NORTH CAROLINA
REGISTER

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March 15, 2007

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Contact List for Rulemaking Questions or Concerns

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

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

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Raleigh, North Carolina 27603

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215 North Dawson Street
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NORTH CAROLINA REGISTER
Publication Schedule for January 2007 – December 2007

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)	270th day from publication in the Register
21:13	01/02/07	12/07/06	01/17/07	03/05/07	03/20/07	05/01/07	05/08	09/29/07
21:14	01/16/07	12/20/06	01/31/07	03/19/07	03/20/07	05/01/07	05/08	10/13/07
21:15	02/01/07	01/10/07	02/16/07	04/02/07	04/20/07	06/01/07	05/08	10/29/07
21:16	02/15/07	01/25/07	03/02/07	04/16/07	04/20/07	06/01/07	05/08	11/12/07
21:17	03/01/07	02/08/07	03/16/07	04/30/07	05/21/07	07/01/07	05/08	11/26/07
21:18	03/15/07	02/22/07	03/30/07	05/14/07	05/21/07	07/01/07	05/08	12/10/07
21:19	04/02/07	03/12/07	04/17/07	06/01/07	06/20/07	08/01/07	05/08	12/28/07
21:20	04/16/07	03/23/07	05/01/07	06/15/07	06/20/07	08/01/07	05/08	01/11/08
21:21	05/01/07	04/10/07	05/16/07	07/02/07	07/20/07	09/01/07	05/08	01/26/08
21:22	05/15/07	04/24/07	05/30/07	07/16/07	07/20/07	09/01/07	05/08	02/09/08
21:23	06/01/07	05/10/07	06/16/07	07/31/07	08/20/07	10/01/07	05/08	02/26/08
21:24	06/15/07	05/24/07	06/30/07	08/14/07	08/20/07	10/01/07	05/08	03/11/08
22:01	0702/07	06/11/07	07/17/07	08/31/07	09/20/07	11/01/07	05/08	03/28/08
22:02	07/16/07	06/22/07	07/31/07	09/14/07	09/20/07	11/01/07	05/08	04/11/08
22:03	08/01/07	07/11/07	08/16/07	10/01/07	10/22/07	12/01/07	05/08	04/27/08
22:04	08/15/07	07/25/07	08/30/07	10/15/07	10/22/07	12/01/07	05/08	05/11/08
22:05	09/04/07	08/13/07	09/19/07	11/05/07	11/20/07	01/01/08	05/08	05/31/08
22:06	09/17/07	08/24/07	10/02/07	11/16/07	11/20/07	01/01/08	05/08	06/13/08
22:07	10/01/07	09/10/07	10/16/07	11/30/07	12/20/07	02/01/08	05/08	06/27/08
22:08	10/15/07	09/24/07	10/30/07	12/14/07	12/20/07	02/01/08	05/08	07/11/08
22:09	11/01/07	10/11/07	11/16/07	12/31/07	01/21/08	03/01/08	05/08	07/28/08
22:10	11/15/07	10/25/07	11/30/07	01/14/08	01/21/08	03/01/08	05/08	08/11/08
22:11	12/03/07	11/08/07	12/18/07	02/01/08	02/20/08	04/01/08	05/08	08/29/08
22:12	12/17/07	11/26/07	01/01/08	02/15/08	02/20/08	04/01/08	05/08	09/12/08

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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.

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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 13 – DEPARTMENT OF LABOR

Notice *is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Department of Labor intends to adopt the rule cited as 13 NCAC 15 .0706 and amend the rule cited as 13 NCAC 15 .0306.*

Proposed Effective Date: *July 1, 2007*

Public Hearing:
Date: *April 4, 2007*
Time: *10:00 a.m.*
Location: *4 West Edenton Street, Raleigh, NC, Room 205*

Reason for Proposed Action: *Pursuant to G.S. 95-110.6, the Commissioner of Labor has the authority to "refuse to issue, renew or may revoke, suspend or amend a certificate of operation" when the rules promulgated under the Elevator Safety Act have not been complied with. Additionally, pursuant to 95-110.5, the Commissioner of Labor has the authority to "establish fees not to exceed two hundred dollars ($200.00) for the inspection and issuance of certificates of operation for all devices and equipment" subject to the Elevator Safety Act "upon installation or alteration, for each follow up inspection, and for the annual periodic inspections thereafter." The Elevator and Amusement Device Bureau is a 100% fee supported Bureau that relies upon timely payment of elevator inspection invoices. Due to the extreme number of outstanding invoices, it is necessary and in the best interest of the Bureau that those persons who do not make timely payment for an elevator inspection have their Certificate of Operation revoked and be subject to a reinstatement fee prior to reissuance of the certificate. The amendment of 13 NCAC 15 .0306 clarifies under what conditions a Certificate may be revoked and the requirements for reissuance. The adoption of 13 NCAC 15 .0706 establishes the fee to be charged for reinstatement.*

Procedure by which a person can object to the agency on a proposed rule: *Objections to the proposed rules may be submitted, in writing, to Erin T. Gould, Assistant Rulemaking Coordinator, via United States mail at the following address: 1101 Mail Service Center, Raleigh, North Carolina 27699-1101; or via facsimile at (919) 733-4235. Objections may also be submitted during the public hearing conducted on these rules, which are noticed above. Objections shall included the specific rule citation(s) for the objectionable rule(s), the nature of the objection(s), and the complete name(s) and contact information for the individual(s) submitting the objection. Objections must be received by 5:00 p.m. on May 14, 2007.*

Comments may be submitted to: *Erin T. Gould, 1101 Mail Service Center, Raleigh, NC 27699-1101, phone (919) 733-7885, fax (919) 733-4235, email erin.gould@nclabor.com*

Comment period ends: *May 14, 2007*

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: A copy of the fiscal note can be obtained from the agency.
☒ **State**
☒ **Local**
☐ **Substantive (**≥$3,000,000**)**
☐ **None**

CHAPTER 15 - ELEVATOR AND AMUSEMENT DEVICE DIVISION

SECTION .0300 - ELEVATORS AND RELATED EQUIPMENT

13 NCAC 15 .0306 CERTIFICATES OF OPERATION

(a) Issuing of Final Certificates of Operation. A certificate of operation shall be issued by the Director where the inspections and tests, required by Rule .0305 of this Section, show beyond a reasonable doubt that the equipment has been designed and installed in accordance with the requirements of these rules.
(b) Framing of Certificates. The certificate furnished by the Director shall be maintained in a suitable frame under transparent cover.
(c) Numbering of Certificates. The final certificate of operation shall show the registration number of the equipment for which it is issued, as required in Rule .0304 of this Section.
(d) Posting of Certificates of Operation. The required certificates shall be posted conspicuously as follows:

(1) inside elevator cars, or
(2) inside dumbwaiter cars, or
(3) inside escalator and moving walk machine rooms, or
(4) in locations designated by the Division.

(e) Limited Certificate of Operation.

(1) Issuance for Elevator. The Director may allow the temporary use of any elevator for passenger or freight service during its installation or alteration under the authority of a limited certificate, issued for each class of service. Such limited certificate shall not be issued for elevators until the elevator has been tested with rated load, and the car safety, hoistway door interlocks, car door switch, and terminal stopping devices have been tested to determine the safety of the equipment for construction purposes.

(2) Issuance for Personnel Hoist. The Director may allow the temporary use of any personnel hoist under the authority of a limited certificate. Such limited certificate shall not be issued until the personnel hoist has been tested with rated load, and the car safety, hoistway door interlocks, car door switch, and terminal stopping devices have been tested to determine the safety of the equipment.

(3) Life of Limited Certificates of Operation. Limited certificates of operation may in the case of an elevator be issued for a period not to exceed 90 days. Limited certificates of operation for a personnel hoist may be used for a period not exceeding the length of the applicable construction project. Such certificates may be renewed at the discretion of the Director upon receiving a written request showing justifiable cause for renewal. Such request must be received 15 days prior to the expiration of said limited certificate.

(4) Posting of Limited Certificates of Operation. Limited certificates of operation shall be posted conspicuously on each elevator or personnel hoist. Such limited certificates for elevators shall bear a notice stating that the equipment has not been finally approved.

(f) Revocation of Certificate of Operation.

(1) The Director may revoke a certificate of operation for any of the following reasons:

(a) Operation of an unsafe device or equipment which is likely to result in personal injury or property damage.

(b) Failure to comply with the provisions of Article 14A of Chapter 95 of the North Carolina General Statutes or the rules in this Chapter.

(c) Non-payment of the inspection fees established in 13 NCAC 15 .0702 if payment is not received within 30 days of the date of invoice.

(2) If the Director revokes a certificate of operation pursuant to 13 NCAC 15 .0306(f)(1), the affected party shall be given notice of the availability of an administrative hearing and of judicial review in accordance with Article 3 of Chapter 150B of the N.C. General Statutes.

(g) Reinstatement of Revoked Certificate of Operation.

(1) If the Director revokes a certificate of operation pursuant to 13 NCAC 15 .0306(f)(1)(a), the owner or operator shall notify the Director in writing when the hazard has been abated and shall request a reinspection of the device or equipment. Once the Director or his assignee has conducted the requested reinspection and has determined that the hazard has been abated and the device may be operated safely, the certificate of operation shall be reissued upon payment of the inspection fee pursuant to 13 NCAC 15 .0702 and the reinstatement fee pursuant to 13 NCAC 15 .0706. Payment of the applicable fees shall be made in accordance with 13 NCAC 15 .0306(g)(4).

(2) If the Director revokes a certificate of operation pursuant to 13 NCAC 15 .0306(f)(1)(b), the owner or operator shall notify the Director in writing when the provisions of Article 14A of Chapter 95 of the North Carolina General Statutes and the rules in this Chapter have been satisfied. Once the Director or his assignee has conducted the requested reinspection and determined that the provisions of Article 14A of Chapter 95 of the North Carolina General Statutes and rules of this Chapter have been satisfied, the certificate of operation shall be reissued upon payment of the inspection fee pursuant to 13 NCAC 15 .0702 and the reinstatement fee pursuant to 13 NCAC 15 .0706. Payment of the applicable fees shall be made in accordance with 13 NCAC 15 .0306(g)(4).

(3) If the Director revokes a certificate of operation pursuant to 13 NCAC 15 .0306(f)(1)(c), upon payment of the original inspection fee pursuant to 13 NCAC 15 .0702 and the reinstatement fee pursuant to 13 NCAC 15 .0706, the certificate of operation shall be reissued. Payment of the applicable fees shall be made in accordance with 13 NCAC 15 .0306(g)(4).

(4) Payment of the fees referenced in this Rule shall be made by credit card, certified check, bank check or money order payable to the North Carolina Department of Labor. The owner shall notify the Division in writing when payment has been made.

Authority G.S. 95-110.5; 95-110.6.

SECTION .0700 – FEES

13 NCAC 15 .0706 ELEVATOR CERTIFICATE OF OPERATION REINSTATEMENT FEE

If a certificate of operation is revoked pursuant to 13 NCAC 15 .0306, a reinstatement fee of two hundred dollars ($200.00) shall be paid, in addition to all overdue inspection fees, prior to reinstatement of the certificate of operation.

Authority G.S. 95-107; 95-110.5; 95-110.6.

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 rule cited as 15A NCAC 02R .0402 with changes from the proposed text noticed in the Register, Volume 21, Issue 12, pages 1087-1088.*

Proposed Effective Date: *September 1, 2007*

Reason for Proposed Action: *In accordance with the Administrative Procedures Act, the Environmental Management Commission (EMC) is re-publishing proposed revisions to the rule establishing the schedule of fees for the Ecosystem Enhancement Program to accept comments for an additional 60 days. This re-publication is required as a result of substantial changes made to the text of the original proposed rule, which was published in the December 15, 2006 edition of the North Carolina Register. Based on comments received after the original publication, two proposed versions of rule text are being published for comment. Each of these proposals is substantially different than the original version published in that fees are being proposed to apply to the entire state (single flat fee) or to be applied based on watershed boundaries (two separate fees for different parts of the state). Please be aware that as a result of this re-publication and the comments received, the EMC may modify the fees proposed as well as how separate fees are applied to different parts of the state. The EMC may adopt either of the two rule revision options published in this notice.*

Procedure by which a person can object to the agency on a proposed rule: *All persons interested and potentially affected by the proposal are strongly encouraged to read this entire notice and make comments. 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 General Statute 150B-21.2(g)). Written comments may be submitted to Suzanne Klimek of the Ecosystem Enhancement Program at the postal address, e-mail address, or fax number listed in this notice.*

Written comments may be submitted to: *Suzanne Klimek, 1652 Mail Service Center, Raleigh, NC 27699-1652, phone (919) 715-1835, fax (919) 715-2219, email suzanne.klimek@ncmail.net*

Comment period ends: *May 15, 2007*

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. 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 6th business day preceding the end of the month in which a rule is approved. 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: A copy of the fiscal note can be obtained from the agency.

☒ **State**
☒ **Local**
☒ **Substantive (≥$3,000,000)**
☐ **None**

CHAPTER 02 - ENVIRONMENTAL MANAGEMENT

SUBCHAPTER 02R - WETLANDS RESTORATION PROGRAM

SECTION .0400 - WETLANDS RESTORATION FUND

15A NCAC 02R .0402 SCHEDULE OF FEES
OPTION 1:

(a) The amount of payment into the Fund necessary to achieve compliance with compensatory mitigation requirements shall be determined in accordance with Subparagraphs (1) through (3) of this Paragraph. The fee shall be based on the acres and types of compensatory mitigation specified in the approved certifications issued by the Department under 33 USC 1341; and permits or authorizations issued by the United States Army Corps of Engineers under 33 USC 1344. Payments shall be rounded up in increments of linear feet for streams and in 0.25 acre increments for wetlands, e.g. for streams, 520.3 linear feet of compensatory mitigation would be considered as 521 feet, and for wetlands, 2.35 acres of required compensatory mitigation would be considered as 2.5 acres for the purpose of calculating the amount of payment. Fees will be assessed according to mitigation type as follows:

(1) Classified surface waters other than wetlands as defined in 15A NCAC 02B .0202. The payment shall be ~~two hundred dollars~~

~~($200.00)~~ three hundred dollars ($300.00) per linear foot of stream

(2) Class WL wetlands as defined in 15A NCAC 02B .0101(c)(8). The payment shall be:

(A) ~~Twelve thousand dollars ($12,000.00)~~ Thirty-two thousand four hundred and fifty dollars ($32,450) per acre for non-riparian wetlands.

(B) ~~Twenty four thousand dollars ($24,000.00)~~ Fifty-seven thousand seven hundred and twenty-five dollars ($57,725) per acre for riparian wetlands.

(3) Class SWL wetlands as defined in 15A NCAC 02B .0101(d)(4). The payment shall be ~~one hundred twenty thousand dollars ($120,000.00)~~ one hundred forty-six thousand six hundred and fifteen dollars ($146,615) per acre.

(b) The fees outlined in Subparagraphs (a)(1) through (a)(3) and Paragraph (d) of this Rule shall be reviewed annually by the Department and compared to the actual cost of restoration activities conducted by the Department, including planning, monitoring and maintenance costs. Based upon this annual review, revisions to Paragraph (a) of this Rule shall be recommended to the Commission when adjustments to this Schedule of Fees are deemed necessary to ensure that the Schedule of Fees reflects the actual costs of restoration activities.

(c) The fees outlined in Subparagraphs (a)(1) through (a)(3) and Paragraph (d) of this Rule shall be adjusted for inflation on an annual basis using the Civil Works Construction Cost Index System published by the US Army Corps of Engineers. This adjustment shall occur at the end of each calendar year as follows: the fees in Subparagraphs (a)(1) through (a)(3) and Paragraph (d) of this Rule for each year shall be multiplied by the annual composite Civil Works Construction Cost Index yearly percentage change issued in September of each year and the result shall be the increase to that fee for the next fiscal year. The revised fees shall be made available via the NC ~~Wetland Restoration~~ Ecosystem Enhancement Program's web site ~~(h2o.enr.state.nc.us/wrp/index.htm)~~ (www.nceep.net) and become effective on the following July 1st. ~~The first adjustment shall be made at the close of calendar year 2003 to become effective July 1, 2004. This process shall continue annually thereafter.~~

(d) For properties and easements donated to the NC ~~Wetlands Restoration Program,~~Department of Environment and Natural Resources, a fee of ~~three hundred fifty dollars ($350.00)~~ one thousand dollars ($1,000) per acre shall be charged at the time the land or easement is transferred to the ~~program~~ Department's Conservation Grant Fund Endowment to cover costs of long-term management of the property. For properties that are less than one acre in size, the minimum payment shall be one thousand dollars ($1,000). This charge applies only to properties and easements donated to the ~~program~~ Department for the sole purpose of property or easement maintenance. This does not apply to properties or easements donated to the ~~program~~ Department in association with restoration projects conducted by the ~~program.~~Department.

OPTION 2:

(a) The amount of payment into the Fund necessary to achieve compliance with compensatory mitigation requirements shall be determined in accordance with Subparagraphs (1) through ~~(3)~~(7) of this Paragraph. The fee shall be based on the acres and types of compensatory mitigation specified in the approved certifications issued by the Department u n d e r 33 USC 1341; and permits or authorizations issued by the United States Army Corps of Engineers under 33 USC 1344. Payments shall be rounded up in increments of linear feet for streams and in 0.25 acre increments for wetlands, e.g. for streams, 520.3 linear feet of compensatory mitigation would be considered as 521 feet, and for wetlands, 2.35 acres of required compensatory mitigation would be considered as 2.5 acres for the purpose of calculating the amount of payment.

(b) Payments made pursuant to Subparagraphs (3) through (6) of this Paragraph shall be subject to separate fees determined by which eight-digit hydrologic unit (as defined by the United States Geological Survey) the permitted impact is located. Fees will be assessed according to the location of the permitted impact and mitigation type as follows:

(1) Fees in Subparagraphs (3) and (4) shall be applied to the following eight digit hydrologic units organized by river basin: Broad: 03050105; Cape Fear: 03030002, 03030004, 03030005, 03030007; Catawba: 03050101, 03050102, 03050103; French Broad: 06010106, 06010105, 06010108; Hiwassee: 06020002; Little Tennessee: 06010202, 06010203, 06010204; Neuse: 03020201; New: 05050001; Roanoke: 03010107; Savannah: 03060101, 03060102; Tar-Pamlico: 03020101; Watauga: 06010103; White Oak: 03030001, 03020106; Yadkin: 03040102, 03040103, 03040105, 03040202

(2) Fees in Subparagraphs (5) and (6) of this Paragraph shall be applied to all other eight digit hydrologic units not listed in Subparagraph (1) of this Paragraph.

~~(1)~~(3) Classified surface waters other than wetlands as defined in 15A NCAC 02B .0202. The payment shall be ~~two hundred dollars ($200.00)~~ three hundred and twenty-three dollars ($323.00) per linear foot of stream.

~~(2)~~(4) Class WL wetlands as defined in 15A NCAC 02B .0101(c)(8). The payment shall be:

(A) ~~Twelve thousand dollars ($12,000.00)~~ Forty-three thousand dollars ($43,000) per acre for non-riparian wetlands.

(B) ~~Twenty four thousand dollars ($24,000.00)~~ Fifty-nine thousand and six hundred dollars ($59,600) per acre for riparian wetlands.

(5) Classified surface waters other than wetlands as defined in 15A NCAC 02B .0202. The

payment shall be two hundred and forty-four dollars ($244.00) per linear foot of stream.

(6) Class WL wetlands as defined in 15A NCAC 02B .0101(c)(8). The payment shall be:

(A) Twenty-two thousand one hundred and thirteen dollars ($22,113) per acre for non-riparian wetlands.

(B) Thirty-three thousand six hundred and ninety-six ($33,696) per acre for riparian wetlands.

~~(3)~~(7) Class SWL wetlands as defined in 15A NCAC 02B .0101(d)(4). The payment shall be ~~one hundred twenty thousand dollars ($120,000.00)~~ one hundred forty-six thousand six hundred and fifteen dollars ($146,615) per acre.

~~(b)~~(c) The fees outlined in Subparagraphs ~~(a)(1)~~ (b)(1) through ~~(a)(3)~~ (b)(7) and Paragraph ~~(d)~~ (e) of this Rule shall be reviewed annually by the Department and compared to the actual cost of restoration activities conducted by the Department, including planning, monitoring and maintenance costs. Based upon this annual review, revisions to Paragraph (a) of this Rule shall be recommended to the Commission when adjustments to this Schedule of Fees are deemed necessary to ensure that the Schedule of Fees reflects the actual costs of restoration activities.

~~(c)~~(d) The fees outlined in Subparagraphs ~~(a)(1)~~ (b)(1) through ~~(a)(3)~~ (b)(7) and Paragraph (e) of this Rule shall be adjusted for inflation on an annual basis using the Civil Works Construction Cost Index System published by the US Army Corps of Engineers. This adjustment shall occur at the end of each calendar year as follows: the fees in Subparagraphs ~~(a)(1)~~ (b)(1) through ~~(a)(3)~~ (b)(7) and Paragraph ~~(d)~~ (e) of this Rule for each year shall be multiplied by the annual composite Civil Works Construction Cost Index yearly percentage change issued in September of each year and the result shall be the increase to that fee for the next fiscal year. The revised fees shall be made available via the NC ~~Wetland Restoration~~ Ecosystem Enhancement Program's web site ~~(h2o.enr.state.nc.us/wrp/index.htm)~~ (www.nceep.net) and become effective on the following July 1st. ~~The first adjustment shall be made at the close of calendar year 2003 to become effective July 1, 2004. This process shall continue annually thereafter.~~

~~(d)~~(e) For properties and easements donated to the NC ~~Wetlands Restoration Program,~~Department of Environment and Natural Resources, a fee of ~~three hundred fifty dollars ($350.00)~~ one thousand dollars ($1,000) per acre shall be charged at the time the land or easement is transferred to the ~~program~~ Department's Conservation Grant Fund Endowment to cover costs of long-term management of the property. For properties that are less than one acre in size, the minimum payment shall be one thousand dollars ($1,000). This charge applies only to properties and easements donated to the ~~program~~ Department for the sole purpose of property or easement maintenance. This does not apply to properties or easements donated to the ~~program~~ Department in association with restoration projects conducted by the ~~program.~~Department.

Authority G.S. 143-214.11; 143-214.12; 143-215.3.

TITLE 25 – DEPARTMENT OF STATE PERSONNEL

***Notice** is hereby given in accordance with G.S. 150B-21.2 that the State Personnel Commission intends to adopt the rules cited as 25 NCAC 01O .0102 - .0106, amend the rule cited as 25 NCAC 01O .0101, and repeal the rules cited as 25 NCAC 01O .0201 - .0206.*

Proposed Effective Date: *September 1, 2007*

Public Hearing:
Date: *May 2, 2007*
Time: *10:00 a.m.*
Location: *116 West Jones Street, Raleigh, NC, Office of State Personnel Conference Room, Administration Bldg., 3rd floor*

Reason for Proposed Action: *The current performance management system has been in place, with minimal changes, for 17 years. In this time, HR professional practices have evolved. The proposed revision is intended to allow greater flexibility in how the performance management process is conducted in the agencies while retaining the requirements established in GS 126-7. To that end, the rules contain less prescriptive detail and encourage agencies to design their performance management systems around the nature of the work being managed and the increasingly results-oriented nature of today's workplaces.*

Procedure by which a person can object to the agency on a proposed rule: *A person may object to these proposed rules by one of the following methods: a written letter to Peggy Oliver, HR Policy Administrator, Office of State Personnel, 1331 Mail Service Center, Raleigh, NC 27699-1331; an email to peggy.oliver@ncmail.net; a telephone call to Peggy Oliver at (919) 807-4832.*

Comments may be submitted to: *Peggy Oliver, Office of State Personnel, 1331 Mail Service Center, Raleigh, NC 27699-1331, email peggy.oliver@ncmail.net*

Comment period ends: *May 14, 2007*

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 01 - OFFICE OF STATE PERSONNEL

SUBCHAPTER 01O - PERFORMANCE MANAGEMENT SYSTEM

SECTION .0100 - GENERAL PROVISIONS

25 NCAC 01O .0101 POLICY

~~(a) Top management within each agency shall initiate and maintain an operative Performance Management System that maximizes the utilization of the knowledge, skills, abilities and behaviors of its employees through a understanding of the relationship between an employee's work assignments and the mission and goals of the agency.~~

~~(b) This system shall be based on the importance of two-way, continuous communication between supervisors and employees to determine job responsibilities, performance requirements, accomplishments, and areas for improvement in meeting job requirements. It shall ensure that all employees:~~

~~(1) are aware of what is expected of them,~~
~~(2) are provided with continuous feedback about their performance,~~
~~(3) are provided with opportunities for education, training and development, and~~
~~(4) are rewarded in a fair and equitable manner.~~

~~(c) Each agency shall have a system for managing performance with a twofold purpose:~~

~~(1) Establishing, monitoring, and evaluating organizational goals, and~~
~~(2) Establishing individual expectations.~~

~~(d) This system shall address establishing individual expectations. Once organizational goals are established and communicated, individual expectations shall be set based on these goals so that each employee understands and can relate assigned duties to the agency's mission and goals.~~

Each agency shall have an operative performance management system that has been approved by the State Personnel Commission.

(1) The State Personnel Director shall help agencies establish and administer their performance management systems.
(2) The State Personnel Director shall review and approve any substantive changes to, or variations in, an agency's performance management system.

Authority G.S. 126-4; 126-7.

25 NCAC 01O .0102 PURPOSE

The purposes of the performance management system are to ensure that:

(1) Employees have clear performance expectations;
(2) The work employees perform contributes to getting the work of the agency accomplished;
(3) Employees receive ongoing information about how effectively they are performing relative to expectations;
(4) Awards and salary increases based on individual performance are distributed fairly;
(5) Opportunities for employee development are identified; and
(6) Individual performance that does not meet expectations is addressed

Authority G.S. 126-4; 126-7.

