and principal mean the person on whose behalf the executive lobbyist lobbies. In the case where a lobbyist is compensated by a law firm, consulting firm, or other entity retained by a person for executive lobbying, the principal is the person whose interests the lobbyist represents in lobbying.
- (15) News Medium - News medium means mainstream media providers whose sole purpose is to report events and that does not involve research or advocacy. Media providers considered outside the mainstream are defined as those that exist as a sham, subterfuge or obscure in order to conceal the identity of those seeking to influence executive action.
- (16) Ordinary Course of Business and Normal Course of Business - Ordinary Course of Business and Normal Course of Business mean conduct of business that is usual, regular, and within normal commercial customs and usages.
- (17) Person - Person means any individual, firm, partnership, committee, association, corporation, business entity, or any other organization or group of persons which has an independent legal existence.
- (18) Quarterly - Quarterly means March 31, June 30, September 30 and December 31.
- (19) Scholarship - Scholarship is a grant or gift of money or other valuables as financial aid to a person for the purpose of helping with the expenses of continuing educational endeavors.
- (20) Solicitation of Others - Solicitation of others is the seeking, approaching, requesting, or petitioning some one else to do or perform some act on your behalf.

shall use registration form #LE-101, check the appropriate blocks, and have it completed in full and executed at the time of or prior to filing. Each executive registration statement shall be effective from the date of filing until January 1 of the following year when a new registration statement must be filed and the applicable fee paid to continue being a executive lobbyist. Each executive lobbyist shall file an amended registration form with the Secretary of State no later than 10 business days after any change in the information supplied in the executive lobbyist's last registration form. Each amended registration form shall include a complete statement of the information that has changed. The lobbyist shall use form #LE-101 for an amended registration, check the appropriate blocks, and have it completed in full and executed at the time of or prior to filing.

(b) How and Where to register - Each executive registration statement with the appropriate fee shall be filed with the Secretary of State in person or by mail or electronically as provided for in Rule .0111 of this Chapter, entitled Manner of Filing Documents and Fees with the Secretary of State.

(c) Registration Form # LE-101 - The registration form shall include the registrant's full name, complete address and telephone number; the registrant's place of business; the full name, complete address and telephone number of each person by whom the registrant is employed or retained; and a general description of the matters on which the registrant expects to act as a executive lobbyist.

(d) Registration Fees - A fee of one hundred dollars (\$100.00) is due and payable to the Secretary of State by either the lobbyist or the lobbyist's principal at the time of each lobbyist registration. A separate registration fee shall be paid for each separate type of executive lobbyist or legislative lobbyist. There is no fee for an amended registration form. If the lobbyist claims hardship in not being able to pay the fee, the lobbyist shall file with the Secretary of State an affidavit on Form LE-101H setting forth reasons for the hardship, check the appropriate blocks and have it completed in full and executed at the time of or prior to filing. Financial hardship is the only basis on which fees may be waived. Based upon the evidence presented, the Secretary of State may waive all or a portion of the fee if such is deemed justified by the Secretary of State. A waiver is good only for the year in which it is granted.

(e) Expenditure Reports of Executive Lobbyist:

- (1) Who must report and when - Each executive lobbyist shall file quarterly expenditure reports under oath with the Secretary of State with respect to each lobbyist's principal within 10 business days after the end of the reporting period. The lobbyist shall use Form # LE-101ER, check the appropriate blocks, and have it completed in full and executed at the time of or prior to filing.
- (2) Where and How to report - Reports shall be filed with the Office of the Secretary of State in person or by mail or electronically as provided for in Rule .0111 of this Chapter, entitled Manner of Filing Documents and Fees with the Secretary of State.
- (3) Report Form #LE-101ER -The expenditure report shall include all expenditures during the

Authority G.S. 147, Article 4C.

18 NCAC 13 .0102 LOBBYIST

(a) Who must register – An executive lobbyist shall file with the Secretary of State a separate registration statement for each principal the lobbyist represents before engaging in any lobbying. The registration shall indicate whether it is registration as a executive lobbyist, legislative lobbyist, or both. The lobbyist

reporting period and shall be due 10 business days after the end of the reporting period. The executive lobbyist shall file expense reports whether or not expenditures are made.

Each expenditure report shall set forth the fair market value (face value if shown), date, a description of the expenditure, name and address of the payee, or beneficiary, and name of any executive branch officer or that person's immediate family member benefiting from the expenditure. Such expenditures shall be reported using the following categories:

- (A) Transportation and lodging;
- (B) Entertainment, food, and beverages;
- (C) Meetings and events;
- (D) Gifts; and
- (E) Other expenditures.

In addition, expenses for the solicitation of others to lobby, whether or not an executive branch officer or family member is affected, shall be reportable if such expenses are incurred in connection, or in concert, with other expenditures reportable under this subsection.

(4) Exemptions from reporting:

- (A) Gifts between an immediate family member or person who is the stepchild, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, or members of the household of the executive branch officer;
- (B) Lawful campaign contributions;
- (C) Commercially available loans made on terms not more favorable than generally available to the public in the normal course of business if not made for the purpose of lobbying;
- (D) Contractual arrangements or business relationships or arrangements made in the normal course of business if not made for the purpose of lobbying;
- (E) The cost of attendance or participation provided by the sponsoring entity of lodging, and of food and beverages consumed, at events sponsored by or in conjunction with a civic, charitable, community, or diplomatic event if the activity or event does not last longer than three hours. If it does last longer than three hours then such must be reported.
- (F) Academic scholarships made on terms not more favorable than scholarships generally available to the public.

(5) Inclusions in reporting - All expenditures made for the purpose of lobbying shall be reported, including the following:

(A) Expenditures benefiting or made on behalf of an executive branch officer or those persons' immediate family members in the regular course of that person's non-executive employment.

(B) Contractual arrangements or direct business relationships between an executive lobbyist or executive lobbyist's principal and an executive branch officer or that person's immediate family member, in effect during the reporting period or the previous 12 months.

Expenditures reimbursed to an executive lobbyist in the ordinary course of business by the lobbyist's principal or other employer.

(6) When more than 15 executive branch officers benefit from an expenditure, no names of individuals need be reported, provided that the report identifies the approximate number of executive branch officers benefiting and, with particularity, the basis for their selection. The approximate number of immediate family members who benefited from the expenditure shall be listed separately.

(f) Lobbyist Violations, Penalties and Late Filing Fees:

(1) It shall be unlawful for a person to lobby without registering unless exempted by the Act.

(2) When an executive lobbyist fails to file an expenditure report as required, the Secretary of State shall send a certified or registered letter advising the executive lobbyist of the delinquency and the penalties provided by law. Within 20 days of the receipt of the letter, the executive lobbyist shall deliver or post by United States mail to or electronically file with the Secretary of State the required report and an additional late filing fee in an amount equal to the late filing fee under G.S. 163-278.34(a)(2) i.e. fifty dollars (\$50.00) per day for each day the filing is late, not to exceed a total of five hundred dollars (\$500.00).

Filing of the required report and payment of the additional fee within the time extended shall constitute compliance. Failure to file an expenditure report in one of the manners prescribed shall result in revocation of any and all registrations of an executive lobbyist. No executive lobbyist may register or reregister until the executive lobbyist has fully complied. Appeal of a decision by the Secretary of State shall be in accordance with Article 3 of Chapter 150B of the General Statutes.

No penalties or late filing fees will be imposed upon a executive lobbyist for subsequent failures to comply with these filing requirements if the Secretary of State failed to

provide the lobbyist with required notifications of the initial violation. However, this does not apply to a failure by the lobbyist to file an expenditure report in a timely manner.

Authority G.S. 147, Article 4C.

18 NCAC 13 .0103 AUTHORIZATIONS FROM LOBBYIST'S PRINCIPAL

(a) Who Must File - Each executive lobbyist or principal shall file with the Department of the Secretary of State within 10 business days after the filing of the executive lobbyist's registration a written authorization signed by the lobbyist's principal authorizing the lobbyist to represent the principal. The principal shall use authorization form #LE-102, check the appropriate blocks, and have it completed in full and executed at the time of or prior to filing. There shall be no use of a power of attorney for a principal without prior approval of the Secretary of State.

(b) How and Where to file - Each principal authorization form with the appropriate fee shall be filed with the Department of the Secretary of State in person or by mail or electronically as provided for in Rule .0111 of this Chapter, entitled Manner of Filing Documents and Fees with the Secretary of State.

(c) Authorization Form LE-102 - The authorization form shall include the principal's full name, complete address and telephone number, name and title of the official signing for the principal, and the name of each lobbyist registered to represent the principal. An amended authorization shall be filed with the Secretary of State no later than 10 business days after any change in the information supplied on the previous authorization. Each amended authorization shall include a complete statement of the information that has changed. The principal shall use Form #LE-102 for the amended authorization, check the appropriate blocks, and have it completed in full and executed at the time of or prior to filing.

(d) Authorization Fees - A fee of one hundred dollars (\$100.00) is due and payable to the Secretary of State at the time the principal's first authorization statement is filed each calendar year for a executive lobbyist. The fee for the executive lobbyist's authorization shall be seventy-five dollars (\$75.00) if an authorization for the principal to be represented by an legislative lobbyist is filed at the same time. No additional fee is due for additional authorizations filed for executive lobbyists. The fee herein shall be reduced to a total of twenty-five dollars (\$25.00) if the principal had annual revenues in its most recent fiscal year of three hundred thousand dollars (\$300,000) or less and is represented by no more than two different lobbyists. This reduced fee covers authorizations filed for the principal's executive and legislative lobbyists. To obtain the reduced fee there must be filed with the Secretary of State evidence of the annual gross revenues being three hundred thousand dollars (\$300,000) or less in its most recent fiscal year. If proper proof is presented to the full satisfaction of the Secretary of State, the reduced fee will apply. The principal shall use Form LE-102RF, check the appropriate blocks and have it completed in full and executed at the time of or prior to filing. There is no fee for amended authorizations.

(e) Expenditure Reports of Principal of Executive Lobbyist:

- (1) Who Must Report and When - Each executive lobbyist's principal shall file quarterly expenditure reports under oath with the Secretary of State. The principal shall use Form #LE-101ER, check the appropriate blocks and have it completed in full and executed at the time of or prior to filing.
- (2) Where and How to report - Reports shall be filed with the Secretary of State in person or by mail or electronically as provided for in Rule .0111 of this Chapter, entitled Manner of Filing Documents and Fees with the Secretary of State.
- (3) Report Form #LE-101ER - The expenditure report shall include all expenditures during the reporting period and shall be due 10 business days after the end of the reporting period. The lobbyist's principal shall file the expenditure reports whether or not expenditures are made during a reporting period.
- (4) Each expenditure report shall set forth fair market value (face value if shown), date, a description of the expenditure, name and address of the payee, or beneficiary, and name of any executive branch officer or that person's immediate family member affected by the expenditure. Such expenditures shall be reported using the following categories:
(A) Transportation and lodging;
(B) Entertainment, food, and beverages;
(C) Meetings and events;
(D) Gifts; and
(E) Other expenditures.
- (5) In addition, expenses for the solicitation of others to lobby, whether or not an executive branch officer, or family member is affected, shall be reportable if such expenses are incurred in connection, or in concert, with other expenditures reportable under this subsection.
- (6) In addition, the compensation paid or agreed to be paid to all executive lobbyists shall be reported, whether or not an executive branch officer or family member is affected. If an executive lobbyist is a full-time employee of the lobbyist's principal, or is compensated by means of an annual fee or retainer, the lobbyist's principal shall estimate and report the portion of the salary, fee, or retainer that compensates for lobbying. The lobbyist's principal's expenditure report shall include an itemized description of all expenditures reimbursed or paid to executive lobbyists for lobbying that are not reported on the executive lobbyists' reports.
- (7) When more than 15 executive branch officers benefit from an expenditure, no names of individuals need be reported provided that the report identifies the approximate number of

executive branch officers benefiting and, with particularity, the basis for their selection. The approximate number of immediate family members of executive branch officers who benefited from the expenditure shall be listed separately.

(8) Exemptions from reporting:

(A) Gifts between an immediate family member or person who is the stepchild, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, or members of the household of the executive branch office;

(B) Lawful campaign contributions;

(C) Commercially available loans made on terms not more favorable than generally available to the public in the normal course of business if not made for the purpose of lobbying;

(D) Contractual arrangements or business relationships or arrangements made in the normal course of business if not made for the purpose of lobbying;

(E) The cost of attendance or participation provided by the sponsoring entity of lodging, and of food and beverages consumed, at events sponsored by or in conjunction with a civic, charitable, community, or diplomatic event if the activity or event does not last longer than three hours. If it does last longer than three hours then such must be reported; and

(F) Academic scholarships made on terms not more favorable than scholarships generally available to the public.

(9) Inclusions in reporting - All expenditures made for the purpose of lobbying shall be reported, including the following:

(A) Expenditures benefiting or made on behalf of an executive branch officer, or that person's immediate family member.

(B) Contractual arrangements or direct business relationships between an executive lobbyist or executive lobbyist's principal and an executive branch officer or that person's immediate family member, in effect during the reporting period or the previous 12 months.

(C) Expenditures reimbursed to an executive lobbyist in the ordinary course of business by the lobbyist's principal or other employer.

(f) Lobbyist's Principal violations, penalties and Late Filing Fees:

(1) It shall be unlawful for a person to lobby without registering unless exempted by the Act.

(2) When a lobbyist's principal fails to file an expenditure report as required, the Secretary of State shall send a certified or registered letter advising the lobbyist's principal of the delinquency and the penalties provided by law. Within 20 days of the receipt of the letter, the lobbyist's principal shall deliver or post by United States mail or electronically send to the Secretary of State the required report and an additional late filing fee in an amount equal to the late filing fee under G.S. 163-278.34(a)(2) i.e. fifty dollars (\$50.00) per day for each day the filing is late, not to exceed a total of five hundred dollars (\$500.00).

(3) Filing of the required report and payment of the late fee within the time extended shall constitute compliance. Failure to file an expenditure report in one of the manners prescribed shall result in revocation of any and all registrations of a lobbyist's principal. No lobbyist's principal may register or reregister until the lobbyist's principal has fully complied.

(4) Appeal of a decision by the Secretary of State shall be in accordance with Article 3 of Chapter 150B of the General Statutes.

(5) No penalties or late filing fees will be imposed upon a principal for subsequent failures to comply with these filing requirements if the Secretary of State failed to provide to the principal with required notifications of the initial violation. However, this does not apply to a failure by the principal to file an expenditure report in a timely manner.

Authority G.S. 147, Article 4C.

18 NCAC 13 .0104 POWERS AND DUTIES OF THE SECRETARY OF STATE

(a) Powers:

(1) The Secretary of State has the authority to adopt any rules, orders, forms and definitions as are necessary to carry out the provisions of Article 4C of Chapter 147 of the General States of North Carolina.

(2) The Secretary of State may petition the Wake County Superior Court for the approval to issue subpoenas and subpoenas duces tecum as necessary to conduct investigations of violations. The court shall authorize subpoenas when the court determines they are necessary for the enforcement of the Executive Branch Lobbying Act. Subpoenas issued shall be enforceable by the court through contempt powers. Venue shall be with the Superior Court of Wake County for a North Carolina

resident and for any nonresident person, or that person's agent, who makes a reportable expenditure and personal jurisdiction may be asserted under G.S. 1-75.4. Complaints of violations and all other records accumulated in conjunction with the investigation of these complaints shall be considered records of criminal investigations under G.S. 132-1.4.

(3) The Secretary of State shall report apparent violations to the Attorney General. The Attorney General shall, upon complaint, make an appropriate investigation thereof, and shall forward a copy of the investigation to the district attorney of the prosecutorial district as defined in G.S. 7A-60 of which Wake County is a part, who shall prosecute any person who violates any provisions of the Lobbying Act.

(b) Duties:

(1) The Secretary of State shall make all registration statements and expenditure reports open to the public except matters in expenditure reports designated by the filer to be payees under protective order issued pursuant to Chapter 50B of the General Statutes or participating in the Address Confidentiality Program pursuant to Chapter 15C of the General Statutes or as provided by any other applicable law which the Secretary of State shall redact and remove that information before making it open to the public.

(2) The Secretary of State shall perform systematic reviews of reports required to be filed by lobbyist and lobbyist's principals on a regular basis to assure complete and timely disclosure of expenditures.

(3) The Secretary of State shall make available as soon as practicable the registrations of the lobbyists in an electronic, searchable format.

(4) The Secretary of State shall make available as soon as practicable the authorizations of the lobbyists' principals in an electronic and searchable format.

(5) The Secretary of State shall provide public access via the Internet to all filings required or made pursuant to the Act as soon as practicable.

(6) The Secretary of State shall deposit all fees collected in the General Fund of the State and deposit all fines according to existing law.

(7) No Gifts' registry:

(A) The Secretary of State shall establish a 'No Gifts' registry for persons subject to the Act or Article 4C of Chapter 147 of the General Statutes. The 'No Gifts' registry shall be published and updated along with the list of lobbyists and lobbyists'

principals required under G. S. 120-47.2.

(B) Except as provided in G.S. 147-54.7, executive lobbyists, legislative lobbyists, and lobbyists' principals shall not give gifts to persons placing their names on the registry. Gifts of informational directories may be given to persons placing their names on the registry. A violation of this provision will be considered a violation of the Act.

(C) The registration is valid from the time the person registers until January 1 of the following year, unless the person requests in writing the removal of that person's name. The registration shall be in writing.

(D) Gift means any payment, entertainment, advance, services, forgiveness of an obligation or debt, or thing of value, unless consideration of equal or greater value has been given therefore.

Authority G.S. 147, Article 4C.

18 NCAC 13 .0105 PUNISHMENT

(a) Whoever willfully violates any provision of the Act shall be guilty of a Class 1 misdemeanor. In addition, no executive lobbyist who is convicted of a violation of the provisions of the Act shall in any way act as a legislative or executive lobbyist for a period of two years following conviction.

(b) In addition to the criminal penalties set forth in the Act, the Secretary of State may levy civil fines for willful false or incomplete reporting up to five thousand dollars (\$5,000.00) per violation. An appeal of a decision by the Secretary of State shall be in accordance with Article 3 of Chapter 150B of the General Statutes.

Authority G.S. 147, Article 4C.

18 NCAC 13 .0106 CONFIDENTIAL INFORMATION

In order to protect confidential information under Chapter 132 related to economic development initiatives or to industrial or business recruitment activities, the Secretary of State, upon proper request in writing from the appropriate authorities, will keep that information and the request confidential until the State, a unit of local government or the business has announced a commitment by the business to expand or locate a specific project in this State or a final decision not to do so and the business has communicated that commitment or decision to the State or local government agency involved with the project.

Authority G.S. 147, Article 4C.

18 NCAC 13 .0107 PROHIBITIONS

(a) No member or former member of the General Assembly may be employed as an executive lobbyist by a lobbyist's principal to lobby as defined in the Act or Article 4C of Chapter 147 of the General Statutes within six months after the end of that member's service in the General Assembly.

(b) No person serving as Governor, as a member of the Council of State, or as a head of a principal State department listed in G.S. 143B-6 may be employed as an executive lobbyist by a lobbyist's principal to lobby as defined in the Act or Article 4C of Chapter 147 of the General Statutes within six months after separation from employment or leaving office.

(c) No individual registered as an executive lobbyist shall serve as a campaign treasurer under Chapter 163 of the General Statutes for a campaign for election as a member of the General Assembly.

(d) An executive lobbyist shall not be eligible for appointment by a State official to any body created under the laws of this State that has regulatory authority over the activities of a person that the lobbyist currently represents or has represented within 60 days after the expiration of the lobbyist's registration representing that person. Nothing herein shall be construed to prohibit appointment by any unit of local government.

(e) No executive lobbyist or another acting on the lobbyist's behalf shall permit an executive branch officer or that person's immediate family member to use the cash or credit of the lobbyist for the purpose of lobbying unless the lobbyist is in attendance at the time of the expenditure.

(f) No person shall act as an executive lobbyist for compensation that is dependent upon the result or outcome of any executive action.

(g) No executive lobbyist or executive lobbyist's principal shall attempt to influence the action of any executive branch officer by the promise of financial support of the executive branch officer's candidacy, or by threat of financial support in opposition to the executive branch officer's candidacy in any future election.

Authority G.S. 147, Article 4C.

18 NCAC 13 .0108 EXEMPTED PERSONS FROM THE ACT

Except as otherwise provided in the Act, the provisions of the Act shall not be construed to apply to any of the following:

(1) An individual solely engaged in expressing a personal opinion or stating facts or recommendations on executive action and not acting as an executive lobbyist.

(2) A person appearing before a committee, commission, board, council, or other collective body whose membership includes one or more executive branch officers at the invitation or request of the collective body or a member thereof and who engages in no further activities as a executive lobbyist in connection with that or any other executive action.

(3) Exempted persons:

(a) A duly elected or appointed official or employee of the State, the United States, a county, municipality, school

district or other governmental agency, when appearing solely in connection with matters pertaining to the office and public duties.

(b) A person performing professional services in drafting bills or in advising and rendering opinions to clients, or to executive branch officers on behalf of clients, as to the construction and effect of proposed or pending legislation where the professional services are not otherwise connected with executive action.

(4) A person who owns, publishes or is employed by any news medium while engaged in the acquisition or dissemination of news on behalf of the news medium.

(5) A person responding to inquiries from an executive branch officer, and who engages in no further activities as a executive lobbyist in connection with that or any other executive matter.

(6) A person appearing before an executive branch agency or department on behalf of another person, on an individual application for a license or permit, or a disciplinary action on a license or permit.

(7) A person appearing before an executive branch officer on behalf of another person with respect to a proposed sale or lease of real property, goods or services to the State, or construction of property by the State.

(8) An employee who represents the employer's interests in executive action for no more than nine hours during a six-month reporting period, provided that neither the employee nor the employer make any expenditure as defined in G.S. 147-54.31. Only the actual time spent directly with an executive branch officer is to be counted toward the nine hour limit.

(9) Except as otherwise provided herein, if a trade association or non-profit organization has filed an authorization form with the Secretary of State and hired a lobbyist pursuant to the Act, members of the trade association or non-profit organization are not lobbyists for a trade association or non-profit organization unless they receive reimbursement of actual travel and subsistence expenses from a trade association or non-profit organization in the ordinary course of business and a significant part of their duties involve lobbying before the General Assembly.

Authority G.S. 147, Article 4C.

18 NCAC 13 .0109 EXEMPTED PERSONS EXPENDITURES

(a) If an executive branch officer accepts an expenditure made for the purpose of lobbying valued over two hundred dollars (\$200.00) from a person or group of persons acting together, exempted or not otherwise covered by the Act, the person or group of persons making the expenditure shall report the date, a description of the expenditure, the name and address of the person, or group of persons making the expenditure, the name of the executive branch officer accepting the expenditure, and the estimated fair market value of the expenditure. The person giving the gift shall use Form LE-101ER, check the appropriate blocks and have it completed in full and executed at the time of or prior to filing. Failure to file the report shall result in a violation of the Act.

(b) If the person making the expenditure above is outside North Carolina, and the executive branch officer accepting the expenditure is also outside North Carolina at the time the person accepts the expenditure, then the person accepting the expenditure shall be responsible for filing the report using available information. The person receiving the gift shall use Form LE-101ER, check the appropriate blocks and have it completed in full and executed at the time of or prior to filing. Failure to file the report shall result in a violation of the Act.

(c) If a executive branch officer accepts a scholarship valued over two hundred dollars (\$200.00) from a person, or group of persons, acting together, exempted or not covered by the Act, the person, or group of persons, granting the scholarship shall report the date of the scholarship, a description of the event involved, the name and address of the person, or group of persons granting the scholarship, the name of the executive branch officer accepting the scholarship, and the estimated fair market value. The person giving the scholarship shall use Form LE-101ER, check the appropriate blocks and have it completed in full and executed at the time of or prior to filing. Failure to file the report shall result in a violation of the Act.

(d) If the person granting the scholarship above is outside North Carolina, the executive branch officer accepting the scholarship shall be responsible for filing the report. The person receiving the scholarship shall use Form LE-101ER, check the appropriate blocks and have it completed in full and executed at the time of or prior to filing. Failure to file the report shall result in a violation of the Act.

(e) Rule .0109(a)-(d) and (f) shall not apply to any of the following:

- (1) Lawful campaign contributions.
- (2) Any gift from a family member to an executive branch officer or
- (3) Gifts associated primarily with the executive branch officer's or that person's immediate family member's non-executive employment.
- (4) Gifts, other than food, beverages, travel, and lodging, which are received from a person who is a citizen of a country other than the United States or a state other than North Carolina and given during a ceremonial presentation or as a custom.
- (5) A thing of value that is paid for by the State.

(f) Reports required by this Section shall be filed within 10 business days after the end of the quarter in which the expenditure was made, with the Secretary of State.

Authority G.S. 147, Article 4C.

18 NCAC 13 .0110 MANNER OF FILING DOCUMENTS AND FEES WITH THE SECRETARY OF STATE:

Personal delivery to:
Secretary of State's Office
2 South Salisbury Street
Raleigh, N. C 27601-2903
Telephone 919-807-2219

Posted mail to:
Secretary of State
P. O. Box 29622
Raleigh, N. C. 27626-0622

Electronically:
Through the internet at www.sosnc.com.

Authority G.S. 147, Article 4C.

18 NCAC 13 .0111 FORMS

All forms required to be used in the Act can be obtained from the Secretary of State in person, by mail, electronically or from the Secretary of State's web site.

Authority G.S. 147, Article 4C.

18 NCAC 13 .0112 DATE DEEMED FILED

Filing of any document or report shall be deemed received by the Secretary of State upon the day of hand delivery, or on the day postmarked if mailed, or on the day electronically received. Documents filed electronically through the internet shall be acknowledged by the Secretary of State through an e-mail sent to the person's e-mail address as it appears in the current registration information for that person. Receipt of the electronic acknowledgment of filing from the Secretary of State shall create a rebuttable presumption that the electronic filing was received by the Secretary of State on the date and time specified in the electronic acknowledgment.

Authority G.S. 147, Article 4C.

18 NCAC 13 .0113 REPORTS UNDER OATH

Any report required to be signed under oath shall be signed by the required person before a Notary Public or any person so authorized by the state in which the report is being signed. Reports signed by an individual with a power of attorney will not be accepted as being signed by the required person without prior approval of the Secretary. If the report is filed electronically and not notarized electronically, the report shall be subscribed and sworn to in an independent affidavit that shall be delivered to the Secretary of State in person or by mail within 72 hours after the report is electronically filed.

Authority G.S. 147, Article 4C.

18 NCAC 13 .0114 PRESERVATION OF RECORDS

All reports, records, documents and accounts used to file the required reports under the Act, shall be preserved and retained by the lobbyist and lobbyist's principal for at least three years counting from the date of the filing of any report.

Authority G.S. 147, Article 4C.

18 NCAC 13 .0115 LAW

The Act will be governed by the laws of North Carolina especially G.S. 1A-1, Rule 4 of the North Carolina Rules of Civil Procedure as it may apply in civil matters.

Authority G.S. 147, Article 4C.

18 NCAC 13 .0116 PROPER FILING

An incomplete and illegible filing will not be considered as a proper filing. However, the Secretary of State may consider an amended filing properly filed, even though late, if the omissions and errors in the original filing are deemed not substantial.

Authority G.S. 147, Article 4C.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 03 - NORTH CAROLINA BOARD OF ATHLETIC TRAINER EXAMINERS

Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Athletic Trainer Examiners intends to amend the rule cited as 21 NCAC 03 .0302.

Proposed Effective Date: January 1, 2007

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice): A demand for a public hearing should be sent to Jennie Dorsett, Rulemaking Coordinator, PO Box 10373, Raleigh, NC 27605.*

Reason for Proposed Action: *Comply with change of the National Athletic Trainers Board of Certification.*

Procedure by which a person can object to the agency on a proposed rule: *Objections to this amendment should be sent to Jennie Dorsett, Rulemaking Coordinator, PO Box 10373, Raleigh, NC 27605.*

Comments may be submitted to: *Jenny Dorsett, PO Box 10373, Raleigh, NC 27605*

Comment period ends: July 14, 2006

Procedure for Subjecting a Proposed Rule to Legislative Review:

If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact:

- State
- Local
- Substantive (\geq \$3,000,000)
- None

SECTION .0300 - RENEWAL OF LICENSE

21 NCAC 03 .0302 CONTINUING EDUCATION

(a) Continuing education courses appropriate for license renewal are those in one or more of the following content areas: Human Anatomy, Human Physiology, Kinesiology/Biomechanics, Psychology, Exercise Physiology, Prevention of Athletic Injuries, Evaluation of Athletic Injuries, First Aid and Emergency Care, Therapeutic Modalities, Therapeutic Exercise, Personal Community Health, Nutrition, and Administration of Athletic Training Programs.

(b) A licensee shall complete ~~80~~ 75 contact hours of continuing education during a three-year license renewal period. Contact hours are defined as the number of actual clock hours spent. One semester hour of credit is equivalent to 10 contact hours.

(c) Licensed athletic trainers who fail to document sufficient appropriate continuing education to renew their licenses shall be notified in writing of the deficiency and shall be allowed 45 days to respond. Continuing education cannot be undertaken during this period to supplement the deficiency. The licenses of athletic trainers who fail to respond within the 45-day period, or who are unable to provide sufficient continuing education shall lapse and be subject to the lapsed license requirements.

Authority G.S. 90-525; 90-533.

CONTESTED CASE DECISIONS

This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 733-2698. 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

Sammie Chess Jr.

Beecher R. Gray

Beryl E. Wade

Melissa Owens Lassiter

A. B. Elkins II

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
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ABC Comm v. Rudean Robinson Harris T/A Rudean's Diner & Lounge 3	03 ABC 1214	Conner	06/28/05	
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David Travis DeBerry v. DHHS, DMA, Third Party Recovery	05 DHR 1687	Conner	01/04/06	
Judy B. Tew v. DHHS, DFS, Licensure Section	05 DHR 1689	Chess	03/16/06	
Charlesse K. Garrison, as mother of Jasmine C. Garrison, a minor	05 DHR 1732	Chess	02/24/06	

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v. N.C. Department of Health and Human Services, Division of Medical Assistance, and the State Board of Nursing			
My Brother's Keeper, Jamie Kearney v. DMA	05 DHR 1769	Morrison	02/15/06
Dr. Vallie Guthrie, NC A&T University, NC Mathematics and Science Education Network	05 DHR 1864	Morrison	01/31/06
Christine Clark v. DHHS	05 DHR 1875	Elkins	04/06/06
Nicole Phillips v. DHHS	05 DHR 1877	Wade	02/21/06
Bruce C. Prevette v. Dept. of Revenue	05 DHR 1983	Gray	03/27/06
Shelinda Sutton v. Div. of Child Development	05 DHR 1984	Lassiter	02/23/06
Liggins Family Care – Woodmere Center, Glenda Liggins	05 DHR 2011	Gray	02/03/06
Chelli Perry Bruner for Johnny Gray Bruner III v. DHHS	05 DHR 2030	Gray	03/15/06
Choice Health Management Services v. DHHS, DFS, CON Section	05 DHR 2043	Gray	02/03/06
Choice Health Management Services, Facility 920763, v. DHHS, DFS CON Section	05 DHR 2072	Gray	01/27/06
Von's Child Care, Shvonne Taylor v. DHHS, Public Health, Child and Adult Care Food Program	05 DHR 2098	Elkins	02/28/06
William Estes v. Mecklenburg Co. Area MH/DD/SA Authority	05 DHR 2109	Lassiter	03/15/06
Penny Lynette Stewart v. OAH (DHHS, DMA)	05 DHR 2167	Elkins	03/24/06
Alisa Faulkner v. Health and Human Services	05 DHR 2202	Lassiter	03/13/06
Aziz Rehman, Wake Forest BP v. DHHS	06 DHR 0004	Morrison	04/05/06
Sheena Monalisa Connelly v. DHHS	06 DHR 0032	Lassiter	03/02/06
Jacqueline Duson v. Medicaid	06 DHR 0034	Lassiter	03/27/06
William Henry Lane v. Carolina Access Enrolle, NC Medicaid	06 DHR 0035	Wade	02/21/06
Ann Margaret Garner v. N.C. Department of Health and Human Services, Division of Facility Services, Health Care Personnel Registry Section	06 DHR 0079	Gray	03/08/06
Leo Cummings v. DHHS, DFS	06 DHR 0108	Chess	04/20/06
Judy B. Tew v. DHHS, DFS, Licensure Section	06 DHR 0115	Chess	03/16/06
Crystal Goldston v. N.C. Department of Health and Human Services	06 DHR 0117	Gray	03/14/06
Columbia Food Mart v. DHHS, Division of Public Health, Women and Children's Health Section	06 DHR 0133	Gray	04/21/06
Melisa Ann Jacobson v. NCOAH	06 DHR 0136	Wade	04/26/06
Kiddie Kingdom Samantha Hawkins v. North Carolina Department of Health and Human Services, Division of Public Health, Child and Adult Care Food Program	06 DHR 0158	Chess	02/28/06
Deborah S. Richardson v. DHHS	06 DHR 0170	Lassiter	03/28/06
Betsy Townsend v. DHHS, DFS	06 DHR 0189	Gray	03/29/06
Maurice T. Baker v. Dept. of Social Services, Nash County – IRS	06 DHR 0236	Gray	03/23/06

A list of Child Support Decisions may be obtained by accessing the OAH Website: www.ncoah.com/decisions.

DEPARTMENT OF CORRECTION

Robert A. Sartori v. DOC	06 DOC 0567	Gray	04/25/06
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DEPARTMENT OF JUSTICE

Andrew Arnold Powell, Jr. v. Crim Just Educ & Trng Stds Comm.	01 DOJ 1771	Chess	07/19/05
Carlos Orellana v. Private Protective Services Board	04 DOJ 0813	Conner	08/01/05
David Upchurch v. Criminal Justice Education and Training Stds. Comm.	04 DOJ 1157	Lassiter	05/13/05
Phillip William Engle v. Sheriffs' Education and Training Stds. Comm.	04 DOJ 1283	Mann	06/28/05
Edward Keith Royal v. Criminal Justice Education & Training Stds. Comm.	04 DOJ 2194	Gray	06/28/05
Richard Michael Ashley v. Criminal Justice Education & Stds. Comm.	04 DOJ 2256	Wade	10/17/05
Tabitha Ann Boyland v. Sheriffs' Educ. & Training Standards Comm.	05 DOJ 0156	Elkins	07/08/05
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George Augustus Pyecha v. Criminal Justice Education & Training Stds Commission	05 DOJ 0483	Chess	09/09/05
Teddy Lynn Warren v. Criminal Justice Education & Training Stds. Comm.	05 DOJ 0505	Conner	06/23/05
Mark Dana Wilson v. Criminal Justice Education and Training Standards Commission	05 DOJ 0530	Gray	11/29/05
Amanda Gayle Talbert v. Criminal Justice Educ. and Training Stds. Comm.	05 DOJ 0648	Lassiter	06/15/05
Amanda Gale Hughes v Sheriffs' Educ Trng Stds. Comm.	05 DOJ 0666	Wade	07/18/05
Jeremy Westbrook v. Alarm Systems Licensing Board	05 DOJ 0693	Lassiter	07/19/05
Benny Keith Johnson v. Sheriffs' Education and Training Stds Comm.	05 DOJ 0770	Elkins	01/23/06
Gary Lee King v Private Protective Services Board	05 DOJ 0830	Lassiter	09/12/05
Phillip Ray Cox v. Company Police Program	05 DOJ 0895	Elkins	11/30/05
Kevin Jon Kern v. Criminal Justice Education & Training Stds. Comm.	05 DOJ 0928	Lassiter	10/10/05
Donald Lee Newton v Criminal Justice Educ. & Training Standards Comm.	05 DOJ 0929	Gray	09/12/05
Glenn Eric Nealy v. Criminal Justice Education and Training Standards Comm.	05 DOJ 0995	Morrison	12/15/05
Brian Stuart Blackwell v. Criminal Justice Education & Training Stds. Comm.	05 DOJ 1021	Gray	03/07/06
John Thomas Suttle v. Company Police Program	05 DOJ 1026	Gray	11/22/05
Robert Baxter Wilkerson III v Private Protective Services Board	05 DOJ 1074	Bryan	08/22/05
Charles Michael Campbell v. Criminal Justice Education & Training Standards Commission	05 DOJ 1149	Gray	12/29/05
Steven William Neu v Sheriffs' Education & Training Standards Comm.	05 DOJ 1169	Lassiter	09/08/05
Timothy Robert Parker v. Sheriffs' Education and Training Standards Comm.	05 DOJ 1187	Gray	12/28/05

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Sybil Yvonne Murrill v. Sheriffs' Education & Training Stds. Comm.	05 DOJ 1188	Lassiter	09/19/05	
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Erin Jerome Bryant v. Sheriffs' Education & Training Standards Comm.	05 DOJ 1239	Chess	01/10/06	
Rodney Thomas Edens v. Sheriffs' Education and Training Standards Comm.	05 DOJ 1247	Morrison	12/22/05	
Timothy Neal Foster v. Sheriffs' Education and Training Standards Comm.	05 DOJ 1339	Lassiter	03/09/06	
Sharon Annette Jackson Byrd v. Sheriffs' Education & Training Std. Comm.	05 DOJ 1583	Chess	02/23/06	
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Robert Matthew King v. Sheriffs' Education and Training Stds. Comm.	05 DOJ 1605	Morrison	03/01/06	
Jonathan David Keen v. Sheriffs' Education and Training Stds. Comm.	05 DOJ 1606	Morrison	03/30/06	
Stewart Alexander Cook v. Criminal Justice Education & Training Standards Comm.	05 DOJ 1626	Gray	03/07/06	
Robert Lee Walker v. Sheriffs' Education & Training Standards Comm.	05 DOJ 1670	Chess	02/28/06	
Jodi Claudette Stewart v. Criminal Justice Education and Training Stds. Comm.	05 DOJ 1968	Lassiter	03/02/06	
Robert G. Prince, Jr., v. Alarm Systems Licensing Board	05 DOJ 2035	Wade	12/30/05	
Nicholas Scott Bowlin v. Alarm Systems Licensing Board	05 DOJ 2036	Wade	12/30/05	
Billy Gray Phillios, II v. DOJ, Company Police Program	05 DOJ 2053	Gray	04/05/06	
Mary Frances Poole v. Private Protective Services Board	05 DOJ 2228	Morrison	03/01/06	
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Jeremy Marlow Jackson v. Alarm Systems Licensing Board	06 DOJ 0045	Morrison	03/14/06	
David G. Graham v. Private Protective Services Board	06 DOJ 0047	Morrison	03/14/06	
Kimberly K. Ennis v. Alarm Systems Licensing Board	06 DOJ 0227	Morrison	03/14/06	
James Edward Campbell v. Alarm Systems Licensing Board	06 DOJ 0398	Morrison	04/06/06	
Robert M. Vails v. Private Protective Services Board	06 DOJ 0450	Morrison	04/06/06	
<u>DEPARTMENT OF TRANSPORTATION</u>				
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<u>DEPARTMENT OF STATE TREASURER</u>				
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George L Brown v Dept of St. Treasurer, Retirement Systems Division	05 DST 0147	Morrison	07/22/05	
Tony M Martin v Dept. of State Treasurer, Retirement Systems Division	05 DST 0253	Lassiter	08/31/05	
Robert A. Gabriel , Sr., v. Dept. of State Treasurer	05 DST 0586	Gray	10/21/05	
Cynthia Lee Williams v. DST, Retirement Systems Division	05 DST 0964	Lassiter	11/10/05	
Martin Todd Oliver .v Teachers' and State Employees' Retirement System, a corporation, Board of Trustees of the Teachers' and State Employees' Retirement System, a body politic and corporate; DST, Retirement Systems Division	05 DST 1167	Elkins	02/06/06	20:22 NCR 1970
Thelma Diane Phillips v. DST, Retirement Division	05 DST 1324	Gray	03/10/06	
Robert A. Gabriel v. Dept. of State Treasurer	05 DST 1358	Gray	09/23/05	
Queen Thompson v. State Treasurer's Office	05 DST 2187	Lassiter	03/03/06	
<u>EDUCATION, STATE BOARD OF</u>				
East Winston Primary School Corporation v. State Board of Education	03 EDC 0029	Chess	09/02/05	
Harry Talmadge Englebert v. State Board of Education	03 EDC 1548	Gray	01/06/06	
Susan Hebach v. Dept. of Public Instruction	05 EDC 0140	Lassiter	09/27/05	
James H. Ballard v State Board of Education	05 EDC 0948	Conner	09/15/05	
Rodolfo R. Toledo v. Dept. of Public Education	05 EDC 1070	Elkins	02/27/06	20:22 NCR 1974
Michael L. McIntosh v. DPI	05 EDC 1097	Elkins	11/07/05	
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<u>ENVIRONMENT AND NATURAL RESOURCES</u>				
Webster Environmental, Inc v. DENR, Asbestos Hazard Mgmt Branch	94 EHR 0225	Gray	07/06/05	
Webster Environmental, Inc v. DENR, Asbestos Hazard Mgmt Branch	94 EHR 0774	Gray	07/06/05	
JFG, Inc, Mr. Wayne Pierce, Pres. v. Onslow Co Health Dept & DEH&NR, Division of Environmental Health	95 EHR 0110	Gray	07/06/05	
Southwinds Homeowners Association v. DEHNR, Div. of Env. Health	95 EHR 0271	Gray	07/06/05	
Sandy Mitchell & E Ward Norris v. Mecklenburg Co Health Dept and DEHNR	95 EHR 0306	Gray	07/06/05	
Ralph K & Carolyn Emery v. Montgomery Co Health & Env. Section	95 EHR 0317	Gray	07/06/05	
Deerfield Shores Utility Co v. Carteret Co Environmental Health Dept.	95 EHR 0354	Gray	07/05/05	
Ron Launder v. Vance Co. Health Department	95 EHR 0515	Gray	07/05/05	
Bardusch Corporation v. DENR	97 EHR 1265	Gray	01/10/06	
Country Lake Estates Associates, by and through, David T. Hawks, Managing Principal, Permit No. NC0055051 v. Div. of Water Quality, Raleigh Regional Office, Department of Human and Natural Resources, by and	01 EHR 0413	Gray	04/10/06	