25 NCAC 01O .0103 COMPONENTS OF A PERFORMANCE MANAGEMENT SYSTEM

An operative performance management system shall consist of:

(1) A process for communicating individual performance expectations, maintaining ongoing performance dialogue, and conducting annual performance appraisals;
(2) A procedure for addressing individual performance that falls below expectations;
(3) A procedure for encouraging and facilitating individual development;
(4) Training in managing performance and administering the system; and
(5) A procedure for resolving performance pay disputes

Authority G.S. 126-4; 126-7.

25 NCAC 01O .0104 RATING SCALE

The annual performance appraisal shall use a 5-level rating scale for reporting overall performance. A rating at the midpoint of the scale shall indicate that an individual's performance has met expectations. Alternative rating scales are permissible, provided they are convertible to a 5-level scale and are approved by the State Personnel Director. Performance-based awards shall be distributed in accordance with G.S. 126-7.

Authority G.S. 126-4; 126-7.

25 NCAC 01O .0105 DISPUTE RESOLUTION

Employee disputes concerning the fairness of their performance appraisal or the amount of their performance-based award shall be addressed in accordance with 25 NCAC 01J .0900.

Authority G.S. 126-4; 126-7.

25 NCAC 01O .0106 MONITORING, EVALUATING, REPORTING

Administration of the performance management system in each agency shall be monitored to ensure that appraisal ratings and salary increases and awards are distributed fairly and equitably.

(1) The State Personnel Director shall report annually on the administration of performance management systems to the State Personnel Commission.
(2) Each agency shall periodically evaluate its performance management system to determine how effectively the system is meeting the purposes stated in 25 NCAC 01O .0102 and take actions to improve the system. Evaluation findings and improvement actions shall be reported to the State Personnel Director.

Authority G.S. 126-4; 126-7.

SECTION .0200 - THE PERFORMANCE MANAGEMENT SYSTEM

25 NCAC 01O .0201 PERFORMANCE MANAGEMENT PROCESS

~~(a) The state's Performance Management System shall consist of a one year work planning and performance evaluation cycle. The steps in the one year review cycle are:~~

~~(1) Work plan developed for an employee at the beginning of the review cycle.~~
~~(2) Interim Review (assessment) of each employee's progress is completed by the supervisor and discussed with the employee six months into the cycle.~~
~~(3) Improvement Plan that addresses any deficient performance.~~
~~(4) Development plan that addresses career development needs.~~
~~(5) Performance Appraisal at the end of each review period evaluates an employee's accomplishments against the goals, objectives and competency requirements that were established at the start of the cycle. Each employee receives an overall rating. Any employee who receives an Unsatisfactory or Below Good rating must have a developmental plan indicating where improvements are needed and that specifies training and development activities to improve performance.~~

~~(b) The Performance Management Process is the sequence of actions that supervisors and managers take when interacting with employees about their performance. The three parts of this Process are:~~

~~(1) Planning - At the beginning of the work cycle, the supervisor and the employee shall meet to develop the employee's work plan.~~
~~(2) Managing - This part of the Performance Management process includes the day-to-day tracking of the employee's progress toward achieving the performance expectations by:~~
~~(A) Feedback through coaching and reinforcing discussions.~~
~~(B) Interim review - Every supervisor must meet with each employee at least at the midpoint of the work cycle for an interim review of performance.~~
~~(3) Appraising - At the end of the work cycle, the supervisor shall meet with each employee to discuss the employee's actual performance and record the actual results and behavior for each expectation as follows:~~
~~(A) Supervisor rates each responsibility and records the rating on the work plan.~~
~~(B) Supervisor rates each competency and records the rating on the work plan.~~
~~(C) The overall rating is discussed with the employee and recorded on the work plan.~~
~~(D) The overall summary statements supporting the rating are written.~~

Authority G.S. 126-4; 126-7.

25 NCAC 01O .0202 COMPONENTS OF AN OPERATIVE SYSTEM

~~Each agency is required to have the following:~~

~~(1) Agency Specific Policy.~~
~~(2) Individual Work Plan.~~
~~(3) Rating Scale.~~
~~(4) Performance Appraisal Summary.~~
~~(5) Development or Performance Improvement Plan for each work plan.~~
~~(6) Education/Training Program.~~
~~(7) Performance Pay Dispute Resolution Procedure.~~
~~(8) Performance Management and Pay Advisory Committee.~~

Authority G.S. 121-5; 126-4; 126-7.

25 NCAC 01O .0203 RELATIONSHIP/PERFO RMANCE MGMT/OTHER HUMAN RESOURCES SYSTEMS

~~(a) Performance management shall be an integral part of the total management of an organization. Information obtained during the Performance Management Process about individual employees or from specific units of the organization shall be a consideration in making other personnel management decisions. The design of the job shall be the basis for job analysis, which determines the content of the performance appraisal. Information obtained from performance appraisals must influence selection, staffing, discipline, training, and development.~~

~~(b) Performance appraisal information shall be one consideration in making other personnel decisions such as promotions, reductions in force, performance salary increases, and all performance based disciplinary actions. Personnel policies dealing with these actions also require consideration of other information. Performance appraisal alone shall not determine such decision.~~

(c) In order to achieve internal consistency in personnel administration, agencies shall adopt procedures that meet the following requirements:

(1) A current (within the past 12 months) Performance Appraisal Summary shall be on file for an employee before any of the personnel actions listed in Paragraph (b) of this Rule can be affected.

(2) Any proposed personnel action as mentioned in this Rule shall be consistent with the overall rating of the employee's performance.

(3) In cases in which the personnel action recommended by the supervisor appears inconsistent with the current overall rating, the supervisor shall write a justification to accompany the recommendation.

Authority G.S. 126-4; 126-7.

25 NCAC 01O .0204 RESPONSIBILITIES OF THE STATE PERSONNEL COMMISSION

The State Personnel Commission shall submit a report on the Performance Management System annually in accordance with G.S. 126-7(c)(9). The report shall include, in addition to statutorily mandated information, recommendations for improving and correcting any inconsistencies in the total Performance Management System and in each agency.

Authority G.S. 126-4(8); 126-7.

25 NCAC 01O .0205 RESPONSIBILITIES OF THE OFFICE OF STATE PERSONNEL

The Office of State Personnel, under the authority of G.S. 126-3, shall administer and enforce all Rules for the performance management system throughout North Carolina State Government. Each agency shall submit information annually for each cycle. This shall include submission of planning documents as well as participating in audits conducted by the Office of State Personnel.

Authority G.S. 126-4; 126-7.

25 NCAC 01O .0206 RESPONSIBILITIES OF AGENCIES

(a) Top management within each agency shall establish, monitor and evaluate their individually tailored performance management systems subject to approval by the State Personnel Director as being in full compliance with this Subchapter. The head of each agency shall bring all units within the agency's purview into full compliance with this Subchapter by January 1, 1990, except for those provisions otherwise stipulated. Failure to adhere to this Subchapter may result in the loss or withholding of performance increase funds throughout an entire agency.

(b) Each agency head shall submit an annual report to the Office of State Personnel, which includes:

(1) a complete description of the current performance management system,

(2) performance increase distribution of each employing unit,

(3) data on demographics of performance ratings,

(4) frequency of evaluations performance pay increases awarded, and

(5) the implementation schedule for performance pay increases.

(c) Within 60 calendar days after receipt of feedback on this annual report from the Office of State Personnel, the head of each agency shall prepare a written plan alleviating inequities and systematic deficiencies and submit it to the Office of State Personnel for concurrence. The head of same agency shall also take sanctions against the managers of those units in which inequities or systematic deficiencies exist.

Authority G.S. 126-4; 126-7.

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

AGENCY	CASE NUMBER	ALJ	DATE OF DECISION	PUBLISHED DECISION REGISTER CITATION
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A list of Child Support Decisions may be obtained by accessing the OAH Website: www.ncoah.com/decisions.

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Febby Manuel v. DMA, DHHS	06 OSP 1282	Overby	01/29/07	
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Calvin D. Ellis v. Fayetteville State University	06 OSP 1336	Wade	12/08/06	
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Douise Morris v. DOC	06 OSP 1409	Gray	11/21/06	
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Sandra S. Denmark v. Dorothea Dix Hospital, DHHS	06 OSP 1685	Gray	01/16/07	
James Ray Merrill v. Broughton Hospital	06 OSP 1767	Lassiter	12/13/06	
Brenda Stroud v. DST	06 OSP 1722	Gray	01/18/07	
Darian Lee Hybl v. Halifax Community College (HCC)	06 OSP 1773	Gray	12/14/06	
Teresa S Weedon v. UNC-CH	06 OSP 1864	Elkins	02/22/07	
Tabitha McAdoo v. UNCW	06 OSP 1881	Morrison	12/29/06	
Todd Williams v. Appalachian State University	06 OSP 1895	Overby	02/05/07	
Terry D. Moses v. DOT	06 OSP 2204	Gray	02/15/07	
Tobias Guilluame v. Fayetteville State University	06 OSP 2257	Gray	02/16/07	
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Anthony W. Allen v. Wake County Human Service	06 OSP 2416	Overby	02/14/07	
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SECRETARY OF STATE

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Ta-Wanda & David Wilson v. UNC Hospitals	06 UNC 1084	Lassiter	09/12/06	
Angel C. Carey v. UNC Hospitals	06 UNC 1146	Lassiter	09/07/06	
Ricky Hayes v. UNC-CH	06 UNC 1426	Overby	12/01/06	
Bonnie G. Cheek v. UNC-CH	06 UNC 1561	Gray	12/14/06	
Regina H. Autry v. SOS				

WELL CONTRACTOR'S CERTIFICATION COMMISSION

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STATE OF NORTH CAROLINA

COUNTY OF DAVIDSON

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
06 DHR 0810

FORSYTH MEMORIAL HOSPITAL, INC. d/b/a FORSYTH MEDICAL CENTER and COMMUNITY GENERAL HEALTH PARTNERS, INC. d/b/a THOMASVILLE MEDICAL CENTER, Petitioners, vs. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, Respondent, and NORTH CAROLINA BAPTIST HOSPITAL, LEXINGTON MEMORIAL HOSPITAL, INC. and HIGH POINT REGIONAL HEALTH SYSTEM, Respondent-Intervenors.	**RECOMMENDED DECISION AND ORDER GRANTING SUMMARY JUDGMENT IN PART AND DENYING IN PART (N.C. GEN STAT. §§ 1A-1, RULE 56; 150B-34B-34(c))**

On October 27 and October 30, 2006, the undersigned Administrative Law Judge ("ALJ") heard the Motion for Summary Judgment by Petitioners Forsyth Memorial Hospital, Inc. d/b/a Forsyth Medical Center ("Forsyth") and Community General Health Partners, Inc. d/b/a Thomasville Medical Center ("Thomasville") (collectively referred to as "Petitioners") filed September 11, 2006. In their responses to this motion, Respondent and Respondent-Intervenors argued that summary judgment be entered against the moving parties, Forsyth and Thomasville, and in favor of Respondent and Respondent-Intervenors, pursuant to Rule 56(c) of the North Carolina Rules of Civil Procedure.

Based upon the briefs, arguments, pleadings, documents, exhibits and the record in this contested case, the undersigned hereby enters this Recommended Decision granting in part and denying in part Petitioners' Motion for Summary Judgment, and granting in part and denying in part Respondent and Respondent-Intervenors' Motion for Summary Judgment pursuant to Rule 56(c).

APPEARANCES

For Petitioners Forsyth Memorial Hospital, Inc. d/b/a Forsyth Medical Center ("FMC" or "Forsyth") and Community General Health Partners, Inc. d/b/a Thomasville Medical Center (collectively "Petitioners"):

Noah H. Huffstetler, III
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For Respondent N.C. Department of Health and Human Services, Division of Facility Services, Certificate of Need Section (the "CON Section or Agency"):

June S. Ferrell
Amy Bason
Angel Gray
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629

For Respondent-Intervenor High Point Regional Health System ("High Point"):

Gary S. Qualls
Colleen M. Crowley
Kennedy Covington Lobdell & Hickman, L.L.P.
430 Davis Drive, Suite 400
Morrisville, NC 27560

For Respondent-Intervenor Lexington Memorial Hospital ("Lexington"):

Terrill Johnson Harris
Robert L. Wilson, Jr.
William W. Stewart, Jr.
Smith Moore LLP
P.O. Box 21927
Greensboro, NC 27420

APPLICABLE LAW

1. The procedural statutory law applicable to this contested case is the North Carolina Administrative Procedure Act ("APA"), N.C. Gen. Stat. § 150B-1 *et seq.*

2. The substantive statutory law applicable to this contested case is the North Carolina Certificate of Need Law, N.C. Gen. Stat. § 131E-175, *et seq.*

3. The administrative regulations applicable to this contested case are the North Carolina Certificate of Need administrative rule, 10A N.C.A.C. 14C.0100 *et seq.*, and the Office of Administrative Hearings rules, 26 N.C.A.C. 3.0100 *et seq.*

BURDEN OF PROOF ON SUMMARY JUDGMENT

Summary judgment is proper "if 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 judgment as a matter of law." Thompson v. Three Guy Furniture Co., 122 N.C. App. 340, 344, 469 S.E.2d 583, 585 (1996) (quoting N.C. Gen. Stat. § 1A-1 Rule 56 (c)). The party moving for summary judgment has the burden of proving the lack of a triable issue of fact. Collingwood v. G.E. Real Estate Equities, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). The evidence is viewed in the light most favorable to the nonmoving party. Davis v. Town of Southern Pines, 116 N.C. App. 663, 666, 449 S.E.2d 240, 242 (1994). Summary judgment, where appropriate, may be rendered against the moving party. N.C. Gen. Stat. § 1A-1 Rule 56(c).

ISSUES

On October 9, 2006, the undersigned issued an Order limiting the scope of discovery and governing the conduct of discovery prior to the Summary Judgment hearing (hereinafter the "Discovery Order"). (Resp. Ex. 15) As part of this Discovery Order, Respondent and Respondent-Intervenors were permitted to conduct discovery on the following issues:

(1) Was the architect's estimate of the cost of Petitioners' project included in the Notice "certified" within the meaning of Section 131E-178(d)?
(2) Did the Notice include information regarding the fair market value of the equipment proposed to be acquired by Petitioners sufficient for the purposes of Section 131E-178(d)?
(3) Was the architect's estimate of the cost of Petitioners' proposed project obtained more than sixty days before Petitioners incurred an obligation for the capital expenditure to which the estimate related as required by Section 131E-178(d)?

(4) Was the Notice submitted within thirty days of the date on which Petitioner made a capital expenditure exceeding the capital expenditure minimum as required by Section 131E-178(d)?

(5) Did the cost overrun experienced by Petitioners on their proposed project result from changes in the project undertaken subsequent to the architect's estimate of its cost?

Based upon consideration of the oral arguments, briefs, pleadings, documents, and exhibits, and the entire record in this proceeding, the undersigned makes the following:

FINDINGS OF UNDISPUTED FACT

Identification of Parties

(1) Petitioner Forsyth Memorial Hospital, Inc., d/b/a Forsyth Medical Center (hereinafter FMC) is a non-profit corporation organized under Chapter 55A of the North Carolina General Statutes. FMC has its principal place of business in Forsyth County, North Carolina. FMC operates a general acute care hospital in Winston-Salem, Forsyth County, North Carolina.

(2) Petitioner Community General Health Partners, Inc. d/b/a Thomasville Medical Center (hereinafter TMC) is a non-profit corporation organized under Chapter 55A of the North Carolina General Statutes. TMC has its principal place of business in Davidson County, North Carolina. TMC operates a general acute care hospital in Thomasville, Davidson County, North Carolina. FMC and TMC are affiliated hospitals that are controlled by the same corporate parent, Novant Health, Inc. ("Novant").

(3) Respondent North Carolina Department of Health and Human Services, Division of Facility Services, Certificate of Need Section (hereinafter Agency) is an agency of the State of North Carolina and is subject to the contested case provisions of the North Carolina Administrative Procedure Act ("APA"). The Agency is authorized by Article 9, Chapter 131E of the North Carolina General Statutes to administer the Certificate of Need ("CON") Act.

(4) Respondent-Intervenors High Point Regional Health System (hereinafter High Point) is a North Carolina non-profit corporation and is licensed by the State of North Carolina as an acute care hospital. High Point has its principal place of business in High Point, Guilford County, North Carolina.

(5) Respondent-Intervenor North Carolina Baptist Hospital (hereinafter Baptist) is a North Carolina non-profit corporation and is licensed by the State of North Carolina as an acute care hospital. Baptist has its principal place of business in Winston-Salem, Forsyth County, North Carolina.

(6) Respondent-Intervenor Lexington Memorial Hospital, Inc. (hereinafter Lexington) is a North Carolina non-profit corporation and is licensed by the State of North Carolina as an acute care hospital. Lexington has its principal place of business in Lexington, Davidson County, North Carolina.

Correspondence and Agency Review Determinations

In a letter dated December 19, 2005, FMC first advised the CON Section that FMC had been proceeding without a CON to acquire a linear accelerator, which would be installed at TMC and operated under TMC's hospital license. (Resp. Ex. 1, Agency File, pp. 1-2)

SUMMARY OF UNDISPUTED FACTS

The following facts are not in dispute:

(1) FMC operates a non-profit, general acute care hospital in Winston-Salem. See Petition for Contested Case in 06 DHR 0810, ¶ 1. Thomasville operates a non-profit, general acute care hospital in Thomasville. Id. at ¶ 2. Forsyth and Thomasville are affiliated hospitals that are controlled by the same non-profit corporate parent, Novant Health, Inc. Id.

(2) A "linear accelerator" is defined by N.C. Gen. Stat. § 131E-176(14b1) to be "a machine used to produce ionizing radiation in excess of 1,000,000 electron volts in the form of a beam of electrons or photons to treat cancer patients." A linear accelerator is used to provide radiation therapy to cancer patients. 2006 SMFP at 99 (attached as Exhibit 1 to Petitioners' Motion for Summary Judgment).

(3) Presently, there is no linear accelerator located in Davidson County. Id. at 104-05. In the 2006 State Medical Facilities Plan ("SMFP") there is a need determination for one linear accelerator in Davidson County. Id. at 109, 111. That need determination is not affected by the present case. Id. at 31.

(4) On May 31, 2005, FMC obtained a cost estimate certified by Nelson C. Soggs, an architect licensed to practice in North Carolina (the "Certified Cost Estimate") for the construction of a vault and related costs for the installation of a linear accelerator at Thomasville (the "Project"). See Letter dated May 31, 2005 from Nelson C. Soggs to David W. McMillan, attached as Exhibit 1 to Petition for Contested Case in 06 DHR 0810. The certified construction estimate was $561,492.00. See Affidavits of Wayne Gregory and David W. McMillan, attached to Petitioners' August 14, 2006 Notice of Filing.

(5) Mr. Soggs has been a licensed architect in the State of North Carolina since 1998 and has been practicing architecture since 1990. See Soggs Deposition at 104-105, attached to Petitioners' October 26, 2006 Notice of Filing. His architecture practice focuses exclusively on healthcare facilities. Id. at 27. In the past he has prepared estimates for various projects at Novant including an ICU addition, a CT scan, and various other renovation projects. Id. at 12-13. He has worked on approximately four other linear accelerator projects. Id. at 117. In preparing the May 31, 2005 estimate, he reviewed a final cost estimate for a linear accelerator addition to Caldwell Memorial Hospital, as well as final cost estimate for a linear accelerator project at Northern Hospital of Surry County. Id. at 107-08.

(6) FMC also obtained a price quotation from RS&A, Inc., a company that specializes in the sale and service of linear accelerators, for the purchase of a linear accelerator to be installed at Thomasville (the "RSA Quote"). See Affidavit of Kenneth Wolff, attached to Petitioners' August 14, 2006 Notice of Filing. The linear accelerator cost $163,060.00. Id. See also Invoice from RSA Inc., dated June 7, 2006, attached as Exhibit 1 to Petition for Contested Case in 06 DHR 0810. Thus, the total expenditure for the Project was estimated to be $724,552.

(7) Upon completion of the Project, FMC intended to enter into an agreement with Thomasville that would allow FMC to operate the linear accelerator at Thomasville's facility in Thomasville. See Affidavits of Gabrielle Causby and Sharon Murphy, attached to Petitioners' August 14, 2006 Notice of Filing.

(8) N.C. Gen. Stat. § 131E-175 et seq. requires that healthcare providers obtain a CON prior to developing or offering certain projects defined as "new institutional health services."

(9) The acquisition of "major medical equipment" is a "new institutional health service" under the CON Law. "Major medical equipment" is defined under N.C. Gen. Stat. § 131E-176(14o) as:

> a single unit or single system of components with related functions which is used to provide medical and other health services and which costs more than seven hundred fifty thousand dollars ($750,000). In determining whether the major medical equipment costs more than seven hundred fifty thousand dollars ($750,000), the costs of the equipment, studies, surveys, designs, plans, working drawings, specifications, construction, installation, and other activities essential to acquiring and making operational the major medical equipment shall be included.

(10) N.C. Gen. Stat. § 131E-178(d) provides a "safe harbor" for health care entities that begin a project based on a certified cost estimate, only to have the actual cost of the project exceed the cost threshold for "major medical equipment". Specifically, N.C. Gen. Stat. § 131E-178(d) states:

> Where the estimated cost of a proposed capital expenditure, including the fair market value of equipment acquired by purchase, lease, transfer, or other comparable arrangement, is certified by a licensed architect or engineer to be equal to or less than the expenditure minimum for capital expenditure for new institutional health services, such expenditure shall be deemed not to exceed the amount for new institutional health services regardless of the actual amount expended, provided that the following conditions are met:

(1) The certified estimated cost is prepared in writing 60 days or more before the obligation for the capital expenditure is incurred. Certified cost estimates shall be available for inspection at the facility and sent to the Department upon its request.

(2) The facility on whose behalf the expenditure was made notifies the Department in writing within 30 days of the date on which such expenditure is made if the expenditure exceeds the expenditure minimum for capital expenditures. The notice shall include a copy of the certified cost estimate.

(11) Neither the statute itself nor any properly promulgated regulation defines the term "certified cost estimate" or explains the requirements a cost estimate must meet in order to be considered "certified." Nothing in N.C. Gen. Stat. § 131E-178(d) requires that the certification be notarized, stamped or sealed to be effective.

(12) The Agency had not developed a form for health care entities to use in obtaining a certified cost estimate. See Hoffman Deposition, Vol. II, at 52, attached to Petitioners' August 14, 2006 Notice of Filing. The Agency had not promulgated rules that refer to the form that a certified cost estimate under N.C. Gen. Stat. § 131E-178(d) must follow. Id. at 54.

(13) At the time of FMC's purchase of the linear accelerator in June 2005, the acquisition of a linear accelerator did not require a CON unless it constituted "major medical equipment." Following FMC's purchase, on August 26, 2005, the CON law was amended to specifically define any acquisition of a linear accelerator to constitute "major medical equipment" regardless of cost. See N.C. Sess. Laws 2005-325, § 1.

(14) On November 28, 2005, FMC first learned that the actual construction costs would exceed the original estimate. See Affidavits of David W. McMillan and Wayne L. Gregory, attached to Petitioners' August 14, 2006 Notice of Filing. The increase in construction costs were due to the increase in the cost of construction materials that resulted from Hurricane Katrina and other market forces, including the impact of construction in overseas markets such as China's demand for certain construction materials. Id. See also McMillan Deposition at 74, attached to Petitioners' October 26, 2006 Notice of Filing.

(15) After FMC learned that the increase in cost of construction materials had driven the total cost of the installation of the linear accelerator above the $750,000 threshold for "major medical equipment," FMC attempted to reduce the cost of the project by eliminating non-essential elements from the scope of construction. See Soggs Deposition at 60-61, 65-67, 113, attached to Petitioners' October 26, 2006 Notice of Filing. FMC eliminated a toilet room, a changing room, and portions of the roof design that were not integral to the vault's structural integrity. Id. at 52, 61 and 92.

(16) Despite FMC's attempts to reduce costs, as of December 12, 2005, the revised total cost, including equipment and construction costs, was $853,356.00. See Affidavit of David W. McMillan, attached to Petitioners' August 14, 2006 Notice of Filing.

(17) On December 19, 2005, in accordance with the provisions of N.C. Gen. Stat. § 131E-178(d), FMC provided written notice (the "Notice") to the Agency of the increased costs. See Exhibit 1 to Petition for Contested Case in 06 DHR 0810. FMC included a copy of the Certified Cost Estimate in its Notice.

(18) N.C. Gen. Stat. § 131E-178(d) does not require the Agency to respond upon receiving the Notice. Likewise, it does not require the proponent of the Project to wait after sending in the Notice before beginning the Project.

(19) On December 29, 2005, FMC issued a Notice to Proceed to Rentenbach Constructors to begin construction of the vault and other necessary upfit at Thomasville. See McMillan Deposition, pps. 111-12, attached to Petitioners' October 26, 2006 Notice of Filing. This Notice to Proceed allowed the contractor to begin work on the project prior to the execution of any contract. Id. Prior to the issuance of this Notice to Proceed, the contractor was not permitted to perform any work related to the project. Id.

(20) On January 4, 2006, FMC entered into a construction contract to build the linear accelerator vault. See Affidavit of David W. McMillan, attached to Petitioners' August 14, 2006 Notice of Filing. Construction began the next day. Id.

(21) The Agency did not respond to FMC's December 19, 2005 Notice until April 4, 2006 when FMC and Thomasville received from the Agency two letters, each captioned as a "Cease and Desist Notice" (the "Cease and Desist Notices"). See Exhibits 1 and 2 to Petition for Contested Case.

(22) The CON Section summarized its decision in the Review Determination letter of April 4, 2006 to FMC by stating:

> … all conditions of N.C. Gen. Stat. § 131E-178(d) have not been met. Consequently, Forsyth Medical Center failed to demonstrate the reported expenditure is "*deemed not to exceed the amount*" it originally provided for the project. Because the total capital cost of the project is now expected to exceed $750, 000, the proposal constitutes the acquisition of "major medical equipment" which is a "new institutional health service" that requires a certificate of need.

(23) The second Review Determination letter of April 7, 2006, was issued to TMC and provides in pertinent part:

> The installation and utilization of the linear accelerator at Thomasville Medical Center constitutes the acquisition of a linear accelerator by Thomasville Medical Center because the arrangement with Forsyth Medical Center is a "comparable arrangement" to a donation or transfer of the equipment to Thomasville Medical Center. The acquisition is a "new institutional health service" that requires a certificate of need.

(24) At the time FMC received the cease and desist letters from the CON Section, all but $26,000 of the total capital costs for the Project had been incurred. The vast majority of preparations necessary to obtain an occupancy permit had already been completed. See Affidavit of David W. McMillan, attached to Petitioners' August 14, 2006 Notice of Filing.

(25) Due to the delay between FMC's Notice and the CON Section's Cease and Desist Notices, FMC had to make all payments to its contractors under their respective contracts, despite the fact that not all work on the Project was completed.

(26) In its Cease and Desist Notice to FMC, the Agency stated as follows:

> The CON Section is hereby giving notice to Forsyth that it must immediately cease and desist from the development and offering of linear accelerator service on the linear accelerator purchased on June 7, 2005. Forsyth may not use the linear accelerator purchased on June 7, 2005 without first obtaining a certificate of need.

(27) TMC has not yet acquired the linear accelerator from FMC and any installation at TMC would post-date August 26, 2005.

(28) Effective August 26, 2005, the CON law was amended to require a CON for a linear accelerator, regardless of cost. N.C. Gen. Stat. § 131E-176(14g), (16)fl.5a (eff. Aug. 26, 2005); 2005 N.C. Sess. Law 325, Senate Bill 740, § 1.

(29) Finding that the project was subject to the legal requirement of a CON under the terms of the law, both Review Determination letters notified TMC and FMC that they should cease and desist from developing the project and offering services associated with the project without first obtaining a CON. (Resp. Ex. 1, Agency File, pp. 32, 36) Otherwise, both entities would face sanctions by the Agency.

(30) The CON Section's Review Determination letters advised Petitioners of their administrative appeal rights in accordance with N.C. Gen. Stat. § 150B-23(f). (Id.)

CONCLUSIONS OF LAW

Based on all the foregoing undisputed facts, the undersigned concludes as follows:

Summary Judgment Standard

(1) Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that 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." N.C. R. Civ. P. 56.

(2) "[A]n issue is genuine if it is supported by substantial evidence, which is that amount of relevant evidence necessary to persuade a reasonable mind to accept a conclusion... [A]n issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." Liberty Mut. Ins. Co. v. Pennington, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citations and internal quotations omitted).

(3) An "administrative agency is a creature of the statute creating it and has only those powers expressly granted to it or those powers included by necessary implication from the legislative grant of authority." In re Williams, 58 N.C. App. 273, 279-80, 293 S.E.2d 680, 685 (1982), quoting In re Broad & Gales Creek Cmty. Ass'n, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980).

(4) Under N.C. Gen. Stat. § 131E-188(a), the Agency's authority is limited "to issue, deny or withdraw a certificate of need or an exemption or to issue a certificate of need pursuant to a settlement agreement."

(5) N.C. Gen. Stat. § 131E-184 sets forth the only "exemptions" for certificates of need in Chapter 131E. The "safe harbor" provision of § 131E-178(d) is not an "exemption" under § 131E-184 or § 131E-188(a).

(6) FMC's Notice under § 131E-178(d) did not constitute an application for a certificate of need or a request for an exemption.

(7) The purpose of the "safe harbor" created under § 131E-178(d) is to permit a provider to proceed with a project which it reasonably believes, based on the estimate of a licensed professional, will not exceed the cost threshold for CON review, without fear that its investment will be wasted if its costs unexpectedly increase.

(8) In its Cease and Desist Letters the Agency stated requirements which do not appear in the plain language of statute 131E-178(d) or in Agency rule or policy statement. As a result, FMC's linear accelerator remains warehoused, and the vault constructed for its operation remains empty.

FMC Complied with § 131E-178(d)

(9) With regard to whether Petitioners complied with § 131E-178(d), the decisive issues are as follows:

a. Was the architect's estimate of the cost of FMC's project included in the Petitioners' December 19, 2005 letter, including attachments (the "Notice"), "certified" within the meaning of § 131E-178(d)?

b. Did the Notice include information regarding the fair market value of the equipment proposed to be acquired by Petitioners sufficient for the purposes of § 131E-178(d)?

c. Was the architect's estimate of the cost of Petitioners' proposed project obtained more than sixty days before Petitioners incurred an obligation for the capital expenditure to which the estimate related as required by § 131E-178(d)?

d. Was the Notice submitted within thirty days of the date on which Petitioner made a capital expenditure exceeding the capital expenditure minimum as required by § 131E-178(d)?

e. Did the cost overrun experienced by Petitioners on their proposed project result from changes in the project undertaken subsequent to the architect's estimate of its cost?

Was the architect's estimate of the cost of Petitioners' project included in the Notice "certified" within the meaning of § 131E-178(d)?

(10) The Agency has not developed a form for health care entities to use in obtaining a certified cost estimate. There are no rules that refer to the form that a certified cost estimate under N.C. Gen. Stat. § 131E-178(d) must follow, and there are no parameters for the format for which the applicant shall provide a certified cost estimate.

(11) In the absence of a statutory definition, the word "certify" should be interpreted according to its common meaning. See Kroger Ltd. P'ship I v. Guastello, ___ N.C. App. ___, 628 S.E.2d 841 (2006). Accordingly, the word "certify" means "to attest authoritatively" or "to present in formal communication." Merriam-Webster's Collegiate Dictionary 187 (10th ed. 2001).

(12) Mr. Soggs' May 31, 2005 estimate is a certified estimate because his signature, appearing on the stationery of his firm, is his certification and that the estimate was true and accurate to the best of his knowledge at the time he signed the estimate. See Deposition of Nelson Soggs at 32, 106-07. His seal as an architect was not needed "since I placed my signature on it, that was my means of certifying it. I've never placed a seal on any other estimate letter in the past that I recall." Id.

(13) The cost estimate provided by Peterson Associates was a formal communication conveying the architect's good faith estimate as to the cost of the Project, thus it constitutes a "certified cost estimate" within the meaning of § 131E-178(d).

(14) Section 131E-178(d) does not permit examination into the wisdom or correctness of a certified cost estimate. The statute as written permits a hospital, such as Forsyth, to rely on the word of licensed architects without subjecting the architects to additional scrutiny regarding the basis of their opinion. Accordingly, no consideration of evidence related to the

basis for the certified cost estimate is required. Even in the absence of this requirement; however, the certified cost estimate prepared by Peterson Architects was based upon actual cost data of contemporaneous and substantially similar projects.

(15) Subsection 131E-178(d) only requires a licensed architect to certify those costs which are, in fact, only estimates, and does not require the architect to recite the cost of equipment provided by an independent vendor. In this case, only the construction costs associated with the construction of the vault required estimating, thus the cost estimate provided by Peterson Associates was "certified" within the meaning of § 131E-178(d).

Did the Notice include information regarding the fair market value of the equipment proposed to be acquired by FMC sufficient for the purposes of § 131E-178(d)?

(16) The term "fair market value" is also not defined in the General Statutes. Court decisions make it clear that the term has been interpreted to mean "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's length transaction." Susi v. Aubin, 173 N.C. App. 608, 612, 620 S.E.2d 682, 684 (2005), quoting Black's Law Dictionary 1587 (8th ed. 2004).

(17) The evidence regarding whether the linear accelerator was sold for "fair market value" was provided by Kenneth Wolff, who sold the linear accelerator to Forsyth. Mr. Wolff's testimony establishes that RS&A sold this linear accelerator for its fair market value and that RS&A does not sell linear accelerators below fair market value. See Wolff Deposition at 60-61. There is no genuine issue that Mr. Wolff's testimony is inaccurate or unreliable.

(18) It is unnecessary to engage in any analysis of the costs of RS&A involved in the acquisition or refurbishing of the linear accelerator. The statute does not require vendors to prove that the price charged for a piece of equipment is based on any specific formula. Further, the statute does not subject vendors of equipment or materials used in any project under the CON law to reveal confidential or proprietary information such as profit margins.

(19) The RS&A quote, attached to the Notice, provides reliable evidence of the fair market value of the linear accelerator. Both RS&A and Forsyth were willing to enter into the transaction. The transaction was an arms-length transaction.

(20) The issue is whether the price actually charged in this instance reflected the fair market value of the linear accelerator, not whether a different price might have been charged under a different set of circumstances. RS&A was a willing seller and Forsyth was a willing buyer and therefore the price agreed upon between RS&A and Forsyth for the linear accelerator represents the fair market value of the linear accelerator. There is no evidence of any collusion between RS&A and Forsyth, and Respondent and Respondent-Intervenors provided no evidence to the contrary. The evidence demonstrates that the sale of the linear accelerator by RS&A to Forsyth was an arms-length transaction between parties of equal bargaining power, thus the price established by their negotiation is conclusively fair.

(21) The Notice did include information regarding the fair market value of the equipment sufficient for the purposes of § 131E-178(d).

Was the architect's estimate of the cost of FMC's proposed project obtained more than sixty days before FMC incurred an obligation for the capital expenditure to which the estimate related as required by § 131E-178(d)?

(22) The acquisition of the linear accelerator alone at a cost of $163,000 was not a reportable event. At the time Forsyth purchased the linear accelerator in June 2005, pursuant to the linear accelerator price quote from RS&A, it was not incurring a capital expenditure for a new institutional health service because the cost of the Project was estimated by Forsyth's architects to be below $750,000, and thus it did not constitute a new institutional health service.

(23) Pursuant to and in compliance with § 131E-178(d)(1), on November 28, 2005 FMC became aware that the increase in construction costs would cause the cost of the Project to exceed $750,000.00.

(24) Pursuant to and in compliance with § 131E-178(d)(1), it was on December 29, 2005 that FMC issued its Notice to Proceed, and it was on this date that FMC incurred an obligation for a capital expenditure.

(25) Therefore, FMC did not incur an obligation for a capital expenditure, which is a new institutional health service as required by N.C. Gen. Stat. § 131E-178(d), until more than 60 days after it received the May 31, 2005 estimate from Peterson Associates or the June 7, 2005 quote from RS&A.

Was the Notice submitted within thirty days of the date on which FMC made a capital expenditure exceeding the capital expenditure minimum as required by § 131E-178(d)?

(26) FMC notified the Agency before FMC incurred an obligation for a capital expenditure that constitutes a new institutional health service.

(27) FMC submitted the Notice to the Agency on December 19, 2005.

(28) FMC gave notice to proceed on the construction contract for the construction of the vault on December 29, 2005.

(29) The construction contract was the expenditure that caused FMC's project to be above the capital expenditure minimum.

(30) Therefore, the Notice to the Agency was submitted within thirty days of the date on which FMC made a capital expenditure exceeding the capital expenditure minimum as required by § 131E-178(d).

Did the cost overrun experienced by FMC on the proposed project result from changes in the project undertaken subsequent to the architect's estimate of its cost?

(31) There was no evidence presented to indicate that the Project changed subsequent to the architect's certified cost estimate. From the time of the certified cost estimate until when construction began, the Project was always intended to be a vault to house a linear accelerator at Thomasville Medical Center.

(32) Section 131E-178(d) does not require an exhaustive review of all construction-related materials generated by FMC's architects, or their contractors regarding the design or construction of this project. The statute does not require FMC to prove that every element identical from the first creation of the certified cost estimate through preliminary design documents to the final project. The issue is narrowly construed to examine whether the project changed in substance in a way unconnected with the intent of the project as originally conceived. The intent of the statute is to prohibit health care providers from initiating one project and later constructing a different project in a manner that avoids compliance with the CON law.

(33) FMC voluntarily notified the CON section of the existence of this project upon notice that the cost of the project had increased above the threshold for a "new institutional health service." The project as finally constructed (and nearly completed) was substantially the same as the project that was originally intended in that the project was always designed to be a vault to house a linear accelerator. Nelson Soggs established that substantial efforts were taken to reduce unnecessary elements from the Project to reduce costs, but that no additions were made to the Project that would have resulted in an increased cost. Reduction of costs is a goal of the CON law.

(34) The uncontroverted evidence before the undersigned indicates that the unexpected rise in construction costs was due to the increase in costs related to construction materials, not due to changes in the project.

(35) The rise in the cost of construction materials was attributable to other market forces and not the result of changes in the project undertaken subsequent to the architect's estimate of its cost.

(36) Accordingly, the cost overrun experienced by FMC on their proposed project did not result from changes in the project undertaken subsequent to the architect's estimate of its cost.

FMC Cannot Relocate the Linear Accelerator to TMC Without a Certificate of Need

(37) N.C. Gen. Stat. § 131E-176(16)(f1)(5a), effective August 26, 2005, provides that a CON is required for:

> The acquisition by purchase, donation, lease, transfer, or comparable arrangement of any of the following equipment by or on behalf of any person:
>
> . . .
>
> 5a. Linear Accelerator

(38) The Agency interprets and applies this statute as requiring a CON when one entity acquires a linear accelerator and then transfers and installs the linear accelerator for use by a separate entity after August 25, 2006. (Resp. Ex. 11, Hoffman Depo, Vol. I, pp. 56-57; Resp. Ex. 2, Hoffman Aff., ¶¶ 4, 8-10) Applying the plain language of the statute, the Agency views the transfer and installation as a donation, transfer or "comparable arrangement" by FMC to TMC, a separate entity, and constitutes a second acquisition. (Id.) This was the same interpretation and application applied by the Agency in the Mission/Asheville Hematology Final Agency Decision. (Resp. Ex. 20)

(39) The Agency's interpretation is consistent with the plain language of N.C. Gen. Stat. § 131E-176(16)(f1)(5a) as well as the law of corporations in North Carolina.

(40) The legislature used multiple words to convey the broad coverage of the statute. The use of the word "donation" means no money has to transfer. The use of the word "transfer" indicates the equipment is provided to, supplied or located at another place other than the location of its owner. The use of the word "comparable arrangement" indicates a broad intent by the legislature and shows that the characterization of the arrangement is not determinative; instead, the inquiry is whether the linear accelerator is being supplied, placed, used, installed at a location of a separate entity that is different and apart from the entity that acquired that linear accelerator.

(41) Under the corporate laws of North Carolina, a corporation is an entity unto itself, with attendant legal rights and duties. See N.C. Gen. Stat. §§ 55-1-40 and 55-3-02.

(42) There is no dispute that FMC and TMC are separate legal entities, are operated as separate legal entities, and are separately licensed hospitals. (See Petition for Contested Case Hearing, ¶¶ 1,2; Resp. Exs. 24, 25, Excerpts from North Carolina Secretary of State website) Under the plain language of Chapter 55 and N.C. Gen. Stat. § 131E-178(b), any transfer of assets between FMC and TMC, including the proposed linear accelerator, represents a transfer of an asset between two separate and distinct corporate entities.

(43) It is undisputed that the installation of the linear accelerator at TMC and resulting transfer of the linear accelerator between FMC and TMC have yet to occur, and thus could only occur after the August 26, 2005 effective date of the change in the CON law requiring a CON for the acquisition of a linear accelerator regardless of costs. Therefore, consistent with the plain statutory language at issue, the installation and transfer of the proposed linear accelerator from FMC to TMC would constitute "an acquisition by donation, lease, transfer, or comparable arrangement" of a new institutional health service on the part of TMC under N.C. Gen. Stat. § 131E-178(b) and would require a CON.

RECOMMENDED DECISION

Based upon the foregoing undisputed facts and conclusions of law, it is the recommended decision of the undersigned that Petitioners' Motion for Summary Judgment be granted in part and denied in part in that FMC complied with the safe harbor provisions and are entitled to the exemption as provided in G.S. § 131E-178(d), and Respondent and Respondent-Intervenors' Motion for Summary Judgment pursuant to Rule 56(c) be granted in part and denied in part in that FMC cannot transfer the linear acceleration to TMC without a Certificate of Need.

ORDER AND NOTICE

The North Carolina Department of Health and Human Services will make the Final Decision in this contested case. N.C. Gen. Stat. § 150B-36(b), (b1), (b2), and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it 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(b)(3) requires the agency to serve a copy of its Final Decision on each party, and furnish a copy of its Final Decision to each party's attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

IT IS SO ORDERED.

This _____ day of January, 2007.

_____

Julian Mann III
Chief Administrative Law Judge

A copy of the foregoing was mailed to:

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Terrill Johnson Harris
Smith Moore LLP
Post Office Box 21927
Greensboro, NC 27420

This the _____ day of January, 2007.

_____
Office of Administrative Hearings
6714 Mail Service Center
Raleigh, North Carolina 27699-6714
(919) 733-2698
FAX: (919) 733-3407

STATE OF NORTH CAROLINA
COUNTY OF HARNETT

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
06 DHR 1412

Kyle Collier, a minor, by his mother and legal guardian, Orbie Etheridge, Petitioner,	)	
v.	)	**DECISION**
N.C. Department of Health and Human Services, Respondent.	)	

This contested case was heard by Fred G. Morrison Jr., Senior Administrative Law Judge, on December 14, 2006, in Raleigh, North Carolina. Oral arguments were presented by the parties on December 19, 2006.

APPEARANCES

Petitioners: Erwin Byrd
Lewis Pitts
Advocates for Children's Services
Legal Aid of North Carolina, Inc.
P.O. Box 2101
Durham, NC 27705

Respondent: Diane Martin Pomper
Assistant Attorney General
9001 Mail Service Center
Raleigh, NC 27699-9001

WITNESSES

For Petitioners: Orbie Etheridge

For Respondents: Tena Campbell
Suzanne Walker
Michael Watson

ISSUE

Whether Respondent's failure to provide or arrange for the requested Medicaid services for Petitioner was proper.

The parties stipulate to the following facts:

1. Petitioner, Kyle Collier, is a 4 year-old, Medicaid-eligible resident of Harnett County. He is in the legal custody of his biological mother, Orbie Etheridge.

2. Petitioner was diagnosed at the age of 2 with a pervasive developmental disorder, which diagnosis has since been identified specifically as autism. He has also been diagnosed with intermittent explosive disorder, bipolar affective disorder, and Pediatric autoimmune neuropsychiatric disorder.

3. Because of his disabilities, Petitioner has had long-standing problems in a variety of settings: at home, in the community, in daycare, and in pre-school.

4. Petitioner engages in self-harm behavior; specifically, biting himself and head-banging when stressed. Petitioner also engages in physical aggression towards others, such as kicking, hitting, and biting.

5. Petitioner requires therapeutic holds numerous times a day in his home, community and school settings. These holds have become more and more difficult to perform as Petitioner has grown, and will no doubt become more challenging as he continues to grow.

6. Petitioner is not able to perform age-appropriate self-care skills. He is not toilet-trained and is not able to help with dressing himself. His speech language skills are delayed.

7. Petitioner has difficulty communicating and engaging in social settings. He is not able to engage new people and prefers solitary activities. Petitioner becomes fixated on certain toys or activities, has limited reciprocal social interactions, and makes limited eye contact.

8. Petitioner has difficulty with his sensory integration, including an extreme sensitivity to fluorescent lights. Any lengthy exposure to certain lights causes him to "melt down", screaming, thrashing, and often hurting himself or others until the lights are turned off or he is removed from the lighted environment.

9. Petitioner's mental health and developmental issues require constant supervision. Caring for his particular behaviors puts a great strain on his mother and siblings, placing him at risk for out-of-home placement.

10. Medical professionals who have evaluated and treated Petitioner have recommended particular services to help him overcome his developmental and emotional disabilities, including occupational therapy with an emphasis on sensory integration, and structured day placement.

11. In March, 2006, Petitioner's mother went to the Sandhills Center and provided them with Petitioner's medical records, including his autism diagnosis and recommendations from treating physicians that he receive speech and occupational therapy, structured day placement, and individual therapy.

12. On April 17, 2006, Petitioner received a "Screening for DD Services" through Sandhills Center, which screening indicated Axis I diagnoses of intermittent explosive disorder and autistic disorder. The screening also indicated that Petitioner is an "individual at risk of institutionalization, hospitalization or homelessness," and requested CAP-MR/DD funding and respite services. Petitioner's mother was assured that this screening/request form would be submitted by Sandhills to the Respondent for approval.

13. To date, Petitioner has not received the needed CAP-MR/DD funding or respite services.

14. On April 27, 2006, Petitioner received a diagnostic assessment through Cardinal Clinic, LLC, a provider of Community Support Services contracted by the Sandhills LME. This assessment, completed by Dr. Debra Japzon Gillum, Ph.D., indicated Axis I diagnoses of medium to severe childhood autism, bipolar affective disorder, and pediatric autoimmune neuropsychiatric disorder.

15. The April 27, 2006, diagnostic assessment by Dr. Gillum also recommended community support services, intensive in-home services, outpatient treatment, speech therapy, a therapeutic and educational day program with a focus on sensory integration, occupational therapy, and a comprehensive psychological and developmental evaluation.

In addition to the facts stipulated above, the undersigned makes the following FINDINGS OF FACT:

Sensory Integration Therapy

16. Petitioner's Autism causes dysfunction in the way he processes external conditions. Many sights - like fluorescent lights - sounds, smells, tastes and textures -like wetness - or other forms of touch over-stimulate him and cause him to react negatively, screaming for hours at a time or lashing out physically at himself or others. At other times, he is under-stimulated, and seeks stimulation by rocking or running into objects or walls.

17. These sensory integration dysfunctions were first identified by an occupational therapist at the hospital in Clinton, North Carolina, who treated Kyle soon after he was first diagnosed with autism in January, 2005. This therapist was able to teach Kyle techniques to overcome certain of his reactions to external stimuli in order to reach developmental goals. For example, the therapy, within two weeks, enabled him to begin feeding himself for the first time.

18. Petitioner's mother could not continue transporting him to the hospital which is located nearly an hour from their home, and the occupational therapy was suspended in 2005, when Petitioner was 3 years old.

19. Soon after these services were suspended, Petitioner's mother began attempting to locate services through the Medicaid Local Management Entity (LME), originally identified to her as the Lee-Harnett Area Program, which had actually merged with, and adopted the name of the Sandhills Center for MH/DD/SAS. Sandhills Center is the LME for Harnett County, where Petitioner lives.

20. During the summer of 2006, Petitioner's mother located an occupational therapist, Donna Green, who agreed to travel from Cary, NC to work with Petitioner on a temporary basis. She came to their home several times and developed, among other strategies for helping Petitioner cope with his sensory integration dysfunction, a "sensory diet," a schedule of activities for Petitioner. For example, Petitioner pushes a cart around his home in the morning to prepare him to sit down and eat breakfast. If he is over-stimulated by lights, sounds, and proximity to other people, the sensory diet recommends placing Petitioner in a dark, quiet place until he can calm down. Another technique that was recommended and that has been successfully applied to Kyle is "brushing," or the use of brushes to stroke his limbs on a regular basis throughout the day. These strategies are intended to help Kyle maintain throughout the day, rather than to help him reach specific developmental goals.

21. Because of the scheduling difficulty presented by the distance between Cary and Petitioner's home, and because Ms. Green agreed to work with Petitioner on a temporary basis only, the occupational therapy sessions with her were discontinued in the fall of 2006.

22. Ms. Green recommended that Petitioner continue to receive sensory integration therapy in a clinical setting where trained clinicians could utilize equipment and techniques to help him reach developmental goals, like toilet-training and pencil-holding.

23. Petitioner's mother expressed her concerns about her son's need for sensory integration therapy to the Community Support Services provider, Cardinal Clinic, when they first began providing Community Supports to Petitioner, in April, 2006 [*see Respondent's Exhibit 1]*.

24. The Southeastern Center, in Fayetteville, NC, was recommended by Cardinal Clinic, in October, 2006, as a potential provider of clinical sensory integration therapy. Petitioner's mother called to make an appointment for him, but was told that the only available appointments were midmorning on weekdays, a time slot that would necessitate Petitioner missing a full day of his school for each appointment since the clinic is nearly an hour away from his developmental preschool. When faced with that difficult choice, Petitioner's mother decided not to schedule those appointments, as she determined he would lose more progress by missing those days of school than he would gain from the appointments.

Day Treatment

25. Several medical professionals, including the first to diagnose Petitioner with autism, have recommended a structured day placement for him. In May, 2006, Dr. Gillum of Cardinal Clinic specifically ordered Day Treatment in the Service Order she completed for Respondent.

26. The "Enhanced Benefit Services for Mental Health and Substance Abuse,"[*see Petitioner's exhibit 2*] effective March 20, 2006, and provided by Respondent to Medicaid recipients and service providers, describes the requirements for Day Treatment:

These interventions are designed to support symptom reduction and/or sustain symptom stability at lowest possible levels, increase the individual's ability to cope and relate to others, support and sustain recovery, and enhance the child's capacity to function in an inclusive setting . . .It is available for children 3 to 17 years of age. . . Day treatment provides mental health and/or substance abuse interventions in the context of a treatment milieu.

[T]he day treatment shall be provided in a setting separate from the consumer's own residence. . . This is a facility based service and is provided in a licensed and structured program setting appropriate for the developmental age of children and adolescents.

Day treatment includes professional services . . . Persons who meet the requirements specified for QP or AP status according to 10A NCAC 27G.0104 may deliver Day Treatment. Supervision is provided according to supervision requirements specified in 10A NCAC 27G.0203 and according to licensure requirements of the appropriate discipline.