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Through, William G. Ross, Secretary					
Heath Dobson v. DENR, Water Pollution Control System Operators Certification Commission	01 EHR 1381	Gray		04/20/06	
Tall Pines Plantation Property Owners Assoc. Inc. v. DENR	01 EHR 1638	Gray		08/17/05	
Heater Utilities, Inc v. NCDENR, Division of Water Quality	02 EHR 0009	Gray		07/06/05	
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Charles C. Barker, Kenneth W. Frazier v. DENR	02 EHR 1714	Wade		11/01/05	
John & Elizabeth Kaylor v. DENR	03 EHR 0046	Conner		06/29/05	
Colonial Pipeline Co. v DENR, Division of Water Quality	03 EHR 0112 ³	Connor		09/12/05	
Colonial Pipeline Co. v DENR, Division of Water Quality	03 EHR 0815 ³	Connor		09/12/05	
Rial Corporation v. DENR	03 EHR 1391	Conner		01/09/06	
Federal Land & Timer Corp v. DENR	03 EHR 1718	Gray		07/28/05	
Terry D. Gregory and wife, Pennie Gregory v. DENR, Div. of Coastal Management and Michael D. Swearingen, Jr.	03 EHR 2201	Gray		09/30/05	20:10 NCR
Cynthia Williamson Putnam v DENR	03 EHR 2383	Conner		09/12/05	
Rial Corporation v. DPI	04 EHR 0074	Conner		01/09/06	
International Paper Company-Roanoke Rapids Mill v. DENR, Div. of Air Quality	04 EHR 0085	Gray		02/13/06	
Pacemaker Leasing Company v. DENR	04 EHR 0223	Gray		04/20/06	
Brenda Severt, David and Nancie Wilson v. DENR	04 EHR 0383	Gray		10/25/05	
Rebecca Page v. DENR	04 EHR 0458	Bryan		09/20/05	
Milton T. Gibson v. Cumberland County Health Dept., Environmental Health	04 EHR 0990	Lassiter		10/11/05	
Robert L. Grissett v. DENR	04 EHR 1237	Chess		05/16/05	
Southern Cleaners and Laundry, Inc. v. DENR	04 EHR 1431	Lassiter		03/27/06	20:22 NCR 1934
Ellen Darrigrand & husband Charles Darrigrand v. DENR, Div/Coastal Mgmt	04 EHR 1469	Mann		06/30/05	20:05 NCR 270
Yvonne D. Bledsoe, Bledsoe Construction Co., v. DENR, Div. of Land Quality	04 EHR 1562	Creech		01/04/06	20:16 NCR
Glenda Daniel v. Halifax Co Health Dept, Env Health Division	04 EHR 1583	Conner		07/27/05	
Mathew and Kathy Johnson v. DENR	04 EHR 2163	Conner		06/01/05	
Affordable Appliance, Jack Steale v. DENR	04 EHR 2164	Conner		05/31/05	
William Nelms v. DENR, Div. of Air Quality	04 EHR 2264	Conner		10/13/05	
Cathy Epps v. DENR, Div. of Air Quality	05 EHR 0130	Wade		12/07/05	
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Don R McGee, McGee's Brother's Co. v. DENR, Div. of Air Quality	05 EHR 0509	Mann		09/07/05	
Jan Harris, Brunswick Environmental Action Team v. DENR, Div. of Coastal Management and Edward M. Gore and Dinah E. Gore, and Tidal Ventures, LLC	05 EHR 0834	Wade		01/24/06	20:22 NCR 1980
Lynn E. Graham v. Co. of Durham, Engineering Dept.	05 EHR 0878	Gray		10/06/05	
Ronald G. Overcash v. DENR, Div. of Waste Management, UST Section	05 EHR 0883	Elkins		01/31/06	
Robert W Hudson v. Division of Marine Fisheries	05 EHR 0886	Morrison		07/05/05	
Freedman Farms v. Fayetteville, Div of Water Quality Office	05 EHR 0905	Conner		11/21/05	
Daniel J Smith v State of NC Environmental Health	05 EHR 0925	Lassiter		08/08/05	
John C Gallop, Jane Gallop Newbern v. DENR/Div of Coastal Mgmt	05 EHR 0941	Gray		07/29/05	
Robert B. Montouri GC v. New Hanover Co. Health Dept.	05 EHR 1001	Morrison		10/03/05	
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George R. Gelsinger Jr. v. DENR, Land Quality Section	05 EHR 1253	Elkins		10/31/05	
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Betty C. Penuel v. Duplin Co. Environmental Health	05 EHR 1476	Conner		12/21/05	
Wood Lake Utilities , Jeffrey B House, MV-2005-0010 v. DENR, Mr. Dan Oakley, General Counsel	05 EHR 1629	Morrison		02/10/06	
Dean Thomas Duff v. DENR, Mary Penny Thompson, General Counsel	05 EHR 2180	Morrison		03/28/06	
Danny R. Strickland v. DENR, Division of Air Quality	06 EHR 0119	Lassiter		04/07/06	
Betsy Yvonne Villines v. Alamance County Health Department Environmental Health Section	06 EHR 0221	Elkins		04/06/06	
Homestead Building Co. v. Franklin County Health Department	06 EHR 0245	Elkins		04/26/06	
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Anne B. Hooper v. Teachers' and State Employees' Comprehensive Major Medical Plan	93 INS 0989	Gray		01/09/06
Pentech Infusions, Inc., AS/Assignee of Betty W. Green and Ava Cathey v. Teachers' and State Employees' Comprehensive Major Medical Plan	03 INS 1518	Elkins		10/07/05
Rachael Elizabeth Ragin v. Teachers' and State Employees' Comprehensive Major Medical Plan	04 INS 1299	Conner		09/26/05
Susan B. Clayton v. Teachers' and State Employees' Comprehensive Major Medical Plan	05 INS 1062	Elkins		01/01/06

MISCELLANEOUS

Aaron Lewis v. General Court of Justice, District Court, Div-Small Claims	06 MIS 0037	Morrison		03/02/06
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Chris Hardison, Magistrate				
Robert A. Sartori v. John Connell Clerk NCCOA, Heather M Freeman Attorney General	06 MIS 0125	Gray	04/10/06	
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Clorie Bivens Owen on behalf of William Baxter Bivens v. OAH	06 OAH 0063	Chess	04/20/06	
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Leavander J. Cheeks v Department of Cultural Resources	02 OSP 0002 ⁴	Conner	09/12/05	
Jodi M. Dolan v. Dept. of Correction	02 OSP 2300	Lassiter	03/23/06	
Vicki B Tamer v. Department of Public Instruction	03 OSP 0243	Gray	08/15/05	
Brenda Haug v. Employment Security Commission of North Carolina, Harry Payne, Commissioner, Sharon Morris, Director of Human Resources, Rick Elingburg, Office Manager	03 OSP 0589	Gray	03/08/06	
Arlene R Burwell v Department of Corrections	03 OSP 0621	Conner	09/12/05	
Howard Len Henderson v. DHHS, Cherry Hospital	03 OSP 0705	Chess	02/20/06	20:22 NCR 1924
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Arlene Burwell v. DOC, Division of Prisons, Polk Youth Institution	03 OSP 0851 ⁵	Conner	11/07/05	
Kathy Sledge v. Department of Corrections	03 OSP 1092	Conner	06/27/05	
Arlene Burwell v. DOC, Division of Prisons, Polk Youth Institution	03 OSP 1141 ⁵	Conner	11/07/05	
Michael B. Carraway v. Wildlife Resources Commission, Div. of Wildlife Management	03 OSP 1545	Gray	09/07/05	
Jack Mason v. Wildlife Resources Commission, Div. of Wildlife Mgt.	03 OSP 1555	Gray	09/07/05	
David Thomas Sawyer v. Wildlife Resources Commission, Div. of Wildlife Mgt.	03 OSP 1556	Gray	09/07/05	
Arlene Burwell v. DOC, Division of Prisons, Polk Youth Institution	03 OSP 1743 ⁵	Conner	11/07/05	
Robert Earl Regan, Jr v DCCPS, State Highway Patrol	03 OSP 2321	Conner	09/12/05	
Wanda Thompson v. Pitt Public Health Center	04 OSP 0116	Gray	11/23/05	
Stanley Ingram v. DOC	04 DHR 0361	Conner	01/11/06	20:22 NCR 1939
Edward Todd Suttles v. Crime Control and Public Safety State Highway Patrol	04 OSP 0711	Wade	01/03/06	
James A Ray v. UNC at Greensboro, Facility Services	04 OSP 0751	Elkins	06/28/05	
Willie Steve Tellado v Dept. of Transportation	04 OSP 0858	Wade	07/18/05	
Jack E. Curtis v. DOC	04 OSP 1005	Conner	01/10/06	
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Donald E. Cline, PH.D v. J.H. Lyall, PH.D, O'Berry Center	04 OSP 1091	DeLuca	10/05/05	
Mona Dale Batten v Columbus Co Department of Social Services	04 OSP 1194	Gray	09/07/05	
Donald E. Cline, PH.D v. J.H. Lyall, PH.D, O'Berry Center	04 OSP 1247	DeLuca	10/05/05	
Loretta G Hooks v. Department of Corrections	04 OSP 1266	Wade	07/11/05	
Demeatress Gholston v. NCSU, Computer Science Department	04 OSP 1279	Mann	02/01/06	
Clayton R. Richardson v. Winston-Salem State University	05 OSP 1343	Lassiter	01/18/06	
Melvin G. Cline., Jr., v. J. Iverson Riddle Development Center and the NC Department of Health and Human Services	04 OSP 1360	Wade	12/15/05	
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Carroll (ED) Swain v. UNC-Chapel Hill	04 OSP 1476	Gray	09/20/05	
Daisy L. Smith v. Cumberland Co Mental Health Center	04 OSP 1558	Elkins	07/28/05	20:05 NCR 291
Jacqueline Hightower v Wayne Co Dept of Social Services	04 OSP 1563	Lassiter	09/09/05	
Michael A. Kelly v. DENR	04 OSP 1572	Gray	12/28/05	
Steven Wayne Mobley v. DENR	04 OSP 1573	Gray	12/28/05	
Shelli Henderson Rice v. ESC of NC	04 OSP 1574	Gray	06/27/05	
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V Wayne Johnson v Department of Transportation	04 OSP 1716	Elkins	07/06/05	
Mimi Jakelsky v. DHHS	05 OSP 1731	Chess	01/13/06	
Beverly R Lee v. Employment Security Commission of NC	04 OSP 1742	Conner	08/03/05	
David J. Savage v. DOI	04 OSP 1773	Lassiter	01/18/06	
Linda Wiggs v. DENR	04 OSP 1863	Mann	01/11/06	
Robert D Jones v Hendsen County Dept. of Public Health	04 OSP 2081	Gray	08/01/05	
Mary Cogdell v. Wayne Co. Dept. of Social Services, Judy Pelt, Director	04 OSP 2117	Wade	10/11/05	
Regina C Gaither v. Forsyth Co Department of Social Services	05 OSP 0047	Conner	06/27/05	
Thomas Freeman, Jr. v. DHHS/Murdoch Center	05 OSP 0071	Wade	08/15/05	
Tracy L. Phillips v. North Carolina A & T State University	05 OSP 0183	Mann	03/03/06	
Percy L. Edwards v. Dept. of Juvenile Justice & Delinquency Prevention	05 OSP 0252	Lassiter	11/30/05	
Thomas A Horton v. Dept. of Crime Control and Public Safety	05 OSP 0389	Lassiter	06/02/05	
Anthony Bruce Allen v Department of Transportation	05 OSP 0418	Chess	06/09/05	
Peggy Anderson v. Whitaker School, NC DHHS	05 OSP 0427	Gray	10/25/05	
Angela Twitty v DOC, Marion Correctional Institution	05 OSP 0491	Wade	08/31/05	
Alan Bradford v. Avery Co.	05 OSP 0493	Wade	10/06/05	
Derek H. Babson v. Department of Transportation	05 OSP 0515	Chess	05/31/05	
James Albert Keyes v. DOT	05 OSP 0553	Gray	12/15/06	
Mary K French Fornes v DOC Eastern Correctional Institution	05 OSP 0584	Gray	07/08/05	
James R Campbell v Forsyth Co Department of Social Services	05 OSP 0587	Elkins	08/26/05	
Gloria Woodard v. Lyndo Tippet, Secretary, NC DOT	05 OSP 0588	Lassiter	06/24/05	
William Rhodney Reep v. DOT, DMV	05 OSP 0717	Lassiter	11/08/05	
Glendora Key v. UNC at Chapel Hill	05 OSP 0784	Gray	09/23/05	

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Deborah Faye Murray v NW Peidmont Council of Governments	05 OSP 0802	Chess	07/13/05	
Joey Todd v. Bladen County Dept. of Social Services	05 OSP 0804	Conner	01/06/06	
Milton W. Nobles v. DHHS/Dorothea Dix Hospital	05 OSP 0815	Gray	06/15/05	
Sandra Thomas v Department of Correction	05 OSP 0824	Wade	07/21/05	
Stacy D Bazemore v NCSU CVM-VTH	05 OSP 0874	Gray	08/01/05	
Donna P. Minelli v. DOC, Div. of Community Corrections	05 OSP 0889	Conner	10/21/05	
Willie Gadden v. Winston-Salem State University	05 OSP 0904	Chess	10/10/05	
Destrik A. Burns v. Albemarle Correctional Institution	05 OSP 0924	Gray	03/13/06	
Susan Hilbourn v. Cumberland County Department of Social Services	05 OSP 0970	Gray	12/07/05	
Albert Ridley v. Odom Correctional Institution, Lawrence Solomon	05 OSP 0989	Gray	10/25/05	
Tammy F. Brogdon v. Durham Co. Dept. of Social Services	05 OSP 1009	Elkins	03/07/06	
Mark P. Gibbons v. Derrick Lee, DOT Plymouth, NC, Robby Taylor, DOT, Creswell, NC	05 OSP 1080	Elkins	10/12/05	
Cindy Owens v Justice Academy	05 OSP 1038	Conner	09/19/05	
Melanie Caudle Pitrolo v. Western NC Regional Air Quality Agency	05 OSP 1075	Conner	12/21/05	
Elva Catalina Lay v. Durham Dept. of Social Services	05 OSP 1112	Chess	02/22/06	
Thomas M. Chamberlin v. Vance-Granville Community College	05 OSP 1170	Chess	09/30/05	
Johnnie V. Carpenter v. DOA	05 OSP 1199	Morrison	03/29/06	
Joe L. Harris, MSW, LCSW v. Alamance Caswell MHDDSA/LME	05 OSP 1221	Chess	10/11/05	
Lolita B. Keel v. Dept. of Revenue	05 OSP 1228	Elkins	10/12/05	
David N. Smith v. NC School of Science and Math	05 OSP 1236	Chess	10/04/05	
Gerald R. Tripp v. NC School of Science and Math	05 OSP 1242	Chess	09/22/05	
Teresa Johnson v. Fayetteville State University	05 OSP 1252	Gray	03/27/06	
Tommy Frank Sykes v. Nash County Government	05 OSP 1334	Chess	12/15/05	
Damon T. Smith v. Tillery Correctional Center	05 OSP 1353	Wade	04/10/06	
David Fleming v. DOT, Divison of Highways	05 OSP 1437	Morrison	03/21/06	20:22 NCR 1995
Debra D Moore v. Irene Wortham Center	05 OSP 1445	Gray	11/02/05	
Samuel Faminiba v. DOT	05 OSP 1468	Morrison	12/13/05	
Natalynn P (Para) Tollison v. NCSU Human Resources, Diane Sortini, Director and Galen Jones, Assistant Director	05 OSP 1501	Morrison	12/14/05	
Frank G. Bermel v. UNC	05 OSP 1563	Lassiter	12/05/05	
Athena Prevatte v. UNC-Pembroke, Police Department	05 OSP 1604	Chess	02/28/06	
William J. Pendleton v. Butner Public Safety MW Hobgood	05 OSP 1720	Lassiter	01/09/06	
Michael D. Beal v. Butner Public Safety MW Hobgood	05 OSP 1722	Lassiter	01/09/06	
Walter B. Williams v. Butner Public Safety MW Hobgood	05 OSP 1723	Lassiter	01/09/06	
Mary D. Taylor v. Cumberland County Department of Public Health	05 OSP 1899	Morrison	04/11/06	
John S. Cmelo v. DOC	05 OSP 1900	Mann	03/24/06	
Mary F. Parker v. Wilson Technical Community College	05 OSP 1905	Lassiter	01/04/06	
Clifton Eugene Middleton II v. Cherry Hospital (Department of Health And Human Services)	05 OSP 2044	Elkins	03/13/06	
Johnnie R. Davis v. DOC	05 OSP 2079	Morrison	03/16/06	
Aboubiehi G. Kablan v. UNC Charlotte	05 OSP 2115	Lassiter	03/13/06	
Terry Michael Williams v. East Carolina University	05 OSP 2116	Lassiter	02/06/06	
Thomas F. Lewin v. DOC	05 OSP 2195	Lassiter	04/07/06	
Clifton Eugene Middleton II v. Cherry Hospital (Department of Health	06 OSP 0028	Elkins	03/13/06	
Sergeant Brandon James Graham v. DOC	06 OSP 0109	Gray	03/21/06	
Lisa A. Forbes v. Dorothea Dix Hospital	06 OSP 0134	Gray	03/29/06	
Lisa A. Forbes v. Dorothea Dix Hospital	06 OSP 0135	Gray	03/29/06	
SECRETARY OF STATE				
Monica A Chitwood v. Dept. of Secretary of State	05 SOS 0237	Conner	06/17/05	
Janice W. Craver v. Dept. of Secretary of State	05 SOS 0286	Conner	06/06/05	
Barbara Jane Kelly v Secretary of State	05 SOS 0310	Elkins	08/22/05	
Richard C Capps v. Dept of Secretary of State	05 SOS 0560	Gray	07/14/05	
Silvia Rodriguez v Department of Secretary of State	05 SOS 0926	Lassiter	09/09/05	
Curtis Eugene Haynes v. Department of Secretary of State	05 SOS 1031	Wade	10/28/05	
Curtis C. Lyons v. Dept. of Secretary of State	05 SOS 1129	Chess	12/12/05	
Blanca Rivera v. SOS	05 SOS 1509	Morrison	03/27/06	
Harvey White v. Dept. of Secretary of State	05 SOS 2130	Lassiter	02/23/06	
UNC HOSPITALS				
Bhimjibhai Lanani v UNC Hospitals	04 UNC 0008	Conner	09/12/05	
Amanda Mathis Miller v. UNC Hospitals	05 UNC 0247	Lassiter	06/02/05	
Darian C. Jones Ph.D v. UNC Hospitals	05 UNC 0315	Lassiter	06/02/05	
Tereasa King v. UNC Hospitals	05 UNC 0376	Lassiter	06/02/05	
Lenora White v. UNC Hospitals	05 UNC 0574	Bryan	09/13/05	
Ellen Griffith v. UNC Hospitals	05 UNC 0585	Conner	07/26/05	
Dawn B & John A Gladden v. UNC Hospitals via Dept. of Revenue	05 UNC 0608	Conner	07/26/05	
Joyce Porter v UNC Hospitals	05 UNC 0623	Elkins	08/11/05	
Martin T Myers v UNC Hospitals	05 UNC 0632	Elkins	08/11/05	
Bettie Brame v UNC Hospitals	05 UNC 0638	Conner	08/01/05	
Joyce Daugherty v. UNC Hospitals	05 UNC 0663	Elkins	08/11/05	
Margarida Goulart v UNC Hospitals	05 UNC 0683	Conner	07/26/05	
Tashuia Williams v UNC Hospitals	05 UNC 0684	Conner	07/26/05	
Robert C. Green v. UNC Hospitals	05 UNC 0751	Wade	01/06/06	
Audrey Ghia v UNC Hospitals	05 UNC 0856	Gray	09/14/05	
De'Juana Middleton v UNC Chapel Hill Hospital	05 UNC 0701	Conner	07/26/05	

CONTESTED CASE DECISIONS

Joshua Ryan Lloyd v. UNC Hospitals	05 UNC 1000	Elkins	01/10/06	20:22 NCR 2001
Marjorie Hindsdale-Shouse v UNC Hospitals	05 UNC 1002	Elkins	09/15/05	
Dawn R Dickerson v UNC Hospitals	05 UNC 1028	Elkins	08/11/05	

WILDLIFE RESOURCES COMMISSION

Linville Land Harbor POA, Inc., by Kevin N. McCracken v. Wildlife Resources Commission	05 WRC 1268	Gray	03/07/06	20:22 NCR 2005
Josephine Perdue v. WRC	05 WRC 1440	Gray	11/18/05	

- 1 – Combined Cases
- 2 – Combined Cases
- 3 – Combined Cases
- 4 – Combined Cases
- 5 – Combined Cases

CONTESTED CASE DECISIONS

STATE OF NORTH CAROLINA
COUNTY OF WAYNE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
03 OSP 0705

HOWARD LEN HENDERSON,)
Petitioner,)
)
v.)
)
NC DEPARTMENT OF HEALTH)
AND HUMAN SERVICES,)
CHERRY HOSPITAL,)
Respondent.)

DECISION

The above-entitled matter was heard before the Honorable Sammie Chess, Jr., Administrative Law Judge on December 2, 2005 in Raleigh, North Carolina.

APPEARANCES

Petitioner: Carena Brantley-Lemons
Attorney at Law
P.O. Box 194
Durham, NC 27702

Respondent: Kathryn J. Thomas
Assistant Attorney General
P.O. Box 629
Raleigh, NC 27602-0629

ISSUE

Whether Respondent correctly calculated the amount due to Petitioner for back pay and disability pay, and whether attorney's fees should be awarded.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 126, *et. seq.*
N.C. Gen. Stat. §150B-23, *et. seq.*
25 N.C.A.C. 01, *et seq.*

WITNESSES

For Petitioner: Howard Len Henderson

For Respondent: Nathaniel Carmichael
Garry Austin

EXHIBITS

Petitioner's Exhibits 1-4 were admitted on behalf of Petitioner.
Respondent's Exhibits 1-5 were admitted on behalf of Respondent.

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 below 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 facts 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 parties received notice of the scheduled hearing at least 15 days in advance.
2. This matter comes on for hearing pursuant to the September 8, 2005 Order entered by the undersigned ALJ.
3. Petitioner was demoted from pay grade 74 to 69 and his salary was reduced by 5% effective April 1, 2003. (FOF #1, 9/8/05 Order)
4. Petitioner was out of work on medical leave as of May 30, 2003. Petitioner was on paid leave from May 30, 2003 through October 3, 2003. (FOF #3, 9/8/05 Order)
5. Petitioner received short term disability payments from October 4, 2003 through July 28, 2004. (FOF #3, 9/8/05 Order)
6. On November 30, 2004, Petitioner was approved for long term disability benefits effective July 28, 2004 contingent upon his resignation from Cherry Hospital. Petitioner submitted his resignation to Cherry Hospital on December 6, 2004 effective July 28, 2004. (FOF ##5-6, 9/8/05 Order; T p. 18)
7. As of January 4, 2005, Respondent restored Petitioner's pay grade and rate to the grade and rate they were prior to the demotion. (FOF #7, 9/8/05 Order)
8. After Petitioner resigned, Respondent paid Petitioner the 5% difference between what he would have received under his pre-demotion salary and what he received based on his demoted salary for the period of April 1, 2003 through October 3, 2003. Petitioner was also paid prorated longevity benefits. Petitioner received a total of \$2,527.74 for the salary difference and the longevity. (FOF #8, 9/8/05 Order)
9. Respondent also paid Petitioner the difference between what he would have received in short term disability benefits based on his pre-demotion salary and what he received after the demotion for the period of October 4, 2003 through July 27, 2004 for a total of \$1,006.65. (FOF #9, 9/8/05 Order)
10. Respondent coordinated the change in pay grade and base salary with the Benefits Processing section at the State Retirement System. (FOF #10, 9/8/05 Order)
11. Petitioner testified that he should have received, and that he should continue to receive, up to and including the date of the hearing, his full salary, even while he was on or continues to be receiving disability benefits for a total of \$49,385.00 up through December 2005. (P. Ex. #1; T. pp. 7-8)
12. Petitioner testified that he lost benefits in that he had to use vacation, sick, bonus and voluntary shared leave during the time he was on paid leave; that he should have accrued leave during the time he was out on disability; and that he should have received additional longevity payments. As to lost benefits, Petitioner testified that he should have received benefits valued at \$34,028.80 up through December 2005. (P. Ex. #1; T. pp. 8-18)
13. Petitioner testified that he incurred attorneys fees in this case as follows: Tracy Hicks Barley \$1,200; Dorothy Hairston \$1,000; and Joyce Davis \$450. (T pp. 26-27) Petitioner did not provide affidavits or other documentation for these fees. (T p. 41-42)
14. In addition, Petitioner subsequently employed Carena Brantley Lemons, who submitted an affidavit indicating the balance of attorney's fees for services rendered was \$9,432.15 up to December 2, 2005, but not including the hearing on December 2, 2005 or subsequent services. (P. Ex. ##3 and 4, T pp. 29-34)
15. Petitioner testified that he had to have the equity taken out of his house to pay his bills during the period of June 2004 through December 2004 because he was not being paid during that time. He also testified that he incurred medical expenses not covered by the State Health Plan, and that those expenses were a result of post traumatic stress disorder which resulted from the demotion action. (T p. 35)
16. Nathaniel Carmichael, Jr., Human Resources Director for Cherry Hospital and O'Berry Center, testified that he has been employed at Cherry Hospital since November 2000, and that his current responsibilities are to direct the day-to-day

- operations of the Human Resources functions including salary administration, personnel administration, workers' comp administration, as well as recruitment, and that he supervises a staff of eighteen professionals. (T p. 49)
17. Mr. Carmichael supervises the administration of the Disability Income Plan of North Carolina for Cherry Hospital. (T pp 49-50)
18. To be eligible to receive short term disability benefits under the Disability Income Plan of North Carolina, an employee has to have been employed for at least one year, and must submit a medical, physical or mental reason for why they are too disabled to continue their current occupation. There is a sixty (60) day waiting period which begins at the onset of the disability, and short term disability continues for a period of three hundred sixty-five (365) days from the onset date. At the end of the 365 day period, the employee can choose extended short term disability or apply for long term disability. (T p 50) Short term disability payments amount to 50% of an employee's base salary. (T p 68)
19. In order to be eligible to receive long term disability benefits under the Disability Income Plan of North Carolina, an employee must have been employed for five years and be mentally or physically incapacitated to perform their current occupation. In addition, the employee must resign from employment. (T p. 51) Long term disability payments amount to 65% of an employee's base salary.
20. Petitioner submitted an application for Short Term Disability on September 17, 2003 stating that the nature of his disability was "mental health." (R #2; T pp. 54-55) Petitioner submitted an application for disability benefits each month. (T p 56) The employer agency is responsible for paying short term disability. (T p 89)
21. Mr. Carmichael testified that Petitioner's Exhibit #1 was not consistent with Respondent's Exhibit #1. For example, in Petitioner's chart, he omitted two payments he actually received in July 2003. The payments Petitioner received on June 30 (\$2,296.55), July 15 (\$794.93) and July 22 (\$718.44) total \$3,809.92, which was his June 2003 monthly salary after the demotion. The payments were broken up because they were based on voluntary shared leave that was paid as it was received. (P Ex. 1; R Ex. 1; T pp 58-59, 65-66)
22. In addition, the numbers reflected in Petitioner's chart starting in January 2004 are calculated on the assumption that state employees received a 2% salary increase beginning January 2004, when in fact salary increases for state employees are normally effective July 1, at the start of the fiscal year. (P Ex. 1; R Ex. 1; T pp 58-59)
23. Mr. Carmichael also testified that Petitioner's "Pre-Demotion Salary Table" fails to show that he received the 5% difference between his pre-demotion salary and his demoted salary. Petitioner received payments in January and February 2005 would have made up the 5% difference, and included longevity. (R Ex. 1, 3, 4, 5; T p. 60)
24. Petitioner continued to receive health insurance under the State Employees' and Teachers' Health Plan during his short term disability. (T p 63)
25. When he resigned, Petitioner became eligible for a pro rated longevity payment of \$1,303.30 which was based on ten months, and which was paid to him. (R Ex. 1 and 5, T p. 64)
26. Based on the Respondent's records, and the testimony of Mr. Carmichael, Petitioner has received all of the benefits which he is entitled to from Respondent. (T pp. 63-64, 83-84)
27. Garry Austin is the Special Assistant to the Senior Deputy Director at the Department of State Treasurer, the Retirement Systems Division. He has been employed with the Retirement System for twenty-nine (29) years. He is familiar with the Disability Income Plan having worked with it since 1988. (T p 85-87)
28. Mr. Austin testified that while the employing agency is responsible for paying short term disability benefits, the agency can request reimbursement from the Retirement System for the second six months. When the agency requests reimbursement, the Disability Plan reviews the information for accuracy, and to make sure that the agency has paid the employee properly. (T pp 89-90)
29. Under N.C.G.S. 135-106(a), the applicant must resign from state service in order to begin receiving benefits. (T p. 88)
30. In order to become eligible for long term disability, the member must first go through the short term disability process first, and have five years of service in the system. The employee has to apply through his or her employer, and the application, along with medical information, is forwarded to the Medical Board. for review, and upon approval, payments are initiated.

The requirements are provided by statute (N.C.G.S. 135, Article 6) The Department of State Treasurer publishes a handbook entitled "Your Retirement Benefits", a public record, which, in part, explains the requirements for becoming eligible for disability benefits. (T pp. 87-88)

31. Mr. Austin testified that Cherry Hospital requested reimbursement from the Retirement System for the second six months that Petitioner was on short term disability, and, according to the records kept in his office, the audit showed that Petitioner was paid appropriately by Cherry Hospital while he was on short term disability. (T p 90)
32. Mr. Austin testified that, based on the records from his office, Petitioner's period of long term disability began July 2004, and that Petitioner is currently receiving long term disability payments. (T p. 90)
33. Mr. Austin testified that Petitioner receives legislative increases. (T p. 92)
34. Mr. Austin testified that Petitioner's Exhibit #1 is inconsistent with the Retirement System records in that Petitioner shows that he received \$2,732 in March 2005, but the Retirement System shows that Petitioner was paid \$3, 705.83 based on a retroactive adjustment made at the request of the employer as a result of the employer's corrected payments to Petitioner. (T p. 92-93) In addition, Petitioner's chart does not reflect a two per cent increase which was effective July 2005 which increased the monthly long term disability payment to \$2,786.70 per month. (T p. 91-92)
35. Mr. Austin testified that vacation leave and sick leave are not accrued during the period of long term disability. (T p. 93) However, individuals receiving long term disability benefits do accrue retirement credits while they are on disability, and they continue to get health insurance as well. (T pp 93-94) An employee would be required to exhaust all of their leave prior to qualifying for long term disability. (T p. 97)
36. Based on all information available to Mr. Austin received to date, the Petitioner has received everything he is entitled to from the Disability Income Plan of North Carolina. (T p. 94-95) Petitioner has accepted the benefits from the Disability Income Plan, and he has not updated or corrected his application. (T pp 99-100)
37. The Petitioner has not established that Respondent failed to pay him everything he is entitled to. Petitioner's chart is inconsistent with the Respondent's records. Respondent's explanations of salary and disability payments are more credible than Petitioner's. Respondent's payroll records (R Ex. 1) are inherently more credible than Petitioner's salary chart (P. Ex 1) in that it is a business record, and Petitioner's salary chart clearly omitted some payments that were made to Petitioner.
38. The Petitioner retained the services of Carena Brantley-Lemons, attorney at law.
39. On or around January 4, 2005, Respondent reinstated Petitioner to Staff Development Director (Grade 74) and removed the record of demotion from Petitioner's personnel record.
40. Petitioner's said attorney rendered valuable service before and during Petitioner's hearings regarding this matter.
41. Petitioner's attorney played a pivotal role in the dispute between the parties, and Petitioner's reinstatement to his position as Staff Director, and removal of the record of demotion from Petitioner's personnel file.
42. Petitioner's attorney fee of \$9,438.15 owed Carena Brantley-Lemons, Esq., prior to the hearing is reasonable. Counsel put a lot of hours in this matter by way of telephone, conferences, meetings with her client, research, briefs and hearing preparation.

CONCLUSIONS OF LAW

1. Petitioner was a career State employee and the Office of Administrative Hearings has jurisdiction over the subject herein pursuant to N.C. Gen. Stat. Chapter 126.
2. The State Personnel Commission is authorized to provide remedies in cases involving disciplinary actions, alleged discrimination or harassment, and any other contested case arising under Chapter 126. Those remedies are as follows:

to reinstate any employee to the position from which the employee has been removed, to order the employment, promotion, transfer or salary adjustment of any individual to whom it has been wrongfully denied or to direct other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improperly discriminatory action.

G.S. § 126-37.

3. Petitioner appears to be seeking damages from Respondent in that he claims he should receive his full salary during his period of disability, and he claims he should receive compensation for leave time even though he has already used the leave time. Because he is only entitled to receive remedies available to him from the SPC, he is not entitled to damages.
4. Petitioner has applied for and has received all income and benefits to which he is entitled by law. Disability income is a benefit which all State employees are entitled so long as they meet certain eligibility criteria. Petitioner met the eligibility criteria for disability income payments, and he has continued to receive those payments. Petitioner is not entitled to recover his full salary or accrue leave time during his period of disability. There are no other payments or benefits due to Petitioner.
5. Petitioner has the burden of proof by a preponderance of the evidence and Petitioner has failed to establish that Respondent has not provided him with all income and benefits to which he is entitled. Petitioner has failed to establish that Respondent incorrectly calculated the amounts due for his salary and disability benefits.
6. N.C.G.S. § 126-4(11) provides that the State Personnel Commission may assess reasonable attorneys' fees when the Commission finds discrimination, harassment, or order reinstatement or back pay. Based on the findings in the prior order entered in this matter on September 8, 2005, and the findings of fact contained above, the undersigned finds support for the award of attorney's fees in this case.

NOW THEREFORE, the undersigned denies the Petitioner's claims his salary and benefits were incorrectly calculated or paid after the date of his demotion. The undersigned grants Petitioner's claims for attorney's fees in the amount of \$9,432.15 as being reasonable, based upon the amount of preparation, the complexity of the case and the result.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that:

- (1) Respondent's decision regarding the amount due Petitioner for back pay and disability should be upheld.
- (2) Respondent's decision to disallow Petitioner's attorney fees for Carena Brantley-Lemons should be reversed and
- (3) Respondent's decision to disallow other attorney fees should be upheld.

NOTICE

The agency that will make the final decision in this contested case is the State Personnel Commission.

The Agency 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.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.

In accordance with the N.C.Gen. Stat. § 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. 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 find 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 evidence in the record relied upon by the agency in making the finding of fact.

This is the 20th day of February, 2006.

Sammie Chess, Jr.
Administrative Law Judge

CONTESTED CASE DECISIONS

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
04 EHR 0085

COUNTY OF HALIFAX

International Paper Company-Roanoke)
Rapids Mill,)
Petitioner,)
)
v.)
)
N.C. Department of Environment and)
Natural Resources, Division of Air)
Quality,)
Respondent.)

**DECISION ON MOTIONS
FOR SUMMARY JUDGMENT**

This matter comes before Administrative Law Judge Beecher R. Gray upon cross motions for summary judgment filed by International Paper Company-Roanoke Rapids Mill (hereinafter "IP") and the North Carolina Department of Environment and Natural Resources, Division of Air Quality (hereinafter "DAQ"). The case is an appeal by IP of various conditions of a Title V Air Permit issued to IP by DAQ.

APPEARANCES

Petitioners:	Rachel B. March Ogletree, Deakins, Nash, Smoak & Stewart, P.C. 2301 Sugar Bush Road Suite 600 Raleigh, NC 27612 Phone (919) 787-9700 Fax (919) 783-9412	Elizabeth B. Partlow Ogletree, Deakins, Nash, Smoak & Stewart, P.C. 1320 Main Street Suite 600 Columbia, SC 29201 Phone (803) 252-1300 Fax (803) 254-6517
Respondent:	John C. Evans Assistant Attorney General NC Department of Justice P.O. Box 629 Raleigh, NC 27602-0629 Phone (919) 716-6955 Fax (919) 716-6767	

ISSUES

The parties have filed two Partial Settlement Agreements setting forth their agreement on all but two issues raised in the appeal. Those two Partial Settlement Agreements are incorporated into this Decision by reference.

The remaining issues framed by the parties are:

1. Did the Division of Air Quality err as a matter of law in including permit conditions that deemed noncompliance with the underlying emission standard(s) if IP operated control equipment outside specified ranges?
2. Did the Division of Air Quality err as a matter of law in including permit conditions that deemed noncompliance with the underlying emission standard(s) if IP failed to maintain monitoring records?¹

The parties agree that these two issues present solely questions of law, and each party has moved for summary judgment. For the reasons set forth herein, this tribunal recommends that the motion of IP be GRANTED and the motion of DAQ be DENIED.

UNDISPUTED FACTS

¹ DAQ framed the questions as (1) whether operation of a source outside a specified monitoring range is a violation (*i.e.*, "deemed noncompliance") of the underlying standard for which the monitoring was imposed, and (2) whether failure to record or maintain records of monitoring is a violation (*i.e.*, "deemed in noncompliance") of the underlying standard for which the monitoring was imposed. I find that these two statements of the questions are substantially identical.

1. In 1990 Congress amended the Clean Air Act and created a federally mandated operating permit program called "Title V." 42 U.S.C. §§ 7661a-7661f.
2. The Title V permit was designed to collect in one document all of the emission limits and standards applicable to the source and was required to include such conditions as are necessary to assure compliance with the applicable requirements. 42 U.S.C. § 7661c(a).
3. Each source with a Title V permit is required to file an annual compliance certification setting forth whether the source was in compliance with each of its permit conditions during the prior year and whether that compliance was continuous or intermittent. 40 C.F.R. § 70.6(c)(5).
4. North Carolina state law requires any person to obtain a permit prior to establishing or operating any air contaminant source. N.C.G.S. § 143-215.108.
5. The Environmental Management Commission (Commission) is authorized to promulgate rules setting forth air quality standards and rules applicable to obtaining permits. N.C.G.S. § 143-215.108; N.C.G.S. § 143-215.3.
6. Administration of the program of air pollution control is committed to the Department of Environment and Natural Resources (DENR). N.C.G.S. § 143-211.
7. North Carolina air quality regulations incorporate by reference rules contained in the Code of Federal Regulations (CFR) where the CFR is mentioned in state regulations. 15A N.C.A.C. 02D.0104.
8. North Carolina has adopted statutory provisions which authorize development of the Title V operating permit program. N.C. Gen. Stat. § 143-215.108.
9. North Carolina promulgated its own Title V regulations at 15A N.C.A.C. 02Q.0500. North Carolina's Title V program contains only minor variations from the minimum elements contained in the federal rule at 40 C.F.R. Part 70, none of which are at issue in this case.
10. North Carolina regulations require Title V permits to contain monitoring and related recordkeeping and reporting requirements as specified in 40 C.F.R. §§ 70.6(a)(3) and 70.6(c)(1). 15A N.C.A.C. 02Q.0508(f).
11. DAQ issued Air Quality Title V Operation Permit No. 01649T34 to IP on December 31, 2003.
12. On January 21, 2004, IP requested a contested case hearing, identifying 34 specific challenges to the Title V Permit.
13. IP and DAQ have resolved all of the challenges except the two questions raised by Issue 1 in the Request for Contested Case Hearing. The parties have filed two Partial Settlement Agreements setting forth the revisions that will be made to the Title V permit as a result of the challenges that have been resolved.
14. The remaining issues addressed by the motions for summary judgment deal with "deemed noncompliance" language in IP's Title V permit. Specifically, numerous conditions in the permit would deem IP in noncompliance with an emission limit if IP either failed to operate a piece of equipment within certain parameters or failed to keep records of certain inspection and monitoring required by the permit.
15. Section 2.1 of the Permit is entitled "Emission Source(s) and Control Devices(s) [sic] Specific Limitations and Conditions." Section 2.1 is further subdivided into Subsections 2.1.A. through 2.1.M., with each of the lettered subsections describing a particular emission unit at the facility and prescribing the emission limits that apply to that unit. As required by Title V, each subsection also sets forth the monitoring, recordkeeping, and reporting requirements applicable to the unit.
16. For some units, IP is required to perform a direct measurement of compliance with the emission limit. Conditions for which IP is required to perform a direct measurement of compliance are not before this tribunal.
17. For other units, compliance with the standard is not measured directly, but instead relies on a surrogate. For example, the emission standard for sulfur dioxide from the Lime Kiln System is 2.3 pounds per million Btu heat input. This limit is specified in 15A N.C.A.C. 02D.0516. (Permit Condition 2.1.I(2)(a).) The permit does not require IP to measure sulfur dioxide from the Lime Kiln. The Title V permit, limits the sulfur content of any fuel oil received and burned in the lime kiln to 2.1 percent by weight. Limiting the sulfur content of the fuel oil is a surrogate for performing an actual calculation or measurement of sulfur dioxide emissions.

18. The use of operational parameters of the emission unit or control device as surrogates for measuring actual emissions is referred to by both parties as parametric monitoring. Parametric ranges are set by testing, engineering calculations, or information from the equipment manufacturer. The assumption underlying parametric monitoring is that operation of the emission unit or control device within the specified range will ensure that emissions from the emission unit will not exceed the emission standard for the air pollutant of concern.

19. IP may *in fact* operate an emission unit or a control device outside the permitted monitoring range and still be in compliance with the underlying emission limit. The question before this tribunal is whether such operation should be deemed noncompliance with the emission limit.

20. The permit also contains a number of requirements that IP record and maintain information about the operation and routine inspection and maintenance of emission units and control devices. The permit provides that IP will be deemed in noncompliance with the underlying emission limit if IP fails to maintain monitoring records or fails to perform inspections or maintenance.

21. IP may *in fact* fail to maintain monitoring records or to perform inspection or maintenance and still be in compliance with the underlying emission limit. The question before this tribunal is whether failure to maintain monitoring records or perform inspections or maintenance should be deemed noncompliance with the emission limit.

CONCLUSIONS OF LAW

1. This matter is properly before the Office of Administrative Hearings and the Office of Administrative Hearings has jurisdiction of the subject matter and the parties herein.

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

3. Summary judgment is appropriate under Rule 56(c) of the North Carolina Rules of Civil Procedure when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c).

4. If the facts of the case are not in dispute, resolution of the question becomes a matter of law, and summary judgment may be appropriate. *Nationwide Mut. Ins. Co. v. Walters*, 142 N.C. App. 183, 189, 541 S.E.2d 773, 776 (2001); *Marshburn v. Assoc. Indem. Corp.*, 84 N.C. App. 365, 353 S.E.2d 123, *cert. denied*, 319 N.C. 673, 356 S.E.2d 779, *pet. for recons. denied*, 320 N.C. 170, 358 S.E.2d 53 (1987).

5. In this case, the parties disagree only on the legal significance of the established facts. Since there is no genuine issue as to any material fact, this tribunal need only determine whether one party is entitled to a judgment as a matter of law. See *Wal-Mart Stores, Inc. v. Ingles Mkts., Inc.*, 158 N.C. App. 414; 581 S.E.2d 111 (2003).

6. The Clean Air Act requires that permits contain "conditions sufficient to assure compliance" with applicable standards. 42 U.S.C. § 7661c(a). The implementing regulations likewise require that permits contain "monitoring, reporting, and recordkeeping requirements sufficient to assure compliance" with applicable standards. 40 C.F.R. § 70.6(c)(1). In the Title V scheme, therefore, complying with permit conditions for monitoring, reporting, and recordkeeping assures compliance with applicable standards. It does not logically follow, however, that the converse is true. Failure to comply with permit conditions does not necessarily mean noncompliance with applicable standards.

7. I have carefully reviewed the legislative history cited by DAQ in its Motion. It is clear from that history that Congress intended to set up a comprehensive operating permit program and to require that permits contain enforceable emission limits and other conditions as are necessary to assure compliance with the applicable requirements. Nothing in that history, however, suggests a determination by Congress that parametric monitoring alone be the sole determinant that a source is violating an enforceable emission limit.

8. Neither the plain language of the Clean Air Act nor the language of state and federal regulations supports a conclusion that failure to meet parametric monitoring requirements or to maintain records should be deemed a violation of the underlying emission limit.

9. Failure to maintain a record, conduct an inspection, or perform maintenance obviously does not demonstrate that an emission limit was violated; failure to maintain a record, conduct an inspection, or perform maintenance proves only that a record was not kept, an inspection was not conducted, or maintenance was not performed. Failure to maintain the record, conduct the inspection, or

perform the maintenance would be a violation of a regulation or permit condition only if that particular regulation or permit condition itself required that a record be maintained, an inspection be conducted, or maintenance be performed.

10. The Clean Air Act and regulations require that the permit include monitoring requirements sufficient to assure compliance with the limit. The monitoring requirements of this permit do so; if IP complies with the monitoring requirements, and the monitoring results are within the prescribed monitoring ranges, IP will be in compliance with its emission limits. However, nothing in the law mandates a determination that *failure* to meet monitoring requirements means that a source has failed to meet emission limits. Further, nothing in the law requires that the monitoring required by the permit be the only basis upon which a permittee may certify compliance with emission limits.

11. In regulations promulgated after enactment of the Clean Air Act, EPA has repeatedly stated that compliance with an emission limit must be determined by considering not only the results of the monitoring prescribed in the permit but also by other competent evidence that indicates compliance status.

12. In the Credible Evidence Rule, promulgated on February 24, 1997, EPA noted in the preamble that even if a source's permit-required monitoring indicates compliance with emission limits, the source cannot ignore other competent data indicating noncompliance when preparing a compliance certification. 62 Fed. Reg. 8314, 8320.

13. In the Compliance Assurance Monitoring (CAM) Rule, promulgated on October 22, 1997, EPA was even more explicit about the proper use of parametric monitoring. 62 Fed. Reg. 54,900. In the preamble to the final rule, EPA addressed one commenter's claim that if a permittee identified an excursion or exceedance of a parametric monitoring range and conducted a prompt correction, the permittee should be shielded from an enforcement action for violation of the underlying emissions limitation. The agency responded as follows:

This is also incorrect. If a source owner or operator identifies one or more excursions or exceedances of its indicator ranges established under part 64, prompt correction of the condition does not establish a shield. At the same time, the CAM excursions do not necessarily give rise to liability under part 64 or [sic] the Act (unless an excursion is specifically made an enforceable permit term). The Agency understands that many sources operate well within permitted limits over a range of process and pollution control device operating parameters. Depending on the nature of pollution control devices installed and the specific compliance strategy adopted by the source or the permitting authority, part 64 indicator ranges may be established that generally represent emission levels significantly below the applicable underlying emission limit. For this reason, and because the Agency anticipates a wide variance in CAM indicator range setting practices, the Agency intends to draw no firm inferences as to whether excursions from CAM parameter levels warrant enforcement of underlying emission levels without further investigation into the particular circumstances at the source. Thus, although staying within appropriately established indicator ranges gives a reasonable assurance of compliance, excursions from indicator ranges do not necessarily indicate noncompliance.

62 Fed. Reg. 54,900-54,907 (emphasis added).

14. Although DAQ argues that the CAM rule is not relevant to Title V compliance monitoring (DAQ Response to IP's Motion for Summary Judgment at 5-6), I conclude that EPA clearly intended that CAM would be implemented through the Title V permit program and contemplated that CAM requirements would yield data "that provide a reasonable assurance of compliance." 62 Fed. Reg. 54,900, 54,903. Indeed, the CAM rule revised 40 C.F.R. § 70.6, which prescribes the content of Title V permits. 62 Fed. Reg. 54,900, 54,946-47.

15. On June 27, 2003, EPA promulgated amendments to the compliance certification requirements for Title V permits. In the preamble to that regulation, EPA noted that compliance with a Title V permit's monitoring requirements may be deemed compliance with the underlying applicable requirements. Absent any credible evidence to the contrary, the permittee may certify continuous compliance with the permit, provided that the permittee did not fail to monitor, report, or collect the minimum data required by the permit. The preamble expressly directs the permittee to consider monitoring not required by its permit when determining compliance:

Responsible officials that used any monitoring method not specified in the permit (regardless of whether the monitoring was performed voluntarily, to comply with a State only requirement, or to track compliance with an applicable requirement that is not yet addressed by the permit), would need to identify the method(s), and take the monitoring results into account when determining the compliance status of the term or condition that is the basis of the certification (applicable requirement).

68 Fed. Reg. 38,518-38,520.

16. North Carolina's own Title V regulations also support the conclusion that information in addition to the monitoring required under the permit must be considered in determining whether a source's compliance status. 15A N.C.A.C. 02Q.0508(t)(3) sets forth the required permit terms for compliance certifications. This language is similar, but not identical, to the federal regulation prescribing permit terms for compliance certifications. 40 C.F.R. § 70.6(c)(5). In particular, 40 C.F.R. § 70.6(c)(5)(iii)(B) requires "[t]he identification of the method(s) or other means used by the owner or operator for determining the compliance status with each term and condition during the certification period. Such methods and other means shall include, at a minimum, the methods and means required under paragraph (a)(3) of this section." Thus, the minimum required method for determining compliance under the federal regulation is the periodic monitoring specified in the permit pursuant to 40 C.F.R. § 70.6(a)(3).

17. North Carolina regulations explicitly require the permittee to consider more than the periodic monitoring specified in the permit in determining compliance. North Carolina requires "the identification of the method(s) or other means used by the owner and operator for determining the compliance status with each term and condition during the certification period, and whether such methods or other means provide continuous or intermittent data, ([i]ncluding at a minimum, the methods and means required under 40 C.F.R. Part 70.6(a)(3), and identifying any other necessary material information that must be included in this certification to comply with Section 113(c)(2) of the Federal Clean Air Act, which prohibits knowingly making a false certification or omitting material information). . ." 15A N.C.A.C. 02Q.0508(t)(3)(D) (emphasis added). The North Carolina regulation, therefore, expressly recognizes that information other than the permit-prescribed parametric monitoring must be considered in preparing the annual compliance certification.

18. To deem IP in noncompliance with an emission limit for out-of-range parametric monitoring or for failure to maintain records impermissibly shifts the burden of proof of an emission violation from DAQ to IP. Deemed noncompliance would mean that a violation of the underlying emission limit is presumed, irrespective of any other evidence that IP is in compliance with the emission limit. *See generally TVA v. Whitman*, 336 F.3d 1236 (11th Cir. 2003), *reh'g en banc denied*, 82 Fed. Appx. 220, *cert. denied*, *Leavitt v. TVA*, 541 U.S. 1030 (2004) (respondent against whom administrative compliance order under Clean Air Act is issued may safely ignore order because order is legally inconsequential until EPA proves existence of Clean Air Act violation). Although this tribunal is not empowered to make constitutional determinations, I note that this shifting of the burden of proof and the presumption of an emission limit violation would appear to infringe on IP's due process rights.

19. The imposition of "deemed noncompliance" permit terms is clearly erroneous as a matter of law.

DECISION

Based upon the pleadings and memoranda submitted by the parties in support of their Motions for Summary Judgment, and after determination that there are no genuine issues or material fact as to the matters presented,

IT IS DECIDED that Respondent IP's Motion for Summary Judgment is GRANTED and Petitioner DAQ's Motion for Summary Judgment is DENIED.

IT IS FURTHER DECIDED that the Partial Settlement Agreements signed by the parties and filed on October 19, 2005, and November 9, 2005, are incorporated into this Decision.

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)(b3).

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 set forth in N.C. Gen. Stat. §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 argument to those in the agency who will make the final decision. N.C. Gen. Stat. § 150B-36(a).

The agency that will make the final decision in this contested case is the Environmental Management Commission.

This is the 13th day of February, 2005.

Beecher R. Gray
Administrative Law Judge

STATE OF NORTH CAROLINA

COUNTY OF ONSLOW

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
04 EHR 1431

Southern Cleaners and Laundry, Inc.)
Petitioner)
vs.)
North Carolina Department of Environment)
and Natural Services)
Respondent)

**ORDER GRANTING SUMMARY JUDGMENT FOR
RESPONDENT**

Upon consideration of Respondent's Motion for Summary Judgment, Petitioner's Motion for Summary Judgment, and the parties' respective responses to each motion, for good cause shown, the undersigned hereby **GRANTS** Respondent's Motion for Summary Judgment and **DENIES** Petitioner's Motion as follows:

APPEARANCES

For Petitioner: Susan M. Young
Randall Tinsley
Brooks Pierce McLendon Humphrey & Leonard
PO Box 26000
Greensboro, NC 27420

For Respondent: W. Wallace Finlator, Jr.
Assistant Attorney General
NC Dept. of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

ISSUE

Whether Petitioner is entitled to reimbursement, under N.C. Gen. Stat. § 143-215.104A et seq and Session Law 2001-265, for \$80,357.12 in past costs that Petitioner incurred in assessing and remediating dry-cleaning contamination at 820 Court Street, Jacksonville, NC?

FINDINGS OF FACT

1. Petitioner owned and previously operated a dry-cleaning business at 820 Court Street, Jacksonville, NC ("the site"). In the mid-1990's, dry-cleaning contaminants were discovered on this property. Petitioner paid for assessment and remediation of the dry-cleaning contamination on this site.

Parties' Stipulations of Fact

2. In 1997, the General Assembly enacted the Dry-Cleaning Solvent Cleanup Act, known as the DSCA, to address dry-cleaning solvent contamination resulting from dry-cleaning facilities. (Session Law 1887-392, codified at Part 6, Article 21A, Chapter 143, N.C. Gen. Stat. § 143-215.104A et seq.) In 2000, the General Assembly enacted Session Law 2000-19, substantially amending the DSCA and creating the Dry-Cleaning Solvent Cleanup Fund ("Fund"). The DSCA is a program administered by Respondent to implement DSCA. Under the 2000 amendments, persons who may be liable for assessment and clean-up of dry-cleaning solvent contamination at dry-cleaning facilities, abandoned dry-cleaning facilities, and wholesale distribution facilities may petition for certification into the DSCA program, pay a deductible, and enter into an assessment and remediation agreement with the DSCA program. Thereafter, the Fund pays the response costs to those who address the dry-cleaning solvent contamination at the facility. (Stipulation 1).

3. In 2001, the General Assembly enacted Session Law 2001-265, which provides in pertinent part:

Any person who undertakes assessment or remediation of dry-cleaning solvent contamination pursuant to a notice of violation or enforcement action by the Department of Environment and Natural Resources during the period beginning 1 October 1997 and ending 30 June 2001 may, on or after 30 June 2001 and prior to 1 July 2002, seek

reimbursement from the Dry-Cleaning Solvent Cleanup Fund for any costs exceeding fifty thousand dollars (\$50,000). The Environmental Management Commission shall reimburse costs if it finds that the costs incurred were (i) appropriately documented and reasonably necessary to assess or remediate the dry-cleaning solvent contamination; (ii) for any of the activities described in subdivisions (1) through (7) of G.S. 143-215.104N(a); (iii) not subject to any of the limitations in subdivisions (4) through (9) of G.S. 143-215.104N(b); (iv) not reimbursable from pollution and remediation legal liability insurance; and (v) required by a notice of violation or a specific order of the Department of Environment and Natural Resources issued on or after 30 June 1996.

Section 2.(a) authorized the Respondent to reimburse persons for past costs of assessment or remediation of dry-cleaning solvent contamination, subject to the criteria set out in Section 2.(a). (Stipulation 2)

4. Respondent posted instructions relating to the submittal of request for reimbursement of past costs on its website on or prior to February 26, 2002. (Stipulation 3)

5. On May 30, 2002, Petitioner submitted a request for reimbursement for past costs incurred in the assessment and remediation of dry-cleaning solvent contamination. This first request for reimbursement is not at issue in this case. (Stipulation 4)

6. On July 15, 2003, Petitioner submitted a second request for reimbursement for \$105,518.00 of past costs Petitioner incurred in assessing and remediating the dry-cleaning contamination at the subject site. The Second Request included (1) \$80,357.12 in past costs incurred from July 1, 2001 through June 30, 2002, and (2) \$25,160.88 in past costs incurred from July 1, 2002 through March 31, 2003. (Stipulation No. 5)

7. Until July 16, 2004, Respondent interpreted Section 2.(a) to mean that past costs had to be incurred beginning October 1, 1997 and ending June 30, 2001 to be eligible for reimbursement. (Stipulation No. 6)

8. On July 16, 2004, Respondent decided to reinterpret Session Law 2001-265 to mean that past costs had to be incurred beginning October 1, 1997 and **prior to July 1, 2002** to be eligible for reimbursement; provided however, that the costs were otherwise eligible under Section 2.(a) and the claimant had begun the assessment or remediation beginning October 1, 1997 and ending June 30, 2001. (Emphasis added; Stipulation 7)

9. By letter dated August 9, 2004, Respondent denied Petitioner's second request for reimbursement for \$105,518.00 for the sole reason that "past-cost claims must have been submitted prior to July 1, 2002." (Stipulation Nos. 8, 15).

10. On August 26, 2004, Scott Stupak, Respondent's Environmental Specialist III, informed Petitioner's counsel that Respondent had reinterpreted Section 2.(a) to allow for reimbursement of cost incurred beginning October 1, 1997 and prior to July 1, 2002, assuming other applicable criteria are met. (Stipulation 9)

11. On August 27, 2004, Petitioner filed a petition with the Office of Administrative Hearings (Stipulation 10), contesting Respondent's denial of reimbursement for \$80,357.12 in past costs incurred from July 1, 2001 through June 30, 2002.

12. On October 12, 2004, Respondent reversed its determination of July 16, 2004 regarding the time frame within which past costs must be incurred to be reimbursable under Section 2.(a), and reinstated its original interpretation that costs must be incurred beginning October 1, 1997 and ending June 30, 2001 to be reimbursable. (Stipulation 11)

13. Between July 16, 2004, and October 12, 2004, Respondent reimbursed three claimants for a total of \$61,866.23 in past costs of assessment and remediation of dry-cleaning solvent contamination incurred beginning July 1, 2001 and prior to July 1, 2002. All the claimants had filed their claims prior to July 1, 2002. (Stipulation 12)

14. On February 14, 2005, Administrative Law Judge Beecher Gray filed a Decision in the case, Brandywine Real Estate Management, Services Corporation and Northridge Partners v. NC Department of Environment and Natural Resources, Division of Waste Management, 04 EHR 1439 ("Brandywine"). In Brandywine, the petitioner sought reimbursement of past costs of assessment or remediation of dry-cleaning solvent contamination incurred prior to October 1, 1997. DENR contended that Section 2.(a) limits reimbursement to costs incurred within the time frame beginning October 1, 1997 and ending June 30, 2001. Judge Gray held, in pertinent part, that "nothing in section 2.(a) limits reimbursable costs to those costs incurred between 1 October 1997 to 30 June 2001." On May 18, 2005, David H. Moreau, Chairman of the Environmental Management Commission, signed a Final Agency Decision adopting the Decision of Judge Gray. Based upon the Brandywine decision, Respondent does not intend to seek recovery of the \$61, 866.23 paid the claimants referenced in Stipulation No. 12. (Stipulation 13)

15. Apart from the issue of timely submission, Respondent agrees that, based on the Brandywine decision, Petitioner's submission of the 2001/2002 costs meets all of the requirements of Section 2.(a). (Stipulation 14)

16. The only reason Respondent denied reimbursement of the 2001/2002 costs was that Petitioner did not submit the Second Request for reimbursement by July 1, 2002. (Stipulation 15)

17. Respondent's policy and practice for reimbursing costs under Section 2.(a) at the time it denied Petitioner's second reimbursement request, was to reimburse for costs incurred between October 1, 1997 and June 30, 2002. As such, had Petitioner submitted its request for reimbursement for the 2001/2002 costs by July 1, 2002, Respondent would have reimbursed Petitioner for those costs. (Stipulation 16)

18. The only amount at issue in this contested case is \$80,357.12.

19. Respondent agrees that it will pay Petitioner \$2020.00 for work conducted in December of 2002, pursuant to the Prioritization Agreement dated November 14, 2002, and submitted with Petitioner's second request. (Stipulation 17)

Additional Finding of Fact

20. Attached as Exhibit A to the parties' Stipulations are the instructions that Respondent posted on its website about filing for reimbursement requests under Session Law 2001-265, Section 2.(a). That instruction consisted of a block of instructions entitled "Deadline for Submittal of Reimbursement Requests, and a Program Overview. These instructions stated:

Deadline for Submittal of Reimbursement Requests

The Drycleaning Solvent Cleanup Act (dSCA) Program is notifying Drycleaners and other interested parties that requests for reimbursement of past assessment and/or remediation costs incurred as a result of drycleaning solvent contamination are being accepted. Past costs that may be eligible for reimbursement must be:

- Incurred from October 1, 1997 through June 30, 2001.
- For actions taken pursuant to a request by NC Department of Environment and Natural Resources
- In excess of \$50,000.

Requests for reimbursement must be made prior to July 1, 2002

(Stipulations, Exhibit A) The Program Overview section of these instructions explained how the North Carolina legislature enacted a statute to address the drycleaning solvent contamination in 1997, and amended this statute for program viability in July 2000. Nowhere in these instructions did Respondent quote, recite, or provide a link to the applicable statutory authority or Session Law upon which these instructions were based.

Parties' Arguments on Summary Judgment

21. Petitioner contends that Respondent should be estopped from denying Petitioner's request for an \$80,357.12 reimbursement, because Petitioner reasonably relied upon Respondent's instructions that past costs "must be incurred from October 1, 1997 through June 20, 2001" to be eligible for reimbursement under Section 2.(a). Due to this reliance, Petitioner did not request reimbursements for past costs incurred from July 1, 2001 through June 30, 2002 until after Respondent decided to "reinterpret" Section 2.(a) on July 16, 2004. As a result, Petitioner did not receive reimbursement for costs which Respondent would have paid Petitioner, had Petitioner submitted its reimbursement request before July 1, 2002.

22. In contrast, Respondent argues that the plain language of Section 2.(a) clearly expresses the legislative intent that July 1, 2002 operates as a statute of limitations for claims for past costs. The language of Section 2.(a) explicitly states that persons desiring reimbursement under the DSCA "may, on or after 30 June 2001 and prior to 1 July 2002" may seek reimbursement for past assessment or remediation costs. Respondent is without authority to pay Petitioner's claim that was submitted more than one year after the running of the statute of limitations in Section 2.(a). In addition, since Respondent is the agency that administers the DSCA, then its interpretation of Section 2.(a) should be given deference as that interpretation is reasonable, and based upon a permissible construction of Section 2.(a).

23. Respondent also asserts that it is not equitably estopped from denying Petitioner's claim, because it did not falsely represent a material fact regarding its interpretation of Section 2.(a), did not act in derogation of fair play and of honest dealing with Petitioner, and Petitioner's claim of estoppel is contrary to the will and intent of the General Assembly.

CONCLUSIONS OF LAW

1. This contested case is subject to dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rules 56 of the Rules of Civil Procedure, N.C. Gen. Stat. §§ 150B-33(b)(3a) and -36(d); and 26 NCAC 3 .0105 and .0114.

2. Rule 56(c) of the North Carolina Rules of Civil Procedure provides that summary judgment will be granted:

[I]f the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

(Rule 56(c) of N.C. Rules of Civil Procedure; Meadows v. Cigar Supply Co., 91 N.C. App. 404, 371 S.E.2d 765 (1988))

3. Since both parties acknowledge there is no genuine issue as to any material fact in this contested case, the only remaining question is which party is entitled to summary judgment as a matter of law.

4. A question of statutory interpretation is a matter of law for the court to decide. Brown v. Flowe, 349 N.C. 520, 522, 507 S.E.2d 894, 896 (1998)

5. Session Law 2001-265, Section 2.(a) provides in pertinent part:

Any person who undertakes assessment or remediation of dry-cleaning solvent contamination pursuant to a notice of violation or enforcement action by the Department of Environment and Natural Resources during the period beginning 1 October 1997 and ending 30 June 2001 **may, on or after 30 June 2001 and prior to 1 July 2002**, seek reimbursement from the Dry-Cleaning Solvent Cleanup Fund for any costs exceeding fifty thousand dollars (\$50,000). The Environmental Management Commission shall reimburse costs if it finds that the costs incurred were (i) appropriately documented and reasonably necessary to assess or remediate the dry-cleaning solvent contamination; (ii) for any of the activities described in subdivisions (1) through (7) of G.S. 143-215.104N(a); (iii) not subject to any of the limitations in subdivisions (4) through (9) of G.S. 143-215.104N(b); (iv) not reimbursable from pollution and remediation legal liability insurance; and (v) required by a notice of violation or a specific order of the Department of Environment and Natural Resources issued on or after 30 June 1996.

(Emphasis added)

6. Where the terms of a statute are clear and unambiguous, the Courts must give a statute its plain and definite meaning. The Courts "are without power to create provisions and limitations not contained in the language of a statute itself." Gibbons v. Cole, 132 N.C. App. 777, 513 S.E.2d 834 (1999)

7. In matters of statutory construction, "the task of the court is to insure that the purpose of the Legislature, the legislative intent, is accomplished." The best evidence of the legislative purpose is "the language of the act, and what the act seeks to accomplish." Ellis v. N.C. Crime Victims Compensation, 111 N.C.App 157, 163, 432 S.E.2d 160, 164 (1993)

8. The plain and ordinary language of Session Law 2001-265, Section 2.(a) requires that any person seeking reimbursement from the Dry-Cleaning Solvent Cleanup Fund file its reimbursement request "on or after 30 June 2001 and prior to 1 July 2002." This language clearly sets "prior to July 1, 2002" as the deadline by which applicants seeking reimbursements under the DSCA must file their requests for reimbursements. The facts are undisputed that Petitioner filed its request for the \$80,357.12 reimbursement more than one year after the June 30, 2002 deadline had run.

9. Respondent's interpretation of Session Law 2001-265, Section 2.(a), in fixing June 30, 2002 as the deadline for filing claims for past costs, is reasonable, and based upon a permissible construction of the plain language of Section 2.(a). Respondent is without power to reimburse Petitioner for past costs beyond the deadline set by Section 2.(a). (See Gibbons, supra)

10. Respondent is not estopped from denying Petitioner's \$80,357.12 request for reimbursement. First, N.C. Gen. Stat. § 143-215.104A *et seq* and Session Law 2001-265 Section 2.(a) were the legal authorities upon which Petitioner was bound to follow in filing its reimbursement request for past costs. In contrast, Respondent's website instructions for filing reimbursement requests were

only Respondent's interpretation of Section 2.(a), stated in layman's terms, and not the legal authority itself. Respondent's initial interpretation of Section 2.(a) was not a misrepresentation of fact, but merely an interpretation of law. Second, estoppel does not apply where an application of it "would override what's clearly written in the statute." Wallace v. Bd. of Trustees, 145 N.C. App. 264, 550 S.E.2d 552 (2001) Under the authority of Wallace, estoppel does not apply in this case as applying estoppel would override the clearly-stated claims deadline written in Section 2.(a).

11. Because Respondent's interpretation of Session Law 2001-265, Section 2.(a) is in accord with the plain language of Section 2.(a), and Respondent is not estopped from denying Petitioner's \$80,357.12 request for reimbursement, Respondent is entitled to judgment as a matter of law.

SUMMARY JUDGMENT

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **GRANTS** Respondent's Motion for Summary Judgment, and **DENIES** Petitioner's Motion for Summary Judgment.

ORDER AND NOTICE

The N.C. Environmental Management Commission will make the Final Decision in this contested case. It is required to give each party an opportunity to file exceptions to this decision and present written arguments to those in the agency who will make the final decision. N.C.Gen. Stat. § 150B-36(a). Pursuant to N.C.G.S. § 150B-36(b), this agency shall serve a copy of the final decision on all parties, and the parties' attorneys of record, and the Office of Administrative Hearings.

This the 27th day of March, 2006.

Melissa Owens Lassiter
Administrative Law Judge

CONTESTED CASE DECISIONS

STATE OF NORTH CAROLINA
COUNTY OF MOORE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
04 OSP 0361 & 1007

STANLEY INGRAM,)	
Petitioner,)	
)	
v.)	DECISION
)	
N.C. DEPARTMENT OF CORRECTION,)	
Respondent.)	

This matter was heard before the Honorable James L. Conner, II, Administrative Law Judge, on November 15-16, 2005 in Raleigh, North Carolina. Petitioner filed his Proposed Decision on December 20, 2005, and Respondent filed its Proposed Decision on December 29, 2005.

APPEARANCES

For Petitioner: Alan McSurely, Esq.
 PO Box 1290
 Chapel Hill, North Carolina 27514

For Respondent: Brian C. Wilks, Esq.
 Assistant Attorney General
 North Carolina Department of Justice
 9001 Mail Service Center
 Raleigh, North Carolina 27699-9001

ISSUES

1. Was Petitioner's non-selection for Correction Training Specialist, Position Number 38606, a result of Respondent's violation of the Whistleblower Act?

2. Was Petitioner a victim of impermissible retaliation for past protests of discrimination when Respondent passed over him for Position Number 38606?

3. Was Petitioner's non-selection for Position Numbers 359, 335, and 3428 a result of Respondent's violation of the Whistleblower Act or retaliation by Respondent for protesting age, race, and sex discrimination?

STATUTES AND RULES IN ISSUE

N.C. Gen. Stat. §§ 126-16, 17, 35, 36, and 84 *et seq.*

FINDINGS OF FACT

1. Petitioner, Sgt. Ingram, has been employed by the North Carolina Department of Correction (DOC) since November 28, 1973 – over 32 years at the time of this Decision – and was so employed when he applied for four promotions in 2004.

2. DOC non-selected him each time he applied for these promotions.

3. Sgt. Ingram is protected by all of the provisions of the State Personnel Act.

4. In 1997 Sgt. Ingram grieved what he believed to be gender discrimination when Respondent passed over him for a promotion to Correctional Lieutenant.

5. In 1997, Sgt. Ingram grieved what he believed to be an improper promotion scheme within the DOC. It required testing for some promotions and merely interviews for others. Sgt. Ingram wrote Rep. Carolyn Russell, who was holding legislative hearings on political patronage in hiring and promotion in State government. (Pet. Ex. 1)

6. Following Rep. Russell's hearings, the legislature passed a law called *Political Hirings Limited*. G. S. 126-14.2. It set forth the State's new policy on political Hirings: Selection should be "based upon job-related qualifications of applicants for employment using fair and valid selection criteria." G.S. 126-14.2(a).

7. In October 1997, to implement G.S. 126-14.2, the DOC adopted its "Merit-Based Recruitment and Selection Plan." It stated: "It shall also be the policy of the Department of Correction to maintain a merit-based recruitment and selection process based on job-related criteria. The process shall be consistently applied in a non-discriminatory manner, promote fairness, diversity, and integrity, and comply with all Federal and State laws, regulations and policies. The primary purpose of the Merit-Based Recruitment and Selection Process shall be to ensure that positions subject to the State Personnel Act 9g.S. 126) are filled with most qualified individuals as determined by job related criteria and in the judgment of unbiased, objective human resource professionals." (Pet. Ex. 3)

8. Mr. Ingram, a Correctional Sergeant at the time, applied for several promotions after he wrote Rep. Russell. He was never selected.

9. In January 2002, his supervisors again gave him an overall evaluation of "Very Good." (Pet. Ex. 5)

10. In late November 2002, his supervisor again gave him an overall evaluation of "Very Good." His supervisor noted Mr. Ingram "Is an excellent trainer. Provides training and briefing pertaining to SOP and ropes course and firearms."

11. In 2003, his supervisor noted "Sgt. Ingram is an excellent supervisor. He can be dependable, making good decision in day to day routine." (Pet. Ex. 11)

12. In January 2003, Mr. Ingram applied for a posted Lieutenant's position. (Pet. Ex. 6) A Captain and an Assistant Superintendent who had worked with Mr. Ingram for 29 and 8 years respectively wrote letters describing their direct observations of his good job-related performance. (Pet. Ex. 7 and 8)

13. Mr. Ingram was qualified for the Lieutenant's position. He had 11 years and 4 months Related Education and Experience above minimum and 160 months as a Sergeant. (Pet. Ex. 9) The DOC selected an applicant with 2 years and 1 month related education and experience above minimum and 49 months as a Sergeant. (Pet. Ex. 9) The selectee was from a family with political influence.

14. The DOC did not computerize training courses its senior employees, such as Mr. Ingram, who was employed in 1973, had taken prior to 1978. DOC maintains computerized records showing that, since 1978, Mr. Ingram had acquired 2,150 contact hours of training by March 2003. (Pet. Ex. 13)

15. In 2003, Petitioner filed a contested case petition protesting alleged discrimination in Respondent's decision not to promote him to a Lieutenant. 03 OSP 0599

16. Mr. F. D. Hubbard learned in a conversation with Sgt. Ingram's new superintendent sometime before 17 February 2004 that Sgt. Ingram had challenged the DOC's alleged discrimination in 2003.

17. On 30 December 2003, Sgt. Ingram reported what he believed to be improper and possibly illegal promotion practices within the DOC to the agency's Director of Prisons. One improper practice Sgt. Ingram reported was DOC's "re-advertising" positions to promote someone DOC favored. St. Ingram wrote:

What is the rational[e] for the re-advertisement when there were several more than adequately qualified people applying? What does this say to those who applied the first time? It says, "We, the Department, don't want you in this position." And "We, the Department, did not get an application from the person we want in this position." What is fair about this practice? Merit? If only one applicant applies and they are qualified, promote them.

. . . If 'merit' is the standard we are using, let us use the entire merit and qualifications of the person. If we are going to use the 'good o' boy' system, let's stop wasting the States money and everyone's time with testing and

interviews. Oh, yes, then there was the time that numerous people told me that they had to pay for their promotion. One now retired Correctional Captain told me that the position cost him several thousand dollars. Name withheld. (Pet. Ex. 14)

18. Mr. Ingram copied this letter to legislators and request a meeting with the DOC Personnel Director and the Office of State Personnel Director. (Pet. Ex. 14)

19. On 13 January 2004, DOC posted a Correction Training Specialist II, Position Number 38606. The posting was until 22 January 2004. The posting type was "Internal Only" and was a "Merit-Based Recruitment and Selection Process based on Job-related criteria." (Pet. Ex. 18)

20. On 19 January 2004, Sgt. Ingram applied for Position Number 38606. (Pet. Ex. 19)

21. His application showed he had been certified as a General Instructor; Firearms Instructor; CPR Car: CPR-2; Monadnock PR-24 Instructor; PERT Instructor: OC Pepper Spray Instructor: Chemical & Impact Munitions; Ropes Instructor; Prison Emergency Response Management Instructor; Interaction Management and other skills. His application showed he had been awarded basic, intermediate and advanced correction certificates. His application showed that in his present position, which he held for the previous 14 months, he devoted "less than five percent of the time" to "formal training." (Pet. Ex 19)

22. His application also showed he had "assisted with staff instruction since 1977 and earned my first Instructor's Certification in the mid-1980's." He had been adjunct with "OSDT, PERT trainings, PR-24 training etc." and "the time spent during this period could have been as much as forty-fifty percent of the time." (Pet. Ex. 19)

23. Sometime during January or February 2004, Sgt. Ingram's letter to the Director of Prisons and other State officials caused DOC to start an investigation of Sgt. Ingram. There was no evidence that DOC ever investigated the people and the practices that were the subject of Sgt. Ingram's letter. (TS Ingram)

24. DOC's top officials investigated Sgt. Ingram about why he did not report the alleged improper, possibly illegal, practices sooner. One top DOC official, Ms. Pat Chavis, required Sgt. Ingram to meet with her in the first part of the year. (TS Ingram)

25. Mr. F. D. Hubbard, the hiring official for Pos. No. 38606, could not recall whether he knew about Sgt. Ingram's letter reporting improper hiring and promotion practices during the first part of 2004. Mr. Hubbard did recall meeting with Ms. Chavis during that period and that she told him about a letter Sgt. Ingram had written, but he could not remember the substance of the conversation. (TS Ingram)

26. On 30 January 2004, Ms. Melanie Wood, who was performing personnel services for Mr. Hubbard, rated Sgt. Ingram and another applicant, Mr. Edward Little, as "Qualified" for the 38606 position. Ms. Wood awarded Sgt. Ingram 8 years of adjunct credit and Mr. Little 4 ½ years of adjunct credit. (Pet. Ex. 20)

27. On 4 February 2004, Sgt. Ingram was interviewed for less than 30 minutes and then Mr. Little was interviewed. Both interviews were rated "acceptable." Two interviewers ranked Mr. Little as doing better in his interview than Mr. Ingram, and the third ranked them equally. (Pet. Ex. 21)

28. On 10 February 2004, Mr. Hubbard offered Mr. Little the Grade 67 Training Specialist II, Position Number 38606, at a salary of \$34,136. (Pet. Ex. 23) Mr. Little had not agreed to take the job at that time.

29. On the same day, the DOC notified Sgt. Ingram he had NOT been selected for that position. (Pet. Ex. 22)

30. Sometime after Sgt. Ingram applied for Position 38606 and before 17 February 2004, in "this general time period," Mr. Hubbard had a casual telephone conversation "where Ingram's name came up" with the new Superintendent at Sgt. Ingram's facility, Mr. Bullock. Mr. Hubbard shared with Mr. Bullock his concerns about Sgt. Ingram, based on a meeting Mr. Hubbard had held with Sgt. Ingram 23 years before. Mr. Hubbard discussed with Mr. Bullock Sgt. Ingram's "general reputation." (TS Hubbard)

31. On 17 February 2004, Mr. Hubbard learned Mr. Little had withdrawn his application for 38606, and Mr. Hubbard wrote: "Mr. Little has withdrawn his name from this consideration. Mr. Ingram is not approved for promotion into this position. He is known to make decisions without evaluating/ considering policy. His judgment is poor. F. D. Hubbard 2-17-04." (Pet. Ex. 21) (TS Hubbard)

32. Mr. Hubbard testified he based his decision not to hire Sgt. Ingram primarily on the one meeting he remembered having with Sgt. Ingram at the Sandhills Youth Center in the 1980's. Mr. Hubbard recalled that Sgt. Ingram had expressed regret about a personal decision Sgt. Ingram had made. This decision was not against DOC policy at the time nor today. (TS Hubbard)

33. Mr. Hubbard did not review Mr. Ingram's application. Mr. Hubbard did not do anything to learn about Sgt. Ingram's job-related experience, job-related knowledge, job-related skills, and job-related abilities since his meeting with him 23 years before. (TS Hubbard)

34. Mr. Hubbard drew from "general knowledge" he had of a "general reputation" that had been attributed to Sgt. Ingram when making his decision. (TS Hubbard) Given that Sgt. Ingram's job performance was very good, it is hard to understand why Sgt. Ingram would have had a "general reputation" among management that was so negative as to disqualify him for a Grade 67, non-supervisory, job – unless it was exactly what Mr. Ingram alleges, namely retaliatory animus for his protected activity.

35. DOC adduced no corroboration or any other information for the fact-finder other than the Facts found *supra* on which Mr. Hubbard based his decision: "Mr. Ingram is not approved for promotion into this position." (TS)

36. Mr. Hubbard directed the Training Specialist Position 38606 to be re-posted on 17 February 2004 (Pet. Ex. 21), and it was posted until 4 March 2004 at a 67T Salary Grade with a salary range of \$26,882-\$43,484. (Pet. Ex. 26)

37. Mr. Hubbard talked with Ms. Chavis about position 38606 before the second set of interviews and received her approval to transfer this position to report to his Administrative Assistant, Ms. Wood.

38. Ms. Wood had served as the "unbiased, objective human resource professional" (Pet. Ex. 3) who, in January 2004, first determined the qualifications for this position. Mr. Hubbard, with Ms. Chavis' approval, added to Ms. Wood's responsibilities the task of supervising the new Training Specialist II. She received no raise in pay or change in job description for this new responsibility. Mr. Hubbard also put her in charge of the second set of interviews for the position. (TS Hubbard and Wood)

39. Mr. Hubbard could not remember whether he told Ms. Chavis that he had already decided not to hire Sgt. Ingram for the position, or any other circumstances surrounding the decision to re-post the position. (TS Hubbard)

40. No one informed Mr. Ingram that Mr. Hubbard, acting as final decision maker for DOC, had already decided that "Mr. Ingram is not approved for promotion into this position." (TS Ingram, Hubbard and Wood)

41. Mr. Ingram applied again.

42. On 18 March 2004, Ms. Wood and two other people interviewed Sgt. Ingram. Ms. Wood could not remember whether she had seen Mr. Hubbard's statement that "Mr. Ingram is not approved for promotion into this position" before the interviews. Ms. Wood was the guardian of the 38606 position file documents, including the document that contained Mr. Hubbard's de-selection of Sgt. Ingram and his reasons for that de-selection. Ms. Wood did remember that Sgt. Ingram and Mr. Little were the only qualified applicants for the first set of interviews, that the position had been reposted, and that she had been placed in charge of the second set of interviews. She also remembered she had the opportunity and reason to review the position history file in question.

43. Immediately after interviewing four qualified applicants, Ms. Wood and her two co-interviewers rated a Mr. William Dunn as giving the best 20-minute interview. (Pet. Ex. 28) One of the interviewers, Mr. Lawrence Shamberger, had also served as an interviewer during the first set of interviews. He knew Mr. Little had not accepted and would reasonably have inferred that Mr. Ingram was apparently not acceptable to the decision-maker.

44. The DOC presented no evidence that any additional job-related information was relied on to make the hiring decision as between the qualified applicants other than the applicants' behavior during the 20-minute interview.

45. Ms. Wood noted that Sgt. Ingram "mentioned 'litigation' several times" in his 20-minute interview. (Pet. Ex. 27)

46. Ms. Wood notified Sgt. Ingram he was not selected for Pos. No. 38606 a second time, on 22 March 2004. (Pet. Ex. 29)

47. Mr. Hubbard told Ms. Chavis about his decision not to hire Sgt. Ingram. Mr. Hubbard could not recall whether he told Ms. Chavis about recording his reasons on the interviewing sheet or whether he told her about how he came to his decision. (TS Hubbard)

48. In June 2004, Sgt. Ingram received another Very Good annual evaluation. His supervisor noted "Sgt. Ingram continues to conduct himself in a professional manner keeping his supervisor's managers and subordinate staff abreast of facility and DOP changes as necessary. Sgt. Ingram continues to be an asset and resource to the Department and Institution alike, performing his duties consistently at the very good level." (Pet. Ex. 32)

49. The document (Pet. Ex. 21) that contained Mr. Hubbard's written decision to not hire Sgt. Ingram was not provided to Petitioner in discovery for over a year. In June 2005, just before the Hearing was scheduled, the document surfaced and was provided. A similar document (Pet. Ex. 28) also had not been provided for over a year and also surfaced just prior to Hearing.

50. Ms. Wood was the custodian of these documents. She was sure they had been provided to the Attorney General's office a year earlier. The Attorney General's office indicated they did not have them, and that as soon as they discovered their existence, turned them over to Petitioner.

51. The undersigned finds it is highly improbable that these two significant documents were the only two documents that were skipped in a photocopying or other clerical malfunction.