When describing the entrance criteria for a child to receive these services, Respondent's publication specifically mentions children Petitioner's age:

The child is at risk of or has already experienced significant *preschool*/school disruption . . . The child is *3 to 5 years of age* with atypical social and emotional development. . . (emphasis added).

27. Several day treatment centers provide such services in the area served by Sandhills, but they do not treat children as young as Petitioner.

28. Petitioner's mother was referred by Sandhills and Cardinal Clinic to two different developmental day care centers, one of which is located far from her home, which she declined because no transportation was available. The other center will not take children from Petitioner's school. Neither center provides Day Treatment as described in Respondent's publication, Petitioner's exhibit 2.

BASED UPON THE FOREGOING STIPULATIONS AND FINDINGS OF FACT, THE UNDERSIGNED MAKES THE FOLLOWING:

CONCLUSIONS OF LAW

1. All Parties are properly before the Office of Administrative Hearings.

2. Jurisdiction is conferred on the Office of Administrative Hearings by Chapter 150B of the North Carolina General Statutes.

3. Petitioner is a Medicaid-eligible child who suffers from an array of serious mental health conditions.

4. Because Petitioner is a Medicaid-eligible child under the age of 21 years old, he is entitled to receive all "necessary health care, diagnostic services, treatment, and other measures . . .to correct or ameliorate defects and physical and mental illnesses and conditions," pursuant to special Early and Periodic Screening, Diagnostic and Treatment Services (EPSDT) mandated for children by federal Medicaid law. 42 U.S.C. §1396d(r)(5).

5. The EPSDT provisions obligate the state Medicaid agency to provide all necessary treatment to children, to ameliorate conditions discovered by screenings, if such services are listed in 42 U.S.C. §1396d(a). Pereira v. Kozlowski, 996 F.2d 723 (4th Cir. 1993). Listed services include "any medical or remedial services (provided in a facility, a home, or other setting) recommended by a physician or other licensed practitioner of the healing arts within the scope of their practice under State law, for the maximum reduction of physical or mental disability and restoration of the individual to the best possible functional level." 42 U.S.C. §1396d(a)(13).

6. Participation in Medicaid requires state Medicaid agencies to "arrange for (directly or through referral to appropriate agencies, organizations or individuals) corrective treatment" to Medicaid recipients under the age of twenty-one. 42 U.S.C. §1396a(a)(43). States are obligated to make available a variety of healthcare providers willing and qualified to provide treatment services to meet the needs of children who are eligible for Medicaid. 42 C.F.R. §441.61. Medical assistance must be available in all political subdivisions of the State. 42 U.S.C. §1396a(a)(1).

7. 42 U.S.C. §1396(a)(8) requires Medicaid assistance to be "furnished with reasonable promptness to all eligible individuals."

8. 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. §1396a(a)(5). In North Carolina, the N.C. Department of Health and Human Services operates as the single state agency responsible for Medicaid. N.C.G.S. § 108A-71; N.C. State Medicaid Plan, TN No. 00-03, Section 1.0.

9. The state may not fail to provide a medically-necessary service to a Medicaid-eligible child because it is too expensive, not listed in the state plan of services, or difficult to provide.

10. Regulations implementing the EPSDT provisions, specifically 42 C.F.R. §431.53, mandate coverage of transportation to and from medical care for those Medicaid recipients who would not otherwise be able to access these services. Transportation costs covered by Medicaid include related travel expenses determined to be necessary by the state agency to secure medical examinations and treatment for a recipient. 42 C.F.R. §440.170(a)(1). According to 42 C.F.R. §441.62(b), the state Medicaid

agency must provide information stating that necessary transportation and scheduling assistance are available to EPSDT-eligible individuals upon request.

11. Petitioner has not been provided the medically-necessary services to which he is entitled.

THEREFORE, IT IS DECIDED that Respondent must arrange for or provide the following services for Petitioner:

1. Occupational Therapy, with a focus on sensory integration, provided, preferably, in an equipped clinical setting no more than forty-five minutes away from Petitioner's home, by professionals who are specifically trained in sensory integration. In order for provision of these services not to interfere with Petitioner's education, Occupational Therapy shall occur in the afternoons, allowing him to remain in school until at least 1:00 pm during the school year. It is imperative that the narrow window of opportunity for Kyle to take advantage of these services not be missed.

2. Day Treatment services by June 18, 2007, located not more than forty-five minutes from Petitioner's home, and fulfilling the requirements listed in Respondent's "Enhanced Benefit Services for Mental Health and Substance Abuse" definition (Petitioner's Exhibit 2, hereinafter "Service Definition"), including mental health interventions in the context of a treatment milieu, provided in a licensed and structured program setting, delivered and supervised by qualified and licensed professionals as indicated in the Service Definition. Such services could be delivered in a facility devoted to services other than Day Treatment (*i.e.* at a developmental day care center), as long as professional staffing, licensing, and treatment requirements are met.

3. Transportation and related services pursuant to Medicaid law, as needed and requested, to ensure that Petitioner can receive these services.

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, N. C. 27699-6714, in accordance with North Carolina General Statute 150B-36(b).

NOTICE

The Decision of the Administrative Law Judge in this contested case will be reviewed by the agency making the final decision according to the standards found in G. S. 150B-36(b)(b1)(b2)(b3). The agency making the final decision is required to give each party an opportunity to file exceptions to the decision of the Administrative Law Judge and to present written arguments to those in the agency who will make the final decision. G. S. 150B-36(a).

The agency that will make the final decision in this contested case is the North Carolina Department of Health and Human Services.

This the 22nd day of December, 2006.

Fred G. Morrison Jr.
Senior Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
03 OSP 0822

Ricky Dixon Petitioner	)	
vs.	)	**DECISION**
County of Buncombe Respondent	)	

On November 15, 2006, Administrative Law Judge Melissa Owens Lassiter conducted a contested case hearing in this matter in Morganton, North Carolina. On December 12, 2006, the undersigned ruled that Respondent had just cause to dismiss Petitioner from employment for unacceptable personal conduct.

APPEARANCES

For Petitioner: Ward D. Scott
Leake & Scott
501 BB & T Building
Asheville, NC 28801

For Respondent: Stanford K. Clontz
Baley Baley & Clontz
106 One Oak Plaza
Asheville, NC 28801

ISSUE

Whether Respondent had just cause to dismiss Petitioner from employment for unacceptable personal conduct?

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 1 – 3

For Respondent: 1 – 8

STATUTES AND RULES AT ISSUE

N.C. Gen. Stat. § 126-34.1
Buncombe County Personnel Ordinance

FINDINGS OF FACT

1. In January 2003, Petitioner was employed by Buncombe County Emergency Management Services Division as an Emergency Medical Technician.

2. Respondent is a local county government that distributes federal grant-in-aid funds to its Emergency Management Services Division ("EMS") for federal emergency management programs.

3. Beginning in July of 2002, paramedic Hart Wainwright and Petitioner worked as partners on EMS 6 in Buncombe County. Petitioner and Wainwright were stationed at the West Buncombe Fire Department, and worked 24-hour shifts. Around the fall of 2002, Petitioner began making comments to Wainwright that her "butt was getting big," and Wainwright had "load bearing hips." Wainwright advised Petitioner to stop making such comments, but Petitioner continued making such comments.

4. Between fall of 2002 and January 2003, Wainwright orally informed EMS Supervisor Ronnie Reece that Petitioner was making offensive comments to her. Reece did not purse the matter with Petitioner, because Wainwright did not want to file a formal complaint with Reece. She advised Reece that she would try to handle the matter with Petitioner herself.

5. On January 18, 2003, Wainwright filed a formal complaint with EMS Supervisor Reece, complaining that Petitioner was continuing to make crude and offensive remarks to her. Wainwright complained that Petitioner:

> Has repeatedly made comments about my character, weight, and physical appearance ever since we have been working together. I am personally offended by the comments he has made and I have asked him to cease with them, however he had not. . . .
>
> Ricky [Petitioner] has recently made comments to a co-worker [sic] stating that I am a drug addict. I feel this is demeaning to my character as it is not true. I find this a slanderous remark which can potentially have a threat on my job.
>
> Comments that he has made concerning my appearance are, 'you have load bearing hips.' 'Hart, your butt looks huge in those shorts.' Comments like this are made almost every shift when I change clothes to workout and even when I am in my uniform. He has also spoken all this in front of other people.
>
> I feel like this is harassment and it should be taken care of in a professional manner.

(Resp Exh 1) Wainwright filed a formal complaint due to the tension between she and Petitioner caused by Petitioner's inappropriate comments.

6. EMS Supervisor Ronnie Reece has been a county employee for 32 years, and an EMS Supervisor for 10 of those years. He investigated Wainwright's complaints by contacting other EMS employees and by contacting employees of West Buncombe Volunteer Fire Department. Supervisor Reece requested those persons submit written statements to him concerning any comments they had overheard Petitioner make about Wainwright. Fire Department Employees Bernard Kostielney, Thomas Kelly, Benjamin Lunsford, and Jamison Judd submitted written statements to Reece. EMS employees Julie Bennett, Allen Morgan also submitted written statements to Reece.

7. On January 21, 2003, Reece advised Petitioner that he was suspending Petitioner with pay based upon his investigation into Wainwright's complaint. Reece handed Petitioner an Employee Incident Report/Notice, informing Petitioner of Wainwright's complaints, and Reece's determination that Wainwright's allegations were true. Reece also informed Petitioner that:

> Section 5(a) of the county personnel ordinance expressly forbids this type harassment and it will not be tolerated by this department.
> As a result, effective immediately, I am suspending you with pay and recommending your dismissal. I have scheduled a pre-dismissal hearing conference for you with the county manager in her office on Monday January 27, 2003 at 11:00 am for the purpose of consideration of this action and in seeking a final decision.

(Resp Exh 2) Petitioner read the Employee Incident Report, but refused to sign it. EMS Director Jerry VeHaun recommended to County Manager Wanda Greene that Petitioner's dismissal be upheld.

8. On January 27, 2003, County Manager Wanda Greene conducted a pre-dismissal conference. Ronnie Reece, EMS Director Jerry VeHaun, County Personnel Director Robert Thornberry, Jr, and Petitioner attended. Reece provided Manager Greene with all statements provided to him during his investigation, including Wainwright's complaint. During the conference, Greene asked Petitioner if he wanted to respond to the allegations, but Petitioner declined. Instead, Petitioner replied that he did not want to make any statements without his attorney being present.

9. By letter dated January 28, 2003, County Manager Greene advised Petitioner that she was sustaining VeHaun and Reece's recommendations that Petitioner's employment be terminated, and that Petitioner's termination was effective that day. (Pet Exh 1)

10. Petitioner internally appealed Greene's dismissal to the next grievance level. On March 13, 2003, Petitioner's attorney received the witness statements upon which Reece, VeHaun, and Greene had based their dismissal of Petitioner.

11. On April 8, 2003, County Manager Wanda Greene conducted a second administrative meeting regarding Petitioner's grievance. Ronnie Reece, EMS Director Jerry VeHaun, County Personnel Director Robert Thornberry, Jr, Petitioner, Petitioner's

attorney, and County Attorney Joe Connelly attended. During this meeting, Petitioner advised Greene that he did not make the alleged inappropriate statements to Wainwright, and informed her of his job performance with EMS.

12. By letter dated April 9, 2003, Greene advised Petitioner that she was upholding her earlier decision to terminate his employment as Petitioner had not presented any evidence to refute any of the reasons for his dismissal. (Pet Exh 2)

13. At the contested case hearing, the preponderance of the evidence showed that several co-workers of Petitioner and Wainwright heard Petitioner making inappropriate comments to Wainwright.

(a) First, Julie Bennett, an EMS co-worker of Wainwright and Petitioner, was working in the EMS lounge at the local hospital when she heard Petitioner make remarks to Wainwright concerning Wainwright's "load bearing hips," and "Hart, your hips are big." (Resp Exh 3) Wainwright told Bennett that Petitioner's remarks "bothered her."

(b) Second, Allen Morgan is an EMS co-worker of Wainwright and Petitioner. In 2002, Morgan, Petitioner, and Wainwright were in the ER lounge at Mission Hospital. Petitioner wanted Wainwright to finish her report, because he was hungry. Petitioner told Wainwright that, "I know you are [hungry]. It's pretty obvious." Petitioner also told Morgan that he did not know how he would get along with Wainwright's "ways." When Morgan asked Petitioner, "what way?" Petitioner said, "Her lesbian ways." (Resp Exh 4) Morgan thought Petitioner's comment was inappropriate, because it was not their business what kind of lifestyle Wainwright lead.

14. Bernard Kostielney is an employee of West Buncombe Volunteer Fire Department. From July 2002 through January 2003, Kostielney worked with Petitioner and Wainwright on four 24-hour shifts per month. Kostielney heard "pretty much every morning," Petitioner tell Wainwright "how big her butt was." Kostielney heard Petitioner tell Wainwright that she needed to watch what she was eating, or she would not be able to fit into her uniform because her hips would get wider. Kostielney also heard Wainwright tell Petitioner not to make such comments. (Resp Exh 5) On at least two occasions, Kostielney advised Petitioner that he needed to "knock it off," or quit making such comments to Wainwright. Kostielney thought Petitioner's comments were inappropriate. Kostielney informed his supervisor of Petitioner's inappropriate comments.

15. Thomas Kelly is an employee of West Buncombe Volunteer Fire Department. Kelly worked on the same shift as Petitioner and Wainwright four to six times per month from July 2002 through January 2003. On several occasions, Kelly heard Petitioner remarked to Wainwright about how large her butt looked in her shorts. Wainwright told Petitioner that he should stop making such comments. Kelly could tell from the tone of Wainwright's voice that Petitioner's comments bothered her. (Resp Exh 6)

16. Benjamin Lunsford is an employee of the North Carolina Community College System, and a volunteer with the West Buncombe Volunteer Fire Department. From July 2002 through January 2003, Lunsford worked two 24-hour shifts every two weeks with Petitioner and Wainwright.

(a) During that time, Lunsford heard Petitioner answer the telephone at the West Buncombe Volunteer Fire Department. After answering the telephone, Petitioner would remark, in a very sarcastic tone, that the telephone call must be "another one of Hart's girlfriends." Petitioner also made comments to Lunsford questioning Wainwright's sexual preferences. (Resp Exh 7)

(b) Lunsford also overheard Petitioner comment to Wainwright about her "load bearing hips." Lunsford thought Petitioner's comments were derogatory.

17. Jamison Judd is a Buncombe County EMS employee who worked with Petitioner on a regular basis before July 2002. On January 14, 2003, Judd and Petitioner were working together on a call, when Petitioner told Judd that he thought Wainwright was addicted to Ambien because she had to take 2-3 Ambien pills to sleep on her days off. Wainwright appeared upset when Judd relayed Petitioner's comment to her. (Resp Exh 8)

18. At hearing, Petitioner acknowledged making critical comments to Wainwright such as, "If you don't quit eating, you'll have to get a new uniform." Petitioner explained that he made those comments because Wainwright had requested him to do so. He indicated that Wainwright had asked him to encourage her as she wanted to lose weight.

19. Petitioner argued that Respondent denied him procedural due process when County Manager Greene made both the initial and final decisions to terminate his employment. Yet, Petitioner did not present any evidence showing that he had asked Greene to recuse herself from making the final decision. Neither did Petitioner present any evidence demonstrating how Greene's alleged "bias" affected her final decision to terminate his employment.

20. On rebuttal, Wainwright denied ever asking Petitioner to help her watch what she ate, or help her with her weight. Instead, Wainwright asked Petitioner to stop commenting about her weight, but Petitioner continued to comment.

CONCLUSIONS OF LAW

1. The parties are properly before the Office of Administrative Hearings and the Office of Administrative Hearings has subject matter jurisdiction over this case.

2. Petitioner was a local government employee at the time of his termination from employment, and thus, was subject to the provisions of Chapter 126 of the North Carolina General Statutes pursuant to N.C. Gen. Stat. § 126-5.

3. N.C. Gen. Stat. Section 126-35 provides, in part:

> No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.

4. Pursuant to N.C. Gen. Stat § 126-35(d), Respondent has the burden of proving that it had just cause to demote Petitioner.

5. N.C. Gen. Stat. § 126-35 does not define "just cause." 25 NCAC 01I .2301(b) provides that unsatisfactory job performance, and unacceptable personal conduct are the two bases for the discipline or dismissal of employees for just cause. The distinction between the categories of "'just cause' provides an applicable test for determining whether a dismissal is for a 'good or adequate reason having a basis in fact under particular circumstances.'" Amanini v. N.C. Dept. of Human Resources, 114 N.C. App. 668, 679, 443 S.E.2d 114, 121 (1994)

6. 25 NCAC 01I .2302(a) states that employees may be dismissed for a current incident of unacceptable personal conduct. It defines unacceptable personal conduct as including:

> (1) conduct for which no reasonable person should expect to receive prior warning; or . . .
>
> (5) conduct unbecoming an employee that is detrimental to the agency's service; . . .

7. Section 5A of Respondent's "Employee Harassment (Hostile Work Environment) policy expressly forbids harassment of employees based on race, sex, age, color, religion, handicap, national origin, or political affiliation. Specifically, that policy provides that "Even in mild form, such harassment constitutes unacceptable personal conduct, and is subject to disciplinary action." It also forbids sexual harassment of employees by supervisors or co-workers "in any form." (Pet Exh 3)

8. Petitioner first argued that he was denied procedural due process when County Manager Greene, the person who initially terminated his employment, was the person who exercised final agency authority to terminate his employment.

9. Our Courts have long recognized the importance of a fair proceeding as a cornerstone of fundamental justice. (*See* In re Murchison, 349 U.S. 133, 136, 99 L. Ed. 942, 946 (1955) (noting that "[a] fair trial in a fair tribunal is a basic requirement of due process"); *Crump v. Bd. of Education*, 326 N.C. 603, 613, 392 S.E.2d 579, 584 (1990) (same)).

10. A vital component of a fair trial is the integrity of the procedure used to obtain a result. "Procedure must be consistent with the fundamental principles of liberty and justice." State v. Hedgebeth, 228 N.C. 259, 266, 45 S.E.2d 563, 568 (1947). A crucial component in insuring that a proceeding is just and in accordance with principles of fundamental fairness is the impartiality of the decision-maker. "An unbiased, impartial decision-maker is essential to due process." Crump, 326 N.C. at 615, 392 S.E.2d at 585.

11. Petitioner is correct that review procedures of this nature call into question the objectivity and fairness of the final decision maker. There is an inevitable bias when a fact-finder is evaluating her own credibility. Enoch v. Alamance County DSS, 164 N.C.App. 233, 595 S.E.2d 744 (2004). Yet, without a statutory or administrative alternative, necessity required Ms. Greene to render a final agency decision in Petitioner's case.

12. Here, Petitioner failed to file an affidavit or verbally ask County Manager Greene to recuse herself for personal bias from making the final agency decision in his case. Petitioner also failed to identify how Greene's purported "bias" interfered with her final decision to terminate Petitioner's employment. Instead, the evidence in the record showed that Greene only had the "mere familiarity

with the facts of the case" due to her role as the decisionmaker. "Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not . . . disqualify a decisionmaker." Hortonville Dist. v. Hortonville Ed. Assoc., 426 U.S. 482, 493, 49 L. Ed. 2d 1, 9 (1976). Furthermore, while Petitioner offered an explanation as to why he made certain inappropriate comments to co-worker Wainwright, Petitioner nevertheless admitted that he made some inappropriate comments to Wainwright. For those reasons, Petitioner's procedural due process argument lacks merit.

13. In contrast, Respondent proved by the preponderance of evidence that it had just cause to discharge Petitioner from employment for making inappropriate comments to a co-worker. Several EMS co-workers and fire department employees overheard Petitioner make inappropriate comments to his EMS co-worker Wainwright on different occasions. Petitioner also admitted that he made some of the comments other co-workers heard Petitioner make to Wainwright. Wainwright and these co-workers felt Petitioner's comments were either inappropriate and/or offensive. Petitioner did not stop making the inappropriate comments to Wainwright after she asked him to stop.

14. Based upon the foregoing, there is sufficient evidence in the record to support Respondent's termination of Petitioner's employment for engaging in unacceptable personal conduct. Petitioner's conduct was conduct for which no reasonable person should expect to receive prior warning, and was conduct unbecoming an employee that was detrimental to the agency's service.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Respondent's decision to terminate Petitioner from employment should be **UPHELD.**

NOTICE AND ORDER

The North Carolina State Personnel Commission will make the Final Decision in this contested case. N.C. Gen. Stat. § 150B-36(b), (b1), (b2), and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it 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(b)(3) requires the agency to serve a copy of its Final Decision on each party, and furnish a copy of its Final Decision to each party's attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

This the 26th day of January, 2007.

_____
Melissa Owens Lassiter
Administrative Law Judge

STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
WAKE COUNTY	05 OSP 1527

ELEANOR J. PARKER, Petitioner, v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DOROTHEA DIX HOSPITAL, Respondent.	)))))))))	**DECISION**

This contested case was heard before Administrative Law Judge Melissa Owens Lassiter on April 25 and 26, May 16 and 17, and August 8 and 9, 2006, in Raleigh, North Carolina.

Petitioner filed a petition on October 11, 2005, alleging that Respondent retaliated against her by transferring her out of the Pretrial Admission Unit twice, and by subjecting her to retaliatory and hostile management practices, in violation of N.C. Gen. Stat. § 126-34.1(7) and N.C. Gen. Stat. § 126-85. In addition, Petitioner claimed that Respondent retaliated against her by placing and maintaining "erroneous and misleading documentation in her personnel file, including her performance review" in violation of N.C. Gen. Stat. § 126-25 and -034.1(a)(6).

At the beginning of the hearing, after reviewing Petitioner's official personnel file maintained by Dorothea Dix Hospital Human Resources Department, the undersigned took Official Notice that Petitioner's personnel file did not contain the documented counseling letters referenced herein. (T p 29-30) The undersigned also notes that Respondent failed to locate, and thus, failed to produce at hearing, certain medical records regarding the two incidents that were the basis for Respondent issuing Petitioner a written warning on September 22, 2005.

Pursuant to the undersigned's request, Respondent filed its proposed Decision with the Office of Administrative Hearings (OAH) on October 6, 2006. Petitioner filed its proposed Decision with OAH on October 8, 2006, and a Supplemental Memorandum on Attorney's Fees on October 17, 2006.

On December 2, 2006, Chief Administrative Law Judge Julian Mann, III extended the deadline by which the undersigned must file her Decision until January 19, 2007.

APPEARANCES

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ISSUE

Whether Respondent retaliated against Petitioner in violation of N.C. Gen. Stat. §§ 126-34.1(a)(7) and 126-85 when it transferred Petitioner from the Pretrial Admission Unit to the Forensic Minimum Security Unit at Dorothea Dix Hospital?

GOVERNING LAW, RULE, AND POLICY

N.C.Gen. Stat. § 126-34.1
N.C.G.S. §§ 126- 84 through - 87
N.C. Personnel Manual
Respondent's Grievance Policy

EXHIBITS

For Petitioner: 1 – 24, 26 – 34; 35 and 36 (under seal)

For Respondent: 1, excluding pp. 2 – 4, 88-89; 2 – 4, 11 - 14

WITNESSES

For Petitioner: Eleanor J. Parker (Petitioner), Sharon Turner, Arlene Pace, Carol Latham, Rhonda Whitaker, Pamela Gordon

For Respondent: Betty Paesler (DHHS Management Representative), Sherman Reid, Amanda Dixon, Darius Jones, Helen Weatherill

FINDINGS OF FACT

After considering all of the evidence presented, the credibility of witnesses, arguments of counsel and applicable statutes, laws, regulations and policies, this Court finds as follows:

1. Petitioner is a career state employee who has been employed with Respondent at Dorothea Dix Hospital ("Dix") in Raleigh, North Carolina since 2001.

2. Petitioner has been a Registered Nurse ("RN") for twenty years, served in the Air Force Reserve Medical Corps for approximately 20 years, and served on the nursing staff at Central Prison in Raleigh, North Carolina and at North Carolina State University in Raleigh, North Carolina before starting employment at Dix hospital.

3. Petitioner has never been disciplined by the North Carolina Board of Nursing.

4. Respondent Dorothea Dix Hospital is a hospital for the mentally ill operated by the Secretary of the Department of Health and Human Services, and is a North Carolina State Agency.

5. The mission of Dorothea Dix Hospital is:

> To provide inpatient psychiatric treatment and care to consumers with severe and persistent mental illness and serious emotional disorders who cannot be treated at the necessary level of care in their local community.

(R Ex 2, p 15) The various units at Dix include adult admissions crisis/crisis stabilization, acute treatment services, long-term services, deaf services, child and adolescent services, geriatric services, medical services, clinical services and forensic services. *Dorothea Dix Hospital Nursing – Administrative Policy Manual, the Scope of Service Statement* (R Ex 2, pp 15-17)

6. At all times relevant to this hearing, there were four Forensic Psychiatry Units located at Dix. These were Pre-Trial ("PTA"), Forensic Minimum Security (FMIN), Forensic Medium Security (FMED), and Forensic Maximum Security (FMAX).

PTA Unit

7. The pre-trial admissions (PTA) unit is a maximum-security forensic unit that conducts mental health evaluations on persons awaiting trial for criminal charges in locations throughout North Carolina. (T p 58) PTA is part of "FMAX," or the maximum-security forensics unit, and is located in the Spruill building on the Dix campus. (T p 64). Admissions are pursuant to a court order for pretrial evaluation. (T p 58, R Ex 2, p 17). The purpose of PTA evaluations is to determine whether the persons being evaluated have the mental capacity to stand trial for the offense(s) with which they are charged. (T p 59).

8. Generally, the patients stay on PTA for ten to fourteen days. (T p 58) Patients on PTA may include individuals charged with violent crimes such as rape, armed robbery, assaults, and murder, and some patients may have been previously convicted of crimes and served time. (T pp 12, 59, 677). "Common nursing care issues include patients who may have withdrawal symptoms from drugs

or alcohol; patients with injuries; patients with seizure disorders, diabetes, heart disease, and patients who have major mental illnesses, including suicidal, delusional, and violent behavior." (R Ex 2, p 17) It is a short-term unit with considerable turnover. (T p 1302)

9. PTA is a locked facility with security measures such as fencing with barbed wire. The patients in PTA are generally a dangerous group of patients. (T pp 60, 92) If these patients escaped, the patients could be dangerous to the residents of the surrounding community. (T p 93) There have been no escapes from PTA. (T p 94)

10. All witnesses at hearing agreed that persons escaping from this unit would create a danger to the public, and given the nature of the population, appear to be both specific and substantial. (T pp 214-215, 677).

11. Staffing at PTA is a safety issue, as it concerns security and escape issues. (T 94). Having sufficient staff to fulfill the needs of the job and provide proper supervision of the PTA population is a legitimate concern on the part of the nursing staff in PTA, including Petitioner. (T p 95).

12. If the patient population on PTA rises above 20, the standard staffing requirement is four (4) health care techs and two (2) licensed staff who are nurses. (T p 95) Before the date of this hearing, Dix management had changed staffing so that only one licensed staff person worked in PTA on the weekend. This change was due to (1) admissions only occurring during the week, usually on first shift, and (2) because management felt licensed staff was more appropriately allocated in other units. (T pp 1309)

13. When a patient is determined not competent to proceed to trial, he may be admitted to one of the long-term forensic units at Dix. (T p 1303)

FMIN Unit

14. Forensic units have a higher level of security. (T p 1303) FMIN is a 24-bed co-ed unit located in the Wright Building. This unit is for patients who are able to be unsupervised for at least part of the day, and who are actively working toward community reintegration. (R Ex 2, p 17)

FMED Unit

15. FMED is a 37 bed co-ed unit for patients who are stable, but not ready for unsupervised passes. FMED is located in the 3 South Building. Nursing care issues in this unit range from managing violent behavior and assisting patients with meeting basic hygiene needs to assisting patients with increased independence. (R Ex 2, p 17)

FMAX Unit

16. At all times relevant to this case, FMAX was a 37-bed male unit that provides treatment for the most disordered forensic patients, management patients from adult psychiatry, and new admissions into the Forensic Treatment Program. FMAX also located in Spruill Building. Nursing care issues in this unit include care of patients with violent physical behavior and aggressive verbal behavior, water intoxication, seizure disorders, sexual acting out, and dual diagnoses of psychoses and mental retardation. (R Ex 2, p 17) FMAX and PTA are located in the same building and have the same level of security. (T p 1303)

Security Concerns in PTA

17. Pursuant to Dix Hospital Nursing Administrative Policy, licensed nursing staff such as a registered nurse is hired for a specific unit. However, such staff "may be temporarily or permanently reassigned to another unit based on need." (T p 448; Resp Exh 2, p 19)

18. On August 8, 2001, Respondent hired Petitioner to work in the "Pre-Trial Assessment" ("PTA") unit in the Spruill Building.

19. From 2004 through November 2005, Paula Bird was the Director of Nursing at Dix Hospital. (T p 310)

20. In August 2004, Betty Paesler served as Assistant Director of Nursing, and Pam Gordon was the Nurse Manager of the Spruill Building. Paesler and Gordon hired Rhonda Whitaker to be the Nurse Manager of the PTA unit. The management team of Whitaker, Gordon, and Paesler supervised Petitioner in ascending order, with Whitaker being Petitioner's immediate supervisor. (Pet Exh 24).

21. Whitaker, Gordon, and Paesler had previously worked together in the Williams Building, an adolescent unit at Dix. (Pet Exh 24).

22. Work in the Williams Building was Whitaker's sole significant experience at Dix before being named PTA manager. (T p 61) Whitaker had not been previously assigned to a forensic unit on a regular basis, but had worked some number of overtime shifts at FMAX. (T p 62; Pet Exh 24).

23. In 2004, Petitioner had been working in PTA without incident for approximately three years. The preponderance of the evidence showed that before Whitaker, Gordon, and Paesler became the management team of the Spruill Building, including PTA, no manager at Dix had previously accused Petitioner of unsafe nursing practices or compromising patient care. Before the Whitaker/Paesler/Gordon management team, Petitioner had never been subject to formal disciplinary action during her employment at Dix.

24. On Petitioner's May 23, 2005 performance review, Petitioner received an overall performance rating of "Very Good," with a rating of "Very Good" on the criterion of "safety awareness." Petitioner's supervisor commented that Petitioner, "Promotes safety within unit, patient care and patient awareness." (T p 39; Pet Exh 26). Betty Paesler signed this performance evaluation without noting any objection to the ratings, even though she had the authority to make objections. (T p 29, Pet Exh 26).

25. Arlene Pace ("Pace") is a registered nurse and former nurse manager with over twenty years of nursing experience. Ms. Pace worked with Petitioner on a daily basis in PTA for about four years, both as Petitioner's charge nurse, and when Petitioner was Pace's charge nurse. (T pp 679-680) During that time, Pace never saw Petitioner conduct herself in an unsafe or incompetent fashion, and Petitioner never refused an instruction given by Pace. Neither Gordon nor Whitaker expressed concern to Pace about Petitioner's ability to deliver safe patient care. (T pp 685 – 686)

26. Carol Latham ("Latham") is a registered nurse with nearly forty years of nursing experience. Ms. Latham observed Petitioner's nursing performance by working with Petitioner on a daily basis in PTA, and generally worked the same shift as Petitioner. (T pp 856-57) Ms. Latham thought that Petitioner was a competent nurse who conducted safe nursing practices, (T pp 880-882) and had great confidence in Petitioner. (T pp 860-62)

27. Sharon Turner ("Turner") is a health care technician with over twenty-five years of experience at Dix. Turner worked with Petitioner on a regular basis in 2004 and part of 2005. (T pp 788-791) Turner and Petitioner worked the same shift three or four times a week. (T p 792) Based on her working experience with Petitioner, Turner also thought that Petitioner exhibited safe and competent nursing practices.

28. During August and September 2004, Petitioner worked under Whitaker's immediate supervision. During that time, Petitioner began expressing concerns to Whitaker and Paesler that the staffing arrangements in PTA were unsafe. Specifically, Petitioner raised safety concerns including whether there were sufficient health care technicians to adequately monitor and closely observe patients, i.e. one-on-one staffing. (T pp 868, 1135-1136; Pet Exh 2). Whitaker would advise Petitioner that she would get back with Petitioner, but failed to do so. (T pp 935, 940) In addition, Petitioner could not find Whitaker to obtain a response to her concerns. (T p 836)

29. Carol Latham also expressed similar safety concerns to Whitaker at a frequency second only to Petitioner. (T pp 868-869). Latham also had great confidence in Sherwood Lee who was the prior nurse manager at PTA, and she felt confident in the safety and security of the unit then. (T pp 860-862) Latham tried to make suggestions to Whitaker, but felt intimidated by the three managers, and thought they did not reach out to the nurses who had worked in that building for two years for any type of advice. (T p 865) Latham did not feel that there was appropriate leadership on that unit under Whitaker, Gordon, and Paesler. (T p 866) Latham also complained about the availability of Whitaker as compared to prior nurse managers, and raised safety concerns with Whitaker. (T p 866-68)

30. After working under the Paesler/Gordon/Whitaker management team for more than one year, Arlene Pace left the PTA unit, specifically because "she felt unsafe," and that "the staff were increasingly unsafe." (T pp 671, 673). She regarded staffing as a safety issue and with respect to fellow staff members, other patients, and to the public. (T p 676)

(a) PTA patients have more potential for violence because they are Axis II diagnosis, i.e. personality disorders, antisocial, behavioral issues, narcissism, etc. (T pp 671) However, there were three lockdowns in the summer between June and August of 2005. Pace described:

> We go into that [lockdown] mode when clients are getting ready to almost riot, or when there are multiple fights. And one of them that I recall, one to the health care techs was at great risk because he was alone in a day room with multiple clients in there. And the other two techs were leading a gentleman down the hall that was disruptive.

(T pp 671-672).

(b) In Pace's opinion, these situations made the unit more dangerous and staffing was an issue regarding this increased danger. (T pp 672-673).

31. Rhonda Whitaker was in charge of providing adequate staffing at this time. Pace also reported her concerns regarding adequate staffing and safety concerns to Whitaker. (T p 673). However, Whitaker gave Pace "answers like 'I'll speak with you later' about things … she never got back with me to talk about these issues."

(a) Pace eventually put her concerns in a letter to Whitaker. (T pp 674-677). In her letter, Pace advised Whitaker that the unit had gone through three lockdown situations. In one case, one health care tech really could have been seriously injured. Pace described to Whitaker how another fight broke out in the day room, and health care tech Reid and the other male techs in the office "did not see on the viewing monitors that there was a problem with the first gentleman that started fighting." That incident "raised my eyebrows," advised Pace, regarding security upstairs being monitored downstairs by the office techs who were in charge of security [on PTA].

(b) In addition, PTA needed more staff as the admission rate went up. (T p 676)

32. On or about June 18, 2004, Ms. Pace also wrote a memorandum to Betty Paesler, also advising Paesler of her concerns regarding adequate safety and staffing on PTA. (Pet Exh 2, Memo to Paesler from Pace re: Work Conduct/Sherman Reid FHCT)

33. Pace was aware that Petitioner was making the same complaints to Whitaker over the same safety and staffing situations. She was not aware of Whitaker giving Petitioner any response to Petitioner's complaints. (T p 677)

34. Petitioner, Pace, and Latham all held the opinion Whitaker failed to substantively respond to their safety and staffing concerns, and seemed resentful when they were raised. (T pp 673, 677-678, 869)

September 20, 2004 Reassignment or Rotation

35. On September 22, 2004, one month after Whitaker became PTA manager, Whitaker and Paesler called Petitioner into a meeting, and issued Petitioner a document labeled "Reassignment." They advised Petitioner that they were reassigning Petitioner to the 3-South building, (FMED) a medium security unit). This document stated:

> One goal is to facilitate the cross training of staff between 3-South, FMAX, and Pretrial. In addition, we wish to insure the development of professional and therapeutic relationships between staff and patients.
>
> Consequently, we have determined to begin the reassignment of staff on October 1, 2004. Approximately 10% of staff is affected at this time.
>
> Assignments will be re-evaluated in 6 months.

(Pet Exh 1). In addition, Paesler and Whitaker transferred or reassigned one first shift health care tech and one second shift health care tech to 3 South, while transferring two health care techs and Sharon Woodall, RN, from 3 South to PTA. (T p 227-229)

36. Paesler and Whitaker advised Petitioner that this reassignment was a part of a "rotation," and that Paesler intended to return Petitioner to PTA in six months. Petitioner requested Paesler write and sign Paesler's intent on the September 20, 2004 Memorandum. Paesler wrote, "It is my intention for Ms. Parker to be re-assigned to [PTA] in 6 months. Signed Betty Paesler 9-22-04." (Pet Exh 1, p 2)

37. Paesler explained that the "rotation" was necessary to address a rash of escapes on FMED unit. An investigation had shown that FMED staff had released patients on that unit, and management was also concerned about too much collusion between staff and the patients. Some staff involved in these releases was fired, but not every staff member who knew about it was fired.

(a) Paesler advised Petitioner that because the escapes happened on second shift, forensic management needed staff who could look at the situation in FMED "with fresh eyes."

(b) In addition, Paesler desired staff to be cross-trained in different units, so staff would be familiar with other units, and therefore, could work on other units if other units needed additional staff. (T pp 1328-29)

38. Petitioner thought Paesler, Gordon, and Whitaker were trying to get her out of PTA, because she had voiced concerns and complaints about safety issues. Petitioner was unhappy about the transfer. Nevertheless, she accepted the assignment and did not appeal that transfer, because management presented the reassignment as a recurring six-month rotation involving a substantial numbers of nursing staff, wherein staff would return to their original units.

39. Petitioner's pay grade and pay stayed the same at her new position at the 3-South Building. (T p 1315)

40. On or about the same time, Paesler sent Paula Bird, Director Nursing, a Memorandum suggesting that only one RN work in PTA on the weekend, because PTA no longer admitted patients on the weekend, and nurses were needed in other units. That change was implemented in PTA over Pace, and Petitioner's objections.

41. On October 1, 2004, Paesler sent an additional memorandum to PTA, FMAX and 3-South nursing staff (nurses and health care techs) stating:

> I wish to thank staff for their patience and cooperation during this transition period. The recent reassignment of staff is necessary to facilitate cross training throughout the 3 units. This regular, recurrent cross training will benefit patient care on an ongoing basis but especially during inclement weather, holidays, vacations, or crisis situations.
>
> I know that it will be stressful initially but the goal is that we can enhance our skills and professionalism by broadening our experience in a variety of work sites.

(T pp 230, 294; Pet Exh 1, p 3)

42. From October through November 2004, Petitioner, Latham, and Pace continued voicing their concerns to management (Bird, Paesler, Hazelrigg, and Dr. Terry Stelle) about the recent rotation, weekend staffing, and accompanying security concerns. (Pet Exh 2)

43. On November 23, 2004, Petitioner, Pace and health care tech Willie Parker met with Betty Paesler and discussed the staffs' concerns about reassignments of 6 months, security problems, and weekend staffing with only one licensed nurse in Spruill. Paesler admitted, in response to staff questions, that there was "no written policy" regarding "forensic staff reassignments," and there was no acuity formula for staffing forensics nursing staff. (Pet Exh 7)

44. Likewise, Respondent had no written plan for the purported "cross-training" on September 20, 2004 when Paesler reassigned Petitioner to FMED unit on 3 South. (T pp 25, 65). While Whitaker stated at hearing, there "may have been" such a policy later, she was unable to cite or specifically refer to it at trial. (T p 65).

Denial of Petitioner's Request to Return to PTA

45. In early March 2005, Petitioner requested Paesler to return to PTA, and reminded Paesler of her written statement that she intended to return Petitioner to PTA. (T pp 73-74; Pet Exh 1).

46. By memorandum dated March 22, 2005, Paesler refused to return Petitioner to PTA. Paesler refused such request as Petitioner had "been a terrific asset to the second shift on 3 South," tended to have control of the unit, directed the techs with confidence, and maintained a "safe and therapeutic environment." Paesler wrote, "I really cannot identify another nurse with your particular strengths." (T pp 76-77; Pet Exh 3)

47. Two days later, on March 24, 2005, someone with Respondent prepared and filed a personnel action form permanently transferring Petitioner to FMED in 3 South. (T p 77; Pet Exh 4). This personnel action form noted the transfer was effective October 1, 2004, the original effective date of Petitioner's "rotation" reassignment. (Pet Exh 4). Petitioner first learned about this personnel action form when she reviewed her personnel file at the Personnel Office on or around March 24, 2005.

48. On March 25, 2005, Petitioner filed an internal grievance with Paesler, alleging that she believed her transfer in October 2004 was done to "maliciously punish" Petitioner for expressing concerns to management while working in PTA. (Pet Exh 5) Petitioner believed the reasons for her transfer to 3 South were fabricated, because since then, nursing management in Forensics had stopped talking to staff about an ongoing staff rotation for orientation purposes, with staff returning to their original units upon completion of the orientation. None of the techs who had been originally rotated out of their units, were being rotated back either, even though most of them were asking to return to their original units. (T pp 1160-63)

49. On March 30, 2005, Paesler responded to Petitioner's grievance, and denied Petitioner's request to be returned to PTA. Paesler also denied any intent to take adverse employment action against Petitioner. Paesler stressed that:

> [Y]ou direct the HCTs with confidence while remaining in charge. This is the model we need for this unit. . . . we . . are determined to support strong leadership in order to prevent further breaches of safety.
>
> . . .
>
> The rotation is an on-going process and we are moving staff on a regular basis.
>
> . . . I need you at this time more on 3 South than on Pretrial. . . but it is my job to assure the best skilled mix of staff on a particular unit.

(Pet Exh 6) On April 2, 2005, Petitioner received Paesler's March 30, 2005 Step 1 decision.

50. On April 7, 2005, Petitioner filed a Step 2 grievance to the Hospital Director for Dix, Dr. Terry Stelle, appealing Paesler's denial to rotate Petitioner back to PTA. (Pet Exh 8) In her grievance, Petitioner stated," The basis of this grievance is that I believe I have been harassed for expressing opinions while working on PTA in Spruill Building." (Pet Exh 8, p 2) Petitioner advised Stelle that she had expressed concerns to nursing management including unsafe staffing on PTA, crisis patients being transferred to PTA without notifying staff that the policy had been changed, failure of management to listen to staff concerns about safety and security, and related escapes from the forensics units. (Pet Exh 8, p 2)

51. On June 2, 2005, Dr. Stelle met with Paula Bird, Betty Paesler and Petitioner regarding Petitioner's grievance. Dr. Stelle ordered Paesler to return Petitioner to PTA effective July 1, 2005. (Pet Exh 9). Dr. Stelle noted in his written decision that:

> Management admits that we did not adequately explain to staff the urgency of the need to rotate staff and that we failed to adequately orient you to the unit to which you were transferred. . . .

(Pet Exh 9)

52. Only following this, and apparently at Dr. Stelle's direction, Paesler, Gordon, and Whitaker produced and transmitted to staff, a written policy regarding the "conditions under which "rotations" are considered, i.e. 'Forensic Staff Rotations' (see attached)." (Pet Exh 9, Stelle's Decision; see also Pet Exh 11, "Forensic Staff Rotations.")

53. In addition, during this same time, Sharon Woodall requested Paesler to keep her position in PTA, and Paesler granted Woodall's request. (T p 80) Similarly, Latham requested to remain in the unit in 3 South that she had been rotated to, and such request was granted. (T p 80)

54. Paesler has moved other employees around, because of concerns about their practices, for not performing up to par, some areas are understaffed, and because vacancies that are hard to fill. (T pp 1717-1721) In determining whether to reassign staff, Paesler considers factors such as the patient population of a unit, the unit's acuity, the workload of the unit, and the skill mix of the staff. (T p 1719) She is charged by the Nursing Board to maintain the adequate skill mix to provide save care for populations at Dix. (T p 1719)

55. At hearing, Paesler conceded that patients assault staff, and there are usually more assaults on admissions units. However, she opined there are fewer assaults, seclusions, and restraints on PTA. (T pp 1720-1721) Paesler acknowledged that she hears complaints about insufficient staffing daily, and insufficient staffing is a chronic problem at Dix. (T p 1724) Paesler heard Petitioner complain about staffing in the fall of 2004. (T p 1725) A preponderance of the evidence showed that the October 2004 rotation was not an "ongoing rotation" involving substantial numbers of nursing staff.

(a) Petitioner and Sharon Woodall were the only licensed nurses Respondent "rotated" in October 2004 in the four forensics units. Respondent transferred Woodall from 3 South to work in Petitioner's job at PTA, and placed Petitioner in Woodall's former job at 3 South (FMED). Approximately nine months later, Respondent rotated Latham to another unit. Likewise, Respondent did not return Latham to her original unit. (T p 82)

(b) Out of 16-20 nurses working in the Spruill Building itself, Petitioner was the only nurse "rotated" on the alleged rotation policy. (T p 22).

(c) Out of 20-30 forensic nurses working at Dix in the fall of 2004, Petitioner, Woodall, and Latham were the only nurses ever "rotated" under this alleged policy. (T pp 80-81).

(d) At hearing, Whitaker acknowledged that a "rotation" implied that the person concerned would leave his or her original location, work at another location for a certain period of time, and then return to his or her original location. (T pp 68-69). Pamela Gordon did not know how to define the term "rotation." (T p 20). Yet, in later testimony, Gordon opined that a "rotation" would not involve a return to one's place of origin.

(e) The evidence is clear that management presented the October 2004 reassignment to staff as a "rotation" whereby staff would return to its original units. Whitaker admitted at the September 22, 2004 meeting with Petitioner, they discussed this reassignment as a "rotation," and that Petitioner understood that it was to be a six-month rotation. (T pp 68-70). Had this not been expressed as a true "rotation," there would have been no reason for Paesler to make the "intent to return" notation on the September 20, 2004 Reassignment memo given to Petitioner, and sign it.

(f) Dix Hospital had a general nursing administrative policy allowing nursing reassignments based on need (Resp Exh 2, p 18). In fact, that nursing policy provided that, "Nursing Services policies address assignment of nursing personnel." (Resp Exh p 18). "The staffing patterns are developed at the unit level by the nurse manager and approved by nurse administration." Yet, there was no specific written policy governing the forensic staff reassignments implemented by Paesler and her management in October 2004. In addition, there was no evidence presented at hearing showing that any management, other than Paesler, Whitaker, or Gordon, approved the alleged "rotation policy" of forensic staff in October 2004. (Whitaker Deposition, p 66, lines 8-13)

56. However, the preponderance of the evidence also showed that the October 2004 reassignment was not to provide "cross-training" for forensic nursing staff.

(a) Management had told Petitioner that her new supervisor Diane Younger would explain the required cross-training to Petitioner. Yet, when Petitioner arrived at 3 South, Petitioner asked Younger about the cross-training requirements, but Younger had no idea what Petitioner was referring.

(b) In addition, Petitioner was given no "cross training" in this "rotation" assignment. According to Whitaker, Petitioner would have received no "cross-training" other than the usual or normal on-the-unit training in patient treatment that is given to anyone who is hired into the unit. (T p 67).

(c) Forensic nursing management did not produce a document explaining the rationale behind the September/October 2004 forensic staff rotations until sometime after the initial rotations. Forensic nursing staff did not receive such document until sometime in April 2005 after Petitioner had filed her grievances. (Pet Exh 11, p 2)

57. Latham, like Petitioner, felt that the Paesler/Gordon/Whitaker management team's purpose in "rotating" her was in retaliation for reporting safety concerns to Whitaker, Paesler, and/or Gordon. (T p 877). Latham felt "personally intimidated" after Petitioner was transferred, and "knew just as soon as [Petitioner] was transferred I'd be next." (T p 878).

Petitioner's July 1, 2005 Return to PTA

58. On July 1, 2005, Petitioner returned to PTA. It was clear that Whitaker and Gordon did not wish Petitioner to return to the unit. (T pp 81, 88). When Petitioner returned to work on PTA, Whitaker assigned her to work a period of five days of orientation. (T p 249; Resp Exh 4, p 5) Whitaker agreed that raising concerns about staffing levels is legitimate. (T p 96)

59. Petitioner continued to express concerns about staffing and safety issues to Whitaker, including by email. (T pp 212, 286-289; Pet Exh 2) On July 14, 2005, Petitioner requested two RNs plus an LPN, because PTA had 29 patients and "census and acuity indicated such need. Petitioner explained that they had four more admissions, only one discharge written, and "last night two male pts were acting out and two female pts refusing meds." Petitioner was so busy it was hard to complete required paperwork.

60. On July 14, 2005, Whitaker and Gordon also conducted a nurses' meeting to discuss and clarify the MD on-call list memorandum issued on July 5, 2005. (Pet Exhs 29, 30) Prior to the July 5, 2005 memo, the forensic psychiatrist was not taking after-hours calls for patients. It had been up to the psychiatry resident for the hospital. Therefore, the psychiatrists implemented a policy addressing the on-call, after-hours forensic psychiatrist. In the July 14th meeting, management reiterated that, pursuant to the new policy, staff should call the forensic psychiatrist if you have behavioral issues, and staff should call the medical doctors if there was a medical issue, call the medical doctors. (T pp 459-460, 258-259; Pet Exhs 29 and 30) This memo also provided, "Any other situation involving the need for a face-to-face evaluation should be referred to the on-call psychiatry resident." (Pet Exh 30)

61. On July 21, 2005, Petitioner sent an email to Whitaker regarding an incident involving patient E, and noted at the end that "Helen was buried alive in charting when I got there. The techs were having a rough time, because they had seven close observations and one constant. Three patients were requiring extra attention all the time." (P Ex 2, p 23) Petitioner thought that the unit was understaffed that night, and Petitioner had volunteered. (T p 1190-1191; (Pet Exh 2) On July 21, 2005, Respondent amended the July 5, 2005 Memorandum regarding the On-Call procedures list to include the language, "**Abnormal vital signs and medical signs and symptoms should be called immediately."** (Pet Exh 30)

62. On July 29, 2005, Petitioner called Gordon, as she was concerned that she was the only nurse scheduled to work the PTA evening shift for the weekend, and patients were acting out. Petitioner was also concerned that there were only three male techs, two techs had been injured, and two were working a double shift. After talking with Gordon for over 1 ½ hours, Petitioner and Gordon pulled two techs from FMAX to help staff in PTA, and Arlene Pace worked as the medication nurse.

63. On August 15, 2005, Petitioner advised Whitaker by letter that office staff had been resistant to assisting RNs on-duty, were argumentative with nurses, and unsupportive. She noted, "It is unsafe to leave ward 3 less than 4 techs when we are a maximum." (Pet Exh 10)

64. In mid-July 2005, nursing management advised Petitioner to stop emailing her staffing concerns to Whitaker. Whitaker acknowledged at hearing that Petitioner was not the only person who raised concerns about the adequacy of staff with her during this time. (T p 255)

(a) Sometime in July or August 2005, Whitaker wrote a work sheet outlining Petitioner's performance issues identified by Whitaker in July and August of 2005. (T p 265, R Ex 2, p 55) On that work sheet, Whitaker listed the seven "clinical" incidents in which Whitaker did not think Petitioner had performed her job properly, and two "personal conduct" complaints.