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.
2. Petitioner has raised both a whistleblower claim and a retaliation claim for filing an age, race, and gender discrimination petition in 2003. (03 OSP 0599) Mr. Ingram's whistleblower claim stems from reports he made to Representative Carolyn Russell in 1997 and another report he made to Director of Prisons, Boyd Bennett, and other high-ranking state officials on 30 December 2003, about six weeks before Mr. Hubbard denied him Position 38606.
3. Petitioner has raised similar claims as to his non-selection for three other positions in the early part of 2004. Respondent persuaded the undersigned that Petitioner did not meet the minimum qualifications for these positions, and therefore, did not meet his *prima facie* retaliation burden for these three instances of non-selection. The undersigned granted Respondent's Motion to Dismiss after Petitioner rested in regard to Position Numbers 00335 and 00359, which were the basis for Petitioner's Contested Case 04 OSP 1007. The undersigned also granted Respondent's Motion to Dismiss after Petitioner rested in regard to Position Numbers 03428, which was one of the two promotions included in contested case 04 OSP 0361. These three positions that were dismissed all were designated as Training Instructor II positions, and they had higher minimum qualifications.
4. The remaining position, however, is a Training Specialist II Position 38606, and Respondent admits that Sgt. Ingram was qualified for this position. The remainders of these conclusions refer to the claim of retaliation in regard to his non-selection for this position.
5. The question presented to the undersigned is whether the DOC retaliated against Petitioner when he, a qualified applicant for Training Specialist II Position Number 38606, was de-selected on 17 February 2004 and, after a second round of interviews, he was de-selected again on 18 March 2004.
6. North Carolina Whistleblower Act "encourage[s]" State employees to report wrongdoing by a State employee or agency and protects them from retaliation for so doing. N.C. Gen. Stat. § 126-84 ff. A state employee, if he believes he has been discriminated against in an employment action such as a promotion, also has the right to file for relief and is protected from retaliation for so doing. N.C. Gen. Stat. §§ 126-16, 17, 36.
7. Certainly the reporting of *discrimination*, an illegal act, is tantamount to a whistleblower report. It becomes a distinction without a difference to try to determine whether the alleged retaliatory animus was the result of Mr. Ingram's reports of improper activities that he made in the form of letters to people with authority over DOC or his contested case petition alleging discrimination in employment actions. A careful reading of his letter to Ms. Russell, his letter to Mr. Bennett, and his discrimination petitions show a common theme: the DOC promotion procedures were corrupt and unfair to seasoned older officers who may not have been of the same political persuasion or who had challenged the patronage systems that had allegedly prevailed in the DOC for many years.
8. To prevail under all of the anti-retaliation statutes, a petitioner must show that he engaged in protected activity, that this was followed by an adverse employment action, and that his protected conduct was a substantial or motivating factor in the adverse action. *Hanton v. Gilbert*, 126 N.C. App. 561, 486 S.E.2d 432 (1997). If Respondent proffers a legitimate reason for de-

selecting Petitioner, then Petitioner has the burden of showing this stated reason was simply a pretext for discrimination. *Kennedy v. Guilford Technical Community College*, 115 N.C. App. 581, 448 S.E.2d 280 (1994).

9. Petitioner has persuaded the undersigned, by the greater weight of the evidence, that he was retaliated against because he had engaged in protected activity of protesting alleged discrimination. He made out a *prima facie* case of retaliation, and his evidence has convinced the undersigned that Respondent's stated reasons for not selecting him were a pretext for such retaliation.

10. The highly improbably "accident" that caused two critical evidentiary documents to be misplaced for over a year, Mr. Hubbard's recollection of a discussion that took place 23 years ago and his non-recall of discussions that took place 18 months ago, and Sgt. Ingram's objective qualifications all are evidence of pretext. Mr. Hubbard's statement that he was told about Sgt. Ingram's protesting discrimination and that was in a discussion about Sgt. Ingram's "general reputation" are evidence of retaliatory animus, particularly in light of the obviously pretextual reason of a private conversation held 23 years before.

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

DECISION

That the Petitioner be promoted into Position Number 38606, or a comparable position, with a salary increase of at least 15% commensurate with his experience and training effective 17 February 2004, with all back pay, raises, and other benefits he would have received had he not been retaliated against, and that Respondent reimburse him for all his reasonable attorney's fees supported by sufficient affidavit.

Petitioner's claims of retaliation for positions 0359, 0335, and 3428 are not supported by the evidence and are dismissed.

NOTICE

The Agency that will make the final decision in this contested case is the North Carolina State Personnel Commission.

The Agency is required to give each party an opportunity to file exceptions to the decision and to present written arguments to those in the Agency who will make the final decision. N.C. Gen. Stat. § 150-36(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.

In accordance with N.C. Gen. Stat. § 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. 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.

This the 11th day of January 2006.

James L. Conner, II
Administrative Law Judge

CONTESTED CASE DECISIONS

STATE OF NORTH CAROLINA

COUNTY OF CATAWBA

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
05 DHR 1147**

DENISE & DAVID LITTLE)
Petitioner,)
)
v.)
)
CATAWBA COUNTY MENTAL)
HEALTH)
Respondent.)

DECISION

This contested case was heard before Julian Mann, III, Chief Administrative Law Judge, on Wednesday, November 9, 2005 in the 1924 Courthouse, 2nd Floor Courtroom, Courthouse Square, Newton, North Carolina.

APPEARANCES

Petitioners: Denise & David Little, *pro se*
PO Box 1153
Newton, North Carolina 28658
Pro se

Respondent: Diane M. Pomper
Assistant Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001
Attorney for Respondent

EXHIBITS

For Petitioners: Petitioners' Exhibits Nos. 3, 4 and 5

For Respondent: Respondent's Exhibits Nos. 1-12

WITNESSES

For Petitioners': David & Denise Little

For Respondent: Angie Triplett
Kelly Bollinger
Randall Ross
Steven Garrett
Melissa Cline
Karen Curtis-Gwynn

STIPULATIONS

The stipulations are contained in the Order for Pre-Trial Conference filed on November 9, 2005 and as otherwise may be contained in the record.

Based upon the stipulations and the preponderance of the admissible evidence the undersigned makes the following:

FINDINGS OF FACT

MORGAN LERAE LITTLE

1. Morgan Lerae Little (hereinafter "Morgan") is the daughter of Petitioners and is presently 12 years old. Morgan was born on July 18, 1993. Morgan resides with Petitioners in Newton, Catawba County, North Carolina. Morgan has medical diagnoses of "Perinatal Encephalitis, Spastic Quadriplegia, Cerebral Palsy, Cortical Visual Impairment, Seizures and Cognitive delay." Morgan's most current occupational therapy evaluation is found in Respondent's Exhibit No. 1 and incorporated herein by reference. Additional medical diagnoses are found in Respondent's exhibit No. 6, incorporated herein by reference.

2. Steven B. Garrett was the CAP Case Manager for Morgan from January through July, 2005. Mr. Garrett is familiar with Morgan. Morgan requires a great deal of assistance for day to day activities. She requires a worker to be with her 24 hours a day for seven days a week for day to day activities.

CAP-MR/DD WAIVER

3. The CAP-MR/DD Wavier stands for Communities Alternative Program for Persons with Mental Retardation and other Developmental Disabilities.

4. This is a waiver program under the Medicaid Program, for services that are provided in the home or community as opposed to institutions.

5. Morgan is receiving services under the CAP Program.

6. A revised waiver went into effect September 1, 2005.

7. Angie Triplett is the lead CAP Local Approver. Ms. Triplett has been employed by the Respondent for the last four years. Ms. Triplett reviewed Morgan's Plan of Care. Ms. Triplett also is familiar with Petitioners and Morgan as a previous Case Manager.

8. CAP is a Medicaid Waiver Program. Since the early 1980s, in order to keep individuals out of institutions or to keep individuals from going into institutions, CAP provides services, supplies and equipment that promote independence of the individuals.

9. CAP provides 10 days to approve or deny a documented request. The request may be returned to the case manager for adjustment but the case manager must act within that 10 day period to permit documentation. Requests for information are sent to the case manager to supply omitted information. By the 10th day the decision to approve or deny must be issued. The determination is made based upon whether the item requested is covered or not and whether or not documentation was received by the time period.

CAP MANUAL

10. The State of North Carolina issued a Manual to assist in the application of this waiver.

11. A CNR is a Continuing Needs Review. This review is done in consultation with the family for the child's treatment plan and goals.

12. A "QP" is a Qualified Professional Provider.

13. Based upon an MR2, a clinical decision is made as to whether or not requested equipment and services are medically necessary, as determined by reference to the Manual. A clinical decision is based upon medical necessity, individual needs, and governmental capabilities. It is a judgment call.

14. There was a "new" Manual in draft at the time of Petitioners' submission and this "new" draft manual was used to evaluate the Petitioners' request. (Respondent's Exhibit No. 10).

15. Respondent's Exhibit No. 11 is the approval letter from Medicaid for the new CAP Manual, effective September 1, 2005.

RESPONDENT'S EXHIBIT NO. 6

16. Respondent's Exhibit No. 6 is a comprehensive 48 page exhibit identified as a CNR (Continuing Needs Review) and related

materials for Morgan that includes a cover letter, Diagnosis, Patient Information, Plan of Treatment, Plan, Medical Information, Request for Equipment; Action Plan, Socialization, Supportive Services, Personal Care Services, Monitoring Plan, Target Population Assignment and Support Needs Assignment Profile. It documents the medications that are required and sets up the treatment plan. Respondent's Exhibit 6 is the plan that was submitted by the Petitioners. The plan includes a request for equipment approval on pages six and seven which are at issue in this contested case.

RESPONDENT'S EXHIBIT NO. 7

17. Morgan's Local Approval Review for submission of request for approval of durable equipment is found in Respondent's Exhibit No. 7.

18. Respondent reviews the request and sends a correctional page back to the Case Manager and requests assistance in acquiring the requested information. This document was forwarded to the Case Manager. This document is not sent to the family, only the Case Manager.

RESPONDENT'S EXHIBIT NO. 8

19. Respondent's Exhibit No. 8 is the Respondent's decision as to the disapproval of the equipment in question. This document lists the reasons for the denial for each item. It is the result of consideration of Respondent's Exhibit No. 6. Certain items were denied because the doctor diagnosed and ordered the equipment but had not signed the prescription. Once documentation was supplied then Respondent provided some of the items originally disapproved

20. The items contained in Respondent's Exhibit No. 8 are for Morgan to stay deinstitutionalized and to improve her quality of life.

RESPONDENT'S EXHIBIT NO. 9

21. The CAP-MR/DD Services Manual revised 3/02/04, effective 4/01/04 is contained in Respondent's Exhibit No. 9.

RESPONDENT'S EXHIBIT NO. 10

22. The CAP-MR/DD Services draft manual dated June 22, 2005 is contained in Respondent's Exhibit No. 10.

PLAN OF CARE

23. Respondent's Exhibit No.1 is an Occupational Therapy Evaluation submitted as a part of the Plan of Care. It accurately reflects Morgan's abilities. Respondent's Exhibits Nos. 3, 4 and 5 were submitted as part of Petitioners' Plan of Care for approval. There is a checklist for services, equipment and other items as part of the Plan of Care to ensure documentation is in place such as a doctor's order, a therapist's evaluation, goals, outcomes, and a plan of care, and quotation for the costs of the requested equipment.

24. "QP" means Qualified Professional which means that this person has a degree in Human Services plus two years of professional level experience. Angie Triplett had this qualification and she made the final decision on approval for the Respondent.

25. Morgan's Plan of Treatment is also outlined and specified in Respondent's Exhibit No. 6 incorporated herein by reference.

APPROVED ITEMS

26. The Medicine dispensers have been approved. The Pediaisure, diapers and disposable underpants have been approved.

27. The Wombat Kitchen Chair has been approved. Originally, there was not sufficient information because it did not have a medical diagnosis. Previously, Respondent had approved a chair and there was a question as to the use of that chair in conjunction with the present request, but the question was resolved because Morgan had outgrown the previous chair. Morgan is now 50 pounds heavier than she was formerly. She no longer fits in her old equipment.

28. An EZ lock system holds the wheelchair stationary in the van. The EZ lock system is now approved but was not supported by a therapist's evaluation or a physician's order. An easy lock system had been purchased for Morgan the year before. There was originally a lack of information to justify why there was a need for another system.

29. Pediaisure is to provide fiber when she can't eat because of canker sores. The diagnosis could have been easily provided before the appeal rights expired. The diapers and the underpads have been provided. Number 4 Pediaisure has been provided. The latex gloves are needed to change Morgan and to do her motor exercises in her mouth.

DISAPPROVED ITEMS

30. The latex gloves have not been approved because they are not covered under CAP but under the home health list because the patient must have an infectious disease such as HIV or Hepatitis B to assist in changing dressing on an open sore.

THE POWER POOL LIFT

31. The reason for the denial of the Power Pool Lift is that it is not covered under CAP, under "Environmental Accessibility for Home Modification." CAP cannot provide items that are used outside of the home. Respondent's Exhibit No. 10, Page 36, fourth bullet up from the bottom, requires that the lifts be used inside the patient's home. Only items that are to be used within the home can be approved as "Home Modifications." The Respondents did not reach health and safety issues as to the Power Pool Lift but had they reached them the following are some of the considerations: The item could not have been used at a time when Morgan had seizures and the equipment was not safe for that purpose. Morgan did not have the ability to sit up and the device does not appear to have wraps around it. Because she must be supported while sitting up, the device was going to be used for the outside pool and that would have only been available during the warm weather or summer months instead of year round. There were alternative methods of placing Morgan in and out of the pool. Evidence was conflicting as to what category in Respondent's Exhibit No. 9 that the outside pool equipment was not permitted. In the previous manual it was called, "Waiver of Equipment Supplies." Respondent's Exhibit No. 10, page 36, fourth bullet from the bottom, "Hydraulic Manual or Electric Lifts including Portable Lifts or Lift Systems" that can be removed and taken to a new location inside the individual's home. "Inside the Individual's Home" has not changed from the previous manual to the new manual.

32. For five months out of the year, Morgan's therapeutic life is in exercising in Petitioners' pool. The Portable Power Lift could conceivably be utilized inside. The pool is one of the main therapeutic hydrotherapy outlets that Morgan has. It has not been provided. It is an aid for Morgan to be lifted so she will not be hurt. If she is in the pool and has a seizure, she can be lifted out. Petitioners are no longer able to pull her out of the pool. Hydrotherapy increases range of motion, muscle strength, bone density, cardiovascular conditions, and not available through other forms of physical therapy. (Respondent's Exhibit No. 6)

33. Ms. Little, the Petitioner, believes that the Portable Aquatic Lift would be considered under Children's Special Health Services in order to have recreational therapeutic activity. Morgan is not able to go to a pool and if she were to go to a pool such as provided by the YMCA she would need the equipment to move her in and out of the pool including the purchase of a membership.

34. The pool lift does have arm rests and it can come with a stabilizing vest. It also has a seatbelt. (Petitioners' Exhibit No. 3)

35. The Portable Aquatic Lift is further described in Petitioners' Exhibit No. 5.

THE BRITAX TRAVELER

36. An Adaptive Car Seat can be used in a small car. A medical doctor could have clarified the utilization of these devices but the Petitioners were not given that opportunity prior to submission. Mr. Garrett admitted in his testimony that he may have failed to secure the documentation in time.

37. The Britax Traveler plus car seat has not been approved. Last year the Petitioners' van vehicle had been modified to include a lift, door modifications and raising the roof. Because the van had been modified the Respondent would not approve a seat to be used in another vehicle because it would be considered a duplicate and not medically necessary. In the event of needing another vehicle Petitioners could use systems like Piedmont Wagon or Medi-CAP vans. In addition, 911 could be called in the event of a medical emergency.

38. The car Britax Traveler is certified for children with disabilities and is made by Snug Seat. It can be used with lap belt and shoulder belt combination. The Britax Traveler Plus Car Seat is further described and justified under Petitioners' Exhibit No. 4.

39. A portable car seat would not be approved because it cannot be bolted down.

40. The adjustable car seat, according to Ms. Little, the Petitioner, is in the manual. When the transit seat is broken or for her to go on regular outings with the help of other people in the community and other transportation is not available, she must have this car seat. There is a big expense associated with a van wagon. The car seats are properly designed for the car seat, with the over the shoulder strap and seat belt.

VARIABLE ACCESS SWING

41. As to the variable access swing and accompanying hardware, the evaluation did not explain the particular application. Present coverage does not make provision for an exception for certain types of swings, previously allowed to increase, by way of example, motor skills. This exception is no longer available.

42. Morgan weighs 78 pounds. Typical children can jump and swing but Morgan is not able to. With the variable Axis Swing she is able to sensorily perceive movement and this is particularly important because of her visual impairment.

CLOSET MODIFICATIONS

43. Closet modifications under the old waiver were not covered except for kitchen closets. Under the new waiver they are covered. There was a diagnosis for closet modifications but no therapist explanation as to how this was going to help Morgan for independent living or to increase skills. For this reason, it was denied. Closet modifications are not permitted except under No. 4, "Kitchen Modifications." It is covered, however, under the new waiver and this is now a moot point. The reason for denial would now turn on the accessibility that it provides to Morgan. The approval would depend on accessibility versus modification for storage purposes. Closet modifications are not confined to the kitchen. Renovations to the bathroom have restricted the closet (walk-in) useless and in an L-shape. The modification will make the closet accessible.

THE GARAGE MODIFICATIONS

44. The garage modifications have not been provided. It is not covered under either manual. Garages are not permitted to be modified. No therapist recommendation was included. The justification included increased recreational and equipment accessibility. These are not justifiable grounds under the new manual. The Respondent assumed that the garage modification was to include heating. Heating a garage would increase the heated safe square footage of the house and is not permitted.

45. The Petitioners' house is small and is filled with devices to assist Morgan. As Morgan gets larger these devices get larger and create clutter which presents a hazard to Morgan who is sight impaired. She needs a bigger living area. She needs an area to perform her therapies. The garage modification would provide the space for Morgan to perform her therapies to prevent her institutionalization.

THE CONTOURED POSITION PILLOWS

46. The contoured pillows was supported by a therapist's evaluation and a doctor's order but Respondent did not deem it medically necessary. There was an absence of justification for this pillow as opposed to other equipment that might have been used. There was some question as to whether or not Morgan needed to be on the floor to utilize these pillows.

47. The contoured positioning pillows, with pump, permit Morgan to be conformed, to the pillows to relieve her from her wheel chair. They can be transported with her. She is able to sit on the couch with the assistance of these pillows.

FLOORING

48. Flooring is under "Environmental Accessibility and Home Modifications." There was not a therapist's evaluation. It was not supported as to why a linoleum floor would not achieve medical necessity. Morgan utilizes four rooms and it was not determined as to Morgan's use of those four rooms and the amount of flooring that was needed. As to the flooring, Morgan is required a level flat flooring because of her blindness and her need for ambulation. This is a laminate floating floor that will outlast linoleum. Linoleum will continue to rip if it is damaged. With the flat flooring you just replace the single piece of flooring.

MEDICAL NECESSITY

49. By prescription written by Robert Greenwood, MD, UNC Department of Neurology, Chapel Hill, North Carolina, dated June 27, 2005, he prescribed (1) Wombat Kitchen Chair, (2) Portable Aquatic Lift (3) Britax Traveler Plus Car Seat for Variable Axis Swing with Swivel Eye Bolt, (5) Contoured Position Pillows and (6) Portable Power Lift. (Respondent's Exhibit No. 3)

50. A letter of medical necessity signed by Dexter D. Warren, Adaptive Equipment Specialist, on July 13, 2005, found that an EZ lock docking device was medically necessary for Morgan Little. (Respondent's Exhibit No. 4 is incorporated herein by reference)

51. Glenn E. Neal, MPT of Children's' Neurotherapy Services, LLC, Hickory, North Carolina "Is in need of a car seat when she is traveling in a vehicle other than the van owned by the Petitioners. The rationale and justification for this piece of equipment is contained in Respondent's Exhibit No. 4 over Glenn E. Neal's signature.

52. Glenn E. Neal, MPT of Children's Neurotherapy Services, LLC, finds that Morgan is in need of a Portable Aquatic Lift (Hi-Lo version) to be used by Morgan as durable medical equipment. This statement is incorporated by reference fully as if set out herein with a submission date stamp of June 21, 2005. (Respondent's Exhibit No. 4) This pool lift is further described in documents found in Respondent's Exhibit No. 5, Petitioners' Exhibit No. 3.

Based upon the foregoing stipulations and 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 Chapters 150B and 108A of the North Carolina General Statutes and applicable federal law.
2. The Respondent bears the burden of proof by the preponderance of the evidence to provide the basis of the denial of Petitioners' request for durable equipment.
3. The Medicaid program provides a federal subsidy to states that choose to reimburse qualified individuals for certain medical expenses. See 42 U.S.C. § 1396 et seq. Although participation in the program is voluntary, states which choose to participate in the Medicaid program must comply with federal Medicaid law. 42 U.S.C. § 1396a(a).
4. The CAP-MR/DD is a Medicaid waiver program permitted under 42 U.S.C. § 1396n(c) which provides for home or community-based services to children through age eighteen. This waiver allows North Carolina to pay for home and community-based services for an individual who would otherwise need institutionalization in an Intermediate Care Facility for the Mentally Retarded (ICF-MR). 42 U.S.C. § 1396n(c). Morgan qualifies for these services.
5. The Medicaid program is jointly financed with federal and state funds "and is basically administered by each state within certain broad requirements and guidelines." House Subcomm. On Health and the Environment, Data on the Medicaid Program: Eligibility, Services, Expenditures Fiscal Years 1967-77, H.R. Rep. No. 10, 95th Cong., 1st Sess. 1. The state determines the scope of the services offered and generally determines the eligibility level for the programs. *Id.* The Act implements a federal-state joint venture in which participating states administer a Medicaid program developed by the state within the parameters established by federal law and regulations. Generally, the Medicaid Act consists of numerous sections and subsections that together form a cooperative mosaic through which the federal government reimburses a portion of the payments made by participating states to providers furnishing care to eligible persons. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981).
6. Federal law mandates that each state participating in the Medicaid program must designate "a single state agency" responsible for the program in that state. 42 U.S.C. § 1936a(a) (5). The North Carolina Department of Health and Human Services operates as this State's single state agency. Respondent serves as agent for this Department.
7. The North Carolina Department of Health and Human Services' rules concerning appeals by Medicaid recipients for the denial, termination or reduction in services (10A N.C.A.C. Subch. 22H) have been promulgated pursuant to the federal provisions of 42 C.F.R. § 431 Subpt. E (200 to 246). These provisions, along with North Carolina's Administrative Procedures Act, entitle Medicaid recipients requesting review of denials of requested Medicaid services to pursue their due process rights through Article 3 of Chapter 150B of the North Carolina General Statutes.
8. Medical necessity for Morgan to receive CAP services has been established, extensively documented in Morgan's Plan of Care. (Respondent's Exhibit No. 6 et. al.) The State must pay for Morgan's medically necessary CAP equipment. Morgan is a person with mental retardation and also meets the definition of persons with related conditions.
9. The CAP/MR/DD Manual (not included in the North Carolina Administrative Code) is a nonbonding interpretative statement from the agency which defines, interprets, and explains the statutes and rules for Medicaid. [See G.S. 150B-(8a)(d)]. Although the Manual sets out the requirements for Medicaid eligibility, it merely explains the definitions that currently exist in the federal and state statutes, rules, and regulations. Violations of or failure to comply with the Manual does not have the effect of law, but failure to meet the requirement(s) set out in the federal and state statutes and regulations is/are a ground to deny Medicaid payments. The North Carolina Courts have found that such a manual (though indeed authorized in its making) is not an agency rule or regulation, within the meaning of the administrative procedure code, and, although such a manual sets out requirements for Medicaid eligibility, it is an interpretative document, and noncompliance with such a manual is of no effect. *Okale ex rel. Okale v. North Carolina Department of Health and Human Services*, 153 N.C.App. 475, 570 S.E.2d. 741 (2002) Respondent's reliance on the CAP-MR/DD Manual as legal authority for denial for Petitioners' request for equipment cannot rise to the level of a *per se* denial.
10. The determination that a Medicaid covered service is medically necessary lies primarily with the recipient's treating physician or other qualified health care provider. Sen. Rpt. No. 404, 89th Cong. 1st Sess., reprinted in 1965 U.S.C.C.A.N. 1943 (1986) ("The physician is to be the key figure in determining the utilization of health services. It is the physician who is to decide upon ... treatments.") The state agency may review this determination; however, absent evidence the prescribed equipment is not medical in nature, is unsafe or experimental, or is otherwise not a service covered under the State Plan, the agency should normally defer to the recommendation of the treating clinicians if it is supported by other evidence. See, e.g., *Weaver v. Reagan*, 886 F.2d 194, 199-200 (8th Cir. 1989) (Medicaid statute creates presumption in favor of the medical judgment of the attending physician.) (Respondent's Exhibit No. 3) The prescriptions written by Dr. Robert Greenwood, MD, create this presumption.

11. The preponderance of the evidence shows that the equipment in question is medically necessary to the proper treatment of Morgan's mental retardation and related conditions. Without such equipment, Morgan's condition and behavior will likely worsen and she will be at increased risk of regression and loss of optimal functional status. Respondent has the burden of proof to establish the legal justification for denial of Petitioners' requested equipment. The Respondent did not carry this burden of proof. Morgan suffers from a severe chronic disability, manifested before age 22, that she is likely to continue indefinitely and that results in substantial functional limitations in the following areas of major life activity: self care, understanding and use of language, mobility, and capacity for independent living. She suffers from mental retardation, moderate/severe impairment to both eyes, Spastic Quadriplegia, Cerebral Palsy, et. al. (Respondent's Exhibit No. 3)

12. Morgan's Plan of Care necessitates active treatment directed toward the acquisition of behavior necessary for her to function with as much self determination and independence as possible and toward the prevention or deceleration of regression or loss of current optimal functional status to avoid institutional care.

13. Based upon Robert Greenwood's (MD) prescription dated May 5, 2005 and June 27, 2005 for closet modifications for wheelchair accessibility, Wombat Kitchen Chair (approved), Portable Aquatic Lift, Britax Traveler Plus Car Seat, Contoured Position Pillows and Pump and Portable Power Lift (Respondent's Exhibit No. 3 and the supporting therapy documentation in Respondent's Exhibit No. 4, the testimony of Denise Little, Petitioner), and the failure of Respondent to carry the burden of proof to establish a legally justifiable basis of denial, the applicable requisites have been established as concluded herein for their approval. Except as otherwise approved or conceded by Respondent, the remainder of the Petitioners' requests have not been established under applicable requisites and are denied without prejudice to Petitioners to make further requests for approval.

14. The Respondent erred in the denial for approval of the closet modifications, Wombat Kitchen Chair, Portable Aquatic Lift, Britax Traveler Plus Car Seat, Contoured Position Pillows and Pump and Portable Power Lift and these items should be provided under Medicaid law for the use and benefit of Morgan Little.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

DECISION

Petitioners' request for durable equipment and modifications for the benefit of Morgan should be allowed for the closet modifications, Wombat Kitchen Chair, Portable Aquatic Lift, Britax Traveler Plus Car Seat, Variable Axis Swing with Eyebolt Set, Contoured Position Pillows and Pump and Portable Power Lift. The remainder of the requests were properly denied or are now moot.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Services Center, Raleigh, NC 27699-6714, in accordance with NCGS §150b-36(a)

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

This the 17th day of February, 2006.

Julian Mann, III
Chief Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
05-DHR 1211

HOSPICE & PALLIATIVE CARE)
CHARLOTTE REGION d/b/a HOSPICE)
AT CHARLOTTE,)
)
Petitioner,)
)
v.)
)
NORTH CAROLINA DEPARTMENT OF)
DIVISION OF FACILITY SERVICES,)
CERTIFICATE OF NEED SECTION,)
)
Respondent,)
)
and)
)
COMMUNITY HOME CARE OF JOHNSTON)
COUNTY, INC. d/b/a COMMUNITY HOME)
CARE AND HOSPICE,)
)
Respondent-Intervenor.)

RECOMMENDED DECISION
by
SUMMARY JUDGMENT

THIS MATTER came on for hearing on January 25, 2006 upon the Motion for Summary Judgment of Petitioner Hospice & Palliative Care Charlotte Region d/b/a Hospice at Charlotte (Charlotte Hospice) and the Motion for Summary Judgment of Respondent-Intervenor Community Home Care of Johnston County, Inc. d/b/a Community Home Care and Hospice (Community). After review of the parties' memoranda, affidavits, supporting documents, pleadings, deposition testimony and other matters of record, the undersigned Administrative Law Judge has determined that Petitioner's Motion for Summary Judgment should be granted and Community's Motion for Summary Judgment should be denied.

The issuance of this decision was delayed due to the filing, response to and consideration of Respondent-Intervenor's Motion for Reconsideration with all documents received by the Undersigned by March 3, 2006. Respondent-Intervenor advanced the argument that Petitioner's case was rendered moot by the Licensure Section's reliance on the no review letter, the subsequent licensure of a branch office, and by its becoming operational.

APPEARANCES

For Petitioner Charlotte Hospice

Parker Poe Adams & Bernstein LLP
Renée J. Montgomery, Esq.
Susan L. Dunathan, Esq.

For Respondent North Carolina Department of Health and Human Services, Division of Facility Services, Certificate of Need Section

NC Department of Justice, Office of the Attorney General
June Ferrell, Esq.

For Respondent-Intervenor Community

Maupin Taylor, P.A.
Marcus Hewitt, Esq.

ISSUE

Whether the Certificate of Need Section violated the standards of N.C.G.S. § 150B-23(a) by granting a no review determination to Community allowing Community to establish a hospice branch office in Mecklenburg County from its parent office in Johnston County.

PARTIES AND PROCEDURE

1. Charlotte Hospice is a non-profit corporation organized under Chapter 55A of the North Carolina General Statutes, with its principal place of business in Mecklenburg County, North Carolina. Charlotte Hospice has been providing end of life and palliative health care and support services in Mecklenburg County since 1978. In 2004, Charlotte Hospice provided 80,775 days of hospice care to the residents of Mecklenburg County. (Draft 2006 SMFP).

2. The Certificate of Need Section (CON Section) is an agency of the State of North Carolina and is responsible for administration of North Carolina's Certificate of Need law, Article 9, Chapter 131E of the North Carolina General Statutes. As part of its responsibilities, the CON Section issues determinations at the request of a health care provider stating whether or not a planned activity of the provider requires a Certificate of Need (no review determinations). 10A N.C.A.C. 14C.0202. (Hoffman Dep., pp. 6-7).

3. Community is a for-profit corporation organized under Chapter 55 of the North Carolina General Statutes with its principal place of business located in Smithfield, Johnston County, North Carolina. In 2004, Community provided no days of hospice care to the residents of Mecklenburg County. (Draft 2006 SMFP).

4. This contested case was filed on July 29, 2005 to challenge a no review determination issued by the CON Section on July 20, 2005 stating that Community could develop a hospice home care office in Mecklenburg County without first acquiring a Certificate of Need. By Order of September 8, 2005, Community was allowed to intervene.

5. The parties have engaged in written discovery. Prior to the filing of the Motions of Charlotte Hospice and Community, the parties conducted the depositions of Lee B. Hoffman, Chief of the Certificate of Need Section; Michael Hale, Vice President of Legal Services of Community Health, Inc.; Natalie Sharpe, Vice President of Clinical Services at Community Health, Inc., who testified in response to a Rule 30(b)(6) Notice of Deposition to Community; and David French, from Strategic Healthcare Consultants.

6. Affidavits from the following individuals were filed in connection with the cross-motions for Summary Judgment: David French, Strategic Healthcare Consultants; Azzie Conley, Assistant Chief of the Acute and Home Care/CLIA Branch of the Licensure and Certification Section, Division of Facility Services, North Carolina Department of Health and Human Services; Sonja Rozier, Vice President of Operations of Community Health, Inc.; C. Saunders Roberson, Jr., President and Chief Executive Officer of Community Health, Inc.

FINDINGS OF FACTS

By letter dated June 29, 2005, Community requested a determination from the CON Section that it could establish a branch office of its Johnston County hospice agency without first obtaining a Certificate of Need (no review determination). (Dep. Ex. 1). Community represented that Mecklenburg County was part of the service area of the Johnston County hospice program based upon serving a single patient (initials "M.D.") beginning on June 29, 2005, the same day that it submitted its no review request to the CON Section. (*Id.*)

1. Community had never served any patients in Mecklenburg County until it began serving M.D. (Hale Dep., pp. 29-31; Sharpe Dep., p. 23). Johnston County is located 200 miles and approximately four hours driving time from Mecklenburg County. (Petition, Ex. B). Johnston County and Mecklenburg County are separated by five counties. (Dep. Ex. 6). Community had not served any patients in the counties between Mecklenburg and Johnston Counties. (Dep. Exs. 7 and 8).

2. Paul Stockett, an employee of Community Health, Inc. (a management company with the same ownership as Community), was previously employed by Britthaven, the corporation which operates the nursing home where M.D. resided. (Sharpe Dep., pp. 87-88, Petitioner's Ex. 2; Hale Dep., pp. 31-32, Petitioner's Ex. 3). Mr. Stockett contacted Britthaven of Charlotte regarding Community's interest in providing hospice services. Community entered into a single use agreement with Britthaven of Charlotte to provide hospice services to M.D. (Agreement, Dep. Ex. 33). The single use agreement was not signed by Community until July 7, 2005, eight days after the date on which Community represented to the CON Section that the patient was admitted. (*Id.*)

3. In order to serve the single patient in Mecklenburg County, Community rotated caretakers, who were primarily working for sister corporations of Community. (Sharpe Dep., pp. 20-23, 46-49, 52-55, 57-59, 93-94; Hale Dep., pp. 6-8). In order to have nurses close enough to the patient to provide care, assigned nurses stayed overnight in Charlotte area hotels until Community could hire staff living in closer proximity to the patient. (Sharpe Dep. p., 89-90).

4. The CON Section issued a no review letter to Community on July 20, 2005 indicating that Community was not required to obtain a CON to proceed with its proposed Mecklenburg hospice branch office. (Dep. Ex. 2). The CON Section did not review Community's Licensure Applications showing that Community had never provided services in Mecklenburg County, nor did it review available data from the State Medical Facilities Plan showing no service by Community in Mecklenburg County. (Hoffman Dep., pp. 74-75). The CON Section based its determination solely on the representation that one patient had been served on the date of the request. (Dep. Exs. 1 and 2).

5. The Chief of the CON Section testified that if a hospice provider represents that it is serving one patient, regardless of the distance, the CON Section will issue a determination that a branch office can be developed without acquiring a Certificate of Need. (Hoffman Dep., pp. 9-10, 30-31). Ms. Hoffman testified that the CON Section has no criteria for determining when to issue a no review determination allowing the establishment of a hospice branch office, except the criteria outlined in the case of *In re Total Care*, 99 N.C. App. 517, 393 S.E.2d 338 (1990). (Hoffman Dep., p. 11). The CON Section relies on *Total Care* as authority for allowing the development of branch offices, regardless of distance, based on service to at least one patient. (*Id.* at 9-11).

6. In granting the no review request to Community, the CON Section made no determination whether Community had inpatient services available in Mecklenburg County or whether an interdisciplinary team was available to provide services 200 miles away from the hospice office in Johnston County. (Hoffman Dep., pp. 51-52). The CON Section made no determination whether any of the other required services for hospice were made available by Community in Mecklenburg County. (Hoffman Dep., pp. 36-37).

7. In its application for a license submitted on July 22, 2005, Community indicated that it had no agreement for inpatient services for patients. (Community Ex. E, p. 2).

8. The Certificate of Need Section also failed to consider whether Community could provide hospice care in Mecklenburg County without substantially changing its services. (Hoffman Dep., pp. 76-77). In its request to establish a branch office, Community did not represent that such office was needed for administrative convenience to serve existing patients and would not involve a substantial change in its services. (Dep. Ex. 1). The activities of Community after receiving the no review determination, hiring new staff and a new medical director, show a substantial change in services to be able to serve Mecklenburg County. (Sharpe Dep., pp. 53, 56, 76).

9. Community distributed marketing materials indicating that the service area of its Johnston County hospice agency was limited to Johnston County. (Dep. Ex. 34).

10. Community was issued a CON in 2003 to develop a hospice program in Johnston County. (Hale Dep., pp 25-26). Community submitted an application for the Johnston County CON based on a need determination for a new hospice agency in Johnston County published in the 2002 SMFP. (Hale Dep., pp. 27-28). In its CON application, Community cited 10 N.C.A.C. 3R.4201(10)(a), which provided that "[h]ospice service area means the single county in which the hospice or hospice inpatient facility will be established . . ." as the basis for its representation that its proposed service area for the CON was limited to Johnston County. (Hale Dep., pp. 26-28).

11. The Certificate of Need issued to Community to establish a hospice agency in Johnston County states that Community's Certificate of Need is valid only for the scope, physical location, and person(s) described in the Certificate. *See also*, N.C.G.S. § 131E-181(a). The physical location on Community's Certificate of Need is Smithfield, North Carolina. (Respondent's Ex. 3, a copy of the CON issued to Community for Project I.D. # J-6721-02). Community does not have Certificate of Need to relocate or expand its hospice to Mecklenburg County. (Hoffman Dep., p. 80).

12. The 2005 SMFP and the draft 2006 Plan available at the time of the CON Section's decision indicated that there was no need for an additional hospice in Mecklenburg County. (Dep. Exs. 7 and 8).

CONCLUSIONS OF LAW

1. This contested case is governed by the provisions of N.C.G.S. § 150B-23. This contested case is not governed by N.C.G.S. § 131E-188 because it is an appeal from the CON Section's July 20, 2005 response to Community's June 29, 2005 letter of intent to develop a hospice branch office and not a "[d]ecision of the Department to issue, deny or withdraw a CON or exemption or to issue a CON pursuant to a settlement agreement." However, the 270 day time limit is being used as guidance and being followed.

2. An Administrative Law Judge may rule on any prehearing motions authorized by the North Carolina Rules of Civil Procedure, including summary judgment motions. *See* N.C.G.S. §150B-33(b)(3a); 26 N.C.A.C. 3.0105(1).

3. Summary judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. N.C. R. Civ. P. 56(c).

4. Where the issue presented is one of statutory interpretation, the reviewing court is not bound by the agency's interpretation of the statute. *Christenbury Surgery Center v. N.C. Dep't of Health & Human Services*, 138 N.C. App. 309, 531 S.E. 2d 219 (2000). A court should only consider an agency's interpretation of the statute where an ambiguity exists. *In re Total Care*, 99 N.C. App. 517, 520, 393 S.E.2d 338, 340 (1990). Where the language of a statute is clear and unambiguous, a court must give such language its plain and definite meaning. (*Id.*)

5. Interpretation of appellate opinions in CON cases is a judicial function that does not require any deference to agency interpretation.

6. A CON is required to relocate "a health service facility from one service area to another." N.C.G.S. § 131 E-176(16)(q). Such relocation is considered a new institutional health service that must undergo CON review and satisfy applicable CON criteria. N.C.G.S. §§ 131E-178(a) and 183. Because a hospice is a health service facility under N.C.G.S. § 131E-176(9b), relocation of a hospice from one service area to another requires a CON.

7. An expansion or partial relocation of a health service facility to a second location is considered a relocation. *See Christenbury Surgery Center v. NC. Dep't of Health & Human Services*, 138 N.C. App. 309, 312, 531 S.E.2d 219, 222 (2000) (describing expansion of a portion of an existing ambulatory surgical program to a second site as a "relocation and expansion").

8. "Service area" is defined in the Certificate of Need law to mean "the area of the State, as defined 'in the State Medical Facilities Plan or in the rules adopted by the Department, which receives services from a health service facility.'" N.C.G.S. § 131E-176(24a). This is the only definition of "service area" in the CON law.

9. In June and July 2005, there was no CON rule or regulation that defined the service area for hospice. The 2005 SMFP, which was in effect at the time of Community's June 29, 2005 no review letter to the CON Section and at the time of the agency decision at issue, defines the service area for a hospice as the county in which it is located, and provides that each county in North Carolina constitutes a hospice service area. *See* 2005 SMFP, p. 270-72.

10. The legally defined service area for Community's hospice is Johnston County, the single county where Community is located. Under the law that existed prior to December 31, 2005 which is applicable to the no review determination at issue, Community could not open a branch office outside Johnston County without first acquiring a Certificate of Need. N.C.G.S. §§ 131E-176(9b), -176(16)(q), -178(a), and -183.

11. Community's proposal to open a hospice office in Mecklenburg County is a relocation of an existing health service facility outside of its existing service area of Johnston County and requires a CON.

12. The definition of "hospice" under the Certificate of Need law states that a hospice must be able to provide inpatient care. N.C.G.S. § 131E-176(13a). This definition also states that hospice care must be provided by an interdisciplinary team. The CON Section granted Community's no review request without determining whether Community had inpatient services available in Mecklenburg County or whether an interdisciplinary team was available to provide services 200 miles away from the hospice office. The CON Section never considered whether the services Community had available in Mecklenburg County met the requirements in the statutory definition of hospice. N.C.G.S. § 131E-176(13a).

13. A hospice agency is required to make nursing services, physician services, and drugs and biologicals routinely available on a 24 hour basis. All other covered services must be made available on a 24 hour basis to the extent necessary to meet the needs of the patients being served. 42 C.F.R. § 418.50(b). In addition to home care, covered services include inpatient, respite, and continuous care. 42 C.F.R. § 418.202 and § 418.204. The CON Section's special criteria for hospice services list the support services that must be available to hospice patients. 10A N.C.A.C. 14C.1504. In granting Community's no review request, the CON Section never considered whether all levels of care and required services were available in Mecklenburg County.