(b) All those incidents were later identified in the August 22, 2005 Documented Counseling and September 22, 2005 Written Warning that Whitaker/Paesler/Gordon issued to Petitioner. (Resp Exh 2, p 55)

65. On August 4, 2005, Gordon advised Paesler by memorandum of the "many issues" with Petitioner's performance. (T p 345, R Ex 1, p 45) In that memo, she described an issue regarding Petitioner's alleged failure to call the medical on-call doctor about patient E., despite Nurse Helen Weatherill's instructions to the contrary. Gordon specifically wrote that on July 27, 2005, Petitioner signed off on discharge orders on a patient on PTA without copying and distributing orders to the necessary people. (Id.) Gordon wrote,"

> This building, both PTA and FMAX, is too acute and fast-paced for Jana [Petitioner]. She does not make sound decisions. She has poor judgment. I believe she compromises both patient and staff safety each time she works.

(Resp Exh 1, p 45)

August 22, 2005 Petitioner's Second Transfer and Documented Counseling

66. On August 22, 2005, one month and 22 days after Dr. Stelle ordered Petitioner returned to PTA, Paesler, Gordon, and Whitaker called Petitioner into a meeting, and issued Petitioner two documents:

(1) Second Transfer Order transferring Petitioner from PTA to FMIN, or ` Forensic Minimum unit beginning 9/12/05 (Pet Exh 13), and

(2) Documented Counseling (Pet Exh 12).

67. After August 22, 2005, Petitioner never worked on the PTA unit again.

August 22, 2005 Transfer Order

68. In August 22, 2005 Transfer Order, the nursing management noted that, "This move was deemed necessary due to the patient safety issues that have occurred since your return to PTA on 7/1/05." (Pet Exh 13). However, the preponderance of the evidence

established that no management at Dix, including the Paesler/Whitaker /Gordon management team, raised any concerns that Petitioner had engaged in unsafe nursing practices before first transferring Petitioner in October 2004. (T p 1025).

(a) Gordon indicated at hearing that she considered Petitioner unsafe to work at PTA. (T p 247) However, Gordon replied, "None" when asked what letters or documentation she produced, before Dr. Stelle's order, that alleged Petitioner was an unsafe nurse or engaged in unsafe practices." (T p 247).

(b) To the contrary, on March 22, 2005 Paesler's primary reason for denying Petitioner's transfer was because:

> You have been a terrific asset to the second shift on 3 South," tended to have control of the unit, directed the techs with confidence, and maintained a "safe and therapeutic environment." Paesler wrote, "I really cannot identify another nurse with your particular strengths."

(T pp 76-77; Pet Exh 3)

(c) Similarly, Paesler based her denial of Petitioner's Step 1 grievance because:

> [Y]ou direct the HCTs with confidence while remaining in charge. This is the model we need for this unit. . . . we . . are determined to support strong leadership in order to prevent further breaches of safety.

(Pet Exh 6)

(d) Further, just three months before the August 22, 2005 transfer order in May 2005, Diana Younger, Petitioner's FMED supervisor, issued Petitioner a rating of "Very Good" in the area of "safety awareness." Younger commented, "Promotes safety within unit, patient care, and patient awareness." (T p 39, Pet Exh 26).

August 22, 2005 Documented Counseling

69. In the August 22, 2005 documented counseling, Paesler, Whitaker, and Gordon cited the following performance and conduct issues:

(a) On 7/29/05, Petitioner did not count with the off-going nurse.

(b) On 7/29/05, Petitioner interfered with the transfer of a patient to 3-South after orders were already written and the transfer was arranged by the charge nurse and P. Gordon**.** The patient's transfer was delayed 6-8 hours.

(c) On 8/1/05, Petitioner did not complete restrictive intervention paperwork. Gordon instructed Petitioner to do so, and turn in a completed document, and, based on Respondent' records, had not yet done so as of 8/22/05.

(d) Petitioner had consistently complained about the "busyness" of the unit since her return on 7/1/05.

(e) On 8/15/05, Petitioner asked Whitaker for another licensed staff to give meds. After she was told no by Whitaker because there were already two licensed staff scheduled, Petitioner called the House Supervisor after Whitaker left in an attempt to get another licensed staff person. That same night, Petitioner paged Whitaker to report that office staff was refusing direct orders given by R.N.s. When Whitaker investigated she found that office staff had been to the pharmacy four times already that evening.

(f) Co-workers had complained about her interpersonal skills and communication style.

(g) On 8/8/05, Petitioner allowed J. Taurasi to go home without checking with the House Supervisor or the Unit nurse manager.

(P Ex 12)

70. In this letter, management also advised Petitioner that they expected her to follow unit and hospital policies for taking off orders and completing Restrictive Intervention paperwork; correct errors promptly; always required to count narcotics with the off-

going and oncoming medication nurse. In addition, Petitioner could not grant vacation/leave time without clearance from the unit nurse manager or House Supervisor. They expected Petitioner to take direction from her supervisors, focus on her work, and focus on problem resolution when problems arose. (T p 543, P Ex 12)

71. Gordon and Whitaker considered staff statements, emails, graphic and progress notes, memos, staff meeting minutes, and doctors' notes in considering whether to issue Petitioner the August 22, 2005 Documented Counseling. (T pp 505-509, R Ex 1 pp 17-54)

72. At hearing, Whitaker denied knowing that someone directed nurses Sharon Woodall or Carol Davis to look through Petitioner's chart and patient treatment information for any kind of irregularities.(T p 100) Yet, the evidence at hearing established that one or more members of the management team directed another nurse to search Petitioner's patient care records and charts for evidence of "mistakes" or other treatment issues by Petitioner.

(a) Specifically, Carol Davis told Arlene Pace that she had been instructed to look through Petitioner's files to see if anything was "incorrect, unusual, whatever, and she had done as instructed." (T pp 692, 694). Pace assumed that Pamela Gordon had instructed Davis to search Petitioner's charts since only Paesler, Whitaker, or Gordon had the authority to order such a search. (T p 693).

(b) In her 20 plus years working at Dix, Pace had never heard of such activity taking place before this incident, and she found it "highly unusual." (T p 693).

73. The first allegation outlined in the "Documented Counseling" was that Petitioner by her own admission, "did not count [medications] with the off going RN." Nursing policy required that the off-going and incoming nurses count narcotics when shifts changed. On July 29, 2005, Petitioner called Gordon around 10:30 or 10:45, and reported that she did not count narcotics with the off-going nurse, counted them herself, but still could not locate the med box keys. (T pp 514-15; Resp Exh 2, pp 24-27, 35) Petitioner later found the keys in the narcotics drawer under the narcotics meds.

(a) On July 29, 2005, nurse Sharon Woodall left PTA day without completing the narcotics count with Petitioner. (T p 48) Woodall falsely signed the narcotics form indicating that she had participated in the narcotics count on July 29, 2005, when she had not. (T p 271).

(b) Gordon personally discussed this incident with Petitioner, and wrote notes at the time of the incident. (T p 379, R Ex 1, p 35)

(c) Management thought that Petitioner should have called the manager immediately, and was cited in the documented counseling (Exhibit 12) for "failing to count" with the off-going nurse." (Pet Exh 12). When Gordon was asked to specify which policy Petitioner's conduct violated in this incident, Gordon was unable to identify such policy. (T pp 259-261, 263)

(d) However, management did not take any disciplinary action or issue a documented counseling to Woodall for failing to conduct the narcotics count on July 25, 2005, or for falsely attesting through her signature, that she had done so. (T p 49).

(e) Whitaker acknowledged this [inventory count] was an "ongoing problem" at the hospital, and one that occurred regularly. (See Resp Exh 2, p 28, Whitaker's September 1, 2004 Memo to PTA nurses). Nevertheless, Petitioner was the only person to whom management issued a documented counseling regarding this issue. (T p 114).

(f) Gordon thought that Sharon Woodall should have gotten a documented counseling for her failure to stay and count narcotics as the off going nurse. (T p 583) However, giving a documented counseling depends on the circumstances. If it is a one-time occurrence, and if the nurse's response is such that she understood what was wrong, and what she needed to do next time, and agreed to do that, then maybe a conversation with the nurse will be sufficient. (T p 649)

74. The second allegation in the Documented Counseling was that Petitioner "interfered with the transfer of a patient" on July 29, 2005. (Pet Exh 12).

(a) At 8:45 am on July 29, 2005, Gordon instructed health care technician Amanda Dixon and the charge nurse to get a patient ready to be transferred to 3 South. Management asserted that Petitioner stopped Dixon, and asked her what she was doing, and told her not to transfer the patient until Dixon heard from her. Several hours later, Dixon still had not transferred the patient because she was waiting to hear from Petitioner. However, Petitioner asserted that Dixon asked her what do I do about the transfer, and Petitioner advised Dixon, don't do anything without a transfer order. Dixon did not tell Petitioner a transfer order had already been issued.

(b) When Gordon asked Petitioner about interfering with the transfer, Petitioner denied knowing what Gordon was talking about, and denied that she had attempted to interfere with the transfer.

(c) Dixon's version of this incident is somewhat suspect in that numerous staff members indicated at hearing that the health care technician assisting in a patient transfer, would seek guidance from the charge nurse, not the medication nurse. Specifically, health care tech Sharon Turner, who has been a health care tech for more than 22 years, would properly direct any questions regarding a patient transfer to the floor nurse or nurse manager, as the person in charge of the transfer, and not to the medication nurse. (T pp 796, 797)

(d) The preponderance of the evidence showed that this matter was a misunderstanding between Petitioner and Dixon. No evidence was presented showing what motivation Petitioner might have had for interfering with a patient transfer in which she was not involved. The evidence established that the general practice at Dix was that health care technicians sought guidance from the charge nurse on transfer issues.

(e) This was the first time Petitioner had been accused of interfering with a transfer. Whitaker never discussed the "interfering with a patient transfer" incident with Petitioner prior to issuing Petitioner the "Documented Counseling."

75. The third allegation was that Petitioner failed to complete restrictive intervention as required by Gordon on August 1, 2005. However, the "counseling" failed to note that Petitioner was off work for the next three days, and Petitioner completed the paperwork in question on the day she returned, and placed the paperwork to filed in the chart. (T p 249) In fact, Gordon admitted that she did not check whether Petitioner had completed the paperwork in question before issuing Petitioner a "Documented Counseling for incompletion.

76. The fourth allegation was that Petitioner had consistently complained about the "busyness" of the unit since her return on 7/1/05.

(a) Whitaker admitted at hearing that Petitioner's complaints about "the busyness of the unit," were actually Petitioner's complaints about the staffing and safety issues of the unit. She conceded that Petitioner raising staffing and safety concerns violated no rule or policy, and that there was no policy suggesting Petitioner could be disciplined for raising these concerns. (T pp 115-117)

(b) Whitaker also admitted that she responded to Petitioner's safety concern complaints by issuing Petitioner a negative documented counseling in response to Petitioner's expressing safety concerns about the unit. (T p 124-125).

77. The fifth allegation in the Documented Counseling was that on August 15, 2005, Petitioner attempted to get another licensed staff to work when Whitaker had already refused Petitioner's request. Allegedly, that same night [at 7 p.m.], Petitioner paged Whitaker to report that staff members were refusing RN's direct orders.

(a) Petitioner admitted that she asked Whitaker for an LPN to give meds on the evening shift, so the RNs could finish admissions and complete a high volume of charting. But, Petitioner denied calling the house supervisor after Whitaker refused. Instead, the house supervisor called the unit, and Arlene Pace answered the phone. Pace asked the supervisor if she might have a spare LPN to help with meds, because they were swamped. The supervisor replied that she would look. Later, when the supervisor called again, Petitioner answered, and again asked if anyone was available to help with meds. Pace and Petitioner never heard from the house supervisor.

(b) Despite listing this allegation, Whitaker acknowledged, at deposition and hearing, that she could not identify any rule that Petitioner violated by asking additional staff to give meds.

(c) Both Whitaker and Paesler admitted at trial that the paging allegation against Petitioner was false. The evidence showed that at 7 p.m. that night, Arlene Pace, not Petitioner, paged Whitaker about office staff refusing nurses' direct orders. Petitioner merely answered the phone when Whitaker called the nurses' station. Whitaker also admitted that no policy existed that made paging Whitaker inappropriate. (T p 280-284). The evidence at hearing showed that office staff initially refused to follow Pace's direct orders to pick up a catheter. However, staff eventually complied with the order, perhaps within ten minutes. (Pace T pp 704, 707, 724-726) Pace informed Whitaker of the facts of this incident on one occasion. (T pp 764-65)

78. The sixth allegation in the Documented Counseling is that coworkers i.e. Sharon Woodall, and Helen Weatherill, had complained to management about Petitioner's interpersonal skills and communication style. Nevertheless, management had not advised Petitioner of any of these complaints or told Petitioner she needed to work on her interpersonal or communication skills.

While Petitioner and Jackie Howze, LPN, had experienced some communication difficulties working together, Petitioner and Howze met with Gordon and Whitaker to resolve those differences.

79. The last allegation in the August 22, 2005 Documented Counseling was that Petitioner allowed health care technician J. Taurasi to go home during the evening shift on August 8, 2005. At hearing, Gordon clarified that this incident occurred on August 6, 2005, not August 8, 2005.

(a) During the evening shift of August 6, 2005, Taurasi asked Petitioner if he could go home. Petitioner reviewed the roster for that date, and saw that **VAC** was printed next to Taurasi's name. Petitioner thought Taurasi was approved for a vacation day. Taurasi told Petitioner that Whitaker had told him, he could not have the day shift off, but was only allowed to have the evening shift off if that shift was adequately staffed. After Petitioner checked on the adequacy of staff, she advised Taurasi he could go home.

(b) In spite of this, Pam Gordon had told Taurasi he could not have the evening shift off. She had written her initials next to his name on the roster, beside some notation that Petitioner could not read. Gordon did not tell the evening shift nurses that Taurasi could not have the shift off.

80. Whitaker, Gordon, and Paesler all reported that they would not have issued the August 22, 2005 Documented Counseling to Petitioner over each individual incident, but considering the incidents in their totality, such Documented Counseling was appropriate. Gordon and Whitaker felt the Documented Counseling was necessary to deal with:

> so many problems coming up all at once with Petitioner and it was causing problems for everyone including the people working with her and it was interfering with patient care.

(T p 542)

(a) However, Gordon and Whitaker's position ignores that some of the reported statements in the Documented Counseling were in fact false or incorrect, some involved the acts of other employees rather than Petitioner, and some appeared trivial in nature.

(b) At hearing, Paesler admitted that while Petitioner raised serious questions about some of the allegations in the Documented Counseling, none of the errors in the Documented Counseling was corrected at any point. (T pp 1779-80).

81. Respondent contended that this Documented Counseling represented a compilation of numerous problems Petitioner had upon returning to PTA.

(a) However, on August 22, 2005, Petitioner had only been working on PTA for less than two months. Had Petitioner been exhibiting this level of erroneous behavior, it is reasonable to assume that these issues, or similar ones, would have risen before now. There was no evidence that management had raised concerns about Petitioner's safety performance, communication, or interpersonal skills before August 22, 2005.

(b) Just three months earlier, in May 2005, Diane Younger issued Petitioner an overall performance rating of "Very Good" in Petitioner's performance evaluation. Paesler had signed such evaluation without comment.

(c) Neither did Paesler express any concerns regarding Petitioner's ability to handle the PTA unit in her memorandum refusing to return Petitioner to PTA after the first rotation/transfer. (Pet Exh 3).

82. On August 24, 2005, Whitaker completed and submitted a personnel action request form to Dix personnel department indicating that Petitioner was being administratively moved from PTA to FMIN. (T pp 134-35; Pet Exh 14) On that form, Whitaker evaluated Petitioner's performance. Whitaker placed that form and evaluation in Petitioner's personnel file. However, she did not advise Petitioner of the evaluation, much less, that Whitaker was placing a copy of that evaluation in Petitioner's personnel file. (Pet Exh 14) The evidence showed that, that personnel action form and evaluation would remain a part of Petitioner's personnel file and information.

(a) In that evaluation, Whitaker indicated that Petitioner was eligible for rehire, because she "has difficulty managing demands of acute admissions unit." (Pet Exh 14, p 2)

(b) Whitaker also rated Petitioner at a level of "Below Good," the next to lowest rating available, on five of nine evaluation criteria. Some of these ratings – such as "Competency" versus "Knowledge"- corresponded directly with items on which Diane Younger had rated Petitioner "Very Good" just two months before. (T p 128-134; Pet Exh 26). When asked about this

discrepancy, Whitaker replied that, "I based … I stick with the fact that I based my ratings on her behavior and her performance on [PTA]." (T p 135).

(b) Whitaker never discussed any perceived performance problems with Petitioner. Instead, Whitaker just collected statements (with Gordon's assistance) from other employees regarding Petitioner's performance.

83. On August 23, 2005, Petitioner responded in writing to the August 22, 2005 Documented Counseling, and sent such response to Dr. Stelle. In this response, Petitioner contended that management had issued the Documented Counseling out of retaliation for her being returned to PTA by Dr. Stelle. (Pet Exh 15)

September 22, 2005 Written Warning

84. On September 7, 2005, Petitioner began working in the FMIN unit at the Wright Building on the evening shift. (Resp Exh 1, p 79) Petitioner's new supervisor was Robin Abdul-Fattah.

85. On September 22, 2005, Whitaker, Paesler, and Gordon called Petitioner into a meeting in the FMIN unit. It is not a usual practice for all three supervisors to participate in a conference to issue a written warning. During the meeting, Whitaker, Gordon, and Paesler collectively issued Petitioner a Written Warning for unsatisfactory job performance. (T pp 78, 139; Pet Exh 12A) When Petitioner received the written warning, she was told, "If you don't like it, file a grievance."

86. Petitioner asked for her new supervisor, Abdul-Fattah, to attend at the meeting. However, Paesler refused Petitioner's request, and held the meeting without Abdul-Fattah being present. (T pp 79-80, 1034). In addition, Paesler, Whitaker, and Gordon did not intend to permit Petitioner to return to PTA. (T p 81) Gordon admittedly did not want Petitioner back in PTA. (T p 81)

87. Paesler and Whitaker signed the written warning, even though Whitaker was no longer Petitioner's supervisor. Although there is a space on the written warning form for the signature of the hospital director and division director, no signature appears on the written warning by either person. (Pet Exh 12A). The written warning provided:

(a) On 7/20/05, you did not report a pulse rate 177 on Patient [E] to the medical doctor on call. You were told by the charge nurse multiple times, but you refused, choosing instead to call the attending psychiatrist, forensic psychiatrist on call, and the psychiatrist on call for the hospital. This patient needed immediate medical attention and you delayed him getting this by calling the wrong doctor.

(b) On 8/14/2005, you wrote in Patient DC's chart that he reported backing out. You did not take vital signs nor call the MD on call. This particular patient had multiple documented complaints of headaches throughout his progress notes.

(Pet Exh 12A)

88. Management attached a memorandum to the Written Warning document. In that memorandum, the above information numbered (a) and (b) was essentially repeated, and followed by:

The above state behavior is in direct violation of the following hospital policies:

- Vital Signs: Documentation and Reporting (DDH Nursing-Clinical Policy: II-3-3)
- Scope of Service Statement (DDH Nursing-Administrative Policy: I-1.2)

Further violations will result in further disciplinary action up to and including dismissal. Beginning immediately:

- You are expected to report any potential medical issues to the medical doctor in the building during business hours or the on call medical doctor when after hours.
- You are to follow all reasonable orders given by the charge nurse.
- You are to obtain vital signs on patients with medical complaints.
- You are to report out of range vital signs immediately to the medical doctor, in house or on call.

(Pet Exh 12A)

July 20, 1995 - Patient E incident

89. The preponderance of the evidence showed that on July 20, 2005, Helen Weatherill was the charge nurse for the on-coming evening shift on the PTA unit. Darius Jones, Sharon Turner, Ben Underhill, and L. Morrison were working as health care techs during the evening shift. Jones was lead health care tech, while Jackie Howze, LPN was the medication nurse on the evening shift.

90. The evening or second shift starts at 3:45 pm. At the beginning of every shift change, the off-going shift reports or advises the oncoming staff about the patients status and what occurred during the prior shift. This session is called, "report." (T pp 801-802) "Report" lasts from fifteen to thirty minutes. (T p 837) Oncoming staff are then assigned to their respective work areas for the shift.

91. The preponderance of the evidence at hearing showed that on July 20, 2005, "report" was held for the oncoming shift and off-going shift. During "report," off-going staff advised on-coming staff that patient E was on "detox" protocol. (Turner and Pace's testimony; T pp 803-04)

(a) At hearing, both Arlene Pace, the off going shift nurse, and Sharon Turner, recalled patient E's condition being discussed at report.

(b) Helen Weatherill acknowledged at hearing that she attended "report" that night. Yet, Weatherill denied patient E's detox protocol being discussed during "report." Nevertheless, the last entry on patient E's medical chart, prior to Weatherill's 8:30 pm progress note, stated that patient E was on detox protocol. (Resp Exh 1, p 29)

92. Dr. Chuiten, a medical doctor, had ordered patient E on detox that day. (Resp Exh 1, p 29) It is unusual for PTA to handle a detox protocol as the medical unit normally handles patients on detox protocol. (T p 804) Patient E was having tremors in his extremities, and remained on 30-minute observations. He was also taking Ativan to as part of his protocol. (Resp Exh 1, p 29)

93. Around 6:15 pm that night, Petitioner arrived to assist Helen Weatherill as a third nurse on the unit. Petitioner assisted Weatherill with charting, and went to the pharmacy.

94. Around 7:30 pm, health care tech Underhill began taking patients' vital signs. Patient E's vital signs were out-of-range, with his pulse being 125. Underhill forgot to report those out-of-range vital signs to the charge nurse, Weatherill. (Underhill's statement) Underhill completed taking the patients' vital signs around 8:30 pm.

95. Sharon Turner was assigned to the hallway that night. She first noticed patient E moving from the hallway to the dayroom, around 6:30 or 6:45. Turner noticed that Patient E's speech was slurred, and his gait was unsteady. Turner was able to communicate with patient E. when she came on duty, but not so much after he went into the dayroom. (T pp 802, 841-47)

(a) Sometime after 7:30 pm, Turner told Petitioner that Patient E was exhibiting behaviors he was not exhibiting before. (T p 825-826) Turner saw Petitioner walk into the office to talk to Weatherill. (T p 825) Turner thought Patient E had received medications around 8:00 p.m. (T p 830) Turner observed that Patient E's condition worsened, and she reported it to Weatherill. (T pp 806-07) Weatherill responded that they were aware of it, and that they had changed his medications. (T pp 830, 1053)

96. At 8:30 pm, Helen Weatherill wrote a progress note that Patient E had been watching TV most of the shift, with no negative behavior displayed, and continued on close observation. (Resp Exh 1, p 29)

97. Between 8:30 and 9:00 pm, patient E was given a scheduled dose of Ativan. After patient E come from medication between 8:30 and 9:00, Jones noticed that patient E started to act a little disoriented When E. returned from the canteen, one of the staff members reported that he was acting a little bizarre. Then he asked to go to his room, and Jones checked on him periodically. (T pp 1607-1609)

98. Around 9:45 or 10:00 pm, Jones walked by Patient E's room, heard a loud bang, and walked into E's room. Jones asked patient E if he was okay, but did not appear to know what was going on. Patient E was more confused, and his tremors had worsened. (T pp 1607-1611) Jones told Helen Weatherill to come look at patient E, and she replied, "get his vital signs." At 10:00 pm, Underhill took patient E's vital signs. E's vital signs were out of range with his pulse rate being 177. (Resp Exh 1, pp 29-30)

(a) Weatherill, Jones, and the other staff were in patient E's room. When Weatherill left patient E's room, Jones was about one pace behind her. Weatherill walked into the office. Petitioner was in the office with Jones in the hallway briefly. Jones went back into the patient's room. (T pp 1607-1611)

(b) Petitioner entered patient E's room, saw patient E, and stated something like, "it's the psych medication that he is taking, and she's going to call the psych doctor." Weatherill and Petitioner walked back into the office to locate the vital signs chart, and Weatherill told Petitioner to "call medical." Darius Jones heard Weatherill tell Petitioner to "call medical." (T p 1642) Weatherill

told Petitioner to call medical several times.

(c) Weatherill, Petitioner and health care techs had difficulty locating the vital signs chart, because the desk was cluttered with paperwork. Petitioner called the on-call psych doctor, because Petitioner thought patient E was having a reaction to Ativan. When the on-call psychiatry doctor arrived, she examined patient E, and said he has to go to medical. The psych doctor questioned Weatherill and Petitioner in the office regarding why the medical doctor had not been called. Petitioner replied that she had called the on-call psych doctor because she thought patient E was having a reaction to Ativan. The psych doctor called the medical doctor, Dr. Holt. Dr. Holt ordered patient E to be transferred to medical. At 11:20 pm, patient E was immediately transferred to the medical unit. (T pp 1607-17; Resp Exh 2, pp 22, 29, 20) Jones took the patient without the paperwork because the doctor was still working on the chart at the time. (T pp 1607-1617) After Patient E was transferred to medical, he was transferred to Wake Med for evaluation and stabilization. (R Ex 1, p 30)

(d) Petitioner had also called Drs. Carbone and Groce when she called the on-call psych doctor. She acknowledged that Weatherill told her to call the medical doctor, but denied refusing to call the medical doctor. Instead, she explained that she called the on-call psych doctor first, because she thought the patient was having a reaction to Ativan.

(e) While Petitioner reported that Weatherill called the on-call medical doctor, there was no other evidence presented at hearing to show that other staff saw or heard Weatherill call the on-call medical doctor.