14. The CON Section only considered whether Community was presently serving one patient, regardless of how far away and regardless of whether all the required services were available to that patient. This superficial review thwarts the intent of the General Assembly in its creation of the Certificate of Need law. The Certificate of Need law was not meant to encourage or endorse a

hospice agency two hundred miles away, going to quickly find one patient and provide services to that one patient in order to establish a branch office without the scrutiny of the Certificate of Need process.

15. Community's service area also is defined in its Certificate of Need application and its Certificate of Need as Johnston County. (Dep. Ex. 46; Respondent's Ex. 3). In determining whether a health service facility may expand to a second location, the service area for which the facility has received a Certificate of Need must be considered. See *Christenbury Surgery Center*, 138 N.C. App. at 312-313, 531 S.E.2d at 221-222. The recipient of a Certificate of Need is required to comply with the material representations of its application. N.C.G.S. § 131E-181(b). Furthermore, a Certificate of Need is valid only for the defined scope, physical location, and person named in the application. N.C.G.S. § 131E-181(a).

16. Community's development of a branch office outside Johnston County is contrary to the restrictions set forth in N.C.G.S. § 131E-181. In issuing a no review determination, the CON Section erred in failing to consider the limitations in Community's Certificate of Need application and the Certificate of Need that was issued. (Hoffman Dep., pp. 44-45).

17. The Court in *In re Total Care*, 99 N.C. App. 517, 393 S.E.2d 338 (1990) held that a CON was not required to open an additional home health office in the home health agency's existing, current service area as determined by the CON law and regulations in effect at that time. The Agency's reliance on *Total Care* to allow the development of branch offices outside a hospice provider's legally defined service area is erroneous. *Total Care* was expressly limited to its facts, which involved a home health agency with a history of serving patients in contiguous counties, seeking permission to develop branch offices to better serve those patients. 99 N.C. App. 522, 393 S.E.2d at 342. Interpreting the *Total Care* opinion to allow the establishment of a hospice branch office 200 miles away based on service to one patient has no foundation in the facts of the *Total Care* case and the underlying rationale of that case to allow the home health agency to better serve existing patients in contiguous counties.

18. Ms. Hoffman testified that she was applying the criteria in *Total Care* to issue the no review determination to Community. (Hoffman Dep., p. 11). However, an analysis of the criteria outlined in *Total Care* does not support the CON Section's decision to allow Community to establish a branch office, 200 miles and six counties away, based upon service to only one patient. Even if *Total Care* were interpreted as allowing a broader geographic area than a single county to be the service area for a hospice, the CON Section failed to properly consider the factors that the Court relied upon in *Total Care*.

19. In *Total Care*, the Court relied upon the definition of "service area" for home health agencies that was in effect at the time. At that time, there was no statutory definition of "service area" but a home health agency's service area was defined by rule as "a county in which a proponent proposes to establish a home health agency or contiguous counties whose boundaries touch the boundary of the county in which the office of the home health agency will be located and whose grouping is consistent with established medical care utilization patterns." 10 N.C.A.C. 03R.2002 (1989). *Total Care* was seeking permission to develop branch offices within its legally defined service area.

20. The CON law in effect in 2005 defines the service area for a hospice as the county in which the hospice is located. N.C.G.S. § 131E-176(24a); 2005 SMFP. Proper application of *Total Care* would have limited Community's development of a hospice branch office to its legally defined "service area" for hospice, which is Johnston County.

21. The Court in *Total Care* relied upon information reported in *Total Care's* annual license renewal forms to determine the "established medical care utilization patterns." *Total Care* at 522, 393 S.E.2d at 341. The Court explicitly noted that the *Total Care* agency had an established history of serving patients in what the Court described as a "fourteen county area block" as evidenced by the *Total Care* agency's annual licensure renewal reports. It was in this contiguous block of counties that *Total Care* wished to establish new offices. *Id.* In this case, Community was seeking to establish a new hospice office six counties away, with no service to the five counties in between the parent office and new office and no history of service in Mecklenburg County.

22. In *Total Care*, the Court cited the fact that the home health agency would not "substantially change its services" when opening an additional site without a CON. *Total Care* at 522, 393 S.E.2d at 342. In this case, the CON Section failed to obtain any information to evaluate whether Community would have to "substantially change its services" by opening an additional hospice office in Mecklenburg County. (Hoffman Dep., pp. 76-77). Because of the distance, Community had to substantially change its services to provide services to Mecklenburg County by hiring new hospice staff and a new medical director in Mecklenburg County. (Sharpe Dep., pp. 43, 56, 76).

23. Contrary to the facts in *Total Care*, the branch office in Mecklenburg County requested by Community was not for administrative convenience to better serve an existing flow of patients. After receiving permission to develop a branch office, the activities of Community in Mecklenburg County showed the development of a new hospice home care program which requires a Certificate of Need. N.C.G.S. § 131E-176(7), (9c), (13a), (16) and (18) and 178(a). (French Dep., pp. 168-169).

24. As applied to this case, *Total Care* would limit Community's service area to a single county as set forth in the 2005 SMFP. In issuing the no review determination here, the CON Section totally disregarded the definition of "service area" as well as several other factors cited in the *Total Care* decision.

25. Even if a hospice service area were not legally limited to a single county and the factors in *Total Care* could be ignored, Community still has failed to show that Mecklenburg County should be considered part of its service area for the Johnston County office. Charlotte Hospice presented the Affidavit and deposition testimony of David French, a health planning expert, which was not rebutted by an expert of Respondent or Respondent-Intervenor. Mr. French testified that service to one patient in a distant, noncontiguous county, does not make that county part of a hospice's service area and that it is not possible to meet all hospice requirements serving one patient in a county 200 miles away. (French Aff.; French Dep., pp. 101-104, 186-187).

26. On the date of the no review request on June 29, 2005, Community did not have a written contract with Britthaven of Charlotte as required by federal regulations. 42 C.F.R. § 418.56(b). Community also had no inpatient agreement in place, as required by both state and federal law. (Respondent's Ex. E, p. 2). The definition of hospice under North Carolina law requires the availability of inpatient care for terminally ill patients and their families. N.C.G.S. § 131E-176(13a).

27. The services to M.D. on June 29, 2005 did not meet mandatory requirements and, consequently, could not be considered hospice services for purposes of establishing a service area.

28. "The fundamental purpose of the CON law is to limit the construction of health care facilities in this state to those that the public needs and that can be operated efficiently and economically for their benefit." *Humana Hosp. Corp., Inc. v. N.C. Dep't. of Human Res.*, 81 N.C. App. 628, 632, 345 S.E.2d 235, 237 (1986).

29. As part of the Department's statutory mandate to limit and control the development of health services, including hospice programs, the Department and the State Health Coordinating Council develop a State Medical Facilities Plan ("SMFP"), approved by the Governor, which includes determinations of the need for health service and health service facilities. N.C.G.S. § 131E-176(25) and § 131E-177(4). In determining the need for hospice services, the SMFP sets forth a specific methodology which is applied to each county to determine whether there is a need for additional hospice services in that county. (2005 SMFP, Dep. Ex. 7, p. 252). The CON Section has ignored the purpose and intent of the State Medical Facilities Plan by approving Community's request to establish hospice services in Mecklenburg County, which showed no need for an additional hospice.

30. The Certificate of Need law requires a CON for the development of a hospice program to prevent the random development of such programs in areas where there is no need. N.C.G.S. §§ 131E-178(a), 131E-176(9b)(16)(a). Ignoring the legal definition of "service area" in the CON law to allow relocations or expansions of existing hospice agencies to new counties outside the legally defined service area results in the proliferation of unnecessary and duplicative hospice services, undermines the need methodology for hospices in the SMFP, and is contrary to the clear language, intent and purpose of the Certificate of Need law as set forth in N.C.G.S. § 131E-175. The Agency admits that allowing the development of hospice branch offices without a Certificate of Need is contrary to the purpose of the Certificate of Need law to prevent duplication. (Hoffman Dep., p. 16).

31. " 'A court should always construe the provisions of the statute in a manner which will tend to prevent it from being circumvented,' otherwise, the problems which prompted the statutes passage would not be corrected." *Good Hope Hospital, Inc. v. N.C. Dep't. of Health and Human Services*, 2006 N.C. App. LEXIS 63 (filed January 3, 2006), quoting *Campbell v. Church*, 298, N.C. 476, 484, 259 S.E.2d 558, 564 (1979).

32. Applying the Certificate of Need law to restrict the development of branch offices outside the county where the parent office is located is supported by the plain language of the Certificate of Need law and its purpose of preventing the proliferation of unnecessary health service facilities. See N.C.G.S. § 131E-175(4).

33. In issuing no review requests, the CON Section, the Agency responsible for administering the CON law, must reasonably review and consider the law and regulations from which a provider is seeking to be excused in order for the Agency to make a fair and informed decision. Although the Agency admits that it has often done such an analysis in the context of other no review requests (Hoffman Dep., pp. 46-50), such analysis was not done in this case.

34. An aggrieved party is one that is affected substantially in his or its person, property, or employment by an administrative decision. N.C.G.S. § 150B-2(6).

35. In *In re Wilkesboro*, 55 N.C. App. 313, 319, 285 S.E.2d 626, 630 (1982), the Court expressly acknowledged that it could "think of no better person [than the existing competitor] to assure complete review" of the Agency's decision, and determined that such existing facility had a "substantial stake" in the outcome of any request by a potential competitor that would allow the

potential competitor to develop a similar health service in the same area. The Court in *Wilkesboro* determined that the existing provider was aggrieved and thus "affected substantially."

36. In *Empire Power Co. v. N.C. Department of Environmental and Natural Resources*, 112 N.C. App 566, 436 S.E.2d 594 (1993), the Court concluded that an existing power company met the definition of an aggrieved person because it had an interest in having the prospective competitor be required to follow the same rules as all other registered entities before being issued a permit. *Id* at 571, 436 S.E.2d at 598.

37. Because of the CON Section's erroneous decision to grant Community's no review request, Community has been permitted to circumvent the requirements of North Carolina's Certificate of Need law. As a competing hospice provider in Mecklenburg County, Charlotte Hospice is substantially prejudiced as a matter of law.

38. Under the Administrative Procedure Act (APA), a person aggrieved by an agency decision or agency action has the right to file a petition with the Office of Administrative Hearings. To hold a petition moot because one could act upon a challenged decision would completely abrogate the right to challenge Agency actions provided under the APA. An appeal to the Office of Administrative Hearings (OAH) is the established course of action to challenge a no review determination. Jurisdiction lies in the OAH pursuant to North Carolina General Statute 150B granting the right to a contested case hearing to persons purportedly aggrieved by an administrative decision. It is noted that this was also the position taken by Respondent-Intervenor in opposing Petitioner's Motion for a Stay of the contested case, pending a Superior Court proceeding filed by Petitioner regarding the same matter.

39. Community was on notice of a challenge to the Agency's no review decision less than two weeks after the decision was issued. Proceeding to move staff under such a cloud is in truth and fact done so at the risk that Community would be required to discontinue that activity. Any other result would sanction the violation of the Certificate of Need law by those who could act before Administrative and Judicial review could be made of the challenge. Moreover, the Certificate of Need Section is authorized to take action preventing persons from violating the Certificate of Need law.

40. There are no genuine issues of material fact regarding the requirement that Community must obtain a Certificate of Need before developing a hospice home care office in Mecklenburg County and Petitioner is entitled to judgment in its favor as a matter of law. The Agency has exceeded its statutory authority, acted erroneously, and failed to act as required by law and rule in issuing a no review determination to Community.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

RECOMMENDED DECISION

Petitioner's Motion for Summary Judgment is GRANTED and Respondent-Intervenor's Motion for Summary Judgment is DENIED. Further, Respondent-Intervenor's motion for reconsideration is also DENIED. Based upon the facts of this case and as a matter of law, Community must obtain a CON before developing or offering a hospice office in Mecklenburg County.

The findings and conclusion of this matter warrant, and it is hereby recommended, that the effectiveness of the CON Section's July 20, 2005 letter be stayed, and the CON Section be stayed from permitting Community to develop or offer a hospice office in Mecklenburg County without a CON.

NOTICE

Before the Agency makes the Final Decision, it is required by G.S. 150B-36(a) to give each party an opportunity to file exceptions to this Recommended Decision, and to present written arguments to those in the Agency who will make the final decision.

The Agency is required by 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. The agency that will make the Final Decision in this case is the North Carolina Department of Health and Human Services.

This the 21st day of March, 2006.

Augustus B. Elkins II
Administrative Law Judge

CONTESTED CASE DECISIONS

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
05 DHR 1244

COUNTY OF GUILFORD

HOSPICE AT GREENSBORO, INC. d/b/a HOSPICE AND)
PALLIATIVE CARE OF GREENSBORO and HOSPICE OF)
THE PIEDMONT, INC.,)

Petitioners,)

v.)

NORTH CAROLINA DEPARTMENT OF HEALTH AND)
HUMAN SERVICES, DIVISION OF FACILITY)
SERVICES, LICENSURE AND CERTIFICATION)
SECTION and NORTH CAROLINA DEPARTMENT OF)
HEALTH AND HUMAN SERVICES, DIVISION OF)
FACILITY SERVICES, CERTIFICATE OF NEED)
SECTION,)

Respondents,)

and)

LIBERTY HOME CARE, LLC,)

Respondent-Intervenor.)

RECOMMENDED DECISION
by
SUMMARY JUDGMENT

UPON CONSIDERATION of Petitioners Hospice at Greensboro, Inc. d/b/a Hospice and Palliative Care of Greensboro's (HPCG) and Hospice of the Piedmont, Inc.'s (Piedmont) Motion for Summary Judgment and Request for Stay and Respondent-Intervenor Liberty Home Care LLC's (Liberty) Motion for Summary Judgment, and; after review of the parties' (Petitioner, Respondents, and Respondent-Intervenor) memoranda, filings, affidavits, supporting documents, and pleadings, and; upon hearing oral argument by all parties on December 21, 2005, in High Point, North Carolina, and; after review of the relevant law; the undersigned Administrative Law Judge, Augustus B. Elkins II, determines the Motions for Summary Judgment are ripe for disposition.

APPEARANCES

For Petitioners HPCG and Piedmont

Smith Moore LLP
Maureen Demarest Murray, Esq.
Susan M. Fradenburg, Esq.
Allyson Jones Labban, Esq.

For Respondent North Carolina Department of Health and Human Services, Division of Facility Services, Certificate of Need Section and Licensure and Certification Section

North Carolina Department of Justice
Office of the Attorney General
Melissa Trippe, Esq.

For Respondent-Intervenor Liberty:

Wyrick Robbins Yates Ponton LLP
Lee M. Whitman, Esq.
Edward K. Greene, Esq.

PARTIES, PROCEDURE AND CONDUCT OF HEARING

1. Hospice at Greensboro, Inc. d/b/a Hospice and Palliative Care of Greensboro (HPCG) is a North Carolina non-profit corporation with its principal place of business at 2500 Summit Avenue, Greensboro, Guilford County, North Carolina. HPCG has been in existence since 1980 and provided 51,303 days of hospice care to residents of Guilford County in 2004 and 60,296 days of hospice care to residents of Guilford County in 2005. 2005 and 2006 State Medical Facilities Plans (SMFPs).
2. Hospice of the Piedmont, Inc. (Piedmont) is a North Carolina non-profit corporation with its principal place of business at 1801 Westchester Drive, High Point, Guilford County, North Carolina. Piedmont has been in existence since 1980 and provided 17,338 days of hospice care to residents of Guilford County in 2004 and 17,657 days of hospice care to residents of Guilford County in 2005. 2005 and 2006 SMFPs.
3. Respondent North Carolina Department of Health and Human Services (DHHS), Division of Facility Services (DFS), Certificate of Need Section (CON Section), is the Section of the Department (DHHS) that administers the Certificate of Need Act (CON Act), N.C. Gen. Stat. Chapter 131E, Article 9.
4. Respondent North Carolina Department of Health and Human Services, Division of Facility Services, Licensure and Certification Section (Licensure and Certification Section) is the Section of the Department that licenses hospices, as well as other health care facilities. The Licensure and Certification Section also surveys hospices and other facilities as the State Survey Agency for the Medicare program.
5. Respondent-Intervenor Liberty Home Care, LLC (Liberty) is a North Carolina for-profit limited liability company with a principal place of business at 2334 South 41st Street, Wilmington, North Carolina.
6. Liberty Home Care, LLC has held a license for a home health agency in Guilford County. This home health agency's license has never authorized Liberty to provide hospice services in Guilford County. 01/01/05 home care license issued to Liberty Home Care.
7. On June 30, 2005, Liberty submitted a letter to the CON Section, requesting a response from the CON Section that it could open a "branch office" in Guilford County of its Fayetteville, Cumberland County hospice without obtaining a CON.
8. On July 7, 2005, the CON Section sent a letter to Liberty stating that Liberty could open a new hospice office in Guilford County without a CON.
9. The Licensure and Certification Section issued a license effective July 19, 2005 to Liberty for a new hospice in Guilford County, relying in part upon the determination by the CON Section that no CON was required to establish this hospice.
10. On August 5, 2005, HPCG and Piedmont filed a Petition for Contested Case Hearing with the Office of Administrative Hearings (OAH), appealing the CON Section's determination that no CON was required for Liberty to establish a hospice in Guilford County, and the Licensure and Certification Section's issuance of a license for a hospice in Guilford County to Liberty.
11. On August 18, 2005, Liberty was allowed to intervene in the contested case.
12. The parties have engaged in discovery in this case through the OAH ordered deadline of December 2, 2005, including interrogatories, requests for production of documents and depositions.
13. The parties have conducted the following depositions:
 - A. Lee B. Hoffman, Chief, CON Section;
 - B. Ann Williams, Licensure and Certification Section;
 - C. James Matthew Butler, Operations Manager, Liberty;
 - D. Sandy Marshall, Senior Clinical Director, Liberty;
 - E. Pamela Barrett, CEO, HPCG;
 - F. Leslie Kalinowski, CEO, Piedmont;
 - G. Minette Strader, Director of Nursing at Oakhurst Rest Home;
 - H. Dr. John Feldman, expert witness for Petitioners; and
 - I. Michael Rovinsky, expert witness for Petitioners.
14. The parties submitted the following affidavits:
 - A. Pamela Barrett, CEO, HPCG;
 - B. Leslie Kalinowski, CEO, Piedmont; and
 - C. Azzie Conley, Chief, Licensure and Certification Section.

FINDINGS OF FACT

1. In February 2005, Liberty submitted to the CON Section a request for "no review" consideration to establish thirteen separate hospice "branch offices" from its hospice offices in Fayetteville in Cumberland County and in Raeford in Hoke County. 02/21/05 letter from Anthony Zizzamia to Lee Hoffman.
2. As of February 2005, Liberty was not serving and had not served any hospice patients in Guilford County. 2005 and 2006 SMFPs; Butler Dep. at 43; Marshall Dep. at 87-88.
3. The CON Section informed Liberty in a letter dated March 7, 2005 that a separate request and showing must be made for each branch office. The CON Section informed Liberty that before making a request, Liberty must be currently providing services to a hospice patient in the county where it wished to open an additional office. The CON Section also provided a form to Liberty, which asks for the dates of service, provided to each patient in each county and requested that Liberty provide similar documentation in a format of its choice. 03/07/05 letter from Craig Smith to Anthony Zizzamia; Marshall Dep. at 128-29.
4. Liberty management directed the staff of the Liberty home health agency in Guilford County to look for a hospice patient to serve so Liberty could seek to open a hospice office in Guilford County. Staff of the Liberty home health agency in Guilford County told the staff at the Oakhurst Rest Home that Liberty was looking for a hospice patient. Butler Dep. at 42.
5. S.H. (initials used for confidentiality), a resident of Oakhurst Rest Home, was hospitalized at Wesley Long Community Hospital during June 2005. S.H.'s attending physician at Wesley Long Community Hospital referred S.H. for hospice services after the resident's discharge from the hospital on June 21, 2005. HPCG's Medical Records of S.H. (filed under seal).
6. S.H. was admitted to Liberty's hospice in Fayetteville for hospice services on June 21, 2005. Butler Dep. at 104-05; Liberty's Medical Records of S.H. (filed under seal).
7. On June 21, 2005, Liberty staff completed a "Home Health Certification and Plan of Care" form for S.H. that referenced hospice services. Liberty's Medical Records of S.H. (filed under seal).
8. Staff located at Liberty's home health agency in Guilford County physically observed, assessed and treated S.H. at Oakhurst Rest Home from June 21-24, 2005. Butler Dep. at 41, 48. Liberty's Medical Records of S.H. (filed under seal).
9. During and prior to 2005, Liberty's home health agency in Greensboro was not licensed to provide hospice services.
10. S.H. died on June 24, 2005. Liberty's Medical Records of S.H. (filed under seal).
11. No staff located at Liberty's hospice office in Fayetteville came to Greensboro to provide any services to S.H. S.H.'s medical records were sent by overnight delivery to Liberty's hospice office in Fayetteville, staff located at Liberty's home health agency in Greensboro consulted with staff located at Liberty's hospice in Fayetteville, and staff located at Liberty's hospice in Fayetteville participated in an interdisciplinary team conference concerning S.H. on June 29, 2005, five days after S.H.'s death. Liberty's Medical Records of S.H. (filed under seal).
12. Liberty did not relocate existing staff, patients or medical records from its Fayetteville hospice office to Guilford County to provide hospice services in Guilford County, but instead advertised for and sought to hire new staff. Butler Dep. at 21, 33-34, 134, 147-48, 194-95.
13. Liberty did not have a contract with any hospital for inpatient services for hospice patients in Guilford County in June or July 2005. Butler Dep. at 58.
14. Liberty did not have a medical director for hospice services located in Guilford County in June or July, 2005. Butler Dep. at 194-95.
15. On June 30, 2005, six days after S.H.'s death, Liberty submitted a letter to the Certificate of Need Section, representing that a hospice patient in Guilford County was "being served" from its Fayetteville, North Carolina hospice location and requesting that it be permitted to open, without a certificate of need, an office in Greensboro in Guilford County, which would be a branch of Liberty's hospice office in Fayetteville. 06/30/05 letter from Anthony Zizzamia to Lee Hoffman.

16. In support of its June 30, 2005 "no review" request, Liberty submitted the "Home Health Certification and Plan of Care" for S.H. dated June 21, 2005. *Id.*
17. At the time Liberty submitted its no review request to the CON Section on June 30, 2005, S.H. had died and Liberty was not providing hospice services to any other patient in Guilford County. Butler Dep. at 43; Marshall Dep. at 87-88.
18. Liberty did not report serving any hospice patients in Guilford County on its 2004 or 2005 license renewal applications for its Fayetteville hospice office. *See* 2005 and 2006 SMFPs. Liberty reported on its 2005 license renewal application that it provided 84 days of care to Cumberland County residents. *See* 2006 SMFP.
19. In June 2005, the 2005 SMFP and the draft 2006 SMFP showed no need determination for additional hospice home care programs in Guilford County. Both the 2005 and draft 2006 SMFP were available to the CON Section in June and July 2005. Hoffman Dep. at 130-31, 133-34.
20. In June 2005, the 2005 SMFP and the draft 2006 SMFP showed that, according to the licensure data and information submitted by Liberty, Liberty had not served any Guilford County hospice patients in 2003 or 2004 from any Liberty hospice office. *Id.*
21. S.H. is the only hospice patient that Liberty represented to the CON Section that it had served in Guilford County.
22. In 2005, the CON Section did not have any written, published regulations, criteria or guidelines concerning when a branch hospice office could be opened without a CON. CON Section's Responses to Petitioner's First Set of Interrogatories and First Request for Production of Documents 7 and 8, pp. 6-7; Hoffman Dep. at 70.
23. The CON Section considered Liberty's June 30, 2005 letter to be a letter of intent and a request concerning whether it should submit a certificate of need application. The CON Section responded to Liberty's June 30, 2005 letter pursuant to CON regulations concerning letters of intent. Hoffman Dep. at 46-48.
24. Although the CON Section had previously provided Liberty with a form asking for the dates or service for each patient, Liberty did not provide the CON Section with this information when it submitted its "no review" request on June 30, 2005, nor did the CON Section request that Liberty provide it with this information. *See* 06/30/05 letter from Anthony Zizzamia to Lee Hoffman; Hoffman Dep. at 61, 70.
25. The CON Section did not ask Liberty any questions regarding whether S.H. was receiving hospice or home health services or whether the services were being provided from a licensed home health agency or a licensed hospice, even though the plan of care submitted to the CON Section by Liberty was on a home health form and not a hospice form. Hoffman Dep. at 60-61.
26. The CON Section did not request from Liberty nor review in Licensure and Certification Section files any information concerning Liberty's policies concerning its geographic service area. Hoffman Dep. at 77, 126-27.
27. The CON Section did not review Liberty's annual license renewal forms for Liberty's Fayetteville hospice office, which were available at the Licensure and Certification Section. Hoffman Dep. at 72-73.
28. The CON Section did not review the data available in the SMFPs regarding whether Liberty had provided hospice days of care to any patient in Guilford County. Hoffman Dep. at 72, 130-31, 134.
29. Cumberland and Guilford Counties are not contiguous. There are three counties between Cumberland and Guilford Counties. 2005 SMFP Appendix C, "List of 'Contiguous Counties'."
30. At the time of its June 30, 2005 no review request, Liberty did not have any existing, operating hospice offices in the counties between Cumberland and Guilford Counties. 2005 and 2006 SMFPs.
31. The CON Section did not request any information from Liberty to ascertain whether opening an additional office in Guilford County would involve a substantial change in its services. Hoffman Dep. at 124-25.
32. In analyzing requests such as Liberty's regarding branch offices, the CON Section instructs its analysts to check whether there is an existing licensed hospice that is providing services, and presumably did so in this case. Hoffman Dep. at 68-69.

33. The CON Section took no other steps to verify Liberty's representations or to require any documentation to support them. Hoffman Dep. at 61, 70.
34. Based upon Liberty's June 30, 2005 request, the CON Section issued a letter dated July 7, 2005 to Liberty stating that Liberty could open an additional hospice office in Guilford County without a CON. The July 7, 2005 letter explicitly states that it is valid only if the facts stated in Liberty's June 30, 2005 letter to the CON Section are accurate. 07/07/05 letter from Martha Frisone and Lee Hoffman to Anthony Zizzamia.
35. The legislature amended the CON Act as of August 26, 2005. The amendments state that, effective December 31, 2005, a CON is required to open any hospice office. Hoffman Dep. at 91-92.
36. Ms. Lee Hoffman, Chief of the CON Section, testified at her deposition that, if Liberty had submitted its no review request after August 26, 2005, she would have determined that Liberty was not currently serving any hospice patient in Guilford County and could not open a hospice office in Guilford County without a CON because the patient died before Liberty submitted its no review request to the CON Section. Hoffman Dep. 90-93.
37. With a letter dated July 15, 2005, Liberty submitted a 2005 Hospice License Application form and a copy of the CON Section's July 7, 2005 no review letter to the Licensure and Certification Section as a basis for its request for a license for a new hospice office in Guilford County. See Liberty's 07/15/05 Hospice Licensure Application.
38. Liberty's license application left blank and did not provide any documentation that its hospice office in Guilford County was providing, could provide, or had a contract with a hospital or other inpatient facility in Guilford County for the provision of inpatient services to hospice patients. *Id.*
39. The license application identified Matt Butler as the Operations Manager for the Guilford County hospice office. *Id.* Mr. Butler is the Operations Manager of Liberty's home health agency in Guilford County.
40. Barry Renn, the Operations Manager of Liberty's Fayetteville hospice office, was not identified on Liberty's license application. *Id.*
41. Ann Williams of the Licensure Certification Section testified at her deposition that a contract for inpatient services is a hospice licensure requirement. Williams Dep. at 28.
42. The Licensure and Certification Section did not ask Liberty for any additional information, did not review any files concerning Liberty's hospice office in Fayetteville or any other location, and did not conduct any on-site survey of Liberty's proposed hospice office in Guilford County. Conley Aff. ¶4, 7, 8.
43. The Licensure and Certification Section issued a full license to Liberty for a hospice in Guilford County, effective July 19, 2005. The license did not identify the Guilford County office as a branch of Liberty's hospice office in Fayetteville or show any limitations on the face of the license. See 07/19/05 license issued to Liberty Home Care and Hospice.

CONCLUSIONS OF LAW

SUMMARY JUDGMENT IN FAVOR OF PETITIONERS IS WARRANTED

A. Standard of review

1. The CON Section treated Liberty's June 30, 2005 request as a letter of intent pursuant to 10A N.C.A.C. 14C.0201 regarding whether Liberty must apply for a CON prior to opening a hospice office in Guilford County. The CON Section's July 7, 2005 letter was a response to Liberty's June 30, 2005 letter of intent pursuant to 10A N.C.A.C. 14C.0202.
2. This contested case is not governed by N.C. Gen. Stat. § 131E-188 because it is an appeal from the CON Section's July 7, 2005 response to Liberty's June 30, 2005 letter of intent and not a "[d]ecision of the Department to issue, deny or withdraw a CON or exemption or to issue a CON pursuant to a settlement agreement."
3. The Licensure and Certification Section issued to Liberty a license for a hospice office in Guilford County effective July 19, 2005, pursuant to its authority under the Hospice Licensure Act and regulations. N.C. Gen. Stat. § 131E-200 *et seq.* The Hospice Licensure Act does not establish any procedure for appeal of hospice licensure actions other than the North Carolina Administrative Procedures Act.
4. This contested case is governed by N.C. Gen. Stat. § 150B-23.

5. An Administrative Law Judge may rule on any prehearing motions authorized by the North Carolina Rules of Civil Procedure, including summary judgment motions. *See* N.C.G.S. §150B-33(b)(3a); 26 N.C.A.C. 3.0105(1) and (6).
6. Summary judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. N.C. R. Civ. P. 56(c).
7. The party moving for summary judgment meets its burden of proof by showing that an essential element of the non-movant's claim does not exist, or by showing that the non-movant cannot produce evidence of an essential element of his or her claim. *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992).
8. Once such a showing is made, the non-movant must "produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that [it] . . . can at least establish a *prima facie* case at trial." *Hoffman v. Great American Alliance Insurance Co.*, 166 N.C. App. 422, 426, 601 S.E.2d 908, 911 (2004).
9. Where the issue presented is one of statutory interpretation of plain language, the reviewing court is not bound by the agency's interpretation of the statute. *Christenbury Surgery Center v. N.C. Dep't of Health & Human Services*, 138 N.C. App. 309, 531 S.E. 2d 219 (2000).
10. Interpretation of appellate opinions in CON cases is a judicial function that does not require any deference to agency interpretation.
11. "The fundamental purpose of the CON law is to limit the construction of health care facilities in this state to those that the public needs and that can be operated efficiently and economically for their benefit." *Humana Hosp. Corp., Inc. v. N.C. Dep't. of Human Res.*, 81 N.C. App. 628, 632, 345 S.E.2d 235, 237 (1986).

B. Liberty's proposal to open a new hospice office in Guilford County constitutes a relocation of its hospice from one service area to another that requires a CON under the CON Act in effect prior to December 31, 2005.

1. A CON is required to relocate "a health service facility from one service area to another." N.C. Gen. Stat. § 131E-176(16)(q). Such relocation is considered a new institutional health service that must undergo CON review and satisfy applicable CON criteria. N.C. Gen. Stat. § 131E-178(a) and 183.
2. Because a hospice is a health service facility under N.C. Gen. Stat. § 131E-176(9b), relocation of a hospice from one service area to another requires a CON.
3. An expansion or partial relocation of a health service facility to a second location is considered a relocation. *See Christenbury Surgery Center v. N.C. Dep't of Health & Human Services*, 138 N.C. App. 309, 312, 531 S.E.2d 219, 222 (2000) (describing expansion of a portion of an existing ambulatory surgical program to a second site as a "relocation and expansion").
4. The *Christenbury* court determined that an existing health service facility may only expand to a second or additional site without a CON if the second site is within the same service area for which it received a CON. *Id.* at 312-313, 531 S.E.2d at 222.
5. "Service area" is defined in the CON Act to mean "the area of the State, as defined in the State Medical Facilities Plan or in the rules adopted by the Department, which receives services from a health service facility." N.C. Gen. Stat. § 131E-176(24a). This is the only definition of "service area" in the CON Act. The CON Act does not state a different definition of "service area" for a relocation or expansion of an existing health service facility as compared to a new facility.
6. In June and July 2005, there was no CON rule or regulation that defined the service area for a hospice. The 2005 SMFP, which was in effect at the time of Liberty's June 30, 2005 no review letter to the CON Section and at the time of the agency actions at issue, defines the service area for a hospice as the county in which it is located, and provides that each county in North Carolina constitutes a hospice service area. *See* 2005 SMFP, p. 270-72.
7. Under the 2005 SMFP, a hospice service area was the county in which the hospice is located. This is the only definition of hospice service area in the 2005 SMFP. This definition, therefore, applies to the opening of a first or additional hospice office.
8. Applying a different, broader definition of "service area" to relocations or expansions of existing hospice offices as compared to establishment of new hospices would allow the proliferation of unnecessary and duplicative hospice services, undermine the need methodology for hospices in the SMFP that is based upon a county service area and be contrary to the clear language, intent and purposes of the CON Act as set forth by the North Carolina General Assembly and stated in N.C. Gen. Stat. § 131E-175.

9. Liberty's proposal to open a hospice office in Guilford County is a relocation of an existing health service facility outside of that hospice's existing service area of Cumberland County, and as such, requires a CON.

10. Based upon the undisputed Findings of Fact, pursuant to Conclusions of Law set forth in paragraphs 69-77, the CON Section erred as a matter of law by not requiring Liberty to obtain a CON before opening an additional hospice office in Guilford County. The Conclusions of Law in paragraphs 1-21 alone are sufficient to warrant summary judgment in favor of Petitioners.

C. Alternately, under *In re Total Care*, 99 N.C. App. 517, 393 S.E.2d 338 (1990) Liberty is required to obtain a CON to develop and offer a hospice office in Guilford County.

11. The CON Section based its decision that no CON was required for Liberty to open a hospice office in Guilford County on its interpretation of *In re Total Care*, 99 N.C. App. 517, 518, 393 S.E.2d 338, 339 (1990). Hoffman Dep. at 30.

12. *Total Care* concerned additional home health offices and not additional hospice offices, and was expressly limited to its facts. *Id.* at 522, 393 S.E.2d at 342.

13. The definitions of home health agency and hospice in the CON Act are different.

14. Judicial review of *Total Care* provides the Undersigned with guidance regarding when an existing hospice can open an additional hospice office without a CON.

15. The CON Section erred by not fully and properly applying the criteria and limits established by the Court of Appeals in *Total Care*.

16. The *Total Care* opinion held that a CON was not required to open an additional home health office in the home health agency's existing, current service area as determined by the CON law and regulations in effect at that time.

17. The *Total Care* Court relied upon the definition of "service area" for home health agencies that was in effect at the time. At that time, a home health agency's service area was defined by rule as "a county in which a proponent proposes to establish a home health agency or contiguous counties whose boundaries touch the boundary of the county in which the office of the home health agency will be located and whose grouping is consistent with established medical care utilization patterns." 10 N.C.A.C. 03R.2002 (1989).

18. The CON Act in effect in 2005 prior to December 31, 2005 defines the service area for a hospice as the county in which the hospice is located. N.C. Gen. Stat. § 131E-176(24a); 2005 SMFP.

19. Under *Total Care*, therefore, the opening of an additional hospice office outside the county in which the hospice is located requires a CON.

20. Liberty's hospice was located in Fayetteville in Cumberland County. Under the 2005 SMFP, the service area for Liberty's hospice was Cumberland County.

21. Guilford County is not within Cumberland County, the service area for Liberty's hospice located in Fayetteville. Therefore, under *Total Care*, a CON is required for Liberty to open a hospice office in Guilford County.

22. Based upon the Findings of Fact, and pursuant to the Conclusions of Law set forth above, the CON Section erred as a matter of law in failing to determine that Guilford County was outside the current service area for Liberty's hospice in Cumberland County pursuant to *Total Care*, and in failing to require Liberty to obtain a CON to open a hospice office in Guilford County. The Conclusions of Law in paragraphs 22-32 alone are sufficient to warrant summary judgment in favor of Petitioners.

23. At the time of the *Total Care* case, the service area for home health agencies was defined by rule to include "contiguous counties where boundaries touch the boundary of the county in which the office of the home health agency will be located and whose grouping is consistent with established medical care utilization patterns." 10 N.C.A.C. 03R.2002 (1989).

24. The Court in *Total Care* relied upon the rule defining a home health agency's service area and did not base its decision on any description of geographic service area proposed by the proponent in its submittal to the agency or the proponent's own policies.

25. The Court in *Total Care* relied upon information reported in *Total Care's* annual license renewal forms to determine the "established medical care utilization patterns." *Total Care* at 522, 393 S.E.2d at 341. The Court explicitly noted that the *Total Care* agency had an established history of serving patients in what the Court described as a "fourteen county area block" as evidenced by the *Total Care* agency's annual licensure renewal reports. It was in this block that *Total Care* wished to establish new offices. *Id.*

26. Liberty's annual license renewal forms showed that it had not provided hospice services to patients in Guilford County from any of its hospice offices in 2003 and 2004. Liberty did not provide any evidence of a history of serving hospice patients in Guilford County. Liberty acknowledged that it represented to the CON Section that it had only provided hospice services to one patient in Guilford County.

27. The *Total Care* opinion does not state nor can it be interpreted that services to one patient establishes a "current geographic service area."

28. Even if *Total Care* is interpreted as allowing a broader geographic area than a single county to be the service area for a hospice, the CON Section failed as a matter of law to apply the appropriate criteria under *Total Care* because it never examined the annual SMFP data or Liberty's licensure renewal reports to determine that Liberty reported no history of days of care to hospice patients in Guilford County. Moreover, in establishing the CON laws, the General Assembly intended that multiple factors be reviewed to establish a certificate of need. Likewise, those factors must have at least some reasonable review in order to establish that a certificate of need is not required.

29. In June of 2005, Guilford County was not within Liberty's existing, current service area because Liberty had only provided hospice services to one patient for three days in Guilford County.

30. Guilford County was not within Liberty's existing and current services area because it was not a county that contiguous to Cumberland County.

31. Guilford County was not within Liberty's existing, current hospice service area under *Total Care* because S.H. was deceased and not receiving hospice services at the time of Liberty's no review request. Even if S.H. had still been alive and receiving hospice services, from Liberty at the time of Liberty's no review request, providing services to one patient is not sufficient to establish an existing, current service area under *Total Care*.

32. Based upon the Findings of Fact, and pursuant to the Conclusions of Law set forth in paragraphs 34-42, the CON Section erred as a matter of law in failing to determine that Guilford County was outside the current service area for Liberty's hospice in Cumberland County pursuant to *Total Care*, and in failing to require Liberty to obtain a CON to open a hospice office in Guilford County. The Conclusions of Law in paragraphs 34-42 alone are sufficient to warrant summary judgment in favor of Petitioners.

33. *Total Care* also requires that the health service facility not "substantially change its services" when opening an additional site without a CON. *Total Care* at 522, 393 S.E.2d at 342.

34. The Department has interpreted *Total Care* to mean that there is no substantial change in hospice services if existing staff, medical records and patients are relocated to the additional site to serve the same service area and no new capabilities are added. DFS Declaratory Ruling to Wake Hospice (2/15/94).

35. The CON Section failed to obtain any information to evaluate whether Liberty was "substantially changing its services" by opening an additional hospice office in Guilford County. Again, the CON Section failed to review an important factor of statutory importance in deciding whether a CON was needed or whether no review was warranted both in truth and in fact.

36. Liberty did not relocate existing hospice staff, patients and records to an additional office in Guilford County to continue a history of service to hospice patients in Guilford County. Liberty substantially changed its services by advertising for and hiring new hospice staff, requesting referrals of new hospice patients, seeking a new medical director, and trying to obtain a contract for inpatient services for hospice patients in Guilford County.

37. A CON is required to "develop" or "offer" a hospice home care program. N.C. Gen. Stat. § 131E-176(7), (9c), (13a), (16) and (18) and 178(a).

38. Because Liberty did not have an established history of serving hospice patients in Guilford County from its hospice in Fayetteville in Cumberland County as demonstrated by its annual license renewal reports and because it did not relocate existing hospice staff, patients and records from Cumberland to Guilford County, Liberty substantially changed its services and its actions constituted developing and offering a new hospice in Guilford County that requires a CON.

39. Based upon the undisputed Findings of Fact, pursuant to the Conclusions of Law set forth in paragraphs 44-49, the CON Section erred as a matter of law in failing to determine that Liberty established a new hospice in Guilford County that required a CON before a valid hospice license could be issued. *See* N.C. Gen. Stat. § 131E-176(13a). The Conclusions of Law in paragraphs 44-49 alone are sufficient to warrant summary judgment in favor of Petitioners.

D. The Licensure and Certification Section erred in issuing a license for a hospice to Liberty.

40. As a matter of law, the Licensure and Certification Section erred in issuing a license to Liberty for a new hospice in Guilford County based on an incorrect determination by the CON Section that a CON was not required. This Conclusion of Law alone is sufficient to invalidate the license issued to Liberty and to warrant summary judgment in favor of Petitioners.

41. The Licensure and Certification Section also did not fully and appropriately evaluate the licensure application submitted by Liberty to determine whether licensure requirements for a hospice office in Guilford County were satisfied.

42. The Licensure and Certification Section did not request any information nor do any survey to determine whether Liberty's Fayetteville hospice was capable of providing direct or core hospice services from the Fayetteville office on a 24 hour a day basis to patients in Guilford County and supervising the staff at the Guilford County location from 97 miles away.

43. The Licensure and Certification Section stated that Liberty must demonstrate that it had a contract for inpatient services in Guilford County to satisfy requirements to obtain a license for a hospice office in Guilford County. Williams Dep. at 28.

44. Liberty's license application showed on its face that Liberty did not have a contract for inpatient services to hospice patients in Guilford County.

45. The Licensure and Certification Section failed as a matter of law to determine that Liberty's license application did not demonstrate compliance with licensure requirements and, therefore, failed as a matter of law in issuing a license to Liberty for the hospice office in Guilford County.

46. The Licensure and Certification Section did not request any information or do any survey to determine whether Liberty's Fayetteville hospice office or its home health agency in Guilford County that was not licensed to provide hospice services provided hospices services to S.H.

47. Independent of whether a CON was required for Liberty to open a hospice office in Guilford County, the Licensure and Certification Section erred as a matter of law in failing to assure that Liberty complied with licensure requirements before issuing to Liberty a license for a hospice office in Guilford County. This Conclusion of Law alone is sufficient to invalidate the license issued to Liberty and to warrant summary judgment in favor of Petitioners.

Petitioners are substantially prejudiced as a matter of law by Respondents' actions.

48. An aggrieved party is one that is affected substantially in his or its person, property, or employment by an administrative decision. N.C. Gen. Stat § 150B-2(6).

49. In *In re Wilkesboro*, 55 N.C. App. 313, 319, 285 S.E.2d 626, 630 (1982), the Court expressly acknowledged that it could "think of no better person [than the existing competitor] to assure complete review" of the Agency's decision, and determined that such existing facility had a "substantial stake" in the outcome of any request by a potential competitor that would allow the potential competitor to develop a similar health service in the same area. The Court in *Wilkesboro* determined that the existing provider was aggrieved and thus "affected substantially."

50. In *Empire Power Co. v. N.C. Department of Environmental and Natural Resources*, 112 N.C. App 566, 436 S.E.2d 594 (1993), the Court concluded that an existing power company met the definition of an aggrieved person because it had an interest in having the prospective competitor be required to follow the same rules as all other registered entities before being issued a permit. *Id* at 571, 436 S.E.2d at 598.

51. When one party must go through the CON process and a competitor is subsequently allowed to open an office offering comparable health services without equal scrutiny, the first party is substantially prejudiced as a matter of law.
52. The CON Section also did not establish and give public notice of any criteria, guidelines or standards for opening an additional hospice office in another county, which made its review not legally sufficient and substantially prejudiced HPCG and Piedmont as a matter of law.
53. The CON Section notified Liberty in response to its February 2005 request that Liberty should provide the inclusive dates of hospice services provided to any patients in Guilford County. The CON Section, however, failed to require Liberty to provide this information, which made its review not legally sufficient and substantially prejudiced HPCG and Piedmont as a matter of law.
54. The CON Section's failure to apply the Court's holding in *Total Care* standing alone substantially prejudiced HPCG and Piedmont as a matter of law.
55. The CON Section's approval of Liberty's "no review" request to open a hospice in Guilford County because it was made before rather than after August 26, 2005, demonstrates that the CON Section has not provided equal scrutiny to Liberty's request and in doing so has substantially prejudiced HPCG and Piedmont as a matter of law.
56. The Licensure and Certification Section's issuance of a license to Liberty for a hospice in Guilford County based on an incorrect determination by the CON Section that a CON was not required substantially prejudiced HPCG and Piedmont as a matter of law.
57. The Licensure and Certification Section's issuance of a license to Liberty for a hospice in Guilford County without determining whether hospice licensure requirements were satisfied failed to subject Liberty to equal scrutiny and prejudiced HPCG and Piedmont as a matter of law.
58. In reaching the determination that HPCG and Piedmont are substantially prejudiced by the CON Section's and Licensure and Certification Section's decisions, the Undersigned did not consider any of the expert evidence submitted by Petitioners in their response to Liberty's motion for summary judgment.

Summary Judgment is warranted in favor of Petitioners

59. The result of the CON Section's failure to apply N.C. Gen. Stat. § 131E Article 9 to Liberty's request to open a hospice office in Guilford County resulted in an unequal application of the CON law, allowed Liberty to open a hospice office in Guilford County without a CON, and thwarted the intent of the General Assembly in its establishment of the CON law.
60. Based upon the Findings of Fact, when considering Liberty's June 30, 2005 request, the CON Section did not consider the 2005 SMFP, information available in prior SMFPs or the draft 2006 SMFP, Liberty's annual license renewal forms, the location of Guilford and Cumberland Counties, the distance between Fayetteville and Greensboro or any information other than that contained in Liberty's June 30, 2005 letter and that Liberty held a license for a hospice in Fayetteville. The CON Section did not request any information or do any investigation to determine whether Liberty was providing hospice services from its licensed hospice in Fayetteville, whether Liberty had a history of providing hospice services to patients in Guilford County, whether Liberty was currently providing hospice services to patients in Guilford County, the dates of hospice services provided to S.H., whether S.H. was receiving home health or hospice services or whether Liberty was substantially changing its services by opening a hospice office in Guilford County. The only information that the CON Section considered was Liberty's representation that it was serving one hospice patient, S.H., in Guilford County, from its Fayetteville hospice office. This review was not legally sufficient, was erroneous, was arbitrary, substantially prejudiced HPCG and Piedmont and warrants summary judgment in favor of the Petitioners as a matter of law.

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

RECOMMENDED DECISION by Summary Judgment

Based upon the foregoing findings of fact and conclusions of law, it is hereby found and so decided that Petitioner's motion for summary judgment is GRANTED and Respondent-Intervenor's motion for summary judgment is DENIED. As a matter of law, Liberty must obtain a CON before developing or offering a hospice office in Guilford County.

CONTESTED CASE DECISIONS

The findings and conclusion of this matter warrant, and it is hereby recommended that the CON Section's July 7, 2005 letter be stayed, and the CON Section be stayed from permitting Liberty to develop or offer a hospice office in Guilford County without a CON. As the findings and conclusions of this matter further warrant, it is also recommended that the Licensure and Certification Section be stayed from treating as effective the July 19, 2005 license it issued to Liberty for a hospice office in Guilford County and be stayed from issuing any future licenses to Liberty for a hospice office in Guilford County unless and until Liberty obtains a CON to develop and offer a hospice office in Guilford County or properly acquires a legally existing hospice office in Guilford County.

NOTICE

Before the Agency makes the Final Decision, it is required by G.S. 150B-36(a) to give each party an opportunity to file exceptions to this Recommended Decision, and to present written arguments to those in the Agency who will make the final decision.

The Agency is required by 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. The agency that will make the Final Decision in this case is the North Carolina Department of Health and Human Services.

IT IS SO ORDERED.

This the 25th day of January, 2006.

Augustus B. Elkins II
Administrative Law Judge

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
05 DST 1167

COUNTY OF TYRRELL

MARTIN TODD OLIVER,)
)
 Petitioner,)
)
 v.)
)
 TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF)
 NORTH CAROLINA, a corporation,)
 BOARD OF TRUSTEES OF THE TEACHERS')
 AND STATE EMPLOYEES' RETIREMENT)
 SYSTEM OF NORTH CAROLINA,)
 a body politic and corporate;)
 DEPARTMENT OF STATE TREASURER,)
 RETIREMENT SYSTEMS DIVISION, and)
 THE STATE OF NORTH CAROLINA,)
 Respondents)

DECISION

THIS MATTER was heard before the undersigned Augustus B. Elkins II, Administrative Law Judge, on November 21, 2005, in Raleigh, North Carolina.

APPEARANCES

For the Petitioner: David G. Schiller, SCHILLER & SCHILLER, PLLC
Raleigh, North Carolina, appearing

For the Respondent: Robert M. Curran, Assistant Attorney General
Raleigh, North Carolina, appearing

ISSUE

Whether Petitioner is eligible for disability retirement benefits pursuant to the North Carolina Statutes, and under *Faulkenbury v. Teachers' and State Employees' Retirement System of the State of North Carolina*, 345 N.C. 683, 483 S.E.2d 422 (1997).

STIPULATIONS OF FACT
per Joint Exhibit 1

1. The Petitioner, Martin Todd Oliver, became employed with the North Carolina Department of Agriculture and a contributing member of the Teachers' and State Employees' Retirement System on February 8, 1978.
2. The Petitioner terminated his position in the State System on February 26, 1990. He had 12 years of membership service in the Teachers' and State Employees' Retirement System at this time.
3. The Petitioner became employed with the Edgecombe County Sheriff's Department and a contributing member of the Local Governmental Employees' Retirement System on February 19, 1990.
4. The Respondent Retirement Systems Division received an Application of Member for Transfer Between Systems (Form 5TR) on April 3, 1990 requesting a transfer from the Teachers' and State Employees' Retirement System to the Local Governmental Employees' Retirement System. The transfer was completed on May 29, 1990.

5. The Petitioner terminated his position with the Edgecombe Sheriff's Department on November 22, 1994. He had 16 years and 10 months of membership service in the Local Governmental Employees' Retirement System at this time, which included the 12 years of membership service transferred from the Teachers' and State Employees' Retirement System.

6. The Petitioner became employed with the North Carolina Department of Environment Health & Natural Resources, and again became a contributing member of the Teachers' and State Employees' Retirement System, on December 1, 1994.

7. The Respondent Retirement Systems Division received an Application of Member for Transfer Between Systems (Form 5TR) on December 6, 1994 requesting a transfer from the Local Governmental Employees' Retirement System to the Teachers' and State Employees' Retirement System. The transfer was completed on February 28, 1995.

8. On June 2, 2003, the Retirement System received an Application for Retirement, which indicated that Petitioner was applying for a Disability retirement under the *Faulkenbury* case.

9. On July 18, 2003, the Retirement System notified the Petitioner by letter that he was not eligible to apply for disability retirement under the *Faulkenbury* Class Action.

10. On September 22, 2003 Petitioner's Application for Retirement was cancelled for the reason he applied for long-term disability benefits under the provisions of the Disability Income Plan of North Carolina.

11. On October 7, 2003 the Medical Board reviewed Mr. Oliver's case. He was approved for long-term with a beginning date of April 2002 and an end date of January 31, 2008. First payment was made in November 2003.

BASED UPON the above Stipulated Facts, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. The N.C. Office of Administrative Hearings has jurisdiction over the parties and subject matter of this contested case pursuant to N.C.G.S. 150B-23, *et. seq.*, and other applicable statutes, and there is no question as to misjoinder or nonjoinder.

2. Prior to January 1, 1988, a member of the Teachers' and State Employees' Retirement System who met the statutory qualifications could retire on a "disability retirement" pursuant to the provision of G.S. § 135-5(c). Effective January 1, 1988, the General Assembly adopted the Disability Income Plan, G.S. §§ 135-100, *et seq.*, and amended § 135-5(c) to provide that the terms of § 135-5(c) "shall not be applicable to members in service on or after January 1, 1988." Thereafter, members who met the disability qualifications were entitled to either short-term or long-term disability benefits, which benefits were calculated differently than the disability retirement benefits.

3. The North Carolina Supreme Court's decision in *Faulkenbury v. Teachers' & State Emples. Retirement Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997), determined that members of the Retirement System who were vested prior to the adoption of the Disability Income Plan (January 1, 1988) and who later became disabled would still be eligible for disability retirement benefits, notwithstanding the language of § 135-5(c) that its provisions "shall not be applicable to members in service on or after January 1, 1988."

4. Though examining a determination of additional disability benefits owed, the case of *Faulkenbury v. Teachers' & State Emples. Retirement Sys.*, 132 N.C.App.137, 510 S.E.2d 675 (1999), is informative as a review of sorts to *Faulkenbury v. Teachers' & State Emples. Retirement Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997). *Faulkenbury* (1999) states, "This case involves four consolidated cases appealed from two decisions of the trial court on remedial questions following a judgment for the plaintiffs on liability. (Plaintiff Hailey's case was consolidated with the three original actions and certified as a class action on 28 July 1997). On 21 July 1995, the trial court entered judgment for the plaintiffs and concluded they were entitled to receive additional disability benefits. This judgment was affirmed by our Supreme Court in *Faulkenbury v. Teachers' and State Employees' Ret. Sys. of North Carolina*, 345 N.C. 683, 483 S.E.2d 422 (1997). These cases, certified as class actions, challenged the way disability benefits were calculated under the Teachers' and State Employees' Retirement System of North Carolina and the North Carolina Local Governmental Employees' Retirement System."

5. *Faulkenbury* (1999) goes on to state, "the plaintiffs include all class members who had been employed for more than five years . . . and whose retirement and disability benefits were vested under either the Teachers' and State Employees' Retirement System of North Carolina or the North Carolina Local Governmental Employees' Retirement System."

6. A Teachers' and State Employees' Retirement System member applying for disability benefits under *Faulkenbury* (1997) must vest not later than January 1, 1988. Petitioner's rights vested in the Teachers' and State Employees' Retirement System prior to January 1, 1988. Petitioner's right to make a claim for disability retirement benefits in the Teachers' and State Employees' Retirement System vested after five years of employment with the State of North Carolina, which was on February 8, 1983. *Faulkenbury v. Teachers' and State Employees' Retirement System of the State of North Carolina*, 345 N.C. 683, 483 S.E.2d 422 (1997).

7. Respondents argue that a "transfer between [retirement] systems is a transfer of service only and does not transfer other accrued rights." In Respondents' view, Petitioner did not transfer his vested rights when he transferred from the Teachers' and State Employees' Retirement System (TSERS) to the Local Governmental Employees' Retirement System (LGERS).

8. Respondent cites G.S. § 128-34(b), which is the statutory provision pursuant to which the Petitioner transferred his credit from the TSERS to the LGERS, and provides in part as follows:

Any member of the Local Governmental Employees' Retirement System shall be entitled prior to his retirement to transfer to this Retirement System his credits for membership and prior service in the Teachers' and State Employees' Retirement System: Provided, the actual transfer of employment is made while he has an active account in the State System and such person shall request the State System to transfer his accumulated contributions, interest, and service credits to this Retirement System; provided further, the State System agrees to transfer to this Retirement System the amount of reserve held in the State System as the result of previous contributions of the employer on behalf of the transferring employee.

9. Respondent further cites G.S. § 135-18.1, which governs the transfer of retirement service from the Local into the State system, and provides in part as follows:

(a) . . . Any person who becomes a member of this Retirement System on or after July 1, 1951, shall be entitled prior to his retirement to transfer to this Retirement System his credits for membership and prior service in the local system: Provided, the actual transfer of employment is made while his account in the local system is active and such person shall request the local system to transfer his accumulated contributions, interest, and service credits to this Retirement System; provided further, with respect to any person who becomes a member of this Retirement System after July 1, 1969, the local system agrees to transfer to this Retirement System the amount of reserve held in the local system as a result of previous contributions of the employer on behalf of the transferring employee.

(b) The accumulated contributions withdrawn from the local system and deposited in this Retirement System shall be credited to such member's account in the annuity savings fund of this Retirement System and shall be deemed, for the purpose of computing any benefits subsequently payable from the annuity savings fund, to be regular contributions made on the date of such deposit.

10. Respondent lastly cites G.S. § 135-5(f) which states, "his membership in the System shall cease and, if he thereafter again becomes a member, no credit shall be allowed for any service previously rendered except as provided in G.S. 135-4, and such payment shall be in full and complete discharge of any rights in or to any benefits otherwise payable hereunder."

11. The authorities cited above deal with such matters as, "credits for membership," "accumulated contributions, interest, and service credits," "previous contributions," "computing any benefits subsequently payable from the annuity savings fund," and "no credit shall be allowed for any service previously rendered."

12. N.C. Gen. Stat. §135-28(b), however, states: "Any such **member shall retain all the rights, credits and benefits** obtaining to him under this Retirement System at the time of such transfer while he is a member of the local system and does not withdraw his contributions hereunder.. ." N.C. Gen. Stat. §135-28(b) (1983) (emphasis added).

13. In looking at the history of *Faulkenbury* (1997), and the "review" language latter cited in *Faulkenbury* (1999) where the court is looking at "the way disability benefits were calculated under the Teachers' and State Employees' Retirement System of North Carolina and the North Carolina Local Governmental Employees' Retirement System.:" the Undersigned is struck by the review of both systems and the logic of maintaining the rights of an eligible member as he or she may transfer uninterrupted between the two systems.

14. Petitioner's retained rights included his vested rights under *Faulkenbury*. Respondents' denial of Petitioner's *Faulkenbury* disability benefits violates Chapter 135 of the General Statutes. Petitioner's vested right (disability benefits) are and have been unlawfully impaired, diminished and violated as announced not only in *Faulkenbury* but also in *Simpson v. North Carolina Local Governmental Retirement System*, 88 N.C.App. 218, 363 S.E.2d 90 (1987), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988).

15. Respondents' failure to pay Petitioner his appropriate disability retirement benefits constitutes a deprivation of property. Respondent's interpretative application of Chapter 135 to the Petitioner is erroneous as a matter of law in that Chapter 135 does not require the cessation of retirement benefits and rights to a vested and retired member of the Teachers' and State Employees' Retirement System (such as the Petitioner) when the member begins working in the Local Government Employees' Retirement Service. Those vested contractual rights may not be impaired, diminished or otherwise not honored. Petitioner's contractual rights as a State employee were properly vested under *Faulkenbury* in the Teachers' and State Employees' Retirement System and as a continuous employee in the two systems they have not been lost.

BASED UPON the foregoing Stipulated Facts and Conclusions of Law, the Undersigned makes the following:

DECISION

There is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. The Respondent's action toward Petitioner, that is denial of eligibility for disability benefits under *Faulkenbury v. Teachers' & State Emples. Retirement Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997), was in error. Petitioner is entitled to a recalculation by Respondent of the amount of Petitioner's monthly disability retirement benefits to reflect Petitioner's membership in *Faulkenbury*.

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. Gen. Stat. § 150B-36(a).

In accordance with N.C. Gen. Stat. § 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. 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 Board of Trustees of the Teachers' and State Employees' Retirement System. The 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 the 2nd day of February, 2006.

Augustus B. Elkins II
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE
OF ADMINISTRATIVE HEARINGS
05 EDC 1070

RODOLFO R. TOLEDO,)
 Petitioner,)
))
 v.)
))
NORTH CAROLINA DEPARTMENT of)
PUBLIC INSTRUCTION,)
 Respondent.)

DECISION

THIS MATTER came on for hearing before the undersigned Administrative Law Judge, Augustus B. Elkins II, on 26 October 2005, in Raleigh, North Carolina.

APPEARANCES

For the Petitioner: John Keating Wiles, Esq.
Cheshire, Parker, Schneider, Bryan & Vitale
Post Office Box 1029
Raleigh, North Carolina 27602

For the Respondent: Laura E. Crumpler, Esq.
Assistant Attorney General
NC Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602

ISSUES

Whether Petitioner engaged in illegal, unethical, or lascivious conduct.

Whether there is a reasonable and adverse relationship between that conduct and Petitioner's continuing ability of the person to perform any of his professional functions in an effective manner.

Whether Respondent is authorized by fact and law to revoke the Petitioner's North Carolina Teacher's License.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 115C-296
16 N.C.A.C. 6C.0601
16 N.C.A.C. 6C.0602
16 N.C.A.C. 6C.0312

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, along with the documents and exhibits received and admitted into evidence and the entire record in this proceeding, the Undersigned makes the following Findings of Fact. In making the 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. The Petitioner holds a North Carolina teaching license issued by the State Board of Education. Petitioner had been employed as a teacher by Pitt County Schools as a high school teacher. He had been licensed to teach in North Carolina since 1994. (T pp. 19, 26).

2. On April 7, 2005, the Respondent found reasonable cause to revoke Petitioner's teaching license on the basis of its determination that he had entered a deferred prosecution agreement upon the charges of taking indecent liberties with a child and that he had pled guilty to and been convicted of taking indecent liberties with a child. On May 12, 2005, the Respondent mailed by certified mail, return receipt, notice to the Petitioner that it would revoke the Petitioner's teaching license unless the Petitioner initiated administrative proceedings within 60 days of the Respondent's mailing of the notice. On July 12, 2005, the Petitioner filed a petition for a contested case hearing alleging that the Respondent's action against his teaching license was not well-grounded in fact or law.

3. In his prehearing statement to this contested case, the Petitioner denied that he had pled guilty to taking indecent liberties with a child, denied that he had been convicted of taking indecent liberties with a child, and asserted that the Respondent's action against the Petitioner's teaching license was, therefore, not well-grounded. At the time of the hearing on this matter, the Respondent had withdrawn its allegation that the Petitioner had pled guilty to taking indecent liberties with a child and had withdrawn its allegation that the Petitioner had been convicted of taking indecent liberties with a child, but maintained that its action against the Petitioner's teaching license was authorized because, it alleged, the Petitioner had engaged in illegal, unethical, or lascivious conduct.

4. In the spring of 2002, Petitioner was arrested under suspicion of taking indecent liberties with a minor. (Exhibits 1 and 1A) The arrest stemmed from an incident occurring at the Pulse Athletic Club in Greenville, North Carolina. (Exhibit 2) The club had an after-school program for children in which the children are picked up from various schools and taken by bus to the club where they are supervised until their parents come to pick them up. (T pp. 49-50) The reported victim in this case was a 13-year-old boy, "R.M.," who was a participant in the after-school program at Pulse Athletic Club. (T p. 50)

5. On 25 March 2002, Officer J.P. Valevich of the Greenville Police Department responded to a reported sexual assault on a juvenile. (Exhibit 2) He interviewed the victim as well as a member of the club staff. (Exhibit 2). In Officer Valerich's investigation report, he described the following:

On 03/25/02, I was dispatched along with [Officer] C.R. Bradshaw #299 to the Pulse Athletic Club regarding a sexual assault on a juvenile that had just occurred. Upon our arrival, S1 [suspect 1] had left the club and we spoke with V1 [victim 1] in the Manager's [office]. I observed V1 as he described to me what had happened and he seemed very nervous and anxious.

V1 stated that he entered the sauna in the men's bathroom. He stated that S1 entered the sauna shortly after him and began smiling at him. V1 stated he and S1 became engaged in conversation and he began to feel awkward when S1 asked him, "Do you cum?" V1 advised he felt very uncomfortable but, still answered S1's question with, "It's no [sic] of your business but, yes I do." V1 stated that during their interaction, it appeared that S1 was masturbating. V1 then advised me that S1 told him that the sauna was more effective if he was (the victim) wet. V1 went and took a shower and came back into the sauna, dressed in only a towel. V1 advised he again engaged in conversation with S1. He then stated S1 approached him and began to "jerk him off." I asked V1 what he meant by that and he stated, "stroking my dick." V1 told me that S1 asked him if it felt good and he replied, "It would feel better if I did it." At that point, S1 began touching him again. V1 stated at that point, he asked S1 if he could tell anybody about the incident and S1 advised him no.

(Exhibit 2)

6. Officer Valevich talked with Jessica, the manager on duty. After V1 reported the incident, she had one of the male staff members take R.M. into the men's bathroom so he could point out the suspect. (Exhibit 2) Further information was obtained through the club's computer. (Exhibit 2) By the time the officers arrived at the club, the suspect, determined to be the Petitioner, had already left through the back door of the club. (Exhibit 2)

7. The Officer also spoke with the victim's mother. (Exhibit 2) She told him that R.M. had Attention Deficit Disorder and had difficulty recalling details. Neither the mother nor R.M. wanted to pursue criminal charges. (Exhibit 2) According to the Officer, R.M. did omit details in each of the three accounts he gave concerning the incident. (Exhibit 2)

8. Petitioner was arrested and subsequently indicted by a grand jury. (Exhibits 30A and 30B) On April 3, 2002, the Petitioner was charged, in Case No. 02 CR 054050 in Pitt County, with taking indecent liberties with a child, a violation of N.C. Gen. Stat. § 14-202.1, a Class F felony.

9. As a result of his arrest, Petitioner was placed on suspension by the Pitt County Schools. On 24 June 2002, prior to the conclusion of the investigation or disciplinary action, Petitioner resigned from his position as a high school teacher with the Pitt County Schools. (Exhibits 25 and 26)

10. On April 19, 2004, in Case No. 02 CRS 54050 in Pitt County Superior Court, Mr. Toledo entered into a deferred prosecution agreement. In a "deferred prosecution" agreement the accused is allowed to defer entering a plea, and defer trial, by agreeing to abide by certain conditions, the fulfillment of which will result in the dismissal of the charges. (T p. 52)

11. Kimberly Robb was the Assistant District Attorney (DA) for Pitt County, District 3A, assigned to prosecute the Petitioner's case. (T p. 44) She had worked as an assistant DA for approximately thirteen (13) years and was assigned primarily to handle sexual assault and child abuse cases. (T p. 44)

12. Ms. Robb ultimately decided that, although she had sufficient evidence to proceed to trial, it was in the best interests of the child not to go forward with the charges. (T p. 54) The child's physician recommended against pursuing the matter and, Ms. Robb agreed to honor the wishes of the family and the doctor. (T pp. 54-55) She agreed to allow Petitioner to enter into a "deferred prosecution" agreement. (T p. 54) Ms. Robb allowed deferred prosecution agreements in "exceedingly rare" cases. (T p. 54) Ms. Robb insisted, as a condition of a deferred prosecution agreement, that the defendant sign an "Admission of Responsibility" acknowledging guilt for the underlying offense. (T p. 53).

13. Petitioner, with the advice and consent of his attorney, entered into a Deferred Prosecution Agreement with the District Attorney's Office, pursuant to which the DA agreed to defer prosecuting the charges in exchange for Petitioner's agreeing to certain conditions. Petitioner's Deferred Prosecution Agreement followed the format set out in N.C. Gen. Stat. § 15A-1341(a1).

14. As a condition of the Agreement, Petitioner admitted that he:

did unlawfully, willfully, and feloniously did take and attempt to take criminal, improper, and indecent liberties with [R.M.] for the purpose of arousing and gratifying sexual desire and did commit and attempt to commit a lewd and lascivious act upon the body of [R.M.] at the time of the offense, the child was under 16 years of age and the defendant was over 16 years of age and at least five years older than the child. (Exhibit 6)

15. The admission was signed by Petitioner, his attorney, and the District Attorney. The Agreement further recited that the Petitioner "fully understood the charges against him and he agreed that the admission or [sic] responsibility given by him and any stipulation of fact shall be used against him and admitted into evidence without objection in the State's prosecution against [him] for this offense should prosecution become necessary as a result of [his] violation of these terms and conditions of Deferred Prosecution." If the Deferred Prosecution Agreement had been revoked for the Petitioner's violation of its terms and the State had proceeded to trial against him, Ms. Robb testified that, although the "Admission of Responsibility" would have been introduced against him, the admission in and of itself would not have been sufficient for the State to prevail on its accusation that he had committed the conduct charged against him.

16. Petitioner's Deferred Prosecution Agreement provided that, in addition to standard conditions including refraining from violating any state, federal, or local law, restricting association to only law-abiding persons, reporting obligations to the probation office, the Petitioner was to be "assessed by a licensed psychiatrist/psychologist for sexual offenders and enroll in and complete all programs of treatment recommended and/or prescribed," and "upon completion of all programs recommended and/or prescribed and written documentation of same, the period of time for this deferred prosecution shall end, and this agreement terminated and the charges dismissed against Defendant with prejudice." (Exhibit 4)

17. On April 19, 2004, Petitioner's Deferred Prosecution Agreement was approved by the Honorable W. Russell Duke, Jr., Senior Resident Judge, Pitt County Superior Court.

18. As shown in Respondent's Exhibit No. 4, Judge Duke's approval of the Agreement proceeded upon that Court's findings of the following facts:

a. Prosecution in this case has been deferred by the District Attorney pursuant to a written agreement with the defendant for the purpose of allowing the defendant to demonstrate good conduct.

b. Each known victim of the alleged crime has been notified of this hearing by subpoena or otherwise and given the opportunity to be heard.

c. The defendant has not previously been convicted of any felony or misdemeanor involving moral turpitude. The defendant has not been convicted by any other misdemeanor except as revealed on the application attached hereto.

d. The defendant states under oath that he has never been placed on probation previously.

e. The defendant is unlikely to commit another offense punishable by a term of imprisonment greater than thirty (30) days.

19. The Petitioner fulfilled the conditions of his Deferred Prosecution Agreement and the charges against him were subsequently dismissed with prejudice.

20. Petitioner maintained his innocence in the hearing on this matter, asserting that he signed the Admission of Responsibility on the advice of his attorney. (T p. 89) He understood that once all the conditions of his Deferred Prosecution Agreement were met, the charges would be dismissed and "that would be the end of the matter." (T p. 20) Petitioner testified that at the time of the case coming forward he would have signed anything to put the case behind him. He stated that he would never have signed the Admission if he thought it would be used against him later. (T p. 21)

21. When asked on cross-examination if the Admission of Responsibility was true when he signed it, Petitioner testified that he was not guilty on April 19, 2004 when he signed the Admission of Responsibility. Petitioner stated at this contested case hearing that he was now withdrawing his admission of April 19, 2004.

22. Petitioner testified that he had recently been hired by the Orange County School System. (T p. 33) At one point he testified that he had informed Orange County officials of his past charges but subsequently he stated he had not told Orange County about the charges. (T pp. 37-38)

23. Petitioner's statements to the police regarding the 2002 incident differed from the account given by the alleged victim. In one of his statements, Petitioner wrote:

I arrived at Pulse Athletic Club at approximately 5:00 pm with the intention of working out as usual and return home for a dinner date. After my usual cardio workout, I proceeded to the sauna/shower area to sweat in the sauna/steam room. After I arrived in the sauna, a few minutes had lapsed when a young man entered the room wrapped in a towel portraying a semi-erect penis. He proceeded to [a] seat up above the bleachers across from where I sat with my legs up and a towel across my mid-section. Of course, only men enter this room, so I did not presume to cover my penis which was exposed due to the position in which I sat on the bench. The young man appeared very anxious and eager.

After a minute or two of being in the sauna with me, the young man began to get more erect and aroused than when he first entered. His towel was already off his body, his full erection visible to me. We exchanged some quick and inconsequential words dealing with the heat of the room and how much weight can be lost in there. Not much after those few words transpired, and then the young man began to stroke himself while showing his erection to me. I myself began to become a little aroused by this sight and the obvious "flirtation." However, I decided to go shower some and cool down before things got any more complicated.

As I showed signs of leaving the room, the young man in question, and whom [sic] continued to stroke his erect penis, asked me "if I would follow him into the other room or the toilets?" - My reply was "absolutely not!" So, in what I believe an act of desperation, he proceeded to come over and show me his hard penis and place my hand on it so that I would help him ejaculate. This is the point where I felt it imperative to leave the room, but not before [going] outside the door and bringing him a towel to cover up. I went out right away and distanced myself from the situation that had turned very awkward.

I proceeded to the shower area to cool off and perhaps lose the young fellow whom [sic] was very persistent by this point about further contact. I did so while in the company of other adults who were already there and in the spa. As I took my shower, I noticed that the young man was still standing outside the showers staring at me and waiting. I remained in there for a few more minutes. The young man then disappeared out of sight the way of the toilets/dressing rooms. Did not see him again for the rest of my stay in that area. I spent maybe another couple of minutes there in the steam room, then showered and went into the locker room to get dressed and leave.

I did so very quickly since I had been running late and left using the side gym door near where I park. I went on to dinner and then home.

I have never had any previous relations, nor do I intend to do so in the future, with any minors/children. I have never been in this situation before nor do I intend to ever be again. My sexual relationships have always been with consenting adults (over 21!). Also, nor would I ever engage in this kind of conduct in a public place.

/s/ Rodolfo R. Toledo.

(Exhibit 12) (emphases in original)

24. In another oral statement reduced to writing, Petitioner stated, "I will admit my penis did become aroused and was flattered this young boy would be attracted to me but I never touched him. No where on his body. No part of me touched any part of him. I do prefer men, not children." (Exhibit 14).

25. Petitioner testified that his statement, in which he admitted that he touched the victim's penis, was, in fact, incorrect. He stated, "It didn't happen. I didn't touch the boy." (T p. 103) Petitioner testified that he did not know the alleged victim, had never

seen him before the incident in the sauna, and had not seen him since then. (T p. 87) Petitioner did state that he was aware that the victim was a child. (T p. 87)

26. Petitioner admitted in his statement that he was "aroused" by the sight of the thirteen year old and by the "obvious flirtation." Petitioner went on at the hearing to state that, "it was a little flattering to have a young man make advances at you . . ." (T p. 104)

27. When Petitioner then left the sauna area, he did not tell anyone else at the club about the incident. He did not warn the other men in the dressing room or shower area. He did not report the incident to the staff. (T p. 108) The alleged victim went immediately to the front desk and reported the incident.

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 of this contested case. The parties received proper notice of the hearing in the matter. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

2. The State Board of Education is vested with the authority, by Constitution and by statute, "to supervise and administer the free public school system." N.C. Const. Art. IX, sec. 5; N.C.G.S. § 115C-12. As part of its constitutional and statutory powers, the State Board has "entire control of certifying all applicants for teaching positions in all public elementary and high schools of North Carolina." N.C.G.S. § 115C-296(a); *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971), *cert. denied*, 406 U.S. 920 (1972).

3. Pursuant to its authority to regulate the certification, or licensing, of teachers, the State Board of Education has adopted a rule, codified as 16 N.C.A.C. 6C.0312, that governs the suspension and revocation of teacher licenses. That rule provides, in part, that the Board may revoke a license for "illegal, unethical, or lascivious conduct by a person if there is a reasonable and adverse relationship between the underlying conduct and the continuing ability of the person to perform any of his/her professional functions in an effective manner." 16 N.C.A.C. 6C.0312(a)(8).

4. The State Board has adopted rules prescribing the standards of professional conduct, or ethics, for teachers. Those rules require, among other things, the licensed educator: (a) to practice the professional standards of federal, state, and local governing bodies; (b) to serve as a positive role model and to demonstrate a high standard of personal character and conduct; and (c) to treat all students with respect, including not committing any sexual act with a student or intentionally soliciting, encouraging, or consummating a romantic or physical relationship with a student. 16 N.C.A.C. 6C.0602(b) (1), (2), and (5).

5. The North Carolina General Assembly has determined that certain crimes, whether misdemeanors or felonies, indicate that a teacher "(i) poses a threat to the physical safety of students or personnel, or (ii) has demonstrated that he or she does not have the integrity or honesty to fulfill his or her duties as public school personnel." N.C.G.S. § 115C-332(a)(1). Those crimes, as specifically enumerated in that section, include all sex crimes and crimes against minors.

6. Petitioner entered into a Deferred Prosecution Agreement in which he signed an Admission of Responsibility to a sex crime against a minor. Petitioner maintained his innocence of the charges of taking indecent liberties at this contested case hearing and recanted his Admission of Responsibility, in essence stating he had been untruthful in his admission. He contended he only signed the Admission on the advice of his attorney and understood that once he fulfilled the conditions of his Deferred Prosecution Agreement, the charges would be dismissed and his Admission could never be used against him in the future. This was a second recanting by Petitioner. In his statement, given to Officer Elks, Petitioner admitted that he was forced by the child to touch the child's penis. On cross-examination at the hearing, Petitioner retracted that portion of his statement, claiming he never meant to admit that fact.

7. The record in this case is void of credible and collaborative evidence that any promises were made to Petitioner, by anyone, that his Admission would never be brought up again ; or that any person offered him protection from future repercussions from any inculpatory statements made by him, in court or out of court.

8. As part of a Deferred Prosecution Agreement, Petitioner freely and voluntarily, upon the advice of counsel, admitted his guilt to the crime of taking indecent liberties with a minor. The acknowledgment of guilt contained in the agreement, without more, is insufficient to raise the legal inference that a guilty plea was entered. N.C.G.S. § 15A-1011, *et seq.*; *State v. Ross*, _ N.C. App. __, 620 S.E.2d 33 (2005). However, while the admission is not binding as a guilty plea in law, it is nevertheless an acknowledgment of guilt in fact and may be and has been considered by the Undersigned in an assessment of all the evidence.

9. As Respondent is attempting to change the status quo (i.e. revoke Petitioner's teaching license), the burden of proof is on Respondent to show that Petitioner engaged in illegal, unethical, or lascivious conduct, and there is a reasonable and adverse relationship between that conduct and Petitioner's continuing ability of the person to perform any of his professional functions in an effective manner. The responsible party for the burden of proof must carry that burden by a greater weight or preponderance of the evidence. Black's Law Dictionary cites that "preponderance means something more than weight; it denotes a superiority of weight, or outweighing." 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.

10. The Respondent has met its burden of showing, by a preponderance of the evidence, that Petitioner took indecent liberties with a minor and thus engaged in illegal, unethical, or lascivious conduct, and further is in violation of the code of ethics for professional educators as set forth in the "Finding of Reasonable Cause and Statement of Charges." Petitioner's conduct bears a reasonable and adverse relationship to the Petitioner's ability to perform any of his professional functions in an effective manner.

11. Petitioner's conduct is not consistent with the high standards of conduct expected of teachers in the State of North Carolina. See *Faulkner v. Board of Educ.*, 311 N.C. 42, 316 S.E.2d 281 (1984).

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

DECISION

It is the decision of the Undersigned that Respondent has carried its burden of proof by a preponderance of the evidence in this matter. 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, Respondent has not exceeded its authority, acted erroneously, failed to use proper procedure, or failed to act lawfully. Respondent did not act arbitrarily or capriciously in initiating the revocation of Petitioner's teaching license and its decision to do so is hereby affirmed.

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. Gen. Stat. § 150B-36(a).

In accordance with N.C. Gen. Stat. § 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 State Board of Education. The 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 24th day of February, 2006.

Augustus B. Elkins II
Administrative Law Judge

STATE OF NORTH CAROLINA

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
05 EHR 0834

COUNTY OF BRUNSWICK

Jan Harris, Brunswick Environmental)
Action Team,)
Petitioner,)
v.)
NC DENR, NC Division of Coastal)
Management,)
Respondent,)
and)
Edward M. Gore and Dinah E. Gore,)
Intervener-Respondents,)
and)
Tidal Ventures, LLC,)
Intervener-Respondent.)

DECISION

This contested case was heard on October 18-20, 2005 at the Carolina Beach Municipal Building in Carolina Beach, North Carolina, before the Honorable Beryl E. Wade, Administrative Law Judge. The case was pursuant to a petition for contested case hearing filed by the Third-Party Petitioners, pursuant to the Third Party Provisions in the Coastal Area Management Act found at N.C.G.S. 113A-121.1(b). The petition challenges the Division of Coastal Management's (DCM's) issuance of Major Permit # 42-05 under the Coastal Area Management Act (CAMA) to Intervener-Respondent Tidal Ventures, LLC for development in the Town of Sunset Beach on property owned by Intervener-Respondents Ed and Dinah Gore.

ISSUE

Whether the Division of Coastal Management acted erroneously or failed to act as required by law or rule by issuing a Coastal Area Management Act (CAMA) Major Permit to Intervener-Respondent Tidal Ventures, LLC for development in the Town of Sunset Beach on property owned by Intervener-Respondents Ed and Dinah Gore. Specifically, Petitioners contend that DCM acted erroneously or failed to act as required by law or rule in issuing the permit in violation of 15A NCAC 7H.0602. Petitioner is alleging that the proposed development will likely close the adjacent waters to shellfishing.

APPEARANCES

For Petitioner: John Runkle, Esq.
Attorney At Law
PO Box 3793
Chapel Hill, NC 27515

For Respondent: Christine Anne Goebel, Esq.
Assistant Attorney General
N.C. DEPT. OF JUSTICE
9001 Mail Service Center
Raleigh, NC 27699-9001

For Intervener-Respondents
Edward M. And Dinah E. Gore: Amos C. Dawson, III, Esq.
Maupin Taylor PA
PO Drawer 19764
Raleigh, NC 27619-9764

For Intervener-Respondent
Tidal Ventures, LLC:

H. Mark Hamlet, Esq.
Crossly, McIntosh, Prior & Collier
2451 S. College Road
Wilmington, NC 28412

TESTIFYING WITNESSES

Janice M. Harris, President of Brunswick Environmental Action Team, Petitioner
James T. Bond, Sunset Beach Property Owner
Carmel R. Zetts, Sunset Beach Property Owner
Martha Emick, Sunset Beach Property Owner
Thomas Stewart Blue, PE, BLUE: Land, Water Infrastructure, Expert Witness for Petitioner
Edward M. Gore, Intervener-Respondent and Property Owner
Samuel N. Varnum, Principal in Tidal Ventures, LLC, Intervener-Respondent and Permittee
Jason Dail, DCM Major Express Permits Coordinator
Linda J. Fluegel, Town of Sunset Beach Administrator
James H. Gregson, DCM District Manager
Michael Ted Tyndall, DCM Assistant Director for Permits & Enforcement
David D. Bowman, East Coast Engineering and Expert Witness for Respondents

EXHIBITS RECEIVED INTO EVIDENCE

Stipulated Exhibits:

It is stipulated and agreed that each of the exhibits identified are a genuine, true and correct copy of the original, and are relevant and may be received into evidence without further identification or proof. Exhibits B, C, & D are found attached to the Prehearing Order. The exhibits are identified as follows:

- A. DCM's Permit File, including index contained in a separate blue binder and prepared by Respondent, and bates stamped page numbers
- B. Third Party Petition to the CRC Chairman filed by Jan Harris and BEAT
- C. DCM's Staff Recommendation in response to the Third Party Petition, including attachments
- D. Decision of the Chairman of the CRC granting the Petitioner's Third Party Petition

Petitioner's exhibits:

P1 Aerial photo of site area
P3 Curriculum vitae of Thomas S. Blue (Response to Discovery P-1)
P4 Minutes of Sunset Beach town meeting from August 2, 1999
P5 Minutes of Sunset Beach town meeting from August 30, 1999
P6 Minutes of Sunset Beach town meeting from November 10, 2003
P7 Aerial photo, same as P1 but with markings made by witnesses

Respondent:

R1 Site photo
R2 Site photo
R3 Site photo
R4 11x17 black and white copy of site plans, marked C-1 through C-4

Intervener-Respondents:

IR1 Enlarged site photograph taken by Intervener Respondent
IR2 Enlarged site photograph taken by Intervener Respondent
IR3 Enlarged site photograph taken by Intervener Respondent
IR4 Enlarged site photograph taken by Intervener Respondent
IR5 Shellfishing closures map produced by Shellfish Sanitation
IR6 Enlarged copies of site plan with color added
IR7 Affidavit of Linda Fluegel
IR8 NOV Response Letter
IR9 Curriculum vitae of David Bowman

MOTIONS

On September 1, 2005, Respondent Division of Coastal Management and Intervener-Respondents Tidal Ventures, LLC and Edward M. and Dinah E. Gore filed a Joint Motion in Limine to exclude evidence regarding the environmental impact of development other than development permitted under CAMA Permit No. 42-05, which permit is the subject matter of this contested case hearing. On September 21, 2005, Petitioner, through its counsel John D. Runkle, filed Petitioner's Response to Motion in Limine. The joint Motion came on for hearing before the undersigned Administrative Law Judge on Friday, September 21, 2005 at the Office of Administrative Hearings in Raleigh, NC. Respondent and Intervener-Respondents submitted a copy of the Site Plan, Stormwater & Erosion Control Plan for the subject development, pictures of the subject property and a notebook containing 18 exhibits in support of their arguments in favor of the Motion. Petitioner's counsel submitted exhibits in opposition to the Motion.