99. Dorothea Dix Hospital's Administrative Policy explains the assignments, duties, and responsibilities of the psychiatry on-call service and the medicine on-call service. (R Ex 2, pp 3-5) Included in the responsibilities of the Medical Call is "Respond as first call to medical problems from all areas of the hospital." (R Ex 2, p 5) In addition, a memorandum was issued on July 8, 2002, which gave guidelines for on call coverage for psychiatric and medical problems. (R Ex 2, p 2)

100. Dorothea Dix Hospital Nursing – Clinical Policy "Vital Signs: Documentation and Reporting", Policy: II-4-3, provides that "Vital Signs will be obtained as ordered, documented, and reported to the medical physician or PA when out of range."

(a) The policy provides that the health care tech staff are responsible for obtaining vital signs and recording on a worksheet as ordered; repeating any out of range vital signs; notifying their **assigned** RN immediately of all out of range vital signs; and submitting their vital sign worksheet to the RN 2 hours prior to the end of their shift.

(b) The RN is responsible for reviewing the vital signs obtained; transcribing vital signs onto the patient vital sign graphic record; assessing patients with out of range vital signs; notifying the medical physician or PA of any out of range vital signs within 2 hours or sooner; documenting the notification and any follow-up ordered, and placing the worksheet on the Medical/PA clipboard. (R Ex 2, p 9) It is the responsibility of the charge nurse to make sure vital signs are taken and to keep track of them. (T p 407)

101. Pam Gordon investigated the patient E incident, and met with numerous persons about the incident. However, she did not meet with Petitioner, but obtained statements from Petitioner and Weatherill. (T p 1489). Gordon reviewed portion of the medical record, the graphic vital signs sheet, the progress notes, and the doctors' orders. (T p 478) She and Whitaker received written statements from Jones and Underhill. In early August 2005, Gordon and Whitaker asked Weatherill and Petitioner for further clarification of the events of July 20, 2005.

102. Gordon and Whitaker corroborated Weatherill's assertion that she told Petitioner to call the "medical on call" with Jones' statement. (R Ex 1, p 23) They felt Petitioner attempted to lay the fault of the incident on Weatherill. The graphic Vital Signs record from the incident shows that the first out of range vital sign was taken at 5:00 p.m., but that time was not correct. (T p 414, Pet Exh 23) While the vital signs should have been reported to Weatherill when they were first noted to be out of range, Underhill failed to do so.

103. Gordon felt the main issue in this incident is that Petitioner failed to execute a direct instruction by the charge nurse, and Petitioner's refusal delayed treatment for Patient E. Gordon opined that if the charge nurse delegates a task to a qualified person, then it becomes the responsibility of the qualified person. (T p 403) Paesler's assessment was that Petitioner was responsible for the breakdown in communication about getting medical help quickly. (T pp 1783-1784)

104. Management did not discipline Helen Weatherill in writing for the situation involving Patient E, but she was talked to verbally. (T p 268)

(a) Management explained that Weatherill was able to document with reports from other staff that she directed Petitioner to call the medical on call. As the charge nurse, it was her responsibility to delegate that duty, and Petitioner should have

followed her instructions. (T pp 268-269)

(b) However, Gordon acknowledged that they "probably should have" been disciplined Weatherill in some way over the incident, (T p 96), or given her a documented counseling. (T p 185) Gordon and Whitaker had the authority to issue a documented counseling to Weatherill and the health care technicians involved, yet failed to do so. (T p 192).

105. The preponderance of the evidence showed that the written warning failed to identify how Petitioner specifically violated policy II – 3 - 3, "Vital Signs Documentation and Reporting," and policy I – 1.2, "Scope of Service Statement." The evidence is unclear how much delay, if any, was caused by Petitioner not calling the on-call medical doctor. Petitioner, Turner and Weatherill, all indicated that the psychiatrist arrived promptly following Petitioner's telephone call, and patient E was immediately transferred the patient to the medical unit.

106. In addition, management unfairly places the entire blame for any delay in patient E obtaining medical treatment on Petitioner when other staff, such as Underhill and Weatherill, obviously contributed to any such delay.

(a) Clearly, Underhill violated this policy by not reporting the first out-of-range vital signs to Weatherill. However, there is no evidence that management disciplined Ben Underhill for failing to report the out-of-range vital signs to Weatherill. His failure violated Respondent's policy, which required Underhill to report out-of-range vitals. (Pet Exh 20, "Vital Signs: Documentation and Reporting, II -3-3")

(b) The evidence showed that Sharon Turner reported patient E's change in behavior to Weatherill, yet she did not proceed to check E's vital signs. It was Weatherill's responsibility as charge nurse to review all vital signs obtained, assess patients with out of range vital signs, and notify the medical physician or PA of out of range vital signs within 2 hours or sooner. (Pet Exh 20, "Vital Signs: Documentation and Reporting, II -3-3"). Weatherill failed to do so. When asked whether Weatherill accomplished all the expected duties of a charge nurse on the night of the Patient E incident, Gordon replied that, "I would say no." (T p 95) Because of Underhill and Weatherill's failures, Patient E was left in a condition with abnormal vital signs for three hours without a doctor being called.

(c) At hearing, Whitaker testified:

Q. So [Petitioner] made the decision, apparently, to call thinking it was an adverse drug reaction to the psych and your response to that was to issue a written warning, is that correct? True, or false?

A. That's correct.

(T p 127).

107. By failing to acknowledge the other staffs' role in the patient E incident, and solely blaming and disciplining Petitioner, Respondent's issuance of the written warning to Petitioner was inaccurate and misleading.

108. Moreover, management issued this written warning to Petitioner, thirty days after the management team had transferred Petitioner out of PTA a second time. The written warning contains a "certification" from management that, "Efforts to correct/resolve this situation without disciplinary actions have failed." (Pet Exh 12A)

(a) Yet, management took no previous efforts to resolve the situation with Petitioner. Whitaker admitted that Petitioner had never been previously counseled for a failure to report elevated pulse rates, that she was not aware of Petitioner being accused of, or counseled for, such by either former or current managers, (T p 150-151), and never made any efforts to resolve the situation with Petitioner. (T pp 191-193). Further, Whitaker did not consider Petitioner's overall record prior to issuing the written warning, despite Dix policy stating she should do so. (T p 152, Pet Exh 16).

(b) If the goal of the warning was to get Petitioner's work performance to improve, then why was Petitioner's current supervisor not only excluded from the September meeting when the warning was issued, but management never gave Petitioner's new supervisor, Abdul-Fattah, a copy of the written warning. (Paesler's and Whitaker's admission in T pp 121, 1774, 1034). Paesler likewise admitted that she did not deliver Petitioner's "private" personnel file to Abdul-Fattah, even though normal practice was to do so. (T pp 121, 1773).

8/14/2005, Patient DC incident

109. The second allegation of the September 22, 2005 written warning was that Petitioner did the following:

> On 8/14/2005, you wrote in Patient DC's chart that he reported backing out. You did not take vital signs nor call the MD on call. This particular patient had multiple documented complaints of headaches throughout his progress notes.

(Pet Exh 12)

110. The preponderance of the evidence at hearing showed that Petitioner interviewed patient D.C. on August 14, 2005, shortly after she arrived at work around 2:00 p.m. D.C. told Petitioner that he had been watching TV, and did not remember the show or getting on the floor. Petitioner asked the tech about DC. The health care tech reported that patient D.C. had fallen asleep. (Pet Exh 36). When Petitioner asked D.C. if it was possible that he had fallen asleep, D.C. replied that it was a possibility. (T p 1039) By then, at 2:30 p.m., D.C.'s vital signs were normal. (T p 1040)

111. At hearing, Petitioner explained that patient D.C. had previously been worked up for claiming to have blackouts, but admitted that she should have documented more of her discussion. (T p 1041) She did not take D.C.'s vital signs, because he was a normal healthy kid. (T p 1041) She admitted in her testimony that she probably should have taken his vital signs. (T p 1041) Petitioner thought that the doctors would have been irritated if she had notified them about the patient's report of blackouts. (T p 1042)

112. Arlene Pace concurred with Petitioner's opinion that patient D.C. was misrepresenting his condition as "blackouts," when in truth he was falling asleep. (T p 699). On or about August 15 or 16, 2005, Pace had charted this information in Patient DC's chart, (T pp 699-700), but her progress notes were missing from D.C's medical records that Respondent produced at trial.

113. In her expert opinion, Gordon thought that Petitioner's documentation for Patient D.C. on August 14, 2005 did not meet the North Carolina nursing practice standards for documentation, because it does not state that she actually assessed the patient, that she took any vital signs, or that she reported anything to the doctor. (T pp 657-658) Paesler also opined that she did not believe that Petitioner applied the correct nursing criteria to this patient. (T p 1734) Based on her education and experience, and her responsibilities as a nursing supervisor, the actual chart note itself was a problem. Paesler noted that there was no further assessment or notification of a physician. (T pp 657-658)

114. In contrast, Paesler, Whitaker, and Gordon also opined that Petitioner was unable to make the determination on her own that Patient DC was misunderstanding his condition. None of the three management team members personally treated Patient D.C., and therefore, could not make an informed medical judgment about D.C.'s condition.

115. Neither Paesler, nor Whitaker, nor Gordon discussed the "blackout" incident with Petitioner prior to issuing her the written warning about it. (T p 1042). There was no evidence they talked with any other staff about Petitioner's charting on this incident. In addition, nowhere in the written warning did management specify how Petitioner's actions violated Respondent's Nursing-Administrative Policy: I-1.2, Scope of Service Statement.

116. On September 27, 2005, Petitioner filed a grievance regarding the written warning, alleging that the written warning was inaccurate and misleading, and generated out of retaliation for a previously filed grievance. She requested that the written warning be removed from her files and "[I]intimidation by management will stop." (Resp Exh 1, pp 73-79)

117. On October 4, 2005, Paesler responded to Petitioner's grievance, stating that in the case of Patient E, Petitioner persisted in calling the psychiatric on call, but never the medical doctor. In addition as to Patient D.C., Petitioner failed to chart that she had notified the medical staff or that medical staff had determined that the blackouts were not genuine. (Resp Exh 1, p 80)

118. On October 6, 2005, Petitioner filed a petition for contested case hearing, alleging that in late 2004 and into 2005, she began to report concerns that staffing in the PTA unit was unsafe, "crisis patients" were being transferred without notification to staff, policies regarding such transfers had changed, staff reporting inaccuracies existed, and management was failing to listen to, or respond to, staff concerns regarding safety and security issues at PTA. Petitioner requested injunctive and monetary relief under the Whistleblower Act.

119. On October 10, 2005, Petitioner requested a Step 2 internal grievance appeal stating that the "written warning is inaccurate and misleading. It was generated out of retaliation for a previously filed grievance." Petitioner requested, "removal of the written warning from her files. Intimidation/retaliation by management will stop." (R Ex 1, pp 81-85)

120. On October 31, 2005, Dr. James Osberg, the new Dix hospital director, reduced the September 22, 2005 written warning to a documented counseling. (R Ex 1, p 87) There were no remaining disciplinary actions outstanding.

121. As of April 4, 2006, Respondent had removed all documents relating to the August 22, 2005 documented counseling, and

September 22, 2005 written warning/documented counseling from Petitioner's personnel file, that is maintained by Dorothea Dix Human Resources Department and by Petitioner's supervisors. (See Affidavits of Terry Johnston and Betty Paesler (Exhibits J and K) of Respondent's Motion for Summary Judgment.)

122. Whitaker's August 24, 2005 negative evaluation written in the Personnel Action Request (Pet Exh 14) apparently remains in the file.

123. After each transfer to another unit, Petitioner's pay grade and salary remained the same. Yet, a preponderance of the evidence at hearing showed that the management team engaged in a pattern of retaliatory behavior toward Petitioner after Petitioner initially reported in 2004, and continued to report in 2005, her concerns regarding unsafe staffing conditions involving a substantial and specific danger to the public safety. Through this retaliatory behavior, Respondent (a) twice transferred Petitioner from her job and moved her position to another location; (b) issued a "Documented Counseling," (c) issued a written warning, and (d) subjected Petitioner to a negative evaluation without her knowledge and without giving Petitioner a chance to respond. Such negative evaluation did not accurately represent Petitioner's job performance at Dix, and contradicted Petitioner's annual performance evaluation of May 2005.

124. The preponderance of the evidence established that Respondent's management team of Paesler, Whitaker, and Gordon repeatedly disciplined Petitioner for job performance issues, when the reasons for such disciplinary actions were often either unsubstantiated, not supported by the full facts of the case, inaccurate, and/or misleading. Respondent's retaliation was further shown by Respondent's selective discipline of Petitioner for performance issues when Respondent did not discipline coworkers for similar performance issues.

CONCLUSIONS OF LAW

1. Pursuant to Chapters 126 and 150B of the North Carolina General Statutes, the Office of Administrative Hearings does not have jurisdiction over the parties or subject matter of this hearing based on the remedies sought by Petitioner.

2. Petitioner is a career State Employee pursuant to N.C. Gen. Stat. § 126-1.1 and as such, is entitled to the protections enumerated under Chapter 126 of the North Carolina General Statutes.

N.C. Gen. Stat. § 126-25 Claim

3. N.C. Gen. Stat. § 126-25 provides that:

> An employee, former employee, or applicant for employment who objects to material in his file may place in his file a statement relating to the material he considers to be inaccurate or misleading. An employee, former employee or applicant for employment who objects to material in his file because he considers it inaccurate or misleading may seek the removal of such material from his file in accordance with the grievance procedure of that department, including appeal to the State Personnel Commission. . . .

4. The preponderance of the evidence presented at hearing showed that the August 22, 2005 Documented Counseling, and September 22, 2005 Written Warning (later, Documented Counseling) were inaccurate and misleading for reasons noted in the above Findings of Fact. Since Respondent has removed such information from Petitioner's personnel file, that issue before the undersigned is now MOOT.

5. The preponderance of the evidence also showed that Rhonda Whitaker's August 24, 2005 negative evaluation, attached to a Personnel Action Form, should be removed from Petitioner's personnel file as it inaccurately represented Petitioner's job performance while employed at Dix. Instead, the evidence proved that Whitaker issued that negative evaluation in retaliation for Petitioner continually voicing her concerns regarding the safety of staffing on the PTA unit from May 2005 to August 2005. For those reasons, Whitaker's August 24, 2005 evaluation listed on the Personnel Action Form (Pet Exh 14) should be removed from Petitioner's personnel records and destroyed in accordance with N.C. Gen. Stat. § 126-25.

N.C. Gen. Stat. § 126-34.1(7) and N.C. Gen. Stat. § 126-85 Claims

6. N.C. Gen. Stat. § 126-34.1(a) provides that a State employee "may file in the Office of Administrative Hearings a contested case only as to the following personnel actions or issues": . . .

> (7) Any retaliatory personnel action that violates G.S. 126-85.

7. N.C. Gen. Stat 126-84 through -88, ie. the Whistleblower Act, makes it the public policy of this State that state employees shall be encouraged to report evidence of activity by a State agency or State employee constituting:

> (a) . . .
>
> (1) A violation of State or federal law, rule or regulation;
> (2) Fraud;
> (3) Misappropriation of State resources;
> (4) Substantial and specific danger to the public health and safety; or
> (5) Gross mismanagement, a gross waste of monies, or gross abuse of authority.
>
> (b) Further, it is the policy of this State that State employees are free of intimidation or harassment when reporting to public bodies about matters of public concern, including offering testimony to or testifying before appropriate legislative panels.

8. N.C. Gen. Stat. § 126-85(b) provides:

> No head of any State department, agency or institution or other State employee exercising supervisory authority shall discharge, threaten or otherwise discriminate against a State employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the State employee has refused to carry out a directive which in fact constitutes a violation of State or federal law, rule or regulation or poses a **substantial and specific danger to the public health and safety.**

(Emphasis added)

9. In Newberne v. North Carolina Department of Crime Control and Public Safety, 359 N.C. 782, 788, 618 S.E.2d 201, 206 (2005), the NC Supreme Court held the plaintiff [Petitioner] must first prove a prima facie case under the Whistleblower Act by proving the following elements:

> (a) [Petitioner] engaged in protected activity,
>
> (b) [Respondent] took adverse actions against [Petitioner] in her employment, and
>
> (c) There is a causal connection between the protected activity and the adverse action taken against the [Petitioner].
>
> . . . The [Petitioner] should include any available 'direct evidence' that the adverse employment action was retaliatory along with circumstantial evidence to that affect.

Newberne, 359 NC at 794.

10. Second, once Petitioner makes a prima facie showing of retaliation, the Respondent "should . . present its case, including its evidence as to legitimate . . reasons for the employment decision." Newberne, 359 NC at 794.

11. Third, once all the evidence has been received, the court should determine whether the "pretext" framework under McDonnell Douglas Corp. v. Greene, 411 U.S. 792 (1973), or the "mixed-motive" framework under Price Waterhouse, 490 US at 228, 109 S.Ct 1775, 104 Led. 2d 268 (1989) properly applies to the evidence in this case. If the Petitioner shows that she engaged in a protected activity and Respondent took adverse action against Petitioner, and Petitioner further establishes by "direct evidence" that "the protected conduct was a substantial or motivating factor in the adverse [employment] action," Newberne, 359 NC at 794 (citation omitted), then the Respondent bears the burden to show its legitimate reason, standing alone, would have induced it to make the same decision." Newberne, 359 NC at 794 (citing Price Waterhouse, 490 US at 252).

12. Our NC Supreme Court in Newberne at 792-793, defined the terms "direct evidence" as "conduct or statements that both reflect directly the alleged retaliatory attitude and that bear directly on the adverse employment decision."

13. Applying the case law to this case, Petitioner engaged in protected activity under the Whistleblower Act in repeatedly reporting to the management team (specifically Whitaker) staffing and safety concerns in 2004 and 2005. The preponderance of the evidence showed that the prospect of PTA patients escaping, due to inadequate staffing and nature of the PTA population, posed a significant danger not only to PTA staff and other patients, but to the public living around Dorothea Dix hospital. Petitioner engaged

in this protected activity before and after her first transfer in October 2004, and continued expressing such concerns when she returned to PTA unit in 2005.

14. In response to this protected activity, Respondent took multiple adverse employment action against the Petitioner, and discriminated against Petitioner's conditions and location of employment, by transferring Petitioner to jobs in other units on two separate occasions, and by issuing Petitioner the written warning on September 22, 2005. N.C. Gen. Stat. 126-85(a) (2003); Newberne 359 NC at 788, 618 S.E.2d at 206. While a "documented counseling" is not a formal "adverse employment" as defined in N.C. Gen. Stat. § 126-34.1, Respondent's issuance of the August 22, 2005 documented counseling to Petitioner was part of an overall pattern of retaliation against Petitioner for continuing to voice concerns about staffing conditions at PTA.

15. It is clear that the "Documented Counseling" and written warning, as well as the August 24, 2005 negative evaluation, affected the conditions of Petitioner's employment. That Respondent subsequently removed some of these documents does not change that the management team discriminated against Petitioner in the conditions of her employment by issuing them in the first place, and that they were clearly intended to have a negative and harmful effect on Petitioner's career.

16. Finally, the preponderance of the evidence demonstrated that Petitioner's protected conduct in reporting the safety of staffing conditions was a "substantial or motivating factor in the adverse actions."

(a) First, the preponderance of the evidence when Respondent "rotated" or transferred Petitioner for expressing concerns about staffing adequacies and conditions, there was no rotation policy governing nursing staff rotation in the forensic units in October 2004. Petitioner was the only nurse "rotated" on the alleged rotation policy out of 16-20 nurses working in the Spruill Building itself. (T p 22). Out of 20-30 forensic nurses working at Dix in the fall of 2004, Petitioner, Woodall, and Latham were the only nurses ever "rotated" under this alleged policy. (T pp 80-81). The preponderance of the evidence showed that the October 2004 rotation/transfer was not to provide "cross-training" for forensic nursing staff.

(b) In August and September 2005, Petitioner was disciplined or "counseled" based on incidents where other employees were equally and sometimes, primarily at fault, or for incidents that appear, were either taken out of context, or not fully investigated. Respondent failed to discipline other employees who were at fault in these same incidents, although Respondent later admitted it should have disciplined those employees.

(c) The management team did not characterize Petitioner as "unsafe" and unable to handle the duties of PTA until Dr. Stelle ordered Petitioner returned to PTA in 2005. The preponderance of the evidence established that Petitioner had not engaged in, or been accuse of, unsafe nursing practices in the several years she previously worked at Dix or afterward September 2005. Specifically, in May 2005, Petitioner received very good performance evaluations from her 3 South supervisor, Diane Younger. Nowhere did Younger mention safety concerns regarding Petitioner's job performance.

17. Respondent "articulated" the lawful reason of cross-training of nursing staff as the reason for transferring Petitioner in October 2004, and explained that it transferred Petitioner again in September 2005 and issued the August 22, 2005 documented counseling and September 22, 2005 written warning due to safety concerns about Petitioner's job performance on PTA.

18. Yet, Petitioner showed by a preponderance of the evidence that Petitioner's protected conduct of expressing safety regarding staffing concerns on PTA was a "substantial or motivating factor in the adverse [employment] actions" of transferring Petitioner in 2004 and 2005, and in issuing Petitioner the August 2005 documented counseling, and the September 22, 2005 written warning. When Petitioner's counsel asked Whitaker about her issuance of the "Documented Counseling" to Petitioner based on complaining about the "busyness" of the unit, Whitaker answered:

> *Q. And one of your responses to those complaints [by Petitioner about safety and staffing], whether it was business or busyness, was to issue this documented counseling, correct?*
>
> *A. Correct.*
>
> *Q All right. And you testified in deposition that you regarded this as a negative documented counseling, correct?*
>
> *A. Yes.*
> *Q. One that would follow [Petitioner] around … for a certain period of time?*
>
> *A. Yes. (T. 124-125).*

Whitaker's admission showed Respondent's intention and retaliatory attitude to take negative actions against Petitioner, in direct response to Petitioner's protected conduct.

19. While it is appropriate to apply the mixed-motive analysis of Price Waterhouse standard in this case, the undersigned notes that it would reach the same result under the burden-shifting analysis of McDonnell Douglas. The circumstantial evidence in this case proved that Respondent's conduct in transferring Petitioner, and issuing the written warning and documented counseling appears to have been pretextual in nature.

Remedies

20. N.C. Gen. Stat. 126-86, passed in 1989, provides the following remedies for successful prosecutions of Whistleblower Act Actions in N.C. Gen. Stat. § 126-87:

> A court, in rendering a judgment in an action brought pursuant to this Article, may order an injunction, damages, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, costs, reasonable attorney's fees or any combination of these. If an application for a permanent injunction is granted, the employee shall be awarded costs and reasonable attorney's fees.

21. While a State employee may bring a Whistleblower Act in the Office of Administrative Hearings, the Office of Administrative Hearings' authority for providing remedies is limited to the grant of authority given to the State Personnel Commission (SPC) by the General Assembly. Depending on the unlawful State employment practice alleged, the SPC has the authority to provide certain remedies.

22. Pursuant to N.C. Gen. Stat. §126-37, the SPC has the authority 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 of the appointing authority.

23. With regard to material, which an employee objects to as inaccurate and misleading, the SPC may order that such material be removed. N.C. Gen. Stat. § 126 -
26. The SPC has promulgated administrative rules pursuant to its authority under N.C. Gen. Stat. § 126-4 which define the limit of the remedies it will provide. Those remedies are as follows:

25 NCAC 01B. 0421	Back Pay
25 NCAC 01B .0422	Front Pay
25 NCAC 01B. 0423	Leave
25 NCAC 01B. 0424	Health Insurance
25 NCAC 01B .0428	Reinstatement
25 NCAC 01B .0430	Removal of Material from Personnel File
25 NCAC 01B .0432	Specific remedies for procedural violations (i.e., extension of time to file appeal when there has been a failure to give written notice of rights)
25 NCAC 01B .0414, .0415 & .0438	Attorney's Fees

24. The SPC has determined that the language "to direct other suitable action to correct the abuse" in N.C. Gen. Stat. § 126-37, would include decisions affecting leave and health insurance, but not interest, damages of any kind, or voluntary programs or benefits. There is no authority for the proposition that the SPC, and by extension, an ALJ, has power to go beyond the remedies specified by statute and rule.

25. As Petitioner has proven that Respondent violated the Whistleblower Act, N.C. Gen. Stat. § 126-84 – 87, she is entitled to be reinstated to her position or a similar position at PTA, entitled to have all documented counseling/written warnings removed from Petitioner's personnel file including the August 24, 2005 Whitaker evaluation, and entitled to reasonable attorney's fees. N.C. Gen. Stat. § 126-4 (11); N.C. Gen. Stat. § 128-87.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that the Respondent retaliated against the Petitioner and violated the Whistleblower Act, N.C. Gen. Stat. § 126-84 – 87.

NOTICE AND ORDER

The North Carolina State Personnel Commission will make the Final Decision in this contested case. N.C. Gen. Stat. § 150B-36(b), (b1), (b2), and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Findings of Fact and Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it 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(b)(3) requires the agency to serve a copy of its Final Decision on each party, and furnish a copy of its Final Decision to each party's attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

This the 19th day of January, 2007.

_____
Melissa Owens Lassiter
Administrative Law Judge

STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF WAKE	06 OSP 0007

Pamela C Granger Petitioner	))	
vs.	)	DECISION
University of North Carolina, Chapel Hill Respondent	))	

Administrative Law Judge Beecher Gray heard this contested case at the Office of Administrative Hearings, Lee House Hearing Room, Raleigh, North Carolina on September 20 and 21, 2006.

APPEARANCES

Petitioner: Michael C. Byrne
Law Offices of Michael C. Byrne
5 West Hargett Street, Suite 310
Raleigh, NC 27601

Respondent: Kimberly Potter
Assistant Attorney General
NC Department of Justice
9001 Mail Service Center
Raleigh, NC 27699-9001

ISSUE

Whether respondent deprived petitioner of property and/or substantially prejudiced petitioner's rights, acted erroneously, failed to act as required by law or rule, and/or was arbitrary, capricious, or abused its discretion, in dismissing petitioner from employment with respondent without just cause.