After due consideration of the Motion in Limine, the exhibits presented at the hearing on the Motion by all parties and the extensive arguments of counsel, the undersigned Administrative Law Judge issued an Order granting the relief requested in Respondent and Intervener-Respondents' Motion In Limine. Pursuant to the Order Granting Respondent and Intervener-Respondents' Motion In Limine, the Petitioner was only allowed to present evidence at the hearing material and relevant to the environmental impact of the access road and associated grading, bulkhead and utilities installation permitted by DCM under CAMA Permit No. 42-05. Speculative and irrelevant evidence regarding the impact of other development differing from the development permitted under Permit No. 42-05 was excluded. Petitioner was not allowed to present evidence concerning the appropriateness or adequacy of Stormwater Permit No. SW8 040740 issued to Tidal Ventures, LLC by Division of Water Quality or of the Stormwater Management Rules adopted by the Environmental Management Commission ("EMC"). Testimony concerning the appropriateness/effectiveness of the provisions of 15A NCAC 2H.1000, including whether some figure other than a 25% limit on impervious surface/built-upon area would be the appropriate limitation for the Stormwater Rules' requirements for development activities adjacent to SA waters in coastal counties was also not allowed during the hearing. Evidence concerning the adequacy of the stormwater permit and the Stormwater Management Rules was not relevant or appropriate at the hearing on the CAMA Permit challenged by Petitioners. Further, the undersigned Administrative Law Judge found that evidence about other types of development of the subject property that might occur in the future, including the density of any such future development and the type of sewage disposal to be employed would be speculative and irrelevant and such evidence was therefore excluded.

Petitioner requested and was granted the opportunity to submit an offer of proof in the form of a written statement of the substance of the evidence excluded. Petitioner's offer of proof is to be submitted after the hearing as a separate document with Petitioner's Proposed Decision.

Based upon careful consideration of the applicable law, testimony and evidence received during the contested case hearing as well as the entire record of this proceeding, the undersigned makes the following:

FINDINGS OF FACT

The Parties

1. All parties have been correctly designated and are properly before the Office of Administrative Hearings. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter.
2. The Petitioner is The Brunswick County Environmental Action Team ("BEAT"), represented by their President, Ms. Jan Harris. The Petitioner first filed a Petition for a Third Party Hearing with the Chairman of the Coastal Resources Commission pursuant to N.C.G.S. § 113A-121.1(b). The Chairman granted its Petition on only two of the issues raised in its request. The Petitioner filed a timely Petition for a Contested Case Hearing raising the two issues allowed by the Chairman. (Stip. Fact 7) These two issues are: 1) Whether the Division of Coastal Management (DCM) erred in issuing the Permit in violation of 15A NCAC 07H.0602, Petitioner alleging that the proposed development would likely close the adjacent waters to shellfishing; and 2) Whether DCM erred in issuing the permit in violation of 15A NCAC 07H.0306, Petitioner alleging that the proposed development would include a public expenditure in the Ocean Hazard AEC.
3. The Respondent is the North Carolina Department of Environment and Natural Resources, ("Agency" or "DENR"), Division of Coastal Management ("DCM").
4. The Intervener-Respondents are Tidal Ventures, LLC-- the permit applicant, and Mr. Ed and Mrs. Dinah Gore-- the current owners of the property. Tidal Ventures, LLC, is a North Carolina limited liability company in which Sammy Varnam and Greg Gore are the only members. Tidal Ventures, LLC, entered into a contract with Ed Gore and Dinah Gore to purchase property which is the subject of CAMA Permit 42-05 and is the current developer of the Property. Pursuant to the contract's

terms, Tidal Ventures, LLC, is/was required to make all necessary arrangements to install a bulkhead on the property. Tidal Ventures, LLC, contracted with Varnam's Docks and Bulkheads to provide the labor for the bulkheading project.

The Property

5. The Property at the center of this dispute is property along Riverside Drive in Sunset Beach, North Carolina in Brunswick County. The site includes 69 lots platted since 1976 and numbered 27 - 94 of Block 40-E, as shown on a plat map recorded in the Brunswick County Registry at Book H, Page 358. The permit application indicated that the area of the property is 38.7 acres in size.
6. The Property is a long peninsula, with some upland vegetation and trees. The natural vegetation on the site consists of sandy soils with sandspurs, Red Cedars and Myrtle bushes on the more elevated areas of the site. The upland is coarse sand material and the north side of the property is bordered by a vast span of coastal wetlands and 404 wetlands. On the north side of the property, it is an average of 300 feet from mean high water and the location of the bulkhead. DCM's Mr. Dail and Mr. Gregson have not seen open or surface water on the north side of the property where the bulkhead will be located. Mr. Gregson stated that much of the marsh to the north of the high ground is "high marsh" growing above the high water line. The percent of the tract that lies within 75 feet of mean high water to be covered by the impervious surface of the road is less than one percent (0.73%). (Stip. Ex. A p. 8)
7. The Property is bordered on the south by an unnamed man-made canal, to the east by Jink's Creek, and to the north by an embayment of Jink's Creek. The waters of the canal are permanently closed to the harvest of shellfish. The waters of Jink's Creek are classified as "SA" High quality waters, but have been temporarily closed since August 13, 2004 to the harvest of shellfish. (Ex. IR-5, Stip. Exhibit A pp.28-30)
8. Several witnesses testified to the presence of numerous goats on spoil islands in the proximity of Jink's creek. Mr. Gregson testified that goat waste can contribute to poor water quality and may be a factor in the temporary closure of Jink's Creek to shellfishing.
9. Along the man-made finger canals and the north side of the entrance canal to the south of the property, about 90% of the shoreline is currently bulkheaded.
10. Approximately 94.5 percent of all land on the island of Sunset Beach is built out for development. There are no similar additional areas available for similar types of projects to be developed on Sunset Beach in the vicinity of the property which is the subject of CAMA Permit 42-05.
11. A portion of the property is subject to the Coastal Area Management Act (CAMA) (N.C.G.S. 113A-100 *et seq.*)
12. While CAMA Major Permit #42-05 permitted development on lots 90-94, the parties have stipulated that for the purposes of this contested case, development of the utility line and road on lots 90-94 will be withdrawn from the permit as soon as the permit suspension is lifted. The development of the bulkhead remains included in the permit, and will wrap around the end of the peninsula on lots 90-94. If the Permittee wishes to do any other future development on these five lots, it will need to apply for a new CAMA permit. This Stipulation eliminates one of the two issues allowed for hearing by the CRC Chairman's decision that issue being whether the proposed development will include a public expenditure in the Ocean Hazard AEC.
13. This property was acquired by the current owners, Ed and Dinah Gore, in 1971, through a deed duly recorded in the Brunswick County Registry. The lots located on the subject property have been platted since 1976.
14. The property is currently undeveloped according to the definition of "development" in CAMA, with the exception of the permitted bulkhead that was partially constructed pursuant to CAMA Major Permit #42-05, before the Third Party Petition was filed and the permit was suspended as a matter of law, pursuant to N.C.G.S. § 113A-121.1(c). (Stip. Fact 4)
15. Development on the site within designated Areas of Environmental Concern (AEC) is subject to the Coastal Area Management Act (CAMA) (N.C.G.S. 113A-100 *et seq.*) Portions of the site are within or adjacent to the Coastal Shorelines, Coastal Wetlands, Public Trust Area, Estuarine Waters, and High Hazard Flood (AEC). The site is not within, but is near the Inlet Hazard AEC for Tubb's Inlet. The Coastal Resources Commission's (CRC) rules primarily at issue in this case are found at 15A N.C.A.C. 07H. *et seq.* (Stip. Fact 5)

The Applicable Law and Administrative Rules

16. The Office of Administrative Hearings has jurisdiction to hear this case pursuant to N.C.G.S. § 113A-121.1 and N.C.G.S. § 150B-23. (Stip. Fact 10)
17. The relevant Statute in this case is N.C.G.S. § 113A, Article 7, "Coastal Area Management" (CAMA). Also applicable are the associated administrative rules for coastal management, found at 15A N.C.A.C. 07 *et seq.* These are the rules of the Coastal Resources Commission (CRC) for the administration of CAMA. (Stip. Fact 11)
18. Under CAMA, "development" in an area of environmental concern ("AEC") requires a permit. N.C.G.S. § 113A-118.
19. The clearing of vegetation by bush hogging is not "development" within the meaning of N.C.G.S. § 113A-118, and would not require a permit.
20. The rule at issue in this case is 15A NCAC 07H.0602 "Pollution of Waters". This rule reads,

"No development should be allowed in any AEC which would have a substantial likelihood of causing pollution of the waters of the state in which shellfishing is an existing use to the extent that such waters would be officially closed to the taking of shellfish. This rule shall also apply to development adjacent to or within closed shellfish waters when a use attainability study of those waters documents the presence of a significant shellfish resource in an area that could be expected to be opened for shellfishing given reasonable efforts to control the existing sources of pollution."
21. Division staff are charged by the CRC to regulate development within the CRC's designated Areas of Environmental Concern (AEC's) within the 20 coastal counties. Staff role is to review and permit development in accordance with CAMA and the rules enacted by the CRC.
22. When DCM reviews a proposed development to decide whether to grant or deny a permit, Staff takes into consideration whether the development "would have a substantial likelihood of causing pollution of the waters of the state in which shellfishing is an existing use to the extent that such waters would be officially closed to the taking of shellfish" as required by 15A NCAC 07H.0602. More importantly, DCM Staff consider the responses they get from the professional resource agencies who directly deal with determining if development would close open shellfishing waters or not. In this case, based on the comments of the resource agencies, DCM made a determination that the proposed project would not significantly or adversely affect these areas.
23. The Division of Coastal Management has not and does not commonly do an independent analysis of shellfish or water quality. DCM Staff are not shellfishing experts, and leave analysis of impacts to shellfishing waters to the expert resource agencies to comment on, including Shellfish Sanitation and Water Quality in this case. DCM Staff do not do separate reviews of other permits issued by other resource agencies, such as DWQ or DLR.
24. N.C.G.S. § 113A-120 requires that DCM "shall issue" a CAMA permit unless they make the finding that the proposed development will significantly impact specified resources listed in that statute.

Requirement to Bulkhead by Town of Sunset Beach

25. On August 2, 1999, the Town of Sunset Beach passed a preliminary assessment resolution stating that the Town of Sunset Beach intended to undertake a navigation project including dredging and bulkheading the four finger canals and entrance canal of Jinks Creek. (Ex. IR-7)
26. On August 30, 1999, the Town of Sunset Beach adopted an assessment resolution whereby the Town of Sunset Beach announced its intention to undertake the navigation project which included dredging and bulkheading the four finger canals and the entrance canal of Jinks Creek adjacent to the property which is the subject of CAMA Permit 42-05. (Ex. IR-7)
27. On November 10, 2003, the Town of Sunset Beach passed a resolution confirming Assessment Role and Levying Assessments. The resolution confirming the assessments effectively required all property owners of property on the entrance canal of Jinks Creek to bulkhead the property. (Ex. IR-7)
28. The Town of Sunset Beach notified property owners whose property was not bulkheaded that if they failed to do so, the Town of Sunset Beach would take appropriate actions to bulkhead the subject properties, and assess those properties for the bulkheading work. (Ex. IR-7)

29. On October 13, 2004, Linda Fluegel, the Town Administrator, wrote a letter to Edward Gore, Sr., informing Mr. Gore that he was in violation of the assessment resolution. (Ex. IR-7)
30. On January 3, 2005, Linda Fluegel wrote to Edward Gore, Sr., a second time notifying Mr. Gore that he was required to bulkhead his property abutting the entrance channel to the finger canals and that the Town of Sunset Beach would complete the bulkheading and assess Mr. Gore the cost of the bulkheading if Mr. Gore did not take appropriate actions to bulkhead the property which is the subject of CAMA Permit 42-05.(Ex. IR-7)

Plans for the Property

31. Tidal Ventures, LLC, agreed to make all necessary arrangements for the installation of bulkheading pursuant to its contract with the Gores and as required by the Town of Sunset Beach along with the installation of a road, water lines and bulkheading on the other side of the peninsula on the subject property.
32. Tidal Ventures, LLC, agreed to make all necessary arrangements for the installation of bulkheading pursuant to its contract with the Gores and as required by the Town of Sunset Beach along with the installation of a road, water lines and bulkheading on the other side of the peninsula on the subject property
33. Tidal Ventures, LLC, retained East Coast Engineering to prepare all applications for permits for the subject property which included applications for only the bulkheading, road and water lines which are the subject of CAMA Permit 42-05.
34. Tidal Ventures, LLC, retained East Coast Engineering to prepare all applications for permits for the subject property which included applications for only the bulkheading, road and water lines which are the subject of CAMA Permit 42-05
35. Tidal Ventures, LLC, has no specific current plan for development of individual lots on the subject property.

The CAMA Permit Application Review Process

36. The first DCM Staff member to discuss the riverside drive project was Jim Gregson. Jim Gregson has been a District Manager with DCM since 2002, and prior to that was a DCM Field Representative beginning in 1997, and a DWQ wetlands specialist beginning in 1992. Mr. Gregson has a B.S. in biology from William & Mary in addition to his extensive work experience. As District Manager, he supervises four field staff in their permitting and enforcement duties and directly supervises the express permit coordinator.
37. Mr. Gregson has known and worked with Mr. Varnum on proposed projects, typically piers and bulkheads, for about eight years. Mr. Gregson had several conversations with Mr. Varnam of Tidal Ventures, LLC about the project, including what permits the development plan would require, and the requirement by the Town that the property be bulkheaded along the canal side. Initially this permit was submitted by Tidal Ventures as a CAMA Minor Permit with the Town of Sunset Beach CAMA Local Permit Officer. After conversations between Mr. Gregson and the Town's LPO, both felt that a CAMA Major Permit was the correct permit for this project, since the development would likely disturb more than an acre of land (and require DLR erosion control plan approval) which requires a CAMA Major permit, as well as the fact that the Town shouldn't process a permit for the Riverside Drive bulkheading which the Town had required of Mr. Gore.
38. After the decision was made to require a CAMA Major permit for the project, Mr. Gregson's involvement with the permit application was more limited. Mr. Gregson was on site in April 2004 and flagged the coastal wetlands line on the property. Mr. Gregson made a quick review of the application to check that it was complete, that it qualified for the express permit program, and also reviewed Mr. Dail's field report.
39. Mr. Gregson decided, based on site visits and surveyor's data that "mean high water" should be used at this site regarding the bulkhead alignment and for jurisdictional purposes, as it would be more accurate than using "normal high water." Mr. Gregson testified that Tom Morgan, the surveyor hired by the applicants to survey mean high water, is one of the best in making a decision of where high water is, since "he's made this practice one of his life studies." Mr. Gregson testified that it is Mr. Morgan's practice to verify his elevations with vegetation when making "mean high water" determinations.
40. After these initial discussions with Mr. Gregson and the Town's LPO informing Mr. Varnam that a CAMA Major Permit was needed for this project, Tidal Ventures chose to submit its application through the Express Permitting Process.
41. On November 29, 2004, DCM received a CAMA Major Express permit application from East Coast Engineering, the consultant and agent for Tidal Ventures, LLC. (Stip Ex. A pp. 1-22). The plans prepared for East Coast Engineering for the

Riverside Drive project incorporate the requisite level of detail necessary for the construction of the road and bulkhead and installation of the water line. The burden is on the Permit Applicant to provide DCM with information needed to process an application. Staff can not dictate what a permit applicant must apply for, but can offer recommendations to an applicant based on comments from other resource agencies.

42. The permit application was primarily handled by DCM Major Express Permits Coordinator Mr. Jason Dail. He has worked for DCM for three and-a-half years, first as a Field Representative and then in his current position for the past year since the Major Express Program began. He has reviewed 50-60 Major Express CAMA permit applications in the past year. His current position entails reviewing all major express permit applications from start to finish, including doing site visits, preparation of field reports, consulting with the resource agencies and ultimately issuing a permit. The Major Express program allows for an involved review process where applicants submit their project to several agencies at once. It is easier for the agencies to determine if there's a problem with the different aspects of the permit. Mr. Dail describes this approach as a multi disciplinary review because all the professional agencies are commenting on the project, and often have meetings to discuss facets of the project with the other agencies.
43. Mr. Dail had some initial contact with East Coast Engineering employees before the Permit Application was submitted. Mr. Dail primarily interacted with representatives from East Coast Engineering, agents hired by Tidal Ventures, LLC during the permit review, and not much directly with the Permit Applicant.
44. Exhibit R4 is a blow-up of the site plans labeled C1 through C4 that were submitted with the permit application. Exhibit R4 is the 11x17 site plans and IR6 is Exhibit R4 enlarged and color added. (Ex. IR-4)
45. Much of the proposed road is not within DCM's AEC jurisdiction. The area that is within DCM's 75-foot Estuarine shoreline AEC jurisdiction is part of the road between lots 76 and 94. The percent of the tract that lies within 75 feet of mean high water to be covered by the impervious surface of the road is less than one percent (0.73%). (Stip. Ex. A p. 8)
46. The total area of the Permittee's tract is 38.7 acres. (Stip Ex. A p. 3) This is contrasted to the 10.6 acre "project area" which is the area suitable for development, and which excludes "federal" or "404" wetlands. (Stip Ex. A p. 9)
47. On February 1, 2005, Jason Dail did a site visit of the Riverside Drive site. (Stip Ex. A p. 28) At the time of the hearing, Mr. Dail had visited the site three or four times.
48. At the site visit, Mr. Dail brought a set of the plans and looked where the high water line, coastal wetlands and 404 wetlands delineations were and compared them with the site plans submitted to ensure they were accurate. Mr. Dail also completed the bio report and looked at the geologic features on site. He took photos of the site, got a GPS location and looked for dunes or creeks or other features of the property.
49. On February 7, 2005, Jason Dail wrote a letter to Tidal Ventures, LLC informing it that their permit application was complete and review would begin. (Stip. Ex. A p. 126). This followed a review of the application materials to ensure the package contains all that's required by the CRC's guidelines.
50. Also on February 7, 2005, Jason Dail completed his field report for the proposed project. (Stip Ex. A pp. 28-30)
51. According to Mr. Dail's field report, the anticipated impacts of the project are the impacts from the proposed development. (Stip Ex. A p. 30) In this case, the initial grading of the road and the bulkhead construction would result in the disturbance of approximately 10 acres of high ground, and the roadway will create approximately 44,400 square feet of impervious surfaces. (Stip Ex. A p. 30)

Public & Adjacent Owner Comment

52. As a part of the CAMA Major Express permitting process, DCM publishes notice of the proposed development in the newspaper which notified the public of when and to whom comments can be submitted and considered. (Stip Ex. A pp. 112-116)
53. Many of the comment letters reviewed in connection with this file were actually in response to another separate permit application filed by Tidal Ventures, LLC and for a project located on the ocean-side of Sunset Beach. All the comment letters for both projects were contained in the same file, and so were included in the Riverside Drive file, but not all of them apply to the Riverside Drive project. (Stip Ex. A pp. 51-78)

54. The Petitioner in this case commented on the project through its President Jan Harris, and raised four main objections to the project. (Stip Ex. A pp. 58-69) Petitioner's concerns about property ownership were remedied by Petitioner's submission of deeds to the property. The second concern is the issue currently before this court. The third issue raised concerns about impervious coverage that were addressed in the permit applicant's stormwater permit. The fourth concern was if the project met the county's water and sewer requirements. Since this is out of DCM's jurisdiction, it was not a basis for permit denial. Mr. Dail considered these four concerns, and did not feel they provided a basis for permit denial. Petitioner indicated on their comment letter that they copied several resources agencies with their comments.

Resource Agency Comment

55. As a part of the CAMA Major Express permitting process, on February 8, 2005, Jason Dail sent information packets about Tidal Ventures, LLC's project to other resource agencies for comment on the project. (Stip Ex. A p. 31) Mr. Dail relies heavily on these resource agencies to tell him if the development will have a negative impact on their resource specialty.
56. The Division of Marine Fisheries did not object to the project. Three different DMF Staff reviewed the project and provided comments raising concerns about potential cumulative impacts from this project. (Stip Ex. A pp. 34-36) Mr. Tyndall testified that DCM staff take comments about cumulative impacts seriously, but determined that the comments alone were not a basis for denial of this project.
57. The Shellfish Sanitation Section of the Division of Environmental Health did not object to the project. (Stip Ex. A pp. 37-38) Shellfish Sanitation did check a box on their pre-prepared standardized comment form to indicate concerns about cumulative impacts. They did not mark the box on their form indicating the area was open to shellfishing. If they knew the project was going to cause a shellfishing closure, Mr. Dail believed DMF staff would have marked that box on their comments form. (Stip Ex. A p. 38) Mr. Tyndall testified that the comments from Shellfish Sanitation would be carefully considered by DCM Staff and staff could put conditions on the permit to inform the applicant and ensure development compatible with the area.
58. The Wildlife Resources Commission staff commented on the project. (Stip Ex. A pp. 46-49) They suggested that the installation and subsequent use of 68 septic systems may eventually cause a shellfish closure, particularly if the lots closest to Jink's Creek were developed, and that threat to shellfishing would also be heightened by introduction of a large impervious surface component from road construction. They provided three conditions that were either met by the final conditions of the permit issued, or were not applicable to the development permitted. Mr. Dail testified that these conditions were considered, and their condition to require a 30-foot buffer between the road and high water is already a requirement of the CRC's rules, and was required in this case. WRC's proposed condition about septic system placement did not apply because the permit would not include septic systems, just the road, bulkhead and waterline. WRC's proposed condition about the material used for the driveway is not something the CRC's rules allow DCM Staff to require, and the CRC's impervious limits were met by this project.
59. Mike Christanbury, DCM's land planner for the Wilmington district provided comments on the project. He stated that the project would be consistent with the local land use plan. (Stip Ex. A p. 39) Field Representatives are not trained about land use plan consistency, and so the DCM District Planner is a commenting agency that reviews these issues and provides comment to the reviewing staff person.
60. The Division of Land Resources commented on the project, noting that the applicant also needed separate permit approval of an erosion and sedimentation control plan. (Stip Ex. A p. 44)
61. The Army Corps of Engineers commented on the project, stating that there would be no Section 10 (open water) or Section 404 (jurisdictional wetlands) impacts proposed by the applicant, and so the Corps would not require a permit for this project. (Stip Ex. A p. 50)
62. The Division of Water Quality did not object to the project. (Stip Ex. A pp. 41-42). They did comment first that the Stormwater Permit application #SW8040740 was being processed. They later notified DCM Staff that the permit had been issued. DCM Staff included condition #2 on the permit at issue to state that a violation of Stormwater Permit #SW8040740 would also be considered a violation of the CAMA permit. (Stip Ex. A p. 81) DCM Staff do not make a separate review of a stormwater permit issued by DWQ.
63. On February 10, 2005, the Division of Water Quality issued Stormwater Permit #SW80407 to Tidal Ventures, LLC. (Stip. Fact 17)

64. Mr. Dail has not seen a resource agency object to a project in the final stages of review. Typically, if there are objections during the initial stages, the comments are shared with the permit applicants, and they are often willing to re-design the project to address the concerns raised. If negative impacts are raised by a resource agency, Mr. Dail would begin contact to discuss the possibility of a denial or possible modifications to the project that would address their concerns. In Mr. Dail's experience, negative comments from resource agencies are rare for upland development, and are more common for in-water work such as marinas.
65. In Mr. Dail's opinion based on his permit reviewing experience, he believes that if resource agencies wanted to object to a permit, they would have no reservations to do so. They would know the language and phrases to use to get the attention of DCM Staff. In this case, Mr. Dail does not feel any of the comments submitted to DCM rose to that level.
66. Mr. Gregson agreed with Mr. Dail, that if a resource agency wanted to object to this project, they would know how to do so. This opinion is based on Mr. Gregson's past experience as a commenting agency representative. He knew "the magic words" to use if the agency felt strongly that a project should be denied. In the past, he has written recommendations that a particular project should be denied.
67. Mr. Tyndall agreed with Mr. Dail and Mr. Gregson, and testified that if resource agencies, such as Marine Fisheries, Water Quality and Shellfish Sanitation wanted to object to a project, they would know how to get DCM's attention. DCM staff and DMF staff have had many discussions about how to word their captions and comments to indicate to DCM that there will be significant adverse impacts from a particular project.
68. Mr. Dail stated that he and DCM Staff reviewing this project, including Mr. Tyndall, reviewed the resource agency comments and did not feel any of them were in strong opposition to the project.

Final Review, Permit Issuance, and Third Party Challenge

69. Before issuing a CAMA Major Permit, Mr. Dail sends the permit to Doug Huggett, DCM's Major Permit Coordinator and Ted Tyndall, DCM's Assistant Director, in DCM's Morehead City headquarters. Mr. Dail also sends any resource agency objections or comments to Mr. Huggett and Mr. Tyndall. Mr. Huggett and Mr. Tyndall review the proposed permit and its conditions and they may make comments or send it back to Mr. Dail to issue.
70. Ted Tyndall has been the Assistant Director for DCM since 2004, and was a District Manager and Field Representative with DCM since 1991. Mr. Tyndall holds a BS in Biology and a Masters in Business Administration from ECU.
71. In his experience reviewing hundreds of CAMA Major permits, Mr. Tyndall has seen many comments and objections from other resources agencies and the public on different projects.
72. On March 31, 2005, Mr. Dail issued CAMA Major Permit #42-05 to Tidal Ventures, LLC authorizing development of the roadway, the utilities and the bulkhead installation. (Stip Ex. A pp. 79-86). The permit included several conditions shown on the face of the document. (Stip Ex. A pp. 80-83) One of the conditions on the permit indicated that any further development on the site, such as homes or septic systems, would require additional permits.
73. Mr. Gregson has reviewed the permit at issue since it was issued, and agrees with its issuance. Mr. Tyndall reviewed the permit at issue and agrees with its issuance.
74. Also on March 31, 2005, Jason Dail sent letters to persons who had provided comment in opposition to the project to DCM, including the Petitioner. He enclosed a letter than explained how to challenge the permit issuance and also enclosed a copy of the permit. (Stip. Fact 19)
75. After CAMA Permit 42-05 was issued, Tidal Ventures, LLC, immediately contracted with Varnam's Docks and Bulkheads for installation of sheet piling bulkhead material. Approximately 2,000 feet of sheet piling bulkhead material has been installed at the present time.
76. Tidal Ventures, LLC, purchased at least \$200,000 of vinyl sheet piling for the project, a portion of which has been used to install the approximately 2,000 feet of sheet piling bulkhead material on the site. A substantial amount of the vinyl sheet piling material is still sitting on the site. However, much of the material necessary to bulkhead the entire property still has to be purchased and the cost of vinyl sheet piling has increased approximately twenty-seven (27%) percent since the first portion of the vinyl sheet piling was purchased. This will result in several hundred thousand dollars of additional cost as a result of the delay caused by the third party appeal of CAMA Permit 42-05.

77. On April 18, 2005, DCM received a Third Party Petition from the Petitioners in this case seeking to challenge the issuance of CAMA Major Permit #42-05. The permit is stayed by operation of law once the Third Party Petition is filed, and in this case, has been stayed since this time. (Stip. Fact 20) Mr. Gregson has known the Petitioner, Jan Harris for several years. Mr. Gregson testified that Ms. Harris has filed numerous objections against other projects, and was not surprised that Ms. Harris filed the third-party petition in this case.
78. On May 3, 2005, the Chairman of the CRC granted Petitioner's Third Party Petition, allowing them to file a Petition for a contested case with the Office of Administrative Hearings pursuant to N.C.G.S. § 113A-121.1(b) on the two issues he specified. (Stip. Fact 21)
79. On May 20, 2005, Petitioner filed this Petition for a Contested Case Hearing with the Office of Administrative Hearings. On June 27, 2005, Intervener-Respondents Ed & Dinah Gore and Tidal Ventures, LLC were allowed to intervene as parties in this case. (Stip. Fact 22)

David Bowman's Expert Testimony

80. Mr. Bowman is a professional engineer with the Brunswick County engineering firm East Coast Engineering. East Coast Engineering prepared the CAMA Major Development Permit Application, the Sedimentation and Erosion Control Plan Application and the Stormwater Permit Application for the Riverside Drive project.
81. Mr. Bowman is familiar with the Riverside Drive property and has been to the property several times, including recently during Tropical Storm Tammy. He is familiar with the grades, elevations and topography of the Riverside Drive property. Mr. Bowman testified that Exhibits IR1 through IR4 are photographs that fairly and accurately represent the condition of the property at Riverside Drive.
82. Mr. Bowman is familiar with construction practices for roads, bulkheads, water lines and utility lines in Brunswick County, which are a significant part of his work.
83. Mr. Bowman has experience with CAMA Major Development Permits, low-density stormwater permit applications and high-density stormwater permits in Brunswick County. He has prepared dozens of low-density stormwater permit applications in Brunswick County over the last 5 to 10 years. Nearly all of Mr. Bowman's work is performed in Brunswick County.
84. Mr. Bowman is familiar with the compaction and infiltration characteristics of the soils in and around Sunset Beach.
85. Mr. Bowman and East Coast Engineering have designed, inspected and certified hundreds of miles of utility lines in Brunswick County.
86. Mr. Bowman was formerly the Assistant Regional Engineer for the Land Quality Section of DENR performing Mining Act, Dam Safety Act and Sedimentation Pollution Control Act inspections for an 8-county area in the Piedmont of North Carolina. In that capacity, Mr. Bowman reviewed and approved numerous sediment and erosion control plans submitted to DENR for approval. He personally inspected over 1,500 different sites for compliance with the State's sediment and Erosion Control Rules.
87. Mr. Bowman is a registered professional engineer in NC, SC and VA.
88. Mr. Bowman was tendered to and accepted by the Court to testify as an expert in the fields of civil engineering, CAMA major development permitting, coastal stormwater design and permitting and coastal sediment and erosion control plan design and permitting.
89. The installation of the water line at the Riverside Drive Property will not create a significant impediment for water movement underground. The sands in and around Sunset Beach and the barrier islands of Brunswick County are very poorly graded, meaning they are uniform in size so they do not compact well. Because of an absence of fines, compaction of the sands will have a very limited impact on reducing infiltration. Rain events will tend to loosen up the soil particles from any compaction that may previously have occurred. Therefore, the soils at Riverside Drive will not be significantly reduced in their infiltration capacity by the construction traffic that will be associated with installation of the water line, bulkhead and road at the property. The bush hogging and clearing of vegetation associated with the Riverside Drive project will not have any significant impact on the infiltrative capacity of the soils there for the same reasons.

90. Mr. Bowman was present at the Riverside Drive property during the heavy rains caused by Tropical Storm Tammy during the first week of October 2005. Mr. Bowman went to the property at high tide to observe and judge the infiltration of the soils, the runoff, possible erosion and how far the water would come up to the property during one of the higher rainfall events. Mr. Bowman did not observe standing water anywhere at the property because the ground was taking it all up. The water on the south side was up to the bulkhead. However, on the north side of the property, the water in some instances had reached the bulkhead but was only about an inch deep.
91. Mr. Bowman did not observe any scouring along the bulkhead on the north side of the property at high tide during the heavy rains associated with Tropical Storm Tammy, and would not expect for there to be any scouring along the toe of the northern bulkhead in the future. The water was very still, because it was buffeted by the marsh.
92. Mr. Bowman expects the bulkhead on the south side of the property adjacent to the canal to improve the control of sediment and erosion at the property. Because the other side of the canal is bulkheaded, there is presently some erosion. When the bulkhead on the south side of Riverside Drive is completed and backfilled, it will level out the ground behind the bulkhead and fully reduce the velocity of the runoff. So, in total, Mr. Bowman expects the bulkhead to reduce the amount of sediment that is leaving the site.
93. East Coast Engineering prepared the sedimentation and erosion control plan for the Riverside Drive project. The plan is sufficient to retain sediment on site. The bulkhead is the primary sediment control measure for the site. It will be installed completely around the peninsula as one of the first parts of the project. As the bulkhead is installed, filter fabric will be laid in behind it so there will be no means for sediment to escape the site. Once the filter fabric and bulkhead are installed, then the roadway can be graded, the water line installed and the backfill put in place. This will prevent sediment from getting off site. The vinyl sheet piles for the bulkhead are designed such that there will not be seepage between the piles. The filter fabric is probably not even necessary for this type of vinyl bulkhead, but is an added, secondary security measure to prevent any sediment from leaving the site.
94. East Coast Engineering prepared the stormwater permit for the Riverside Drive project that was submitted to the Division of Water Quality. The Division of Coastal Management does not issue stormwater permits.
95. Mr. Varnam's and Mr. Greg Gore's instructions to East Coast Engineering with respect to control of run off from this property have been that they want a good quality project, both in the way it looks and in the way it performs. They wanted the best product, regardless of what extra measures it would include.
96. Mr. Bowman is confident that the stormwater controls designed for this project will prevent significant amounts of stormwater from leaving the site, such that stormwater runoff would have an adverse impact on water quality.
97. Mr. Varnam and Mr. Greg Gore have asked East Coast Engineering to evaluate what other steps could be taken to retain any runoff on site. Of the development permitted by DCM, only the roadway would contribute to runoff so East Coast Engineering has looked at sloping the roadway toward the landward side of the property, away from the bulkhead. Then the water would have to flow uphill to get to the bulkhead. The cap on the bulkhead will be an inch and one-half to two inches higher than the ground at the bulkhead, so even if the water could flow uphill, it would have to jump over the bulkhead cap when it got there.
98. There is a 20-foot wide access easement for the 12-foot roadway. The driveway can be shifted landward to provide a buffer between the bulkhead and the road, and with the infiltration of the soils, that would be more than enough to handle the runoff from a 12-foot driveway.
99. If these stormwater runoff reduction techniques are employed during construction of the road, that would more than adequately control stormwater runoff from the road. On this property, there will be very little sheet flow because most of the rain will be soaked into the ground before it can run anywhere. When East Coast Engineering prepared the stormwater permit application, it calculated the impermeable surface percentages for the project, which are shown on page C4 of the plans (the small black and white plans are Respondent's Exhibit 4, and the large colored plans are Intervener-Respondents' Exhibit 6). The size of the subject property is 38.7 acres. The size of the project area is 10.6 acres. The size of the road is .94 acres. Thus, the road constitutes an impermeable surface of about 8.5% of the total project area of 10.6 acres. The remaining impervious area for future allocation on the Riverside Drive project is 73,989.3 square feet or 1.7 acres, which is the amount of allowable impervious surface left over after the driveway is taken out.
100. When East Coast Engineering submitted the stormwater permit application to the Division of Water Quality ("DWQ"), it did not attempt to break down the 1.7 acres of future allocation for impervious surfaces as to any particular number of lots or any

particular building plan. East Coast Engineering submitted the entire project as one lot in the application. However, Linda Lewis of DWQ asked that the future allocation for impervious surface be broken down on a per-lot basis so that all of the impervious surface would not be concentrated in a particular area.

101. While the Sediment and Erosion Control permit allows 10 acres of disturbance during the construction of the road, water line and bulkhead, Mr. Bowman anticipates that less than 10 acres will be disturbed. Because of the need for the contractor have to "lay down" areas for the bulkhead materials and not knowing where they would be placed, the easiest way to do it was to permit the entire 10 acres for possible disturbances. .

Testimony of Thomas Blue, Expert for Petitioner

102. Mr. Thomas Blue testified as an expert witness for the Petitioner. Mr. Blue is a board certified engineer licensed to practice in North Carolina, South Carolina and Virginia. He received BS degrees in Environmental Engineering and Civil Engineering and a Master of Civil Engineering Degree in Environmental and Water Resources Engineering from N.C. State University. He is currently on leave of studies from N.C. State University in his PhD program with co-majors in Biosystems Engineering and Soil Science. He is an invited lecturer at N.C. State University where he teaches hydrologic analysis, stormwater management and related subject matter in the College of Engineering. He is a board certified land surveyor and is a principal in the firm of Blue Land, Water, Infrastructure in Southern Pines, N.C. (Petitioner's Ex. P3).
103. Mr. Blue has never been to the Riverside Drive Property. He can't say if he was ever on the subject Property or adjacent to it. He has never personally observed the water level on the North side of the Property or been at the Property when it was raining. He cannot testify relative to direct, physical personal observation to anything about the site or adjacent to the site, because he can't say that he has ever been on the subject Property or directly adjacent to it. He cannot say whether pictures that are Intervener Respondents Exhibits 1-4 show the property that is the subject of this case. He recalls going to Sunset Beach once or twice, but that was in the past before he was retained to testify in this case. He doesn't remember the specific dates or times of year he went to Sunset Beach. Mr. Blue has not taken any soil samples or measurements at the Property. He has relied on general soils information and his familiarity with soil systems from that area in preparing his testimony. Mr. Blue believes that to determine the effects of stormwater on an area, you need to do it on a case by case basis. But Mr. Blue has never been to Property at issue in this case, and he has never applied for a low-density stormwater permit for a residential subdivision in the coastal area. He cannot say how often the water will reach the bulkhead on the north side of the Property or what the velocity of the water will be.
104. Although Mr. Blue does not contend that the development permitted at the Property is violating any existing standard, any prescriptive standard, any certain methodology related to sheet flow or certain amount of impervious area or anything like that, in Mr. Blue's opinion, there is a substantial likelihood of the development permitted under CAMA Permit 42-05 causing pollution of the waters of the State in which shellfishing is an existing use to the extent that such waters would be officially closed to the taking of shellfish. However, Mr. Blue can not say whether the shellfish waters adjacent to the Property which are currently closed would ever re-open, whether this project is built or not.
105. Mr. Blue believes the wetlands in front of the bulkhead will all be scoured away, resulting in an increase in sediment in the water. Suspended sediment is particularly a problem in Mr. Blue's opinion because pollutants are often transported by absorbing or attaching to particulate matter.
106. Mr. Blue believes the wetlands on the south side of the peninsula will all be scoured away. On the north side, there is a much larger marshland, so there is no way putting in the bulkhead will scour away all those wetlands. On the north side, even though the bulkhead will be an average of at least 300 feet from the mean high water line, Mr. Blue believes that what will likely happen is that a scour zone near the toe at the bottom of the bulkhead will probably occur. Mr. Blue believes that water sheet flowing off the property will flow over the bulkhead. He believes that scouring will create a little open conduit which could take anything running over the bulkhead out to the open waters.
107. However, contrary to Mr. Blue's opinion, Intervener-Respondents Exhibits 1-4 are photographs which reflect the fact that healthy, stable wetland vegetation grows in front of the vinyl sheet piling bulkhead which was installed on the Property prior to the stay of the Permit in the area between the bulkhead and the adjacent man-made canal. These photographs also reflect that there is healthy coastal wetland vegetation on the opposite side of the manmade canal in areas between the canal and the bulkheading installed adjacent to lots on Northshore Drive. No scouring of wetlands in this area has been observed by Mr. Gore in the more than 20 years this bulkhead has been in place, and the vegetation has remained stable. The wetlands are protected during maintenance dredging. The photographs fairly and accurately depict the current condition of the Property. (Intervener Respondents Exhibits 1-4).