GOVERNING LAW, RULE, AND POLICY

1. N.C.G.S. 126-35
2. N.C.G.S. 126-35.1
3. N.C.G.S. 126-22
4. N.C.G.S. 126-25
5. N.C.G.S 126-34.1
6. Racial Harassment Policy, UNC Chapel Hill
7. Workplace Violence Policy, UNC Chapel Hill
8. North Carolina State Personnel Manual

WITNESSES

Called by Petitioner: Pamela Granger (Petitioner), Claire Miller
Called by Respondent: Karen Silverberg, Gena Carter, Betty Satterfield, Susan Huey

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. As of her dismissal from Respondent University of North Carolina-Chapel Hill ("Respondent") on August 19, 2005, Petitioner had been employed with Respondent for just over 19 years. T. 102.

2. Petitioner began employment with Respondent in 1986. She was promoted several times by a succession of supervisors. As of June 2005, Petitioner was a University Administrator V in Respondent's Department of Biochemistry and Biophysics ("the department"). T. 383-387. Her supervisor (and chairman of the department) was Dr. David Lee ("Lee"), who did not testify at this contested case hearing.

3. Petitioner had a consistent history of outstanding work performance. In her last performance review prior to her dismissal, Lee graded Petitioner an overall performance rating of "Outstanding" as well as an "Outstanding" rating in six out of seven subcategories ranking her work performance. T. 99-100. Moreover, in 19 years of employment, Petitioner had received no previous disciplinary action of any kind. T. 384.

4. Petitioner had received overall performance ratings of "Outstanding," defined in part as "performance … far above the defined job expectations" (P. Ex. 7) for all but one of her 19 years of employment with Respondent. This included two prior supervisors in the department. T. 124-126.

5. Petitioner, as a University Administrator V, supervised all the "SPA," or State Personnel Act, employees in the department. Included among these employees was an accounting staff, which as of 2005 was comprised of majority African-American employees. T. 49. Supervising that accounting staff as a direct report to Petitioner was one Isabelle Jones-Parker ("Jones-Parker"), an African-American female. Jones-Parker did not testify at this contested case hearing.

6. In June 2005, Jones-Parker submitted to various officials and employees of Respondent a letter (R. Ex. 1) entitled ""Letter of Complaint of Racism, Harassment, and Workplace Hostility" ("complaint letter"). T. 12. The complaint letter made accusations of various kinds against several employees in the department, including Petitioner. T. 13. Jones-Parker also retained an attorney who made legal threats against Respondent. T. 60, (P. Ex. 28).

7. In response to the above, Respondent appointed three university employees to investigate Jones-Parker's complaints. T. 22-22. The three employees were former Assistant Dean for Human Resources for the School of Medicine Karen Silverberg ("Silverberg"); Human Resources Team Leader Gena Carter ("Carter"), and Joanna Carey Smith ("Smith") of Respondent's Office of General Counsel. T. 12-14. Smith did not testify at this contested case hearing. Silverberg, who subsequently left Respondent and took a job at Duke, did testify for Respondent. Carter also testified for Respondent.

8. Silverberg, Carter, and Smith ("the investigation group") did not conduct their investigation under any university policy, even though Respondent has a "racial harassment policy" as well as a "violence in the workplace policy" T. 129, (R. Ex. 9-10).

9. The investigation group, though not always all three at the same time, interviewed various employees of the department in the process of investigating Jones-Parker's allegations in the complaint letter. T. 22. Silverberg testified that no black employees were interviewed. T. 51. Neither Silverberg, Carter, nor Smith personally witnessed Petitioner commit any of the conduct complained of by Respondent. T. 297.

10. It was evident from the letter of complaint and the testimony at this contested case hearing that Petitioner and Jones-Parker did not have a good personal relationship. However, Petitioner consistently gave Jones-Parker positive performance evaluations at the "Very Good" level or better. T. 75-77. And, Petitioner initially hired Jones-Parker into the department. T. 111.

11. Jones-Parker was considered by some in the department to be a difficult person to get along with. Lee (according to Silverberg) stated to the investigation group that he considered Jones-Parker a "paranoid type of person" who "complained all the time." T. 63-64 (P. Ex. 21). Lee also wondered what could be done to make Jones-Parker "happy," noting that this was "difficult." Jones-Parker previously had not complained to Lee about racially motivated behavior in the department. T. 54 (R. Ex. 20).

12. Following the investigation, the investigation group found that Jones-Parker was not subjected to racial harassment by persons in the department, including Petitioner. T. 90.

13. In the course of the investigation, however, Respondent obtained information about Petitioner from certain members of the department, including Betty Satterfield ("Satterfield") and Susan Huey ("Huey"), both of whom testified for Respondent at the contested case hearing.

14. In summary, as expressed by Respondent in its dismissal letter to Petitioner, Respondent alleged that Petitioner: (a) used a racial slur, "nigger," in reference to Jones-Parker (and additionally said she would never hire a black person again); (b) that Petitioner was insubordinate by discussing the investigation group's activities with other members of the department, after being told not to; (c) that Petitioner removed from the workplace and disposed of a personal "Black History project" notebook belonging to Jones-Parker," and (d) that Petitioner created a "general sense of intimidation" in the workplace (R. Ex. 19).

15. When questioned by the investigation group about use of the racial slur, Petitioner promptly admitted that she had used the slur once, in anger, under her breath on one occasion in reference to Jones-Parker, in a telephone call with Petitioner's sister. Petitioner said that she was very upset about the accusations made by Jones-Parker in the complaint letter, which included allegations (among others) that Petitioner engaged in sexual acts in the workplace and engaged in theft of telephone services from the state. T. 82, 386-88 (R. Ex. 1).

16. Petitioner expressed regret about using the slur and that she did not consider the comment appropriate. Petitioner said she admitted using the slur in accordance with Respondent's racial harassment policy, which encouraged discussion of such issues and stressed that action in response was to be corrective, not punitive (The policy does state that this is the case; yet Respondent took the most punitive action possible – dismissal – against Petitioner in this case. T. 109-110). Petitioner did not believe that one use of a racial slur, not directed to the employee in question, was likely to subject her to disciplinary action, let alone dismissal. Petitioner used the slur out of anger with Jones-Parker's accusations and not out of genuine racial animus toward Jones-Parker, T. 391; even adverse witnesses stated that the animus between Jones-Parker and Petitioner was not based on racial issues. T. 169-170, 174,

17. Petitioner denied making the comment, "I'll never hire another black person again," as reported by Satterfield. Moreover, the Court does not find Satterfield's testimony credible, as shown below.

18. Petitioner said that she had not used a similar slur in her previous 19 years of employment with Respondent. T. 387-88. Respondent admitted that their investigation showed no evidence of such conduct by Petitioner other than this one admitted incident, nor was there, per Respondent's investigation evidence of a prior allegation by anyone of such conduct by Petitioner. T. 101-105.

19. With respect to the insubordination allegation, Satterfield had made statements and reports to the effect that Petitioner telephoned Satterfield and "questioned her extensively" about the investigation group's activities. However, the telephone records submitted by Satterfield in support of this allegation showed only two calls made on July 15, 2006, each of one minute or less. T. 232.

20. Moreover, Silverberg and Carter gave differing testimony as to what instructions they initially had given Petitioner regarding the issue of discussing the investigation group's activities. Carter testified that Petitioner was told not to discuss the investigation group's activities. Silverberg, however, present at the same meeting in July 2005 at which these instructions were given, testified that Petitioner was given a copy of the complaint letter, told to share it with her staff, and additionally told to "prepare" her staff for testimony before the investigation group. T. 152-153. Whatever instructions were given that day were not put in writing, nor was Petitioner informed that she was subject to disciplinary action for discussing the matter with her staff. T. 151. 1

21. Following Satterfield's complaint that Petitioner attempted to contact her, however, the investigation group arranged for Petitioner to be placed on paid leave via a letter issued August 3, 2005. In that letter, Petitioner was instructed not to discuss the investigation group's activities with staff. By all evidence, including Silverberg and Carter's testimony, as well as Petitioner's, Petitioner followed that written instruction to the letter.

22. Silverberg testified that Respondent's decision to dismiss Petitioner was not based on racial views, but on Petitioner's "poor management" style. T. 90. However, as noted, Petitioner had years of outstanding work evaluations on management style issues. Silverberg suggested that Lee's high ratings to Petitioner in this category might be the result of Petitioner "concealing" this poor management style from Lee. T. 118.

23. However, Lee supervised Petitioner for seven years. T. 120. And, Petitioner's correspondingly high ratings from two supervisors prior to Lee were additionally placed into evidence. T. 125-126. The Court finds as fact that Petitioner could not, in all probability, have "concealed" this supposedly poor management style from three different supervisors over a period approximately ten years to the point of getting consistently "outstanding" ratings in this category.

1 Moreover, it was placed in evidence that Satterfield herself violated this "gag order" not to discuss the investigation. T. 234-235. Respondent took no disciplinary action at all against Satterfield for doing so, despite this information appearing in the investigation group's notes. T. 242.

24. With respect to the black history notebook allegation, a notebook belonging to Jones-Parker, that she had left in the workplace, disappeared. Initially, Jones-Parker suspected either Satterfield or the department cleaning staff of taking the notebook, which contained information on a non-work-related "Black History Month" project. T. 185, 212 (R. Ex. 19).

25. Jones-Parker asked Satterfield at or around the time the notebook disappeared if she had seen the notebook. Satterfield told her she had not. T. 219. Satterfield admitted at the contested case hearing, in response to questioning by this Court, that this was not a true statement at the time she made it. T. 240-241.

26. Satterfield underwent two interviews with the investigation group, plus a third at her request. In the first two interviews, and in her statements prepared with respect to those interviews, she either failed to mention the notebook issue – which was discussed in each meeting – or denied knowing what had happened to it. T. 236, 271. Satterfield additionally made the written statement, "I told [Jones-Parker] I had not seen the notebook." T. 241. This written statement likewise was false at the time Satterfield made it.

27. In the third interview, Satterfield changed her story, claiming that Petitioner told Satterfield that Petitioner had removed the notebook from a desk in the work area and given it to her boyfriend to throw away in a Federal Express envelope. No other witness supported this testimony; Respondent obtained its information charging Petitioner with taking the notebook from Satterfield alone. T. 297.

28. Satterfield made some other statements that caused this Court to question her credibility. She testified that Petitioner promised her a promotion to Jones-Parker's former position if Satterfield assisted Petitioner in removing Jones-Parker from the department. T. 196. However, this accusation appears nowhere in Satterfield's three written statements to the investigation group nor does it appear in any notes taken by the investigation group. Carter, when asked whether Satterfield had made this allegation in her interviews, indicated that she had not.

29. Satterfield claimed she initially failed to tell the truth about the matter because she was afraid Petitioner would "retaliate" against her. Satterfield was unable to identify any act of retaliation by Petitioner that would support this claim or any person against whom Petitioner had "retaliated." T. 224. Satterfield claimed she was "frightened" of Petitioner, but only after mid-July 2005, approximately three weeks prior to Petitioner's dismissal. T. 225. Yet Petitioner had supervised Satterfield for a protracted period of time and had given her an evaluation of "outstanding." T. 224.

30. The Court observed at the contested case hearing, and observes here, that Satterfield cannot pick and choose when she wants to tell the truth. T. 240-241. Based on her previous false statements and the other matters referenced above, the Court does not find Satterfield to be a credible witness, including but not limited to her accusation that Petitioner claimed she "would never hire a black person again" – of which Satterfield was the sole source.

31. As the insubordination allegation and the black history notebook allegation solely were based on information obtained from Satterfield, the Court dismissed those allegations at the close of Respondent's case.

32. The second fact witness (in addition to Satterfield) offered by Respondent for testimony as to personal observations of Petitioner's conduct was Susan Huey, a Human Resource facilitator in the department. The Court finds that Huey appears to bear a grudge against Petitioner because of Huey being "very upset" about a performance evaluation Petitioner gave to Huey shortly before the investigation began in this case. T. 182, 183. Huey admitted at this contested case hearing that she was very upset with Petitioner over this incident.

33. For instance, Huey testified that Petitioner "was not a good manager." T. 184. However, there is no evidence Huey made that allegation to anyone prior to her dispute with Petitioner over the performance evaluation. In fact, there is evidence to the contrary. Placed into evidence (P. Ex. 38) was a "Boss's Day" card to Petitioner from 2005, which Huey signed with the statement, "Thanks for being a great boss and a wonderful person to work with." T. 184. Huey admitted that she had written this statement to Petitioner. T. 185.

34. Moreover, Huey submitted a written statement following her interview with the investigation group, per the investigation group's instruction. T. 167 (P. Ex. 40). Huey testified at this contested case hearing that this statement contained everything discussed during that interview. T. 168. This testimony proved to be less than accurate.

35. Huey stated to the interview committee, for example, that the conflict between Petitioner and Jones-Parker did not appear to be about Jones-Parker's race. However, her written statement makes no mention of this. T. 167-68. Also, Huey wrote in the statement that "[Petitioner] had a problem with black people, she didn't like them." At the contested case hearing, however, Huey was unable to identify any black person other than Jones-Parker with whom Petitioner had "problems;" Huey then admitted that her "black people" statement referred to Jones-Parker alone – not black people in general. T. 174. Like Satterfield, Huey spoke of being afraid of

"retaliation" by Petitioner, but was unable to identify any person against whom Petitioner retaliated or relate any incident in which Petitioner retaliated against Huey herself. T. 172-175.

36. In short, Huey provided no substantive evidence proving that Petitioner engaged in the kind of general workplace intimidation Respondent alleged. Nor, as noted, did Satterfield provide any credible testimony. These again were the only witnesses called by Respondent who claimed to actually have witnessed the alleged conduct by Petitioner of which Respondent complains; Parker and Silverberg, as noted, did not witness any of the conduct concerned.

37. Another witness, Claire Miller ("Miller") from Respondent's human resources department, provided the investigation group and Lee with an "HR Risk Assessment" that recommended that Petitioner be dismissed from employment. (P. Ex. 25). This document stated, in an assessment that Carter claimed to agree with, that dismissal was proper even though a demotion would have removed the work group from the risk of being subjected to future behavior.

38. Miller also stated in the HR Risk Assessment that the situation might be different if Respondent had evidence of past outstanding work performance, implying that such did not exist. However, Miller neither spoke to Petitioner nor reviewed Petitioner's past performance reviews prior to making this statement. T. 359. At this contested case hearing, when confronted with those evaluations (P. Ex. 9-18), Miller admitted that there was actually substantial evidence of outstanding past work performance on Petitioner's part (T. 360)– which this Court also finds as a fact.

39. Miller also claimed that the "possibility of public criticism" for the University was a factor in her recommendation to dismiss Petitioner and that such a possibility could, in her view, constitute just cause to dismiss a career state employee at Respondent University. Putting aside the legal issue of whether a possibility of public criticism could justify dismissal under the State Personnel Act, Miller admitted that no such criticism – in fact, no public criticism at all – had resulted from Petitioner's actions. T. 367-370.

40. Despite the above, Miller's "HR risk assessment" was an admitted factor in Respondent's decision to dismiss Petitioner.

41. Moreover, both Carter and Miller testified that a factor in recommending Petitioner's dismissal was the likelihood that Petitioner could not be "remediated" – i.e., that there was a high probability that this conduct could occur again. T. 283, 367. However, there was absolutely no evidence of prior conduct of this kind by Petitioner in 19 years of progressively responsible employment. T. 326. And in fact, there was no evidence suggesting that Petitioner would use such a slur on a successive occasion. And, Petitioner was neither warned nor given any opportunity to show that she would not use the slur in the future.

42. Carter stated that another factor in Respondent's decision to dismiss Petitioner was that she did not "apologize" or "show remorse" for her conduct. T. The Court finds as a fact that there would be no reason why Petitioner should apologize or show remorse for conduct in which she did not engage. And, showing remorse or being apologetic appears nowhere in Respondent's policies as a factor in a dismissal; Carter testified that she did not inform Petitioner that a showing of remorse could make a difference in Respondent's decision to dismiss her.

43. In summary, the Court finds as a fact that Petitioner did not, under the evidence presented, engage in any of the conduct alleged by Respondent except the single use of the racial slur out of the presence of any African-American, which Petitioner admitted prior to trial and again admitted at this contested case hearing.

44. The Court further finds as a fact that Petitioner's use of the racial slur, under the totality of the circumstances (as Respondent claims to have reviewed these facts), was an isolated incident that occurred in anger and was not made to Jones-Parker or any other black employee of Respondent. The slur was not made directly to Jones-Parker or any other black employee, nor is there any evidence that Petitioner intended her (or anyone else in the workplace) to hear the comment, as it was made under Petitioner's breath and in a telephone conversation with Petitioner's sister. In fact, there was an utter absence of proof that Petitioner's conduct toward Jones-Parker was motivated by racial animus, either personally or through any kind of employment action. As noted, Petitioner hired Jones-Parker and gave her consistently high evaluations, and even adverse agency witnesses testified that the conflict between the two was not based on race. Finally, of course, Respondent itself concluded that Jones-Parker had undergone no racial harassment in the department.

Based on these findings of fact, the Court makes the following

CONCLUSIONS OF LAW

1. The parties received proper notice of hearing and this matter properly is before the Office of Administrative Hearings for decision.

2. The burden of proof for showing that Respondent had just cause to dismiss Petitioner from employment lies with Respondent. Petitioner Pamela Granger ("Petitioner") is a state employee with career status.

3. As our Supreme Court stated in the Carroll case, the test for just cause in an unacceptable personal conduct case is in two parts: first, whether the employee engaged in the conduct alleged; and second, does the conduct constitute unacceptable personal conduct.

4. This Court has concluded that, based on the evidence, Petitioner engaged in none of the conduct alleged by Respondent, other than the one admitted use of the racial slur under the circumstances found above. Therefore, with the exception of the racial slur issue, Respondent's evidence fails the first part of the applicable legal test.

5. This Court is cognizant of the fact that neither Respondent nor any agency wants employees, particularly managers, using racial slurs. However, it is well established that an isolated use of a racial slur in the workplace, however unseemly, does not constitute a racially hostile work environment under law, as the case law offered by Petitioner's counsel demonstrates. See, e.g., Skipper v. Giant Food, Inc., 68 Fed. Appx. 393, 398 (4th Cir. 2003). And, the Court observes, though Respondent testified that it did not act under its racial harassment policy, that this policy informs employees, including Petitioner, that action involving racial harassment matters is to be undertaken with corrective, not punitive, action in mind – the policy states, in fact, that an admission and a pledge not to do such conduct again (or similar wording) could often resolve the matter. Petitioner here admitted her use of the slur, in reliance on the wording of this policy as well as out of honesty - and was fired.

6. Had Respondent decided to give Petitioner a written warning, or even demote Petitioner, the outcome possibly could be different. However, that is not what Respondent decided to do in this case. Petitioner's isolated and anger-generated usage of a single slur, as compared to 19 years of excellent workplace conduct and performance, did not constitute just cause for dismissal based on unacceptable personal conduct.

DECISION

1. As Respondent did not meet its burden of proof, and did not have just cause to dismiss Petitioner based on the evidence, its decision to dismiss Petitioner for just cause is REVERSED.

2. Petitioner is to be reinstated in employment with Respondent at the position and pay grade she held as of the date of her dismissal.

3. Respondent shall pay to Petitioner back pay accruing from the date of Petitioner's dismissal (August 19, 2005) through the date she begins reinstated employment with Respondent.

4. Respondent shall reimburse Petitioner for costs of this action, including 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 22nd day of December, 2006.

_____

Beecher Gray
Administrative Law Judge

STATE OF NORTH CAROLINA | **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

COUNTY OF LENOIR | **06 SOS 1329**

MARY P. LEE,	)	
Petitioner,	)	
	)	
v.	)	**DECISION**
	)	
NORTH CAROLINA DEPARTMENT OF THE SECRETARY OF STATE,	)	
	)	
Respondent.	)	

This contested case was heard in the Lenoir County Courthouse in Kinston, North Carolina on November 2, 2006, and in the Office of Administrative Hearings in Raleigh, North Carolina on November 15, 2006, presided over by Julian Mann, III, Chief Administrative Law Judge. The Respondent was represented by the North Carolina Department of Justice, Assistant Attorney General Melissa H. Taylor appearing. Petitioner appeared Pro Se.

Based upon a preponderance of the admissible evidence the undersigned makes the following:

FINDINGS OF FACT

1. Petitioner is a citizen and resident of Lenoir County. Respondent is an agency and Department of the State of North Carolina.

2. Petitioner was issued a Notary Public Commission by Respondent in 1977. Petitioner had extensive experience during her active professional career as a bank loan officer.

3. Respondent issued Notary Public Commissions pursuant to N.C. Gen. Stat. § 10B-1 et seq.

4. The purpose of the Notary Public Act, N.C. Gen. Stat. § 10B-1 et seq., is to promote, serve, and protect the public interests and to prevent fraud and forgery.

5. N.C. Gen. Stat. § 10B-60(a) provides that the Respondent may revoke a notarial commission on any ground for which an application for a commission may be denied under N.C. Gen. Stat. §10B-5(d). N.C. Gen. Stat. § 10B-5(d)(5) provides that Respondent may deny an application for a commission if the applicant has engaged in "official misconduct" within the meaning of N.C. Gen. Stat. § 10B-3(15).

6. N.C. Gen. Stat. § 10B-3(15)(a) and (b) defines "official misconduct" as "[A] notary's performance of a prohibited act or failure to perform a mandated act set forth in this Chapter or any other law in connection with notarization" or "[A] notary's performance of a notarial act in a manner found by the Secretary to be negligent or against the public interest."

7. The Respondent by way of a document entitled, "Order of Revocation of Notary Public Commission," was notified that the grounds for the revocation of her notary office was that Petitioner notarized a Deed of Trust as a "mobile notary." (Respondent's Exhibit C)

8. On March 14, 2006, Petitioner notarized loan closing documents for Ms. Robin Sanford. Among those documents were a Deed of Trust, Owners Affidavit, and a Marital Affidavit.

9. Respondent received a complaint from the Nash County Register of Deeds regarding the Deed of Trust.

10. After investigating the complaint, Respondent determined that Petitioner had notarized the Deed of Trust as a "mobile notary."

11. Gayle Holder, Director, Certification and Filing Division, State of North Carolina Department of the Secretary of State, stated that the term "mobile notary" is used in the industry to mean a signing agent or one who takes loan closing documents to a customer to have the documents signed and notarized.

12. Petitioner is not a person licensed to practice law in North Carolina nor is she a paralegal under the supervision of an attorney. The evidence in this contested case establishes that Petitioner has not violated any of the eight items that would be considered to be the unauthorized practice of law by a non-lawyer.

    a. Abstracts or provides an opinion on title to real property

    c. Explains or gives advice about the rights or responsibilities of parties concerning matters disclosed by a land survey..

    d. Provides a legal opinion or advice in response to inquiries by any of the parties regarding legal rights or obligations of any person, firm, or corporation…

    e. Advises or instructs a party to the transaction with respect to alternative ways for taking title…"

    f. Drafts a legal document for a party to the transaction or assists a party in the completion of a legal document.." (Petitioner's Exhibit #2)

13. Petitioner acted as a closing agent on the loans she closed and that she performed this work for various companies. Petitioner did not charge for the notarizations required on the closing documents.

14. After her North Carolina Notary Public Commission was revoked, Petitioner was no longer capable of engaging in her employment. Petitioner had previously made $2,000 to $3,000 month as a closing agent. Prior to the revocation of her Notary Public Commission, Petitioner performed 5 to 15 loan closings a week. Petitioner made between $50 to $100 per loan closing.

BASED UPON the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of the subject matter and the parties herein pursuant to Article 3 of Chapter 150B and Chapter10B of the North Carolina General Statutes.

2. Petitioner notarized loan closing documents for Ms. Robin Sanford.

3. In revoking Petitioner's North Carolina Notary Public Commission based on Petitioner engaging in official misconduct, Respondent acted arbitrarily, capriciously and contrary to the law in that she was charged with being a "mobile notary." This was the sole asserted ground in Respondent's Exhibit C and the stated issue in Respondent's Prehearing Statement. This was the only grounds that formed the basis for the revocation of her notarial office. This term is not defined in or specifically made a grounds for revocation either by statute or promulgated rule. In other jurisdictions this conduct, as defined by that jurisdiction, has been either permitted or prohibited by statute. North Carolina has not adopted a statute either authorizing or prohibiting this conduct, nor defined the term.

4. The Petitioner has not been given the proper notice of misconduct to justify the loss of her property interest or office. Therefore, Respondent has not and cannot carry its burden of proof to either give notice of the facts justifying revocation or the proof of what constitutes the practice of "a mobile notary" and the facts that must be established to prove a violation of the definition. The Secretary has not by promulgated rule or otherwise defined the term or specifically prohibited the practice. Notice of what constitutes misconduct and the proof thereof is one of the most fundamental and rudimentary requirements of due process of law and the factual and legal notice requirements required by Article 3 of Chapter 150B.

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

DECISION

Respondent's revocation of Petitioner's North Carolina Notary Public Commission was not justified under the law or facts as alleged and therefore is not **AFFIRMED**. Petitioner is entitled to resume the Office of Notary Public.

IT IS SO ORDERED.

NOTICE AND ORDER

The decision of the Administrative Law Judge in this contested case will be reviewed by the agency making the final decision according to the standards found in G.S. 150B-36(b),(b1) and (b2). The agency making the final decision is required to give each party an opportunity to file exceptions to the decision of the Administrative Law Judge and to present written argument to those in the agency who will make the final decision. G.S. 150B-36(a).

The agency that will make the final decision in this contested case is the Department of the Secretary of State.

This is the 12th day of January, 2007.

_____
Julian Mann, III
Chief Administrative Law Judge