108. Since the installation of approximately 2,000 feet of vinyl bulkheading on the site prior to the stay, there has been no scouring of any wetlands outside the bulkhead and none is expected. There will be no wave action or scouring in the area of the permitted bulkhead on the north side of the Property, because water only gets to that area during extreme high tides and is no more than 1 or 2 inches deep during extreme tides. The water is very calm there, because it is buffeted by the large marsh.
109. Mr. Gregson testified that Mr. Blue's testimony that stormwater would sheet flow off the bulkhead is incorrect. Mr. Gregson stated that when a bulkhead is constructed, there is a void behind the bulkhead filled with clean fill material, and DCM does not allow that fill to come up to the top of the bulkhead. Usually, the fill is several inches or more below the cap. In addition, the cap on the bulkhead will be one and one half to two inches higher than the ground, which will prevent water from flowing over it. DCM required the use of a swale or similar measures be used at this site in-front of the bulkhead to divert stormwater away from the bulkhead as condition #4 on the permit. (Stip Ex. A p. 81)
110. In Mr. Blue's opinion, taking vegetation off of the Property will significantly reduce the infiltration potential. He believes that compaction from construction activities associated with installation and filling behind the bulkhead will further reduce the infiltration potential of the soils on the Property. Mr. Blue explained the Rational Method technique to predict the peak runoff rate at a site. It is a very simple formula and one of the parameters is known as the Rational C, which is the runoff coefficient rate. It is like a rating system, and is an indicator of the relative response of the watershed. Mr. Blue believes each site should be evaluated using the Rational Method, rather than having prescriptive standards or regulations that allow 10%, 20% or 50% impervious surface on a given site.
111. According to Mr. Dail and Mr. Tyndall, if DCM changed their permitting system to measure imperviousness on the Rational C scale as proposed by Mr. Blue, it would have a significant effect on the permitting process.
112. Mr. Blue believes that a gravel roadway is worse than a paved roadway, because it is impervious and also erodes. There was no detailed grading plan for the road, but Mr. Blue believes the road will not be level and that water will accumulate in low areas and flow off site. Mr. Blue was concerned that the plans did not show proposed spot grading elevations.
113. However, as explained by Mr. Bowman the concerns of Mr. Blue are not justified. The project plans prepared by East Coast Engineering incorporate the requisite level of detail necessary for the construction of the road and bulkhead and installation of the water line. Because this was a low density project and they were not designing on-site wastewater or stormwater retentions systems or constructing a road to DOT standards, any more detail would have been unnecessary. The plans call for only a 12 foot wide road that is a private driveway, not a public roadway. Mr. Bowman is familiar with the site and the infiltration and compaction characteristics of the soils at the Property. Mr. Bowman was at the Property during the heavy rains caused by Tropical Storm Tammy during the first week in October of 2005. Mr. Bowman did not observe standing water anywhere at the property and the water on the north side of the Property had only reached the bulkhead in some places and was only about an inch deep. Mr. Bowman expects the bulkhead on the south side of the Property to improve control of sediment compared to the current natural conditions and on the north side does not expect any scouring along the bulkhead. The bulkhead with filter fabric installed behind it will prevent sediment from getting off site. The road can be sloped away from the bulkhead so that water would have to flow uphill to get to the bulkhead. The road can be shifted landward in the 20 foot access easement to provide a buffer between the bulkhead and the road. With the infiltration capacity of the soils, that would be more than enough to handle runoff from a 12 foot road. Furthermore, the cap on the bulkhead will prevent any water that reaches the bulkhead from flowing off site. Mr. Bowman is confident that the stormwater controls designed for this project will prevent significant amounts of stormwater from leaving the site, such that water quality would be adversely impacted.
114. Mr. Blue is concerned that installing the water line could create a significant impediment for the way water moves underground and that it will change where the water runs off the site. In his experience, when you install a water line you typically compact the fill in small lifts, generally with a hand-operated vibratory compactor. In his opinion, putting in a water line prevents water from moving the way it naturally did. This depends on where you are on the site. If you are not close to adjacent waters these things might not be such a big deal. These issues are site specific.
115. However, as explained by Mr. Bowman, because the soils at the Property are very poorly graded, they are uniform in size and do not compact well. Because of an absence of fines, compaction of the sands will have a very limited impact on reducing infiltration. Rain events will tend to loosen up the soils from any compaction that may have occurred. Mr. Bowman and East Coast Engineering have designed, inspected and certified hundreds of miles of utility line in Brunswick County. Mr. Bowman has never seen a mechanical tamp employed to compact soils for water or utility lines in Brunswick County, and one would not be necessary to put in the water line at the Property. Therefore, contrary to Mr. Blue's opinion, installation of the water line at the Property will not create a significant impediment for water movement underground.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction to hear this case pursuant to N.C.G.S. § 113A-121.1 and N.C.G.S. § 150B-23. It is stipulated that all parties are properly before the court and that the court has jurisdiction of the parties and the subject matter. All parties have been correctly designated, and there is no question as to misjoinder or nonjoinder of parties.
2. Petitioners have standing to bring this case and are properly before the Office of Administrative Hearings.
3. Petitioners bear the burden of proof on the issues. Specifically, Petitioners must prove by a preponderance of the evidence that the Respondent substantially prejudiced Petitioners' rights and that the agency acted erroneously or failed to act as required by law or rule as alleged in Petitioner's Petition and as set forth in N.C.G.S. § 150B-23(a). Peace v. Employment Sec. Comm'n, 349 N.C. 315, 328, 507 S.E. 2d 272, 281 (1998).
4. Under CAMA, development in an area of environmental concern ("AEC") requires a permit. N.C.G.S. § 113A-118. (Stip. Fact 12)
5. Pursuant to N.C.G.S. § 113A-113(a) and (b)(6), the Coastal Resources Commission has designated Areas of Environmental Concern and has adopted use standards or state guidelines for development within them, located at 15A N.C.A.C. 07H.0100 *et seq.*
6. DCM Staff must issue a permit for proposed development unless the development does not meet one of the bases for denial found at N.C.G.S. § 113A-120.
7. The administrative law judge determines these issues based on a hearing limited to the evidence that is presented or available to the agency during the review period. Britthaven, Inc. v. Dep't of Human Resources, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459, *rev. denied*, 341 N.C. 418, 461 S.E.2d 745 (1995). This limits the scope of review to that information available to the agency up until the time the Third Party Petition was granted on May 3, 2005 by the Chairman of the Coastal Resources Commission.
8. Under N.C.G.S. § 150B-23(a), the administrative law judge in a contested case hearing is to determine whether petitioner has met its burden in showing that the agency substantially prejudiced petitioner's rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule. Britthaven, Inc. v. Dep't of Human Resources, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459, *rev. denied*, 341 N.C. 418, 461 S.E.2d 745 (1995).
9. By issuing the permit, Respondent did not act erroneously or fail to act as required by law or rule. N.C.G.S. § 150B-23(a).
10. Because of his lack of familiarity with the Riverside Drive property and the fact that he has never been to the property, Mr. Tom Blue's testimony concerning the impact of the project on adjacent shellfish waters lacks credibility.
11. Because of David Bowman's extensive experience in preparing CAMA major permit applications, erosion and sediment control plans, stormwater permit applications and design of utility lines in Brunswick County, and because of his firsthand familiarity with the property and his observations of the property during the heavy rainfall caused by Tropical Storm Tammy, Mr. Bowman's testimony about the potential impact of the development permitted under the subject CAMA major permit is more credible than the testimony of Petitioner's expert, Tom Blue, who lacks firsthand knowledge of the Riverside Drive property and has never been to the property.
12. Petitioner has failed to meet its burden of proof. Petitioner has failed to show by a preponderance of the evidence that the development permitted, the bulkhead, the road and the waterline, will have a substantial likelihood of causing pollution of waters of the State in which shellfishing is an existing use to the extent that such waters will be officially closed to the taking of shellfish. Petitioner has failed to prove that Respondent DCM acted erroneously or failed to act as required by law or rule in issuing the subject permit. N.C.G.S.150B-23(a).

DECISION

Based on the foregoing findings of fact and conclusions of law, Respondent's decision to grant the CAMA Major Permit for the road/bulkhead/waterline development at the Riverside Drive Property in Sunset Beach is AFFIRMED. Petitioners have not

demonstrated by a preponderance of the evidence that Respondent acted erroneously or failed to act as required by law or rule by issuing the permit at issue.

ORDER

It is hereby ordered that the agency serve a copy of its final agency decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C.G.S. § 150B-36(b)(3).

NOTICE

The agency making the final decision in this contested case is the North Carolina Coastal Resources Commission. That Commission is required to give each party an opportunity to file exceptions to this recommended 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.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.

This the 24th day of January, 2006.

Beryl E. Wade
Administrative Law Judge

NORTH CAROLINA
WAKE COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
05 OSP 1437

DAVID FLEMING,)
)
 Petitioner,)
 v.)
)
 N.C. DEPARTMENT OF TRANSPORTATION,)
 DIVISION OF HIGHWAYS,)
)
 Respondent.)

DECISION

This contested case was heard before Fred G. Morrison Jr., Senior Administrative Law Judge, in Raleigh, North Carolina, on January 14 and 15, 2006.

APPEARANCES

Petitioner: Michael C. Byrne
Law Offices of Michael C. Byrne
5 West Hargett Street, Suite 310
Raleigh, NC 27601

Respondent: Alexandra M. Hightower
Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27601

ISSUE

Whether Respondent violated N.C.G.S. 126-7.1 by failing to grant Petitioner, a career state employee, promotional priority consideration.

APPLICABLE STATUTES AND RULES

- N.C. Gen. Stat. § 126-7.1
- N.C. Gen. Stat. § 126-14.3
- N.C. Gen. Stat. § 126-34.1
- N.C. Gen. Stat. § 126-36.2
- N.C. Gen. Stat. §150B-23
- 25 N.C.A.C. 1H.0606 (2005)
- 25 N.C.A.C. 1H.801 (2005)

EXHIBITS

For Petitioner: 1-21
For Respondent: 1-24

FINDINGS OF FACT

In making the Findings of Fact, the undersigned has weighed all the evidence and assessed the credibility of the witnesses. The undersigned has taken into account the appropriate factors for judging credibility of witnesses, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have. Further, the undersigned has carefully considered the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. After

Careful consideration of the sworn witness testimony presented at the hearing, the documents and exhibits admitted into evidence, and the entire record in this proceeding, the undersigned makes the following FINDINGS OF FACT:

1. Petitioner David Fleming is an employee of the State of North Carolina with career status pursuant to N.C.G.S. Chapter 126 (the "North Carolina State Personnel Act"), having 21 years of continuous state service.
2. For all of Petitioner's 21 years of state service, he has been employed at the machine shop ("the machine shop") operated by Respondent North Carolina Department of Transportation ("Respondent") located in Raleigh, North Carolina.
3. For all of Petitioner's 21 years of state service, he has at no time received an annual performance rating of less than "Very Good," the second highest rating available on the performance rating scale employed by Respondent. Petitioner received one written warning in 1997 for using state equipment for a personal project, which warning was subsequently made inactive. In 2004, Petitioner received a written warning for failing to maintain a current driver's license (which had expired), and he obtained a new license the day he was informed of the problem. There was no recurrence of either warning. In one performance review, it was noted that Petitioner needed to improve on coming to work on time, though improvement was noted on a subsequent review and there was no rating below "Good" in this category of review.
4. Petitioner began work for Respondent in the position of "Machinist." In 1997, Petitioner was promoted to the position of Engineering Research Technician I, working in the machine shop, a position which one of Respondent's employees, HR Hoyle ("Hoyle") testified was unique in North Carolina and which was, per testimony of Petitioner, created with a job description setting forth duties Petitioner had been performing for some time prior to the adaptation of the position description.
5. The machine shop provides two basic areas of support for Respondent. In addition to traditional metalworking and machinist work, the machine shop creates (in an apparently unique combination for DOT) custom-designed equipment for various DOT requirements. This often involves creating machines and equipment not from blueprints or formal specifications, but rather from sketches or vague conceptions brought in by customers. In his years in the machine shop, Petitioner, in addition to other responsibilities set forth below, built various custom equipment, including mechanical robots and a pontoon boat, and supervised persons engaged in such work and ensured that such projects were completed in a timely fashion.
6. The position description for Petitioner's job, in addition to various other responsibilities connected with the machine shop, states that Petitioner is "also the lead worker in the machine shop. The employee is the back-up supervisor for the shop in the absence of the shop supervisor and as a result carries most of the administrative duties of the shop supervisor. Time keeping, equipment repair reports, safety reports, and holding shop safety meetings are also included in the role."
7. The position description for Petitioner's job, in addition to various other responsibilities connected with the machine shop, also requires a "vast knowledge of the principles and operation of the various machine shop tools and equipment" and "the ability to work independently with little instruction or guidance."
8. The position description for Petitioner's job, in addition to various other responsibilities connected with the machine shop, also states, as the required *minimum* training and experience for the position, "Completion of high school and five years of progressive experience in the performance of the full range of journeyman level tasks associated with metal working and machining metal parts and assembly of electro-mechanical equipment."
9. This five-year experience requirement for Petitioner's job exceeds the minimum progressive experience level in this area for the promotional position at issue in this case by two years, as seen below. Petitioner additionally had completed a two year tool and die making course at Wake Technical Community College.
10. In addition to the 1997 promotion referenced, Petitioner in 2000 was selected by the then machine shop supervisor, Carson Kelly ("Kelly"), to serve as Assistant Supervisor of the machine shop. Kelly himself had served as Assistant Supervisor to the previous machine shop supervisor and selected Petitioner for his former position upon being promoted to machine shop supervisor.
11. In early 2003, Petitioner's status as Assistant Supervisor, or "lead worker," was formalized by issuance of a Form PD-105 noting his assumption of those duties and giving him a raise.
12. Petitioner, from 2000 to 2004, supervised the machine shop whenever Kelly was absent from work, including some period of time when Petitioner, due to Kelly working a different schedule than some others in the machine shop, supervised the shop for approximately two hours each day.

13. Petitioner additionally supervised the machine shop for a period of approximately four months while Kelly was out with an injury, including hiring decisions (hiring one employee) and machine shop operations. When Kelly returned to the job, he praised Petitioner's work supervising the machine shop in his absence. At no time did any of Respondent's managers state that machine shop operations suffered due to any attendance problems on the part of Petitioner.

14. During his period as Assistant Supervisor in the machine shop, in accordance with that status and with the duties of the Engineering Research Technician I position, Petitioner additionally took in time cards every afternoon, made sure all the employees signed out, took in work orders, created work orders and closed work orders – using the DOT's SAP system, with which he became familiar, to do the work order process. No other machine shop employee had these responsibilities.

15. Two employees of Respondent, Bobby Thrower and HR Hoyle (respectively "Thrower" and "Hoyle"), testified that Petitioner during this time had no involvement in personnel decisions at the machine shop. However, both Petitioner and Frankie Bogan ("Bogan"), a machinist in the shop, testified that Petitioner participated in all employee interviews for the machine shop and in fact developed the initial interview test questions, including a hands-on test for machinist ability.

16. In September 2004, Kelly retired as machine shop supervisor.

17. Upon Kelly's retirement, Petitioner was named Interim Supervisor of the machine shop by Thrower, Hoyle, and Respondent's managerial employee, Drew Harbinson ("Harbinson"). Petitioner testified that Harbinson stated at the time that Thrower and Hoyle reported that the shop employees looked up to Petitioner "as a leader" and that Petitioner needed to "run the machine shop the way it needed to be done."

18. At the time Petitioner was named Interim Supervisor of the machine shop, at least two employees were then working in the shop who later, along with Petitioner, applied for the promotion at issue in this case and were rated (again along with Petitioner, as seen below) as "Most Qualified" applicants. Despite the presence of these persons, Respondent selected Petitioner to assume the Interim Supervisor duties.

19. As Interim Supervisor, Petitioner assumed all the duties of the machine shop supervisor except for employee yearly performance reviews. Petitioner reported to Thrower, to whom Kelly had reported, and there was no higher-ranking employee working in the machine shop during this period. Bogan testified that all of the employees in the machine shop referred to Petitioner as the "supervisor" of the machine shop, and looked to him as the leader of the machine shop.

20. At the time Thrower, Hoyle, and Harbinson appointed Petitioner as Interim Supervisor of the machine shop, none of them expressed any hesitation about Petitioner's ability to do the job nor did they express any reservations about Petitioner's attendance or timely arrival at work having an impact on machine shop operations or Petitioner's ability to do the job.

21. Thrower and Hoyle at various times, as well as Harbinson, praised Petitioner's work as Interim Supervisor of the machine shop during 2004. Thrower and Hoyle stated that they had done so. Harbinson did not recall specifically, but believed he may have done so.

22. At no time did Thrower, Hoyle, or Harbinson state or suggest to Petitioner that he was having an "attendance problem" or issue as Interim Supervisor of the machine shop.

23. In a "Job Performance Exception" evaluation, Hoyle wrote on September 13, 2004, that Petitioner was "Doing a very good job of supervising – he appears to be working with the employees and the work-load in the shop has picked up. David is on the job and in the shop or office."

24. In that same "Job Performance Exception," Thrower additionally wrote: "David continues to do a very good job."

25. Thrower additionally wrote on January 5, 2005, that (under Petitioner's supervision) "The machine shop is running smooth – The employees are working together and the work is getting out of the job on time – David has been on the job most of the time and communicates with me and the employees."

26. In Petitioner's annual performance review completed during his time as Interim Supervisor (covering April 2004 through April 2005), Thrower and Hoyle noted that Petitioner's attendance had improved and that Petitioner received an overall performance rating of "Very Good," and was doing "a very professional job" of supervising the machine shop.

27. No documents prepared prior to the hiring decision at issue in this case express anything but praise for Petitioner's work supervising the machine shop as either Assistant Supervisor/lead worker under Kelly or during his time as Interim Supervisor after Kelly retired.

28. In November 2004, in a second posting, Respondent posted the position of Machinist Supervisor, the position vacated by Kelly and the position which Petitioner had been filling as Interim Supervisor.

29. Petitioner applied for this position, which would have represented a promotion for him. In the initial determination of qualifications, Petitioner was rated one of the "Most Qualified Applicants" for the Machinist Supervisor position.

30. In the position posting concerning the job-related qualifications in this case, the "position qualifications" for the Machinist Supervisor position state "Completion of high school and three years of experience in the performance of the full range of journeyman level tasks associated with the machining of a variety of metal parts, or an equivalent combination of training and experience." This is compared with the minimum qualifications for Petitioner's present position: "Completion of high school and *five* years of progressive experience in the performance of the full range of journeyman level tasks associated with metal working and machining metal parts and assembly of electro-mechanical equipment." In short, the promotion for which Petitioner applied called for two years less of this type of experience than the position he currently holds.

31. With respect to the machinist-related qualifications in the Machinist Supervisor position posting, no witness, either for or against Petitioner, disputed that Petitioner was an excellent machinist, and more than one witness testified that he was an excellent machinist. Petitioner had been serving in progressively more responsible machinist and supervision jobs over a period of 21 years, in the very machine shop in which the Machinist Supervisor position is located.

32. The "Description of Work" portion of the position posting calls for experience in the "assignment and review of tasks performed by other trades personnel in related repair work." Petitioner had been filling this function as Assistant Supervisor/Engineering Research Technician I since 2000.

33. The "Description of Work" portion of the position posting also calls for experience in the scheduling "of machine shop work, discusses assignments with machine shop employees and determines work to be performed." As noted above, Petitioner had substantial experience in these areas, again in the machine shop in question, over a period of some years. This includes the DOT SAP program, which according to the testimony, Petitioner alone knew how to use. In fact, one of Respondent's employees testified that proper use of that computer program, which tracks work orders and progress of work orders, was essential to the Machinist Supervisor position.

34. The position posting also calls for the "ability to plan, organize, and direct the work of machinists and semi-skilled tradesmen." Petitioner, again, served (by the terms of his position description and all testimony) as Assistant Supervisor/Lead Worker of the machine shop from 2000 to September 2004, including a period of time (4 months) where he supervised the machine shop full-time when the then-supervisor was out with an injury.

35. Also, Petitioner then served as Interim Supervisor of the machine shop for approximately nine months following Kelly's retirement. Respondent's management, in all documentation created before the hiring decision (and according to Petitioner and some additional testimony throughout the process) consistently praised Petitioner's job serving as Assistant Supervisor/Lead Worker and as Interim Supervisor.

36. Petitioner had over four years of supervisory related experience in the machine shop at issue as of the date of the hiring decision in this case, including over a year of full-time supervisor experience. In addition to this experience being in the machine shop at issue, this experience was recent as Petitioner had been supervising the shop from September 2004 until the date of the hiring decision.

37. Moreover, Petitioner had over 20 years of experience in the unique services provided by the machine shop, which again include not only traditional machinist (and some tool and die) work, but the creation of scratch-built boats, robots, and other vehicles from conceptual visions suggested by customers. Petitioner took the lead on this kind of work.

38. Despite this, Respondent did not hire Petitioner for the Machinist Supervisor position.

39. Respondent instead hired Fred Wilson ("Wilson"), a non-state employee, for the Machinist Supervisor position.

40. Wilson had no prior experience in the machine shop and no prior state service.

41. Wilson had approximately twenty five years of experience as a tool and die maker for Cooper Lufkin prior to being laid off in 2003.
42. Wilson then obtained employment in a machine shop in the western part of the state as a tool and die maker.
43. Nowhere on his application does Wilson indicate that he had supervisory experience. In both of his prior positions, he lists his occupation as "tool and die maker."
44. Wilson's resume and his testimony revealed that he served as supervisor in the Cooper-Lufkin machine shop for approximately 15 months.
45. Wilson's supervisory experience was in 1979 and 1980, approximately 25 years before he applied for the position at issue. In 1980, he returned to the status of tool and die maker and served in that position until being laid off in 2003. He did not serve as a supervisor at United Southern.
46. Wilson completed a four-year tool and die program at Wake Tech.
47. Respondent's management was impressed by Wilson's responses in the interview, by his experience, and by (in the case of Thrower) his prior experience as a softball umpire.
48. Wilson (like Petitioner) did a good job on the hands-on machinist test given to applicants.
49. Respondent's witnesses also testified that they were impressed by certain "supervisory-related courses" taken by Wilson, and Wilson stated that these courses helped him "be the man I am today." This contrasts with Petitioner, who had taken no such courses.
50. However, of the "supervisory courses" concerned, all but one were taken more than 25 years ago, and no evidence was presented of any refresher or additional courses taken. One course, "Quality Circle Training," was taken in 1984, 20 years before Wilson applied for the position. Another course, "Personal Time Management," appears only tangentially related to supervision. No evidence was offered as to the specific curricula of the courses concerned.
51. Wilson had no prior experience in the DOT SAP computer system, which is used by the machine shop to generate, track the progress of, and close work orders from customers.
52. Respondent's management testified that they had concerns about Petitioner's attendance.
53. However, again barring the single reference to "needs to improve getting to work on time" in his performance review at one point, there are no documents created prior to the hiring decision that make negative statements about Petitioner's attendance – and there was no evidence presented that any leave taken by Petitioner was unapproved by Respondent's management. Further, there is nothing but praise in the documented record for Petitioner's performance as a supervisor.

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings and have stipulated that Notice of this hearing was timely.
2. Petitioner is a career state employee subject to the protections of the North Carolina State Personnel Act, including priority consideration as set forth in N.C.G.S 126-7.1.
3. In enacting N.C.G.S. 126-7.1, the General Assembly clearly intended for career state employees to receive "priority consideration" – a hiring preference - over non-state employees when the state employee is applying for a promotion and the state employee and non-state employee have "substantially equal" qualifications.
4. 25 N.C.A.C. 1H.0801 (c) provides rules on how the "substantially equal" qualifications issue is to be applied: "'Substantially equal qualifications' occur when the employer cannot make a reasonable determination that the job-related qualifications held by one person are significantly better suited for the position than the job-related qualifications held by another person." There is no question that Petitioner was qualified for the position, as Respondent rated him one of the "most qualified" applicants, and likewise no question that Petitioner was a career state employee seeking a promotion.
5. Accordingly, the legal question to be determined here is: was Respondent reasonable in determining that Wilson's job-related qualifications were significantly better suited for the position than the job-related qualifications held by Petitioner? See, e.g., 25 N.C.A.C. 1H.0801 (c) (2005).
6. Respondent's conclusion that Wilson's job-related qualifications for the Machinist Supervisor position were significantly better suited than Petitioner's was not reasonable under or supported by the evidence presented. Management's personal

preference for the responses or attitude of one candidate cannot substitute - or be substituted for - job-related qualifications in matters of priority consideration - where job-related qualifications are the determinative factor. Such job-related qualifications can be found by comparing the direct experience of the candidate with the experience and qualifications listed in the job posting.

7. In looking at those qualifications, Petitioner had more supervisory experience in the very machine shop at issue than Wilson had in private facilities – and Wilson's experience, while valuable, was 25 years in the past. Petitioner, by contrast, was supervising the machine shop as of the date of the hiring decision. And, while both candidates had substantial experience in machinist matters, only Petitioner had experience – two decades of experience - in the specialized design services provided by the machine shop.

8. Considering the evidence presented on the respective job-related qualifications of the two applicants, and as compared with the job description and testimony regarding the mission and duties of the machine shop and its employees, the undersigned concludes after careful review of such evidence that, far from Wilson's job-related qualifications being "significantly better suited" than those held by Petitioner, Petitioner's job-related qualifications for the Machinist Supervisor position were at least equal to, and perhaps superior to, those held by Wilson, the successful applicant.

9. Whether Wilson was qualified for the job is not the issue (clearly he was), nor is whether Respondent's management considered Wilson to be the best candidate for the position. Respondent claimed that both Petitioner and Wilson were among the most highly qualified applicants. Under these circumstances, Respondent was required to give Petitioner priority consideration unless it determined, reasonably, that Wilson's job-related qualifications were significantly better suited than Petitioner's – not "equal to" or even "slightly better than," but *significantly better than*. As noted, under the evidence, Respondent could not have reasonably made such a determination.

10. Accordingly, it is concluded that Petitioner has met his burden of proof in demonstrating that he did not receive priority consideration for a promotion when he was entitled to receive same, having substantially equal qualifications to the non-state employee selected, and that by not granting Petitioner such priority consideration, Respondent violated N.C.G.S. 126-7.1.

DECISION

1. **BASED UPON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW**, the undersigned hereby determines that the Respondent unlawfully and erroneously failed to grant Petitioner priority consideration for a promotion to the position of Machinist Supervisor in the machine shop, and its hiring decision in the matter is therefore **REVERSED**.

2. **IT IS FURTHERMORE DECIDED** that Petitioner (a) be awarded back pay from the date of Respondent's hiring decision, representing the difference between Petitioner's current pay grade and the pay he would have received in the Machinist Supervisor position; (b) that Petitioner receive front pay from the date of this decision representing the difference between Petitioner's current pay grade and the pay he would have received in the Machinist Supervisor position, such front pay to continue until such time as Petitioner is placed into the Machinist Supervisor position; (c) that Petitioner is to be placed into the Machinist Supervisor position; (d) that Wilson be placed into Petitioner's current position; and (e) that Petitioner be reimbursed for his reasonable attorney's fees.

NOTICE

The Agency that will make the final decision in this contested case is the North Carolina State Personnel Commission.

The Agency is required to give each party an opportunity to file exceptions to the recommended decision and to present written arguments to those in the Agency who will make the final decision. N.C. Gen. Stat. § 150-36(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.

In accordance with N.C. Gen. Stat. § 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. 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.

This the 21st day of March, 2006.

Fred G. Morrison Jr.
Senior Administrative Law Judge

STATE OF NORTH CAROLINA

COUNTY OF ORANGE

IN THE OFFICE
OF ADMINISTRATIVE HEARINGS
05 UNC 1000

JOSHUA RYAN LLOYD,)
Petitioner,)
)
v.)
)
UNIVERSITY of NORTH CAROLINA)
HOSPITALS,)
Respondent.)

DECISION

THIS MATTER came on for hearing before the undersigned Administrative Law Judge, Augustus B. Elkins II, on October 25, 2005 in Raleigh, North Carolina.

APPEARANCES

For Petitioner: Joshua Ryan Lloyd, *Pro se*
1500 Old NC 10, #C-9
Hillsborough, North Carolina 27278

For Respondent: Scott T. Stroud
Assistant Attorney General
N.C. Department of Justice
211 Friday Center Drive, G-21
Chapel Hill, North Carolina 27515

ISSUE

Whether Respondent is entitled to intercept the 2004 North Carolina State Income Tax refund of Petitioner who was a patient of Respondent as a result of being a victim of a violent crime.

EXHIBITS

Petitioner's exhibit 1 which is the Notice and Order of Restitution to UNC Hospital, by Superior Court Division of Orange County, #02 CRS 55653.

Respondent's exhibits 1 which is a computer printout of notes in system.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the 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 judgment of credibility, including but not limited to the demeanor of the witnesses, any interests, bias, or prejudice a witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witnesses testified, whether the testimony of the witness is reasonable, whether the testimony is consistent with all other believable evidence in the case, and the qualifications of the witness as an expert.

FINDINGS OF FACT

1. Petitioner was the victim of a violent crime(s) in Chapel Hill, North Carolina on or about November 9, 2002. As a result of an assault, Petitioner was taken to the Emergency Room of Respondent, UNC Hospital, for medical services for injuries to his head and face.

2. Respondent presented as its only witness, Carolyn Penny who reviewed parts of a six page printout of Petitioner's patient account. Ms. Penny was not personally aware of most of the notes in the printout. Ms. Penny testified that the dates of medical services provided to Petitioner by Respondent were November 9 through November 23, 2002.
3. Respondent's Exhibit 1 (computer printout notes) begins (on last page) with the date of November 11, 2002, where apparently certain codes were changed. Respondent's witness did not testify to a majority of Respondent's Exhibit 1.
4. Respondent's Exhibit 1 shows Petitioner was referred for Medicaid on 11/12/02 and that on 12/03/02 the computer printout reveals that, "Patient not Eligible for Medicaid."
5. Ms. Penny testified that on December 3, 2002, that an unidentified (to the Undersigned) UNC staff person spoke with Petitioner's mother who informed Respondent that Petitioner had health insurance under his step mother's policy. Respondent's Exhibit 1 shows that the UNC Hospital was given the name of the insurance company (Cigna Health Care), a policy number, a group number, the policy holder and the policy holder's employer.
6. Ms. Penny testified that Respondent attempted to bill Cigna. She testified apparently the information submitted to Cigna was either inaccurate or incomplete. The Undersigned finds that the incorrect and/or incomplete information provided was just as likely an error of Respondent as it was of Petitioner's mother or step mother.
7. Respondent's exhibit shows "12/10/02, 7:22A, Letter INS3 requested," and "12/10/02, 7:24A, Letter INS3 printed on 12/10/2002, 7:23AM." Ms. Penny testified that she interpreted this to be a request for more information regarding the information that Petitioner's mother gave about Petitioner's step mother.
8. Respondent's exhibit shows the next entry on 12/31/02 as "acct bal no action tkn." Other than some code changes on January 17 and 18, 2003, the next entry comes almost four months after the December 10 letter entry and on 04/07/03 states, "pt mom called stating that her son was a victim and that the person wo(sic) hurt him is to pay this bill and we need to bill him." According to the exhibit, the UNC Hospital staff person stated, "i advised her we don't get in to legal battles, i did advised pt mom if she sends me a copy of the judge orders, i will take it managment (sic)."
9. A separate 04/07/02 entry at 11:50A shows, "New Insurance found for account: CIGNA, PPO. . . ," then lists a policy number, group number and effective through date. Another 04/07/03 entry at 11:53A states, "re'd call from pt's step mother even though expecting restitution from criminal case to eventually pay off bill wants to file ins just to be sure bill gets paid and credit record not effected."
10. Respondent's exhibit shows on 04/09/03 an entry stating, "added H74 per Jennifer @ 800-849-9000, she stated that the plan was an HMO eff: 01/19/98-12/31/02 then it switched over to Scranton, PA, added action code."
11. A month later, the 05/09/03 entry in Respondent's exhibit states, "this service was from some type of accident and no insurance info was given to is (sic) within an allowed time to get an authorization, per thr pt's parent a legal suit is pending the person that caused the injury is to pay this bill. *bal. guarantors will have to resolve thru leagal (sic) measures." The entry goes on to state that apparently Respondent "did not file an appeal because of the system notes due to the DOS." Only Respondent would know of and base a decision on the "system notes."
12. Also on 05/09/03 in a separate entry, but at the same time as cited in the entry noted above, a UNC Hospital staff member wrote, "acct expecting restitution from criminal case." A 06/20/03 entry in Respondent's exhibit1 states, "pt c/d: person that hurt him is suppose to pay bill: He will get in touch with Carl Fox, dist atty."
13. Petitioner's Exhibit 1 includes Orange County Superior Court case number 02 CRS 55653 Restitution Worksheet, Notice and Order in the case of the *State of North Carolina versus Samuel Barrington Roberts*, whereby UNC Hospital, PO Box 75430, Charlotte, NC 28275-0430 was to receive restitution in the amount of \$9309.16. The Undersigned notes that the section on the order regarding restitution to Petitioner in this case, Mr. Lloyd, is blank. In accordance with North Carolina law, the Superior Court found that UNC Hospital was an entity directly and proximately harmed as a result of Roberts commission of a criminal offense and ordered that restitution be paid directly to Respondent and not Petitioner. In other words there is no order directing that restitution be paid to Petitioner, who thus has no avenue for receiving said payment.

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 N.C. Office of Administrative Hearings has jurisdiction over the parties and subject matter of this contested case pursuant to N.C.G.S. 150B-23, *et. seq.*, and there is no question as to misjoinder or nonjoinder. The parties received proper notice of the hearing in the matter. To the extent that the findings of fact contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels.
2. Respondent maintains that it received incomplete evidence from Petitioner's mother and/or step mother regarding insurance that would have covered Petitioner. The evidence in the record does not support this contention. As stated in the finding of facts, The Undersigned finds that the incorrect and/or incomplete information provided was just as likely an error of Respondent as it was of Petitioner's mother or step mother. A review of the whole record reveals that the error of information was most likely that of Respondent. This is revealed in the 05/09/03 entry in Respondent's exhibit where a Respondent staff member states, "this service was from some type of accident and no insurance info was given to is within an allowed time to get an authorization." Petitioner's injuries were clearly not a result of "some type of accident" and this was well documented and established by multiple agents of the Respondent. When a mistake is made by Respondent regarding the very reason for services provided to the Petitioner, the preponderance of the evidence then shows that the recording of policy numbers regarding insurance was the result of Respondent's error.
3. Respondent could have corrected any insurance misinformation with due diligence on its part, but stood inactive. The evidence shows that after a December 10, 2002 letter was sent, no action was undertaken by Respondent. In fact, Respondent's records are silent for approximately four (4) months and only when Petitioner's mother called is an entry made in Respondent's records. Certainly the law of equity demands that Petitioner not be held responsible for the inaction of Respondent.
4. Moreover, Respondent chose not to file any appeal with the insurance carrier of Petitioner's step mother, leaving the carrier to base its timeframes on the belief that Petitioner was involved in "some type of accident." There is no showing in the evidence presented that the insurance carrier was aware that Petitioner was taken as an emergency patient due to being the victim of a violent crime. Again, the law of equity demands that Petitioner not be held liable for the failings of Respondent.
5. Besides all of the conclusions above, Petitioner is entitled to rely on the principle of merger, that is, a collateral aspect of *res judicata* which determines the scope of claims precluded from relitigation by an existing judgment. While *res judicata* precludes a subsequent action based on the same claim, collateral estoppel bars subsequent determination of the same issue, even though the action may be premised upon a different claim. In this case as in all cases, collateral estoppel should be applied in particular situations as fairness and justice require.
6. In this case the matter of payment for services provided by Respondent has been made by a North Carolina Superior Court sitting in Orange County, which found that restitution of medical bills should be paid directly to UNC Hospital by the Petitioner's attacker. Respondent was aware that this matter was being decided by a court of competent jurisdiction as multiple entries into its computer notes attest to. One entry in fact states, "acct expecting restitution from criminal case." The matter has been settled and fairness and justice in this case require that merger and collateral estoppel apply and that Petitioner be held harmless from liability. Respondent is free to pursue collection of the money owed it by Samuel Barrington Roberts through channels involved in collection of debt owed pursuant to an order of restitution.
7. Holding Petitioner as a victim, harmless, is supported through case law and legislative intent regarding victim's restitution. It is noted that Respondent receives significant federal monies for services provided through Medicaid and other federal programs and research avenues. Legislative history of the Mandatory Victims Restitution Act (MVRA) shows that a purpose of the MVRA is to ensure that the **offender** realizes the damage caused by the offense and pays the dept owed to the victim *as well as to society*. (emphasis added) S.Rep 104-179, reprinted in 1996 U.S.C.C.A.N. 924. It is certainly federal legislative intent that an **offender** (not the victim) must in every case involving bodily injury, pay what it costs to care for a victim. Certainly the law of equity followed in North Carolina could not demand differently. Moreover, a superior court of North Carolina has ordered that the **offender** pay Respondent directly for medical services provided to the Petitioner and has not ordered restitution paid to Petitioner, who of course is bound by that order the same as Respondent.

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

DECISION

There is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. Based on any one of the conclusions and certainly all combined, including the principles of merger and collateral estoppel, the Respondent's action toward Petitioner was in error, and Petitioner is entitled to a return of any tax refund intercepted by Respondent. Further, Petitioner's

name should be removed from any tax set-off action regarding the services Petitioner received from November 9, 2002 through November 23, 2002 as a result of being a victim of a violent crime in Chapel Hill, North Carolina.

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. Gen. Stat. § 150B-36(a).

In accordance with N.C. Gen. Stat. § 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 University of North Carolina Hospitals system. The 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 9th day of January, 2006.

Augustus B. Elkins II
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF AVERY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
05-WRC-1268

Linville Land Harbor POA, Inc.,)
By Kevin N. McCracken)
Petitioner,)
)
v.)
)
N.C. Wildlife Resources Commission,)
Respondent.)

DECISION

This case was heard before the undersigned on February 10, 2006, in Lincolnton, North Carolina. Both parties were represented by counsel and presented evidence in the form of oral testimony and exhibits.

Based on the testimony and exhibits entered into evidence, I make the following:

FINDINGS OF FACT

1. Petitioner Linville Land Harbor Property Owners Association, Inc. (hereinafter "Linville") is a non-profit homeowners' association, pursuant to *N.C.G.S. §105-277.8* and *§ 528(c)* of the *Internal Revenue Code*, which maintains and manages a community know as Linville Land Harbor in Avery County.

2. The Linville Land Harbor community consists of approximately 1800 platted lots, of which Linville owns approximately 80 undeveloped lots. Linville has established a marketing committee and entered into an open listing agreement with three realty companies to market these lots. In addition, it has set up a marketing website with links to these realtors to promote the sale of the lots.

3. The proceeds of the sale of lots owned by Linville go into Linville's operating funds.

4. Linville has an operating budget of over \$3 million per year. Property owners pay mandatory assessments to Linville annually, and may also pay for additional amenities such as golf, fishing, tennis and pool fees.

5. All land, green areas, lakes, streams and buildings belonging to Linville ("common areas") are held in trust for the use, benefit and enjoyment of all members of the association equally. Each member has an irrevocable right to use and enjoy, on an equal basis, all common areas owned by Linville.

6. Linville's property includes a portion of the Linville River and a lake which is part of the common area and which is surrounded in its entirety by a strip of land owned by the association which land is a buffer zone between the commonly-owned lake and private property.

7. The lake is an impoundment greater than ten acres and is therefore classified as "public fishing waters" as defined by *N.C. Gen. Stat. §113-129(9) and (13a)*.

8. Pursuant to *N.C. Gen. Stat. §113-270.1B*, a valid North Carolina Fishing License is required to fish in the lake when fishing from a boat or any floatation device.

9. Linville has purchased a Special Guest Fishing License from Respondent North Carolina Wildlife Resources Commission (hereinafter "Commission") every year since 1991, pursuant to *N.C. Gen. Stat. § 113-271 (d)(9)*, which states:

Special Guest Fishing License -- \$50.00. This license shall be issued only to the owner or lessee of private property bordering inland or joint fishing waters, including public mountain trout waters, and entitles persons to fish from the shore or any pier or dock originating from the property without any additional fishing license. This license is applicable only to private property and private docks and piers and is not valid for any public property, pier, or dock nor for any private property, pier, or dock operated for any commercial purpose whatsoever. The guest fishing license shall not be in force unless displayed on the premises of the property and only entitles fishing without additional license to persons fishing from the licensed property and then only when fishing within the private property lines. The guest fishing license is not transferable as to person or location. (emphasis added)

10. Under its Special Guest Fishing License and pursuant to its Rules and Regulations, Linville sells its members and guests individual fishing permits, which allow members and guests to fish from the commonly owned banks of the lake. These Linville permits are not available and can not be sold to the general public.

11. A property owner may opt for a \$40 annual permit, or may get a daily or three-day permit. Guests and renters may only get a daily or three-day permit. A daily permit costs \$10. A three-day permit costs \$20.

12. No one over sixteen may fish at Linville Land Harbor without paying a fee for one of these permits.

CONTESTED CASE DECISIONS

13. In 2005, in excess of \$16,000 was collected by Linville from the sale of these permits.
14. Fishing is regulated by Linville's Fishing Committee, a group consisting of thirty property owner volunteers who are elected to three-year terms.
15. Linville has controls in place so that only property owners or bona fide guests of property owners are allowed to fish from the banks of the lake.

16. Any person who goes out on to the lake to fish in a boat or on floatation devices is required to have an individual license issued by the Commission.
17. Linville, in its regulations for use of the lake, does not allow the construction of any docks or piers and there are none on the lake.
18. On July 21, 2005 the Commission informed Linville by letter that its Special Guest Fishing License for 2005-2006 was being revoked.
19. According to the Commission's revocation letter, the basis for the revocation was that Linville is a commercial enterprise.
- 20.. Linville timely filed its Petition for a Contested Case Hearing
21. The Commission's revocation of the Special Guest Fishing License was stayed pending the outcome of this matter.
22. All money collected by Linville from the sale of its fishing permits is segregated and accounted for separately from all other funds collected and spent by Linville.
23. All money collected by Linville is used to maintain the lake and the buffer zone, including fish stocking and trail maintenance. Approximately 75-80% is spent on fish stocking.
24. Decisions to spend money for the stewardship of the lake are made by Linville's Fishing Committee. The Fishing Committee members also work on lake and trail maintenance on a volunteer basis. The Fishing Committee furthermore oversees the rules and regulations for the use of the lake on a volunteer basis.

Based on the above findings of fact, I make the following:

CONCLUSIONS OF LAW

1. Linville does not operate the land around and bordering the lake for a commercial purpose.
2. Linville's sale of fishing permits to its members and guests is not a commercial enterprise.

Based on the foregoing findings of fact and conclusions of law, I make the following:

DECISION

The Commission's revocation of Linville's Special Guest Fishing License was improper and Linville's Special Guest Fishing License must be reinstated immediately.

ORDER

It is hereby ordered that the agency serve a copy of its final agency decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C.G.S. § 150B-36(b)(3).

NOTICE

The agency making the final decision in this contested case is the North Carolina Wildlife Resources Commission. That Commission 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.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.

This the 7th day of March, 2006

Beecher R. Gray
Administrative Law Judge